File No. CI20-01-26627

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., C.B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C.C280, AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC.

Applicant

- and -

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., 4093879 CANADA LTD., 4093887 CANADA LTD., NYGARD INTERNATIONAL PARTNERSHIP, NYGARD PROPERTIES LTD., and NYGARD ENTERPRISES LTD.

Respondents

AND

Estate Nos: 31-2627758, 31-2627760, 31-2627764, 31-2627767, and 31-458926

IN THE MATTER OF THE NOTICE OF INTENTION TO FILE A PROPOSAL OF NYGARD PROPERTIES LTD., NYGARD ENTERPRISES LTD., NYGARD INTERNATIONAL PARTNERSHIP, 4093879 CANADA LTD., AND 4093887 CANADA LTD.

REPLY MOTION BRIEF OF THE RESPONDENTS

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PART II - POINTS TO BE ARGUED

1. The Second Supplementary Twelfth Report of the Receiver (the "**Supplementary Twelfth Report**") and the Receiver's Supplementary Motion Brief (the "**Receiver's Second Brief**") make two basic arguments.

    1. That NPL does not have rights of subrogation pursuant to the *Act* because the Receiver did not use the proceeds of the sale of NPL's properties to repay "Lender Debt", but rather to repay the "Receiver's Borrowings" from the Lenders.

        This "Lender Debt"/"Receiver's Borrowings" distinction is also said to mean that the Receiver's Arbitrary Allocation "*does not involve any transfer of assets or proceeds as between NI, NIP, and NPL*",[1] due to some mechanism that is not clearly explained.

    2. That even if NPL has rights of subrogation against its co-guarantors, those rights must be set off against NIP's inter-company claims against NPL and NEL, with the result that NPL and NEL are net debtors to NIP and so "*cannot escape an Order for substantial consolidation and/or bankruptcy*."[2]

2. Both arguments are contrary to the facts (including, notably, the facts as previously reported to the Court by the Receiver) and the law.[3]

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[1] Receiver's Second Brief at paragraph 22, page 11
[2] Receiver's Second Brief at paragraph 10, page 7
[3] This brief is supplementary to the Motion Brief of the Respondents (the "**Respondents' First Brief**") and employs terms defined therein.

ISSUE ONE: SUBROGATION AND THE REPAYMENT OF THE LENDERS

(i) The Facts: The Receiver Resiles From its Reports to the Court

3. If the Receiver treated its own Twelfth Report as reliable, there would be no uncertainty with respect to the repayment of the Lenders. The Twelfth Report stated, in a chart it identified as "*Payment of Remaining Lender Debt by Guarantors*", (the "**Repayment Chart**"), that the Guarantors had paid the Lenders a total of $66,466,000. Of this sum, $30,082,000 had repaid the "Receiver's Borrowings" from the Lenders. The balance of $36,384,000 had repaid "Lender Debt".

Note 2: Payment of Remaining Lender Debt by Guarantors

Debt Repayment Summary *(in 000's)*	
Total Amount Distributed to Lender	66,466
Repayment of Receiver's Borrowings	(30,082)
Repayment of Lender Debt	36,384
Repayment of Lender Debt by Borrower (NI)	(8,001)
Balance of Lender Debt	28,383
Equal Contribution by NIP/ NPL	14,192

[4]

4. The Receiver's choice of the term "Lender Debt" is misleading; the term "Principal and Interest", or something similar, would have been more accurate. As the chart itself acknowledges, the "Receiver's Borrowings" were debt owed to the Lenders, just as principal and interest were. "Lender Debt" presumes a distinction that cannot be justified on the facts.

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[4] Twelfth Report, at page 37

5. With respect to the source of the funds used to pay that "Lender Debt", the Chart identifies Nygard Inc. (a US Borrower) as having provided $8,001,000. The actual source of the "Balance of Lender Debt", being $28,383,000, is not identified in the Chart; the Receiver's use of the term "*Equal Contribution by NIP/NPL*" relies upon the Receiver's prior unilateral allocation of funds to NIP which patently came from the sale of NPL's Properties, a subject discussed at length in the Respondents' First Brief.

6. With respect to the patent source of the $28,383,000 balance, the chart on the previous page of the Twelfth Report ("*Nygard Group – Separate Corporation Analysis*" (again, the "**Proceeds Chart**"))[5] stated that the sale of NPL's assets had raised $28,579,000 (again, the "**NPL Proceeds**"). The $28,383,000 paid to retire the *"[b]alance of Lender Debt*" represented 99.3% of the NPL Proceeds figure. Further, paragraph 99 of the Twelfth Report read as follows.

> *The Lenders received a total of approximately $36.4 million (the "**Lender Debt**") from the proceeds of realization upon Property over the course of the Receivership Proceedings to satisfy outstanding and accruing obligations under the Credit Facility.*[6]

7. Of course, adding $28.5 million (the NPL Proceeds) to $8.0 million (the funds from Nygard Inc.) creates a total of "*approximately $36.4 million*" (actually, $36.5 million) used "*to satisfy outstanding and accruing obligations under the Credit Facility*."[7]

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[5] At page 36
[6] At page 34
[7] Twelfth Report, at paragraph 99, page 34

8. The Proceeds Chart indicated that the NPL Proceeds had been used to repay *solely* Lender Debt, by stating that NPL had paid nothing (" – ") toward the Receiver's Borrowings.[8]

Operating Entity	NIP	Inc.	NPL	Corporate OH
[…]				
6. Payment of Remaining Debt by Guarantors (Note 2)				
Receiver's Borrowings	-	-	-	30,082
Distribution to Lenders	(14,192)	-	(14,192)	(30,082)

9. Even if a careful reader of the Proceeds Chart observed that the Receiver's Borrowings had been paid by "*Corporate O[ver]H[ead]*", and further observed that NPL had in the Receiver's (disputed) "*Corporate Overhead Allocation*" paid $4,155,000 toward corporate overhead,[9] that $4.155 million represented i) only 14.6% of the NPL Proceeds, and ii) only 13.8% of the $30,082,000 sent to the Lenders in repayment of the Receiver's Borrowings.

10. Read very closely, then, the Twelfth Report presented the Court with two possibilities on this point. Either:

(a) NPL had paid nothing (" – ") toward the Receiver's Borrowings, (0% of the NPL Proceeds), and 99.3% of the NPL Proceeds had gone to repayment of "Lender Debt", allocated as between NIP and NPL; or

[8] Proceeds Chart, Twelfth Report, page 36
[9] Proceeds Chart, Twelfth Report, page 36

(b) NPL had paid $4,155,000 (13.8% of those Borrowings, representing 14.6% of the NPL Proceeds), *via* Overhead, to the Receiver's Borrowings, with the balance (85.4% of the NPL Proceeds) going to Lender Debt, allocated as between NIP and NPL.

11. It cannot be stressed enough that the argument articulated in the Respondents' First Brief *used the Receiver's own numbers*: the $66 million, the $28.579 million, and so forth. As the Respondents told the Court on November 5th, they were happy to proceed with the Twelfth Report being the only evidence before the Court because they were confident that that Report vindicated their positions. Having requested and obtained an adjournment, the Receiver's response to the Respondents' use of the Twelfth Report has been to insist that the *real* state of affairs is contrary to the above key elements of its own Twelfth Report. Specifically, the Supplementary Twelfth Report asserts:

> *44. What **actually** happened was that none of the NPL Asset Sale Proceeds were used to repay the Credit Facility, and that approximately $11.9 million of NPL Asset Sale Proceeds were used to repay amounts borrowed by the Receiver during the course of the Receivership Proceedings (the "Receiver's Borrowings")…*[10]

12. The Receiver's new position on the facts therefore is:

(a) that 0% of the NPL Proceeds had been used to repay "Lender Debt", rather than the 99.3% or 85.4% manifest in the Proceeds and Repayment Charts; and

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[10] At pages 8-9, emphasis added

(b) that $11.9 million of the NPL Proceeds (42% of those Proceeds and 40% of the Receiver's Borrowings) had been sent to the Lenders in repayment of the Receiver's Borrowings, rather than the $0 (" – ") or $4,155,000 (14.6% of the NPL Proceeds and 13.8% of those Borrowings) manifest in the Proceeds and Repayment Charts.

(this is hereinafter the "**New Position**")

13. Only the Receiver and the Lenders know the details of the Lenders' repayment. The Court and the Respondents know only what they are told by the Receiver. It should not be possible for the Receiver to so dramatically change its position *on the facts* reported to the Court.

14. The New Position is employed as support for legal assertions congenial to the Receiver, being that payments by the Guarantors to the Lenders in respect of the Receiver's Borrowings are not payments on the Guarantees, and therefore NPL cannot have rights of subrogation against the Co-Guarantors.[11] For reasons that will be discussed below, the legal assertions are clearly wrong: the use of NPL's money to pay the Receiver's Borrowings constituted payments on the Guarantee, with the attendant consequences under the *Act*. As a result, the relative degree to which the NPL Proceeds paid to the Lenders were used to pay the Receiver's Borrowings or the "Lender Debt" should be irrelevant to the result of this motion. That said, it is worth noting that the Receiver's New Position is inconsistent with the Receiver's position on a previous motion adjudicated by this Court.

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[11] Supplementary Twelfth Report at paragraph 60

15. The New Position turns "*entirely on the timing of receipts from the sale of the Property*". (Nowhere in the Twelfth Report was there a qualification of repayment by date, or otherwise.)

> *53.* ***As the amounts outstanding in respect of the Credit Facility were effectively repaid on or about July 27, 2020*** *and there were no realizations from the NPL properties subject to the Receivership Order (as amended) until July 31,2020 (from the sale of the Notre Dame Property), it should be clear to all parties that,* ***based entirely on the timing of receipts from the sale of the Property, no NPL Asset Sale Proceeds were actually used to repay the Credit Facility*** *and only a portion of NPL Asset Sale Proceeds were used to repay the Receiver's Borrowings.*[12]

16. In support of this conclusion, the Supplementary Twelfth Report cites a number of passages from its Seventh Report, all to the effect that the Lenders had been repaid in full, "*pursuant to the Credit Agreement or Receiver Term Sheet*" before the September 10, 2020 date of that Report.[13] There were similar statements made in the Receiver's later Ninth Report, as in:

> *proceeds from the Property, totaling approximately $66.1 million, were distributed to the Lenders. The Receiver notes that on September 11, 2020, the Lenders returned approximately $1.0 million to the Receiver relating to excess funds held by the Lenders…*"[14]

17. This Honourable Court may remember that the Respondents cited <u>*the very passages*</u> from the Seventh Report now relied upon by the Receiver, as well as the aforementioned passages from the Ninth Report, in their response to the Receiver's November 9, 2020 motion for an order approving the sale of NPL's Inkster Property.[15] At

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[12] Supplementary Twelfth Report at paragraph 53, emphasis added
[13] Supplementary Twelfth Report at paragraphs 50-51, pages 10-11
[14] Ninth Report, paragraph 161(d), page 50
[15] Compare paragraphs 8-9 of the Motion Brief of the Respondents dated November 6, 2020, and the citations therein, to paragraphs 50-51, pages 10-11, of the Supplementary Twelfth Report dated November 30, 2021

that time, the Respondents argued that since the Receiver had clearly and repeatedly said that the Lenders had been repaid in full, the Receiver should be discharged and NPL's remaining Property, including the Inkster Property, should be returned to it. Not so, replied the Receiver:

> *38. As a final note,* ***the Respondents' argument for the discharge of the Receiver is premised on the suggestion that all obligations to the Applicants have been satisfied, which in [is] not the present case****. As described in the Ninth Report of the Receiver, the Receiver continues to review two claims of the Applicants made and* ***secured pursuant to the Credit Agreement****,* ***which have not yet been confirmed or paid****.*[16]

18. Indeed, a representative of the Lenders made submissions during the hearing of the November 2020 motion, emphatically stating that the Lenders had not yet been fully repaid. This Court accepted the Lenders' and Receiver's submission and held in its November 19, 2020 Reasons for Judgment that the Receiver had been able "*to* ***substantially*** *pay the debt owing to the Lenders*"[17] as at that date.

19. In sum:

(a) In the Seventh and Ninth Reports, the Receiver said that the Lenders had been paid in full on July 27, 2020 (with respect to the Credit Facility) and before September 10, 2020 (with respect to the Receiver's Borrowings). When the Respondents relied upon those statements to argue for an order opposed by the Receiver, the Receiver told this Court that the Lenders had *not* been paid in full "*pursuant to the Credit Agreement*" as at November 2020.

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[16] Supplementary Motion Brief of the Receiver (Inkster Approval and Vesting Order) dated November 10, 2020, at paragraph 38, page 15, emphasis added

(b) Nine months later, the Respondents asked the Receiver questions about the repayment of the Lenders, as it had been discussed in the Twelfth Report. With respect to the most important question, the Receiver eventually answered by referring the Respondents back to the Twelfth Report: "*Please see paragraphs 99-102, 104, and 113-130 of the Twelfth Report, which outlines clearly the basis upon which proceeds of the sales of NPL Property have been allocated."*[18] (The insufficiency of this answer is discussed in the Respondents' First Brief).[19]

(c) When, in November 2021, the Respondents relied upon statements made in the Twelfth Report concerning the repayment of the Lenders to argue for a different order opposed by the Receiver, the Receiver, apparently perceiving an advantage if the Lenders had been paid in full on July 27, 2020 (with respect to the Credit Facility) and before September 10, 2020 (with respect to the Receiver's Borrowings), forgot its position on the November 2020 motion, implicitly disavowed key elements of the Twelfth Report, and adopted the New Position, in which the Seventh Report (once itself implicitly disavowed) was rehabilitated and re-presented to the Court and the Respondents as trustworthy.[20]

20. The facts should not be a continually moving target. Happily, the dates upon which the "Lender Debt" and the "Receiver's Borrowings", respectively, were repaid are

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[17] At page T6, emphasis added
[18] Affidavit of Debbie Mackie affirmed October 29, 2021, Exhibit "B", page 7
[19] See the discussion in the Respondents' First Brief at paragraphs 27-32, pages 15-17
[20] Supplementary Twelfth Report at paragraphs 50-51, pages 10-11

irrelevant to the outcome of this motion. This is so pursuant to, *inter alia*, the terms of the contracts between the Lenders and NPL.

(ii) The Facts: The Repayment of the Lenders by NPL

21. The Receiver has adopted the New Position as "factual" support for a novel legal argument, which is that "*the costs of enforcement ought to be excluded when determining the extent of subrogation and contribution of both NPL and NIP*."[21] The exclusion ought to occur, the Receiver suggests, because *"[t]he Receiver's Borrowings are not advances made pursuant to the Credit Facility and repayment of funding provided under the Receiver Term Sheet is not guaranteed by any guarantee given in relation to the Credit Facility."*[22] (This is hereinafter the "**New Argument**".) The New Argument is made on advice from the Receiver's counsel, and consists only of bare assertions.[23]

22. The notion that the Receiver's Borrowing Charge is somehow distinct from security granted under the Credit Agreement dated December 30, 2019 (the "**Credit Agreement**"), such that repayment of the Borrowing Charge is not enforcement of the Lenders' security is flatly contrary to, or inconsistent with:

1. the Credit Agreement;

2. the *Debenture - Nygard Properties Ltd*. executed by NPL in favour of the Lenders on December 30, 2019, (the "**Debenture**");

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[21] Receiver's Second Brief, at paragraph 14, page 8
[22] Supplementary Twelfth Report at paragraph 60
[23] Supplementary Twelfth Report at paragraph 60

3. the demand letter sent by counsel to the Lenders to the Respondents;

4. the affidavit filed by the Lenders in support of their application for the appointment of the Receiver;

5. the Receivership Order; and

6. the Receiver's previous statements to the Court.

23. In each of the above, the repayment of the Receiver's Borrowings is explicitly or implicitly treated as an incident of the Lenders' execution on their security under the Credit Agreement and other contracts.

(a) The Credit Agreement

24. The guaranty (the "**Guarantee**") pursuant to which NPL's properties were sold by the Receiver and their proceeds remitted to the Lender is Article XI in the Credit Agreement. The primary clause in the Guarantee is as follows:

> ***11.01 Guaranty.*** *Each Guarantor hereby unconditionally guarantees, as a primary obligor and not merely as a surety, jointly and severally with each other Guarantor when and as due, whether at maturity, by acceleration, by notice of prepayment of otherwise,* ***the due and punctual performance of all Obligations of each other Loan Party****. Each payment made by any Guarantor pursuant to this Guaranty shall be made in lawful money of the United States in immediately available funds.*[24]

25. With respect to NPL, the Guarantee is limited as follows.

> *The Agent agrees that its recourse against Nygard Properties Ltd. ("NPL") pursuant to Mortgages or owned Real Estate of NPL shall be limited to a*

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[24] Credit Agreement, clause 11.01, page 120, emphasis added

realized value after all costs and expenses, ***including enforcement costs*** *of $20,000,000.*[25]

26. "Obligations" are defined in the Credit Agreement as follows.

"Obligations" means all advances to, and debts (including principal, interest, fees, costs, and expenses), liabilities, obligations, covenants, indemnities, and duties of, any Loan Party arising under any Loan Document or with respect to any Revolving Loan or otherwise, whether direct or indirect (including Ledger Debt and those acquired by assumption), absolute or contingent, due or to become due, now existing or hereafter arising and ***including interest, fees, costs, expenses and indemnities that accrue after the commencement by or against any Loan Party or any Affiliate thereof of any proceeding under any Debtor Relief Laws*** *naming such Person as the debtor in such proceeding, regardless of whether such interest, fees, costs, expenses and indemnities are allowed claims in such proceeding.*[26]

27. A "Loan Party" is defined as follows.

"Loan Parties" means, collectively, each Borrower and each Guarantor.[27]

28. "Guarantor" is defined as follows.

"Guarantor" means Canadian Holdings and each Subsidiary of Canadian Holdings (other than the Borrowers and any Excluded Subsidiaries).[28]

29. "Limited Recourse Guarantors" is defined as follows.

"Limited Recourse Guarantors" means Canadian Holdings and Nygard Properties Ltd. and their successors.[29]

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[25] Credit Agreement, clause 11.05, page 122, emphasis added
[26] Credit Agreement, clause 1.01, page 29, emphasis added
[27] Credit Agreement, clause 1.01, page 28
[28] Credit Agreement, clause 1.01, page 24
[29] Credit Agreement, clause 1.01, page 28

30. “Canadian Holdings” is defined as follows.

> *“Canadian Holdings” means Nygard Enterprises Ltd. and its successors.*[30]

31. “Debtor Relief Laws” is defined as follows.

> *“Debtor Relief Laws” means the Bankruptcy Code, Canadian Insolvency Laws and all other liquidation, conservatorship, bankruptcy, assignment for the benefit of creditors, moratorium rearrangement,* ***receivership****, insolvency, reorganization, or similar debtor relief Laws of the United States, Canada or any province of Canada or other applicable jurisdictions from time to time in effect and affecting the rights of creditors generally.*[31]

32. In short: NPL guaranteed the repayment of Obligations; Obligations included “*fees, costs, expenses and indemnities that accrue after the commencement by or against any Loan Party or any affiliate thereof of any proceeding under any Debtor Relief Laws*”; Loan Parties included the borrowers and guarantors; NPL was a Limited Recourse Guarantor, but that recourse specifically included “*enforcement costs*”, to a maximum sum; and Debtor Relief Laws included a receivership pursuant to the CCAA. The inescapable result is that (subject to the US $20 million limit), NPL guaranteed repayment of the Lenders’ costs of enforcement, inclusive of the “*costs, expenses and indemnities*” of the Receiver, which (of course) would be funded by the Receiver’s Borrowing from the Lenders.

(b) The Debenture

33. On December 30, 2019, NPL executed the Debenture in favour of “*the Mortgagee, the Lender, the Credit Parties and certain others from time to time*” in the

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[30] Credit Agreement, clause 1.01, page 6
[31] Credit Agreement, clause 1.01, page 12

principal sum of $50,000,000.[32] The Debenture was described in its clause 3 as continuing security for the Obligations "*arising under or by virtue or otherwise in connection with the Credit Agreement*".[33] Its clause 15(5) grants the Lenders the right to bring "*proceedings in any court of competent jurisdiction for the appointment of one or more receivers, receivers and managers, or interim receivers*…" as a remedy for default.[34] The rights of this receiver are set out in clause 17 ("*Receiver*"), sub-clauses 6 and 7 of which are as follows:

> *(6) No such receiver shall be liable to the Corporation to account for monies other than monies actually received by him in respect of the Property, or any part thereof, and* ***out of such monies so received every such receiver shall, in the following order, pay****:*
>
> *(i) his remuneration as aforesaid;*
>
> *(ii) all costs and expenses of every nature and kind incurred by him in connection with the exercise of his powers and authority hereby conferred;*
>
> *(iii)* ***interest, principal and other money which may, from time to time, be or become charged upon the Property*** *in priority to these presents, including taxes;*
>
> *(iv) to the Mortgagee all interest, principal and other monies due hereunder to be paid in such order as the Mortgagee in its discretion shall determine;*
>
> *(v) and thereafter, every such receiver shall be accountable to the Corporation for any surplus as required by applicable law.*
>
> *The remuneration and expenses of the receiver shall be paid by the Corporation on demand and shall be a charge on the Property and shall bear interest from the date of demand at the same rate as applied to the principal hereby secured.*
>
> *(7)* ***Every such receiver may, with the consent in writing of the Mortgagee, borrow money*** *for the purpose of maintaining, protecting or*

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[32] Debenture, clause 1, page 1
[33] At page 1
[34] At page 6

> *preserving the Property or any part thereof, or for the purpose of carrying on business of the Corporation, and any receiver may issue certificates (in this sub clause called "receiver's certificates") for such sums as will, in the opinion of the Mortgagee,* ***be sufficient for obtaining security upon the Property or any part thereof for the amounts from time to time so required by the receiver****, and such receiver's certificate may be payable either to order or to bearer and may be payable at such time or times, and shall bear such interest as the Mortgagee may approve and the receiver may sell, pledge or otherwise dispose of the receiver's certificates in such manner and may pay such commission on the sale thereof, as the Mortgagee may consider reasonable,* ***and the amounts from time to time payable by virtue of such receiver's certificates shall form a charge upon the Property*** *in priority to the amounts secured under this debenture;*[35]

34. Reading (6) and (7) together, the proceeds from the sale of NPL's Properties were to be paid in the following order:

i) the Receiver's remuneration;

ii) the Receiver's costs and expenses;

iii) the Receiver's borrowings, including interest and principal ("*which may, from time to time, be or become charged upon the Property in priority to these presents, including taxes*")[36];

iv) the amounts owed to the Mortgagee for interest and principal; and

v) surplus.

35. Thus, pursuant to its Guarantee NPL bore liability for repayment of the Obligations under the Credit Agreement, inclusive of the costs of enforcement and

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[35] At pages 7-8, emphasis added
[36] Debenture, clause 6(iii)

subject to a limit on recourse; the Debenture secured NPL's payment of the Obligations pursuant to its Guarantee; part of the security granted in the Debenture was the right to appoint a receiver; and the Debenture made the receiver's borrowings "*a charge upon the Property",*[37] to be paid in priority to interest and principal due to the Lenders. The chain of contractual causation begins with the Guarantee and ends with payment of the Receiver's Borrowings; stated differently, there is no payment toward the Receiver's Borrowings by NPL that is *not* predicated upon the Guarantee.

36. The terms of the Debenture are significant for two more reasons. Firstly, in the Supplementary Twelfth Report the Receiver states that, after its appointment:

> ***Property proceeds*** *deposited to the collection accounts and swept to the Lenders* ***were applied firstly to repay the amounts outstanding in respect of the Credit Facility, and thereafter to repay the Receiver's Borrowings****, such that, in the result, the actual Property proceeds used to repay the Credit Facility and the Receiver's Borrowings were effectively determined by the timing of the sales of Property and receipt of proceeds from such sales;*[38]

37. The payment of principal and interest to the Lenders ("*amounts outstanding in respect of the Credit Facility*") in priority to the payment of the Receiver's Borrowings was a breach of the Debenture, which stipulated that the contrary "*shall*" occur.[39] Assuming for the moment that "*the timing of the sales of Property and receipt of proceeds from such sales"*[40] is in some way relevant (it is not), if the priorities established by the Debenture had been respected, then the NPL Proceeds, coming as they did relatively late in the liquidation process, would have been applied largely or

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[37] Debenture, clause 7
[38] At paragraph 49(d), page 10, emphasis added
[39] At sub-clauses 6(iii) and (7)
[40] Supplementary Twelfth Report at paragraph 53

completely to the "*amounts outstanding in respect of the Credit Facility*",[41] rather than to the Receiver's Borrowings, and the Receiver would have been denied its current (untenable) argument that the NPL Proceeds were not paid pursuant to NPL's Guarantee.

38. Secondly, with respect to clause (7)(v), ("*every such receiver shall be accountable to the Corporation [NPL] for any surplus"):* NPL overpaid on its guarantee by approximately USD $3 million.[42] That sum is "*surplus*" and should be disgorged to NPL immediately. The Receiver has no claim to it, and is required by the Debenture to account to NPL for it.[43]

(c) The Demand Letter

39. On February 26, 2020, then-counsel for the Lenders sent a demand letter ("*Demand Notice and Notice of Intention to Enforce a Security*") to the Respondents. In the conclusion to that letter, counsel wrote:

> *Please be advised that unless payment is received by the Lenders within ten (10) days of the date of this demand, the Agent, on behalf of the Lenders, will take such further actions* ***as are available to it under the Credit Document and the Security Documents*** *and at law, equity or otherwise, as it deems necessary, to recover the Indebtedness. Those steps may include, without limitation,* ***the enforcement against the Collateral by way of the appointment of a receiver or interim receiver****.*[44]

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[41] Supplementary Twelfth Report at paragraph 53

[42] The uncertainty is caused by the fluctuations in the US-Canadian exchange rate. NPL's guarantee was in US dollars, whereas the proceeds of the NPL properties were in Canadian dollars

[43] If that sum is properly disgorged, the contribution calculation will have to be adjusted such that NPL is given credit for a $US 20 million (roughly $24 million Canadian) payment to the Lenders.

[44] Letter from Jake Schmidt to the Respondents dated February 26, 2020, Affidavit of Robert Dean sworn March 9, 2020, (the "**Dean Affidavit**"), at Exhibit "A", page 2, emphasis added

40. This is the Lenders' lawyer treating a receiver as *the means* by which the Lenders' security will be enforced.

(d) The Lenders' Affiant

41. The affidavit filed by the Lenders in support of their application for the Receivership Order was sworn by Robert Dean ("**Dean**") on March 9, 2020. In keeping with the terms of the Guarantee and Credit Agreement, Dean swore that:

> *White Oak's recourse against Nygard Properties Ltd. pursuant to mortgages on owned real estate of Nygard Properties Ltd. is limited to a realized value after all costs and expenses**, including enforcement costs**, of $20 million.*[45]

42. Dean later swore that:

> *The Lenders are only willing to advance additional amounts to the Nygard Group in the context of these receivership proceedings. White Oak and Second Avenue*
>
> *have therefore agreed to fund the costs of the receivership in accordance with an*
>
> *agreed upon term sheet (the "Term Sheet") and the terms of the proposed Appointment Order*
>
> *In that regard, if the Receiver is appointed, White Oak is prepared to advance funds in accordance with a budget to be agreed upon with the receiver, **provided that White Oak is granted a Court-ordered charge over the Nygard Group's assets** and such advances are made in accordance with the Term Sheet*
>
> *[…]*
>
> *Accordingly, White Oak is requesting the Court to grant the proposed Receiver the power to borrow from White Oak on security of a Court-ordered charge (the "Receiver's Borrowings Charge")…*[46]

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[45] Dean Affidavit, at footnote 2, pages 22-23, emphasis added
[46] Dean Affidavit, at paragraphs 123-126, pages 59-60, emphasis added

43. Thus, the Lenders' affiant swore that NPL was liable for enforcement costs, subject to the limit on recourse, and that the Receivers' Borrowing Charge, which was to be in favour of the Lenders, was intended to fund enforcement, being "*the costs of the receivership*".

(e) The Receivership Order

44. In keeping with the terms of the Debenture, paragraph 24 of the Receivership Order grants a charge over "*the whole of the Property*" (including the NPL Properties) as security for the payment of the monies borrowed.

> *24. THIS COURT ORDERS that* ***the Receiver is at liberty and is hereby empowered to borrow from the Applicant****, pursuant to and in accordance with the terms of the Receiver Term Sheet and the budget (the "****Budget****") contemplated therein,* ***such monies from time to time as it may consider necessary or desirable for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order****, including, without limitation, payment of expenses contemplated in the Budget by the Receiver on behalf of the Debtors (without any liability in respect thereof and as authorized by this Order) or the Receiver, subject to the terms of the Receiver Term Sheet (including the Budget).* ***The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all Encumbrances*** *in favour of any Person, but subordinate in priority to (i) any Encumbrance in favour of a secured creditor who would be materially affected by this Order and who was not given notice of this application, (ii) the Receiver's Charge, and (iii) the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.*[47]

45. According to the terms of the Credit Agreement, the Debenture, the Demand, and the Receivership Order, then, the Receiver was the instrument by which the Lender

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[47] Receivership Order, paragraph 24, emphasis added

executed upon its security (in the case of NPL, the Guarantee and Debenture). The securing of the receiver's borrowings against NPL's Property was i) contemplated as part of the contract between NPL and the Lenders, and ii) an incident of the execution on the Lenders' contractually-granted security, as supervised and facilitated by the Court. There should be no dispute that *all* payments made by NPL to the Lenders were made pursuant to its Guarantee, and *only* pursuant to its Guarantee.

(f) The Receiver's Previous Statements

46. Prior to its November 5th adjournment request, and the consequent filing of its Supplementary Brief, the Receiver had never before attempted to draw a distinction between the enforcement of amounts secured by the Guarantee and Debenture and the enforcement of the Receiver's Borrowing Charge. This is to say that it had previously treated enforcement costs as simply enforcement costs, and the Receiver's Borrowing Charge as one amount secured in favour of the Lenders. In the Twelfth Report, for example, the Receiver stated:

> *NEL and NPL are limited recourse guarantors and, as such, recourse in respect of NEL and NPL was limited to assets specifically secured to a realized value, after all costs and expenses,* ***including enforcement costs****, of USD $20 million.*[48]
>
> *[…]*
>
> *[P]roceeds from the Property, totaling approximately $66 million (including Receiver's Borrowings of approximately $30 million and amounts due under the Credit Agreement of approximately $36 million), has been distributed to the Lenders,* ***in full satisfaction of the secured amounts owing to the Lenders***.[49]

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[48] Twelfth Report at paragraph 100(c), page 34, emphasis added
[49] Twelfth Report at paragraph 83(d), page 28, emphasis added

47. For these reasons, the Receiver's suggestion that a (hypothetical) payment toward the Receiver's Borrowing Charge was not a payment pursuant to the Guarantee (because the Borrowing Charge arose out of the Receivership Order, not the Credit Agreement, Guarantee or Debenture) is clearly incorrect as a matter of fact.

(iii) The Law: Subrogation and the Repayment of the Lenders

48. The Receiver's argument on this point is that *Wong v Field*[50] means that "*the costs of enforcement ought to be excluded*"[51] when rights of subrogation and contribution are calculated. This argument is predicated upon disregarding the contractual evidence set out above, the import of which was that NPL guaranteed (subject to the limit on recourse) repayment of "*enforcement costs*."[52] (By contrast, the guarantees in *Wong* contemplated only "*the full amount of the loan*",[53] not the loan and costs of enforcement. In this respect, *Wong* is a different case.)

ISSUE TWO: THE INTERCOMPANY DEBT IS IRRELEVANT TO NPL'S RIGHTS TO SUBROGATION AND CONTRIBUTION

(i) Set-Off is Not Available

49. The Receiver has argued that given the state of the intercompany debts, (specifically, those owed by NPL and NEL to NIP), the existence of any right of subrogation in favour of NPL is irrelevant ("*any portion of the Net Receivership Proceeds which would stand to the credit of NPL are subject to claims of NPL creditors*

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[50] 2012 BCSC 1141, Tab 8 in the Respondents' First Brief
[51] Receiver's Second Brief, at paragraph 14, page 8
[52] Credit Agreement, clause 11.05, page 122
[53] *Wong v Field*, at paragraph 10

which clearly exceed the proceeds available to satisfy those claims").[54] Stated plainly, the Receiver is asserting a defence of set-off against NPL's claim for contribution. Such a defence is not available, in law or on the facts, for the simple reason that through subrogation NPL would not be asserting its own rights against (for example) NIP, but those of the Lenders.

50. The law is clear: the Court of Appeal for Ontario has held that in subrogation, set-off is not available, because the claims to be set-off are not in the same right.[55] This is to say that the debts are not mutual in the manner required for set-off. The Receiver has acknowledged this principle, but simply asserts that NIP's claim can be set-off notwithstanding.[56]

51. On the facts, set-off against NPL's subrogated rights cannot occur *pursuant to the terms of the Credit Agreement*. Clause 10.08 of the Credit Agreement ("*Right of Setoff*") establishes that the Lenders have the right:

> *to the fullest extent permitted by applicable Law, to set off and apply any and all deposits … and other obligations … at any time owing by such Lender … to … any Borrower or any other Loan Party against any and all of the Obligations …*"[57]

52. This is by contrast to the Borrowers and Guarantors, which do not have a right of setoff. Clause 10.22 ("*Additional Waivers*") (b) states in part:

> *The obligations of each Loan Party shall not be subject to any reduction, limitation, impairment or termination for any reason (other than the indefeasible*

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[54] Receiver's Second Brief at paragraph 10 and 16; see also the Supplementary Twelfth Report at paragraphs 61 and 66
[55] *Colonial Furniture Co. (Ottawa) Ltd. v. Saul Tanner Realty Ltd.* (2001), 52 O.R. (3d) 539, (C.A.), cited in *Houlden & Morawetz* at G§36(18) "Subrogation of Claims", Tabs 11 and 12 in the Respondents' First Brief
[56] Receiver's Second Brief at paragraph 16
[57] At page 112

> *payment in full in cash of the Obligations … and* ***shall not be subject to any defense or setoff*** *… whatsoever by reason of the invalidity, illegality or unenforceability of any of the Obligations* ***or otherwise****.*[58]

53. Among the terms of the Guarantee in Article XI section is section 11.02 (**"***Waivers*"), which states that:

> *each Guarantor hereby absolutely, unconditionally and irrevocably waives … any other defence of any Loan Party or any notice, demand or defense by reason of cessation from any cause of Obligations* ***other than payment and performance in full of the Obligations*** *by the Loan Parties and any defense that any other guarantee or security was or was to be obtained by the Agent*.[59]

54. Further, section 11.05 ("*Liabilities Absolute*") states that the liability of each Guarantor hereunder shall be:

> *absolute, unlimited and unconditional and* ***shall not be subject to any … setoff*** *… whatsoever by reason of the invalidity, illegality or enforceability of any other Obligation* ***or otherwise****. […]*[60]

55. Therefore, as subrogation would cause NPL to step into the shoes of the Lenders, NPL would, on the terms of the Credit Agreement, be entitled to enforce those subrogated rights against the Borrowers and the Unlimited Guarantors (including NIP) without being subject to any set-off (or defense of any kind whatsoever.)

56. Lastly, the rights that the Receiver is attempting to set off against NPL's subrogated rights are in fact *among* the security assigned to NPL *via* subrogation. Clause 11.08 ("*Reinstatement*") of the Guaranty is a basket clause encompassing not

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[58] At pages 117-118, emphasis added
[59] At pages 120-121, emphasis added
[60] At pages 121, emphasis added

merely rights of reinstatement, but other rights of the Lenders. Clause 11.08 (e) states as follows:

> *(e)* ***All present and future monies payable by any Loan Party to any Guarantor****, whether arising out of a right of subrogation or otherwise,* ***are assigned to the Agent for its benefit and for the ratable benefit of Lenders as security for such Guarantor's liability to the Agent*** *and Lenders hereunder and are postponed and subordinated to the Agent's prior right to payment in full of Obligations. Except to the extent prohibited otherwise by this Agreement, all monies received by any Guarantor from any Loan Party shall be held by such Guarantor as agent and trustee for the Agent. This assignment, postponement and subordination shall only terminate when the Obligations are paid in full in cash and this Agreement is irrevocably terminated.*[61]

57. As each of NEL, NIP, NPL and the numbered companies were Guarantors, any money owed to any of those Guarantors by any other Guarantor was assigned to the Lenders as security for the indebtedness of that Guarantor. Hence, NIP assigned the receivables owed to it by NEL and NPL to the Lenders. As subrogation would entitle NPL to all the Lenders' security, (subject to a limit on recovery imposed by its payment to the Lenders), NPL would be the assignee of the receivables owed to NIP by NPL and NEL. Therefore, those receivables could not, setting all other arguments aside, be available to NIP to set off against NPL's subrogated rights.

Conclusions on Subrogation

58. As any payment by NPL to the Lenders was a payment on its Guarantee for the purpose of the subrogation analysis, and as there can be no set-off against NPL's subrogated rights, then the subrogation analysis resolves in the manner set out in

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[61] At pages 123, emphasis added

paragraph 49 of the Respondents' First Brief (the "**Contribution Calculation**").[62] With respect to other suggestions made by the Receiver concerning the subrogation analysis, the responses are as follows.

59. The Contribution Calculation is unchanged by any payments made by NIP on its guarantee. Even if it is acknowledged that NIP made such payments, (which is denied, given the statements in the Twelfth Report), there is no issue of NIP having overpaid its guarantee, because that guarantee was unlimited and so extended as far as $66.4 million, which sum NIP clearly did not pay. (Its assets only brought in approximately $50 million).[63] Therefore, NIP has not overpaid "*the just proportion"* of its debt, relative to NPL, and so cannot be due a payment in contribution from NPL.[64] NPL has, however, overpaid the just proportion of its debt relative to NIP. Stated differently, the issue is not what NIP has paid, but rather *what NPL has paid relative to its liability*. That analysis gets us to an aggregate right of contribution of $21 million, more than $7 million of which comes from NIP.

60. With respect to the inclusion of NEL in the contribution analysis:[65] NEL was a "*Limited Recourse Guarantor*".[66] Pursuant to clause 11.09 of the Credit Agreement and Guarantee,[67] and section 2.2[68] and Exhibit C[69] of the Canadian Pledge Agreement

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[62] Subject to a potential adjustment if the approximately US $3 million in "surplus" improperly held by the Receiver is disgorged to NPL.
[63] Proceeds Chart, Twelfth Report at paragraph 36, NIP "Total Receipts"
[64] *Act*, section 3, Tab 1 of the Respondents' First Brief
[65] Receiver's Second Brief at paragraph 7, page 5, and the Supplementary Twelfth Report at paragraph 67
[66] Credit Agreement, clause 1.01, pages 6 and 28, "Canadian Holdings" and "Limited Recourse Guarantors"
[67] At page 123
[68] Canadian Pledge Agreement dated as of December 30, 2019 (the "**Pledge Agreement**"), Exhibit "F" to the Dean Affidavit, at page 4

referred to in clause 11.09, recourse against NEL was limited to shares it held in the respondent 4093879 Canada Ltd. It appears that no value has been ascribed to those shares; there has certainly been no effort to realize upon them. This means that the value of NEL's guarantee was possibly unknown but (given how the Lenders and the Receiver have conducted themselves) almost certainly nil. If the value is unknown, it is impossible to calculate the "*just proportion*"[70] due from NEL. If the value is nil, that proportion is nil. Either way, NEL cannot be included within the contribution calculation.

61. With respect to the suggestion that NPL's pledge of shares in 887 makes NPL an unlimited guarantor:[71] accepting this argument would mean ignoring i) the Credit Agreement, the Guarantee, the Dean Affidavit, and various Reports to the Court in which NPL is repeatedly and explicitly referred to as a "*Limited Recourse Guarantor*", and ii) the fact that, again, the Lenders and the Receiver made no effort to realize upon the relevant shares, which means that those shares have been assigned no realizable value. If the shares have no value, NPL's Guarantee is limited to recourse against its real property in the all-inclusive sum of US $20 million,[72] which is the figure that all parties have employed throughout this proceeding, and the which was employed in the contribution calculation.

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[69] Pledge Agreement, at Exhibit C
[70] *Act*, section 3, Tab 1 of the Respondents' First Brief
[71] Supplementary Twelfth Report at paragraphs 60 and 65(b)
[72] Credit Agreement, clause 11.05, page 122

VARIOUS OTHER MATTERS

The Arbitrary Allocation

62. The Receiver's argument respecting its allocation of funds away from NPL is that "*the actual timing*" of the payments means that "*none of the NPL Asset Sale Proceeds were used to repay the Credit Facility*",[73] and that therefore "[*t]he allocation does not involve any transfer of assets or proceeds as between NI, NIP and NPL*"[74] (presumably because repayment of the Receiver's Borrowings was not repayment of the Lenders.) The argument is factually and legally groundless, for the reasons given above. Further, it does even not make sense when compared to the Twelfth Report filed in support of this motion: if NPL did not make *any* payments toward the so-called "Lender Debt", there would be no reason for the Receiver to allocate 50% of those payments to NPL, as it did in the Repayment and Proceeds Chart.[75]

63. The Receiver has not cited any cases in support of its allocation of the proceeds from the sales of assets in a multi-entity receivership. The Respondents have cited *Re Nortel*,[76] the leading decision, which supports the Respondents' position. The Receiver cannot say that the principles articulated in that case do not represent the law; instead it has sought to evade the effect of Justice Newbould's decision by simply asserting that it

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[73] Receiver's Second Brief at paragraph 22, page 11
[74] Receiver's Second Brief at paragraph 22, page 11
[75] Twelfth Report, pages 36 and 37
[76] 2015 ONSC 2987, leave to appeal refused 2016 ONCA 332, application for leave to appeal filed (and discontinued) 2016 CarswellOnt 14117; Paragraphs 52-57 and Tabs 15-17 of the Respondents' First Brief

was "*based on the particular circumstances in that case*"[77] and so has "*no application*"[78] here. The emptiness of the response should be noted.

The Receiver's Allocation of Expenses in the Proceeds Chart

64. The Receiver has unilaterally allocated expenses (the Landlord's Charge and Corporate Overheads) to NPL in amounts totaling approximately $6 million (and by so doing has behaved as if a substantial consolidation order had already been made.)[79] Relative to the Arbitrary Allocation, this is a minor issue, but the Receiver has devoted a number of pages to it in both the Twelfth and the Supplementary Twelfth Reports, so it should be observed that the Receiver's allocations are not even *prima facie* reasonable. Briefly:

(a) The Receiver has allocated 50% of the Landlord's Charge to NPL,[80] although NPL is not a party to any of the leases pursuant to which the Landlord's Charge was levied, and although during the receivership NIP paid rent of $6.175 million and NPL paid nil.[81] NPL should not be responsible for any of the Landlord's Charge.

(b) The majority of the Corporate Overheads are payroll (which represents $4.6 million of the $13 million in corporate overhead) and professional fees ($6.4 million of the $13 million.)[82]

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[77] Receiver's Second Brief at paragraph 20, page 10
[78] Receiver's Second Brief at paragraph 21, page 10
[79] Proceeds Chart, Twelfth Report, page 36
[80] Proceeds Chart, Twelfth Report, page 36 "Disbursements - Payment of Landlord's Charge"
[81] Proceeds Chart, Twelfth Report, page 36, "Disbursements – Rent"
[82] Proceeds Chart, Twelfth Report, page 36 "Corporate OH – Payroll – Professional Fees"

a. *Payroll* The attribution of employment expenses to NPL did not occur prior to the receivership,per the audited Financial Statements of the companies, the last of which was for 2018 fiscal year.[83] Further, the payroll allocated to NPL by the Receiver exceeds the total amount NPL earned as income on an annualized basis (the total rent charged by NPL to NIP was approximately $1.3 million per annum).[84] This is clearly absurd.

b. *Professional Fees* The Receiver has allocated fees proportionately based on the gross proceeds of realizations, rather than by the work actually done in respect of the separate corporate entities.[85] This is not appropriate. NPL was a very high-yield to low-effort realization. It owned commercial real estate; all that needed to be done to obtain the proceeds from that real estate was to clean it up and arrange for its sale.[86] There was a motion argued with respect to the sale of the Inkster Property, a short motion concerning questions asked of the Receiver, and the within motion, respecting which some professional fees should be attributed to NPL, but there is no evidentiary justification for the attribution of millions of dollars of professional fees to an estate which actually caused the Receiver to incur only tens of thousands of dollars in fees.

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[83] Albert Gelman Inc. Report on Receiver's Separate Corporation Analysis, dated October 28, 2021, Exhibit "B" to the Affidavit of Joe Albert affirmed October 29, 2021, (the "**AGI Report**"), at Appendix 1
[84] AGI Report, at paragraphs 16-21 and Appendices 2-3
[85] Twelfth Report, "Allocation of Corporate Overhead (proportionate to gross proceeds)" page 37; AGI Report at paragraphs 22-24

Substantive Consolidation

65. The Receiver has attempted to distinguish *one of its own cases*, *Republic Airways*,[87] because NPL has observed that that decision supports NPL's argument on consolidation.[88] The supposed distinction is that *Republic Airways* involved a creditor being carved out of the consolidation, and NPL and NEL are debtors. This overlooks the fact that NPL is also a major creditor of the companies to be consolidated, which means that *Republic Airways* applies squarely to this case.

Bankruptcy

66. The Receiver observes that the Court in *Ladacor*[89] assigned each of the relevant companies into bankruptcy, and suggests that the result should be the same here. The Receiver chooses not to contend with *why* the Court in Ladacor made the order it did: because *"[w]hat is left with the three debtor corporations is a paucity of assets and a mountain of claims against them*."[90] That is not this case: NPL is solvent even if its rights of subrogation are not factored in, especially as the Receiver has now reduced its estimate of the company's tax liability from five to three million dollars.[91] (The Receiver has apparently ignored the possible tax consequences of NPL's payment of $28.579 million pursuant to its Guarantee, which might create a significant tax credit for the

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[86] AGI Report at paragraphs 22-24
[87] 565 B.R. 710 (Bankr. S.D.N.Y. April 10, 2017), ("***Republic Airways***"), *aff'd*, 2018 U.S. Dist. LEXIS 52148 (S.D.N.Y. March 28, 2018) (Tab 14 of the Receiver's Brief); see Receiver's Second Brief at paragraphs 26 and 27, page 12

[88] Respondents' First Brief at paragraphs 72-74, pages 37-39
[89] *Bank of Montreal v. Ladacor AMS Ltd.,* 2019 ABQB 985, Tab 7 in the Respondents' First Brief
[90] *Ladacor*, at paragraph 143, Tab 7 in the Respondents' First Brief
[91] Twelfth Report at paragraph 125, page 43; Supplementary Twelfth Report at paragraph 38, page 7

company.) Once NPL's rights of subrogation (and hence its right to all the funds currently in the receivership) are factored in, NPL becomes prosperous, and there is no conceivable justification for assigning it (or its owner, NEL), into bankruptcy. It is the other Respondents that are subject to "*a mountain of claims*", and they have not objected to the making of a consolidated bankruptcy order.

The Preserved Proceeds

67. Section 11.09 of the Credit Agreement and Guarantee says that:

> *Notwithstanding anything to the contrary contained in this Article XI, Agent's recourse with respect to the Limited Recourse Guarantors shall be limited to the assets encumbered by the Mortgages and assets pledged by each Limited Recourse Guarantor pursuant to the Securities Pledge,* ***and neither Agent nor Lenders shall enforce such liability against any other asset or property of any Limited Recourse Guarantor.***[92]

68. This, of course, is consistent with the General Order dated April 29, 2020 (the "**General Order**"), which limited the scope of the Receiver's appointment to "***only*** *such property, undertakings and assets of NEL and NPL in which the Applicants have an interest pursuant to the Credit Agreement … and the Loan Documents (as defined in the Credit Agreement)".*[93] As the Guarantee and the General Order placed the assets which produced the Preserved Proceeds outside the reach of the Lenders and the Receiver, no assertion of "*an interest*"[94] by the Receiver could give the Receiver an enforceable claim to those Proceeds. This is especially true when NPL is, *via* subrogation, a secured creditor of the Co-Guarantors, and there is no legal mechanism

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[92] At page 123, emphasis added
[93] General Order dated April 29, 2020 at paragraph 2, emphasis added
[94] Twelfth Report, at paragraph 69, page 19

by which NPL could be compelled to make its assets available to NIP's unsecured creditors, absent an order for substantial consolidation.

Fees

69. As set out above, the Receiver is currently holding approximately US $3 million in "*surplus*" under the Debenture; NPL has a subrogated claim to all the funds currently in the receivership that are not "*surplus*"; and the Preserved Proceeds have been frozen (the "**Three Sums**"). Each of these sums should be paid to NPL, for employment according to its discretion. If this Court declines to order immediate payment of any or all of these sums, it should order the release of $1,150,000.00 to NPL so that NPL, NEL and Peter Nygard personally may pay the accounts of their lawyers.

70. Even when a Court has imposed a *Mareva* injunction over the assets of a civil defendant, that defendant is given access to funds sufficient to pay its legal and living expenses.[95] The imposition of a *Mareva* injunction requires the meeting of a far higher test than the granting of a receivership order.[96] As the Receiver has incorrectly claimed the Three Sums, NPL and NEL are being denied funds necessary to respond to a very expensive receivership, which denial would not be possible in the much stricter *Mareva* regime. Peter Nygard, further, requires money to conduct his defence of criminal charges, which defence will redound to the benefit of NPL and NIP, as follows. If Nygard's criminal defence is successful, current or anticipated civil proceedings in respect of Peter Nygard's conduct which name NIP and NPL as defendants will cease

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[95] *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*, 2003 CanLII 12916, Tab 1

to threaten the assets of those companies. (On this point, see the affidavit of Brian Greenspan, Nygard's criminal lawyer.)[97]

Costs

71. The Receiver has cited *Kaptor Financial*[98] as support for a request for substantial indemnity costs. That case concerned "*unsubstantiated allegations…completely unrelated to the relief sought*",[99] including statements that the relevant trustee in bankruptcy had participated in an improper conspiracy, had deliberately omitted material facts from its reports, and had disregarded Generally Accepted Accounting Principles.

72. NPL has not made allegations about the character of the Receiver; it has not suggested dishonesty or moral turpitude, as in an allegation of conspiracy. Most importantly, the arguments made by NPL to which the Receiver objects were all tightly focused on "*the relief sought*" by the Receiver, and were all derived from carefully-defended readings *of the Receiver's own material*. A defensible argument, even if unsuccessful, should not be sanctioned, as it cannot meet the standard established by the Supreme Court: *"Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."*[100] On this point, the Court of Appeal for Ontario has very recently upheld a

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[96] See, for example, *Chitel v Rothbart* (1982), 141 D.L.R. (3d) 268, (O.C.A.) at paragraphs 44 and 56-58, Tab 2
[97] Affirmed December 9, 2021
[98] *Kaptor Financial v SF Partnership, LLP*, 2016 ONSC 6607, ("*Kaptor Financial*"), Tab 1 in the Receiver's Second Brief
[99] *Kaptor Financial* at paragraph 6, Tab 1 in the Receiver's Second Brief
[100] *Young v. Young,* [1993] 4 S.C.R. 3 at paragraph 260, Tab 3

motion judge who declined to impose substantial-indemnity costs requested by a trustee in bankruptcy. The motion judge had held, in a passage quoted by the Court of Appeal:

> *While any **unfounded** allegation that attacks the integrity of a court officer is inappropriate and uncalled for, I find that the allegations made against the Trustee in this case do not rise to the level of reprehensible, scandalous or outrageous conduct. **The defendants' conduct was more in the nature of an aggressive defence of the claim**. Accordingly, substantial indemnity costs are not an appropriate sanction in this case. The appropriate scale is partial indemnity costs.*[101]

73. NPL has done nothing more than mount a defence of its rights. In the event that NPL and NEL are unsuccessful on this motion, there will be no basis for the making of a substantial indemnity costs award against all or any of the Respondents.

PART III - ORDER SOUGHT

74. The respondents NPL and NEL request:

1. that they be excluded from any order made permitting substantial consolidation and subsequent bankruptcy;

2. an order that the Receiver forthwith pay to NPL an amount equal to the sum by which the NPL Proceeds exceeded US $20 million, according to the Bank of Canada exchange rate as at the date of the order;

3. an order that the Preserved Proceeds be forthwith paid to NPL;

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[101] *Gelman v. 1529439 Ontario*, 2021 ONSC 424 at paragraph 16, emphasis added, Tab 4; affirmed *Pantziris v. 1529439 Ontario Limited*, 2021 ONCA 784, (see paragraphs 23-24), Tab 5

4. in the alternative to 2, above, an order directing the payment of $1,150,000.00 to NPL in respect of its legal fees, and those of NEL and Peter Nygard; and

5. costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10TH DAY OF DECEMBER, 2021.

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COURT FILE NO.: 99-CV-179494
DATE: 20030107

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
CANADIAN IMPERIAL BANK OF COMMERCE	)	Lincoln Caylor and Bianca Lanene, for the Plaintiff (Responding Party)
	)	
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	)	Brian Shiller and Alan Gold, for the Defendants (Moving Parties)
	)	
Defendants (Moving Parties)	)	
	)	
	)	**HEARD:** December 3, 2002

MOLLOY J.

REASONS FOR DECISION

A. NATURE OF THE MOTION

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

B. FACTUAL BACKGROUND

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

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

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

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

[6] At the present time, both Lawrence Mpamugo and his wife Kathleen are unemployed. They have two children: Steven (aged 20) and Pauline (aged 19). Both are students at the University of Toronto. Pauline does not work; Steven works part-time at the Bay, earning $40.00 a week. In support of this motion for a variation of the injunction order, Lawrence Mpamugo has filed affidavits in which he states that over the past three years he has borrowed money and sold inherited properties in Nigeria to pay legal fees for this civil case and to fund the defence of the criminal charges against him. He says that he and his family are now broke and

have no source of income to live on. He further claims that he has no assets other than those frozen by the injunction and household furnishings and jewellery worth less than $2000.00.

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

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

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

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

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

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

C. ASSETS FROZEN BY THE INJUNCTION

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

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

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

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

- $300,000, estimated value of family home at Wallenberg Crescent
- $161,000 in a GIC with the TD Bank, which Mr. Mpamugo says came from income he received since 1993 for work unrelated to Credit Valley

- $492,000.00 in an account at Scotia Bank in the name of Credit Valley (Kirwin and Highway 10 – account # 0126411), which Mr. Mpamugo says came from Scotia Bank advances for student loans and/or income received for unrelated work done by the defendant company Marygold, which Mr.Mpamugo controls

- $666,000 in an account at the Royal Bank in the name of Credit Valley (Dundas and Highway 10 – account # 1003045), which Mr. Mpamugo says are funds advanced by Royal Bank for student loans and earnings of Marygold for unrelated work.

D. CASE LAW

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

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

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

[17] The purpose of the *Mareva* injunction is a limited one. It is meant to restrain a defendant from taking unusual steps to put his assets beyond the reach of the plaintiff in order to thwart any judgment the plaintiff might eventually obtain. It is not meant to give the plaintiff any priority over other creditors of the defendant, nor to prevent the defendant from carrying on business in the usual course and paying other creditors. The nature of the *Mareva* is such that it is typically sought and granted, in the first instance, without notice to the defendant, but then is subject to a motion by the defendant to vary the injunction to permit payments in the usual course of business

or living. As was noted by the English Queen's Bench in *Iraqi Minister of Defence v. Arcepey Shipping Co. S.A.*, [1980] 2 W.L.R 480 at 485-486:

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

[18] This principle has been endorsed by the Supreme Court of Canada (referring with approval to the *Iraqi Ministry of Defence* decision) in *Aetna Financial Services Ltd. v. Fegelman* (1985), 15 D.L.R. (4th) 161 at 177. Thus, even where the *Mareva* injunction may have been originally granted in a broad and sweeping form, this is in contemplation that it will likely later be modified to permit the defendant to maintain his normal standard of living and to meet legitimate debt payments accruing in the normal course. It is common for such exemptions to include the payment of ordinary living expenses and reasonable legal expenses to defend the lawsuit: *University of British Columbia v. Conomos*, [1989] B.C.J. No. 2269 (B.C.S.C.); *Kelly v. Brown*, [1990] O.J. No. 419 (Ont.Ct.Gen.Div.); *National Bank of Canada v. Melnitzer*, [1997] O.J. No. 2424(Ont.Ct.Gen.Div.); *Pharma-Investment Ltd. v. Clark*, [1997] O.J.No.1334 (Ont.Ct.Gen.Div.); *Halifax plc v. Chandler*, [2001] E.W.J. No. 5249 (R.C.J.C.A.).

[19] The English cases apply a preliminary test before granting relief from a *Mareva* injunction. Under those authorities, before an Order will be made permitting payment of expenses out of funds frozen by a *Mareva* injunction, the defendant must satisfy the court that he has no other assets from which to make the payments: *Halifax plc v. Chandler*, at para 17; *Ostrich Farming Corporation v. Ketchell*, December 10, 1997, English Court of Appeal (Civil Division), per Roch and Millett LJJ. Although I could find no Canadian authority explicitly adopting that test, I believe it is implicit in many of the decisions. It is really only logical that this should be the case. Suppose, for example, that a defendant has one account in the jurisdiction containing $100,000.00 and it is properly frozen by a *Mareva* injunction at the behest of a plaintiff who has a claim exceeding that amount and who has shown that the defendant is trying to put the funds beyond the reach of the court. If that was the defendant's only source of funds, one can easily see the rationale of permitting his ordinary living expenses to be paid out of

the account. If, however, the defendant has millions of dollars in other accounts not covered by the *Mareva* injunction, it is not reasonable to first deplete the assets that are covered by the injunction before having recourse to the other funds. Accordingly, I find it is appropriate to apply that preliminary test in this case.

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

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

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

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

> It cannot be sufficient for a defendant to establish that he has no other funds with which to conduct his own defence. For even if that be so, he must in addition show that there is an arguable case for his having recourse to the funds in question. If he cannot show an arguable claim in his part to the funds, he has no right to use the money. A trustee has no right to have recourse to trust money to defend himself against a claim for breach of trust unless he has an arguable case

> for saying he has a beneficial interest in the funds in question. No man has a right to use someone else's money for the purpose of defending himself against legal proceedings. Just as the Court's jurisdiction to grant the injunction in the first place depended on the plaintiff's establishing an arguable case that the money belonged to it, so its willingness to permit the defendant to have recourse to the money depends upon his establishing an arguable claim to the money.

And further, at page 6:

> The plaintiff has put forward a strongly arguable case for saying that the money belongs beneficially to the plaintiff. The defendants ought not to have access to those moneys for the purpose of their legal costs unless they establish, first, that they have no other funds out of which to pay those costs, and secondly, that they have an arguable case for denying that the money belongs to the plaintiff company. For that purpose they must put in evidence and condescend to particulars. If they do so, and only then, will the court enter into the difficult balancing exercise which other judges have described, in which the court must weigh up the relative strength of the two cases, consider the nature of the defence which has been put forward and all the other circumstances of the case.

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

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

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

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

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

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

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

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

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

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

E. ANALYSIS

(i) *Available Assets Not Frozen by Any Injunction*

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

[28] Mr. Mpamugo filed an affidavit in May 2002 in which he listed certain assets and swore that those were the only assets he owned. On cross-examination in August, he stated that he was not aware of any other bank accounts but undertook to review "the disclosure" (referring to the Crown's disclosure material in the criminal proceedings) to be sure. In November 2002, Mr. Mpamugo filed a supplementary affidavit in which he disclosed for the first time two other bank accounts in the name of Credit Valley, one at the Scotia Bank and the other at the Royal Bank. The total funds in the two accounts exceed $1 million. He also disclosed for the first time a GIC in his name with a value of approximately $161,000.00. The existence of these assets was known to the Crown and referred to in the disclosure material. It is difficult to accept that Mr. Mpamugo had simply forgotten about more than $1 million and tempting to conclude that he only disclosed it because he knew the police were aware of it and it was therefore inevitable that

the plaintiff would find out about it eventually. Further, it was frozen by the injunctions in any event and frozen assets not readily traceable to the plaintiff's funds would be more likely to be released by the court for use in funding his defence and other expenses. The timing of Mr. Mpamugo's disclosure of these assets is therefore suspiciously convenient for him. That said, the existence of these additional assets is now known and I have no other evidence to rebut the defendant's sworn evidence that he has now disclosed all of his assets and that everything he has is frozen by the injunction. It is always difficult for a party to prove a negative, and particularly difficult to prove the non-existence of something. It is not unusual for the evidence on this kind of point to consist entirely of a sworn statement that there are no such assets. While the credibility of the defendant's evidence in this regard is suspect, I am not prepared on a motion of this nature to simply dismiss his evidence entirely without some evidence that there are assets elsewhere. For purposes of this motion, therefore, I hold that the defendant has established the first part of the test and that, apart from assets frozen by the injunction, he has no means to pay his ordinary living expenses and legal fees.

(ii) *Assets Subject to the Proprietary Injunction*

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

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

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

[32] The defendant recently disclosed a GIC in his name at the TD Bank which he says came from money he earned between 1993 and 1999 and is not money received from the CIBC. He produced no documentation to support that proposition. For present purposes, he has failed to

discharge his onus of demonstrating that the source of this asset was other than the CIBC. I will treat it as if it were subject to the proprietary injunction.

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

[34] In respect of the Scotia Bank account, Mr. Mpamugo produced as an exhibit to his November affidavit a bank statement for the period from May 31 to June 30, 1999. That statement shows an opening balance of $232,257.87 and five deposits over that month 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 documents from the financial institutions involved. However, there was ample time to obtain such documentation and I am not prepared to accept Mr. Mpamugo's uncorroborated evidence as to the source of the funds in this account. Therefore, until such supporting evidence is forthcoming, I will treat the funds in the Scotia Bank account as subject to the proprietary injunction.

[36] In respect of the Royal Bank account, Mr. Mpamugo produced the bank statement for the month from June 7, 1999 to July 7, 1999. There is an opening balance of $568,235.02 and a closing balance of $655,522.95. The total of all deposits during the month is approximately $150,000.00. Mr. Mpamugo testified on cross-examination that the account was opened in January 1999 and that 50% of the funds in the account are from earnings by Marygold, with the remaining 50% being tuition received directly from students and student loan advances by the Royal Bank for tuition. However, Mr. Mpamugo conceded on cross-examination that all of the deposits for the month shown on the statement are preceded by the entry "RB STUDENT TUIT" and that those amounts were student loan advances from the Royal Bank. There were no other deposits during the month. Therefore, at least $150,000.00 (plus interest earned on that amount since July 1999) is from a source other than CIBC and is not subject to the proprietary

injunction. With respect to the balance of the funds, Mr. Mpamugo produced no documentation of any kind and again his evidence was vague and devoid of particularity. As is the case with the Scotia Bank account, Mr. Mpamugo has failed to satisfy me on credible evidence that any of the funds in the account represent business earnings by Marygold or actual tuition paid by legitimate students directly to Credit Valley. Therefore, apart from the $150,000.00 from Royal Bank funds, for purposes of this motion I will treat the funds in this account as subject to the proprietary injunction.

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

(a) The available funds

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

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

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

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

(b) Living Expenses

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

sufficient money in the Expense Account for this purpose, I will also deal below with the payment of living expenses out of the funds frozen by the proprietary injunction.

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

(c) Legal Expenses

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

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

[44] Mr. Mpamugo also seeks leave to pay the account of Mr. Edward Greenspan, who represented him at the preliminary inquiry. Those services have been fully rendered and Mr.

Greenspan is no longer acting. There are insufficient assets to warrant payment of that account at this time. That is particularly so since the account has not been assessed and I am not in a position to determine if it is reasonable.

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

(d) University Expenses

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

(e) Wallenberg Crescent Tax Arrears

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

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

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

[48] The apartment buildings at Scarlett Road and Queen Avenue were purchased with cash received from the CIBC and are subject to the proprietary injunction. In an affidavit sworn in November 1999, the defendant Kathleen Mpamugo swore that the total monthly income from the two properties was approximately $8000.00 and that the total monthly expenses to maintain them were $4500.00. The defendants were authorized under the December 1999 Order of Cameron J. to open a separate account for these properties and to deposit all rental income and pay all expenses out of that account. Although the account was opened, it was not operated on a

consistent basis. Some of the rental cheques were cashed through other accounts or at Money Mart. Some payments were allegedly made in cash. It would appear no records were kept, or at least none were produced. It is unclear what, if any, expenses were paid. There are no mortgages on the property. The tax arrears have grown to sizeable proportions, to an extent that suggests no property taxes were paid at all. There are also utility arrears and Mr. Mpamugo stated in his affidavit that both properties are in a poor state of repair. By the time of Mr. Mpamugo's affidavit in support of this motion in May 2002, there would have been $240,000.00 of income from these properties. It is largely unaccounted for. Although Mr. Mpamugo now swears that the apartment buildings have been operating at a loss, I am hard pressed to understand how that can be the case since there is substantial revenue and virtually no expenses have been paid. At the very least, the properties would appear to have been mismanaged. Alternatively, revenue from the properties may have been used by the defendants for other purposes.

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

(b) Payment of Expenses Out of Proprietary Assets

[50] I have a discretion in respect of whether payments should be made out of the assets frozen by the proprietary injunction in the event there are insufficient funds in the Expense Account to cover them. In exercising that discretion I must be mindful that the plaintiff has not yet proven its entitlement to the assets in question and there is an underlying unfairness to the defendant in tying up his assets prior to the plaintiff proving its case at trial. On the other hand, there is unfairness to the plaintiff if I permit the defendant to use the funds for his own purposes, including funding his defence of this case, only to discover at the end of the action that the money belonged to the plaintiff all along. There is a fundamental unfairness in requiring the plaintiff to fund the defence of its own case against the defendant and to provide the defendant

and his family with all of their living expenses for the time it takes to get this case to trial, if the defendant did in fact defraud the plaintiff of the amounts claimed. In this situation, I find the relative strength and weakness of the parties' cases to be very influential. The plaintiff has put forward evidence establishing a strong *prima facie* case of fraud. Apart from a bald denial, the defendant has not put forward any defence at all. The evidence before me therefore overwhelmingly favours the plaintiff.

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

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

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

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

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

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

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

F. SUMMARY OF RULINGS and COSTS

[58] To summarize:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[59] Costs are left to the trial judge.

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MOLLOY J.

Released: January 7, 2003

COURT FILE NO.: 99-CV-179494
DATE: 20030107

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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)

REASONS FOR DECISION

MOLLOY J.

Released: January 7, 2003

Chitel et al. v. Rothbart et al.

(1983), 39 O.R. (2d) 513
141 D.L.R. (3d) 268; 69 C.P.R. (2d) 62; 30 C.P.C. 205

ONTARIO
COURT OF APPEAL
MACKINNON A.C.J.O., ARNUP and GOODMAN JJ.A.
DECEMBER 2, 1982

Practice -- Referral to Court of Appeal -- Interlocutory injunction -- Mareva principle -- Available if five criteria met -- Full disclosure -- Grounds of claim and defence -- Assets of defendant -- Risk of removal -- Undertaking as to damages -- Judicature Act, R.S.O. 1980, c. 223, s. 19.

The plaintiff sued her personal physician for conversion of shares in two private companies. The plaintiff obtained an ex parte injunction, which was continued twice, because she alleged that the defendant was intending to leave Canada. The plaintiff was then cross-examined and affidavit material was filed on behalf of the defendant demonstrating that he had been on staff of an accredited hospital for 12 years, had no intention of leaving that position or Canada, was leaving on a short sabbatical which had been long-planned, and denying that the plaintiff relied on him with regard to securities particularly since she was the more experienced in that field. On a motion to continue the interlocutory injunction, Anderson J. (36 O.R. (2d) 124) referred the matter to the Court of Appeal to set out the criteria for Mareva injunctions (Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A., [1980] 1 All E.R. 213).

Held: the application should be dismissed.

The affidavit of the plaintiff failed to make the necessary full and frank disclosure of all the relevant facts and of the expected position of the defendant required to obtain an ex parte injunction. It failed to disclose that the plaintiff was a knowledgeable and long term stock trader who controlled a Swiss company, in which she placed some of her share holdings. It failed to disclose previous stock transactions between the parties' Swiss corporations. It failed to point to any specific assets which were in danger of being dissipated and which the plaintiff wished frozen. Indeed it did not identify any assets of the defendant. Because of the failure to make full disclosure with the resulting incomplete and misleading picture of the relationship between the parties, the discretion to continue the injunction until trial should not be exercised.

Furthermore, where an ex parte injunction has been granted, counsel for a party to be cross-examined should be particularly chary of interfering in the cross-examination by providing answers or of instructing the witness not to answer questions. Wide latitude must be given in order to bring all relevant matters before the court as quickly as possible.

Obiter: the general rule, as was stated in Lister & Co. v. Stubbs, (1890), 45 Ch. D. 1, that the court has no jurisdiction to protect a creditor before he gets judgment. There are, however, exceptions to this general rule which find their genesis in s. 19(1) of the Judicature Act, R.S.O. 1980, c. 223: "a mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made". "Just or convenient" must not be construed so broadly as to permit the court to grant the injunction simply because the court thought it convenient.

Mareva injunctions are recognized in Ontario and may be granted if the following criteria are met:

(1) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.

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

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

(4) The plaintiff should give some grounds for believing that there is risk of the assets being removed before the judgment or award is satisfied.

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

Numbers (1), (2), (5) are standard considerations when considering the usual application for an interlocutory injunction. However, when applying for a Mareva injunction, the material to support (1) and (2) must be such as persuades the court that the plaintiff has a strong prima facie case on the merits.

Criteria (3) and (4) cover areas unique to the Mareva injunction. The material under (3) must establish those assets with as much precision as possible so that the injunction can be directed toward a specific asset. It would be punitive to tie up all the assets and income of a resident defendant. Damages by way of undertaking might be far from proper compensation.

Item (4) material must persuade the court that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid a judgment or that the defendant is otherwise disposing of his assets, out of the ordinary course of business, so as to render a future tracing impossible or remote.

Although American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, has been followed in this province with respect to interlocutory injunctions, it has been properly emphasized by the Divisional Court in Yule Inc. v. Atlantic Pizza Delight

Franchise (1968) Ltd. et al. (1977), 17 O.R. (2d) 505, that the remedy must remain flexible and that the American Cyanamid test may not be a suitable test in all situations.

[Lister & Co. v. Stubbs (1890), 45 Ch. D. 1; Aslatt v. Corp. of Southampton (1880), 16 Ch. D. 143; Third Chandris Shipping Corp. et al. v. Unimarine S.A., [1979] Q.B. 645, [1979] 2 All E.R. 972; Canadian Pacific Airlines Ltd. v. Hind (1981), 32 O.R. (2d) 591, 122 D.L.R. (3d) 498, 22 C.P.C. 179, 14 B.L.R. 233, apld; OSF Industries Ltd. v. Marc-Jay Investments Inc. (1978), 20 O.R. (2d) 566, 88 D.L.R. (3d) 446, 7 C.P.C. 57, overd; Mills and Mills v. Petrovic et al. (1980), 30 O.R. (2d) 238, 118 D.L.R. (3d) 367, 18 C.P.C. 38, 12 B.L.R. 224; Campbell v. Campbell (1881), 29 Gr. 252; American Cyanamid Co. v. Ethicon Ltd., [1957] A.C. 396, [1975] 1 All E.R. 504; Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd. et al. (1977), 17 O.R. (2d) 505, 80 D.L.R. (3d) 725, 35 C.P.R. (2d) 273; N.W.L. Ltd. v. Woods, [1979] 3 All E.R. 614; Nippon Yusen Kaisha v. Karageorgis et al., [1975] 3 All E.R. 282; Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A., [1980] 1 All E.R. 213; Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, [1978] Q.B. 644, [1977] 3 All E.R. 324; Beddow v. Beddow (1978), 9 Ch. D. 89; Siskina (cargo owners) et al. v. Distos Compania Naviera S.A., [1979] A.C. 210, [1977] 3 All E.R. 803; Barclay-Johnson v. Yuill, [1980] 3 All E.R. 190; Prince Abdul Rahman Bin Turki Al Sudairy v. Abu-Taha et al., [1980] 3 All E.R. 409; Bank of Montreal v. James Main Holdings Ltd. et al. (1982), 26 C.P.C. 266, 23 R.P.C. 188, refd to]

APPLICATION to continue a Mareva injunction referred to the Court of Appeal, from Anderson J., 36 O.R. 124.

Charles B. Cohen, Q.C., for plaintiffs, applicants.

R. Alan Harris, for defendants, respondents.

The judgment of the Court was delivered by

MACKINNON A.C.J.O.:-- This Court is in a rather unusual position on this appeal. The application before us is by the plaintiffs to continue an interlocutory injunction until the trial of the action. The application originally came on before Mr. Justice Anderson [36 O.R. (2d) 124] who referred it to this Court under the provisions of s. 34(1) of the Judicature Act, R.S.O. 1980, c. 223. He was of the view that there was a divergence in the cases at the High Court level concerning the principles upon which a judge's discretion should be exercised in the granting of an interlocutory injunction. He felt there was now the necessity for an authoritative statement on the subject at the appellant level. He had particular regard to the proliferation of the now commonly called "Mareva" injunction [Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A., [1980] 1 All E.R. 213].

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

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

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

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

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

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

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

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

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

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

Justice Galligan and his [her?] lack of frankness was compounded by the position taken by her counsel on the cross-examination on her affidavit.

On cross-examination, after counsel for the plaintiff refused to allow her to answer a number of questions, and sought to limit the cross-examination, the following took place between counsel:

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

Counsel for the defendant made clear his purpose in the cross-examination which was a proper and legitimate purpose,

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

Counsel seemed to have confused, in part at least, the right to limit "fishing expeditions" on examination for discovery with a severe limitation on the extent of proper cross-examination. Counsel at trial would not, on any and every pretext, seek to frustrate proper examination. If he did, he would be quickly corrected by the trial judge. Because a judge is not present does not mean that a counsel, who is an officer of the court, should take a different position. He should not answer some obviously significant question himself before the witness answers, unless it is done by agreement with counsel for the other side, nor lead his witness immediately after the witness has given a damaging answer to explain the answer. Nor should he interrupt and prevent, time after time, questions from being answered although a legitimate ground has been given for their being asked. It seems to me that this is so in all cases, but particularly where ex parte injunctions have been granted. In such cases the matter is one of urgency which should be determined as quickly as possible by the court without the party restrained being forced to bring interlocutory motions and appeals in order to get the answers of the deponent to relevant questions. I have digressed to a certain extent but I think it important that a practice not develop which would debase the value of the right to cross-examine and effectively frustrate its legitimate purpose.

In any event, from the answers that were secured, it is now clear, despite the implication in the plaintiff's affidavit, that the defendant was not her doctor who had, by virtue of

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

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

There is no evidence that the individual defendant intends to leave the country or is dissipating his assets. The plaintiff at no time in these proceedings, by way of affidavit or by her answers on cross-examination, points to any specific assets which are in danger of being dissipated which she wishes

frozen. Indeed, apart from his income, which counsel for the plaintiff advises us he has agreed to release from the interim injunction, and the defendant's half interest in the house already transferred to his wife, which it is also agreed is not relevant to these proceedings, there is no evidence that the defendant has any assets at all.

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

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

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

This conclusion would be sufficient to dispose of this application but, as I noted earlier, the matter comes before us because Mr. Justice Anderson was of the opinion that earlier cases dealing with Mareva injunctions, particularly Mills and Mills v. Petrovic et al. (1980), 30 O.R. (2d) 238, 118 D.L.R. (3d) 367, 18 C.P.C. 38, if followed, would mandate a continuation of the injunction. He was of the view that the law of this province with respect to interlocutory injunctions exhibits some confusion. He went on to say "[t]here is a dearth of authority at the appellate level. It appears to me that authoritative guidance is much needed" [at p. 129 O.R.]. I have made it clear that because of the nature of the material in support of the application and its serious deficiencies, which were not apparent at the time of the granting of the interim injunction, I would not continue the injunction. Accordingly, anything I may have to say as to Mareva injunctions is not necessary to my decision. However, out of deference to Mr. Justice Anderson's request and in view of the fact that the matter only came before us because he felt that some extended form of Mareva injunction might apply, I shall deal with that issue.

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

The second exception is where there is a strong prima facie case made out of theft or fraud. In support of this proposition he referred us first to Campbell v. Campbell (1881), 29 Gr. 252. This was a suit for alimony instituted by the plaintiff against her husband and a brother-in-law of her husband in the course of which she sought to impeach a conveyance executed by her husband to his brother-in-law. The plaintiff alleged that the conveyance was the result of a

conspiracy to defeat her in her attempt to compel payment of alimony if she was successful in her alimony action. It was admitted that there was a conspiracy between the defendants to deal with the husband's land so as to prevent the plaintiff from recovering any alimony. Boyd C. held (p. 255) that:

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

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

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

The plaintiff there sought to restrain the sale of the house pending the outcome of the action for return of the moneys allegedly stolen. The learned Motions Court judge said that the evidence of theft was very strong but stated that he did not wish to prejudge the issue which was then pending in the criminal courts. However, later in his reasons he stated (at

p. 368 D.L.R.) "it does not appear to me to be an unreasonable extension of the principle ... to permit equity to give a person who has been defrauded or stolen from by a defendant some measure of relief that would not be available to a plaintiff in an ordinary action where fraud or theft are not issues" (emphasis added). In this passage he appears to be making a finding for the purposes of the civil action that a theft had been committed. It may be that the facts justified the order made but, in any event, that is not this case.

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

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

> My Lords, when properly undestood, there is in my view

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

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

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

The case dealing with Mareva injunctions have been much canvassed and I do not propose to run through them all again. It had been the traditional view in England, as well as in this province, that an interlocutory injunction would not be granted

to restrain a defendant from disposing of his assets or removing them from the jurisdiction prior to judgment. However, the modern departure from that view has its genesis in a trilogy of cases: Nippon Yusen Kaisha v. Karageorgis et al., [1975] 3 All E.R. 282, heard May 22, 1975; Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A., [1980] 1 All E.R. 213, although reported in 1980 was heard June 23, 1975; and Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, [1978] Q.B. 644, [1977] 3 All E.R. 324, heard March 2 to 9, 1977.

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

In Nippon Yusen Kaisha v. Karageorgis, the defendants had chartered a number of the plaintiff's ships. They did not pay the charterparty fee and attempts by the plaintiff to locate the defendants were unsuccessful. The plaintiff believed "and rightly believe[d]" (p. 283) that the defendants had funds in the banks in London and feared that those funds would be transmitted out of the jurisdiction unless something was done. Accordingly, an ex parte application was brought to restrain the defendants from disposing of or removing any of their assets from the jurisdiction. Donaldson J. refused the application and the plaintiffs appealed. In the course of his short reasons for judgment, Lord Denning M.R. said this (p. 283):

> We are told that an injunction of this kind has never been done before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them. We were told that Chapman J in chambers recently refused such an application. In this case also Donaldson J refused. We know, of course, that the practice on the continent of Europe is different.
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> It seems to me that the time has come when we should revise

our practice. There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which says the High Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems to me that this is just such a case. There is a strong prima facie case that the hire is owing and unpaid. If an injunction is not granted, these moneys may be removed out of the jurisdiction and the shipowners will have the greatest difficulty in recovering anything. Two days ago we granted an injunction ex parte and we should continue it.

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

So they have applied for an injunction to restrain the disposal of those moneys which are now in the bank. They rely on the recent case of Nippon Yusen Kaisha v. Karageorgis, [1975] 3 All E.R. 282, [1975] 1 W.L.R. 1093. Donaldson J felt some doubt about that decision because we were not referred to Lister & Co v. Stubbs, (1890) 45 Ch. D. 1, [1886-90] All E.R. Rep. 797. There are observations in that case to the effect that the court has not jurisdiction to protect a creditor before he gets judgment. Cotton LJ said, 45 Ch. D. 1 at 13, [1886-90] All E.R. Rep. 797 at 799:

> "I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the

> defendant, the defendant has been ordered to give security until that has been established by the judgment or decree."

And Lindley LJ said, 45 Ch. D. 1 at 15, [1886-90] All E.R. Rep. 797 at 800: "... we should be doing what I conceive to be very great mischief if we were to stretch a sound principle to the extent to which the Appellants ask us to stretch it ..."

Donaldson J felt that he was bound by Lister & Co. v. Stubbs and that he had no power to grant an injunction. But, in deference to the recent case, he did grant an injunction, but only until 17.00 hours today (23rd June 1975), on the understanding that by that time this court would be able to reconsider the position.

Now counsel for the charterers has been very helpful. He has drawn our attention not only to Lister & Co. v. Stubbs but also to s 45 of the Supreme Court of Judicature (Consolidation) Act 1925, which repeats s 25(8) of the Judicature Act 1873. It says:

> "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient ..."

In Beddow v. Beddow (1878), 9 Ch. D. 89 at 93, Jessel MR gave a very wide interpretation to that section. He said: "I have unlimited power to grant an injunction in any case where it would be right or just to do so ..."

There is only one qualification to be made. The court will not grant an injunction to protect a person who has no legal or equitable right whatever. That appears from North London Railway Co. v. Great Northern Railway Co. (1883), 11 Q.B.C. 30. But, subject to that qualification, the statute gives a wide general power to the courts. It is well summarised in Halsbury's Laws of England, 21 Halbury's Laws (3rd Edn) 348, para 729; see now 24 Halsbury's Laws (4th Edn) para 918:

> "... now, therefore, whenever a right, which can be asserted either at law or equity, does exist, then whatever the previous practice may have been, the Court is enabled by virtue of this provision, in a proper case, to grant an injunction to protect that right."

In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right f*by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction.

Both Roskill and Ormrod L.JJ. reserved their final views because only one side had been heard, the appeal being ex parte. However, the contract clearly called for a daily rate of hire payable half-monthly in advance and it was clearly in arrears; the default being unexcused, there was strong reason for granting the application. It can be seen that Lord Denning M.R. refers to Jessel M.R.'s interpretation of the words "just or convenient" found in s. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925 which repeats s. 25(8) of the Judicature Act of 1873, and purports to apply it. However, it should be noted that in the later case of Aslatt v. Corp. of Southampton (1880), 16 Ch. D. 143 at 148, Jessel M.R. had this to say about those words:

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

In the third and final case in the trilogy, Rasu Maritima

S.A. v. Perusahaan, supra, Lord Denning M.R. once again presided and once again the defendants were foreigners. On this occasion the defendants were represented by counsel in the Court of Appeal and the matter was fully argued. Lord Denning summarised the facts briefly as follows (p. 327 All E.R.):

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

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

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

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

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

He then returned once again to Jessel M.R.'s statement in Beddow v. Beddow (1878), 9 Ch. D. 89, as to the wide discretion granted by the words "just or convenient" and concluded that

courts can lay down considerations to be borne in mind when exercising the discretion but from time to time as public policy changes these considerations may change. He quoted with approval the reasons of Kerr J. in the court below which, he said, gave the practical reasons for justifying the procedure (pp. 333-34):

> The two cases of Nippon Yusen Kaisha v. Karageorgis and Mareva Compania Naviera S.A. v. International Bulk Carriers Ltd are part of the evolutionary process. This court was there presented with sets of facts which called aloud for intervention of the court by injunction. Study those facts and you will see that it was both just and convenient that the courts should restrain the debtor from removing his funds from London. Unless an interlocutory injunction were granted ex parte, the debtor could and probably would, by a single telex or telegraphic message, deprive the shipowner of the money to which he was plainly entitled. So just and convenient, indeed, is the procedure that it has been constantly invoked since in the commercial courts with the approval of all the judges and users of that court. Now, after full argument, I hold that those cases were rightly decided. And I would like to read here the words of Kerr J, the commercial judge, who has had more experience than any other of this jurisdiction in giving what he says are the practical reasons which justify this procedure:
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> > "A plaintiff has what appears to be an indisputable claim against a defendant resident outside the jurisdiction, but with assets within the jurisdiction which he could easily remove, and which the court is satisfied are liable to be removed unless an injunction is granted. The plaintiff is then in the following difficulty. First, he needs leave to serve the defendant outside the jurisdiction, and the defendant is then given time to enter an appearance from the date when he is served, all of which usually takes several weeks or even months. Secondly, it is only then that the plaintiff can apply for summary judgment under RSC Ord 14 with a view to levying execution on the defendant's assets here. Thirdly, however, on being apprised of the proceedings, the defendant is liable to remove his assets,

> thereby precluding the plaintiff in advance from enjoying the fruits of a judgment which appears irresistible on the evidence before the court. The defendant can then largely ignore the plaintiff's claim in the courts of this country and snap his fingers at any judgments which may be given against him. It has always been my understanding that the purpose and scope of the exercise of this jurisdiction is to deal with cases of this nature. To exercise it on a ex parte basis in such cases presents little danger or inconvenience to the defendant. He is at liberty to apply to have the injunction discharged at any time on short notice."

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

Shortly after this case, the issue of Mareva injunctions was incidentally raised in the Siskina (cargo owners) et al. v. Distos Compania Naviera S.A., [1979] A.C. 210, [1977] 3 All E.R. 803. There the House of Lords came to the conclusion that the appeal did not provide an appropriate vehicle for the consideration of the wider question of what restrictions, whether discretional or jurisdictional, there may be on the powers conferred on the High Court by s. 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925 to "grant a mandamus or an injunction or appoint a receiver in all cases in which it appears to the court to be just or convenient so to do." Lord Hailsham (p. 828 All E.R.), for his part at that moment, was limiting the applicability of the Mareva

injunction, if it were a valid remedy, to foreign based defendants with assets in England. The House of Lords, so far as I am aware, has yet to deal with Mareva injunctions and their applicability to domestic defendants.

In a later case, Third Chandris Shipping Corp. et al. v. Unimarine S.A., [1979] Q.B. 645, [1979] 2 E.R. 972 [affirming [1979] 2 All E.R. at 974], Lord Denning M.R. purported to set out "guidelines" for the granting of Mareva injunctions. Once again the case concerned a charter contract wiht a foreign defendant. Mustill J., who heard the application in the court of first instance in the course of discussing Mareva injunctions, said (pp. 976-77 All E.R.):

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

411, is authority binding on this court that the plaintiff must demonstrate the existence of assets within the jurisdiction if Mareva relief is to be granted. If the only assets whose existence is asserted by the plaintiff consists of a credit balance and if in fact it is shown that no such balance exists, the requirements of the MBPXL case are not satisfied.

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

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

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

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

Lawton L.J., in the course of his reasons, was of the view that the mere fact that a defendant having assets within the jurisdiction, is a foreigner, cannot by itself justify the granting of a Mareva injunction. "There must be facts from the Commercial Court, like a prudent, sensible commercial man, can

properly infer a danger of default if assets are removed from the jurisdiction" (p. 987). Cumming-Bruce L.J., the third member of the court, felt that "[t]here must be evidence of some facts leading to an inference that the assets within the jurisdiction may well be removed" (p. 988).

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

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

Sir Robert Megarry considered the two lines of authority -- the one illustrated by Lister & Co. v. Stubbs (1890), 45 Ch. D. 1, and the cases which followed it and the other Mareva cases based on what is "just or convenient". He came to the conclusion which is set out as follows at pp. 194-95 All E.R.:

It seems to me that the heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action. If there is no real risk of this, such an injunction should be refused; if there is a real risk, then if the other requirements are satisfied the injunction ought to be granted. If the assets are likely to remain in the jurisdiction, then the plaintiff, like all others with claims against the defendant, must run the risk common to all, that the defendant may dissipate his assets, or consume them in discharging other liabilities, and so leave nothing with which to satisfy any judgment. On the other hand, if there is a real risk of the assets being removed from the jurisdiction, a Mareva injunction will prevent their removal. It is not enough for such an injunction merely to forbid the defendant to remove them from the jurisdiction, for otherwise he might transfer them to some collaborator who would then remove them; accordingly, the injunction will restrain the defendant from disposing of them even within the jurisdiction. But that does not mean that the assets will remain sterilised for the benefit of the plaintiff, for the court will permit the defendant to use them for paying debts as they fall due: see Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A., [1980] 1 All E.R. 480 at 486, [1980] 1 W.L.R. 488 at 494 per Robert Goff J.

If, then, the essence of the jurisdiction is the risk of the assets being removed from the jurisdiction, I cannot see why it should be confined to "foreigners", in any sense of that term.

. . . . .

In the result, I would hold (1) that it is no bar to the grant of a Mareva injunction that the defendant is not a foreigner, or is not foreign-based, in any sense of those terms, (2) that it is essential that there should be a real risk of the defendant's assets being removed from the jurisdiction in such a way as to stultify any judgment that the plaintiff may obtain, and (3) that, in determining whether there is such a risk, questions of the defendant's nationality, domicile, place of residence and many other

matters may be material to a greater or lesser degree.

> In addition to establishing the existence of a sufficient risk of removal of the defendant's assets, the plaintiff must satisfy certain other requirements. I shall not attempt any comprehensive survey, particularly in view of the guidelines laid down by Lord Denning MR in Third Chandris Shipping Corp v. Unimarine S.A., [1979] 2 All E.R. 972 at 984-985, [1979] Q.B. 645 at 668-669. But I may refer to three of them. One is that it must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default.
>
> Second, the plaintiff must establish his claim with sufficient particularity, and show a good arguable case, though he need not demonstrate that his case is strong enough to entitle him to judgment under RSC Ord 14: see the Pertamina case, [1977] 3 All E.R. 518, [1978] Q.B. 644. Third, the case must be one in which, on weighing the considerations for and against the grant of an injunction, the balance of convenience is in favour of granting it. In considering this in Mareva cases, I think that some weight must be given to the principle of Lister & Co. v. Stubbs (1890), 45 Ch. D. 1, [1866-90] All E.R. Rep 797 ...

And, finally he said (p.195):

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

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

> So I would hold that a Mareva injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his

> absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied.

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

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

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

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

> 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.

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

Section 19(1) is the Ontario counterpart to s. 45(1) of the

Supreme Court of Judicature (Consolidation) Act, 1925, the section upon which Lord Denning placed much reliance. The opening words of s. 19(1) are identical to those of s. 45(1) and state: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made" (emphasis added). Those words, of course, must not be construed so broadly as to permit the court to grant the injunction, as Jessel M.R. put it in Aslatt v. Corp. of Southampton (1880), 16 Ch. D. 143, "simply because the Court thought it convenient."

I do not propose to canvas all the recent Ontario cases which have dealt with the granting of a Mareva injunction. Saunders J., in a helpful judgment in Bank of Montreal v. James Main Holdings Ltd. et al. released March 1, 1982 [since reported 26 C.P.C. 266, 23 R.P.C. 188], attempted to rationalize a number of the judgments here and in England and he pointed out that in almost all of the decided cases there was some unusual circumstance related to the risk or removal or disposition of the property or assets.

In the instant case the Motions Court judge referred to OSF Industries Ltd. v. Marc-Jay Investments Inc. (1978), 20 O.R. (2d) 566, 88 D.L.R. (3d) 446, 7 C.P.C. 57. In that case the court, in effect, refused to follow Nippon Yusen Kaisha v. Karageorgis et al., [1975] 3 All E.R. 282, and held that "it is not for the Court to interfere quia timet and restrain the defendant from dealing with his property until the rights of the litigants are ascertained" (p. 448). Lerner J. held that there was in this province at that time no basis in law for the remedy of Mareva injunction. With deference, I am of the opinion that the learned judge was in error in this conclusion and the case cannot be used to stand in the way of the granting of a Mareva injunction in a proper case.

As mentioned earlier, items (i), (ii) and (v) of Lord Denning's guidelines are standard considerations for the courts of this province when considering the usual application for an interlocutory injunction. However, when an application for a Mareva injunction is before the court, the material under items

(i) and (ii) of the guidelines must be such, as I have already said, as persuades the court that the plaintiff has a strong prima facie case on the merits.

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

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

Earlier, in another connection, I pointed out that our practice in interlocutory injunctions generally is somewhat different from what occurs in England. My understanding is that it is rare in England for a deponent to be cross-examined on his affidavit in such cases. Here, cross-examination is the rule rather than the exception. Although the ex parte order is made without the benefit of such cross-examination, on the

hearing for the continuation of the order the court usually has the cross-examination on the affidavits that have been filed, including any filed by the defendant. At that time the Ontario court is in a better position than it would be without such cross-examination to assess the respective merits of the parties both with regard to whether a strong prima facie case has has been established on the claim and with regard to whether the "guidelines" have been satisfied.

The instant application illustrates what can take place between the ex parte hearing of the original and the hearing on the application to continue. Mr. Justice Galligan cannot be faulted for granting the original ex parte injunction. On the material before him it appeared that, as a result of a professional medical relationship, the defendant had secured the trust of a woman inexperienced in financial matters who relied on him for financial advice. He then, in abuse of that trust, secured shares from her by fraud or theft. When she commenced asking for their return he made arrangements to leave Canada and indeed was in the process of leaving and removing all his assets from Canada. She secured the injunction the day before he was to leave Canada for good.

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

The courts must be careful to ensure that the "new" Mareva injunction is not used as and does not become a weapon in the hands of plaintiffs to force inequitable settlements from defendants who cannot afford to risk ruin by having an asset or assets completely tied up for a lengthy period of time awaiting

trial. I would respectfully adopt what Grange J. said in Canadian Pacific Airlines Ltd. v. Hind (1981), 32 O.R. (2d) 591, 122 D.L.R. (3d) 498 at 503, 22 C.P.C. 179:

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

Mr. Justice Anderson in the instant case said, "I can see no reason why the plaintiff with a cause of action for fraud should be given assurance of recovery under such a judgment and not if the judgment stemmed from some other cause" [p. 128 O.R.]. I agree with this view and I have sought to point out the conditions that must be satisfied before a Mareva injunction can be granted. However, I do not have the pessimistic view taken by the Motions Court judge that all the former criteria for the granting of interlocutory injunctions are now to be disregarded. I do not believe that to be so. The Mareva injunction is here and here to stay and properly so, but it is not the rule -- it is the exception to the rule.

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

Application dismissed.

Irene Helen Young *Appellant*

v.

James Kam Chen Young *Respondent*

and

W. Glen How *Respondent*

and

Watch Tower Bible and Tract Society of Canada *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of British Columbia, the Law Society of British Columbia and the Seventh-day Adventist Church in Canada *Interveners*

INDEXED AS: YOUNG *v.* YOUNG

File No.: 22227.

1993: January 25, 26; 1993: October 21.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Family law — Custody — Access — Best interests of the child — Access parent insisting on instructing children on religion — Custodial parent and children objecting to religious instruction — Court ordering that access parent discontinue religious activities with children — Scope of "best interests of the child" — Whether or not "best interests of the child" equivalent of absence of harm — Whether or not restriction on access in best interests of the children.

Family law — Children — Best interests of the child — Access parent insisting on instructing children on religion — Custodial parent and children objecting to

Irene Helen Young *Appelante*

c.

James Kam Chen Young *Intimé*

et

W. Glen How *Intimé*

et

Watch Tower Bible and Tract Society of Canada *Intimée*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général du Manitoba, le procureur général de la Colombie-Britannique, la Law Society of British Columbia et l'Église adventiste du septième jour au Canada *Intervenants*

RÉPERTORIÉ: YOUNG *c.* YOUNG

Nº du greffe: 22227.

1993: 25, 26 janvier; 1993: 21 octobre.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit de la famille — Garde — Droit d'accès — Intérêt de l'enfant — Parent ayant le droit d'accès insistant pour donner un enseignement religieux aux enfants — Parent ayant la garde et enfants s'opposant à l'enseignement religieux — Ordonnance de la cour interdisant au parent ayant le droit d'accès de faire participer ses enfants à ses activités religieuses — Portée du critère de l'«intérêt de l'enfant» — L'«intérêt de l'enfant» équivaut-il à l'absence de préjudice? — La restriction du droit d'accès est-elle dans l'intérêt de l'enfant?

Droit de la famille — Enfants — Intérêt de l'enfant — Parent ayant le droit d'accès insistant pour donner un enseignement religieux aux enfants — Parent ayant la

religious instruction — Court ordering that access parent discontinue religious activities with children — Scope of "best interests of the child" — Whether or not "best interests of the child" equivalent of absence of harm — Whether or not restriction on access in best interests of the children.

Family law — Property and financial awards — Lump sum payment — Family debts — Principles governing reallocation of property.

Constitutional law — Charter of Rights — Freedom of religion — Freedom of expression — Divorce Act requiring that orders concerning children only take into account "the best interests of the child" — Access parent insisting on instructing children on religion — Custodial parent and children objecting to religious instruction — Court ordering that access parent discontinue religious activities with children — Whether or not access restriction infringing freedom of religion — Whether or not access restriction infringing freedom of expression — Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), ss. 16(8), 17(5) — Canadian Charter of Rights and Freedoms, s. 2(a), (b).

Courts — Costs — Principles governing awards of costs on solicitor-client basis.

Torts — Maintenance — Religious society carrying cost of action — Common religious action — Whether or not tort of maintenance.

Appellant's and respondent's separation was marked by a protracted series of court battles. Appellant was awarded custody of the couple's three daughters and respondent was granted access subject to court imposed restrictions arising from appellant's objection to his religious activity with the children. Respondent was ordered not to discuss the Jehovah's Witness religion with the children, take them to any religious services, canvassing or meetings, or expose them to religious discussions with third parties without appellant's prior consent. Organized religion was not important to appellant although she wanted the children to be raised within the United Church.

The two older daughters liked their father but came to dislike his religious instruction to the extent that it was

garde et enfants s'opposant à l'enseignement religieux — Ordonnance de la cour interdisant au parent ayant le droit d'accès de faire participer ses enfants à ses activités religieuses — Portée du critère de l'«intérêt de l'enfant» — L'«intérêt de l'enfant» équivaut-il à l'absence de préjudice? — La restriction du droit d'accès est-elle dans l'intérêt de l'enfant?

Droit de la famille — Prestation sous forme de biens et d'argent — Prestation sous forme de capital — Dettes familiales — Principes régissant une nouvelle répartition des biens.

Droit constitutionnel — Charte des droits — Liberté de religion — Liberté d'expression — La Loi sur le divorce prévoit que les ordonnances concernant les enfants ne doivent tenir compte que de «l'intérêt de l'enfant» — Parent ayant le droit d'accès insistant pour donner un enseignement religieux aux enfants — Parent ayant la garde et enfants s'opposant à l'enseignement religieux — Ordonnance de la cour interdisant au parent ayant le droit d'accès de faire participer ses enfants à ses activités religieuses — La restriction du droit d'accès viole-t-elle la liberté de religion? — La restriction du droit d'accès viole-t-elle la liberté d'expression? — Loi sur le divorce, L.R.C. (1985), ch. 3 (2e suppl.), art. 16(8), 17(5) — Charte canadienne des droits et libertés, art. 2a), b).

Tribunaux — Dépens — Principes régissant l'attribution des dépens comme entre procureur et client.

Responsabilité délictuelle — Pension alimentaire — Société religieuse supportant les frais de l'action — Action religieuse commune — Y a-t-il eu soutien délictueux?

La séparation de l'appelante et de l'intimé a été marquée par une longue série de batailles judiciaires. La garde des trois filles du couple a été confiée à l'appelante et un droit d'accès a été accordé à l'intimé, sous réserve de certaines restrictions imposées par la cour en raison de l'opposition de l'appelante aux activités religieuses de l'intimé avec les enfants. Celui-ci devait s'abstenir de discuter de la religion des Témoins de Jéhovah avec les enfants, de les amener à des offices religieux, à des visites de sollicitation ou à des réunions, ou de les mêler à des débats religieux avec des tierces personnes sans le consentement préalable de l'appelante. La religion organisée n'était pas importante pour l'appelante, même si elle voulait que ses enfants soient élevées dans la foi de l'Église unie.

Les deux aînées aimaient leur père mais elles se sont mises à détester son enseignement religieux au point

damaging his relationship with them and was contributing to the stress the children were experiencing in adjusting to their parents' separation.

The trial judge also made orders for the distribution of property and for costs. The respondent's interest in the matrimonial home was ordered transferred to the appellant because any remaining interest in the house, after respondent paid what was already owing to appellant, was to be transferred in the form of lump sum maintenance. Respondent was found responsible for debts incurred by the appellant for the support of herself and the children pending maintenance and for a debt made to a family corporation. Costs were awarded on a solicitor-client basis against respondent, his lawyer and a religious society not a party to the proceedings.

Respondent appealed. The Court of Appeal set aside the limitations on religious discussion and attendance, on the ground that it was in the best interests of the children that they come to know their non-custodial parent fully, including his religious beliefs, unless the evidence established the existence of or the potential for real harm or the child did not consent to being subject to the access parent's views or practices. The Court of Appeal also altered the division of property and the awards of costs made by the trial judge. Appellant appealed these rulings to this Court.

Four constitutional questions queried (1) whether ss. 16(8) and 17(5) of the *Divorce Act* (requiring that judicial decisions regarding custody and access be made "in the best interests of the child") denied the *Charter* guarantees of freedom of religion, of expression and of association (s. 2(*a*), (*b*), and (*d*)), and if so, (2) were they justified under s. 1; (3) whether ss. 16(8) and 17(5) violated the equality guarantee of the *Canadian Charter of Rights and Freedoms* (s. 15(1)), and (4) if so, were they justified under s. 1. The Court considered the requirements of the "best interests of the child" and whether this standard infringed the guarantees of freedom of religion and expression under the *Charter*. A main consideration was unrestricted access by a non-custodial parent and the conditions necessary to curtail that access.

que cela a altéré les relations qu'il avait avec elles et a contribué au stress que l'adaptation à la séparation de leurs parents leur a fait subir.

Le juge de première instance a également rendu des ordonnances relatives à la répartition des biens et aux dépens. Elle a ordonné que les droits de l'intimé sur le foyer conjugal soient transférés à l'appelante parce que tous les droits résiduaires sur la maison, après paiement par l'intimé de ce qu'il devait déjà à l'appelante, devaient être transférés sous forme de capital. L'intimé a été tenu responsable des dettes contractées par l'appelante pour subvenir à ses besoins et à ceux de ses enfants en attendant le versement d'une pension alimentaire et d'une dette contractée envers une société familiale. Les dépens comme entre procureur et client ont été accordés contre l'intimé, son avocat et une société religieuse qui n'avait pas été constituée partie à l'instance.

L'intimé a interjeté appel. La Cour d'appel a annulé les restrictions visant les discussions religieuses et la participation à des activités religieuses pour le motif qu'il est dans l'intérêt des enfants d'apprendre à connaître pleinement celui de leurs parents qui n'en a pas la garde, ce qui comprend ses croyances religieuses, à moins que la preuve n'établisse l'existence ou la possibilité d'un préjudice réel pour l'enfant ou le non-consentement de celui-ci à être ainsi exposé aux opinions et aux pratiques du parent ayant le droit d'accès. La Cour d'appel a également modifié le partage des biens et les dépens ordonnés par le juge de première instance. L'appelante s'est pourvue de ces décisions devant notre Cour.

Quatre questions constitutionnelles ont été soulevées, à savoir (1) si les par. 16(8) et 17(5) de la *Loi sur le divorce* (qui prévoient que les décisions judiciaires en matière de garde et de droit d'accès doivent «tenir compte de l'intérêt de l'enfant») portent atteinte aux libertés de religion, d'expression et d'association garanties par la *Charte* (al. 2*a*), *b*) et *d*)), et, dans l'affirmative, (2) s'ils sont justifiés par l'article premier; (3) si les par. 16(8) et 17(5) violent les garanties d'égalité énoncées dans la *Charte canadienne des droits et libertés* (par. 15(1)), et, dans l'affirmative, (4) s'ils sont justifiés par l'article premier. La Cour a examiné les exigences du critère de «l'intérêt de l'enfant» ainsi que la question de savoir si ce critère viole les libertés de religion et d'expression garanties par la *Charte*. Elle a aussi étudié l'élément important que constitue le droit d'accès sans restriction du parent qui n'a pas la garde et les conditions nécessaires pour restreindre ce droit d'accès.

Held (L'Heureux-Dubé J. dissenting in the result): The appeal should be allowed in part.

The issues should be decided as follows:

1. The test regarding access is the best interests of the child (L'Heureux-Dubé J., La Forest and Gonthier JJ., and Iacobucci and Cory JJ.). McLachlin J. suggests that in cases such as this harm is usually an important element in determining the best interests of the child. Sopinka J. would recognize a threshold element of harm.

2. Sections 16(8) and 17(5) of the *Divorce Act* do not violate ss. 2(*a*), (*b*), (*d*) or 15(1) of the *Charter*. L'Heureux-Dubé J. (and La Forest and Gonthier JJ.) found the *Charter* to be inapplicable. McLachlin J. found the impugned legislation did not violate the *Charter*. Cory and Iacobucci JJ. agreed that there was no *Charter* violation. Sopinka J. found that the *Charter* applied and could only be overridden in limited circumstances.

3. The restrictions on access should be removed (L'Heureux-Dubé J. and La Forest and Gonthier JJ. dissenting).

4. The judgment dealing with property and financial matters and the award of costs should be varied (L'Heureux-Dubé J. dissenting).

Best Interest of the Child, *Charter* Considerations and Access

Per L'Heureux-Dubé J.: The power of the custodial parent is not a "right" with independent value granted by courts for the benefit of the parent. Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure, protect and promote the child's best interests. That duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being. The non-custodial parent retains certain residual rights over the child as one of his or her two natural guardians.

Child placement decisions should safeguard the child's need for continuity of relationships, reflect the

Arrêt (Le juge L'Heureux-Dubé est dissidente quant au résultat): Le pourvoi est accueilli en partie.

Les questions sont tranchées de la façon suivante:

1. Le critère relatif à l'accès est l'intérêt de l'enfant (le juge L'Heureux-Dubé, les juges La Forest et Gonthier et les juges Iacobucci et Cory). Selon le juge McLachlin, dans les cas comme la présente affaire, le préjudice est habituellement un élément important pour déterminer l'intérêt de l'enfant. Le juge Sopinka est d'avis de reconnaître un élément préliminaire de préjudice.

2. Les paragraphes 16(8) et 17(5) de la *Loi sur le divorce* ne portent pas atteinte aux al. 2*a*), *b*) ou *d*) ni au par. 15(1) de la *Charte*. Selon le juge L'Heureux-Dubé (et les juges La Forest et Gonthier) la *Charte* ne s'applique pas. Le juge McLachlin est d'avis que les dispositions législatives contestées ne violent pas la *Charte*. Les juges Cory et Iacobucci sont d'accord pour dire qu'il n'y a pas eu de violation de la *Charte*. Le juge Sopinka conclut que la *Charte* s'applique et que l'on ne peut y passer outre que dans des circonstances restreintes.

3. Il y a lieu d'abolir les restrictions à l'accès (le juge L'Heureux-Dubé et les juges La Forest et Gonthier sont dissidents).

4. Le jugement relatif aux biens et aux questions financières et à l'attribution des dépens doit être modifié (le juge L'Heureux-Dubé est dissidente).

L'intérêt de l'enfant, les considérations relatives à la *Charte* et le droit d'accès

Le juge L'Heureux-Dubé: Le pouvoir du parent gardien n'est pas un «droit» qui a une valeur intrinsèque et que le tribunal accorde au parent pour son avantage. En fait, l'enfant a le droit d'avoir un parent qui voit à son intérêt et le parent gardien a l'obligation de garantir, de protéger et de favoriser le meilleur intérêt de l'enfant. Cette obligation suppose qu'il lui incombe, exclusivement et principalement, de surveiller tous les aspects de la vie quotidienne et du bien-être à long terme de l'enfant, et de prendre les décisions importantes relatives à son éducation, à sa religion, à sa santé et à son bien-être. Le parent qui n'a pas la garde conserve certains droits résiduels sur l'enfant, en tant que l'un de ses deux tuteurs naturels.

Les décisions relatives au placement de l'enfant doivent voir à satisfaire le besoin de continuité de la rela-

the extent required to give the appellant the entire interest in the matrimonial home.

The money owed by the family's jewelry corporation was not, in law, a debt for which respondent was personally liable. Only the corporation was liable. The debt appellant incurred to support herself and the children before she applied for maintenance is similarly unenforceable against respondent as a debt, although it could be taken into consideration in an order for reduction of his interest in the family assets.

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. The facts that an application has little merit and that part of the cost of the litigation may have been paid for by others do not justify awarding solicitor-client costs.

No order for costs should have been made against respondent's barrister. Costs are awarded as compensation for the successful party, not to punish a lawyer. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which he or she was involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. The courts have jurisdiction to make such an award, often under statute and as part of their inherent jurisdiction to control abuse of process and contempt of court. The proceedings here, despite their length and acrimonious progress, did not fall within these characterizations. Courts, moreover, must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her profession.

Since the Society did not appear as a party, the costs awarded against it must be taken to be the equivalent of an award for the tort of maintenance. A person must intervene "officiously or improperly" to be liable for the tort of maintenance. Provision of financial assistance to a litigant by a non-party will not always constitute maintenance. Funding by a relative or out of charity must be distinguished from cases where a person wilfully and

preuve peut justifier qu'elle ait décrété un nouveau partage des droits des parties dans les biens familiaux de façon à accorder à l'appelante l'entière propriété du foyer conjugal.

La somme due par la compagnie familiale de joaillerie n'était pas, en droit, une dette dont l'intimé était personnellement responsable. C'est la compagnie seule qui en est responsable. Il n'est pas non plus possible d'imputer à l'intimé la dette qu'a contractée l'appelante pour subvenir à ses besoins et à ceux de ses enfants avant de faire une demande de pension, bien qu'on puisse en tenir compte pour réduire les intérêts de l'intimé dans les biens familiaux.

Les dépens comme entre procureur et client ne sont généralement accordés que s'il y a eu conduite répréhensible, scandaleuse ou outrageante d'une des parties. Le peu de fondement d'une demande et le fait qu'une partie des frais soit payée par des tiers ne constituent pas des raisons d'accorder les dépens sur cette base.

L'avocat de l'intimé n'aurait pas dû être condamné aux dépens. Les dépens sont accordés en vue d'indemniser la partie ayant gain de cause, et non de punir un avocat. Tout membre de la profession juridique peut faire l'objet d'une ordonnance compensatoire pour les dépens s'il est établi que les procédures dans lesquelles il a agi ont été marquées par la production de documents répétitifs et non pertinents, de requêtes et de motions excessives, et que l'avocat a agi de mauvaise foi en encourageant ces abus et ces délais. Les tribunaux ont compétence en la matière, souvent en vertu d'une loi et en vertu de leur pouvoir inhérent de réprimer l'abus de procédures et l'outrage au tribunal. En dépit de sa longueur et de son climat acrimonieux, la présente instance n'a pas été marquée par ce genre de faute. De plus, les tribunaux doivent faire montre de la plus grande prudence en condamnant personnellement un avocat aux dépens, vu l'obligation qui lui incombe de préserver la confidentialité de son mandat et de défendre avec courage même des causes impopulaires. Un avocat ne devrait pas être placé dans une situation où la peur d'être condamné aux dépens pourrait l'empêcher de remplir les devoirs fondamentaux de sa charge.

La Société n'ayant pas été constituée partie, il faut présumer que les dépens qui lui ont été imposés sont l'équivalent d'une indemnité accordée pour soutien délictueux. Pour qu'il y ait soutien délictueux, il faut qu'il y ait intervention «officieuse ou illégitime». L'aide financière que fournit un justiciable sans être l'une des parties ne constituera pas toujours un soutien délictueux. On doit distinguer, à cet égard, les cas du parent qui

CITATION: Gelman v. 1529439 Ontario, 2021 ONSC 424
COURT FILE NO.: CV-14-10638-00CL
DATE: 20210120

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: ALBERT GELMAN INC., in its capacity as Trustee in Bankruptcy of SPIROS PANTZIRIS, Plaintiff/Moving Party

AND:

1529439 ONTARIO LIMITED, AGLAIA PANTZIRIS, ASPE CONSULTING SERVICES LTD., JULIE PANTZIRIS also known as JULIE TAYLOR also known as JULIE TAYLOR PANTZIRIS and ELLEN BOWLIN, Defendants/Responding Parties

BERFORE: Dietrich J.

COUNSEL: *Lou Brzezinski* and *Alex Fernet Brochu*, for the Plaintiff/Moving Party

Steven Bellissimo, for the Defendants/Responding Parties

HEARD: In writing

ENDORSEMENT ON COSTS

DIETRICH J.

[1] The plaintiff Albert Gelman Inc., in its capacity as Trustee in Bankruptcy (the "Trustee") was successful in its summary judgment motion in respect of which I issued reasons for decision on September 28, 2020.

[2] The Trustee sought an order setting aside two transfers of property by Spiros Pantziris (the "Bankrupt") and declaring those transfers void as against the Trustee. The defendants (other than Ellen Bowlin) brought a cross motion.

[3] In my reasons for decision, I granted summary judgment and declared that the transfer of the Bankrupt's interest in a residential property known as 9 Berkindale Crescent in the City of Toronto to his spouse, and the transfer of his preferred shares in the family business to a corporation controlled by his mother, were transfers at under value for the purposes of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). I set aside both transfers and found them to be void as against the Trustee.

[4] The parties were encouraged to agree on the matter of costs but were unable to. They also could not agree on the form of the judgment in this case. Each of the parties has made oral and written submissions on the costs and the form of the Judgment.

[5] The Trustee asserts that substantial indemnity costs are appropriate in this case and that pre-litigation costs incurred by it prior to the summary judgment motion should be included in the award. The Trustee also asserts that the Judgment should include a vesting order.

[6] The defendants assert that costs on a substantial indemnity scale are not appropriate in this case and that the costs awarded should not include any pre-litigation costs and, in any event, should be reduced because the time spent by the Trustee's counsel was grossly excessive. They also assert that the Judgment cannot include a vesting order because the Trustee did not include this specific relief in its pleadings.

[7] For the reasons that follow, I find that the Trustee is entitled to its fair and reasonable costs, not including pre-litigation costs, on a partial indemnity basis. The Judgment shall include an order that the Bankrupt's interest in the residence vests in the Trustee and an order that the Trustee be the registered owner of the shares, as proposed by the Trustee in its draft Judgment sent to the defendants on November 5, 2020.

Costs

[8] The Trustee was the successful party. The defendants (other than Ellen Bowlin who did not participate in the summary judgment motion or the cross motion) were unsuccessful on the Trustee's motion and on their cross motion. As the successful party, the Trustee is entitled to its costs.

[9] The Trustee submits a Bill of Costs in which it seeks costs (including disbursements and HST), on a substantial indemnity scale, of $583,849.59. Its costs (including disbursements and HST) on a partial indemnity scale would be $426,305.66. The fees attributed to "pre-litigation matters" amount to $71,960.50 on a substantial indemnity scale and $47,637.00 on a partial indemnity scale. The Trustee also submits a Supplementary Bill of Costs in which it claims additional costs of $9,268.71 on a substantial indemnity basis, or $6,171.38, on a partial indemnity basis, for reviewing my reasons, preparing the Bill of Costs, and preparing costs submissions.

[10] The defendants assert that the Trustee is not entitled to pre-litigation costs, costs that have already been awarded, costs that have been settled between the parties, costs for trial preparation (when the Trustee chose to proceed by way of summary judgment), and for a second Mareva injunction motion that was dismissed without costs, all of which must be deducted from the costs award. With those reductions, the defendants calculate the substantial indemnity costs to be $444,457.29, and partial indemnity costs to be $333,915.27, not including costs shown on the Supplementary Bill of Costs. The defendants further assert that the costs award must be further reduced because the time billed was grossly excessive and the Trustee did not provide any receipts or invoices to substantiate the claim for disbursements of $116,184.63.

The scale of the costs

[11] The Trustee asserts that costs follow the cause and that it should be indemnified for its legal costs on a substantial indemnity basis. All of its legal costs, including fees and disbursements, prior to 2020 were reviewed and approved by the Registrar before they were paid to the Trustee.

The Trustee acknowledges that all time and disbursements after January 31, 2020 have yet to be assessed.

[12] Applying the factors set out in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the Trustee submits that in terms of proportionality, the estate will benefit from the return of the Bankrupt's interest in the residential property and the shares, which are the principal assets of the estate. It also submits that the action was complex, involving many motions, voluminous productions, numerous examinations for discovery and cross-examinations on affidavits, resulting in the tremendous amount of work reflected in its Bill of Costs. The Trustee asserts that the action has been fraught with delays and it points to a number of instances where the conduct of the defendants unnecessarily lengthened the proceeding and drove up the Trustee's costs. For example, the defendant Aglaia Pantziris gave 120 refusals to answer questions in her examination on behalf of the family companies, which questions she never answered. In response to the Trustee's motion to compel her to answer the questions refused, the defendants brought an unsuccessful motion to remove the Trustee's lawyers of record. Justice Newbould found the removal motion "completely miscast" and "tactical … for the reason of delaying the action." Also, the defendants refused to produce further documents and only did so when the Trustee set out to bring a motion to strike the defendants' pleadings. The defendants also refused to consent to a consolidation of this action and an action commenced by a creditor. When Justice Myers ordered the consolidation, he stated that it was an "obvious outcome that ought to have been negotiated." Further, on the day before the defendant Julie Pantziris was scheduled to be examined, she served a Further Affidavit of Documents, most of which had never been produced before and necessitated a cancellation of the examination so the Trustee could review the documents. Prior to the summary judgment motion, the Trustee was advised that Aglaia Pantziris had suffered a stroke and would not be able to testify in connection with that motion, and that the Bankrupt had authority to manage the family companies using a power of attorney granted by Aglaia Pantziris. This information, provided without any evidence of Aglaia Pantziris' incapacity to manage property, caused the Trustee to bring a motion for an interim injunction against the family company to restrict the sale, transfer or encumbrance of their shares and assets. Later, Aglaia Pantziris claimed to have revoked the power of attorney, having regained her capacity to manage her property.

[13] Also, the Trustee alleges that substantial indemnity costs are appropriate because the defendants made unfounded allegations of improper conduct by the Trustee, and attacked its integrity as a court-officer occupying a position of public trust. Specifically, the defendants alleged that the Trustee's initiation of the process was an abuse of process and unfair. They alleged that the Trustee was being influenced by and taking instruction from the creditor Cobalt Capital and that Cobalt Capital was drawing on the court's resources to advance a claim that amounted to a vexatious abuse of process.

[14] The defendants rely on *Boucher v. Public Accountant's Counsel of The Province of Ontario*, (2004) 71 O.R. (3rd) 291 (C.A.) in support of their position that in fixing the costs, the court must consider: a) what is fair and reasonable for the unsuccessful party to pay in the circumstances; and b) the reasonable expectations of the unsuccessful party.

[15] The defendants submit that substantial indemnity costs are reserved for those cases involving an offer to settle (which is not this case) and where the losing party's conduct is deserving of the court's disapproval. They submit that the discretion of the court to award costs on

that scale ought to be exercised in "only special and rare cases": *Sienna v. State Farm*, 2015 ONSC 786, at para. 20. They argue that the defendants' conduct does not rise to the level of "reprehensible, scandalous or outrageous", being the guiding principle to be applied in awarding substantial indemnity costs as set out by the Supreme Court of Canada in *Young v. Young*, [1993] 4 SCR 3.

[16] I agree that the defendants' conduct, while at times uncooperative and obstructive, does not rise to the level of reprehensible, scandalous or outrageous. I accept that the defendants took steps that led to real delay in the prosecution of this case. However, in the main, that conduct was addressed by the motion judges, who awarded costs against the defendants when appropriate (i.e. Justices Newbould and Myers). While any unfounded allegation that attacks the integrity of a court officer is inappropriate and uncalled for, I find that the allegations made against the Trustee in this case do not rise to the level of reprehensible, scandalous or outrageous conduct. The defendants' conduct was more in the nature of an aggressive defence of the claim. Accordingly, substantial indemnity costs are not an appropriate sanction in this case. The appropriate scale is partial indemnity costs.

Pre-litigation costs

[17] Regarding the pre-litigation costs, the defendants submit that such costs are rarely, if ever, awarded in a legal proceeding, and that they should not be awarded in this case.

[18] Section 131 of the of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court.

[19] In support of its claim for pre-litigation costs, the Trustee relies on the case of *B & D Construction Inc. v. Buset*, [2005] O.J. No. 2308, in which the court adopted the reasoning in *Gioberti v. Gioberti*, [1972] 2 O.R. 263 (Ont. H.C.). In *Gioberti*, which deals with an assessment, the Master noted, at para. 7, that costs, on an effectively full indemnity basis, are costs "for only those services that are reasonably necessary in order to effectively prosecute the action and bring it to trial and they do not include anything before the action is commenced or after judgment is given." *B &D* also makes reference to *Singer v. Singer* (1975), 11 O.R. (2d) 234, a case decided by a taxing officer in which the respondent complained about the time expended on pleadings, preparation and proceedings. The respondent argued that some of that time was unnecessary to the prosecution of the proceeding. In that case, the Master also found that full indemnity costs are limited to the cost of services reasonably necessary for the prosecution or defence of the action. The case of *Unified Technologies Inc. (Trustee of) v. Bell Canada*, [1992] O.J. No. 2026 is also referred to in *B & D*, and it deals with a determination of full indemnity costs, described in that case as "full indemnity to the beneficiary 'excluding costs which are not reasonably necessary to fully and fairly prosecute or defend the action.'" This case, too, concerns the limits of indemnity on costs awarded on a full indemnity basis. The court states that "any limits on the indemnity are not related to discretion but to the exclusion of services that are not reasonably necessary for the proper presentation of the client's case."

[20] I do not find this line of cases regarding the limits of indemnity to be helpful to the Trustee in support of its claim that all of the pre-litigation costs set out in its Bill of Costs should be borne

by the defendants. The Trustee has not provided any authority in support for its broad claim that all such costs are incidental to its claim that the subject transfers were made at undervalue.

[21] I find that the Trustee has not shown that any of the costs included in the "Pre-litigation Matters" section of its Bill of Costs, which it classifies generally as: a) information gathering; and b) review and analysis of relevant related proceedings, are costs that would be properly included in the award of costs payable by the defendants. I am not persuaded that all of the time described as pre-litigation costs was incidental to the Trustee's claim against the defendants. Much of the time spent appears to relate to the principal creditor's decision to petition the Bankrupt into bankruptcy. The defendants were not parties to the bankruptcy application and took no position on it. I also note that the Trustee did not seek recovery of these pre-litigation costs in its statement of claim or motion for summary judgment.

[22] I agree with the defendants' submission that, as a general principle, pre-litigation costs may not be included in a costs award. They point to *Greenlight Capital Inc. v. Stronach* (2008), 240 O.A.C. 86, at para. 76, where the Ontario Divisional Court held that an award of costs prior to the Notice of Application was an error in principle.

[23] In *DeFelice v. 1095195 Ontario* Limited, 2013 ONSC 1561, Brown, J., as he then was, denied pre-litigation costs that were incurred in respect of the management of a building that was the subject of the litigation. Brown J. held that the applicants were only entitled to recover the costs related to the litigation, which they incurred in preparing the application and proceeding with it through the hybrid trial.

[24] I accept that there may be circumstances in which pre-litigation costs could be included in an award of costs made against an unsuccessful party. For example, in *90 George Street Ltd. v. Ottawa-Carleton Standard Condominium Corp. No. 815*, 2015 ONSC 336, Smith J. found that because the *Condominium Act* required the parties to mediate budget disagreements before undertaking arbitration, the mediation process did not represent an exercise of discretion by the parties prior to commencing arbitration; and, for that reason, costs encompassing the mediation relating to the arbitration process were properly included in the award of costs.

[25] Nothing in the Trustee's submissions persuades me that their pre-litigation costs for information gathering and review of related proceedings to determine their strategy for advancing their claims merit inclusion in the costs award. Accordingly, I decline to exercise my discretion to award those pre-litigation costs.

Quantum of costs

[26] The defendants argue that the Trustee's Bill of Costs includes costs that have already been considered by motion judges who awarded costs against the defendants on those motions, and which costs the defendants have already paid. I agree that any duplication of costs should be eliminated from the Bill of Costs as should any costs incurred by the Trustee for motions in respect of which motion judges have ruled on costs. I accept the defendants' calculations on the amounts to be deducted, which leaves a balance of $333,915.27, on a partial indemnity basis, plus $6,171.38, on a partial indemnity basis, for legal services reflected in the Supplementary Bill of Costs.

[27] I accept the submission of the defendants that even with the above-noted deductions the Bill of Costs includes time for work for which the defendants should not be liable; for example, fees related to the bankruptcy hearing and the Bankrupt's discharge hearing. I also accept the defendants' submission that some of the time spent is excessive; for example, 63.8 hours for a very limited discovery, 122.3 hours for the undertakings and refusal motions; and 513.8 hours for the summary judgment motion.

[28] Taking into account these factors as well as other relevant factors set out in r. 57.01 of the *Rules of Civil Procedure*, R.R.O., Reg. 194, I fix the Trustee's costs at $170,000, inclusive of disbursements and HST. I find this award to be fair, reasonable and proportional. It is also an award that the defendants could reasonably expect to pay. These costs shall be paid within thirty days of this endorsement.

The Judgment

[29] The Trustee has prepared a draft Judgment including a vesting order in respect of the residential property and the shares that are the subject of the transfers at under value in this matter.

[30] The defendants submit that because relief in the form of a vesting order was not specifically sought, the Trustee is not entitled to it. In its pleadings, the Trustee sought an order "setting aside and declaring void" the transfers of the residential property and the shares. This is the relief that I granted on the summary judgment motion.

[31] In my reasons, I set aside the Bankrupt's transfer of his interest in the residential property to his spouse, and the transfer of his shares in the family business to a corporation controlled by his mother. I also found each of these transfers to be void as against the Trustee. In my view, an order that the residential property and the shares vest in the Trustee is corollary to the finding that the transactions are set aside and void as against the Trustee. It is the natural and logical result of the relief sought and granted and in respect of which the defendants were on notice. A vesting of the assets in the Trustee for the benefit of the creditors was the very essence of the Trustee's motion. A generous reading of the pleadings, which include a request for an order for "such further and other relief as to this Honourable Court seems just" can lead to no other conclusion.

[32] The consequence of setting aside those transactions and finding that they are void as against the Trustee is that the property is restored to the estate of the transferor, being the Bankrupt's estate. However, the Bankrupt is an undischarged bankrupt with no authority to dispose of or otherwise deal with the property per s. 71 of the *BIA*. Once the property is restored to the Bankrupt's estate, it shall pass to and vest in the Trustee in accordance with s. 71 of the *BIA*. The effect of my findings is an order in respect of the Bankrupt's property. Accordingly, I disagree with the defendants' submission that s. 71 does not apply in the context of a proceeding involving transferees of the Bankrupt's property but not the Bankrupt himself. A purposive reading of s. 71 also leads to the conclusion that the result of setting aside the transfers is that the transferred property would vest in the Trustee for the benefit of the Bankrupt's creditors.

[33] The Trustee included in the draft Judgment a provision that authorizes the land registrar to implement the relief granted in my reasons and to vest title to the Bankrupt's interest in the

residential property in the Trustee. This authority does not, in my view, alter the nature or substance of that relief.

[34] I do not accept the defendants' objection to the proposed form of the Judgment. The very purpose of ss. 95 and 96 of the *BIA*, which cover transfers at under value, is to create a mechanism to permit a trustee in bankruptcy to void transfers at under value and to return assets illegitimately removed from the bankrupt's estate to the bankrupt's estate for the benefit of the bankrupt's creditors. The vesting order is the means to implement the order granted in the summary judgment motion and to restore the property to the Trustee for the benefit of the bankrupt's creditors.

[35] The Judgment shall issue in the form of the draft proposed by the Trustee. The Judgment does not need to be entered.

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Dietrich J.

Date: January 20, 2021

COURT OF APPEAL FOR ONTARIO

CITATION: Pantziris v. 1529439 Ontario Limited, 2021 ONCA 784
DATE: 20211105
DOCKET: C68762

Doherty, Miller and Sossin JJ.A.

BETWEEN

Albert Gelman Inc., in its capacity as Trustee in Bankruptcy of Spiros Pantziris

Plaintiff (Respondent)

and

1529439 Ontario Limited, Aglaia Pantziris, Aspe Consulting Services Ltd., Julie Pantziris also known as Julie Taylor also known as Julie Taylor Pantziris and Ellen Bowlin

Defendants (Appellants)

Steven Bellissimo, Kristina Bezprozvannykh and Frank Bennett, for the appellants

Lou Brzezinski and Alex Fernet Brochu, for the respondents

Heard: October 28, 2021 by video conference

On appeal from the judgment of Justice B. Dietrich of the Superior Court of Justice dated September 28, 2020; reported at 2019 ONSC 5531.

REASONS FOR DECISION

[1] In October 2013, the court made a bankruptcy order against Spiros Pantziris (the "bankrupt") and appointed the respondent, the Trustee in bankruptcy (the "Trustee"). Subsequently, the Trustee took steps to recapture certain assets of the bankrupt. The Trustee brought a summary judgment motion seeking orders setting aside two transactions:

- The transfer by the bankrupt in August 2008 of the bankrupt's 50 per cent interest in his residence to the appellant, Julie Pantziris, the bankrupt's wife and joint owner of the residence; and
- The transfer of the bankrupt's shares in 1529439 Ontario Limited ("the shares") to the appellant ASPE Consulting Services Ltd. ("ASPE") in April 2013.

[2] The defendants (appellants) brought a cross-motion seeking the dismissal of the Trustee's claims on two grounds. First, the defendants argued that the proceedings constituted a misuse of the bankruptcy process and an attempt by the main creditor, Cobalt Capital Textile Investments L.P. ("Cobalt Capital") to obtain double recovery from the bankrupt. Second, the defendants submitted the claims were time-barred under the *Limitations Act, 2002* S.O. 2002 c. 24, Sch. B.

[3] The motion judge found in the Trustee's favour on all issues. She granted summary judgment vesting the bankrupt's 50 per cent interest in the residence in

the Trustee. She also set aside the share transfer to ASPE and ordered that the Trustee be made the registered owner of the shares.

[4] The motion judge's reasons are thorough and demonstrate that the issues raised by the parties could properly be addressed by way of summary judgment. We are in substantial agreement with the motion judge's analysis of those issues.

The Residence

[5] After a thorough review of the evidence, the motion judge concluded the bankrupt's transfer of his 50 per cent interest in the residence was both an "undervalue" transfer within the meaning of s. 96(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and a fraudulent conveyance under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 ("*FCA*"). The motion judge's findings of fact are fully justified on the evidence before her. There is no basis upon which this court can interfere with those findings.

The Shares

[6] Mr. Pantziris executed a promissory note as security for a loan purportedly made to him by ASPE. ASPE was controlled by Mr. Pantziris' mother. Mr. Pantziris did not repay the loan and ASPE sued. ASPE obtained default judgment and moved to transfer the shares in 1529439 Ontario Limited, a corporation controlled by the Pantziris family, to ASPE. ASPE took the position that the shares were security for the loan in respect of which it had obtained default judgment.

[7] The transfer of the shares to ASPE was authorized only a few days before the bankruptcy application. The face value of the shares substantially exceeded the amount of the loan purportedly made to Mr. Pantziris.

[8] The motion judge was satisfied that the transfer of the shares was made with intent to prefer ASPE, a non-arms length creditor, and with intent to defeat the interest of other creditors. The motion judge's factual findings support that conclusion. The findings include:

- The value of the shares transferred far exceeded the value of the alleged debt;
- Mr. Pantziris was insolvent at the time ASPE obtained default judgment and was unable to repay the loan;
- ASPE was not a non-arms length creditor, apparently controlled by Mr. Pantziris' mother; and
- The transfer occurred during the 12-month period prior to the bankruptcy.

[9] In addition to concluding the share transfer constituted an improper preference, the motion judge also found that ASPE had no enforceable security interest in the shares: Reasons, at paras. 92-97. In reaching that conclusion, the motion judge considered the relevant provisions of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), as well as the language in the promissory note, the absence of any other documentation supporting the existence of a security

interest, and the absence of any reference to a security interest when ASPE sued on the promissory note and obtained default judgment: Reasons, at paras. 87-97.

[10] The appellants have demonstrated neither an error by the motion judge in her interpretation of the *PPSA*, nor a material misapprehension of the evidence relevant to whether ASPE had an enforceable security interest in the shares. The motion judge's order with respect to the shares stands.

The *Limitations Act*

[11] The appellants argue that, because the main creditor was aware of the facts underlying the claims advanced by the Trustee more than two years before the Trustee advanced those claims, the *Limitations Act* bars the Trustee from advancing those claims.

[12] The claims in issue are all claims by which the Trustee seeks, under various statutory provisions, to set aside transactions made by the bankrupt before the bankruptcy order was made. The claims are made so that certain property owned by the bankrupt may be brought back into the bankrupt's estate for the benefit of the creditors.

[13] The motion judge analyzed the limitation period argument at some length: see Reasons, at paras. 104-14. We agree with her that, for the purposes of the claims made by the Trustee in this proceeding, the Trustee could not be "the person with the claim" under s. 5(1) of the *Limitations Act*, until the Trustee had

been appointed by the court. The limitation period in respect of the claims advanced here could not begin to run until the appointment of the Trustee in October 2013. Even then, the provisions of the *Limitations Act* must be read, having regard to the powers given to the Trustee to recover the assets of the bankrupt.

[14] Nor does s. 12 of the *Limitations Act* have any effect on the Trustee's right to bring forward the claims. The Trustee is not "a person claiming through a predecessor in right, title or interest". The Trustee is claiming in its own right: Reasons, para. 118.

[15] The appellants make one further submission with respect to the *Limitations Act*. They contend, that even if the limitation period runs from the appointment of the Trustee, the claim with respect to the shares was not made until the Trustee amended the statement of claim in 2018, some five years after the Trustee commenced the action and three years after the two-year limitation period would have run.

[16] We do not accept this submission. A review of the substance of the amendments reveals they did not allege a new cause of action, but clarified the relief sought in the existing action.

[17] The motion judge properly rejected the appellants' submissions based on the *Limitations Act*.

The Abuse of Process Allegation

[18] The appellants argued that its primary creditor, Cobalt Capital, was using the bankruptcy process to attempt to recover losses it had already recouped from the bankrupt. In oral argument in this court, the appellants submitted that Cobalt Capital maneuvered the appointment of the Trustee for that purpose and that the Trustee was complicit in the scheme.

[19] The Trustee was appointed on consent. There was no evidence before the motion judge that the Trustee was acting on anyone's instructions. The appellants' theory as to the Trustee's motivation is speculation and was properly not relied on by the motion judge.

[20] The appeal is dismissed.

The Costs Appeal

[21] The Trustee seeks leave to appeal the costs order. The motion judge awarded the Trustee costs on a partial indemnity basis. The Trustee submits the motion judge should have awarded costs on a substantial indemnity basis. Further, the Trustee argues, that even if partial indemnity costs were appropriate, the motion judge wrongly deducted certain pre-litigation costs from the award and also erred in substantially reducing the quantum claimed on a partial indemnity basis.

[22] This court grants leave to appeal costs sparingly. Even if leave is granted, the court defers to costs decisions made by judges of the Superior Court. Those

judges are much more familiar with the various nuances of setting costs in different litigation contexts than are members of this court.

[23] The Trustee submits that the unfounded allegations made by the appellants against the Trustee amounted to an attack on the integrity of a court officer and warranted costs on a substantial indemnity basis. The motion judge did not accept the Trustee's characterization. She said:

> I find that the allegations made against the Trustee in this case do not rise to the level of reprehensible, scandalous or outrageous conduct. The defendants' conduct was more in the nature of an aggressive defence of the claim. Accordingly, substantial indemnity costs are not an appropriate sanction in this case.

[24] The Trustee's submissions invite this court to reject the motion judge's assessment and adopt the harsher characterization advanced by the Trustee. Deference demands that we decline that invitation. Instead, we defer to the motion judge's assessment. Given the motion judge's finding, partial indemnity costs were appropriate.

[25] Similarly, we see no reason to interfere with the motion judge's treatment of the pre-litigation costs, or her assessment of the quantum of costs sought by the Trustee. We see no value in this court going back over the individual components of the costs claim with a view to redoing the work done by the motion judge.

[26] We grant leave to appeal the costs order and dismiss the appeal.

Costs of the Appeal

[27] The parties were able to agree on the appropriate order with respect to the costs of the appeals. The Trustee is entitled to the costs of the main appeal on a partial indemnity basis, fixed at $33,727. The appellants are entitled to the costs on the costs appeal, fixed at $8,531.

"Doherty J.A."
"B.W. Miller J.A."
"L. Sossin J.A."