Court File No. CV-19-629552-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF DEL EQUIPMENT INC.

Applicant

BRIEF OF AUTHORITIES OF THE RESPONDING PARTY GIN-COR INDUSTRIES INC.
Returnable November 5, 2019

November 4, 2019

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INDEX

TAB 1

1981 CarswellOnt 346
Ontario County Court [Judicial District of York]

Strazisar v. Canadian Universal Insurance Co.

1981 CarswellOnt 346, [1981] O.J. No. 2194, 21 C.P.C. 51, 8 A.C.W.S. (2d) 156

Strazisar v. Canadian Universal Insurance Co. Ltd.

Borins Co. Ct. J.

Heard: February 27, 1981
Judgment: March 17, 1981
Docket: No. 88693/78

Counsel: *P. Robson* , student-at-law, for plaintiff-respondent.
J.D. Strung , for defendant-applicant.

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
VIII Commencement of proceedings
VIII.2 Writ of summons
VIII.2.d Renewal
VIII.2.d.v Application to set aside

Headnote

Practice --- Institution of proceedings — Writ of summons — Renewal — Application to set aside — General

Writs — Renewal post diem — No attempts made to serve writ — Whether defendant prejudiced by renewal.

The plaintiff suffered extensive injuries in a motor vehicle accident on November 12th, 1977. On March 21st, 1978, her solicitors issued a writ against the owner and operator of the motor vehicle which had struck her, seeking damages for personal injuries and loss of income. On November 24th, 1978, the writ in the present action was issued claiming disability benefits against the defendant as the insurer of the motor vehicle. No attempts had been made to serve the writ when it expired November 23rd, 1979. The plaintiff's solicitors obtained an ex parte order on April 10th, 1980 renewing the writ nunc pro tunc for 12 months from November 24th, 1979. The affidavit filed in support of the application contained no mention of any attempts having been made to serve the writ, nor any explanation as to the delay of 4 1/2 months in seeking renewal of the writ, following its expiry. A settlement of the personal injury action was effected and completed July 2nd, 1980. The writ in the disability benefits action was served July 9th, 1980. The present application to set aside the ex parte order was originally returnable in early August, 1980, and was adjourned to permit a further affidavit to be filed by plaintiff's counsel, and to permit cross-examination. After several demands, an affidavit was extracted from plaintiff's counsel, and he was cross-examined.

Held:

On an application to set aside the order renewing the writ, the application should be dismissed. Upon the basis of the evidence before the Judge who made the ex parte order, it was clear that he erred in exercising his discretion in renewing the writ, since there was no evidence whatever which would constitute a sufficient reason for not having served the writ; however, the Court on the present application was entitled to admit further evidence, and to consider whether the order renewing the writ should stand on the basis of all of the material now before the Court.

The plaintiff must establish a sufficient reason within the meaning of R. 8(1) as to why the defendant had not been served. From the accumulated case law, several factors emerge which assist in measuring the facts of each particular case against the statutory standard of a "sufficient reason". These are, (1) whether the defendant had notice before expiry of the writ that the plaintiff was asserting a claim against him; (2) whether something was said or done by the defendant or his representative to induce the plaintiff to believe that it would be unnecessary to serve the writ; (3) whether the plaintiff moved promptly for renewal of the writ after its expiry; (4) whether or not the failure to serve the writ resulted from the direction, participation or involvement of the plaintiff personally. (5) if, after taking into consideration the above and other factors which may be presented by the evidence, the Court is not satisfied that a prima facie case has been made out establishing a "sufficient reason" to excuse non-delivery of the writ, nevertheless, the Court may, in its discretion, renew it if it is satisfied that to do so will not cause any prejudice to the defendant, it being the obligation of the plaintiff to establish absence of prejudice.

Neither the affidavits filed by plaintiff's counsel, nor the answers he gave on cross-examination, provided any sufficient reason for failure to serve the writ before its expiration. The additional evidence suggested that it was in the plaintiff's interest to keep from the defendant any knowledge of the writ in the disability benefits action until the personal injury action had been settled, and that the plaintiff's counsel had been guileful in that respect. The material also supported a prima facie case of negligence against the plaintiff's solicitors.

It did not appear, however, that the defendant would be prejudiced in maintaining its defence on the merits if the renewal order were to stand. The factual issue would be the disability of the plaintiff. Through its participation in the defence of the personal injury action, the defendant in this action was fully informed as to the plaintiff's injuries. Any prejudice in settlement of the personal injury action, arising from the operation of s. 237(2) of The Insurance Act (Ontario), could be dealt with in the defences raised in this action.

Having regard to the conduct of the plaintiff's solicitors, the appropriate disposition of costs was that the plaintiff's solicitors pay the costs of the defendant and any costs thrown away on a solicitor and client basis, and that no account be rendered to the plaintiff for this application or the application to renew the writ.

Annotation

See Holmested & Gale, Rules 8(1) and 219 and Fraser and Horn, The Conduct of Civil Litigation in British Columbia, c. 37.2. See also Power's Western Practice Digest (3rd ed.), vol. 2, pp. 1128-9.

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Cases considered:

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Amer. Motors (Can.) Ltd. v. Renwick (1976), 1 C.P.C. 153 — *referred to*

Arnett v. Menke (1979), 11 C.P.C. 263 (Ont. H.C.) — *referred to*

Atkinson v. Plimpton (1903), 6 O.L.R. 566 — *referred to*

Avery, Re, [1952] O.R. 192, [1952] 2 D.L.R. 413 (C.A.) — *referred to*

Beebe v. Brown, [1963] 1 O.R. 76 — *referred to*

Bell Can. v. Bolton Hydro Elec. Commn. (1977), 3 C.P.C. 199 (Ont. H.C.) — *referred to*

Blyth v. Maritime Central Airways, [1962] O.W.N. 12 (C.A.) — *referred to*

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Cairns v. Airth (1894), 16 P.R. 100 (C.A.) — *referred to*

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Flett v. Way (1891), 14 P.R. 123 — *referred to*

Fretz v. Lafay, [1939] O.R. 273 (C.A.) — *referred to*

Fuleki v. Lapain, [1968] 2 O.R. 860 — *referred to*

Goudeketting v. Schakiel, [1960] O.W.N. 321 (M.C.) — *referred to*

Herman v. Klig, [1938] O.W.N. 270 — *referred to*

Lance v. Young (1977), 16 O.R. (2d) 629, 3 C.P.C. 322 (H.C.) — *referred to*

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McCluckie v. McMillan (1973), 2 O.R. (2d) 56, 41 D.L.R. (3d) 701 (Div. Ct.) — *referred to*

Matyus v. Papp (1973), 1 O.R. (2d) 54 — *referred to*

Merrick v. Woods, [1972] 1 O.R. 701 — *referred to*

Mogan v. Bd. of Education of Toronto, [1946] O.W.N. 784 — *referred to*

Myers v. Elman, [1940] A.C. 282, [1939] 4 All E.R. 484 (H.L.) — *referred to*

Nugent v. Crook , Ont. C.A., September 16, 1979 (unreported) — *referred to*

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Robertson v. Toronto Transit Commn. (1978), 7 C.P.C. 178 (Ont. C.A.) — *referred to*

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Sandulo v. Robinson (1975), 10 O.R. (2d) 778 — *referred to*

Simpson v. Sask. Govt. Ins. Office (1967), 61 W.W.R. 741, 65 D.L.R. (2d) 324 (Sask. C.A.) — *referred to*

Stender v. McDonald, [1967] 1 O.R. 295 , affirmed [1967] 1 O.R. 300n — *referred to*

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Wilson v. Federated Mut. Ins. Co., [1969] O.W.N. 193 — *referred to*

Statutes considered:

Insurance Act, R.S.O. 1970, c. 224

s. 237(2) [re-en. 1971, Vol. 2, c. 84, s. 17].

Sched. E [en. 1971, Vol. 2, c. 84, s. 26].

Rules considered:

Ont. Rr. 8(1), 178, 219.

Authorities considered:

Holmested & Gale, Ontario Judicature Act and Rules of Practice, R. 8, §§5, 6 and 7.

Williston & Rolls, The Law of Civil Procedure, 1970, pp. 317 et seq.

Application to set aside an order renewing a writ of summons post diem.

***Borins Co. Ct. J.*:**

1 This is an application by the plaintiff pursuant to R. 219 of the Rules of Practice to set aside an ex parte order renewing a writ of summons. It raises, once again, the familiar question of the proper exercise of judicial discretion under R. 8(1) in the renewal of a writ of summons subsequent to its date of expiry. It also raises, as an ancillary question, what facts the Court may take into consideration subsequent to the order renewing the writ in the exercise of the powers granted by R. 219.

2 The facts relative to this application are somewhat complex. Therefore, I find it convenient to outline first the facts as they stood at the date of renewal and the principles applicable to a R. 8(1) application. Then I will outline the facts as they developed subsequent to renewal and the principles which apply to a R. 219 application.

The facts at the date of the renewal of the writ

3 [The learned Judge's recitation of these facts is summarized as follows:] On November 12th, 1977, the plaintiff had been struck by a motor vehicle operated by one Stergiopoulos, and she sustained extensive injuries which prevented her from working as a housekeeper. On March 21st, 1978, an action for damages for personal injuries was commenced against Stergiopoulos. The defendant in the present action was the insurer of Stergiopoulos. On November 24th, 1978, the writ in the present action was issued, claiming Schedule E benefits for loss of income under the Insurance Act, on the basis that the plaintiff had been permanently disabled by the accident. The writ expired November 23rd, 1979.

4 On April 10th, 1980, an ex parte order was made renewing the writ nunc pro tunc for 12 months from November 24th, 1979. The affidavit filed in support of the application referred to the then pending personal injury action against Stergiopoulos, which had proceeded through examinations for discovery. The deponent expressed the opinion that there would be no prejudice to the defendant, but made no reference whatever to any attempts having been made to serve the writ, nor to any reason for a 4 1/2 month delay following expiration of the writ in making application for renewal.

5 The personal injury action against Stergiopoulos was settled, and when it came on for trial on May 29th, 1980, judgment was issued in the terms of minutes of settlement, specifying general and special damages of $45,000 and costs. The judgment was satisfied on July 2nd, 1980. On July 9th, 1980, the writ in the present action was served, no previous attempt to serve the writ having been made since the date of granting of the ex parte renewal order.

6 The present application was launched on July 25th, 1980, returnable in August. The application was adjourned sine die to permit a further and better affidavit to be filed, and to permit cross-examination. Numerous requests for delivery of the affidavit were not answered. The defendant's solicitors brought the motion on for hearing on December 8th, 1980, and upon return of the motion the supplementary affidavit was served. The motion was again adjourned sine die for cross-examination, which took place December 19th, 1980. The motion was brought back on for hearing by the defendant's solicitors, after having been twice further adjourned at the request of the plaintiff's solicitors. The supplementary affidavit referred to correspondence between the plaintiffs and the defendant's solicitors with respect to the processing of disability benefits claims and to payments of benefits made before and after issue of the writ. The deponent described how his mistaken belief as to when the cause of action for disability benefits arose. He reiterated his opinion that the defendant had not been prejudiced.

7 The learned Judge observed that the affidavit advanced no reason for failure to serve the writ in the year following its issue, and pointed out that the suggestion as to a mistaken belief as to when the cause of action arose did not justify the failure to serve the writ, or seek renewal promptly following its expiry. Certain portions of the transcript on the cross-examination were reproduced for later reference in the learned Judge's reasons, and the judgment continued as follows:

The original application to renew the writ

8 Upon the original application to renew the writ on April 10, 1980, were the materials before the Court sufficient to enable it to exercise its discretion in favour of the plaintiff? This requires a consideration of R. 8(1) which reads in part:

> 8(1). The writ shall be in force for twelve months from the date thereof ... but, if *for any sufficient reason* any defendant has not been served, the writ may at any time before its expiration, by order, be renewed for twelve months .... (The italics are mine).

Reading the rule without considering the judicial gloss which over the years may have been placed upon its language, it is clear that it provides for the renewal of a writ before its expiration "if for any sufficient reason" it "has not been served". Since 1959 there has been no doubt that a writ may be renewed subsequent to its expiration by combining R. 178 with R. 8(1): *Brown v. Humble*, [1959] O.R. 586 (C.A.) . However, before 1959 and even thereafter, where an application to renew a writ was made before or after its expiration the focus of judicial attention has been upon the reason why the plaintiff failed to serve the defendant. For example, in *Mogan v. Bd. of Education of Toronto*, [1946] O.W.N. 784 , the Master, in considering an application to renew a writ before its expiration, quoted the dictum of Middleton J.A. in *Perth Motor Co. v. Epps Tpt.* (1941), 11 Fortnightly L.J. 4 at p. 5 to the effect that "the only ground for renewal of a writ [is] inability to serve the defendant". At p. 785 [O.W.N.] the Master went on to say:

> In view of the practice or apparent impression with some that the renewal of a writ is a matter of routine, it may be as well to indicate that diligent and constant efforts to serve the writ, and the impossibility of serving it, should be established on an application for the renewal of a writ: *Bendt v. Bendt & Kutschke*, [1945] O.W.N. 664 at 666 .

In the *Mogan* case the application for renewal was dismissed, the Master being of the view that there was no question as to the plaintiff's ability to serve an officer of the defendant Board of Education.

9 A similar result was reached in *Albright v. DePutter*, [1959] O.W.N. 95 , where Spence J., affirmed the order of the Master who had set aside an order renewing a writ before it had expired. No attempt had been made to serve the writ until three days before it expired. Spence J. held that to obtain a renewal of a writ there must be real diligence shown in attempting to serve it. And again in *Davis v. Chubey*, [1960] O.W.N. 88 (Ont. H.C.) , Spence J. dismissed without reasons an appeal from the order of the Master who had set aside an order renewing a writ. In his reasons the Master stated at p. 89:

> In determining this question two principles are to be kept in mind. First, the only ground for renewal of a writ is inability to serve the defendant; *per* Middleton, J.A., in *Perth Motor Co. v. Epps Transport* (1941), 11 F.L.J., p. 4 at p. 5. Secondly the test to be applied as to the sufficiency of the ground for inability to serve is the degree of diligence used in attempting to effect service: *Mogan v. Toronto Bd. of Education*, [1946] O.W.N. 784 .

10 Were I to consider the renewal of the writ based upon the evidence before the Judge on April 10, 1980, I would have no hesitation in concluding that he erred in exercising his discretion in renewing the writ. As I observed earlier, there was not a word in the affidavit of Gary Neinstein upon which the Court could have concluded that the plaintiff had been unable to serve the writ upon the defendant. It follows, of course, that since there was no evidence that the plaintiff had been unable to serve the defendant there was also no evidence pointing to the degree of diligence employed by the plaintiff in attempting to serve the defendant. There was simply not a word as to why the plaintiff had been unable to serve the defendant. Placed at its highest, the evidence before the Court was that the defendant must have known that the plaintiff intended to continue with her claim for disability benefits because the defendant and its insured, Stergiopoulos, were represented by the same solicitors and thus the defendant would suffer no prejudice if the writ were to be renewed. This fell short of meeting the test for the renewal of a writ of summons and accordingly did not form a sufficient foundation for the exercise of the discretion accorded by R. 8(1).

The present application

11 This application is brought under R. 219 which reads, in part, as follows:

> 219. A party affected by an ex parte order ... may move to rescind or vary the order by notice ... returnable before the judge or officer who made the order, or any other judge or officer having jurisdiction....

It is to be observed that the Rule does not contain any statement as to the nature of the application, nor any test that is to be applied in determining whether or not the ex parte order should be rescinded or varied nor any indication as to whether or not the Judge hearing the application may receive materials in addition to those that were before the Court on the original application.

12 It would appear to be well established that on an application under R. 219 the Court may receive evidence in addition to that which was before the Court on the ex parte application: *Flett v. Way* (1891), 14 P.R. 123 ; *Cairns v. Airth* (1894), 16 P.R. 100 (C.A.) . This was permitted by the Judge before whom this application came on August 14, 1980, and explains how it came to be that Mr. Neinstein's supplementary affidavit and the transcript of his cross-examination thereon are before me for my consideration. With respect, while it is not difficult to envisage circumstances in applications to set aside an ex parte order renewing a writ where a defendant may be granted leave to file materials before the Court it is difficult to envisage circumstances where a plaintiff should be permitted to file additional evidence. To do so indiscriminately would not only serve to bonus the dilatory plaintiff but would be an encouragement to plaintiff's solicitors to be less than thorough in presenting renewal applications. More so, perhaps, it ignores the absolute duty of frank and full disclosure of all material facts encumbent upon a party moving ex parte: *Atkinson v. Plimpton* (1903), 6 O.L.R. 566 ; *Herman v. Klig*, [1938] O.W.N. 270 . Where, in an application such as this a plaintiff seeks leave to file further affidavit material, it is well to keep in mind the test to be applied as stated by R.E. Holland J. in *McCluckie v. McMillan* (1973), 2 O.R. (2d) 56 at 57, 41 D.L.R. (3d) 701 (Div. Ct.) .

13 The nature of an application pursuant to R. 219 is stated in Holmested's Judicature Act, 4th ed., at p. 681, and is quoted with approval by Masten J.A. in *Fretz v. Lafay*, [1939] O.R. 273 at 275 (C.A.) :

> The motion to rescind or vary may be supported, or opposed, by matter not before the Judge or officer when the order was made. The motion is not an appeal, but is a substantive motion, and the question is not alone whether the order should have been made, but whether, having been made, it should, in view of any change in the state of affairs, or position of the parties, be rescinded: *Howland v. Dominion Bank* (1892), 15 P.R. 56 , at p. 63; *Cairns v. Airth* (1894), 16 P.R. 100 , and *Cousins v. Cronk* (1897), 17 P.R. 348 ; *Allison v. Breen* (1900), 19 P.R. 119 , 143.

In *Re Avery*, [1952] O.R. 192, [1952] 2 D.L.R. 413 (C.A.) at 201 Hogg J.A. stated the proposition to be:

> However, it has been decided that the question open for consideration upon a motion under the provisions of Rule 217 [now Rule 219] is not alone whether the order ought not to have been made, but also whether, having been made, it should be rescinded or varied.

Accordingly, I am obliged to consider whether or not the order renewing the writ ought to be rescinded or varied on the basis of the material now before the Court.

The law with respect to renewal of writs

14 A large body of case law exists on the subject of the renewal of expired writs, much of it in the last twenty years. It is neither necessary nor practical to review all of the cases. They are conveniently collected in Holmested & Gale, Ontario Judicature Act & Rules of Practice, R. 8, §§ 5, 6, 7, and in Williston & Rolls, The Law of Civil Procedure, 1970, pp. 317 et seq. Originally, the authorities uniformly held that if a limitation period had intervened this would prove fatal to the renewal of a writ, irrespective of whether the application to renew was made before or after the expiry of the writ: see, *e.g., Prescott v. McArthur*, 62 O.L.R. 385, [1928] 3 D.L.R. 489 . However, since *Brown v. Humble* , supra, the intervention of a limitation period is merely a fact to be taken into account in the exercise of the discretion granted by Rr. 8(1) and 178. While it is accurate to say that the decisions of the past twenty years can be characterized as exhibiting a more liberal attitude toward the renewal of expired writs, renewal is by no means ordered in every case: Holmested & Gale, supra. Not infrequently renewal is refused, although some of the cases appear difficult to reconcile.

15 As the number of cases accumulate, several factors have emerged as appropriate for consideration by the judicial officer called upon to exercise his or her discretion to renew a writ of summons. Before discussing them, however, it is important to observe that the Courts have not attempted to re-write R. 8(1). As a threshold issue it remains for the plaintiff to establish a "sufficient reason" why the defendant has not been served. This basic principle survives, as survive it must short of the amendment or repeal of the Rule: see, *e.g., Syms v. Wojtaniak* (1977), 3 C.P.C. 120 , affirmed (1977), 4 C.P.C. 278 ; *Bell Can. v. Bolton Hydro Elec. Commn* . (1977), 3 C.P.C. 199 (Ont. H.C.) ; *Laurin v. Foldesi* (1979), 23 O.R. (2d) 321, 10 C.P.C. 144 (C.A.) ; *Arnett v. Menke* (1979), 11 C.P.C. 263 (Ont. H.C.) . Therefore, in my view the cases are to be interpreted as no more and no less than the measurement of the facts which each present against the statutory standard of a "sufficient reason" for the plaintiff's failure to timely serve the writ. From the cases these factors have emerged as significant.

16 (1) Whether or not the defendant had notice before the expiry of the writ that the plaintiff was asserting a claim against him: *Ward v. Reg. of Motor Vehicles*, [1969] 1 O.R. 787 ; *Amer. Motors (Can.) Ltd. v. Renwick* (1976), 1 C.P.C. 153 . No particular form of notice is required. For example, it may be by letter, settlement negotiations, or by way of actual service of the writ which is technically irregular or otherwise invalid: see, *e.g., Wilson v. Federated Mut. Ins. Co.*, [1969] O.W.N. 193 ; *Matyus v. Papp* (1973), 1 O.R. (2d) 54 ; *Sandulo v. Robinson* (1975), 10 O.R. (2d) 778 . However, even though the defendant may have had notice of the plaintiff's claim circumstances may exist where the defendant might reasonably infer that the claim had been abandoned: see, *e.g., Goudeketting v. Schakiel*, [1960] O.W.N. 321 (M.C.) ; *Fuleki v. Lapain*, [1968] 2 O.R. 860 .

17 (2) Whether something was said or done by the defendant or his representative to induce the plaintiff to believe that it would be unnecessary to serve the writ: *Robinson v. Cornwall*, [1951] 1 O.R. 587, [1951] 4 D.L.R. 161 ; *McCarthy v. Kirk*, [1955] O.W.N. 608 ; *Blyth v. Maritime Central Airways*, [1962] O.W.N. 12 (C.A.) .

18 (3) Whether or not the plaintiff moved promptly for renewal of writ after its expiry. Long delay in applying for renewal has generally led to a refusal to renew: see, *e.g., Stender v. McDonald*, [1967] 1 O.R. 295 , affirmed [1967] O.R. 300n (18 months after expiry); *Merrick v. Woods*, [1972] 1 O.R. 701 (14 months); *Power v. Anderson*, [1971] 2 O.R. 739 (6 years); *Syms v. Wojtaniak* , supra (12 months); *Arnett v. Menke* , supra, (3 years, 4 months).

19 (4) Whether or not the failure to serve the writ resulted from the direction, participation or involvement of the plaintiff personally: see, e.g., *Beebe v. Brown*, [1963] 1 O.R. 76 ; *Amer. Motors Can. Ltd. v. Renwick* , supra; *Syms v. Wojtaniak* , supra.

20 (5) If, after taking into consideration the above and other factors which may be presented by the evidence, the Court is not satisfied that a prima facie case has been made out establishing a "sufficient reason" to excuse non-delivery of the writ

nevertheless the Court may, in its discretion, renew it if it is satisfied that to do so will not cause any prejudice to the defendant, it being the obligation of the plaintiff to establish absence of prejudice: *Nugent v. Crook* , September 16, 1979, Ont. C.A. unreported; *Bell Can. v. Bolton Hydro Elec. Commn.* , supra; *Dewar v. Carson* (1977), 15 O.R. (2d) 686, 3 C.P.C. 334 (C.A.) . It is in this regard, as suggested earlier, that the Courts appear to have been placing a gloss on the expression "sufficient reason" and giving it a broad meaning. Even though no reason can be found for the failure to serve the writ, if in all the circumstances the defendant will suffer no prejudice if the action is permitted to proceed that is seen to provide a sufficient reason to excuse the failure of service. In this type of case it would seem that the Court is balancing the prejudice to the plaintiff which would result if the action cannot proceed because of the intervention of a limitation period against any prejudice to the defendant if the action is permitted to proceed. In *Laurin v. Foldesi* , supra, at p. 147 C.P.C., Lacourciere J.A. stated:

> The basic consideration in these matters is whether the renewal post diem will advance the just resolution of the dispute, without prejudice or unfairness to the *parties* . (The italics are mine.)

It must also be noted that in the *Laurin* case the Court of Appeal appears to give an interpretation to R. 8 more liberal than found in any other case in holding, at p. 146, that the Court may renew a writ if "sufficient reason [is] shown for the renewal" and then applying that principle. It is prejudice to the defendant in maintaining a defence on the merits that is to be considered: *Lance v. Young* (1977), 16 O.R. (2d) 629, 3 C.P.C. 322 (H.C.) ; *Sandulo v. Robinson* , supra, and not the mere fact that if the renewal is granted the defendant will lose a technical defence of statute of limitation: *Simpson v. Sask. Govt. Ins. Office* (1967), 61 W.W.R. 741, 65 D.L.R. (2d) 324 (Sask. C.A.) ; *Symes v. Wojtaniak* , supra. What constitutes prejudice in maintaining a defence on the merits will vary from case to case and will require, in fairness to both plaintiff and defendant, a close factual analysis.

Conclusion

21 On the basis of the material before me it is patently clear that Mr. Neinstein was approaching the plaintiff's claim in a very leisurely manner. Never once did he attempt to serve the writ after it was issued on November 24, 1978. After its expiration on November 23, 1979, it was not renewed for more than 4 1/2 months. Three months passed from the date of renewal until the date of service. There is no suggestion that the defendant insurance company would prove difficult to serve located as it is in downtown Toronto. However, during this time the *Stergiopoulos* action was settled. Once it was served with the writ the defendant moved without delay to have the renewal set aside. On August 14, 1980, the Judge gave Mr. Neinstein leave to deliver a supplementary affidavit. The defendant's solicitor practically had to beg Mr. Neinstein to deliver the affidavit. It was finally delivered on December 8, 1980.

22 In his supplementary affidavit he attempts to justify his conduct of the case. His reasoning is clearly specious. It does not hold up to scrutiny. This was borne out by the cross-examination. He was less than careful in his supplementary affidavit. His reference to Mr. Rogers' letter of June 9, 1979, was clearly inaccurate. The letter was written on April 9, 1979. It was made an exhibit to his affidavit. He could not have read it carefully before it was sworn. He would have the Court believe that he did not seek to renew the writ until April 10, 1980, because he did not believe that a cause of action "truly arose" until the 11th of June, 1979. This makes absolutely no sense. Even if he meant to say that it was until April 11th, 1979, that he believed a cause of action "truly arose" it would not help his explanation. If there were no cause of action extant on November 24, 1978, when the writ was issued the writ, whether renewed on April 10, 1980, or any other date, would not support a cause of action that "truly arose" on either June 11, 1979, or April 11, 1979. He then went on to say he was in error in his belief as to the date upon which the cause of action "truly arose" and deposed to the opinion that the plaintiff had a cause of action when the writ was issued. When cross-examined he was asked when he thought the cause of action arose. After first stating April 10, and then November 12, 1977, (which was the date of the accident), he finally settled on June 30, 1978, on which date he said the defendant stopped its payment of disability benefits.

23 In para. 9 of his supplementary affidavit, Mr. Neinstein swore that the writ was not served "because of pending negotiations or alternatively, because of my error in judgment". In cross-examination he said he did not know why the writ was not served in June, 1979, when he received the letter from Mr. Rogers and admitted that it should have been served. While he said that he usually gives a student or a law clerk a memo to serve a writ once it is issued he could locate none in his file. He characterized his error in failing to serve the writ as an "error in procedure" rather than an "error in judgment". He was asked about the "pending negotiations" and stated that negotiations were still going on with Mr. Rogers and he was

hopeful of settling this action. However, there was no correspondence offered either in the supplementary affidavit or on the cross-examination to support the assertion that negotiations were continuing. Mr. Neinstein made no reply to Mr. Rogers' letter of April 9, 1979, which made it clear that there would be no disability benefits paid for the period subsequent to June 30, 1978. Perhaps the most effective answer would have been the service of the writ, but that was not to occur for precisely 15 months. Indeed, Mr. Neinstein could do no more than assume that Mr. Gluckstein had advised Mr. Rogers that a writ had been issued.

24 There are answers which Mr. Neinstein gave when cross-examined which I find difficult to accept at face value. I refer, for example, to his comment that he believed that serving the writ would have prejudiced the settlement negotiations and that this may have been why he did not serve the writ. I refer also to his refusal to give a direct answer when asked if there would have been any difficulty in serving the writ on the insurance company in downtown Toronto. His view that the "six weeks" which he says it took to finally serve the renewed writ was a reasonable length of time is both factually incorrect and incorrect in law. Three months elapsed between the order renewing the writ and its service and it is a principle as old as *Church v. Marsh* (1843), 2 Hare 652 that ex parte orders should be served as soon as possible. Finally, I make reference to Mr. Neinstein's excuse for failing to respond to four letters sent by the defendant's solicitors and his failure to deliver his supplementary affidavit for four months. This he excused by "pressures of practice". This is an excuse which is frequently given for dilatory conduct in applications of this nature. The pathology of this type of conduct as evidenced by the many renewal cases in the reports bears this out. Surely a well-organized, conscientious solicitor should never have to rely on "pressures of practice" as an excuse for doing what the proper practice of law requires of him.

25 In my view, Mr. Neinstein is unable to provide a satisfactory excuse for his failure to serve the writ before it expired. In the words of R. 8(1) he has not provided "any sufficient reason" for failing to serve the writ before its expiration. Nor has he provided any sufficient reason for his failure to serve it promptly even after its renewal.

26 The additional materials filed upon this application do not advance the plaintiff's case beyond that which was presented to the Judge on April 10, 1980. Indeed, the additional materials support the inference that it was in the plaintiff's interest to keep from the defendant any knowledge of the existence of the writ until after the *Stergiopoulos* case was finally determined. It was within a week of satisfaction of the *Stergiopoulos* judgment that the writ was finally served. The disability benefits which the plaintiff is seeking are Sched. E benefits under The Insurance Act, R.S.O. 1970, c. 224, as amended. By virtue of s. 237(2) [re-en. 1971, Vol. 2, c.84, s. 17] the plaintiff was obliged to have deducted from her claim against Stergiopoulos all Sched. E [en. 1971, Vol. 2, c. 84, s. 26] payments made or available to her. The policy of this provision is the avoidance of double recovery: *Cox v. Carter* (1976), 13 O.R. (2d) 717 (H.C.) . No doubt it is true that the $1,540 paid by the defendant was taken into account in reaching a settlement in the *Stergiopoulos* case — this was only reasonable given the fact that the same law firm represents both Stergiopoulos and his insurer. However, once the *Stergiopoulos* case was disposed of this left the way clear for the plaintiff's action against the defendant for additional disability benefits to suddenly and unexpectedly surface thereby circumventing the effects of s. 237(2) — or attempting to do so — and possibly enabling the plaintiff to reap the benefit of a double recovery.

27 There is on the material before me a prima facie case of negligence made out against the plaintiff's solicitors with respect to their failure to serve the writ upon the defendant within the appropriate time. This is clear from the admissions made by Mr. Neinstein when he was cross-examined. In his second affidavit he attributed his failure to serve the writ to an error in judgment, but when examined he said it was caused by an error in procedure. There could not have been any difficulty in serving the defendant which is an insurance company with an office in downtown Toronto. There was nothing on the part of the defendant or its representatives that caused or contributed to the solicitors' failure to serve the writ. After Mr. Rogers' letter of April 9, 1979, there remained more than seven months before the writ expired. There is no acceptable evidence that the defendant had notice of *the* claim as set out in the writ. It is, of course, true the defendant had notice of *a* claim on the part of the plaintiff for Sched. E benefits but the clear inference is that once Mr. Rogers wrote on April 9, 1979, enclosing a cheque in payment of benefits up to June 28, 1978, he would have been justified in assuming that the plaintiff had accepted the moneys paid in full satisfaction of her claim. No reply was ever made to that letter; no letter was ever sent to the defendant or to Mr. Rogers objecting to this payment. There is no acceptable evidence that either the defendant or Mr. Rogers was ever notified of the existence of the writ. And there is no evidence that there were any settlement negotiations with respect to the claim in this action; there could not have been any as the defendant was never aware of the action. Taking all of these facts into consideration it is my opinion that no sufficient reason has been established for failing to serve the writ before its expiration.

28 I am obliged, as well, to consider the conduct of the plaintiff's solicitor after the order renewing the writ. This must be viewed in the context of what was occurring in the *Stergiopoulos* action. The fact that the order renewing the writ was not signed and entered until April 30, 1980, leads to the obvious inference that the existence of the instant action was well known to the plaintiff's solicitor when the judgment of Mr. Justice Haines was obtained on May 29, 1980, and when he negotiated the minutes of settlement upon which the judgment is founded. The inference can also be drawn that Mr. Rogers, who represented both Mr. Stergiopoulos and the Canadian Universal Insurance Co. Ltd., was unaware of the existence of this action during that time. While there is a suggestion in Mr. Neinstein's cross-examination that the disability benefits already paid to the plaintiff were taken into consideration in the settlement of the *Stergiopoulos* action, the logical inference is that if Mr. Rogers had been aware that the instant action was waiting in the wings the settlement figures may have been substantially different. Indeed, there might well not have been a settlement if the true picture had been disclosed — although there is no evidence before me with respect to this. However, if full disclosure had had the effect of preventing a settlement I believe that it is reasonable to assume that the logical result would have been the obtaining of an order moving this action into the Supreme Court and the trial of both actions together.

29 Needless to say I am greatly distressed with the conduct of the plaintiff's solicitors. It is not only the dilatory manner in which they dealt with the issue of the renewal and their response to this motion which concerns me. It is also the apparent guile which cloaks this entire unhappy situation. It is difficult to reach any conclusion other than that they knowingly held back the existence of this action until the *Stergiopoulos* case was safely settled. And there is also the material presented to the Court in support of the ex parte application for renewal in which full disclosure was not made; the Court was not informed that no effort was made to serve the defendant and that the plaintiff (through her solicitors) knew where to locate the defendant.

30 I come now to consider whether in the face of this the order renewing the writ should nevertheless be permitted to stand. This requires a consideration of the question of prejudice to the defendant. If this action is allowed to proceed to trial, will the defendant be prejudiced in maintaining its defence *on the merits* ? It is my opinion that it will not. The factual issue in this case will be the disability of the plaintiff. Through its participation in the defence of the *Stergiopoulos* case the defendant has information with respect to the injuries sustained by the plaintiff. It's solicitors received medical reports. She was examined for discovery in that action and a medical examination was conducted on behalf of the defence. There will be similar examinations in this case. While the defendant may well have suffered prejudice in its settlement of the *Stergiopoulos* action by virtue of s. 237(2) of The Insurance Act, such prejudice, if any, will not affect its ability to defend this action nor prevent the Court from rendering a result which will be just to both parties. No doubt the defendant will, in its pleadings, raise whatever defence, if any, is now available arising from the settlement of the *Stergiopoulos* action and will raise the issue of double recovery for the consideration of the trial Judge. Accordingly, the application of the defendant to set aside the order renewing the writ of summons is dismissed.

31 In reaching this conclusion I have been troubled greatly by the conduct of the plaintiff's solicitors. At first my impression of the case was that the loss should properly shift from the defendant, who did nothing to cause the plaintiff's solicitors to forego service of the writ, to the solicitors themselves. This, of course, would require the plaintiff to sue the solicitors. I have already explained why I believe the action be allowed to continue. However, I wish to add another word with respect to the conduct of the solicitors.

32 It would appear that the weight of authority supports the proposition that the loss should shift from the innocent defendant — innocent in the sense that he played no role in the failure to serve the writ — to the plaintiff's solicitor only where the defendant would suffer prejudice if the action is permitted to proceed. In such a case the neglect of the plaintiffs solicitor is, as it were, neutralized by an absence of prejudice to the defendant. While I subscribe to the view of the Court of Appeal in *Robertson v. Toronto Transit Commn.* (1978), 7 C.P.C. 178 at 179 (Ont. C.A.) that "the Court... is concerned primarily with the rights of litigants, rather than with the conduct of the solicitors", I do not interpret this as the judicial imprimatur for inexcusable neglect on the part of a solicitor. No doubt in the appropriate case the plaintiff will be left to seek his remedy against his solicitor. However, in cases such as this where there is no prejudice to the defendant and the action is permitted to proceed to trial the conduct of the solicitor which has been respon sible for proceedings such as these cannot be permitted to go ignored.

33 This is an appropriate application in which to award costs to the defendant even though it is the unsuccessful party.

This was far from a hopeless application; the defendant had an arguable case. However, it is not the plaintiff personally who should be required to pay the costs. She is not responsible for what has happened. She had the right to expect that her solicitors would conduct her litigation with reasonable competence. It is their fault that we are here. They should have to pay the defendant its costs of this motion and any costs thrown away. "The primary object of the Court is not to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured": *Myers v. Elman*, [1940] A.C. 282 at 289, [1939] 4 All E.R. 484 (H.L.) per Viscount Maugham; see, also *Dewar v. Carson* , supra. Because this application would not have been necessary if the solicitors had acted competently in the first place, costs should be on a solicitor and client basis. The solicitors must pay the costs themselves. Because the plaintiff is in no way at fault her solicitors cannot subsequently include them as part of their account to their client, nor can they charge their client for anything they did with respect to this application and with respect to the application to renew the writ. A condition such as this is necessary to protect the client who is often ignorant of the true nature of proceedings apparently undertaken on his or her behalf and disbursements charged where such proceedings and disbursements cannot be said to be necessary in the proper conduct of the litigation. In plain language, in some cases it is an unfortunate fact that clients must be protected from their lawyers. Also, this is a proper case to direct that a copy of these reasons be sent to the Law Society so that it may consider the conduct of the plaintiff's solicitors: *Cook v. Szott* (1968), 65 W.W.R. 362, 68 D.L.R. (2d) 723 (Alta. C.A.) .

34 In the result, the application is dismissed with costs to the defendant of this application and any costs thrown away on a solicitor and client basis payable forthwith after taxation. The costs shall be paid by the plaintiff's solicitors of record who shall not include in their solicitor and client account the amount thereof nor charge the plaintiff for their services with respect to this application and the original application to renew the writ of summons.

Application dismissed.

TAB 2

Most Negative Treatment: Check subsequent history and related treatments.

2012 ONCA 475
Ontario Court of Appeal

Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.

2012 CarswellOnt 8327, 2012 ONCA 475, [2012] O.J. No. 3029, 111 O.R. (3d) 401, 218 A.C.W.S. (3d) 286, 22 C.P.C. (7th) 224, 294 O.A.C. 308

Sadie Moranis Realty Corporation, Plaintiff (Appellant) and 1667038 Ontario Inc. and George B. Callahan, Defendants (Respondents)

Laskin, Goudge, Rouleau JJ.A.

Heard: April 13, **2012**
Judgment: July 5, **2012**
Docket: CA C53832

Proceedings: affirming *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.* (2011), 2011 CarswellOnt 592, 2011 ONSC 671, 16 C.P.C. (7th) 312 (Ont. Div. Ct.); reversing *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.* (2009), 2009 CarswellOnt 3799 (Ont. S.C.J.); affirming *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.* (2008), 2008 CarswellOnt 7955 (Ont. Master)

Counsel: Kirkor Apel, for Appellant
Trent Morris, for Respondents

Subject: Civil Practice and Procedure; Contracts; Property; Torts

Related Abridgment Classifications

Civil practice and procedure
XVI Disposition without trial
XVI.6 Money in court and offers to settle
XVI.6.a Payment into court

Real property
IV Real estate agents
IV.9 Rights of agent
IV.9.a Commission
IV.9.a.viii Miscellaneous

Headnote

Civil practice and procedure --- Disposition without trial — Money in court and offers to settle — Payment into court
Company refused to pay commission to listing agent due to dispute over manner of sale — Agent commenced action for payment of commission against company and lawyer who held remainder of proceeds of sale in trust — Agent's motion for order requiring lawyer to pay remaining proceeds into court pending outcome of action was granted by master, and court upheld order — Divisional court held that judge and master erred, and ordered that motion and costs orders below be dismissed — Agent appealed — Appeal dismissed — Rule 45.02 of Rules of Civil Procedure was limited exception to law's aversion to providing plaintiff with execution before trial — Test required by Rule could not be met when claim was for

damages since claim for damages was not legal right to fund — Rule did not require that legal right to specific fund be proprietary right as claimed by Divisional court — Listing agreement provided for payment of commission on closing, but did not provide that commission be paid out of proceeds of sale.

Real property --- Real estate agents — Rights of agent — Commission — Miscellaneous
Company refused to pay commission to listing agent due to dispute over manner of sale — Agent commenced action for payment of commission against company and lawyer who held remainder of proceeds of sale in trust — Agent's motion for order requiring lawyer to pay remaining proceeds into court pending outcome of action was granted by master, and court upheld order — Divisional court held that judge and master erred, and ordered that motion and costs orders below be dismissed — Agent appealed — Appeal dismissed — Rule 45.02 of Rules of Civil Procedure was limited exception to law's aversion to providing plaintiff with execution before trial — Test required by Rule could not be met when claim was for damages since claim for damages was not legal right to fund — Rule did not require that legal right to specific fund be proprietary right as claimed by Divisional court — Listing agreement provided for payment of commission on closing, but did not provide that commission be paid out of proceeds of sale.

Table of Authorities

Cases considered by *Goudge J.A.*:

Assante Financial Management Ltd. v. Dixon (2004), 2004 CarswellOnt 2158, 8 C.P.C. (6th) 57, [2004] O.T.C. 452 (Ont. S.C.J.) — considered

News Canada Marketing Inc. v. TD Evergreen (2000), 2000 CarswellOnt 3544 (Ont. S.C.J.) — followed

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 45 — considered

R. 45.02 — considered

APPEAL by agent from judgment reported at *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.* (2011), 2011 CarswellOnt 592, 2011 ONSC 671, 16 C.P.C. (7th) 312 (Ont. Div. Ct.), reversing order for payment into court of certain funds.

***Goudge J.A.*:**

Introduction

1 The central issue in this case is whether the appellant meets the test required by rule 45.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to obtain an order that certain funds be paid into court pending the outcome of this action.

2 Rule 45.02 reads:

SPECIFIC FUND

45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

3 The appellant's motion under rule 45.02 succeeded before the Master. It was also awarded costs of $20,000. On appeal, the Superior Court judge upheld the order and awarded further costs of $8,746.83. Leave to the Divisional Court was granted,

where the appeal was allowed, the orders of the judge and the Master, including the costs orders, were set aside, and the appellant's rule 45.02 motion was dismissed, with global costs to the respondents fixed at $10,000.

4 The appellant appeals with leave to this court. It seeks first to restore the Master's order pursuant to rule 45.02, and second, to restore the Master's costs order in any event.

5 As I will explain, I agree with the result reached by the Divisional Court, but for somewhat different reasons. I would therefore dismiss the appeal.

The Background

6 This litigation arose as a result of the sale of land by the respondent 1667038 Ontario Inc. (166). The respondent George B. Callahan (Callahan) was the solicitor for 166 on the transaction.

7 Pursuant to a listing agreement it signed with 166 on November 1, 2006 (the Listing Agreement), the appellant was the listing agent for the property. The Listing Agreement provided for the appellant to receive a commission of eight percent of the sale price on the closing of the sale.

8 On May 31, 2007, an offer to purchase the property for $2,000,000 was accepted. The purchaser paid a deposit of $5,000. The sale closed on or about May 15, 2008 and the deposit was applied to the appellant's commission. The balance of the proceeds of the sale were held in trust by Callahan.

9 166 refused to pay the remainder of the commission to the appellant because it says that the appellant, among other things, failed to ensure that certain lots within the property would remain with the vendor and would not be included in the sale.

10 The appellant therefore commenced this action on June 6, 2008. Callahan was sued only because he held the proceeds of the sale. By the time of the motion before the Master, all but some $40,000 of these proceeds had been disbursed.

11 As originally framed, the appellant's action sought its commission as being due and owing on closing pursuant to the Listing Agreement. On June 3, 2009, the Master (not the Master who dealt with the rule 45.02 motion) dismissed the appellant's motion to amend this claim to also seek recovery based on express or implied trust, unjust enrichment and constructive trust, and conversion. No appeal was taken from this order.

12 This appeal results from the motion under rule 45.02 brought by the appellant in its action against the respondents. The motion sought to require Callahan to pay into court the proceeds of the sale remaining in trust pending the outcome of the action for the appellant's commission.

13 On December 17, 2008, the Master granted the order. The Master found that it was not necessary that the appellant have a proprietary claim to succeed. She held that the words of the Listing Agreement were capable of establishing a term that the commission be paid out of the proceeds of the sale. The Master also found that, although the appellant did not plead trust principles, the record supported the appellant's claim to the monies in trust on the basis of constructive trust. The Master ordered costs of $20,000 to the appellant as fair and reasonable given the appellant's success, and taking into account the usual factors relevant to costs, together with the respondents' delay in disclosing the disbursal of much of the sale proceeds.

14 On appeal, the Superior Court judge upheld this order and the reasoning underlying it and assessed additional costs of $8,746.83.

15 On further appeal, the Divisional Court held that both the judge and the Master erred in finding that a plaintiff need not establish a proprietary claim to a specific fund in order to obtain relief under rule 45.02. The court found that the appellant's claim is framed as a breach of the Listing Agreement. In the absence of a proprietary claim, the court ordered that the rule 45.02 motion and the costs orders below be dismissed. It awarded the respondents global costs for all proceedings of $10,000.

Analysis

16 The issue in this appeal is the test required by rule 45.02, and whether the appellant meets it in this case. To reiterate, rule 45.02 reads as follows:

> **SPECIFIC FUND**
>
> 45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

17 Rule 45.02 is part of Rule 45 which, as its title suggests, provides for the interim preservation of property pending litigation. The Rule is a limited exception to the law's deep-seated aversion to providing a plaintiff with execution before a trial. The risk of such an order, because of its invasive nature, is well explained by Sharpe J.A. in *Injunctions and Specific Performance*, looseleaf 3d ed. (Aurora: Canada Law Book, **2012**), at para. 2.760:

> Clearly, pre-trial execution of any kind poses definite problems. Attachment of assets or interference with disposition of assets will often constitute a serious interference with the defendant's affairs. That interference may be more readily justified where the plaintiff's right is specifically related to the asset in question. However, where the plaintiff asserts a general claim and looks to the assets only as a means of satisfying a likely or possible monetary judgment against the defendant, interference with the defendant's assets is more difficult to justify.

18 In my view, the policy approach dictated by this caution must inform the test required by rule 45.02. In *News Canada Marketing Inc. v. TD Evergreen*, [2000] O.J. No. 3705 (Ont. S.C.J.), at para. 14, Nordheimer J. put forward a test which does that, and which I would adopt:

> I conclude therefore that the appropriate test for relief under rule 45.02 should require the plaintiff to establish that:
>
> (a) the plaintiff claims a right to a specific fund;
>
> (b) there is a serious issue to be tried regarding the plaintiff's claim to that fund;
>
> (c) the balance of convenience favours granting the relief sought by the plaintiff.

19 The first of these requirements, the one under special scrutiny in this appeal, faithfully reflects the language of rule 45.02. It requires that there be a specific fund readily identifiable when the order is sought. It also requires that the plaintiff assert a legal right to the specific fund as a claim in the litigation. While I do not find it to be a helpful descriptor, I think it is in this sense that past jurisprudence has sometimes described the specific fund as "earmarked to the litigation".

20 The second and third requirements, though not centrally in issue in this case, are equally important in manifesting the policy behind the rule. They ensure that interference with the defendant's disposition of assets is limited to cases where the plaintiff has a serious prospect of ultimate success, and there is something compelling on the plaintiff's side of the scales, such as a real concern that the defendant will dissipate the specific fund, that is sufficient to outweigh the defendant's freedom to deal with his or her property.

21 Framed in this way, the test will not be met where a plaintiff's claim is for damages. That is so even if a specific fund is identifiable in the factual matrix of the litigation, because a claim for damages is not a claim to a legal right to that fund. In *Assante Financial Management Ltd. v. Dixon* (2004), 8 C.P.C. (6th) 57 (Ont. S.C.J.), Wilton-Siegel J. put it this way, at para. 28:

> There is a subtle but important difference between an amount that may be owing to the plaintiff and a right of the plaintiff to a fund.

22 Where the test is met, the order secures the specific fund claimed by the plaintiff pending the outcome of the litigation. The order is distinguishable from a *Mareva* injunction (with its even stricter test), where the defendant is restrained from dealing with its own assets pending trial even though the plaintiff is not asserting a legal right to any of those assets.

23 Much of the argument in this court addressed the Divisional Court's refinement of the first part of the test from *News Canada Marketing Inc.* The Divisional Court required that the plaintiff's claim to the specific fund be proprietary in nature.

24 The Divisional Court was simply reflecting a notion that has crept into the rule 45.02 jurisprudence over the last decade, perhaps spurred by cases in which the claimed right to the specific fund was seen as clearly proprietary in nature (such as a claim of ownership) and therefore undoubtedly sufficient to meet the first part of the test. Where, however, the order is denied because the claimed right is not seen as proprietary a difficulty with the refinement arises.

25 One way to put that difficulty is that the language of the subrule does not require that the right to the specific fund claimed by the plaintiff be a proprietary right. The refinement is simply not true to the subrule.

26 Put another way, if the refinement (i.e. that the plaintiff's claim be to a proprietary right to the specific fund) is seen to confine the plaintiff to only a certain sort of legal right, it would unjustifiably narrow the subrule to something less than the subrule provides for. If, on the other hand, the refinement is seen as not affecting the test as stated in the subrule, it adds nothing. Moreover, it risks diverting the proper inquiry into an analysis of whether the legal right claimed has a "proprietary dimension" or is "proprietary in nature" as several of the cases have described. Either way, the refinement is not justified.

27 In short, I do not think that rule 45.02 requires that the legal right to the specific fund claimed by the plaintiff be a proprietary right.

28 What remains is to examine whether the appellant meets the test for a rule 45.02 order as I have framed it.

29 In my view, it is clear that the appellant does not do so. While the monies held in trust are in an identifiable fund, the appellant does not claim a legal right to that specific fund in this litigation.

30 I agree with the Divisional Court that the appellant's claim is for breach of contract because of the vendor's failure to pay the commission in accordance with the Listing Agreement. That agreement provides for the payment of the commission on closing and for the application of the deposit to that commission. Importantly, it does not provide for the commission to be paid out of the proceeds of the sale. In finding that the words of the Listing Agreement were capable of giving the appellant such a right, the Master was in error.

31 The Master also erred in finding that the appellant could claim a right to the monies in trust on the basis of trust principles. That conclusion is untenable in the face of the dismissal of the appellant's motion to amend its claim to do just that.

32 In short, the appellant cannot meet the test for an order under rule 45.02. The Divisional Court was correct to allow the appeal and dismiss the motion.

33 Since the motion fails, there is no justification for independently sustaining the costs order which was made by the Master based on the appellant's success.

34 In the result, I would dismiss the appeal with costs fixed at $5000 inclusive of disbursements and applicable taxes.

Laskin J.A.:
I agree

Rouleau J.A.:
I agree

Appeal dismissed.

TAB 3

2000 CarswellOnt 3544
Ontario Superior Court of Justice

News Canada Marketing Inc. v. TD Evergreen

2000 CarswellOnt 3544, [2000] O.J. No. 3705, 100 A.C.W.S. (3d) 145, 100 A.C.W.S. (3d) 45

News Canada Marketing Inc., Plaintiff and TD Evergreen, A Division of TD Securities Inc./Valeurs Mobilieres TD Inc., Defendant

Nordheimer J

Heard: September 29, 2000
Judgment: October 4, 2000
Docket: 00-CV-188234CM

Counsel: *Joseph C. D'Angelo*, for Plaintiff.
F. Paul Morrison and *Ian A.C. MacKinnon*, for Defendant.

Subject: Property; Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XV Preservation of property rights pending litigation
XV.2 Interim preservation of property

Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.f Non-party

Headnote

Practice --- Pre-trial procedures — Interim preservation of property
Purchaser and vendor entered in to share purchase agreement — Purchaser placed sum of purchase price into escrow account held by defendant and subject to escrow agreement — Vendor indemnified purchaser under share purchase agreement — Purchaser was to notify defendant regarding claims for indemnity and defendant would interplead disputed amount if no objection by vendor — Purchaser sent notice to defendant but it was not received until after defendant had advanced funds to vendor in advance of date set out in escrow agreement — In advance of its request to forward funds early, vendor knew of purchaser's notice and failed to inform defendant — Motion by purchaser to pay funds in escrow account into court was granted — Vendor was ordered to pay into court proportion of moneys improperly advanced, sufficient to bring total amount equal to purchaser's claim — Interpretation of indemnity clause was serious issue to be tried — Balance of convenience favoured maintenance and protection of fund held in escrow.

Table of Authorities

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 45 — considered

R. 45.01 — considered

R. 45.02 — considered

MOTION by purchaser for escrow funds held by defendant to be paid into court.

Nordheimer J.:

1 In this motion, the plaintiff seeks an order requiring certain escrow funds to be paid into court or otherwise secured in favour of the plaintiff pending the disposition of this, and of a companion, action. The defendant actually took no position with respect to this motion. The opposition to the relief sought comes from the vendor under a share purchase agreement which I will describe in more detail below. The vendor's solicitors are also the solicitors for the defendant in this action.

2 In August 1994, the plaintiff (which was then known as Actmedia Canada Inc.) entered into a Share Purchase Agreement whereby it agreed to acquire the shares of a company which was, at the time, owned by Nedcorp Quebec and others. Pursuant to the terms of the Share Purchase Agreement, the sum of $2,380,000.00 of the purchase price was to be placed in an escrow account. The purpose of the escrow account, as stated in one of the preambles to the escrow agreement, was:

> ... to be used to satisfy certain potential indemnities of Nedcorp (including for this purpose, of Nedkov) as provided in section 8.1(a) of the Purchase Agreement;

3 The escrow agreement established certain dates on which portions of the escrow funds were to be paid out to the vendor. The sum of $550,000.00 was to be paid out on August 15, 1998; the sum of $950,000.00 was to be paid out on August 15, 1999; and the sum of $750,000.00 was to be paid out on August 15, 2000. The balance of the escrow funds was to be paid out on August 15, 2001. The escrow funds were placed into an account with the defendant.

4 Clause 8.1(a) of the Share Purchase Agreement says in part:

> each shareholder shall severally indemnify and hold harmless Purchaser against any losses, claims, damages or liabilities (together, "Claims") to which Purchaser may become subject insofar as such Claims (or actions in respect thereof) arising out of or are based upon
>
> > (i) a breach by such Shareholder of any representation, warranty or covenant made by such Shareholder herein or in any agreement executed pursuant hereto...

5 The essential process established under the escrow agreement is that if the plaintiff claims to be entitled to be indemnified by the vendor, it may deliver to the defendant a written notice requesting that the defendant pay all, or a portion, of the escrow funds to the plaintiff. If the defendant does not receive a written objection from the vendor within 14 days of such notice, the defendant may pay the amount to the plaintiff. If the defendant does receive an objection, then the defendant is permitted to interplead the disputed amount.

6 The amount due on August 15, 1998 was paid to the vendor. However, matters were considerably different a year later. On August 4, 1999 a letter from the plaintiff's solicitors was sent by courier to the defendant. The letter enclosed a notice

pursuant to the terms of the escrow agreement requesting the defendant to pay to the plaintiff the amount of $1,462,192.00 to satisfy a claim for indemnity which the plaintiff claimed to have against the vendor. Copies of the letter and notice were concurrently sent by courier to the vendor. The defendant refused to accept the courier delivery because the letter was addressed to an individual who no longer worked for the defendant although this was the person identified in the escrow agreement as being the person to whom notices to the defendant should be addressed. It appears that the defendant had never advised the plaintiff that the individual in charge of the escrow account had changed.

7 Because of the defendant's refusal to accept the courier delivery, the next day copies of the letter and notice were sent by fax transmission to the defendant. In addition, on August 11, 1999 the original versions of the letter and notice were personally delivered to the defendant. The letter and notice eventually reached the individual within the defendant in charge of the escrow arrangement on August 17, 1999.

8 Meanwhile, and unknown to the plaintiff, the vendor requested the defendant to send to it, on August 13, 1999, the $950,000.00 that was to be paid on August 15, 1999. The reason for this request, it appears, was that August 15, 1999 was a Sunday. The defendant, after obtaining a signed confirming letter from the vendor, complied with the vendor's request and in fact released the funds to the vendor on August 12, 1999. Then by letter dated August 16, 1999, the solicitors for the vendor wrote to the defendant and objected to the notice which the plaintiff had delivered.

9 Over the next several months, and for reasons which are not explained, the defendant refused to respond to inquiries from the solicitors for the plaintiff as to the status of the funds in the escrow account. The plaintiff assumed that the defendant was proceeding to interplead the disputed funds. However, after several months had passed and with no evidence that the defendant was so proceeding, the plaintiff commenced this action. It was only when the defendant filed its statement of defence in this action that the plaintiff first became aware that the defendant had in fact released the $950,000.00 to the vendor.

10 As a consequence of this revelation, the plaintiff brought this motion in which it seeks essentially to have the remaining funds in the escrow account paid into court and to require the vendor to pay into court that portion of the $950,000.00 needed to make the total amount paid into court equal to the amount of the plaintiff's claim under its notice. The plaintiff seeks this relief because it says that it has lost faith in the defendant's impartiality because of the improper payment of the $950,000.00. In the alternative, the plaintiff seeks an injunction restraining the defendant from releasing or disbursing any further amounts from the escrow account.

11 The plaintiff principally relies on Rule 45 in support of the relief which it seeks, the relevant portions of which are:

> 45.01(1) The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party.
>
> (2) Where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just.
>
> 45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

12 Both parties rely on the decision in *Sun v. Ho* (1998), 18 C.P.C. (4th) 363 (Ont. Gen. Div.) for the test applicable to a motion under rule 45. In that case, Rivard J., at p. 364, accepted the test put to him by counsel in the following terms:

> Mr. Birnboim, on behalf of the responding parties submits the following: firstly, under Rule 45.02 the plaintiff must establish a right to a specific fund; secondly, there must be a strong prima facie case and, thirdly, the balance of convenience requires the Court to inquire into the potential harm that would be incurred by the moving party if the relief is not granted.
>
> I have added the words, 'potential harm that would be incurred by the moving party if relief is not granted' because that is the test set out in the *Unigrand International Enterprises Ltd. v. Sea-Glo Seafoods Ltd.* (January 29, 1993), Doc.

93-CQ-31872 (Ont. Gen. Div.) a case referred to the Court by counsel.

This same test is set out in *Tom Jones Corp. v. Mishemukwa Developments Ltd.* (1996), 46 C.P.C. (3d) 77 (Ont. Gen. Div.). In contrast, in the decision in *Kongrecki v. Rafael* (1993), 19 C.P.C. (3d) 58 (B.C.C.A.) there is no mention of a requirement that there be a "strong" prima facie case.

13 It is not clear to me where the requirement for a "strong" prima facie case is derived from. It is not found in the rule itself nor does it appear to be mentioned in earlier Ontario authorities under the rule. In one of the first cases to consider rule 45.02, *Rotin v. Lechcier-Kimel* (1985), 3 C.P.C. (2d) 15 (Ont. H.C.), White J. allowed an appeal from a decision of a Master and ordered certain monies paid into Court on the basis that the plaintiffs had established "a prima facie" entitlement to the funds. Similarly, in *Maybank Foods Inc. Pension Plan v. Gainers Inc.* (1988), 63 O.R. (2d) 687 (H.C.), MacFarland J. granted an order under rule 45.02 requiring that a specific fund be paid into court. In the course of her decision, Madam Justice MacFarland stated that the plaintiffs had raised a "substantial issue to be tried." Finally, in *Charlebois v. Denjon Construction Ltd.* (1997), 13 C.P.C. (4th) 150 (Ont. Gen. Div.) in considering a motion under rule 45.02, Platana J. adopted a "prima facie case" or "sufficient grounds" test.

14 I mention this issue because it seems strange to me that the requirement under rule 45.02, to obtain an order for payment into court of a specific fund, would be a higher or more onerous one than that required to obtain an interlocutory injunction, in which it is generally only necessary to show that there is a serious issue to be tried. I consider that there is some considerable logic to having the tests for either form of relief employ a similar standard since they are in large measure designed to accomplish a similar result. I conclude therefore that the appropriate test for relief under rule 45.02 should require the plaintiff to establish that:

(a) the plaintiff claims a right to a specific fund;

(b) there is a serious issue to be tried regarding the plaintiff's claim to that fund;

(c) the balance of convenience favours granting the relief sought by the plaintiff.

15 The vendor submits that the plaintiff's claim against the escrow funds is not covered by the indemnity agreement and therefore the plaintiff cannot establish that it has a strong, or any, prima facie claim to the funds. The vendor also submits that the relief being sought is in the nature of a *Mareva* injunction and that the plaintiff ought to have to satisfy the stringent tests for a *Mareva* injunction before any relief is granted to it. I will deal with each of these points in turn.

16 The plaintiff's claim against the escrow funds under its notice arises out of an issue with respect to the calculation of adjusted working capital for the purchased company as of the closing date. Under clause 1.3, depending on the results of that calculation, there was a requirement to adjust the purchase price. The plaintiff says that a calculation of the adjusted working capital, which the plaintiff also says was considerably delayed by the vendor, gave rise to an entitlement in the plaintiff to an adjustment of the purchase price which it now claims. The vendor disputes the plaintiff's claim and, in any event, submits that it is not a matter which is covered by the indemnity provisions in the share purchase agreement and therefore the escrow funds are not available to respond to it.

17 The vendor's position in this latter respect is based on the wording of clause 8.1(a), which I set out above, and specifically the use of the words "to which Purchaser may become subject". The vendor says that these words do not permit a claim to be made by the plaintiff on the indemnity where it is a claim for loss suffered by the plaintiff itself but only permits claims to which the plaintiff becomes "subject" at the instance of another. The vendor relies on the definition of "indemnify" contained in Black's Law Dictionary (7th edition, West Group, 1999) as meaning:

to reimburse (another) for a loss suffered because of a third party's act or default.

I note, however, that in the same dictionary the word "indemnity" is defined as:

a duty to make good any loss, damage, or liability incurred by another.

Unlike the former definition, the latter definition contains no element of involvement by a third party.

18 I do not agree with the vendor's submissions on this point. In my view, the vendor's interpretation of clause 8.1(a) of the Share Purchase Agreement is overly narrow. It seems to me that a person can be "subject" to losses, claims, damages or liabilities without it being a necessary requirement for there to be a third party involved. I would further observe that if it had been intended to have such a narrow application of the indemnity provision in the Share Purchase Agreement much clearer language could have been employed to accomplish that purpose.

19 In any event, it is clear to me that there is a serious issue to be tried regarding this dispute. Until that dispute is resolved, I believe that the balance of convenience favours the maintenance and protection of the fund which the parties expressly set aside from the purchase price. While there was considerable discussion on the motion about the credit worthiness of the vendor and whether that impacted on the balance of convenience, it is obvious to me that the whole reason for setting aside a portion of the purchase price in an escrow account was to avoid any issue of the monies not being available from the vendor to answer for any claim that might be made by the plaintiff.

20 I also do not accept the submission of the defendants that the relief being sought is tantamount to a *Mareva* injunction and that the plaintiff must therefore satisfy the very strict tests for that relief. This situation is very much different than that to which a *Mareva* injunction is normally directed. Here we have a specific fund which the parties agreed should be set aside in the hands of an escrow agent to be available to answer for certain specified claims. In a *Mareva* injunction case, the plaintiff seeks to restrain the defendant from dealing with the defendant's own assets which the plaintiff would otherwise have no right to claim against, or interfere with, until such time as it had a judgment against the defendant. In my view the two situations are not at all comparable and I therefore do not see any reason to require the plaintiff to satisfy the prerequisites for a *Mareva* injunction in order to obtain relief either under rule 45.02 or in terms of the injunctive relief it seeks.

21 The vendor submits that to grant the relief being sought by the plaintiff, which would have the effect of removing the defendant as the escrow agent, is equivalent to the removal of an executor or trustee. The vendor then cites various authorities regarding the removal of trustees. Again, I do not find the analogy advanced by the vendor to be apt. However, even if it were, there is certainly evidence before me that would raise a legitimate issue as to the defendant's handling of the escrow account. In this regard, it is evident to me that the defendant was in error in forwarding to the vendor the sum of $950,000.00 on August 12, 1999. There was no basis for the vendor receiving such funds in advance of the August 15, 1999 due date and if, as was the case, that date fell on a Sunday then the appropriate date for payment of those funds became Monday, August 16, 1999 and not any earlier date. Further, had it not been for the defendant's own internal changes in personnel, it would have been in receipt of the plaintiff's notice in advance of the payment being made and would then have been absolutely precluded from making any payment to either party under the terms of the escrow agreement. The actions of the defendant in regard to this payment would satisfy me that there were sufficient grounds to question the good faith and reasonableness of the defendant's actions which in turn would provide sufficient grounds for the removal of it as a trustee — see *Re McLaren* (1922), 51 O.L.R. 538 (C.A.).

22 I have concluded therefore that the plaintiff is entitled to an order under rule 45.02 for the payment into court of the balance of the monies being held by the defendant in the escrow account together with all accrued interest. Lastly, I should also mention that the vendor had the plaintiff's notice in advance of prevailing upon the defendant to make the payment which the defendant did on August 12, 1999. It apparently did not mention this fact to the defendant when it made its request for the monies. In such circumstances, it is only fair and reasonable that the vendor should also have to pay into court that portion of the monies which it improperly received which is sufficient to bring the total amount (excluding accrued interest) equal to the amount of the plaintiff's claim.

23 I therefore grant an order directing the defendant to pay the sum of $880,000.00 into court together with all interest that has accrued in the escrow account, and that the sum of $582,192.00 be paid into court by Nedcorp Group Inc. and Nedcorp Holdings (Quebec) Inc., or that these sums be otherwise secured in favour of the plaintiff, pending the final disposition of the issues between the parties or further order of this court.

24 In the circumstances, I cannot see any reason why the plaintiff would not be entitled to its costs of this motion payable forthwith but, if there are matters which counsel wish to bring to my attention that might alter my view in this regard, they may do so by way of written submissions. I am also prepared to fix the costs of the motion if the parties cannot agree on them

on receipt of appropriate submissions for that purpose. The plaintiff shall file its submissions within 10 days of the release of these reasons and the defendant/vendor shall file its responding submissions within 10 days thereafter. As always, I would appreciate it if counsel would keep their submissions brief.

Motion granted.

TAB 4

2011 ONSC 7113
Ontario Superior Court of Justice [Commercial List]

Deol v. Morcan Financial Inc.

2011 CarswellOnt 13652, 2011 ONSC 7113, [2011] O.J. No. 5371, 210 A.C.W.S. (3d) 378, 38 C.P.C. (7th) 348

Harpinder Deol, Plaintiff and Morcan Financial Inc. o/a/R/E Active Mortgages, Guiseppe Taibi and Harold Kennedy, Defendants

D.M. Brown J.

Heard: October 21, November 15, 2011
Judgment: November 30, 2011
Docket: CV-11-9243-00CL

Counsel: S. Schneiderman, for Plaintiff
E. Snow, for Defendants

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

Related Abridgment Classifications

Civil practice and procedure
XV Preservation of property rights pending litigation
XV.2 Interim preservation of property

Headnote

Civil practice and procedure --- Pre-trial procedures — Interim preservation of property
Plaintiff D sued defendants for damages for breach of oral contract under which she provided mortgage agent services to defendant M Inc. — D brought motion for, inter alia, order directing defendants to preserve, pending outcome of litigation, such finders' fees and volume bonuses in their possession on account of mortgage transactions for which D claimed commissions were owing to her, where those funds had not already been used — That part of motion dismissed — D relied primarily on "specific fund" rule, R. 45.02 of Rules of Civil Procedure, to support request for pre-trial preservation order — D did not demonstrate existence of specific fund to which she was asserting proprietary claim — In amended statement of claim, D contended M Inc. owed her $666,359.09 in unpaid finders' fees and that that amount was at all material times being held in trust by defendants — On examination for discovery, defendant T testified that during relevant period M Inc. only operated one bank account and financial institutions would deposit finders' fees into that account — Having reviewed references to other evidence contained in parties' factums, there did not appear to be any evidence M Inc. held in trust portions of finders' fees due to D — Nor, under legislation in force at relevant time, was M Inc. required to hold finders' fees in trust — Evidence strongly suggested finders' fees received by M Inc. prior to termination of D's retainer had since been used by M Inc. for operating expenses — What D really sought was order compelling defendants to put to one side general corporate funds to stand as security for judgment D hoped to secure at trial, and that sort of execution before judgment was not available under R. 45.02.

Table of Authorities

Cases considered by *D.M. Brown J.*:

Rosen v. Homelife/St. Andrew's Realty Inc. (1994), 1994 CarswellOnt 4528 (Ont. Gen. Div.) — referred to

Sadie Moranis Realty Corp. v. 1667038 Ontario Inc. (2011), 2011 CarswellOnt 592, 2011 ONSC 671 (Ont. Div. Ct.) — referred to

Stearns v. Scocchia (2002), 2002 CarswellOnt 3700, 27 C.P.C. (5th) 339, [2002] O.T.C. 855 (Ont. S.C.J.) — considered

Statutes considered:

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

Mortgage Brokers Act, R.S.O. 1990, c. M.39
Generally — referred to

Rules considered:

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

R. 45 — considered

R. 45.02 — considered

Regulations considered:

Mortgage Brokers Act, R.S.O. 1990, c. M.39
General, R.R.O. 1990, Reg. 798

s. 6(1) — considered

RULING concerning part of motion by plaintiff in which plaintiff sought order directing defendants to preserve, pending outcome of litigation, such finders' fees and volume bonuses in their possession on account of mortgage transactions for which plaintiff claimed commissions were owing to her, where those funds had not already been used.

***D.M. Brown J.*:**

I. Motion for the interim preservation of funds

1 Ms. Harpinder Deol sues the defendants for damages for breach of an oral contract under which she provided mortgage agent services to Morcan Financial Inc. Those parts of the motion concerning discovery-related relief I dealt with by way of handwritten endorsements dated October 21 and November 15, 2011. Ms. Deol also seeks interim relief under Rule 45 of the *Rules of Civil Procedure*, specifically an order:

> Directing the Defendants to preserve, pending the outcome of this litigation, such finders' fees and volume bonuses in their possession on account of mortgage transactions for which the Plaintiff claims commissions are owing to her, where those funds have not already been used.

2 For the reasons set out below, I dismiss that part of her motion.

II. Background facts

3 In her Amended Statement of Claim Ms. Deol pleaded that she was retained by Morcan as a mortgage agent in 2004.

Under the terms of her oral retainer contract she would find clients for Morcan and arrange mortgage funds for them from financial institutions. Deol and Morcan would then split the lender's finders' fees 90:10. Ms. Deol sues Morcan for her share of finders' fees which she alleges are owing to her for mortgages which she arranged during the period December, 2006 through to June, 2008.

4 As part of her pleading Ms. Deol alleges that the defendants held her share of the finders' fees in trust and that each defendant stood as a trustee of those funds towards her. Ms. Deol also invokes the oppression remedy under the *Ontario Business Corporations Act*, alleging that she is a "complainant" and that the defendants' failure to pay her a share of the finders' fees was oppressive conduct.

5 Morcan denies any liability, contending that Ms. Deol failed to submit required documentation to support her claim for a share of some finders' fees and that otherwise Morcan has paid her all commissions earned by her. The defendants deny the existence of any trust relationship and contend that Ms. Deol lacks standing to bring an oppression claim. Morcan has counterclaimed for an alleged overpayment of commissions to Ms. Deol.

6 The plaintiff commenced her action on December 29, 2008. She amended her Statement of Claim earlier this year to assert the breach of trust and oppression claims. Examinations for discovery have been held, although the defendants owe some answers to undertakings.

III. The principles governing the application of Rule 45.02

7 The plaintiff relies primarily on the "specific fund" rule, Rule 45.02, to support her request for a pre-trial preservation order. Rule 45.02 provides:

> 45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

8 Morden & Perell, in *The Law of Civil Procedure in Ontario*, write that "the purpose of the motion under rule 45.02 is to protect before trial a claimant who is asserting a proprietary claim to or proprietary interest in a specific asset."[1] They explain the policy underlying Rule 45.02 as follows:

> Rule 45.02 is an exception to the general rule that a plaintiff cannot obtain execution before judgment, and it is not to be used just as a means to obtain security for a debt or potential indebtedness of the defendant. While a *Mareva* injunction and an order under rule 45.02 share several policy concerns about prejudgment remedies, they are discrete or mutually exclusive interlocutory remedies, and a plaintiff does not have to satisfy the requirements for a *Mareva* injunction in order to obtain a remedy under rule 45.02.[2]

9 In *Stearns v. Scocchia* the Court emphasized the extraordinary nature of a Rule 45.02 order and the resulting need to scrutinize any request with care:

> Because of the extreme nature of a rule 45.02 order and/or a *Mareva* injunction, they are remedies that should be available only when it is necessary to balance the interests of the plaintiff and defendant. Both orders maintain the status quo until trial in a way that is fair to both the plaintiff and defendant and must not place the interests of the plaintiff before those of the defendant. Such orders are not merely procedural in nature and should be granted only in exceptional circumstances because they have the potential to injure a defendant before the plaintiff has proven its case at trial. Furthermore, it can place a defendant in an unfair position because it freezes a fund that would otherwise be available to the defendant and available for the purpose of operating its business. In short, such an order can appreciably tilt the scales in favour of a plaintiff on the basis of unproven allegations. Judicial discretion is therefore to be carefully exercised when considering a rule 45 order or the granting of a *Mareva* injunction given the severe prejudicial consequences that can result.[3]

10 The jurisprudence which has developed under Rule 45.02 indicates that in order for a moving party to obtain an order under Rule 45.02 it must meet three criteria:

(a) the plaintiff must claim a right to a specific fund, defined as "a reasonably identifiable fund earmarked to the

litigation in issue", and that claim must be proprietary in nature;

(b) there must be a serious issue to be tried respecting the proprietary claim; and,

(c) the balance of convenience must favour granting the relief sought.[4]

11 As to the first requirement to demonstrate the existence of a "specific" fund", Morden & Perell write:

Funds held in trust may constitute a specific fund, but a specific fund is not limited to trust funds; rather, a specific fund refers to a reasonably identifiable fund earmarked for the pending litigation. The rule has been used when the property at issue is a claim to pension funds held for employees. The rule has been applied with respect to sale proceeds held in a trust account.

A deposit payable in a real estate transaction has been held not to constitute a specific fund. Revenue from the operation of a parking lot does not constitute a specific fund. *A claim to funds due under a contract does not constitute a specific fund.*

Although the tracing of the fund may be done in the appropriate circumstance to prevent an injustice, the right to a remedy under the rule may be lost if before the motion is brought the specific fund is intermingled with other funds.

Where the specific fund is no longer available, an order may not be made under this rule requiring the defendant to pay other monies into court.[5]

12 On the last point MacFarland J. (as she then was) commented on the specificity requirement under Rule 45.02:
Were I to make an order requiring this sum of money to be paid into court, the defendant against whom the order was made would have to obtain funds from other sources or his/its own resources. In my view, that is not what is contemplated by Rule 45.02. The rule provides jurisdiction, in my view, only for the "specific fund" to be paid into court and not, where that fund is no longer available, for other monies to be paid into court in lieu thereof.[6]

IV. Analysis

13 The plaintiff has not demonstrated, on the evidence before me, the existence of a specific fund to which she is asserting a proprietary claim. In her Amended Statement of Claim the plaintiff contends that Morcan owes her $666,359.09 in unpaid finders' fees and pleads that that amount "was at all material times being held in trust by the Defendants..." On his examination for discovery Mr. Taibi testified that during the relevant time period Morcan only operated one bank account and financial institutions would deposit finders' fees into that account either directly or by cheque. Having reviewed the references to other evidence contained in the parties' factums, there does not appear to be any evidence that Morcan held in trust portions of finders' fees due to Ms. Deol.

14 Nor, under the legislation in force at the relevant time, was Morcan required to hold finders' fees in trust. Section 6 of Ont. Reg 798 made under the former *Mortgage Brokers Act*, R.S.O. 1990, c. M.39 provided:
6. (1) All funds received by a mortgage broker in connection with a mortgage transaction other than those which are clearly made as payment for fees earned shall be deemed to be trust funds.[7]

15 Moreover, the evidence strongly suggests that finders' fees received by Morcan from financial institutions prior to the termination of Ms. Deol's retainer in June, 2008 have since been used by Morcan for operating expenses.

16 As I assess the evidence, no specific fund exists in the hands of Morcan. What the plaintiff really seeks is an order compelling the defendants to put to one side general corporate funds to stand as security for a judgment which the plaintiff hopes to secure at trial. That sort of execution before judgment is not available under Rule 45.02.

V. Conclusion

17 For these reasons I dismiss that part of the plaintiff's motion brought under Rule 45.02.

18 I would encourage the parties to try to settle the costs of all aspects of this motion. If they cannot, the plaintiff may serve and file with my office written cost submissions, together with a Bill of Costs, by Friday, December 9, 2011. The defendants may serve and file with my office responding written cost submissions by Monday, December 19, 2011. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

Motion partly dismissed.

Footnotes

1 John Morden and Paul Perell, *The Law of Civil Procedure in Ontario, First Edition* (Toronto: LexisNexis, 2010), p. 186.

2 *Ibid.*

3 *Stearns v. Scocchia* (2002), 27 C.P.C. (5th) 339 (Ont. S.C.J.), para. 22.

4 *Ibid.*, para. 9. As to the "proprietary nature" of the claim, see *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.*, 2011 ONSC 671 (Ont. Div. Ct.), para. 7.

5 *Morden & Perell, supra.*, pp. 186-7 (emphasis added).

6 *Rosen v. Homelife/St. Andrew's Realty Inc.*, [1994] O.J. No. 2887 (Ont. Gen. Div.), para. 11.

7 Emphasis added.

TAB 5

2007 CarswellOnt 3444
Ontario Superior Court of Justice

American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd.

2007 CarswellOnt 3444, [2007] G.S.T.C. 142, [2007] O.J. No. 2138, 157 A.C.W.S. (3d) 937, 49 C.P.C. (6th) 180, 86 O.R. (3d) 53

American Axle & Manufacturing, Inc. (Plaintiff / Respondent) v. Durable Release Coaters Limited (Defendant / (Appellant)

Pattillo J.

Heard: February 8, 2007
Judgment: June 1, 2007
Docket: 03-CV-255954-CM3

Proceedings: reversing *American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd.* (2006), 2006 CarswellOnt 5273 (Ont. Master)

Counsel: Jean M. DeMarco for Plaintiff
Gregory M. Sidlofsky for Defendant

Subject: Goods and Services Tax (GST); Civil Practice and Procedure; Property

Related Abridgment Classifications

Civil practice and procedure
XV Preservation of property rights pending litigation
XV.2 Interim preservation of property

Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.i Upon appeal from Master
XXIII.13.i.iii Miscellaneous

Headnote

Tax --- Goods and Services Tax — Importations
Plaintiff shipped gear rotors that it manufactured in Buffalo, New York across border to defendant in Mississauga, Ontario for coating and return to plaintiff — Plaintiff was "importer of record" on customs documents and paid GST on value of gear rotor shipments — Pursuant to refund agreement, defendant agreed to aid plaintiff in recovering past GST by applying for input tax credit on GST amounts already paid on rotors by plaintiff — Defendant received GST refund cheque, which it deposited into its operating account — Bank applied proceeds to pay down defendant's line of credit — Plaintiff commenced action — Plaintiff brought successful motion for order for interim preservation of property pursuant to R. 45.02 of Rules of Civil Procedure — Master found that agreement made it clear that any refund that defendant obtained belonged to plaintiff, and that any refund monies obtained were trust funds for plaintiff — Defendant appealed — Appeal allowed — Rule 45.02 of RCP could not be invoked in absence of specific fund — Absent specific fund, order made by master was injunctive and not within master's jurisdiction — Record before master was not sufficient to support finding that trust existed — Even if it was, finding of trust and breach of trust were not necessary to determination of whether there was specific fund.

Tax --- Goods and Services Tax — Input tax credits — Who entitled
Plaintiff shipped gear rotors that it manufactured in Buffalo, New York across border to defendant in Mississauga, Ontario for coating and return to plaintiff — Plaintiff was "importer of record" on customs documents and paid GST on value of gear rotor shipments — Pursuant to refund agreement, defendant agreed to aid plaintiff in recovering past GST by applying for input tax credit on GST amounts already paid on rotors by plaintiff — Defendant received GST refund cheque, which it deposited into its operating account — Bank applied proceeds to pay down defendant's line of credit — Plaintiff commenced action — Plaintiff brought successful motion for order for interim preservation of property pursuant to R. 45.02 of Rules of Civil Procedure — Master found that agreement made it clear that any refund that defendant obtained belonged to plaintiff, and that any refund monies obtained were trust funds for plaintiff — Defendant appealed — Appeal allowed — Rule 45.02 of RCP could not be invoked in absence of specific fund — Absent specific fund, order made by master was injunctive and not within master's jurisdiction — Record before master was not sufficient to support finding that trust existed — Even if it was, finding of trust and breach of trust were not necessary to determination of whether there was specific fund.

Civil practice and procedure --- Pre-trial procedures — Interim preservation of property
Plaintiff shipped gear rotors that it manufactured in Buffalo, New York across border to defendant in Mississauga, Ontario for coating and return to plaintiff — Plaintiff was "importer of record" on customs documents and paid GST on value of gear rotor shipments — Pursuant to refund agreement, defendant agreed to aid plaintiff in recovering past GST by applying for input tax credit on GST amounts already paid on rotors by plaintiff — Defendant received GST refund cheque, which it deposited into its operating account — Bank applied proceeds to pay down defendant's line of credit — Plaintiff commenced action — Plaintiff brought successful motion for order for interim preservation of property pursuant to R. 45.02 of Rules of Civil Procedure — Master found that agreement made it clear that any refund that defendant obtained belonged to plaintiff, and that any refund monies obtained were trust funds for plaintiff — Defendant appealed — Appeal allowed — Rule 45.02 of RCP could not be invoked in absence of specific fund — Absent specific fund, order made by master was injunctive and not within master's jurisdiction — Record before master was not sufficient to support finding that trust existed — Even if it was, finding of trust and breach of trust were not necessary to determination of whether there was specific fund.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Upon appeal from Master — General principles
Plaintiff shipped gear rotors that it manufactured in Buffalo, New York across border to defendant in Mississauga, Ontario for coating and return to plaintiff — Plaintiff was "importer of record" on customs documents and paid GST on value of gear rotor shipments — Pursuant to refund agreement, defendant agreed to aid plaintiff in recovering past GST by applying for input tax credit on GST amounts already paid on rotors by plaintiff — Defendant received GST refund cheque, which it deposited into its operating account — Bank applied proceeds to pay down defendant's line of credit — Plaintiff commenced action — Plaintiff brought successful motion for order for interim preservation of property pursuant to R. 45.02 of Rules of Civil Procedure — Master found that agreement made it clear that any refund that defendant obtained belonged to plaintiff, and that any refund monies obtained were trust funds for plaintiff — Defendant appealed — Appeal allowed — Master was clearly wrong — Rule 45.02 of RCP could not be invoked in absence of specific fund — Absent specific fund, order made by master was injunctive and not within master's jurisdiction — Record before master was not sufficient to support finding that trust existed — Even if it was, finding of trust and breach of trust were not necessary to determination of whether there was specific fund.

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

Bank of Nova Scotia v. Liberty Mutual Insurance Co. (2003), 178 O.A.C. 254, 67 O.R. (3d) 699, 2003 CarswellOnt 4362 (Ont. Div. Ct.) — followed

Carleton University v. Mercier (2000), 2000 CarswellOnt 1456 (Ont. S.C.J.) — considered

Howitt v. Howden Group Canada Ltd. (1999), 170 D.L.R. (4th) 423, 1999 CarswellOnt 659, 26 E.T.R. (2d) 1, 20 C.C.P.B. 250, 1999 C.E.B. & P.G.R. 8356 (headnote only) (Ont. C.A.) — referred to

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Rosen v. Homelife/St. Andrew's Realty Inc. (1994), 1994 CarswellOnt 4528 (Ont. Gen. Div.) — considered

Rotin v. Lechcier-Kimel (1985), 3 C.P.C. (2d) 15, 1985 CarswellOnt 405 (Ont. H.C.) — considered

Stearns v. Scocchia (2002), 2002 CarswellOnt 3700, 27 C.P.C. (5th) 339, [2002] O.T.C. 855 (Ont. S.C.J.) — considered

Sun v. Ho (1998), 1998 CarswellOnt 995, 18 C.P.C. (4th) 363 (Ont. Gen. Div.) — considered

Union Bank of Switzerland v. Batky (1998), 157 D.L.R. (4th) 364, 107 O.A.C. 241, 40 R.F.L. (4th) 440, 1998 CarswellOnt 840, 24 C.P.C. (4th) 157 (Ont. Div. Ct.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101(1) — referred to

Excise Tax Act, R.S.C. 1985, c. E-15
s. 180 [en. 1990, c. 45, s. 12(1)] — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 37.02 — referred to

R. 40 — referred to

R. 45.02 — considered

APPEAL by defendant from decision reported at *American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd.* (2006), 2006 CarswellOnt 5273 (Ont. Master), granting plaintiff's motion for order for interim preservation of property pursuant to R. 45.02 of *Rules of Civil Procedure*.

***Pattillo J.*:**

1 The defendant appeals from the Order of Master Hawkins dated August 25, 2006, requiring it to pay $623,000 into court pursuant to rule 45.02 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

2 Rule 45.02 provides as follows:

> Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

Background

3 The plaintiff is a major public company that designs and manufactures various products for the automobile industry. It produces gear rotors, which are components of axles, in its facility in Buffalo, New York.

4 The defendant is a private corporation that carries on the business of coating metal and other forged products in Mississauga, Ontario.

5 In February 2000, the plaintiff contracted with the defendant to coat the gear rotors that the plaintiff was producing at its facility in Buffalo, New York. The rotors were shipped across the border by the plaintiff, coated by the defendant, and returned to the plaintiff in the United States.

6 At the outset of the relationship, the plaintiff was named as the "importer of record" and was accordingly required to pay excise tax ("GST") to the Canadian Government. After paying in excess of $600,000 in GST, the plaintiff became aware that GST need not be paid where the manufactured items did not originate in Canada. In order to obtain such a result, the defendant would have to be named as the "importer of record".

7 On October 31, 2000, the plaintiff and the defendant entered into a written agreement entitled the "Letter of Agreement for NAFTA Certificates and Goods and Services Tax" (the "Agreement"). The Agreement provided that the defendant would become "importer of record". It further provided as follows:

> Goods and Services Tax: DRC (defendant) will support AAM (plaintiff) with claims for past G.S.T. (prior to Nov. 1, 2000) and assist with the applications for refunds (under Section 180 of the *Canadian Excise Tax Act*) from Revenue Canada. AAM will supply the necessary supporting documentation.

Section 180 of the *Excise Tax Act*, R.S. 1985, c. E-15 required that the defendant, as a resident of Canada, apply for the refund in its name, as importer of record.

8 The plaintiff hired Deloite & Touche to prepare all the necessary documentation to apply for the refund. Disagreements arose between the parties in respect of their business relationship. The defendant initially refused to submit the refund application. Eventually it was submitted.

9 On November 4, 2002, the defendant received a cheque from the Government of Canada in the amount of $697,537 on account of the GST refund. By this time, the relationship between the parties had deteriorated significantly. Upon receipt, the defendant deposited the GST refund cheque in its operating account, and the defendant's bank automatically applied the funds to pay down the defendant's existing line of credit. The defendant did not advise the plaintiff it had received the cheque.

10 The defendant's position is that it refused to release the GST refund to the plaintiff because of unpaid invoices that were outstanding at the time of receipt and because of losses that it had incurred that were attributable to the plaintiff's breaches of contract. The plaintiff takes issue with this position, which it says has no merit.

11 Sometime after November 4, 2002, the plaintiff learned through an independent third party inquiry with the government that the defendant had received the GST refund. On September 25, 2003 it commenced this action claiming, *inter alia*, payment of the GST refund in the amount of $697,819.89 plus interest, a declaration that the plaintiff is the legal and equitable owner of the refund, unjust enrichment, breach of fiduciary duty and constructive trust. The plaintiff alleged in paragraph 24 of its claim that the defendant's retention of the refund constituted a breach of contract.

12 By Statement of Defence and Counterclaim dated November 3, 2003, the defendant alleged the plaintiff had breached the contract in relation to gear rotors, pleaded set-off with respect to the amount claimed in the Statement of Claim and counterclaimed for damages. The defendant expressly denied that it owed a fiduciary duty to the plaintiff or that it had been unjustly enriched.

13 The plaintiff commenced its motion for, *inter alia*, interim preservation of property pursuant to rule 45.02 requiring the defendant to pay into court the sum of $625,000 in January 2006. The plaintiff reduced the amount sought to be paid into court by some $75,000 on the basis that it conceded that it owed the defendant that amount on account of unpaid invoices. It denied any further amounts were owing to the defendant.

14 The matter was argued before the Master on July 19, 2006 and the Master released written reasons for decision dated August 25, 2006.

The Decision Appealed From

15 In allowing the plaintiff's motion and requiring the defendant to pay the sum of $623,000 into court in accordance with rule 45.02, the Master referred to and followed the test laid down by Rivard J. in *Sun v. Ho* (1998), 18 C.P.C. (4th) 363 (Ont. Gen. Div.) in respect of a motion under rule 45.02 as follows:

> 1. the plaintiff must establish a right to a specific fund;
>
> 2. there must be a strong *prima facie* case; and
>
> 3. the balance of convenience requires the court to inquire into the potential harm that would be incurred by the moving party.

16 In applying the first test for a rule 45.02 order, involving the right to a specific fund, the Master was of the view that the terms of the Agreement made it clear that any refund that the defendant obtained belonged to the plaintiff. Although the Agreement did not expressly refer to trust, the Master held that the circumstances surrounding the refund application were such that any refund monies obtained were trust funds for the plaintiff. The Master rejected the defendant's argument that there was no specific fund because the refund had been deposited by the defendant into its bank account and was no longer available. He regarded the defendant's actions as a breach of trust and held that the defendant's wrongdoing should not defeat the motion. Finally, relying on *Leung Estate v. Leung*, [2004] O.J. No. 1417 (Ont. S.C.J.), the Master held that notwithstanding that the specific fund had been spent, the court could order the defendant to restore the fund and pay the proceeds into court.

17 The Master found, on the evidence before him, that the plaintiff had made out a strong *prima facie* claim to the specific fund that was the refund monies received by the defendant.

18 Finally, the Master held that the balance of convenience favoured the granting of the order. He described the financial condition of the defendant as "delicate" based on an analysis of the financial statements of the defendant for the year ended November 30, 2005. At the same time he referred to evidence from the defendant on cross-examination that it had the ability to comply with an order of the court to pay the $623,000 into court.

19 The defendant appeals from the Master's order on two grounds: first, that the Master erred in law in holding that there was a specific fund with the meaning of R. 45.02; and second, that the Master erred in law in finding that the refund monies were trust funds and that the defendant had committed a breach of trust.

Standard of Review

20 The Divisional Court in *Bank of Nova Scotia v. Liberty Mutual Insurance Co.* (2003), 67 O.R. (3d) 699 (Ont. Div. Ct.) considered the test to be applied in respect of the review of a case management Master's decision. Dunnet J. on behalf of the court at p. 702 stated as follows:

> [12] We accept that the test to be applied on the review of a Master's decision is as follows:
>
> (a) if the matter is one of discretion, the court should not interfere unless the master was clearly wrong;
>
> (b) if the matter is one of law that is not vital to the disposition of the law suit, the court should not interfere unless the master was clearly wrong; and

> (c) if the matter is one of law that is deemed vital to the disposition of the law suit, the test should be one of correctness.
>
> [13] Where the Master is dealing with interlocutory matters not vital to the disposition of the case; the motion ought to be heard as an appeal and not *de novo*.
>
> [14] The notion of an increased level of deference that ought to be shown to Case Management Masters result from their unique role in the civil litigation process. This is not to say that there will not be situations where motions regarding productions are indeed vital to the lawsuit. This will depend on the nature of the case and the production in issue.

21 In the present case, the question of the operation of rule 45.02 is a question of law. The matter is clearly interlocutory. The real issue in determining the proper standard of review is the question of whether the decision is "vital to the disposition of the lawsuit". The defendant argues, given the nature of the order under appeal, which effectively grants the plaintiff execution before judgment, that it meets the "vital" test. The plaintiff on the other hand submits that the defendant's representative on cross-examination testified that the defendant had the ability to pay the amount ordered into court and that its future business prospects were positive. Accordingly, payment of the amount ordered will not impair the defendant's business or its ability to defend the action.

22 Rule 45.02 is one of the few exceptions that exist to the general rule that there can be no execution prior to judgment. Another exception is a Mareva injunction. The exceptions, however, are few and they are viewed by the courts as extreme remedies to be exercised with caution. In *Stearns v. Scocchia*, [2002] O.J. No. 4244 (Ont. S.C.J.), in considering a motion pursuant to rule 45.02, G.P. Smith J. stated a para. 22 as follows:

> Because of the extreme nature of a rule 45.02 order and/or a Mareva injunction, they are remedies that should be available only when it is necessary to balance the interests of the plaintiff and defendant. Both orders maintain the status quo until trial in a way that is fair to both the plaintiff and defendant and must not place the interests of the plaintiff before those of the defendant. Such orders are not merely procedural in nature and should be granted only in exceptional circumstances because they have potential to injure a defendant before the plaintiff has proven its case at trial. Furthermore, it can place a defendant in an unfair position because it freezes a fund that would otherwise be available to the defendant and available for the purpose of operating its business. In short, such an order can appreciably tilt the scales in favour of a plaintiff on the basis of unproven allegations. Judicial discretion is therefore to be carefully exercised when considering a rule 45 order or the granting of a Mareva injunction given the severe prejudicial consequences that can result.

23 The extreme nature of rule 45.02 combined with the fact that the money ordered to be paid into court by the Master represents the entire amount of the plaintiff's claim, raise the possibility that the order appealed from could involve a matter vital to the disposition of the lawsuit. However, on the record, I am unable to determine that it does. While the defendant's financial position is "delicate", it has indicated that it can pay the money into court if required. Therefore it is my view that in order to succeed on this appeal, the defendant must establish that the Master was clearly wrong in his decision.

Rule 45.02

24 In *News Canada Marketing Inc. v. TD Evergreen*, [2000] O.J. No. 3705 (Ont. S.C.J.), Nordheimer J. dealt with a motion for an order under rule 45.02. After referring to the test set forth in *Sun v. Ho*, *supra*, and referring to other cases dealing with rule 45.02, Nordheimer J. was of the view that the requirements to obtain an order for payment into court of a specific fund should be no higher or more onerous than the requirements to obtain an interlocutory injunction. Nordheimer J. expressed the test for a rule 45.02 order as follows at para. 14:

> a) the plaintiff must claim a right to a specific fund;
>
> b) there is a serious issue to be tried regarding the plaintiff's claim to that fund; and

c) the balance of convenience favours granting the relief sought by the plaintiff.

25 I agree with the test as stated by Nordheimer J. Having said that, and notwithstanding that the Master followed the test set out by Rivard J. in *Sun v. Ho*, *supra*, no reversible error results; in fact, the test applied by the Master is more stringent in respect of the strength of the plaintiff's claim.

26 Counsel for the defendant concedes that at the time that the defendant received the refund cheque from the government on November 4, 2002 a "specific fund" existed. He submits, however, that the Master erred in holding that, some four years later, after the monies had long since been used by the defendant, the fund continued to exist and that the defendant should be required to effectively replenish it and pay the funds into court.

Specific Fund

27 Having regard to the wording of the rule 45.02, the extreme nature of the remedy and the majority of the authorities, in order to succeed on a motion pursuant to rule 45.02, a specific fund must be in existence and, in the case of money, be reasonably identifiable as earmarked for the litigation in issue.

28 Rule 45.02 refers to a "specific fund". In *Rotin v. Lechcier-Kimel*, [1985] O.J. No. 466 (Ont. H.C.), White J. stated:

> In my opinion, "Specific Fund", in the absence of jurisprudence indicating otherwise, means a reasonably identifiable fund earmarked to the litigation in issue. That which a mortgagor owes on a mortgage is a mere chase in action and in my opinion has not assumed the status of a specific fund.

29 In *Rosen v. Homelife/St. Andrew's Realty Inc.*, [1994] O.J. No. 2887 (Ont. Gen. Div.), MacFarland J. (as she then was) summed up what is required in connection with a specific fund under rule 45.02:

> The heading or title for Rule 45.02 is "Interim Preservation of Property". In my view, the rule is intended for the preservation of property which is in existence and in the case of money, is reasonably identifiable fund which can be earmarked to the litigation in issue. See *Rotin et al. v. Lechier-Kimel et al.*, [1985] 3 C.P.C. (2nd) 15. In each of the cases to which counsel referred, the funds were available to be paid into court; in this case the specific fund is no longer available. Were I to make an order requiring this sum of money to be paid into court, the defendant against whom the order was made would have to obtain funds from other sources or his/its own resources. In my view, that is not what is contemplated by Rule 45.02. The rule provides jurisdiction, in my view, only for the 'specific fund' to be paid into court and not, where that fund is no longer available, for other monies to be paid into court in lieu thereof.

See also: *Miller v. Carley*, [2006] O.J. No. 1813 (Ont. S.C.J.) and *Union Bank of Switzerland v. Batky* (1998), 157 D.L.R. (4th) 364 (Ont. Div. Ct.) at para 81.

30 In reaching his decision that the defendant must pay the money into court in the absence of a "specific fund", the Master relied on *Leung Estate v. Leung*, *supra*. That case involved, in part, a motion by estate trustees preventing the defendants from disposing, depleting, transferring or encumbering assets and to pay into court certain amounts pending the trial. The motion sought relief by way of certificates of pending litigation, an injunction and an order pursuant to rule 45.02. The evidence indicated that prior to the deceased's death, the defendant, who was his son and was acting under a power of attorney, transferred money from the deceased's brokerage account to Hong Kong and shortly after his death, transferred the money back to Ontario to a company controlled by the defendant and his brothers. Madam Justice Greer found that the money deposited in the company's account was a "specific fund" under rule 45.02 but that the money had not remained and was used for other purposes. Notwithstanding, and with no discussion of the case law concerning rule 45.02 or what constituted a "specific fund" under the rule, Greer J. ordered that the company sell specific liquid assets (mutual funds and GIC's) and pay the money into court. The learned judge stated in her consideration of the injunction portion of the motion that if she had not ordered payment under rule 45.02, she would have ordered some injunctive relief to protect the assets into which the deceased's money could be traced. In my view, and having regard to the authorities I have already referred to, I

think that the decision is wrong to the extent that it holds that rule 45.02 can be invoked in the absence of the existence of a specific fund.

31 The plaintiff also relied upon the decision of the decision of Aitken J. in *Carleton University v. Mercier*, [2000] O.J. No. 1446 (Ont. S.C.J.). That case involved an interim preservation order pending the return of an interlocutory injunction. The learned motions judge noted that the test for an interim interlocutory injunction was the same as that for an interlocutory injunction and proceeded to review the facts of the case having regard to the three requirements — serious question to be tried; irreparable harm; and balance of convenience. He also referred to rule 45.02 in reference to the fact that if funds paid to the defendant were paid to third parties who appear not to be operating at arm's length from the defendant in apparent contradiction of the terms of a signed contract, he would have no hesitation in ordering their preservation pending a judicial determination of entitlement to the fund. Notwithstanding the reference to rule 45.02, the granting of the interim injunctive relief requested was, in my view, pursuant to the court's injunctive power and not pursuant to rule 45.02.

32 In *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.), the Supreme Court of Canada confirmed that courts in Canada have the power to grant a Mareva injunction to prevent a defendant from dealing with his assets or removing them from the jurisdiction in advance of judgment. Such an order can only be granted by a judge (Section 101(1), *Courts of Justice Act*, R.S.O. 1990, c. C.43). Rule 37.02 provides that the Master has the jurisdiction of a judge unless a statute or rule provides otherwise. Rule 40 provides that an interlocutory or mandatory injunction is within the jurisdiction of a judge.

33 In coming to the decision he did in this case, the Master stated that the order he was asked to make was not injunctive in nature. While that is the case in respect of an order pursuant to rule 45.02, in the absence of a specific fund, the order which the Master made is clearly injunctive and accordingly not within the Master's jurisdiction.

Trust

34 The defendant's second ground of appeal is that the Master erred in law in finding that the refund monies were trust monies and that the defendant committed a breach of trust by placing them in its bank account. The trust determination formed part of the Master's decision in relation to whether there was a specific fund and the defendant's argument that the monies were no longer available. In my view, the Master erred in making the finding that he did having regard to the issues and the record before him.

35 While the issue of whether the refund monies constituted trust funds is an issue in the action, it was not something that should have been determined on a rule 45.02 motion. The authorities are clear that in order for a trust to be found there must be evidence of the three certainties: certainty of intention to create a trust, certainty of subject matter and certainty of the objects: see *Howitt v. Howden Group Canada Ltd.* (1999), 170 D.L.R. (4th) 423 (Ont. C.A.). The record before the Master was not sufficient to support the Master's finding, particularly in respect of certainty of intention. Even if it was, I do not think that a finding of trust and a breach thereof was necessary to a determination of whether there was a specific fund. Rule 45.02 encompasses specific funds of all types, whether trust monies or otherwise. As already discussed, in the absence in this case of the existence of a specific fund, even if a trust fund were involved, rule 45.02 would not apply.

36 Accordingly, for the reasons given, I am of the view that in the absence of jurisdiction, the Master was clearly wrong in making the order he did. In the result, I would allow the appeal and set aside the order of the Master dated August 25, 2006.

37 The Master ordered costs in the cause of $2,000. In my view because the defendant was successful on the appeal it should have its costs, on a partial indemnity basis of both the appeal and the appearance before the Master. Accordingly I award the defendant costs fixed at $8750.00, including disbursements and GST, which amount includes $2,000 for the appearance before the Master.

Appeal allowed.

Most Negative Treatment: Reversed
Most Recent Reversed: American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd. | 2007 CarswellOnt 3444, [2007] G.S.T.C. 142, 49 C.P.C. (6th) 180, [2007] O.J. No. 2138, 86 O.R. (3d) 53, 157 A.C.W.S. (3d) 937 | (Ont. S.C.J., Jun 1, 2007)

2006 CarswellOnt 5273
Ontario Superior Court of Justice

American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd.

2006 CarswellOnt 5273, [2007] G.S.T.C. 141, 150 A.C.W.S. (3d) 1026

American Axle & Manufacturing Ing. v. Durable Relase Coaters Limited

Master T.R. Hawkins

Heard: July 19, 2006
Judgment: August 25, 2006
Docket: 03-CV-255954CM 3

Counsel: Jean M. DeMarco, for Moving Plaintiff
Gregory M. Sidlofsky, for Responding Defendant

Subject: Goods and Services Tax (GST); Civil Practice and Procedure; Property

Related Abridgment Classifications

Civil practice and procedure
XV Preservation of property rights pending litigation
XV.2 Interim preservation of property

Headnote

Tax --- Goods and Services Tax — Importations
Plaintiff shipped gear rotors that it manufactured in Buffalo, New York across border to defendant in Mississauga, Ontario for coating and return to plaintiff — Plaintiff was "importer of record" on customs documents and paid GST on value of gear rotor shipments — Pursuant to refund agreement, defendant agreed to aid plaintiff in recovering past GST by applying for input tax credit on GST amounts already paid on rotors by plaintiff — Defendant received GST refund cheque, which it deposited into its operating account — Bank applied proceeds to pay down defendant's line of credit — Plaintiff commenced action — Plaintiff brought motion for order for interim preservation of property pursuant to R. 45.02 of Rules of Civil Procedure — Motion granted — Defendant was ordered to pay sum of $623,000 into court — Plaintiff made out strong prima facie claim to specific fund of refund monies which defendant received — Terms of refund agreement made it clear that any refund which defendant obtained from Canada Customs and Revenue Agency belonged to plaintiff, not defendant — Any refund monies obtained were indeed trust funds which defendant held in trust for plaintiff.

Tax --- Goods and Services Tax — Input tax credits — Who entitled
Plaintiff shipped gear rotors that it manufactured in Buffalo, New York across border to defendant in Mississauga, Ontario for coating and return to plaintiff — Plaintiff was "importer of record" on customs documents and paid GST on value of gear rotor shipments — Pursuant to refund agreement, defendant agreed to aid plaintiff in recovering past GST by applying for input tax credit on GST amounts already paid on rotors by plaintiff — Defendant received GST refund cheque, which it deposited into its operating account — Bank applied proceeds to pay down defendant's line of credit — Plaintiff commenced

action — Plaintiff brought motion for order for interim preservation of property pursuant to R. 45.02 of Rules of Civil Procedure — Motion granted — Defendant was ordered to pay sum of $623,000 into court — Plaintiff made out strong prima facie claim to specific fund of refund monies which defendant received — Terms of refund agreement made it clear that any refund which defendant obtained from Canada Customs and Revenue Agency belonged to plaintiff, not defendant — Any refund monies obtained were indeed trust funds which defendant held in trust for plaintiff.

Civil practice and procedure --- Pre-trial procedures — Interim preservation of property
Plaintiff shipped gear rotors that it manufactured in Buffalo, New York across border to defendant in Mississauga, Ontario for coating and return to plaintiff — Plaintiff was "importer of record" on customs documents and paid GST on value of gear rotor shipments — Pursuant to refund agreement, defendant agreed to aid plaintiff in recovering past GST by applying for input tax credit on GST amounts already paid on rotors by plaintiff — Defendant received GST refund cheque, which it deposited into its operating account — Bank applied proceeds to pay down defendant's line of credit — Plaintiff commenced action — Plaintiff brought motion for order for interim preservation of property pursuant to R. 45.02 of Rules of Civil Procedure — Motion granted — Defendant was ordered to pay sum of $623,000 into court — Plaintiff made out strong prima facie claim to specific fund of refund monies which defendant received — Terms of refund agreement made it clear that any refund which defendant obtained from Canada Customs and Revenue Agency belonged to plaintiff, not defendant — Any refund monies obtained were indeed trust funds which defendant held in trust for plaintiff.

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Leung Estate v. Leung (2004), 7 E.T.R. (3d) 290, 2004 CarswellOnt 1366 (Ont. S.C.J.) — followed

Sun v. Ho (1998), 1998 CarswellOnt 995, 18 C.P.C. (4th) 363 (Ont. Gen. Div.) — followed

Rules considered:

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

R. 60.11 — referred to

R. 60.12 — considered

MOTION by plaintiff for order for interim preservation of property pursuant to R. 45.02 of *Rules of Civil Procedure*.

***Master Hawkins*:**

1 At the opening of this motion by the plaintiff the defendant moved for an order striking certain items from a brief of documents which the plaintiff had filed in support of its motion. Defence counsel complained that the plaintiff's brief documents contained items which were not properly identified, which were filed after the cross-examinations in connection with the plaintiff's motion were completed and which were filed after the defendant had the ability to file responding materials. I gave defence counsel two opportunities to have the plaintiff's motion adjourned to enable him to conduct further cross-examinations and to file further material, if so advised. He declined both these opportunities. In these circumstances I declined to exclude documents from the plaintiff's brief of documents on the ground of late filing.

2 In this motion the plaintiff seeks several distinct forms of relief. The parties wish me to hear first the plaintiff's motion for an interim preservation order, rule on that motion, and hear the balance of the plaintiff's motion later.

3 The plaintiff moves for an order under subrule 45.02. That subrule provides as follows:

> Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

4 The plaintiff is a manufacturer of driveline systems, chassis systems and forged products for trucks, buses and cars. The plaintiff is located in Detroit, Michigan.

5 The defendant carries on the business of coating metal and formed products in Bramalea, Ontario.

6 Beginning in 2000 the plaintiff began shipping gear rotors to the defendant for coating. For several months the customs broker involved completed importation documents showing the plaintiff as the importer of record of the gear rotors being sent to the defendant in Bramalea, Ontario. In consequence the plaintiff had to pay and did pay goods and services tax on the value of each shipment of gear rotors. The plaintiff says that it paid over $697,000 in GST on these shipments over several months.

7 In the fall of 2000 the plaintiff learned that if the defendant were shown as the importer of record of the gear rotors the plaintiff would be exempted from paying GST on the value of the rotors in future and that the defendant could apply for an input tax credit or refund of the GST already paid by the plaintiff. By written agreement dated October 31, 2000 (the "Refund Agreement") the defendant agreed to assist the plaintiff in recovering the GST which the plaintiff had paid by applying for an input tax credit. This application was completely successful and in November 2002 the defendant received a refund of $697,537 from the Canada Customs and Revenue Agency.

8 Although the defendant does not claim to be entitled to this refund to the exclusion of the plaintiff, or that the plaintiff has never had any entitlement to this refund, the defendant did not forward the refund to the plaintiff. Rather the defendant deposited the refund cheque in its bank account. The defendant's bank applied the deposit proceeds to reduce the defendant's loan from the bank.

9 The plaintiff submits that the refund proceeds are a "specific fund" within the meaning of rule 45.02 the right to which is in question and that this court should order the bulk of the refund proceeds paid into court or otherwise secured pending trial. The plaintiff is seeking an order that the defendant pay only $623,000 of the refund proceeds into court because it acknowledges that some $75,000 in invoices from the defendant to the plaintiff are unpaid.

10 The defendant advances several arguments in response. First the defendant says that there is now no specific fund to preserve pending trial. Once the defendant deposited the refund cheque in its bank and the bank applied the deposit proceeds so as to reduce the defendant's loan (as the defendant knew the bank would) the defendant submits that any specific fund was gone.

11 This is not an answer to the plaintiff's motion. In *Leung Estate v. Leung*, [2004] O.J. No. 1417 (Ont. S.C.J.) Greer J. heard a motion for an order under rule 45.02. There one of the defendants had a power of attorney from his father. He used this power of attorney to remove funds from his late father's account at a stockbroker firm and later deposited the funds in the account of one of the corporate defendants. By the time the motion was brought the defendant son had spent some $1,200,000 of the funds. Greer J. held the money in the corporate defendant's account to be a specific fund under rule 45.02. She applied the test lad down by Rivard J. in *Sun v. Ho* (1998), 18 C.P.C. (4th) 363 (Ont. Gen. Div.) for motion under rule 45.02. There Rivard J. said the following (at paragraph 1).

> [F]irstly, under Rule 45.02 the plaintiff must establish a right to specific fund;
>
> secondly, there must be a strong prima facie case and,
>
> thirdly, the balance of convenience requires the court to inquire into the potential harm that would be incurred by the moving party if the relief is not granted.

12 The fact that the defendant son had spent a large part of the funds in the corporate defendant's account did not defeat the rule 45.02 motion before Greer J. She ordered liquid assets of the corporate defendant to be cashed in and the proceeds paid into court.

13 In my view the plaintiff in this action has met the tripartite test which Rivard J. laid down in *Sun v. Ho*, supra. The terms of the Refund Agreement make it clear that any refund which the defendant obtained from Canada Customs and Revenue Agency belonged to the plaintiff, not the defendant. Although the Refund Agreement did not expressly refer to any refund obtained as being trust funds, the circumstances surrounding the refund application were such that any refund monies obtained were indeed trust funds which the defendant held in trust for the plaintiff.

14 The defendant has a counterclaim for damages based on the plaintiff's alleged breaches of the agreements for coating services between the parties. The defendant claims the right to apply the refund monies which it obtained in partial satisfaction of its claim for damages and to set off those damages against the plaintiff's claims. A trustee may not claim set-off against trust funds. See *Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.*, [2000] O.J. No. 3289 (Ont. S.C.J.) per Stinson J. at paragraph 334.

15 The plaintiff has, on the evidence before me, made out a strong prima facie claim to the specific fund of refund monies which the defendant received.

16 The balance of convenience favours the granting of the order sought. There is a real potential of harm to the plaintiff if the order sought under rule 45.02 is not granted. The financial position of the defendant is delicate. The defendant says that it has the ability to comply with an order that it pay the net sum of $623,000 into court pending trial and that its future business prospects are positive. Set against this are the following facts. In the year ending November 30, 2005 the defendant had a large demand loan owing to a related corporation. It had net earnings of $68,452. Its financial statements do not take the current litigation into account. Most troubling is the fact that it has a deficit in retained earnings of $959,191.

17 I reject the defendant's argument that this motion should be dismissed because the defendant itself spent the refund monies by paying down its bank loan and a specific fund no longer exists. I regard the defendant's use of the refund monies as a breach of trust. The court is not anxious to see a litigant defeat a proceeding for reasons based on its own misconduct.

18 It is clear from the decision of Greer J. in *Leung Estate v. Leung*, supra, that the court may make an order under rule 45.02 that are responding party who has spent part of a specific fund restore the fund and pay the proceeds into court. It makes no difference that the responding party has spent all of the specific fund rather than part of it.

19 The order that I am asked to make is not injunctive in nature. Masters may make orders under rule 45.02. Masters may not grant injunctions. The remedy for non-compliance with a master's order for payment of money under rule 45.02 is not a contempt motion under rule 60.11 but rather a motion under rule 60.12 for failure to comply with an interlocutory order with a typical sanction being an order dismissing the non-complying party's proceeding or striking out the party's defence.

20 For all these reasons an order will issue that within 30 days the defendant is to pay the sum of $623,000 into court pending the trial of this action or further order of this court.

Motion granted.

TAB 6

1994 CarswellOnt 4528
Ontario Court of Justice (General Division)

Rosen v. Homelife/St. Andrew's Realty Inc.

1994 CarswellOnt 4528, [1994] O.J. No. 2887, 51 A.C.W.S. (3d) 1254, 6 W.D.C.P. (2d) 27

Joanne Rosen, Plaintiff and Homelife/St. Andrew's Realty Inc. William Porteous and Aldo D'Aguanno, Defendants

MacFarland J.

Heard: December 1, 1994
Judgment: December 2, 1994
Docket: Newmarket 94-CQ58281

Counsel: Wendy J. Linden, for Plaintiff
Paul H. Caroline, for Defendants

Subject: Corporate and Commercial

Headnote

Commercial law

MacFarland J.:

1 The plaintiff is a licensed real estate agent, who at all material times was associated with the corporate defendant. The defendant William Porteous is the president of Homelife and Aldo D'Aguanno, a licensed real estate agent also associated with the corporate defendant.

2 The issues in this litigation concern the plaintiff's entitlement to certain commission monies received by the corporate defendant as the result of the completion of a certain real estate transaction with which the plaintiff had certain involvement.

3 The total commission owing to the corporate defendant as the result of this transaction is said by the plaintiff, to be $138,000.00, of which she is entitled to the sum of $111,100.00. Mr. Porteous admits in his affidavit that the corporate defendant did receive a payment in the sum of $138,000.00 in respect of the subject transaction, which he deposes were paid ... "in full and complete satisfaction of any and all claims which Homelife might make with regard to the Royal Bank's sale of certain lands to Kaitlin Holdings Ltd." Whether the monies are characterized as commission owing, or monies paid in settlement, is immaterial to the matter which I must determine.

4 It is admitted that Homelife, on November 2, 1994, received the sum of $138,000.00 in payment of the commission owing in respect of the subject transaction and have paid Ms. Rosen nothing to date in spite of her request that they do so.

5 The plaintiff claims that she is, by virtue of her agreement with Homelife, entitled to be paid $111,100.00. Her contract provides that she is required to pay an administrative fee of 30% of gross commission up to $80,000.00 and 5% of any gross commission earned beyond or above that amount. The defendants, Homelife and Porteous dispute the amount owing to the plaintiff. In his affidavit, Porteous claims both he and the defendant D'Aguanno were involved in the negotiations and the plaintiff had failed to live up to certain other parts of the contract with the defendant Homelife and was thereby not entitled to be paid commission in accordance with the formula set out above.

6 There can be no doubt on the evidence before me, that Ms. Rosen had at least some significant involvement in this transaction. Mr. Porteous' own letter to the solicitors of the mortgagee dated October 5, 1994, is evidence of the fact. I have trouble with his statement in his affidavit filed, wherein he now says that letter was an attempt on his part to bolster the ego of the plaintiff. He does not, however, go so far as to say that the statement made in the letter was untrue.

7 When Ms. Rosen did not receive the commission money to which she felt she was entitled, despite her request that she be paid, she instructed her solicitor to write to the corporate defendant. That letter is dated November 7, 1994 and was sent both by facsimile transmission and by mail. The defendant admits receiving the $138,000.00 on November 2, 1994 and on November 15, 1994 transferring the funds to the operating account of the corporate defendant from where they were applied to satisfy an outstanding "...overdraft and/or Line of Credit..." owed by Homelife to its banker. The balance, some $28,000.00 according to the affidavit of Mr. Porteous, remained as a credit in the operating account of the company and has since been used for the day to day operating expenses of the corporate defendant.

8 The plaintiff seeks an order pursuant to the provisions of Rule 45.02 requiring that the defendants be required to pay into court the sum of $111,100.00.

9 I am satisfied that the $138,000.00, had it remained in the Homelife trust account, or even in the general account for that matter, would have constituted a specific fund as is contemplated by Rule 45.02. The difficulty here is that the funds have been disbursed.

10 Ms. Linden, on behalf of the plaintiff, argues that if I do not make the order she requests, it will send out the wrong message to litigants. It will, she says, encourage unscrupulous litigants to spend monies which they hold and entitlement to which, they know, is disputed. The obvious fear is that there will be no money left at the end of the litigation road with which to pay the judgment.

11 The heading or title for Rule 45 is "Interim Preservation of Property". In my view, the rule is intended for the preservation of property which is in existence and in the case of money, is a reasonably identifiable fund which can be earmarked to the litigation in issue. See *Rotin et al v. Lechcier-Kimel et al*, (1985) 3 C.P.C. (2nd) 15. In each of the cases to which counsel referred, the funds were available to be paid into court; in this case the specific fund is no longer available. Were I to make an order requiring this sum of money to be paid into court, the defendant against whom the order was made would have to obtain funds from other sources or his/its own resources. In my view, that is not what is contemplated by Rule 45.02. The rule provides jurisdiction, in my view, only for the "specific fund" to be paid into court and not, where that fund is no longer available, for other monies to be paid into court in lieu thereof.

12 In result therefor, the application is dismissed, but in the circumstances, without costs.

TAB 7

2009 CarswellOnt 2032
Ontario Superior Court of Justice [Commercial List]

DSLC Capital Corp. v. Credifinance Securities Ltd.

2009 CarswellOnt 2032, [2009] O.J. No. 1568, 176 A.C.W.S. (3d) 1133

DSLC CAPITAL CORP. (Plaintiff) and CREDIFINANCE SECURITIES LIMITED, DONABO INC., GEORGES BENARROCH, MARJORIE ANN GLOVER, and CREDIFINANCE CAPITAL CORP. (Defendants)

Cameron J.

Heard: March 30-31, 2009; April 7, 2009
Judgment: April 20, 2009
Docket: 09-CL-8003

Counsel: Gregory Sidlofsky for Plaintiff
John L. Longo for Defendants, Credifinance Securities Limited, Marjorie Ann Glover
Fred Tayar for Defendants, Donabo Inc., Georges Benarroch, Credifinance Capital Corp.

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

Related Abridgment Classifications

Business associations
III Specific matters of corporate organization
III.2 Shares
III.2.c Subscription for shares
III.2.c.i General principles

Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.a General principles

Debtors and creditors
XIII Loans
XIII.1 General principles

Remedies
II Injunctions
II.9 Form and operation of order
II.9.h Dissolution of injunction
II.9.h.i Prima facie case

Remedies
II Injunctions
II.9 Form and operation of order
II.9.h Dissolution of injunction
II.9.h.iii Balance of convenience

Remedies

II Injunctions
II.9 Form and operation of order
II.9.h Dissolution of injunction
II.9.h.viii Miscellaneous

Headnote

Business associations --- Specific corporate organization matters — Shares — Subscription for shares — General principles

Business associations --- Legal proceedings involving business associations — Practice and procedure in actions involving corporations — General principles

Debtors and creditors --- General principles — Loans

Remedies --- Injunctions — Form and operation of order — Dissolution of injunction — Grounds for dissolution — Prima facie case

Remedies --- Injunctions — Form and operation of order — Dissolution of injunction — Grounds for dissolution — Balance of convenience

Remedies --- Injunctions — Form and operation of order — Dissolution of injunction — Grounds for dissolution — Miscellaneous

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American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd. (2007), [2007] G.S.T.C. 142, 86 O.R. (3d) 53, 49 C.P.C. (6th) 180, 2007 CarswellOnt 3444 (Ont. S.C.J.) — referred to

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News Canada Marketing Inc. v. TD Evergreen (2000), 2000 CarswellOnt 3544 (Ont. S.C.J.) — referred to

Rosen v. Homelife/St. Andrew's Realty Inc. (1994), 1994 CarswellOnt 4528 (Ont. Gen. Div.) — considered

Rotin v. Lechcier-Kimel (1985), 3 C.P.C. (2d) 15, 1985 CarswellOnt 405 (Ont. H.C.) — considered

United States v. Friedland (1996), 1996 CarswellOnt 5566 (Ont. Gen. Div.) — referred to

Rules considered:

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

Cameron J.:

Motions

1 This is a motion to continue until trial the interim Mareva injunction granted *ex parte* to DSLC Capital Corp. ("DSLC") by The Honourable Mr. Justice Morawetz dated February 6, 2009, as modified by me on February 12, 2009. I discontinued the injunction as against Marjorie Ann Glover but continued it as against the remaining defendants.

2 In the alternative, DSLC moves to have the $392,300 plus $1,600 U.S. loaned pursuant to the Subordinated Loan Agreement in the form required by the Investment Dealers Association ("IDA") paid into Court under Rule 45.02.

3 The defendants bring cross motions to dissolve the injunction on the grounds that:

1.) Morawetz J. was misled; and

2.) R. 45.02 is applicable only to a specific fund which does not exist here because of a commingling of funds.

4 The *ex parte* order of Morawetz J. on February 6, 2009, stated, in part:

...I am satisfied that the 3 part test set out in *RJR McDonald* has been satisfied and the requested ruling be granted.

The plaintiff has established a strong *prima facie* case and in view of the relocation of Mr. Benarroch to France and the evidence that the National Bank account has been closed and the defendants are under an investigation conducted by IIROC - I am of the view that there is a serious risk of dissipation of assets if the relief sought is not granted.

The plaintiff has established that in view of the allegations that damages may not provide an adequate remedy, and a freezing of assets is appropriate. I am also satisfied that the balance of convenience favours the plaintiff.

An undertaking as to damages has been filed. ...

5 The undertaking was filed by DSLC.

6 Since July 1, 2008 the IDA has been known as the Investment Industry Regulatory Organization of Canada ("IIROC").

Salient Facts

7 Georges Benarroch had been a resident of France for over 10 years. He also had business interests in Florida where he visits four times a year for a week at a time. He comes to Canada five times a year for a week at a time and for vacations. There is no evidence of any property he owned in Canada. His home and cottage in Ontario were owned by his four sisters, children, nephews, nieces and himself through an off-shore family trust. He was Chairman of the Board, President and CEO of Credifinance and indirectly owned the shares of Credifinance.

8 Marjorie Glover has been the Treasurer and Chief Compliance Officer of Credifinance since 1991.

9 On September 30, 2005, Foundation Investment Partners Inc. ("Foundation"), a company in which Adam Szweras, David Carbonaro ("David") and John Lorenzo were principals, signed an Option Agreement to acquire a 10% interest in Credifinance Securities Ltd. ("Credifinance") for $250,000 and a purchase option to acquire a further 70% of Credifinance.

10 In reply to due diligence inquiries the IDA advised that "it is conducting an investigation into certain activities at Credifinance." Benarroch made David aware of the IDA letter. Foundation elected to terminate its initial 10% equity and the right to exercise the purchase option and Credifinance refunded the $250,000.

11 Mr. Alistair Crawley, counsel for Credifinance, had met with David on December 16, 2005. He was unclear as to the specifics of the discussion. He said that the investigation was quite unfocussed. He recalled "having difficulty ascertaining the precise issues that the IDA was investigating."

12 Mr. Benarroch sent a fax to Fortune on December 18, 2005 which did not clarify the issue.

13 In 2006, Credifinance sold its seats on the TSE and MSE and declared a dividend of over $1 million. This effectively stripped Credifinance of its assets.

Share Subscription Agreement

14 In November 2007, when Credifinance Capital Corp. ("CCC") controlled Credifinance, DSLC entered a Share Subscription Agreement with Credifinance drafted by David. It recited that Credifinance was a licensed securities dealer and a member of the IDA. DSLC agreed to purchase the initial 100,000 common shares for $1,000 giving it 9.1% of the shares. In addition, it agreed to lend, by way of a subordinated loan agreement, $400,000 to Credifinance on closing which would be deposited in trust with counsel for DSLC pending a Uniform Subordinated Loan Agreement attached as a schedule. The representations and warranties would survive the closing for 3 years. They agreed to negotiate in good faith a Unanimous Shareholders Agreement to lend a further $1,600,000 by way of subordinated loans in not more than 36 monthly installments together with the purchase of 1,496,647 shares for 60% of the shares. Mr. Benarroch would serve as chairman of the board for 5 years and remain CEO of Credifinance until the aggregate of $2 million had been contributed by way of subordinated loans. John Lorenzo, Georges Benarroch and Anne Glover would be the directors subject to contrary agreement. The Share Subscription Agreement was subject to an "entire agreement" clause.

15 The IDA approved the transaction on January 17, 2008.

Uniform Subordination Agreement

16 The Uniform Subordination Agreement between DSLC, Credifinance and IIROC dated January 24, 2008 subordinated the $400,000 payment to the claims of the general creditors of Credifinance before DSLC could lay claim to it. Paragraph 7 of the Uniform Subordination Agreement provided that it could be terminated by IIROC "by notice in writing given to the Creditor and to the Member" (Credifinance).

17 The $400,000 was invested in a GIC until late October, 2008.

Guarantee of $25,000 Revenue

18 In the summer of 2007, when the Share Subscription Agreement was being discussed, Georges Benarroch agreed to contribute $25,000 monthly to Credifinance on account of expenses by responding "Looks fine" in an email on October 1, 2007. By the signing on November 13, he had changed his mind and refused to insert in the agreement any requirement that CCC contribute one-half of the monthly expenses of Credifinance. However, he did make the payments for 2007 and January and February, 2008, but not thereafter. He said it was pursuant to a Term Engagement Agreement dated May 1, 2007 between CCC and Credifinance to pay whatever he felt necessary and that there was no need for it after February 2008. DSLC thought that the $550,000 plus $400,000 loan would remain in Credifinance.

19 Mr. Lorenzo says Mr. Benarroch originally included the commitment of CCC and DSLC to generate a fee income of $25,000 each per month under Article 6 (f) (i) of the Share Subscription Agreement. It was later determined that Credifinance might not be determined by the IDA to have satisfied its revenue rules so they deleted the references to guaranteed fees by CCC and DSLC. However, the parties agreed to honour their commitments outside of the Share Subscription Agreement in accordance with memoranda in August 2007, agreed by both parties. DSLC abided by the commitment to generate at least $25,000 per month in order to maintain the account at about $550,000. This term requiring CCC and DSLC to guarantee fee income of $25,000 each was essential to DSLC. Ms. Glover sent invoices to DSLC requesting DSLC to pay $25,000 to

Credifinance "in accordance with Agreement". It was not honoured by CCC after February 2008. Mr. Benarroch says there was no agreement.

20 After September 2008, DSLC made no further loans to Credifinance as Mr. Benarroch had not signed a shareholders' agreement under the Share Subscription Agreement and had not appointed Mr. Lorenzo or Robert to the board of directors.

21 Notwithstanding regular financial reporting to Robert, only mild complaint was made in an email as to non-payment of the $25,000 in June, 2008 and then not again until the Share Purchase Agreement and the explicit term that Mr. Benarroch would not contribute funds. In February 2008, Robert Carbonaro ("Robert"), brother of David, told Mr. Benarroch to vacate his office as he was "taking over" as CEO.

22 From April 15, 2008, on, Robert was developing business for Credifinance in the Middle East among wealthy people who were prepared to invest in Canadian securities.

23 He was Vice President and COO. Until his departure in December 2008, he or Mr. Lorenzo received all financial and other information requested from Marjorie Glover but he did not tell Morawetz J.

24 Robert discussed with Ms. Glover in February 2008 the investigation against Mr. Benarroch, Ms. Glover and Credifinance. She told him it had been dismissed on appeal in July, 2007 and that there had been nothing further since then. She did not mention an examination of Benarroch in April 2007 or a further request for information in July 2007 by IDA.

25 This was the same information that had been provided to John Lorenzo and David, on behalf of DSLC, in August 2007, by Mr. Benarroch when they were negotiating the Share Subscription Agreement between DSLC and Credifinance.

26 In 2008, CCC transferred its shares in Credifinance to Donabo Inc., a Nova Scotia company.

27 In the Fall of 2008, Mr. Benarroch refused to open any new accounts or hire staff pending negotiation and closing of a new purchase agreement.

Share Purchase Agreement

28 In the summer of 2008 it was decided that the Share Subscription Agreement was too complicated. DSLC and Donabo negotiated and signed on October 9, 2008, a Share Purchase Agreement between DSLC, as purchaser, and Donabo Inc., as vendor, for shares of Credifinance for $600,000, payable $350,000 on closing and $250,000 within 90 days. Closing was to be the later of October 31, 2008 or the date of regulatory approvals. There would be 4 directors with 3 nominated by the purchaser and one by the vendor. Among the vendor's representations was "that to the best of its knowledge and belief...(f) The material debts, contracts and liabilities, present or future, contingent or otherwise ... have been disclosed to the Purchaser (and accurately set out in the financial statements of the Corporation annexed hereto as Schedule "B")..." Georges Benarroch would be chairman of the board for 5 years at $75,000 per year plus payment of his disability insurance premiums of $20,000. The vendor would have no obligation to generate revenue for Credifinance. Approval of IIROC was a condition of closing. Donabo would continue to hold 15% of the shares. If the transaction did not close for any reason, the Share Purchase Agreement would terminate and the terms of the Share Subscription Agreement between DSLC and Credifinance of November 13, 2007 would reactivate.

IIROC Charges

29 On November 6, 2008, in an email from Mr. Fenton of Aird, Berlis, Credifinance was accusing DSLC of delay for failure to close, notwithstanding DSLC had not yet received consent from IIROC. They threatened to terminate the agreement if not closed by November 11 saying there were "regulatory reasons".

30 Mr. Crawley said he received a draft notice of hearing on November 7, 2008 for the purpose of setting a date to determine a hearing. He then advised Mr. Benarroch by telephone.

31 Late on Thursday, November 13, 2008, Marjorie Glover of Credifinance received notice from IIROC of a hearing in the matter of Georges Benarroch, Marjorie Ann Glover, Linda Kent and Credifinance. The charges related to misconduct between January 2003 and March 2006 in respect of Magnum D'Or Resources Inc. and Osprey Gold Corp. It also related to Benarroch allegedly misleading IDA investigators between September 2005 and April 2007. Ms. Glover forwarded it to Mr. Benarroch on November 14, 2008. Mr. Benarroch sent it to Mr. Crawley, with whom he wanted to discuss it on November 14, 2008 before sending it to anyone else. It was not sent to DSLC.

32 The charges exposed the principals to fines of up to $1 million and Credifinance of a fine of up to $5 million and expulsion from membership in IIROC.

The Missed Closing

33 On Friday, November 14, 2008, IIROC sent notice to Robert that "it did not object to the purchase of an additional 833,000 shares of Credifinance from Donabo Inc. by DSLC."

34 On November 17, 2008, Robert discovered on the IIROC website the notice of hearing of November 13, 2008, independent of any efforts by Credifinance or its principals. Ms. Glover normally sent IIROC emails to Robert, but not that of November 13. Ms. Glover said she thought Mr. Benarroch had done so.

35 The charges resulted in a "contingent liability" for costs and expenses relating to the pending hearing and for fines and other penalties that may be imposed by IIROC. It also resulted in material impairment to the goodwill and market value of Credifinance.

36 On November 24, 2008, Credifinance terminated its Share Purchase Agreement. The Share Subscription Agreement was thus reactivated. Further, Mr. Benarroch declared DSLC in default of the Share Subscription Agreement since it had the obligation to provide up to $2 million in subordinated loans to Credifinance. However, it required that they negotiate in good faith a unanimous shareholders agreement. There was no firm agreement to lend the further $1.6 million until such an agreement was negotiated. None was signed.

37 Credifinance alleges that DSLC stalled in closing pending efforts to obtain the $350,000. It said DSLC's bank account showed that it did not have the $350,000 available to close the Share Purchase Agreement before Credifinance cancelled the agreement on November 24, 2008.

38 Mr. Lewis and Robert advised Mr. Fenton of Aird, Berlis on November 6, 2008 that DSLC was in funds to close, notwithstanding there was only $82,857 in the account. DSLC's bank account did not have the $350,000 necessary to close until November 25, 2008. On November 26 and 28, $130,000 was taken out and returned to investors.

Subsequent Events

39 DSLC demanded repayment of the loan of $400,000 in early December. Credifinance refused.

40 Robert resigned December 8, 2008, leaving substantial fees owing to him.

41 Credifinance took steps to close down retail operations and resign its membership in IIROC on December 23, 2008. It started to re-develop its M&A activity, advisory business and raising capital for clients by way of private placements or from institutional clients for which it did not need IIROC membership. It continued to deal with the closing of retail accounts, supervision of the preparation of Credifinance's termination audit, dealing with the IIROC investigation, closing of Canaccord accounts and termination of membership in IIROC.

42 Credifinance paid $20,645 to Benarroch in Paris as a consulting fee in January 2009. This was the first time such a payment was made. It was at the rate of about $5,000 or 3000 per month.

43 On February 10, 2009 Credifinance had $392,334.86 and $1,606.60 (U.S.) with National Bank and $150,257 with

Canaccord. I released $40,000 on February 12 and $50,000 on March 19, 2009 to pay expenses. There should be at least $60,257 in Canaccord and $392,334 plus $1,606 (U.S.) in National Bank of Canada.

44 Credifinance's membership in IIROC was suspended on March 6, 2009 due to a deficiency of about $250,000 in firm capital after release of $40,000 on February 12, 2009.

45 On April 1, 2009 IIROC terminated the Subordinated Loan Agreement, removing IIROC's restriction on repayment of the loan. In doing so, IIROC noted $632,000 in cash to meet liabilities of $26,000 before subordinated loans of $400,000. This would leave about $56,000 available after the authorized payout of $90,000 on February 12 and March 19, 2009 and approximately $60,000 for expenses for December 24, 2008 to February 12, 2009 and the $20,300 for consulting fees to Mr. Benarroch.

46 Credifinance's lease of 2,000 sq. ft. of space in Yorkville for $6,600 per month expires at the end of 2009. It is trying to sublet some or all of the space. Ms. Glover and a bookkeeper are the only employees. Ms. Glover has been employed since 1991 and earns $78,000 per year.

The Law

Mareva Injunction

47 This case highlights the dilemma of a Mareva injunction. If dissolved, the defendant Mr. Benarroch may move the $460,000 or some large part of it offshore making execution of a judgment more difficult. Or, the money could be used to defend the claim on the loan and to prosecute a damage claim, thus reducing the amount available. On the other hand, if the injunction is maintained or the money paid into court, it will remain secure pending the outcome of the action for the recovery of the loan or damages, and for costs. This would be unfair to the defendant unless good grounds exist to justify the injunction.

48 A Mareva injunction is a highly unusual *ex parte* remedy. It is issued only if the applicant has a strong *prima facie* case of fraud sufficient to overcome the common law rule of no execution before judgment. The plaintiff must make a full and frank disclosure of material matters and fairly state the defendant's case. He must also show that there is a real and genuine risk the defendant will put his assets beyond his creditors for the purpose of avoiding judgment so as to render tracing remote. The defendant is entitled to use his assets to carry on his business but he is not entitled to dissipate his assets or remove his assets to avoid judgment. Further, the plaintiff must show irreparable harm that can't be compensated in damages and that the balance of convenience favours him. See *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.); *Aetna Financial Services Ltd. v. Feigelman* (1985), 15 D.L.R. (4th) 161 (S.C.C.) . If there is a material non-disclosure or misstatement, the injunction must be set aside as a matter of right, without regard to whether the injunction might be sustainable on the basis of a corrected record: See *United States v. Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.)per Sharpe. J. at p. 178.

49 The plaintiff wishes to tie up money which could otherwise be used on expenses such as payment of suppliers in the ordinary course, salaries and termination pay for employees, rent coming due by the end of the lease term and legal fees to resist the action. All such expenses will reduce the money available to satisfy any judgment.

Rule 45.02

50 Alternatively, the plaintiff seeks an order under Rule 45.02 which reads as follows: Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

51 In order to succeed:

a) the plaintiff must claim a right to a specific fund;

b) there is a serious issue to be tried regarding the plaintiff's claim to that fund;

c) the balance of convenience favours granting the relief sought by the plaintiff.

See *News Canada Marketing Inc. v. TD Evergreen*, 2000 CarswellOnt 3544 (Ont. S.C.J.).

52 The requirement of a strong *prima facie* case does not apply to R. 45.02. However, it is an extreme remedy and judicial discretion, including a serious issue to be tried, irreparable harm and balance of convenience favouring the plaintiff, should be exercised before an order is made. *American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd.* (2007), 86 O.R. (3d) 53 (Ont. S.C.J.).

Specific Fund

53 In *Rotin v. Lechcier-Kimel*, [1985] O.J. No. 466 (Ont. H.C.) White J. stated:

> In my opinion, "Specific fund" ... means a reasonably identified fund earmarked to the litigation in issue. That which a mortgagor owes on a mortgage is a mere chose in action and ... has not assumed the status of a specific fund.

54 In *Rosen v. Homelife/St. Andrew's Realty Inc.*, [1994] O.J. No. 2887 (Ont. Gen. Div.) McFarland J. said:

> ...the rule is intended for the presentation of property which is in existence and in the case of money, is reasonably identifiable fund which can be earmarked to the litigation in issue ... The rule provides jurisdiction ... only for the "specific fund" to be paid into court and not, where the fund is no longer available, for other monies to be paid into court in lieu thereof.

55 In *Assante Financial Management Ltd. v. Dixon*, [2004] O.J. No. 2237 (Ont. S.C.J.) para. 28 Wilton-Siegel J. noted that there was a "subtle but important difference between an amount that may be owing to the plaintiff and a right of the plaintiff to a fund". The plaintiff had only established a possible claim for payment of damages leased on an alleged breach of contract. Therefore the plaintiff was really seeking execution before judgment rather than preservation of a specific fund.

56 To the extent the funds have been commingled, they cannot be subject to R. 45.02. To the extent they have not been commingled, I see no reason why they cannot be subject to R. 45.02. They are the remaining integral part of the $407,500.

57 The plaintiff claims it is entitled to the $407,524 originally held in a GIC with National Bank of Canada. It was held in a GIC until October 27, 2008 and then was placed in its bank account and used, to the extent of some $43,000, to pay creditors' expenses. It reached as low as $364,000 on December 31, 2008 and is now at $392,334.86 plus $1,606.60 (U.S.). Subject to examination, these expenses appear to be in the normal course of business with the possible exception of the $20, 300 consulting fee. I hold that while there was some commingling of monies, $310,500 constitutes a specific fund to which the plaintiff lays claim. To the extent of $310,500 of the $407,524, there was no commingling of funds.

Discussion

Possible Risk of Removal

58 Mr. Benarroch has lived in Paris for 10 years. There is evidence that he periodically visits a home in the Annex of Toronto and his family cottage in Ontario. These properties are owned by a foreign trust for his family, not by Mr. Benarroch. He refused to answer questions about other property he may own in Ontario. There is no evidence he owns any property or other assets in Ontario. Subject to the injunction, he may take the $392,334 and $1,606 (U.S.) and $60,200 and move it offshore. He has already taken $20,300 by way of management fees from the company in 2009 and had it paid to Paris. I see nothing to prevent his taking more offshore. If he does, it is gone with nothing to replace it. He could, but not necessarily would, take these assets offshore.

Contribute $25,000 Monthly

59 On October 1, 2007 Mr. Lorenzo suggested in an email that Benarroch invest $25,000 or so a month in Credifinance as one-half the expenses and to maintain cash at $550,000 to $600,000. Benarroch replied in an email "Looks fine" and then went on to arrange to meet Lorenzo at the Café de la Paix in Paris. David, who drafted the Share Subscription Agreement, was persuaded to omit this from the agreement and to put an "entire agreement" clause in the agreement. He says it was because there already was a letter agreement or at least they had orally agreed to contribute equally. Notwithstanding this, Benarroch paid the $25,000 in January and February 2008 and then ceased. Mr. Benarroch said it was payable pursuant to a Term Engagement dated May 1, 2007 by CCC but was no longer required after February, 2008. Robert, who was producing fee-paying business totalling more than $25,000 per month on behalf of DSLC, raised the issue in June 2008. Benarroch replied with a collateral argument. Nothing further was heard of the matter until the Share Purchase Agreement which said he would not have to contribute. It is debatable whether there was a commitment to contribute. This was not enunciated in the materials before Morawetz J. The judge was left with the impression that there was a clear obligation to contribute.

Non-Appointment of Lorenzo

60 In para. 27 of the motion record Mr. Lorenzo complained that he was not appointed as a director of Credifinance. However, Mr. Lorenzo had earlier said that he was not an expert in securities dealers' financing and Robert would have been a better nominee as director. In fact Mr. Benarroch appointed neither.

61 Paragraph 43 of the motion record said that the defendants failed to produce any financial reporting to DSLC. Robert was provided with everything he asked for from January to November, 2008.

The $400,000

62 DSLC said in the *ex parte* Motion Record at paragraph 51 of Mr. Lorenzo's affidavit, referring to December 2008:

> ...following the demand for repayment of the $400,000 loan, the defendants proceeded to close the account with National Bank of Canada in which the loan was deposited and held. It is unknown what the defendants did with the proceeds of the loan.

At para. 53 Mr. Lorenzo said:

> ...It is alleged in the notice of claim that Benarroch and Glover conspired to convert the loan to their own use and dissipated it. Other than the approximate $80,000.00 in commissions owed to Carbonaro and Michael, there were no creditors of Credifinance that would have had a priority claim to the loan and the $400,000 ought to have been repaid to DSLC subject to the approval of the IIROC which had already been requested.

At para. 55:

> ...DSLC alleges in the notice of action that the defendants have converted these funds to their own use and otherwise dissipated the funds so that they are not available to pay amounts owing to DSLC.

63 Paragraph 51 is wrong. Ms. Glover asked Robert about liquidation of the GIC but he did not respond. Nothing required that the $400,000 be kept in any particular form or instrument. Ms. Glover liquidated it on October 27, 2008. The National Bank account was still open. There were no grounds for saying it had been removed.

64 Paragraph 53 states as sworn evidence what is unsworn in the Notice of Claim but that is not in fact correct. There are also claims for rent, salary, telephone and other supplies and termination pay. The terms of the Subordinated Loan Agreement required that it be available to other creditors in the ordinary course of business before DSLC could lay claim to the funds. It did not say DSLC would rank equally with those other creditors. That only changed when the Subordinated Loan Agreement was cancelled on April 1, 2009.

65 Paragraph 55 is clearly wrong. The defendants have not converted those funds materially below the $400,000 or converted them to their own use and have not dissipated them. There is no evidence of dissipation. There was only suspicion. This was not drawn to the attention of Morawetz J.

66 However, because they failed to contribute the $25,000 per month the defendants used the funds in Canaccord and the $400,000 to pay the continuing expenses. If they had contributed $25,000 per month towards expenses there would have been about $200,000 more in Credifinance.

67 I find there is still about $395,000 in Credifinance, plus another $60,000 in Canaccord, after allowing for expenses of $90,000 which I have approved.

DSLC Not Aware of Investigation

68 While representing Fortune in 2005, David learned of an IDA investigation. In August 2007, Mr. Lorenzo and David were advised of the IDA charges and were told Credifinance's appeal had been successful. Robert discussed the charges with Ms. Glover in February 2008 and was told the same thing and that there had not been any activity on the investigation for many months. They had read the appeal decision of July 2007. It was not apparent to them from the appeal decision that there were also misconduct charges continuing to be investigated. Mr. Crawley's evidence of December 2005 confirms this. Credifinance suggests otherwise. Having read the decision of the appeal panel three times, I agree with DSLC that there were no other charges apparent or pending. IIROC would certainly not tell Credifinance or anyone else that it was investigating charges. DSLC was not aware of further "misconduct" charges or that they were still under investigation. The November 13, 2008 charges, discovered on November 17, were a surprise to DSLC and raised a problem with the Credifinance finances and membership in IIROC so essential to DSLC.

69 Mr. Benarroch said, after receiving the November 13 notice, that he wanted to discuss it with Mr. Crawley first before advising DSLC. Ms. Glover said it was an oversight that it was not sent to DSLC. DSLC was not aware of it until Monday, November 17, 2008. It is a question of fact whether there was an effort to conceal the hearing until the transaction closed.

70 Credifinance's March 31, 2007 statements issued in August 2007 noted the success of the appeal decision in July 2007. However, the March 31, 2008 statements issued in 2008 made no reference to the investigation of the IDA charges. Mr. Benarroch said that IIROC did not require that statements disclose a continuing investigation if no charges had been laid. IIROC concurred with this non-disclosure in the Spring of 2008.

DSLC Insolvent

71 In February 2009, when DSLC gave its undertaking to pay damages, it appears DSLC was insolvent. It had $2,000 in cash and subject to Credifinance's expenses, $407,000 or less repayable by Credifinance. It had about $750,000 in shareholder loans. Accordingly, it was $341,000, or more, in deficit. If liable for $2 million plus costs on default of the Share Subscription Agreement it was seriously in deficit. This shortfall was not made apparent to Morawetz J. before granting the injunction. The defendants claim that the undertaking is insufficient.

U.S. Lawsuit

72 CCC and Credifinance were engaged in litigation with some U.S. investors. Mr. Benarroch did not tell DSLC or the auditors of this litigation because they were fully indemnified by BMB Munai, a large public company which was a co-defendant. It was not noted on the financial statements. Mr. Benarroch says IIROC did not require disclosure. DSLC says it was misled.

Other Expenses

73 Credifinance paid Ms. Glover and a bookkeeper but the employees did other work for Mr. Benarroch besides the

normal course of business for Credifinance. Credifinance was also using its funds to pay the legal fees of all the defendants and it would be liable for supplier costs, termination costs for these employees and for continued payment of rent to the expiry of the term in January 2010. DSLC says these are not costs for which it should be liable. Further, these costs could well eat into the $407,000.

Conclusion

74 I am satisfied that if the injunction were dissolved, Mr. Benarroch could move the funds offshore so as to render tracing remote. If he does so, the plaintiff will be irreparably harmed. The balance of convenience clearly favours the plaintiff. Donabo and CCC are not subject to the order of the Ontario courts so no order by this court would affect them.

75 However, the plaintiff did not make a full and frank disclosure of material matters and fairly state the defendant's case in respect of the errors noted in paras. 43, 51, 53 and 55 of his affidavit, the "obligation" to pay $25,000 per month and in respect of the solvency of the plaintiff in giving the undertaking. Mr. Lorenzo was substantially speculative with respect to the location of the $407,000 after liquidating the GIC. Mr. Lorenzo obviously did not know things Robert knew but this lack of communication must fall at the feet of the plaintiff.

76 There was also no evidence presented to Morawetz J. that Mr. Benarroch or CCC may or may not be obliged to pay $25,000 per month by way of sharing expenses. The plaintiff made much of this point and it deserved to be presented to Morawetz J. fairly.

77 There is much evidence of fraud but I do not think the plaintiff had made out a strong *prima facie* case of fraud.

78 A strong *prima facie* case of fraud is not a consideration under R. 45.02. However, there must be a specific fund. The $407,000 was commingled with other funds but at any month-end it never fell below $364,742.72 on December 31, 2008 and on February 10, 2009 it stood at $392,334.56 plus $1,606.66 (U.S.). To the extent the $407,000 was depleted, there was no depletion of the original fund, according to the General Ledger Activity for January, 2009, below $310,500. I find a specific fund of $310,500 remaining.

Disposition

79 I order the defendant Credifinance to pay $310,500 into court under R. 45.02 pending the ultimate disposition or settlement of this action whereupon the injunction will be dissolved and terminated.

TAB 8

COURT FILE NO.: 188/09
DATE: 20090723

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:	
DSLC CAPITAL CORP.	Gregory Zidlofsky, for the Plaintiff
Plaintiff	
- and -	
CREDIFINANCE SECURITIES LIMITED, DONABO INC., GEORGES BENARROCH, MARJORIE ANN GLOVER, and CREDIFINANCE CAPITAL CORP.	John Longo, for the Defendants
Defendants	
	Heard: June 10, 2009

Ellen Macdonald J.

REASONS FOR DECISION

[1] The Defendant, Credifinance Securities Limited ("Credifinance") seeks leave to appeal the order of the Honourable Mr. Justice Cameron made on April 20, 2009. Justice Cameron ordered Credifinance to pay $310,500 into court pursuant to rule 45.02. Rule 45.02 states:

> Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

[2] The motion before Justice Cameron was heard on March 30, 31, and April 7, 2009. The motion sought to continue until trial the interim *Mareva* injunction granted *ex parte* to DSLC Capital Corp. ("DSLC") by Justice Morawetz on February 6, 2009. The order of Justice Morawetz was modified by Justice Cameron on February 12, 2009, when he discontinued the injunction as against Marjorie Ann Glover, but continued it as against the remaining Defendants.

[3] Credifinance (the moving party) requests that this court grant leave to appeal from the order of Justice Cameron with costs. According to rule 62.02(4), leave to appeal to the Divisional Court shall not be granted unless:

> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[4] In this motion, Credifinance submits that the requirements of both r. 62.02(4)(a) and (b), above, are met here. First, with respect to (4)(a), it submits that there are conflicting decisions on the matters raised in the proposed appeal, and that it is desirable that leave to appeal be granted, since litigants in Ontario would benefit from a pronouncement by a full panel of the Divisional Court as to the scope of rule 45.02 jurisdiction.

[5] Second, even if the requirements of (4)(a) are not met, Credifinance submits that the requirements of (4)(b) are met. There is reason to doubt the correctness of Justice Cameron's finding that a specific fund ever existed. Further, even if there was a specific fund at one time, Justice Cameron ought to have found that it ceased to exist once it was commingled with other funds. These doubts are significant not only as they relate to this case, and not only as they relate to this parties. Rather, they are of such general importance to the development of law and the administration of justice, that leave to appeal should be granted.

[6] DSLC counters that there are no decisions that conflict with the order appealed from, and no reasons to doubt the correctness of this order. Rather, Justice Cameron correctly found that the $310,500 in question was a specific fund. Further, DSLC submits that the order is of significance only to the parties, and that there are no general issues of public importance raised by Credifinace in this motion for leave.

[7] It is common ground that for the court to grant an order under rule 45.02, the following requirements must be met: (a) the plaintiff must claim a right to a specific fund; (b) there must be a serious issue to be tried regarding the plaintiff's claim to the fund; and (c) the balance of convenience must favour granting the relief sought. This motion for leave concerns the first branch of this three-part test. Justice Cameron's reasons with respect to this branch are detailed and comprehensive. I refer specifically to paras. 56 and 57 of his decision:

> To the extent the funds have been commingled, they cannot be subject to R. 45.02. To the extent they have not been commingled, I see no reason why they cannot be subject to R. 45.02. They are the remaining integral part of the $407,500.
>
> The plaintiff claims it is entitled to the $407,524 originally held in a GIC with National Bank of Canada. It was held in a GIC until October 27, 2008 and then was placed in its bank account and used, to the extent of some $43,000, to pay creditors' expenses. It reached as low as $364,000 on December 31, 2008 and is now at $392,334.86 plus $1,606.60 (U.S.). Subject to examination, these expenses appear to be in the normal course of business with the possible exception of the $20,300 consulting fee. I hold that while there was some commingling of monies, $310,500 constitutes a specific fund to which the plaintiff lays claim. To the extent of $310,500 of the $407,524, there was no commingling of funds.

[8] I agree with Credifinance that a party seeking a rule 45.02 order must claim a specific fund, and that even where a specific fund is claimed, a rule 45.02 order may be rendered unavailable to the extent that the specific fund has been commingled with other funds. The jurisprudence is clear on these points.

[9] Upon a thorough review of the record before Justice Cameron and the record before this court, however, I see no good reason to doubt the findings of Justice Cameron that these requirements were met in this case. A specific fund was defined in *Rotin v. Lechcier-Kimel*, [1985] O.J. No. 466 (H.C.J.), as "a *reasonably* identifiable fund earmarked to the litigation in issue" (emphasis added). It was reasonable for Justice Cameron to find that the right of DSLC to a specific fund was in question, notwithstanding that that DSLC's claim is sounded in damages. Further, it was reasonable for him to find that while this fund was no long traceable in its entirety, there remained $310,500 which were directly traceable to the original fund, and which had not been commingled. There is therefore no conflict between Justice Cameron's order and the case law concerning Rule 45.02, nor is there any other good reason to doubt the former's correctness.

[10] Given my finding that Justice Cameron's order is consistent with the case law, and that there is no other good reason to doubt its correctness, it is my opinion that an appeal is neither desirable, nor necessary to ensure the resolution of matters of public importance.

[11] For these reasons, this application for leave to appeal is dismissed.

[12] During oral submissions, counsel agreed that there would be no costs awarded if Credifinance proved successful on this motion, and that DSLC would receive $3,000 in the event this motion was dismissed. Accordingly, costs are awarded to DSLC in the amount of $3,000.

Ellen Macdonald J.

Released: July 23, 2009

COURT FILE NO.: 188/09
DATE: 20090723

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

DSLC CAPITAL CORP.

Plaintiffs

- and -

CREDIFINANCE SECURITIES LIMITED, DONABO INC., GEORGES BENARROCH, MARJORIE ANN GLOVER, and CREDIFINANCE CAPITAL CORP.

Defendants

REASONS FOR DECISION

Ellen Macdonald J.

TAB 9

2006 CarswellOnt 2802
Ontario Superior Court of Justice

Miller v. Carley

2006 CarswellOnt 2802, [2006] O.J. No. 1813, 148 A.C.W.S. (3d) 40

Paul Miller (Plaintiff) and Daniel Carley (Defendant)

Taliano J.

Heard: March 23, 2006
Judgment: May 5, 2006
Docket: 47746/06

Counsel: Peter A. Mahoney, Bradley J. Troup for Plaintiff
David Shapiro for Defendant

Subject: Civil Practice and Procedure; Property

Related Abridgment Classifications

Civil practice and procedure
XV Preservation of property rights pending litigation
XV.2 Interim preservation of property

Headnote

Civil practice and procedure --- Pre-trial procedures — Interim preservation of property
Defendant won lottery and received proceeds — Plaintiff alleged that he and defendant agreed to pool funds for purchase of lottery tickets and share equally between them if any winnings resulted from purchase of such lottery tickets — Plaintiff brought motion pursuant to R. 45.02 of Rules of Civil Procedure for order requiring proceeds of lottery winning to be paid into court pending disposition of action — Motion dismissed — Although plaintiff established serious issue to be tried, plaintiff failed to meet other two parts of test for payment into court of specific fund — Plaintiff failed to establish right to specific fund as proceeds were paid to defendant and converted into his own personal asset rendering fund unidentifiable — Plaintiff failed to advance compelling reasons to justify balance in favour of payment into court as evidence did not indicate defendant intended to do anything to frustrate plaintiff's recovery of judgment if successful — Order would cause potential harm to defendant by depriving him control of his assets.

Table of Authorities

Cases considered by *Taliano J.*:

Assante Financial Management Ltd. v. Dixon (2004), 8 C.P.C. (6th) 57, 2004 CarswellOnt 2158 (Ont. S.C.J.) — considered

Dialadex Communications Inc. v. Crammond (1987), 57 O.R. (2d) 746, 34 D.L.R. (4th) 392, 14 C.P.R. (3d) 145, 1987 CarswellOnt 837 (Ont. H.C.) — considered

Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada Ltd. (2005), 6 B.L.R. (4th) 182, 2005 CarswellOnt 1954 (Ont. S.C.J.) — considered

Mutual Tech Canada Inc. v. Law (2003), 2003 CarswellOnt 892 (Ont. Master) — considered

News Canada Marketing Inc. v. TD Evergreen (2000), 2000 CarswellOnt 3544 (Ont. S.C.J.) — followed

Rotin v. Lechcier-Kimel (1985), 3 C.P.C. (2d) 15, 1985 CarswellOnt 405 (Ont. H.C.) — considered

Stearns v. Scocchia (2002), 2002 CarswellOnt 3700, 27 C.P.C. (5th) 339, [2002] O.T.C. 855 (Ont. S.C.J.) — followed

Thunder Bay (City) v. 1013951 Ontario Ltd. (2000), 2000 CarswellOnt 1231, 32 R.P.R. (3d) 63, 10 M.P.L.R. (3d) 184 (Ont. S.C.J.) — considered

Toronto Port Authority v. Canada Auto Parks-Queenpark Ltd. (2000), 2000 CarswellOnt 4241, 3 C.P.C. (5th) 104 (Ont. S.C.J.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 45 — referred to

R. 45.02 — pursuant to

MOTION by plaintiff for payment into court of lottery proceeds.

***Taliano J.*:**

1 The defendant has hit the jackpot — a five million dollar jackpot to be exact. It happened on February 21, 2006. However, life has a way of tempering good fortune with adversity because the plaintiff, who is a good friend of the defendant, claims a 50% interest in the jackpot and seeks an order pursuant to Rule 45.02 requiring the winnings to be paid into court pending disposition of the plaintiff's action.

2 In support of his claim, the plaintiff filed an affidavit dated March 10, 2006, which is sketchy to say the least. In it, he alleges that he had entered into a "joint venture/partnership" with the defendant to purchase Ontario Big Win Lottery tickets. His cash contribution to the venture was ten dollars. In addition, he alleges that he used his car to drive the defendant to several retail outlets to purchase the tickets and that he himself had actually scratched the winning ticket of the 12 tickets that the defendant had purchased. He also alleges in this affidavit that he drove the defendant to Toronto the next day to collect the winnings.

3 The defendant vigourously disputes the plaintiff's claim. In a detailed responding affidavit, dated March 15, 2006, the defendant denies any partnership with the plaintiff and alleges that there was a third person present when the lottery tickets were purchased, one Bob Delisle, a friend of both the plaintiff and the defendant, whose evidence supports the defendant. The defendant alleges that the plaintiff did come to the defendant's residence on February 21st and together they went to pick up Bob Delisle. The threesome then made several stops before the defendant announced that he wanted to purchase lottery tickets. They then stopped for gas, which the defendant alleges he paid for and proceeded to two retail outlets where the defendant tried unsuccessfully to purchase tickets. The defendant then instructed the plaintiff to drive to a third outlet, an Avondale store and when they arrived the defendant went into the store. This retail outlet had 12 tickets left and the defendant bought all 12 tickets for ten dollars each. He returned to the vehicle and handed several tickets to his friends to scratch. One of the tickets that he had handed to the plaintiff to scratch was the winning ticket. The plaintiff announced the win according to the defendant by saying, *you just won five million dollars*. The three friends went back into the store and announced the good news to the clerk and the defendant took the remaining fifty dollars he had in his wallet and gave it to the clerk.

4 Upon returning to the vehicle, the defendant telephoned his father to announce his good luck and the threesome went straight to the defendant's home to show his disbelieving father the winning ticket. When his mother entered the home at 5:30 p.m. that same day, he shared the good news with her. Later that same evening, the defendant's sister and fiancé came to the house and they were also told the news. All of these communications were made in the presence of the plaintiff and Bob Delisle and at no time did the plaintiff assert that he was a partner in the winning ticket according to the evidence of the defendant and Delisle. They celebrated until four o'clock in the morning at which time the threesome agreed that they would drive to Toronto later that day to pick up the winnings. After breakfasting together and joking with the waitress that the defendant was a millionaire, the three friends did go to Toronto in the plaintiff's vehicle to collect the prize.

5 At the lottery office, reception scanned the winning ticket and confirmed its validity. The three friends were then shown to the "Winners Circle", where they remained for several hours. Before receiving the proceeds of the lottery, the defendant was asked by gaming officials, in the presence of his two friends, if there was anyone else who was entitled to a share in the winning ticket and the defendant replied no and no one contradicted him. Gaming officials also asked the plaintiff and Bob Delisle if they had any interest in or were entitled to any portion of the winning ticket and each of them denied that they had any right to or interest in the winning ticket or the proceeds. The defendant was therefore presented with a cheque for five million dollars and the three friends returned to St. Catharines.

6 That evening, the threesome and others attended a celebration during which, the defendant was interviewed by the press, allegedly in the presence of the plaintiff, concerning the lottery and at no time during the celebration did the plaintiff assert to the press or to others that he had an interest in the winning ticket. It was not until February 23rd that the defendant heard that the plaintiff was asserting a claim and he telephoned the plaintiff to verify if what he had heard was true. The plaintiff denied saying anything to this effect. On February 27th, the defendant announced to his two good friends that he was going to build them a house. However, by a letter dated March 1, 2006, authored by the plaintiff's solicitors, the plaintiff asserted a claim to a portion of the winnings.

7 Bob Delisle swore an affidavit dated March 15, 2006, in support of the defendant's version of events. Mr. Delisle states that the idea to purchase the lottery tickets was the defendant's idea alone and at no time did he see the plaintiff tender any money towards the purchase of the tickets. Nor at any time during the celebrations afterwards did the plaintiff express any claim or interest in the ticket or the winnings. Mr. Delisle also confirms the defendant's version of events that occurred at the lottery office in Toronto.

8 In the plaintiff's responding affidavit dated March 20, 2006, the plaintiff repeats his allegation that he contributed ten dollars towards the purchase of the lottery tickets and states that the money was given to the defendant *before* picking up Mr. Delisle on February 21st. In this affidavit, he also asserts, for the first time, that they stopped for gas at one of the retail outlets and that he paid five dollars to the defendant to give to the clerk in the store. Also for the first time, he states that the defendant did not want anyone to know about winning the lottery and asked his friends not to say anything. Notwithstanding, the plaintiff asserts that he did telephone his girlfriend and told her that he and the defendant had won the lottery and the defendant got on the telephone to confirm it.

9 The plaintiff offers an unusual explanation for his silence at the lottery office in Toronto. He states that although he drove to Toronto that day, he did not have his driver's licence with him. He claims that they knew without identification, a cheque would not be issued and not wanting to hold up the release of the winnings, he denied having any interest in the winnings.

10 With respect to the media interview, the plaintiff alleges that the defendant requested that the plaintiff let the defendant do the talking so that he could promote and advertise his bar during the interview. The plaintiff agreed and therefore said nothing. In addition, he alleges that he was not present during the actual interview.

11 With respect to his silence throughout the critical two-day period of winning and collecting the lottery, the plaintiff states that on the way back to St. Catharines from Toronto, the plaintiff asked the defendant when *"he would be hooking me up"*, meaning when would the defendant give the plaintiff his share of the winnings, and he states that the defendant did not respond. When he asked the same question several days later, the defendant responded that he wanted to buy the plaintiff a house after he had built up some interest on the winnings. From this conversation, the plaintiff concluded that the defendant did not intend to share the winnings and he decided to seek legal advice.

12 In the plaintiff's statement of claim, he alleges in paragraph four that he entered into an agreement whereby the plaintiff and the defendant *"would pool funds for the purchase of the lottery tickets and share equally between them any winnings that resulted from the purchase of such lottery tickets. In the alternative, such agreement was implied"*. However, nowhere in any of his affidavit material does the plaintiff allege an agreement to share equally in the winnings. Had such an agreement been made, it was incumbent upon the plaintiff to set out the particulars in his affidavit material. In the absence of such an allegation, the only evidence from the plaintiff with respect to an agreement to share the winnings in his vague allegation of a joint venture partnership that he contributed ten dollars towards the cost of the tickets and his driving to get the tickets and to retrieve the lottery proceeds. Certainly this evidence falls short of establishing an entitlement to an *equal* share of the winnings and would not support a claim, even to 1/12th of the winnings if this allegation of a ten dollar contribution is disbelieved.

13 In *News Canada Marketing Inc. v. TD Evergreen*, [2000] O.J. No. 3705 (Ont. S.C.J.), Nordheimer, J. held that for a moving party to successfully apply for an order under rule 45.02:

> (a) the plaintiff must claim a right to a specific fund;
>
> (b) there must be a serious issue to be tried regarding the plaintiff's claim to that fund; (as opposed to a strong prima facie case), and
>
> (c) the balance of convenience must favour granting the relief sought.

"Right to a Specific Fund"

14 Kozak J. held in *Thunder Bay (City) v. 1013951 Ontario Ltd.*, [2000] O.J. No. 1292 (Ont. S.C.J.) at paragraph 45 that:

> The provisions of rule 45.02 are restricted to situations where the right to the fund itself is the subject of the issue in litigation. The fund is not to be paid into Court as a form of security for costs or the equivalent of execution before judgment. The purpose of a motion under rule 45.02 is to protect a claimant who is asserting a specific a proprietary claim to assets prior to trial.

It is clear that the purpose of a motion under rule 45.02 is to protect a claimant who is asserting a proprietary claim to a specific asset or assets prior to trial.

15 In *Rotin v. Lechcier-Kimel* (1985), 3 C.P.C. (2d) 15 (Ont. H.C.), White J. defined "specific fund" as follows:

> In my opinion, 'specific fund', in the absence of jurisprudence indicating otherwise, means a reasonably identifiable fund earmarked to the litigation in issue. That which a mortgagor owes on a mortgage is a mere chose in action and in my opinion has not assumed the status of a specific fund.

16 The specific fund in question in *Toronto Port Authority v. Canada Auto Parks-Queenpark Ltd.*, [2000] O.J. No. 4297 (Ont. S.C.J.), was 50% of the monthly net revenue from certain properties. The court was not satisfied that the anticipated rent revenue qualified as a specific fund contemplated by the Rules as there was no certainty as to the monthly revenue that would be generated.

17 Justice Wilton-Siegel in *Assante Financial Management Ltd. v. Dixon*, [2004] O.J. No. 2237 (Ont. S.C.J.), para 28 noted that there was *"subtle but important difference between an amount that may be owing to the plaintiff and a 'right' of the plaintiff to a fund."* The court held that the plaintiff had only established a possible claim for payment of damages based on an alleged breach of contract. Therefore, the plaintiff was really seeking execution before judgment rather than preservation of a specific fund.

18 Similarly in *Mutual Tech Canada Inc. v. Law*, [2003] O.J. No. 1015 (Ont. Master), Master MacLeod considered the

three-part test for granting an order under Rule 45.02. The evidence indicated that the disputed money no longer existed as a segregated fund but had been used to capitalize the defendant corporation. The plaintiff argued that the defendant should not be permitted to avoid the reach of Rule 45.02 by the simple act of utilizing the disputed funds. In response, the court noted at paragraph 12:

> I do not think that will always be correct. Intermingling of funds may well mean there cannot be recourse to Rule 45.02. To hold otherwise, would render the words "a specific fund" meaningless and would more resemble execution in advance of judgment than preservation of a fund. On the other hand, I agree that taking steps to intermingle funds in the face of a pending motion should not be rewarded. A party who alters the status quo in the face of a pending motion will be unable to rely on that fact. It may well be a matter of timing. It may also be the case that recourse to injunctive relief is necessary if the preconditions for an order under Rule 45.02 no longer exist. In either case, failure to move promptly may be fatal.

19 Based on the foregoing decisions, I have some doubt that the plaintiff's materials satisfy the first prong of the test. The proceeds of the lottery win were paid to the defendant and the defendant has now converted those funds to his own use. Prior to payment to the defendant, the lottery constituted a specific fund that was readily identifiable as such and would be subject to Rule 45 order. However, after payment of the proceeds to the defendant and his conversion of the fund into his own personal asset, the character of the fund changed, its boundaries blurred by the co-mingling of the fund with the personal assets of the defendant, assets which are subject to the defendant's personal direction and control. The fund no longer exists as such. To award relief to the plaintiff at this point violates that line of cases that discourages execution before judgment. As Wilton-Seigel J. stated in *Assante* (*supra)* at para 26 *"there is simply an amount yet to be determined which may be payable to the plaintiff if its view of the contractual relationship is upheld."*

20 That is not to say that tracing of the fund could not be done in the appropriate circumstances to prevent an injustice, but tracing would involve the exercise of the court's discretion, an exercise which is not warranted by the circumstances of this case.

"Serious Issue to be Tried"

21 The second step of the Rule 45.02 test requires that there be a serious issue to be tried. The standard for determining whether a serious issue to be tried exists is a lower threshold than a strong *prima facie* case. Justice Nordheimer, in *News Canada Marketing Inc. v. TD Evergreen*, (*supra)* held that a *"strong" prima facie case puts the test too high.* Justice Spies in *Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada Ltd.*, [2005] O.J. No. 1970 (Ont. S.C.J.), described the threshold of a "serious issue to be tried" as a low one, requiring a demonstration that the plaintiff's claim is not frivolous or vexatious. Where material facts are in dispute, Justice Smith, relying on *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392, 57 O.R. (2d) 746 (Ont. H.C.) at 396 , reasoned that the lower standard of demonstrating a serious issue to be tried was appropriate.

22 I am satisfied that the plaintiff has satisfied the second test requirement.

"Balance of Convenience"

23 *Stearns v. Scocchia*, [2002] O.J. No. 4244, 27 C.P.C. (5th) 339, [2002] O.T.C. 855 (Ont. S.C.J.), para 19 offers a clear description of the third step of the 45.02:

> *Essentially, it allows for an* expansive view of the facts of any particular case to allow a court, in the exercise of its discretion, to make an order where it is just and convenient to do so. *The nature of the relief sought must be* viewed against the backdrop of the particular facts *of each case when determining whether it is* just and convenient to make such an order. *A rule 45.02 order is an* exceptional category of pre-trial order, *not merely procedural in nature, and one that can have a profound impact on a party. Before such an order is granted a moving party must show that there are* cogent reasons to grant such an order and that without the order a palpable unfairness would result.

24 In my view, the plaintiff's materials do not satisfy this requirement. There is nothing in the evidence that would suggest that the defendant intends to leave the jurisdiction or to do anything else that might frustrate the plaintiff's recovery of any judgment that he might be successful in obtaining. On the other hand, making an order deprives the defendant of control over his assets. Furthermore, the plaintiff has not filed any undertaking to compensate the defendant for any damages he might sustain as a result of the making of such an order. Quite frankly, other than securing a potential judgment, no compelling reason has been advanced to justify making the requested order. Certainly it has not been demonstrated that a palpable unfairness would result if the order is not made. Accordingly, the plaintiff has not met the balance of convenience test.

25 Since the plaintiff has failed to satisfy two of the three requirements for the making of a Rule 45 order, the motion is dismissed. Costs may be spoken to if necessary.

Motion dismissed.

TAB 10

2008 CarswellOnt 2053
Ontario Superior Court of Justice

Zikman v. 156665 Canada Inc.

2008 CarswellOnt 2053, [2008] O.J. No. 1408, 166 A.C.W.S. (3d) 463, 64 C.P.C. (6th) 109

Bruce Zikman and Condotrust Realty Investments Inc. o/a Setam Real Estate Services v. 156665 Canada Inc., Regional Financial Services Limited, Lucian Michaels, Michaels & Michaels, XYZ Corporation Limited, John Doe and Jane Doe

Harris J.

Heard: April 2, 2008
Judgment: April 14, 2008*
Docket: Hamilton 07-34238

Counsel: Hendrik Keesmaat for Plaintiff
Jeffrey Kramer for Defendant

Subject: Contracts; Property; Civil Practice and Procedure

Related Abridgment Classifications

Real property
III Sale of land
III.4 Remedies
III.4.m Practice and procedure
III.4.m.v Miscellaneous

Headnote

Real property --- Sale of land — Remedies — Practice and procedure — Miscellaneous
Plaintiff and defendant were each principals and sole shareholders of separate corporations — Parties made real estate investments together through their respective corporations — Plaintiff was responsible for finding investments and negotiating purchase price — Defendant would obtain loans and advance funds necessary for purchase — Defendant was named purchaser of property — Defendant passed away and defendant estate sold property — Plaintiff brought action for half of proceeds of sale — Plaintiff brought motion for order requiring defendants to pay into court half of net proceeds of sale of property — Motion granted — Funds were readily ascertainable as function of sale price — No co-mingling of funds had occurred and funds were residing in specific trust available to be paid after trial or settlement — Balance of convenience favoured plaintiff — Abundant evidence existed showing parties had lifelong friendship and many years of partnering together on real estate investments — Purchase in question had evidentiary historical context that had similar earmarks of previous purchases between parties — Any proprietary interest normally gained by parties arose not from land but from proceeds of sales.

Table of Authorities

Cases considered by *Harris J.*:

Harris v. Lindeborg (1930), [1931] 1 D.L.R. 945, 1930 CarswellBC 127, [1931] S.C.R. 235 (S.C.C.) — referred to

News Canada Marketing Inc. v. TD Evergreen (2000), 2000 CarswellOnt 3544 (Ont. S.C.J.) — referred to

Stearns v. Scocchia (2002), 2002 CarswellOnt 3700, 27 C.P.C. (5th) 339, [2002] O.T.C. 855 (Ont. S.C.J.) — referred to

Statutes considered:

Statute of Frauds, R.S.O. 1990, c. S.19
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. **45.02** — considered

MOTION by plaintiff for order requiring defendants to pay into court half of net proceeds of sale of property.

***Harris J.*:**

1 The plaintiffs seek an order requiring the defendants to pay into court 50 percent of the net proceeds of the sale of a property (the Elgin property, Port Elgin Ontario).

2 The plaintiff, **Zikman**, is the majority shareholder of plaintiff Condotrust. The defendant, Frankel, until he died August 2004, was the sole shareholder of defendant "156 Inc."

3 Over the years Frankel and **Zikman** made real estate investments together through their respective corporations. **Zikman** would find the investments (properties), negotiate the purchase and 156 Inc. would obtain loans and advance the funds. If **Zikman** was required to guarantee the loans he would do so.

4 In return 156 Inc. would obtain 12 percent interest on the funds used for the investment. Thereafter, profits or losses would be divided 50 percent to defendant 156 Inc. and 50 percent to plaintiff Condotrust.

5 This enterprise between **Zikman** and Frankel was relatively loose and much of the agreements between these two friends would be sealed by a handshake. Not entirely surprising that the Frankel Estate, and particularly the Frankel widow, balks at the present investment known as the Elgin property as she had never been advised by her late husband of the business arrangements between Zickman and Frankel.

6 The plaintiffs support their claim in several (three) ways: firstly, by the evidence of Edward Shinder the accountant for **Zikman** and Frankel who obtained a letter (September 22, 2003) from Frankel confirming their business association and the formula the two men used.

7 Second, the financial statements of Condotrust are consistent with the Frankel letter *supra*. And thirdly, from time to time **Zikman** would stand in as a guarantor of the mortgages documents.

8 The defendants rely on several things. **Zikman** admits that he was not present when Frankel allegedly signed the September letter and neither is he (**Zikman**) able to produce the original. As well, the letter refers to an attached summary of a portfolio of properties, however, there was no attachment to the letter when he, **Zikman**, received it. As well, Frankel's widow contends that her husband was formal in all his business affairs and that all paper work was drafted by attorneys.

9 Additionally, Mrs. Frankel spoke to Lucian Michaels, a lawyer who acted on the purchase of the Ontario properties and confirmed that Condotrust had no interest in any of the Ontario properties. This is countered by the context arising from the history of **Zikman** and Frankel.

10 There is clear evidence that **Zikman** and Frankel had a long-standing relationship. They were close personally and had a mutual enterprise over the years dealing in real estate transactions. It was a no frills business relationship that worked well. Notwithstanding that the Elgin property has no documentation except for the affidavit of Kelly Panter, there is an evidentiary historical context that has the similar, or same earmarks of the previous purchases between the two men. The faxed message from law firm Michaels & Michaels, speaks of acquiring the funds from 156 Inc. for the Elgin property. Mr. **Zikman**, in his affidavit (sworn October 15, 2007), states that in the Fall of 2003, 156 Inc, made an investment with Regional Financial Services for the Elgin property on the same terms as the previous investments between Messrs. **Zikman** and Frankel. The plaintiff submits the absence of further documentation could reasonably be due to the Elgin property being acquired or *"closed"* after the date of the Frankel letter and therefore not mentioned in the December 17, 2003 letter from Regional Financial Services.

11 Rule **45.02** provides that where there is a right to a specific fund in question, the court may order the fund to be paid into court ... on such terms as are just. The test for granting an order requires that: (1) the plaintiff claims a right to the specific fund; (2) there is a serious issue to be tried regarding the plaintiffs' claim to the fund; and (3) the balance of convenience favours granting the relief sought. See *News Canada Marketing Inc. v. TD Evergreen*, [2000] O.J. No. 3705 (Ont. S.C.J.), para. 5.

12 The defendants raise the issue of *Statute of Frauds* and contend that transactions with the various properties, including the Elgin property, was an interest in land. The plaintiff contends that the interest in the lands was in money only. The Supreme Court of Canada determined the case of *Harris v. Lindeborg* (1930), [1931] 1 D.L.R. 945 (S.C.C.) holding that an agreement for the division of the proceeds of the sale of land is not an agreement within the meaning of the *Statute*. Similarly, I am of the view that this agreement was intended and acted upon solely as an agreement for the division of the proceeds of sale of land. The proprietary interest arose not from the land but from its proceeds of sale solely. Such an agreement between the parties does not confer an interest in land but rather an interest in money only. The plaintiff had no claim on the land whatsoever. His duty was to locate and investigate profitable properties and to assist in the funding when necessary. For this he was provided with 50 percent of the profits, or losses, when sold.

13 I find that the test for granting an order preserving a specific fund pursuant to Rule **45.02** has been met on all three fronts (See *News Canada ibid.*) and the *"fund"* is a reasonably identifiable fund earmarked to this law suit.

14 The amount is readily ascertainable as a function of the sale price on the Elgin property. There is no co-mingling of the funds, the funds exist and are residing in a specific trust available to be paid to this court after trial or settlement.

15 The nature of the relief sought is to be viewed against the back drop of the particular facts of each case when determining whether it is just and convenient to make such an order.

16 See *Stearns v. Scocchia* (2002), 27 C.P.C. (5th) 339, [2002] O.T.C. 855 (Ont. S.C.J.). There is abundant evidence that Messrs. **Zikman** and Frankel had a lifelong friendship and many years of partnering together on real estate investments, each with their own particular continuing tasks on their shared investments.

17 I am persuaded that the balance of convenience is with the plaintiff. The funds requested to be paid into court will be available to the party that prevails at trial. There is no discernable harm to the defendant on the plaintiffs' request.

18 There is a serious triable issue here and without that opportunity, a palpable unfairness would result.

Conclusion

19 Accordingly, the plaintiffs' motion is allowed with costs to the plaintiffs.

20 If the parties are unable agree on costs they may provide me with their cost memorandum (one page, Letterhead) within 30 days.

Motion granted.

Footnotes

* Additional reasons at ***Zikman*** *v. 156665 Canada Inc.* (2008), 2008 CarswellOnt 4921 (Ont. S.C.J.).

TAB 11

2003 CarswellOnt 892
Ontario Superior Court of Justice

Mutual Tech Canada Inc. v. Law

2003 CarswellOnt 892, [2003] O.J. No. 1015, 121 A.C.W.S. (3d) 252

Mutual Tech Canada Inc. v. Pui Ching Law et. al.

Master MacLeod

Judgment: March 5, 2003
Docket: 98-CV-143329CM

Proceedings: additional reasons at *Mutual Tech Canada Inc. v. Law* (May 5, 2003), Doc. 98-CV-143329CM (Ont. Master)

Counsel: *Ralph Cuervo-Lorens*, for Plaintiff/Moving Party
Harvey S. Dorsey, for Defendants/Responding Parties

Subject: Employment; Public

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.10 Costs of particular proceedings
XXIV.10.e Interlocutory proceedings
XXIV.10.e.ii Motions and applications

Labour and employment law
II Employment law
II.5 Wages and benefits
II.5.c Bonus contracts
II.5.c.i Bonus based on profits
II.5.c.i.B Miscellaneous

Headnote

Employment Law --- Wages and benefits — Bonus contracts — Bonus based on profits — General

Table of Authorities

Cases considered by *Master Macleod*:

American Cyanamid Co. v. Ethicon Ltd. (1975), [1975] A.C. 396, [1975] 1 All E.R. 504, [1975] F.S.R. 101, [1975] R.P.C. 531, 119 Sol. Jo. 136, [1975] 2 W.L.R. 316 (U.K. H.L.) — followed

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

Jet Print Inc. v. Cohen (1999), 1999 CarswellOnt 2357, 43 C.P.C. (4th) 123 (Ont. S.C.J.) — referred to

Micallef v. Gainers Inc. (1988), 25 C.P.C. (2d) 248, (sub nom. *Maybank Foods Inc. Pension Plan v. Gainers Inc.*) 63 O.R. (2d) 687, 1988 CarswellOnt 347 (Ont. H.C.) — referred to

News Canada Marketing Inc. v. TD Evergreen (2000), 2000 CarswellOnt 3544 (Ont. S.C.J.) — considered

Sun v. Ho (1998), 1998 CarswellOnt 995, 18 C.P.C. (4th) 363 (Ont. Gen. Div.) — referred to

Taribo Holdings Ltd. v. Storage Access Technologies Inc. (2002), 2002 CarswellOnt 3811, 27 C.P.C. (5th) 194 (Ont. S.C.J.) — referred to

Tom Jones Corp. v. Mishemukwa Developments Ltd. (1996), 46 C.P.C. (3d) 77, 1996 CarswellOnt 641 (Ont. Gen. Div.) — referred to

***Master Macleod*:**

1 The plaintiff seeks an order that a specific fund be paid into court pursuant to Rule 45.02. The motion (combined with other relief) was originally launched by the plaintiff in June of 1998 and it came before Juriansz J. in September of that year. At that time, paragraphs 1 a) and b) of the original notice of motion were adjourned "on consent *sine die* to be brought on seven days' notice". In the intervening period, the parties have engaged in a series of examinations and interlocutory motions. There have also been some efforts to settle both the motion and the action. The motion was eventually argued before me on November 27th, 2002 and January 21, 2003. I should note that the action was ordered into case management on May 15th, 2000.

2 The plaintiff is a wholesaler of integrated circuits and related computer parts and services and until the beginning of February 1998 the defendant Law was the general manager. It is undisputed that Ms. Law worked for Mutual Tech since approximately July of 1993 and was fully responsible for its operations and business. The plaintiff apparently reported to Francis C.W. Wong and he, in turn, asserts that his responsibility was to monitor the operations of Mutual Tech for his mother who is the owner. For the purpose of this motion, the ownership is not critical. There is no doubt that Ms. Law had responsibility for the day to day operations of the company.

3 There is also no real dispute that Ms. Law was compensated by way of salary and bonus. The bonus appears to have been a percentage of the profits of the corporation. Apparently there was an agreement that certain of the expenses of Mutual Tech which were expenses for the benefit of Francis Wong or the owner were not to be considered in the calculation of profit. The manner in which this usually worked was that Ms. Law would calculate her bonus and send the calculations to Mr. Wong. Ms. Law's evidence is that she would then call Mr. Wong and he would verbally acknowledge her calculation. She would then pay herself the bonus in a fashion that would least interfere with cash flow and the bonus would be divided between herself and her husband, K. Leung, also an employee of Mutual Tech and one of the defendants in this action.

4 While Mr. Wong asserts there was a discretionary element to the bonus, it appears that Ms. Law's calculation of bonus was never vetoed. At the time Ms. Law left the employment of Mutual Tech, she had not been paid a bonus for the fiscal year ending March 31, 1997 and of course the fiscal year ending March 31, 1998 was still in progress. For the purpose of this motion, it is not disputed that Ms. Law would have been entitled to a bonus for the previous fiscal year. There remains a dispute about whether or not she was entitled to a bonus for the partial fiscal year in which she left her employment, whether or not the corporation made any profit that year and whether any bonus would be offset by damages.

5 Ms. Law contends that in late 1997, Mr. Wong attempted to diminish her responsibilities in Mutual Tech. She also contends Mr. Wong was setting up companies to compete with Mutual Tech and by so doing breached her contract of employment and an oral agreement between herself and Mr. Wong. She alleges constructive dismissal. The plaintiff on the other hand, alleges that Ms. Law wrongfully left her employment without notice and set up a competing business in breach of her fiduciary duty. There are other allegations such as use of confidential information and destruction of documents including non competition agreements.

6 Whether or not Ms. Law was justified in taking the steps she did is of course the central issue in this litigation. What is not in dispute is that she, Mr. Leung and all or substantially all of the other employees resigned and set up shop in a similar business, the defendant 1275809 Ontario Inc carrying on business as MMAX Group Association. There is also no dispute, that prior to leaving, Ms. Law paid herself the sum of $700,000.00 on account of bonus for 1997 and 1998. This sum was divided between Ms. Law and Mr. Leung and approximately 50% of the amount was remitted to Revenue Canada as a source deduction.

7 It is this $700,000.00 which is the focus of the motion and the "fund" the plaintiff sought to have paid into court. As I understand it, it is now conceded for the purpose of the motion that a 1997 bonus of $331,002.00 would have been owing. This results in a fund of $368,998.00, being the remainder of the $700,000.00. It has also been conceded since the first time the parties attended before me that the funds paid to Revenue Canada are not part of the fund to be paid into court. The fund, in other words would be the $368,998.00 less the amount remitted to Revenue Canada or roughly 180,000.00. The parties are able to work out the exact mathematics. The question before me is whether or not the order should be made.

8 Cases cited by counsel suggest a three part test for granting an order under Rule 45.02 which include a claim by the plaintiff to a specific fund; a strong prima facie case; and the balance of convenience.[1] More recent decisions cast doubt on the need for a "strong" prima facie case but rather suggest there must be a "serious issue to be tried".[2] I prefer this latter view as expressed by Nordheimer J. in *News Canada Marketing Inc. v. TD Evergreen* . In that decision he ruled that "strong" prima facie case puts the test too high. It should only be necessary to demonstrate that there is a serious issue to be tried.

9 In essence, these are injunctive tests. The serious issue test set out in *American Cyanamid*[3] is the appropriate test to be applied for most types of injunctive relief in Ontario. Mareva injunctions and injunctions to enforce restrictive covenants are exceptions which require the higher test of a *prima facie* or strong *prima facie* case.[4]

10 An order under Rule 45.02 is not a Mareva injunction. Were it so, quite apart from the question of whether it would be appropriate for a master to make the order, it would not be appropriate without an undertaking in damages and without the higher standard. That is because a Mareva injunction seeks to restrain a defendant from dealing with his or her own assets by restraining removal from the jurisdiction. The Rules Committee should not be assumed to have intended by means of Rule 45.02 to allow the court to grant injunctive relief without the usual safeguards. Injunctions are an exercise of the inherent power of a Superior Court judge and are governed by s. 101 of the *Courts of Justice Act*. Rule 45 by contrast should be seen as an expression of the authority conferred by s. 104 of the Act and interpreted accordingly.

11 There is a serious issue to be tried concerning the entitlement to bonus for the fiscal year 1998. For the purposes of the motion, the plaintiff has abandoned the argument there is a serious issue about the 1997 bonus. I am also of the view that the 1998 estimated bonus at some point in time constituted a fund to which the plaintiff claims entitlement. The funds removed from the plaintiff constituted an asset which is the very subject matter of this aspect of the litigation. While it was not an identifiable designated trust fund as was the case in *Micallef v. Gainers Inc.*[5], it was a clearly identifiable sum of money removed from the plaintiff's bank account and it could be readily traced.

12 The evidence before me is clear that the disputed money no longer exists as a segregated fund. In fact the funds were used to capitalize the defendant corporation. The plaintiff argues that the defendant should not be permitted to avoid the reach of Rule 45.02 by the simple act of utilizing the disputed funds. I do not think that will always be correct. Intermingling of funds may well mean there can not be recourse to Rule 45.02. To hold otherwise, would render the words "a specific fund" meaningless and would more resemble execution in advance of judgment than preservation of a fund. On the other hand, I agree that taking steps to intermingle funds in the face of a pending motion should not be rewarded. A party who alters the status quo in the face of a pending motion will be unable to rely on that fact. It may well be a matter of timing. It may also be the case that recourse to injunctive relief is necessary if the preconditions for an order under Rule 45.02 no longer exists. In either case, failure to move promptly may be fatal.

13 In the case at bar, there is no evidence that the defendants sought to thwart the motion by disposing of the funds in the face of the motion so I think that argument is something of a "red herring". While the timing of the motion and the actions taken by each party may impact the date on which the court should assess the facts, timing (or delay) is more often a factor to be weighed when assessing the balance of convenience.

14 In the case at bar, the funds were apparently removed on January 27th, 1998. Demand letters were written on February 6th and 13th, 1998. The action was commenced on March 10th, 1998 and the original notice of motion was served on June 5th, 1998. Plaintiff's counsel argues that in the circumstances of this case, the plaintiff could not have moved more promptly. I note that the motion, originally returnable in August, was not heard until September and at that time, the portion I am concerned with was adjourned on consent.[6] The plaintiff contends that discussions ensued and it was only in January of 1999 that they broke down and the defendant made it clear the funds would not be paid into court voluntarily.

15 This however is neither 1998 nor 1999 but 2003. I need only determine if the timing of events in 1998 and 1999 was reasonable if the intervening time does not matter. It would take an extraordinary set of circumstances to persuade the court that a preservation order makes any sense some 5 years after the funds were removed from the plaintiff and used in establishing the defendant corporation. Both companies appear to be carrying on business. I have not been presented with evidence there is any danger a judgment for the $180,000 (which is now said to be the disputed fund) will be less likely to be enforceable if the requested relief is refused.

16 The only extraordinary set of events has been the conduct of the litigation itself. Huge amounts of time and money have been expended and I am advised that despite mountains of transcripts, the parties can not agree to use them for discovery purposes. The action in other words is barely underway. Mountains of paper have been filed. Witnesses have been examined at length. Days of court time have been spent obtaining rulings and directions.[7]

17 In support of this motion, the plaintiff relied upon an affidavit of Francis C.W. Wong. That affidavit was sworn in July of 1998. It was met with responding affidavits served in August. Following the adjournment of the motion and the amendment of the pleadings, the plaintiff then responded with a reply affidavit of Mr. Wong in March of 1999. I am advised this was met with more affidavits by the defendants, notices of cross examination and summonses to witnesses. There then ensued a motion to strike the defendants affidavits and summonses to witnesses and an appeal of the master's order. This occupied the balance of 1999 and the appeal was heard in January 2000. Francis Wong served another reply affidavit responding to the defendants' further affidavits in March of 2000.

18 Examinations and cross examinations were conducted during 2000 and refusals and undertakings motions were heard over several days in 2001 and 2002. I am advised that there was mediation in a related proceeding in the United States sometime in early 2001 and in February of 2002 the parties and their counsel participated in a lengthy settlement conference with me. Cross examinations resumed in 2002. In October of 2002, the defendant served two further affidavits. There was a further flurry of affidavits just before the hearing of this motion on November 27th, 2002.[8]

19 The plaintiff argues that it is inequitable to allow the defendants to resort to self help, have the use of the disputed funds and to inflict this huge amount of evidence on the plaintiff and the court and then to refuse to order the funds paid into court because of the passage of time. There are at least three problems with that argument. In the first place, the original motion was adjourned on consent to be brought back on seven days notice. For most of the intervening time, the plaintiff could have insisted on having the motion heard.

20 In the second place, the propriety of the affidavit material, cross examinations and examinations in aid of the motion have already been argued and the plaintiff did not prevail. Thirdly, the plaintiff resisted questions which were the subject of the refusals motions and the propriety of those refusals have also been determined. There is no basis for me to conclude today that the delay in hearing this motion should be found to be solely or even substantially the result of unacceptable tactics on the part of the defendants.

21 The balance of convenience test is not a theoretical construct but a test to be measured against real events in the real world. What purpose would be served in ordering these funds paid into court? Far from preserving the status quo, it would at this stage simply give the plaintiff an advantage in the litigation. I am unable to conclude the balance of convenience favours payment into court. Accordingly the motion must be dismissed.

22 This can not be construed as the court condoning the defendant's actions. The plaintiff may win the day at trial. If the defendant is found to have left abruptly, hired away the employees and started a competing business while helping herself to a bonus that was not yet due or payable, she may well be visited with substantial damages and the other relief sought in the statement of claim. The relief claimed contains all the tools necessary for the court to visit a full measure of condemnation

and opprobrium on these events if they were unjustified.

23 It is not my role on the motion to pre-judge the merits of the action. Application of either the substantial issue or strong *prima facie* case tests do not involve prejudging the outcome. These are hurdles to be overcome by a plaintiff seeking extraordinary interim relief and are not to be equated with summary judgment. I must assume the plaintiff may be successful but I am equally required to assume the defendant may prove her allegations. The rules of civil procedure are designed to ensure the just determination of cases on their merits and in appropriate cases to preserve the status quo pending that outcome. To make an order today restoring the situation to that which existed in 1998 would accomplish neither of these ends.

24 In summary, the motion for payment into court is dismissed. The question of costs may be addressed in writing on a schedule to be agreed between counsel.

25 Upon receipt of these reasons, counsel are to attempt to agree on a timetable for discoveries and all other steps necessary to bring the action to a conclusion. Consideration should be given to appropriate dispute resolution options. A case conference will be convened at the request of either counsel or if an agreed upon timetable has not been filed with my office before the end of March, 2003.

Footnotes

1 See. *Sun v. Ho* (1998), 18 C.P.C. (4th) 363 (Ont. Gen. Div.) and *Tom Jones Corp. v. Mishemukwa Developments Ltd.* (1996), 46 C.P.C. (3d) 77 (Ont. Gen. Div.)

2 See *News Canada Marketing Inc. v. TD Evergreen*, [2000] O.J. No. 3705, 2000 CarswellOnt 3544 (Ont. S.C.J.) which was cited by counsel and *Taribo Holdings Ltd. v. Storage Access Technologies Inc.*, [2002] O.J. No. 3886 (Ont. S.C.J.) which was not.

3 *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (U.K. H.L.)

4 *Chitel v. Rothbart* (1982), 141 D.L.R. (3d) 268, 39 O.R. (2d) 513 (Ont. C.A.); *Jet Print Inc. v. Cohen* (1999), 43 C.P.C. (4th) 123 (Ont. S.C.J.)

5 (1988), 63 O.R. (2d) 687 (Ont. H.C.)

6 The relief granted by Juriansz J. involved striking certain — but not all — impugned paragraphs of the statement of defence and counterclaim.

7 Not all of the interlocutory activity has been solely related to this motion. Production issues, for example, have also been argued.

8 Mr. Dorsey served two affidavits of non parties in October after the cross examinations were under way. Mr. Cuervo-Lorens asked that the affidavits not be admitted but if they were he wished to file an affidavit in response and to adjourn the motion for further cross examinations. The affidavits were for the most part affidavits concerning the calculation of the bonus with supporting financial material. In the result, I admitted all of the affidavit material but I did not grant an adjournment. Nothing in this decision turns on the material in those affidavits as Mr. Cuervo-Lorens advised me in argument that he was only pursuing payment in of $180,000.00.

TAB 12

2009 CarswellOnt 7350
Ontario Superior Court of Justice (Divisional Court)

167986 Canada Inc. v. GMAC Commercial Finance Corp.-Canada/Societe Financiere Commerciale GMAC-Canada

2009 CarswellOnt 7350, [2009] O.J. No. 4976, 182 A.C.W.S. (3d) 1060, 258 O.A.C. 100, 66 B.L.R. (4th) 41, 80 C.P.C. (6th) 251

167986 CANADA INC. (Applicant / Appellant) and GMAC COMMERCIAL FINANCE CORPORATION-CANADA/SOCIÉTÉ FINANCIÈRE COMMERCIALE GMAC-CANADA, BLACK SAXON QRC INC. and QRC LIMITED PARTNERSHIP (Respondents / Respondents on Appeal)

Whalen, Dambrot, Swinton JJ.

Heard: November 6, 2009
Judgment: November 25, 2009
Docket: Toronto 234/09

Proceedings: affirming *167986 Canada Inc. v. GMAC Commercial Finance Corp.-Canada/Societe Financiere Commerciale GMAC-Canada* (2009), 2009 CarswellOnt 2690, 75 C.P.C. (6th) 265 (Ont. S.C.J. [Commercial List])

Counsel: Alan Lenczner, Philip Cho for Applicant / Appellant
Alan B. Mersky, Katherine Smirle for Respondent, GMAC Commercial Finance Corporation-Canada/Société Financière Commerciale GMAC-Canada
Daniel S. Murdoch for Respondents, Black Saxon QRC Inc., QRC Limited Partnership

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

Related Abridgment Classifications

Bills of exchange and negotiable instruments
V Letters of credit

Civil practice and procedure
XV Preservation of property rights pending litigation
XV.2 Interim preservation of property

Debtors and creditors
I General principles
I.4 Miscellaneous

Guarantee and indemnity
II Guarantee
II.1 Contract of guarantee
II.1.b Existence of guarantee

Guarantee and indemnity
IV Practice and procedure
IV.1 Guarantee
IV.1.i Miscellaneous

Remedies
II Injunctions
II.1 Principles relating to availability of injunctions
II.1.g Existence of legal or equitable right capable of enforcement

Headnote

Bills of exchange and negotiable instruments --- Letters of credit
Applicant 167 Inc. had long-standing relationship with S Ltd., who entered into loan agreement with GMAC — 167 Inc. agreed to enter loan agreement as third party guarantor and provide letter of credit to GMAC — GMAC entered into forbearance agreement with S Ltd. as it attempted to restructure — S Ltd. obtained protection under Companies' Creditors Arrangement Act — 167 Inc. became aware of forbearance agreement — When letter expired, 167 Inc. directed GMAC to convert it into cash collateral — 167 Inc. took position that cash collateral was not assignable, and that forbearance agreement invalidated loan agreement — GMAC advised 167 Inc. of intent to assign cash collateral to another firm — 167 Inc. applied for determination of whether its obligations under loan agreement were terminated — 167 Inc.'s motion for preservation order directing payment into court of cash collateral pending determination of application was dismissed — 167 Inc. appealed — Appeal dismissed — Motions judge correctly held that cash collateral was not specific fund against which 167 Inc. could make proprietary claim — Funds paid on letter of credit were property of issuing bank, and loan agreement did not create proprietary claim to specific fund — Until liquidation occurred, 167 Inc. had no claim to any part of cash collateral funds — Wording of agreement permitting GMAC to commingle cash collateral with its own funds indicated there was no specific fund.

Guarantee and indemnity --- Guarantee — Contract of guarantee — Miscellaneous issues
Applicant 167 Inc. had long-standing relationship with S Ltd., who entered into loan agreement with GMAC — 167 Inc. agreed to enter loan agreement as third party guarantor and provide letter of credit to GMAC — GMAC entered into forbearance agreement with S Ltd. as it attempted to restructure — S Ltd. obtained protection under Companies' Creditors Arrangement Act — 167 Inc. became aware of forbearance agreement — When letter expired, 167 Inc. directed GMAC to convert it into cash collateral — 167 Inc. took position that cash collateral was not assignable, and that forbearance agreement invalidated loan agreement — GMAC advised 167 Inc. of intent to assign cash collateral to another firm — 167 Inc. applied for determination of whether its obligations under loan agreement were terminated — 167 Inc.'s motion for preservation order directing payment into court of cash collateral pending determination of application was dismissed — 167 Inc. appealed — Appeal dismissed — Motions judge correctly held that cash collateral was not specific fund against which 167 Inc. could make proprietary claim — Motions judge properly determined that law of guarantee did not apply to agreement, regardless of title given by parties — Because of qualities of letter of credit, including its critical difference from guarantee, its use as form of security was fundamental part of substance of agreement — Agreement was not contract of guarantee, since only recourse available to GMAC was right to letter of credit or cash collateral derived from it — 167 Inc.'s obligation under agreement was primary obligation to provide letter of credit on which GMAC could draw if proper documents were presented to bank.

Civil practice and procedure --- Pre-trial procedures — Interim preservation of property
Applicant 167 Inc. had long-standing relationship with S Ltd., who entered into loan agreement with GMAC — 167 Inc. agreed to enter loan agreement as third party guarantor and provide letter of credit to GMAC — GMAC entered into forbearance agreement with S Ltd. as it attempted to restructure — S Ltd. obtained protection under Companies' Creditors Arrangement Act — 167 Inc. became aware of forbearance agreement — When letter expired, 167 Inc. directed GMAC to convert it into cash collateral — 167 Inc. took position that cash collateral was not assignable, and that forbearance agreement invalidated loan agreement — GMAC advised 167 Inc. of intent to assign cash collateral to another firm — 167 Inc. applied for determination of whether its obligations under loan agreement were terminated — 167 Inc.'s motion for preservation order directing payment into court of cash collateral pending determination of application was dismissed — 167 Inc. appealed — Appeal dismissed — Motions judge did not determine merits of underlying application, but merely found that 167 Inc. did not even meet low threshold of whether there was serious issue to be tried with respect to its claim to cash collateral — Motions judge correctly held that cash collateral was not specific fund against which 167 Inc. could make proprietary claim — Motions judge properly determine that law of guarantee did not apply to agreement, regardless of title given by parties, since it was letter of credit rather than guarantee.

Guarantee and indemnity --- Practice and procedure — Guarantee — General principles
Applicant 167 Inc. had long-standing relationship with S Ltd., who entered into loan agreement with GMAC — 167 Inc. agreed to enter loan agreement as third party guarantor and provide letter of credit to GMAC — GMAC entered into forbearance agreement with S Ltd. as it attempted to restructure — S Ltd. obtained protection under Companies' Creditors Arrangement Act — 167 Inc. became aware of forbearance agreement — When letter expired, 167 Inc. directed GMAC to convert it into cash collateral — 167 Inc. took position that cash collateral was not assignable, and that forbearance agreement invalidated loan agreement — GMAC advised 167 Inc. of intent to assign cash collateral to another firm — 167 Inc. applied for determination of whether its obligations under loan agreement were terminated — 167 Inc.'s motion for preservation order directing payment into court of cash collateral pending determination of application was dismissed — 167 Inc. appealed — Appeal dismissed — Motions judge did not determine merits of underlying application, but merely found that 167 Inc. did not even meet low threshold of whether there was serious issue to be tried with respect to its claim to cash collateral — Motions judge correctly held that cash collateral was not specific fund against which 167 Inc. could make proprietary claim — Motions judge properly determined that law of guarantee did not apply to agreement, regardless of title given by parties — Because of qualities of letter of credit, including its critical difference from guarantee, its use as form of security was fundamental part of substance of agreement — Agreement was not contract of guarantee, since only recourse available to GMAC was right to letter of credit or cash collateral derived from it.

Debtors and creditors --- General principles — Miscellaneous issues
Preservation order — Applicant 167 Inc. had long-standing relationship with S Ltd., who entered into loan agreement with GMAC — 167 Inc. agreed to enter loan agreement as third party guarantor and provide letter of credit to GMAC — GMAC entered into forbearance agreement with S Ltd. as it attempted to restructure — S Ltd. obtained protection under Companies' Creditors Arrangement Act — 167 Inc. became aware of forbearance agreement — When letter expired, 167 Inc. directed GMAC to convert it into cash collateral — 167 Inc. took position that cash collateral was not assignable, and that forbearance agreement invalidated loan agreement — GMAC advised 167 Inc. of intent to assign cash collateral to another firm — 167 Inc. applied for determination of whether its obligations under loan agreement were terminated — 167 Inc.'s motion for preservation order directing payment into court of cash collateral pending determination of application was dismissed — 167 Inc. appealed — Appeal dismissed — Motions judge did not determine merits of underlying application, but merely found that 167 Inc. did not even meet low threshold of whether there was serious issue to be tried with respect to its claim to cash collateral — Motions judge correctly held that cash collateral was not specific fund against which 167 Inc. could make proprietary claim — Motions judge properly determined that law of guarantee did not apply to agreement, regardless of title given by parties.

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Algoma Steel Inc., Re (2001), 25 C.B.R. (4th) 194, 147 O.A.C. 291, 2001 CarswellOnt 1742 (Ont. C.A.) — referred to

Angelica-Whitewear Ltd. v. Bank of Nova Scotia (1987), [1987] 1 S.C.R. 59, 1987 CarswellQue 24, 1987 CarswellQue 91, 73 N.R. 158, 6 Q.A.C. 1, 36 D.L.R. (4th) 161, 36 B.L.R. 140 (S.C.C.) — referred to

Assante Financial Management Ltd. v. Dixon (2004), 2004 CarswellOnt 2158, 8 C.P.C. (6th) 57 (Ont. S.C.J.) — referred to

Birch Lake (Municipal District) v. London Guarantee & Accident Co. (1930), [1930] 3 W.W.R. 634, [1931] 1 D.L.R. 600, 1930 CarswellAlta 123 (Alta. T.D.) — referred to

BNY Capital Corp. v. Katotakis (2005), 2005 CarswellOnt 625 (Ont. C.A. [In Chambers]) — referred to

Carley Capital Group, Re (1990), 119 B.R. 646, 20 Bankr. Ct. Dec. 1789, Bankr. L. Rep. 73636 (U.S. W.D. Wis.) — distinguished

DIRECTV Inc. v. Gillott (2007), 2007 CarswellOnt 883, 39 C.P.C. (6th) 227, 84 O.R. (3d) 595 (Ont. S.C.J.) — referred

to

John Ziner Lumber Ltd. v. Kotov (2000), 2000 CarswellOnt 3752, 5 C.L.R. (3d) 44, 137 O.A.C. 177 (Ont. C.A.) — referred to

Manulife Bank of Canada v. Conlin (1996), 1996 CarswellOnt 3941, 1996 CarswellOnt 3942, 6 R.P.R. (3d) 1, 94 O.A.C. 161, 203 N.R. 81, [1996] 3 S.C.R. 415, 139 D.L.R. (4th) 426, 30 O.R. (3d) 577 (note), 30 B.L.R. (2d) 1 (S.C.C.) — considered

Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832 (1987), (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 38 D.L.R. (4th) 321, 73 N.R. 341, 46 Man. R. (2d) 241, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* [1987] 3 W.W.R. 1, 1987 CarswellMan 176, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)* [1987] 1 S.C.R. 110, 1987 CarswellMan 272, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 25 Admin. L.R. 20, [1987] D.L.Q. 235 (S.C.C.) — considered

News Canada Marketing Inc. v. TD Evergreen (2000), 2000 CarswellOnt 3544 (Ont. S.C.J.) — referred to

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Transamerica Commercial Finance Corp. Canada v. Northgate RV Sales Ltd. (2006), 2006 CarswellBC 3180, 2006 BCSC 1917, 31 C.B.R. (5th) 144 (B.C. S.C. [In Chambers]) — referred to

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Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Rules considered:

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

APPEAL by 167986 Inc. from judgment reported at *167986 Canada Inc. v. GMAC Commercial Finance Corp.-Canada/Societe Financiere Commerciale GMAC-Canada* (2009), 2009 CarswellOnt 2690, 75 C.P.C. (6th) 265 (Ont. S.C.J. [Commercial List]), dismissing its motion for preservation order.

Swinton J.:

Overview

1 167986 Canada Inc. ("167") appeals with leave from the order of Morawetz J. dated May 14, 2009, in which he dismissed 167's motion under rule 45.02 for an order preserving a certain sum of money. At issue in this appeal is the application of the law relating to guarantees to the rights and obligations under a Letter of Credit Agreement between 167 and GMAC Commercial Finance Corporation-Canada ("GMAC").

The Background

2 On January 9, 2006, GMAC entered into a Loan Agreement to provide a revolving credit facility to SAAN Stores Ltd., a company operating a chain of discount retail stores. 167 is a long-term supplier of goods to SAAN and, as it was owed money for goods sold to and received by SAAN, it was also a creditor of SAAN.

3 The Loan Agreement was altered three times, the third time on June 21, 2007. Prior to the third change, GMAC indicated that it was prepared to increase its lending to SAAN if a third party guaranteed a portion of the increased lending. 167 came forward as a guarantor and entered into an agreement with GMAC and SAAN entitled the Letter of Credit Agreement ("LC Agreement").

4 Under the LC Agreement, 167 agreed to obtain a Letter of Credit from the Bank of Montreal ("the Bank") in the amount of $3.5 million. Section 2.01 of the agreement begins with the words "Limited Recourse Guarantee". In the first sentence, 167, defined as the Investor, "unconditionally guarantees and promises to pay to the Lender, on demand" the indebtedness of SAAN (defined as the Borrower) under the Loan Agreement, subject to the terms and conditions of the LC Agreement. The section goes on to say,

> Notwithstanding the preceding sentence or anything to the contrary contained herein, the liability of and recourse to the Investor hereunder will be limited to the Letter of Credit, the Lender will not have any right to sue or commence any action against the Investor to recover any amounts owing by the Investor pursuant to the provisions hereof except to the extent necessary to permit the Lender to realize upon the security constituted by the Letter of Credit ...

5 Section 2.04 permits SAAN, the Borrower, to substitute another Letter of Credit, cash collateral or letter of guarantee in certain circumstances. Section 2.05 deals with the renewal of the Letter of Credit. It states that the Letter of Credit will expire on March 31, 2008, and the Investor will have no obligation to renew it. However, the Borrower is obligated to have the Letter of Credit replaced or renewed annually for additional one-year periods. If the Letter of Credit has not been renewed within three months of maturity, the Lender has the right to draw against it within 30 days of maturity and to hold the proceeds as Cash Collateral.

6 Section 2.06 deals with enforcement of the Letter of Credit, permitting the Lender to retain the Letter of Credit or the Cash Collateral as security against any ultimate shortfall in recovery of the Borrower's indebtedness, if the Lender issues a notice of intention to enforce security pursuant to the *Bankruptcy and Insolvency Act* ("BIA").

7 Section 2.07 then deals with realization of the security. It requires the Lender to dispose of all of the Borrower's inventory before claiming any payment under the Letter of Credit or the Cash Collateral. If there is a shortfall on the loan after disposal of the inventory, the Lender can draw against the Letter of Credit or the Cash Collateral. Once the loan is paid in full, if there are funds remaining on the Letter of Credit or from the Cash Collateral, the Lender is to notify the Bank to cancel the Letter of Credit or return the remaining funds to the Investor.

8 Pursuant to section 2.10, the Investor states that it will not have, and hereby waives, any rights of subrogation until the Borrower's indebtedness under the Loan Agreement has been paid in full to the Lender. Finally, section 2.11 deals with the Cash Collateral, stating,

> To the extent that the Lender is, in accordance with section 2.05, to hold the Cash Collateral, the Investor hereby irrevocably assigns, pledges, hypothecates, transfers and sets over to the Lender, and grants to the Lender a security

> interest in, hypothec on, and right to set off (compensate) against the Cash Collateral. The hypothec created herein is for the amount of the Cash Collateral. The Cash Collateral shall be held by the Lender, without interest, in an account designated by the Lender for such purposes in its books and records and may be commingled with the Lender's own funds. ...

9 Section 3.04 provides that the agreement will enure to the benefit and be binding on the Investor, Borrower, Lender and their successors and assigns.

10 In consideration for the LC Agreement, SAAN entered into a Credit Support Agreement with 167, which provided 167 with the right of subrogation. SAAN also provided guarantees from the Chahine II Family Trust and Tony Chahine, principal of SAAN, in the event the Letter of Credit was drawn on by GMAC.

11 As required, 167 obtained the Letter of Credit (entitled a "Letter of Guarantee") from the Bank with GMAC named as beneficiary. According to that document, payment was to be made under the Letter of Credit if GMAC provided appropriate documentation. The documentation must state that the amount claimed is due to GMAC, as GMAC is entitled to draw under the Guarantee in accordance with the terms and conditions of the Letter of Credit Agreement dated June 4, 2007. In return for the Letter of Credit, GMAC increased SAAN's credit facility to $25 million.

12 On October 25, 2007, GMAC gave SAAN notice of default under its credit facility and notice of its intention to enforce its security pursuant to s. 244(1) of the BIA. SAAN advised that it was seeking to restructure its affairs and intending to dispose of its assets *en bloc*.

13 On December 17, 2007, GMAC entered into a Forbearance Agreement to the Loan Agreement with SAAN. The Forbearance Agreement provided for an increase in the maximum advance under the Loan Agreement from $25 million to $30 million, to be available from December 17, 2007 until December 31, 2007, when the maximum reverted to $25 million. GMAC also agreed to forbear until the earlier of March 31, 2008 or the occurrence of additional acts of default.

14 In conjunction with the Forbearance Agreement, the respondent Black Saxon and GMAC entered into Loan Put Agreements dated December 17, 2007 and January 2, 2008. By these agreements, Black Saxon granted GMAC put options requiring Black Saxon to purchase and acquire, by way of assignment, GMAC's interest in the credit facility provided to SAAN. The combined put option price was $12.8 million.

15 On December 28, 2007, SAAN obtained protection under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). In the Initial Order made by Morawetz J. in the CCAA proceedings, the Forbearance Agreement was specifically referred to and approved

16 In addition to providing the Letter of Credit, 167 was a trade creditor of SAAN. It retained counsel in February 2008 and participated in the CCAA proceedings. The evidence shows that 167 became aware of the Forbearance Agreement in February or March 2008.

17 On March 31, 2008, the Letter of Credit expired. Rather than renew it, 167 directed GMAC to call upon the Letter of Credit and convert it into the Cash Collateral.

18 On April 25, 2008, 167 brought a motion to be declared an unaffected creditor under the CCAA proceedings.

19 On June 6, 2008, GMAC sought and obtained the appointment of PriceWaterhouseCoopers LLP ("PWC") as the interim receiver and receiver of SAAN. The Receiver's task was to ensure the orderly completion of SAAN's liquidation. 167 did not oppose the Receivership.

20 Up to this point, 167 had raised no issue with respect to GMAC's entitlement to the Cash Collateral. Lee Karls, president of 167, gave evidence that he had become aware of the CCAA proceedings in December 2007 or January 2008. On cross-examination, he said the following (Transcript, pp. 103-104):

> 474.

Q. Okay. And were you waiting to see if that was going to happen?

A. I was waiting for everything to happen. I didn't know what was going to happen. I really didn't know what was going to happen. So it's not like I waiting until that happened to - the picture was painted that everything was going to be beautiful. And that's kind of where, the end of March when it wasn't such a rosy picture and I didn't believe everything I heard anymore, that might be the time when the rift started. So -

475.

Q. What was going to be beautiful?

A. Stalking horse. Everything getting moved over to the new company. Everything's status quo.

476.

Q. Your LC would be okay and wouldn't get called on?

A. Correct.

21 At another point in his cross-examination, Mr. Karls stated (Transcript at pp. 112-13, Q. 506):

> ... I thought there was a deal that the stores were being bought. So I didn't really care. If the stores had been bought, my money's secure ... Each one of those things that I was told, I knew I was getting my money back, and besides my LC money back I was getting, I was getting merchandise money back.

22 On July 4, 2008, 167 first took the position that its obligations under the Letter of Credit Agreement may have been terminated. It took the position that the Cash Collateral was not assignable, and that GMAC's loan had been or would be satisfied in full.

23 Subsequently, on July 18, 2008, 167 took the position that the Forbearance Agreement invalidated the LC Agreement.

24 On October 3, 2008, GMAC advised 167 that it would be assigning on an "as is where is" basis to Black Saxon all of its rights and obligations under the Loan Agreement with SAAN and the security documents relating thereto, including the LC Agreement. This prompted 167 to launch an application to determine whether its obligations under the LC Agreement were terminated because of amendments to the Loan Agreement by the Forbearance Agreement in December 2007. As noted by the motions judge, 167 is concerned that if it succeeds on its application, it may be required to seek payment from Black Saxon, which it believes to be of "questionable solvency" (Reasons, at para. 27).

25 On October 14, 2008, Morawetz J. ordered, on consent, that the Cash Collateral be paid into escrow by GMAC to Stikeman Elliot LLP as the escrow agent.

The Rule 45.02 Motion

26 167 then brought a motion under rule 45.02 to preserve the Cash Collateral by an order paying it into court. Rule 45 deals with orders for interim preservation of property. Rule 45.02 provides:

> Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

27 The motions judge dismissed the motion for reasons found at 2009 CanLII 24224 [*167986 Canada Inc. v. GMAC Commercial Finance Corp.-Canada/Societe Financiere Commerciale GMAC-Canada*, 2009 CarswellOnt 2690 (Ont. S.C.J. [Commercial List])]. He concluded that 167 has no proprietary interest in the Cash Collateral, as the funds paid under a letter of credit are the funds of the issuing party, here the Bank. He also noted that the LC Agreement provides that the title to the Cash Collateral was assigned to GMAC upon conversion of the Letter of Credit. Moreover, the LC Agreement did not provide for the Cash Collateral to be held as an indivisible and traceable fund. Therefore, he concluded that 167 has no proprietary interest in the Cash Collateral: "The Cash Collateral was derived from the LC Agreement and 167 has no proprietary interest in the Letter of Credit" (at para. 40). Therefore, "167 has, in my view, failed to establish a right to any specific fund" (at para. 42).

28 The motions judge also concluded that 167 had failed to establish a serious issue to be tried with respect to 167's claim to the Cash Collateral (at para. 55). 167 had argued that it was released from its obligations under the LC Agreement and entitled to the return of the Cash Collateral because GMAC entered into the Forbearance Agreement. This argument rests on the proposition that the LC Agreement is a guarantee, and 167, as guarantor, was released from its obligations because there was a material change to the indebtedness under the Loan Agreement that it guaranteed.

29 The motions judge held that the law of guarantee was not applicable to the LC Agreement. He described that agreement as a contract entered into by 167 to supply a standby letter of credit, with 167's only rights being to have that letter of credit drawn upon in accordance with the terms of the agreement (at para. 45). Changes to the Loan Agreement, including GMAC's decision to enter into the Forbearance Agreement, are irrelevant to the LC Agreement and do not discharge 167's obligations (at para. 48).

30 In the alternative, if 167 were a guarantor under the LC Agreement, the motions judge concluded that 167 was not entitled to a release under the law of guarantee, as 167 had implicitly ratified any forbearance by its conduct through the CCAA proceedings (at para. 49).

31 The motions judge also held that the assignment to Black Saxon was valid, a conclusion that was not appealed.

32 Given his conclusions, the motions judge did not find it necessary to deal with the issue of the balance of convenience. He dismissed the motion and stated that the Cash Collateral should be transferred by GMAC to Black Saxon pursuant to the Loan Put Agreements.

The Test on a Rule 45.02 Motion

33 The test for relief under rule 45.02 requires the moving party to show:

1. that the party claims a right to a specific fund,

2. that there is a serious issue to be tried regarding the party's claim to that fund, and

3. the balance of convenience favours granting the relief sought. (

News Canada Marketing Inc. v. TD Evergreen, [2000] O.J. No. 3705 (Ont. S.C.J.) at para. 14)

The Issues on Appeal

34 There are four issues on this appeal:

1. Did the motions judge err by resolving conflicts in the evidence and determining difficult questions of law on a rule 45.02 motion?

2. Did the motions judge err in finding that the Cash Collateral was not a specific fund within the meaning of rule

45.02?

3. Did the motions judge err in applying the law governing letters of credit to the LC Agreement, rather than applying the law governing guarantees?

4. Did the motions judge err in finding an implied ratification by 167?

Analysis

Issue No. 1: Did the motions judge err by resolving conflicts in the evidence and determining difficult questions of law on a rule 45.02 motion?

35 This Court should intervene only if the motions judge made an error in law or a palpable and overriding error in his appreciation of the evidence.

36 The order under appeal was made by an experienced judge of the Commercial List in his role as the supervising judge of the CCAA proceedings involving SAAN. As the Court of Appeal has indicated, the expertise of such judges in insolvency proceedings is deserving of deference (*BNY Capital Corp. v. Katotakis*, [2005] O.J. No. 623 (Ont. C.A. [In Chambers]) at para. 8; *Algoma Steel Inc., Re*, [2001] O.J. No. 1943 (Ont. C.A.) at para. 8).

37 167 submits that the motions judge went too far in his scrutiny of the merits of the case. While he was required to determine whether 167 had established there was a serious issue to be tried with respect to 167's claim to the Cash Collateral, he in fact determined the merits of the application. This is contrary to the instruction in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) at para. 40 that a court at the interlocutory stage should not try to resolve conflicts of evidence or decide difficult questions of law.

38 In my view, the motions judge did not determine the merits of 167's application. He was required to decide if there was a serious issue to be tried with respect to 167's claim to the Cash Collateral, and he determined that 167 did not meet even this low threshold. He came to this conclusion based on the application of well-known legal principles to the uncontested facts and in light of the terms of the LC Agreement.

Issue No. 2: Did the motions judge err in finding that the Cash Collateral was not a specific fund within the meaning of rule 45.02?

39 In his reasons, the motions judge stated the first part of the test under rule 45.02 required the moving party to establish "a right to a specific fund", rather than a *claim* of a right to a specific fund (at paras. 30, 42). However, it is clear from his reasons that his first question was whether there was a claim to a specific fund.

40 To determine that question, a motions judge has to make a preliminary assessment as to whether the moving party has a proprietary claim. Here, he concluded that there was no specific fund, and that 167 had no basis to make a proprietary claim against the Cash Collateral. Therefore, he held that 167 did not satisfy the first part of the test. I agree with his conclusion.

41 A "specific fund" is a reasonably identifiable fund, earmarked to the litigation in issue (*Rotin v. Lechcier-Kimel* (1985), 3 C.P.C. (2d) 15 (Ont. H.C.) at para. 5). The party seeking a rule 45.02 order must have a proprietary claim against the specific fund (*DIRECTV Inc. v. Gillott* (2007), 84 O.R. (3d) 595 (Ont. S.C.J.) at paras. 59 and 62). Establishing a possible claim for payment of damages for breach of contract does not establish a right to a specific fund (*Assante Financial Management Ltd. v. Dixon*, [2004] O.J. No. 2237 (Ont. S.C.J.) at para. 28).

42 The motions judge correctly held that the Cash Collateral was not a specific fund against which 167 could make a proprietary claim. The law governing letters of credit is clear: the funds paid on a letter of credit are the property of the issuing bank (*Angelica-Whitewear Ltd. v. Bank of Nova Scotia*, [1987] 1 S.C.R. 59 (S.C.C.) at para. 10). As Blair J. (as he

then was) said in *885676 Ontario Ltd. (Trustee of) v. Frasmet Holdings Ltd.*, [1993] O.J. No. 113 (Ont. Gen. Div. [Commercial List])) ("*Frasmet*") at para. 29:

> Letters of credit are a specialized form of commercial credit, designed by their very nature to be free and clear of the equities between the parties to the underlying transaction which they are issued to secure. They constitute an independent contract between the issuer (usually a bank, as in this case) and the beneficiary (one of the parties to the underlying transaction - a landlord in this case). This principle of "autonomy" goes to the root of the practice surrounding their issuance. The only admitted exception to the principle is fraud.

43 In the present case, the Bank paid the Cash Collateral to GMAC pursuant to the Letter of Credit, an autonomous agreement to which the Bank and GMAC were the only parties. 167 had no proprietary claim to the Letter of Credit or its proceeds at the time they were drawn upon by GMAC.

44 167 relies on the terms of the LC Agreement to show that it has a claim to the Cash Collateral. In particular, it relies on the fact that GMAC is not entitled to draw down on the Cash Collateral unless there is a shortfall on the SAAN loan after the SAAN inventory has been liquidated. If the liquidation is sufficient to satisfy the loan, 167 is entitled to the return of the Cash Collateral. Alternatively, 167 is entitled to any amount of the Cash Collateral that is surplus after the funds from the liquidation are used to pay down the loan.

45 In my view, these provisions do not create a proprietary claim to a specific fund. According to the LC Agreement, GMAC has a contractual obligation to account for the Cash Collateral funds it received from the Bank after the liquidation and to pay the balance owing after the liquidation, if any. Until the liquidation occurs, 167 has no right to claim any part of the Cash Collateral funds.

46 As the motions judge noted, section 2.11 of the LC Agreement expressly provides that 167 "hereby irrevocably assigns, pledges, hypothecates, transfers and sets over to the Lender" the Cash Collateral. This wording indicates that 167 had no proprietary interest in the Cash Collateral.

47 Moreover, the wording of the LC Agreement permitting GMAC to commingle the Cash Collateral with its own funds indicates that there is no specific fund to which 167 could assert a proprietary claim.

48 This is not a case where there is a claim for trust funds, as in some of the cases relied on by 167 (see, for example, *Rotin*, *supra* at para. 13; *1463150 Ontario Ltd. v. 11 Christie Street Inc.*, 2007 CarswellOnt 6937 (Ont. Master)).

49 In any event, 167 is not claiming the return of the Cash Collateral under the LC Agreement. In its Notice of Application, it seeks payment of the amount of the Cash Collateral plus interest on the basis that its obligations under the LC Agreement are discharged under the law of guarantee. This is a claim in damages, as 167 has no proprietary interest in the Letter of Credit or the funds drawn on it. What 167 is seeking is execution before judgement; it cannot do so through a rule 45.02 motion.

Issue No. 3: Did the motions judge err in applying the law governing letters of credit to the LC Agreement, rather than applying the law governing guarantees?

50 167's application is based on the assertion that the LC Agreement was a contract of guarantee. It then asserts that the acts of forbearance by GMAC were material amendments to the guarantee, and, therefore, 167 was discharged from its obligations under the guarantee. It relies on the decision of the Supreme Court of Canada in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415 (S.C.C.) at para. 2, where the Court referred to the well-established principle of law that a guarantor will be released from liability on the guarantee where the lender and the principal borrower agree to a material alteration of the terms of their loan agreement without the consent of the guarantor.

51 167 argues that the motions judge's error in refusing to apply the law of guarantee is rooted in his failure to distinguish the substance of a guarantee from the substance of a standby letter of credit. He is said to have erred by defining the parties' relationship based on the form of security given for the LC Agreement, rather than the substance of the agreement.

52 167 relies on *Wichita Eagle & Beacon Publishing Co. v. Pacific National Bank of San Francisco*, 493 F.2d 1285 (U.S. Cal. C.A. 1974), where the Court held that it was not bound by the label on an instrument describing it as a letter of credit. The Court in that case went on to look at the terms of the agreement, concluding that the instrument was really a contract of guarantee, because the issuer was not required to deal only with documents in order to determine whether payment would be made. Rather, the issuer would be required to determine facts relating to the performance of a separate contract, a lease, in order to determine whether to make payment. Therefore, the instrument was held to be, in substance, a guarantee.

53 In the present case, the motions judge carefully considered the terms of the LC Agreement to determine whether the law of guarantee applied to it. He recognized that the classification of the agreement should be determined by its substance and not just by the title given to a particular document.

54 It is significant that 167 contracted with GMAC in the LC Agreement to cause the Bank to issue an irrevocable standby letter of credit as security for the obligations of SAAN as borrower. As Blair J. observed in *Frasmet Holdings*, *supra*,

> There is a fundamental difference between a letter of credit, which is a very specialized form of security, and a guarantee, which is not a form of security at all (except in a loose, non-legal sense of that term). (at para. 26)
>
> . . . . .
>
> Thus, it can be seen that a letter of credit is a creature quite different from a simple guarantee. It is a form of security which may be called upon by the secured creditor when the event for which the security has been given occurs, without regard to the circumstances existing between the parties to the underlying transaction. (at para. 34)

55 While 167 argues that the motions judge improperly let form triumph over substance, I disagree. Because of the qualities of a letter of credit, its use as a form of security is a fundamental part of the substance of the LC Agreement. As Farley J. stated in *Westpac Banking Corp. v. Duke Group Ltd.*, [1994] O.J. No. 2203 (Ont. Bktcy.)), "a standby letter of credit is critically different from a guarantee or indemnity" (at para. 17). Farley J. quoted with approval from *Carley Capital Group, Re*, 119 B.R. 646 (U.S. W.D. Wis. 1990), which held that a letter of credit creates a primary liability - to pay on the presentation of documents - rather than a secondary liability, to pay in the event that the borrower defaults.

56 In *Westpac*, Farley J. stated (at para. 28):

> One must remember that the parties chose the letter of credit method as the way of satisfying the requirements; thus they chose how the substance of this transaction would be dealt with. The autonomy principle is not form, it is a foundation of the letters of credit regime. It is this regime which on a policy basis is recognized as being quite valuable to society (and the economy) as a whole.

57 167 argues that *Carley* can be distinguished because, in that case, there was no privity of contract between the lender and the party who arranged the letter of credit. Here, there is privity between GMAC and 167 because of the LC Agreement.

58 It is common to find side agreements between a party who provides a standby letter of credit and a lender in order to deal with issues such as enforceability and conditions of payment (see Lazar Sarna, *Letters of Credit: The Law and Current Practice*, 3rd ed. (Thomson Carswell) at pp. 3-8 to 3-8.1). However, the existence of privity between GMAC and 167 does not turn the LC Agreement into a contract subject to the law governing guarantees. To determine whether the law of guarantee applies, one must consider the terms of the LC Agreement, including the fact that the security provided in it is a letter of credit.

59 Moreover, an examination of the terms of the LC Agreement confirms that it is not a contract of guarantee. The only recourse available to GMAC under the agreement is to the Letter of Credit (or the Cash Collateral derived from it).

60 As well, there is no provision for waiver of forbearance in the LC Agreement, as one would expect in a commercial guarantee instrument (see Geraldine Andrews and Richard Millet, *Law of Guarantees*, 4th ed. (London: Sweet & Maxwell,

2005) at p. 528).

61 In addition, 167 entered into a separate Credit Support Agreement with SAAN in order to create a right of subrogation. As a guarantor, 167 would have no need to obtain such a right, as the right of subrogation arises by law for a guarantor (*Westpac*, *supra*, at para. 17).

62 If 167 wanted the right to have its obligations discharged in the event of a material change to the Loan Agreement, it could have sought such rights by contract as well. Instead, the LC Agreement appears to contemplate the possibility of further amendments to the Loan Agreement, defining it "as the same may be further amended, modified, replaced, restated or supplemented from time to time."

63 167 argues that its obligations under the LC Agreement were secondary obligations and, therefore, it is a guarantor. In fact, 167's obligations under the agreement are primary obligations to GMAC - to provide the Letter of Credit on which GMAC could draw if the proper documents are presented to the Bank. 167 was required to provide the Letter of Credit before and irrespective of any default by SAAN, the principal borrower. The proceeds ultimately drawn on the Letter of Credit by GMAC were the Bank's funds; it was the Bank, not 167, that paid the debt of SAAN.

64 In contrast, a guarantee creates a secondary obligation, requiring payment by the guarantor on the default of the borrower (*Carley Capital Group, Re*, *supra* at p. 2). That is not the situation under the LC Agreement.

65 167 argues that the LC Agreement creates a secondary obligation on the part of 167 because payment from the Letter of Credit or the Cash Collateral can be made only if the loan is not satisfied by SAAN or by the liquidation of the SAAN inventory. Again, it is not correct to say the obligation is secondary. 167's obligation under the LC Agreement is primary; the agreement does not require 167 to do anything after it has provided the Letter of Credit. 167 may, in certain circumstances, have a right to monies from GMAC, but only if there is a surplus from the funds advanced by the Bank after the liquidation of the inventory and payment of the loan. As Blair J. said in *Frasmet*, *supra*, at para. 33:

> An irrevocable letter of credit has been said to be the equivalent of cash or moneys worth placed at risk to its full face value the moment it is issued, subject to the happening of certain specific events ...

66 167 also argues that the Letter of Credit is security for 167's guarantee under the LC Agreement, and not security for SAAN's indebtedness. However, the terms of the LC Agreement and the Letter of Credit make it clear that the Letter of Credit was security for SAAN's indebtedness under the Loan Agreement and not security for a guarantee provided by 167. Section 2.06 states clearly that in the event of insolvency proceedings against SAAN, "GMAC may retain the Letter of Credit, or the Cash Collateral, as the case may be as security against any ultimate shortfall of the Borrower's indebtedness."

67 Therefore, reading the LC Agreement as a whole and in light of the obligation assumed by 167, there is no serious issue that the law of guarantee applies to the agreement so as to permit 167 to argue that its obligations as a guarantor were discharged as a result of the Forbearance Agreement.

Issue No. 4: Did the motions judge err in finding an implied ratification by 167?

68 In the alternative, if the LC Agreement is subject to the law relating to guarantees, the motions judge held that 167 implicitly ratified the changes to the Loan Agreement.

69 167 argues that a guarantor has no legal obligation to warn a creditor when the creditor engages in conduct that may discharge the guarantee (see *Birch Lake (Municipal District) v. London Guarantee & Accident Co.*, [1930] 3 W.W.R. 634 (Alta. T.D.) at para. 11).

70 However, if a guarantor, upon learning of a material variation in the guaranteed loan, continues to allow a creditor to supply credit to the debtor, the guarantor is deemed to have ratified the variation after a reasonable period has elapsed (*Transamerica Commercial Finance Corp. Canada v. Northgate RV Sales Ltd.*, 2006 CarswellBC 3180 (B.C. S.C. [In Chambers]) at paras. 37 and 39).

71 167 concedes the possibility that ratification may exist in the context of guarantees, but submits that the motions judge erred in determining that there had been ratification. There was no express ratification of the changes to the Loan Agreement, and 167 argues that any implied ratification must be clear and unequivocal (*John Ziner Lumber Ltd. v. Kotov* (2000), 5 C.L.R. (3d) 44 (Ont. C.A.) at para. 31). 167 submits that its participation in the CCAA proceedings, as a trade creditor, could not constitute clear and unequivocal ratification of amendments to the Loan Agreement.

72 I see no error on the part of the motions judge with respect to ratification. The evidence is clear that 167 was aware of the Forbearance Agreement at the latest in February or March 2008. It participated in the CCAA proceedings over the course of several months, including the Receivership motion, without raising any issue about the Letter of Credit or the termination of its obligations under the LC Agreement. While 167 states that it participated in the CCAA proceedings as a trade creditor rather than guarantor, it is clear that 167 knew of the Forbearance Agreement through its participation, and it raised no objection.

73 As well, it directed GMAC to draw down the Cash Collateral, rather than renew the Letter of Credit at the end of March 2008, again without raising any issue about the termination of the LC Agreement. The evidence of Mr. Karls shows that 167 raised no concerns because he hoped that a restructuring of SAAN would result in the recovery of the monies advanced under the Letter of Credit and payment of amounts owing to 167.

74 While the motions judge did not determine whether there were material changes that would affect the validity of the Loan Agreement, the evidence suggests that the Forbearance Agreement would not discharge the Loan Agreement. SAAN defaulted under the Credit Facility in October 2007, leading GMAC to issue a notice of its intention to enforce its security. By section 2.06 of the LC Agreement, GMAC was then entitled to retain the Letter of Credit or Cash Collateral as security against any ultimate shortfall in recovery of SAAN's indebtedness. Thus, GMAC's rights against the guarantee crystallized before the Forbearance Agreement. As noted in *Alberta Opportunity Co. v. Wilson*, [1994] A.J. No. 498 (Alta. Master), once a guarantor becomes liable on the guarantee, later accommodations to the borrower would not change the terms of the guarantee (at para. 41).

Conclusion

75 For 167 to succeed in this appeal, it was required to show that the motions judge erred on each of three issues: the specific fund, the applicability of the law relating to the law of guarantee, and ratification. In my view, the motions judge did not err in concluding that there was not a specific fund to which 167 had a proprietary claim. Nor was there a serious issue with respect to 167's claim that the LC Agreement was terminated, thus entitling 167 to the Cash Collateral. Given this conclusion, there is no need to address the balance of convenience.

76 The appeal is dismissed. If the parties cannot agree on the costs of the motion for leave to appeal and the appeal, they may make brief written submissions through the Divisional Court Office within 21 days of the release of this decision.

Appeal dismissed.

TAB 13

1995 CarswellOnt 326
Ontario Court of Justice (General Division)

Toronto Dominion Bank v. Bank of Montreal

1995 CarswellOnt 326, [1995] O.J. No. 176, 18 B.L.R. (2d) 248, 22 O.R. (3d) 362, 53 A.C.W.S. (3d) 209, 6 E.T.R. (2d) 202

TORONTO-DOMINION BANK v. BANK OF MONTREAL, RICHARD BAIN, LOUIS REZNICK, ANTHONY F. GRIFFITHS, ALLAN D. HORN and W. DAVID WILSON

MacPherson J.

Heard: January 9-10, 1995
Judgment: February 2, 1995
Docket: Doc. 67305/91Q

Counsel: *Joel Goldenberg*, for plaintiff.
Burton Tait, Q.C., for defendant Bank of Montreal.
Bruce Thomas, for defendant Richard Bain.
D.N. Plumley, Q.C., and *J.C. D'Angelo*, for defendants *Anthony F. Griffiths*, *Allan D. Horn* and *W. David Wilson*.
Defendant *Louis Reznick*, in person.

Subject: Corporate and Commercial; Estates and Trusts; Restitution

Related Abridgment Classifications

Restitution and unjust enrichment
II Benefits conferred under mistake
II.1 Mistake of fact

Headnote

Restitution --- Benefits conferred under mistake — Mistake of fact

Banking and banks — Cheques — Accepted or certified cheques — Bank error in entering amount of deposit — Incorrect amount ultimately drawn on by cheque that was certified by bank which made error — Cheque deposited in payee's account at second bank and funds withdrawn — No unjust enrichment — Bank in error not entitled to equitable relief — Reliance on mistake.

The plaintiff bank, TD, commenced an action to recover $425,003.07 from the defendant bank, BMo, and from RB, LR, AG, AH and DW, former directors of C Corp., a bankrupt company. Prior to its bankruptcy on June 29, 1990, C Corp. was a retailer of carpet and related products in Canada and the U.S. BMo was C Corp.'s principal banker and had extended to C Corp. secured lines of credit totalling $10,000,000. C Corp. also maintained an account at a Toronto TD branch for the purposes of receiving credit card deposits from across Canada. C Corp.'s practice was to transfer the money from this TD account every two or three days to its main account at BMo.

C Corp.'s board of directors determined on June 20 and 21, 1990 that C Corp. was in serious financial difficulty and meetings were arranged for June 25 with representatives of BMo to discuss the situation.

On June 21, a teller at a TD branch in LaSalle, Quebec, posted a wire transfer deposit to the TD account of C Corp. in Toronto but made a mistake while typing the entry on the computer and $450,000.50 was deposited to the C Corp. account

instead of the correct amount of $450.50. The error was not detected at the LaSalle TD branch until the morning of June 22, and the LaSalle TD branch did not notify the Toronto TD branch of the error by telephone until later that day. A Toronto TD branch ledger clerk reported the error to her supervisor, who had the authority to make correcting entries in the C Corp. account. The supervisor failed to make the correction. C Corp. employees detected the increased balance in C Corp.'s TD branch account and after making inquiries to verify the balance, were advised by TD that there had been no unusual postings.

A C Corp. employee shortly thereafter attended at the Toronto TD branch and presented for certification a cheque in the amount of $585,000 which was duly certified by TD and deposited by C Corp. to the credit of its current account at BMo. TD contacted no one at C Corp. to notify it that the cheque had been certified in error and BMo had no notice of any problem with respect to the cheque. The cheque was honoured by TD when presented to TD by BMo on June 25.

During that same week, C Corp. exceeded its $10,000,000 line of credit with BMo. On both occasions, a representative of BMo immediately called C Corp. to insist on coverage of such excess and C Corp. complied. On June 25, C Corp. met with BMo and BMo was told that C Corp. was insolvent. On June 26, BMo notified C Corp. that unless the amount in excess of the line of credit was covered, BMo would return all cheques drawn on C Corp.'s account received on June 22 which would include two payroll cheques for C Corp.'s employees. C Corp. instructed BMo to stop payment on all cheques issued by C Corp., commencing with those received on June 22, except for the two payroll cheques. BMo wanted the C Corp. directors to remain in office and the C Corp. directors notified BMo that they would be prepared to stay on as directors of C Corp. if BMo would indemnify them against personal liability for the payment of employee wages and other benefits after June 25. BMo was not willing to permit the line of credit to exceed $10,000,000 which at that time was drawn down to $9,968,315.

The next day, BMo and C Corp. discovered the $450,500.50 deposit to the credit of C Corp. in the BMo account. Neither C Corp. nor BMo knew that this cheque resulted from TD's errors. On June 27, BMo certified a C Corp. cheque payable to FR, a law firm, in trust, in the amount of $586,835 which was deposited into an FR trust fund for the payment of wages of C Corp. employees. The amount of the cheque represented the difference between C Corp.'s outstanding loans balance on June 26 and its line of credit. Absent the certification and delivery of the cheque, the C Corp. directors would have resigned on June 26.

On June 29, C Corp. made an assignment in bankruptcy. On the same day, a debit memo sent from the LaSalle TD branch arrived at the Toronto TD branch. It had been delayed in transit for a week because it had originally been misdirected to a non-existing Toronto TD branch. The debit memo resulted in an overdraft in excess of $400,000 in the C Corp. TD account. Late in the afternoon on July 3, TD notified BMo of the mistake that had occurred and requested the return of the amount of the original certified cheque. TD advised C Corp. of the mistake on July 5 and on the same day made a written demand on FR for reimbursement out of the trust fund. TD sued for recovery of money from the trust account, less recoveries received from C Corp. from time to time in the intervening years. TD's statement of claim was framed in terms of allegations of breach of trust, negligence, conversion and unjust enrichment against all defendants. At trial, TD proceeded against the defendants only on the basis of unjust enrichment.

Held:

The action was dismissed against all defendants.

Certification of a cheque by a bank is irrevocable and there is no distinction between certification obtained by the payer or by the payee. Certification creates a status in the cheque which is the equivalent of acceptance of such certified cheque regardless of who is responsible for certification. TD could not resile from the certified cheque that it gave to BMo.

TD did not establish the elements of unjust enrichment at trial. There are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment; a corresponding deprivation; and an absence of any juristic reason for the enrichment. BMo conceded the first two elements; however, there was a juristic reason for BMo to receive and retain the funds transferred to it by TD. C Corp. owed a very substantial debt to BMo and the existence of this debt and BMo's instant use of the cheque to reduce the debt was a juristic reason for BMo's retention of the money. Money paid under a mistake of fact that is used to discharge a debt owed to the payee by the payer is an exception to the general principle that a person who pays money under a mistake of fact should be able to recover it.

Unjust enrichment is an equitable remedy and the party claiming it must establish that its conduct leading to its deprivation was untainted. Given the conduct of the TD employees in this matter and the delay of TD in seeking recovery of the money

paid under the mistake, it would have been against commercial conscience to have allowed TD to recover on unjust enrichment grounds. In contrast, BMo and the C Corp. directors acted in good faith and made efforts to permit C Corp. to remain in business and to pay the C Corp. employees the wages that they were entitled to receive.

BMo was entitled to rely on the reliance exception to recovery of money paid under a mistake of fact. BMo and the C Corp. directors made fundamental decisions concerning the management of C Corp.'s bank account and its indebtedness to BMo in reliance on the day-by-day state of the bank accounts, including the proceeds of the mistaken cheque. Without the mistaken funds, BMo might have made different decisions during that week, including an attempt to realize sooner on its security against C Corp. and with better results. Absent the mistaken funds, BMo's vigilant policing of the excess in C Corp.'s line of credit would almost certainly have led BMo to make decisions different from those it in fact made at the time.

TD failed to establish its claim against the directors because it could not be said that they received an incontrovertible benefit. A claim for unjust enrichment can succeed only if the benefit received by the person enriched is "incontrovertible" or "demonstrable" or "unquestionable." The fact that a portion of the money paid by TD to C Corp. under the mistake was used to establish a fund to pay the wages to the C Corp. employees was insufficient to establish the required benefit. No employee of C Corp. ever made a claim under s. 131 of the *Business Corporations Act* (Ont.) for payment of wages by a director of C Corp., nor did any of the directors receive any of the money in the FR trust fund. Accordingly, the directors received no direct benefit, and, as for indirect benefit, no one initiated an action against the directors under the statute.

In addition, the directors' receipt and use of the money received through TD's mistake was completely innocent. The directors served C Corp. faithfully and took important steps to protect their employees and manage C Corp. during a period of financial hardship. During that same period, TD was slow and inept in its attempts to recover the money. Unjust enrichment is an equitable doctrine; the equities favoured the directors and TD did not succeed in its attempt to invoke it.

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Peel (Regional Municipality) v. Ontario, (sub nom. *Peel (Regional Municipality) v. Canada)* [1992] 3 S.C.R. 762, 144 N.R. 1, 59 O.A.C. 81, 12 M.P.L.R. (2d) 229, 98 D.L.R. (4th) 140 — *considered*

Peter v. Beblow, [1993] 1 S.C.R. 980, [1993] 3 W.W.R. 337, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621 — *referred to*

Rathwell v. Rathwell, [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 1 E.T.R. 307, 1 R.F.L. (2d) 1, 83 D.L.R. (3d) 289 — *referred to*

Royal Bank v. Harowitz (1994), 17 O.R. (3d) 671 (Gen. Div.) — *referred to*

Sorochan v. Sorochan, [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289, 46 Alta. L.R. (2d) 97, 2 R.F.L. (3d) 225, 29 D.L.R. (4th) 1, 69 N.R. 81, 23 E.T.R. 143, [1986] R.D.I. 448, [1986] R.D.F. 501, 74 A.R. 67 — *referred to*

Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd., [1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591, 5 N.R. 23, 55 D.L.R. (3d) 1 — *referred to*

Statutes considered:

Bills of Exchange Act, R.S.C. 1985, c. B-4 —

s. 2 "acceptance"

s. 38

s. 127

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

s. 131

Action to recover moneys paid by mistake on basis of unjust enrichment.

***MacPherson J.*:**

Introduction

1 This case presents an unusual mix of high comedy and financial tragedy in the normally bland worlds of banking and retail sales. The story unfolds in a two-week period in the summer of 1990.

2 The comedy is all on a major national bank's side. In a milliseconda teller in a small Quebec branch made a mistake and gave away almost half a million dollars. Then, for the next two weeks, bank personnel in Quebec and Ontario stumbled around, almost in Keystone Kops fashion, trying to retrieve the money.

3 The financial tragedy is on the side of a retail carpet chain which received the money by mistake just as it was tumbling into bankruptcy.

4 From the perspective of the actors involved, the events on the bank's comedy stage and the carpet company's tragedy stage unfolded, they thought, in splendid isolation from each other. They were wrong. In fact, unbeknownst to the actors, the comedy and the tragedy intersected. And five years later they intersect again in this trial because the bank, which lost the large sum of money entirely through its own errors, believes that it is entitled to recover the money from another bank and from the former directors of the corporation, both of whom used the money without realizing that they had obtained it by mistake.

A. Factual Background

5 The trial proceeded on the basis of an Agreed Statement of Facts. The parties and their counsel are to be complimented for converting what could have been a long trial involving many witnesses into a one-and-a-half-day trial devoted entirely to

legal argument.

6 The plaintiff, Toronto-Dominion Bank ("TD"), sues to recover $425,003.07 from either the Bank of Montreal ("B of M"), or the former directors of Carpita Corporation ("Carpita"), Messrs. Bain, Reznick, Griffiths, Horn and Wilson.

7 Prior to its bankruptcy on June29, 1990, Carpita carried on business across Canada and in the United States as a retailer of carpet and related products under the business name Factory Carpet.

8 B of M was the principal banker of Carpita and, at the relevant time in 1990, had extended to Carpita lines of credit aggregating $10,000,000. B of M had valid security over Carpita's assets, including its receivables.

9 Carpita also maintained an account at the College and Spadina branch of TD. It used this account for the receipt of Visa deposits from across Canada. Every two or three days the money was transferred from this account to Carpita's main account at the B of M.

10 On June 20 and 21, 1990, the Board of Directors of Carpita met to discuss the precarious financial position of the corporation. There was a discrepancy of $2,500,000 between the company's own financial records and its bank statements. It also appeared that the corporation might have lost $20,000,000 in the previous fiscal year. One director, Mr.Beutel, scrambled for cover and resigned on the morning of June 21. The other directors decided to notify B of M, the company's principal banker, with a view to discussing the situation. A meeting was set for Monday, June 25, the earliest date on which representatives of B of M were available.

11 Meanwhile, on June 21 as well, a completely different set of events was set in motion. A teller at a TD branch in LaSalle, Quebec made two keying errors. She kept her finger on a key too long, thus shifting decimals in two entries by three spaces. The result was a wire transfer deposit into the TD College and Spadina branch to the credit of Carpita in the amount of $450,500.50 instead of the correct amount of $450.50.

12 The teller did not detect her error. At the close of business on June 21 she would have known that her records were out of balance. However, as a matter of risk management it is not worth it to TD to find the error that day. Reports are produced overnight by TD's data centre and such errors are usually found before the branch opens for business the next day.

13 In this instance the posting error was detected at the LaSalle branch at about 10:00 a.m. on June 22, 1990. It was discussed among employees and a Mr. Laberge was instructed to call the Toronto branch. He began by first preparing a written interbranch debit and then turned to other branch business. At noon he attempted to telephone the Toronto branch. He didn't get through then. However, at about 2:30 p.m. someone in the Quebec branch spoke by telephone to a ledger clerk at the TD Toronto branch advising her of the error. The clerk reported the error to her supervisor. The supervisor had the authority to make, and should have made, correcting entries in the Carpita account. She did not do so.

14 Meanwhile, on the same day, Friday, June 22, Ms Friedrichs, a clerk at Carpita, telephoned the TD branch to inquire about the balance in the Carpita Visa account. The same TD supervisor informed her that the balance was $595,000. MsFriedrichs said "wow" and immediately informed the company's accountant, Mr.Grilo. He told her to call the bank again to verify the balance and ensure that no unusual postings had occurred. MsFriedrichs made a second call to the TD supervisor who checked the records and confirmed that there was nothing unusual in them. Shortly thereafter, a Carpita representative attended at the Toronto TD branch and presented for certification a cheque payable to Factory Carpet for $585,000. The TD supervisor authorized the certification. On the same day, Carpita deposited the cheque to the credit of its current account at B of M.

15 No one at TD contacted Carpita to advise it that the $585,000 cheque had been certified in error. No notice was given to B of M of any problem with respect to the cheque, even though it was Carpita's pattern to transfer its funds quite regularly to B of M. The TD supervisor does not recall telling anyone else of the error. Thus, when the cheque was received by the TD Toronto branch on Monday, June 25, it was honoured. B of M now had the $585,000 in its accounts.

16 I turn now to the events of the second week, the week of June 25. It will be recalled that a meeting of representatives of Carpita and B of M was scheduled for Monday, June 25. Twice during the previous week Carpita had appeared to exceed

its $10,000,000 line of credit. On both occasions Mr.Stratton of B of M called Carpita to insist on coverage of the excess. Carpita complied.

17 On the morning of June 25, B of M saw that the loan balance in Carpita's account had risen to $10,471,936. Mr.Stratton called Mr. Grilo at Carpita on Monday morning and asked that the company have a solution to be discussed at the meeting scheduled for that afternoon.

18 At approximately 2:00p.m. on Monday, June 25, several representatives of Carpita and B of M met. The Carpita people informed B of M of Carpita's huge losses in the previous fiscal year and that there was no longer any equity in the company. No solution to the line of credit excess problem was achieved, presumably because it paled almost into insignificance against the $20,000,000 loss being discussed.

19 On Tuesday, June 26 another meeting was held. Mr. Stratton advised the Carpita representatives that unless the excess beyond the line of credit was covered, B of M would return all cheques drawn on Carpita's account received on June 22. This would include two cheques payable to Comcheq Corporation for payroll purposes. At about 2:30 p.m., Carpita instructed B of M to stop payment of all cheques issued by Carpita, commencing with those received on June 22. However, Carpita's instruction exempted the two cheques payable to Comcheq to reimburse it for payroll amounts totalling $515,785.68 which had previously been remitted to Carpita employees.

20 Following the stop payment order given on June 26, B of M returned cheques totalling $573,299.15 before the final closing of accounts for the previous day. This was in accordance with standard banking practice. However, B of M did not return the payroll cheques to Comcheq. The result was that at the close of business on June 25, Carpita had borrowed $9,968,315 on its $10,000,000 line of credit.

21 Also at the meeting on June 26, the Carpita and B of M representatives discussed the ongoing management of Carpita. The Carpita directors were prepared to stay on if B of M would indemnify them against personal liability for the payment of employee wages and other benefits after June 25. In other words, the decision not to dishonour the two previous payroll cheques covered liability to June 25. Now attention was being focussed on possible future liability for employee claims.

22 B of M wanted the directors to stay in office, at least until it decided to commence to realize on its security. But B of M was not willing to permit the line of credit to exceed $10,000,000. The directors were prepared to continue to serve, provided they were immunized from personal liability for employee claims. When the representatives met on June 26 this combination of positions presented an intractable problem because Carpita was so close to the limit of its line of credit.

23 By the next day the problem was solved by the incredible irony of the accidental $450,000 finding its way into B of M's records. Overnight Carpita went from being almost at the ceiling of its line of credit to having about $600,000 of breathing space. Neither Carpita nor B of M knew that this change was the result of TD's errors. In any case, on Wednesday, June 27, B of M certified a Carpita cheque payable to the law firm Fogler Rubinoff in trust in the amount of $586,835 which was deposited into the Fogler Rubinoff trust fund for the benefit of Carpita employees. The amount of the cheque equalled the difference between Carpita's outstanding loans balance on June 26 and its line of credit limit of $10,000,000. Without the certification and delivery of that cheque, the Carpita directors would have resigned.

24 On Friday, June 29, Carpita made an assignment in bankruptcy with the knowledge of B of M. Still no one at B of M or Carpita had any inkling of the $450,000 windfall. But the TD comedy of errors was about to catch up to the Carpita tragedy. On this same day, the debit memo sent from the Quebec TD branch arrived at the College and Spadina branch. It had been delayed in transit for a week because it had originally been misdirected to a non-existent Toronto branch. The debit memo resulted in an overdraft in excess of $400,000 in Carpita's TD account. Even though the account had no overdraft privilege, nobody at TD reacted to the situation on June 29.

25 The long holiday weekend ensued. Finally, in the late afternoon of July 3, TD notified B of M of the mistake that had been made and requested a return of the amount of the original certified cheque. TD didn't get around to advising Carpita of the mistake until July 5. Also on July 5, TD made a written demand on Fogler Rubinoff for reimbursement out of the trust fund.

26 By agreement of counsel, the balance in the Fogler Rubinoff trust account, namely $585,887.61, has been paid into a special accountof Ernst and Young, Carpita's trustee in bankruptcy, to abide the outcome of this litigation. In the intervening years TD has recovered about $25,000 from Carpita through other avenues. Hence its claim now is for the recovery of $425,003.07 from this special account.

B. Legal Issues

27 TD's Statement of Claim was framed in terms of allegations of breach of trust, negligence, conversion and unjust enrichment against all the defendants. Most of these allegations have been abandoned. At trial the argument proceeded on only two bases, which I would frame in the form of questions:

(1) Can TD recover $425,003.07 from B of M because the latter has been unjustly enriched?

(2) In the alternative, can TD recover $425,003.07 from the former directors of Carpita because they have been unjustly enriched?

28 I will address these questions in turn.

(1) Unjust Enrichment — Bank of Montreal

29 TD claims that B of M has been unjustly enriched by mistakenly receiving and improperly retaining $425,003.07 of TD's money. TD says that at the close of business on June26 Carpita had available to it on its line of credit about $585,000. However, says TD, just over $450,000 of this amount was there by mistake. TD's submission is that this amount was impressed with a trust in its favour. The money has not disappeared; it is in a trust account abiding the result of this trial. It is, therefore, available to be returned to TD and, says TD, it would be against commercial conscience if it were not returned.

30 TD grounds its argument in a passage from the judgment of GoffJ. (the highly regarded English academic in the domain of equity before his appointment to the bench) in *Barclays Bank Ltd. v. W.J. Simms, Son & Cooke (Southern) Ltd.*, [1979] 3 All E.R. 522 (Q.B.). After an extensive review of centuries of jurisprudence relating to the recovery of money obtained by mistake of fact, GoffJ. said, at p. 535:

> From this formidable line of authority certain simple principles can, in my judgment, be deduced.
>
> 1. If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact.

31 The applicability of this principle in Ontario, and its legal basis, have recently been articulated by OsborneJ. in *Morgan Guaranty Trust Co. of New York v. Outerbridge* (1990), 72 O.R. (2d) 161 (H.C.), at p. 188:

> The obligation to return money paid by mistake (of fact) is rooted in the law of restitution, responsive as it is to what the law views as unjust enrichment. Notions of an implied contract to repay have been discarded. The claim is equitable.
>
> As a statement of general principle I refer to Goff and Jones' text *The Law of Restitution*, 3rd ed., at pp. 12-13 where the following appears:
>
> > Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff. Obvious examples are where the plaintiff has himself conferred the benefit on the defendant through mistake or compulsion. To allow the defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense and this, subject to certain defined limits, the law will not allow.

32 TD supplements its argument anchored in unjust enrichment by asserting that the money it mistakenly transferred to B of M is still recoverable. Because $585,000 has been placed in a trust account and not spent, there is more than enough money available, says TD, for its recovery of just over $425,000. TD points to an old Privy Council decision, *Colonial Bank v. Exchange Bank of Yarmouth* (1885), 11 App. Cas. 84, and especially to this passage at p. 89:

> Now it was not true that the sum had been used and could not be recalled. The defendants had only got to run a pen through some private entries in their own books and the matter then would have stood in precisely the same position as it stood in before the mistake was made.

A century later the same result could and should prevail, says TD, with the punching of a key (one hopes that the B of M employee would do this more successfully than the TD teller in LaSalle, Quebec!) replacing the stroke of a pen.

33 I do not agree with TD's claim and analysis. In my view, there are at least three compelling reasons, each sufficient in its own right, for denying TD's claim grounded in unjust enrichment.

(a) Legal effect of certifying a cheque

34 The first reason is the legal effect of cashing a certified cheque. In a decision released about a month ago, *A.E. LePage Real Estate Services Ltd. v. Rattray Publications Ltd.*, [1994] O.J. No. 2950 [reported at 120 D.L.R. (4th) 499], the Court of Appeal stated clearly that a certified cheque is irrevocable. The principal issue in this case was whether there was a distinction between certification obtained by the payer and certification obtained by the payee. Finlayson J.A., in approving of the decision made at trial by MontgomeryJ., (1991), 5 O.R. (3d) 216 (Gen. Div.), was not prepared to make such a distinction. His reasons are, I believe, animated by a desire to enunciate general principles of value to the commercial community. One consequenceis non-acceptance of the payer-payee distinction. He said, at p. 6 [p. 504, D.L.R.]:

> ... certification creates a status in the cheque which is the equivalent of acceptance regardless of who is responsible for the certification.
>
> The great advantage of treating certification as acceptance, whether at the instance of the payee or the drawer, is that it brings a certified cheque squarely within the framework of the *Bills of Exchange Act* and *codifies the consequences of certification.*[1]

(My emphasis.) [Footnote added by MacPherson J.]

35 In reaching this conclusion, Finlayson J.A. relied on a law review article by Professor Benjamin Geva, Canada's foremost academic authority on the law of banking and negotiable instruments. The article is "Irrevocability of Bank Drafts, Certified Cheques and Money Orders" (1986), 65 Can. Bar Rev. 107. Finlayson J.A. said this about it in his judgment in *LePage*, at pp. 6-7 [p. 505, D.L.R.]:

> Professor Geva argues persuasively that acceptance is the proper theoretical basis underlying certification. After undertaking a detailed examination of certified cheques in his article, *supra*, he identifies three premises for this theory in his examination at pp. 110-11:
>
> > First of all, the irrevocability of the banker's obligation facilitates the acceptability of banker's instruments as cash substitutes. Secondly, prevailing mercantile perceptions as to irrevocability attached to any type of instrument should be reflected in existing law. Thirdly, it is preferable to explain the irrevocability of the banker's obligation in the framework of the law of negotiable instruments rather than under general principles of law. Indeed, fitting irrevocability into a known category of statutory engagement under the Act is bound to produce a greater certainty than the application of broad and often open-ended general principles.

36 I make one final point about *LePage*. Not only is FinlaysonJ.A.'s judgment for the court written very much at the level of broad legal and commercial principles; in addition, the fact situation in *LePage* is very similar to the situation in this case, namely a mistakenly certified cheque cashed by a second financial institution. My conclusion, therefore, is that the reasoning

and result in *LePage* govern this case. TD cannot resile from the certified cheque that it gave to B of M.

(b) The 'juristic reason' component of unjust enrichment

37 My second reason for not agreeing with TD's argument is that I do not believe that the elements of an unjust enrichment are made out in this case. These elements are now well-known in the Canadian legal context because of a series of major decisions by the Supreme Court of Canada: see, for example, *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Becker v. Pettkus*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; and *Peter v. Beblow*, [1993] 1 S.C.R. 980. In *Pettkus*, DicksonJ. put it thus, at p. 848:

> ... there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.

38 B of M concedes that the first two of these elements are met in this case — TD has been deprived of money and B of M has received it.

39 However, in my view, the third element for unjust enrichment is missing. There is a juristic reason for B of M receiving and retaining the funds. When B of M cashed the certified cheque for about $585,000 it had granted a line of credit of $10,000,000 to Carpita and Carpita in fact owed it almost that amount. In other words, Carpita owed a very substantial debt to B of M. The existence of this debt, and B of M's instant use of the cheque to reduce the debt, is a juristic reason for B of M's retention of the money. In *Barclays Bank*, supra, Goff J., after setting out the general principle that a person who pays money under a mistake of fact should be able to recover it, articulated three exceptions to the rule. The second one he expressed as follows, at p. 535:

> His claim may however fail if ... (b) the payment is made for good consideration, *in particular if the money is paid to discharge, and does discharge, a debt owed to the payee ... by the payer ...*

(My emphasis.) See also: *Royal Bank v. Harowitz* (1994), 17 O.R. (3d) 671 (Gen. Div.), and *McDiarmid Lumber Ltd. v. Canadian Imperial Bank of Commerce* (1992), 94 D.L.R. (4th) 227 (B.C. S.C.); contra, in obiter, *Morgan Guaranty Trust*, supra.

40 I make one other point about TD's unjust enrichment argument. Unjust enrichment is an equitable remedy. The party claiming it must establish that its conduct leading to its deprivation was untainted. In a commercial context I like the formulation of Lambert J.A. of the British Columbia Court of Appeal in *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R. (4th) 161, at p. 172:

> In my opinion the concept of the injustice of the enrichment as being against sound commercial conscience must continue to guide the application of the three tests in *Pettkus v. Becker* when they are applied to a commercial relationship.

41 In the present case, it would be against commercial conscience to allow TD to recover on unjust enrichment grounds. While B of M and Carpita were struggling to try to keep Factory Carpet afloat and pay its employees, TD employees in two provinces displayed remarkable lassitude and ineptitude as they tried to correct the original mistake. The litany of errors and omissions is set out earlier in these reasons. I agree with Mr. Tait, B of M's counsel, who described TD's conduct in an apt and colourful sentence "In short, the TD system permitted an error to be made at the speed of light which could only be corrected by the equivalent of the Pony Express."

(c) The reliance exception to recovery for mistake of fact

42 In *Barclays Bank*, supra, GoffJ. enunciated three exceptions to the general principle that a person has a prima facie right to recover money paid under a mistake of fact. He expressed the third exception in this fashion, at p. 535:

> His claim may however fail if ... (c) the payee has changed his position in good faith, or is deemed in law to have done so.

See also: *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.*, [1976] 2 S.C.R. 147, and *Morgan Guaranty*, supra.

43 In my view, B of M is entitled to rely on this exception in this case. In the week before it became aware of the seriousness of Carpita's situation, B of M, on two occasions, immediately notified Carpita when Carpita went over its line of credit. Adherence to the line of credit was important to B of M. It did not wink at excesses, even small ones or even for a day. The next week saw Carpita tumble into financial ruin. During that week B of M and the Carpita directors made fundamental decisions about the management of Carpita's bank account and its indebtedness to B of M in reliance on the day-by-day state of the bank accounts, including the proceeds of the mistaken cheque. Without the mistaken funds, B of M might have made different decisions during the last week of June 1990. It might not have permitted a trust fund to be created for the benefit of employees or it might have attempted to realize sooner, and with better results, on its security. We will never know for certain because a different course of conduct was pursued in reliance on the known state of Carpita's accounts. What we do know is that B of M was vigilant about policing the excess in Carpita's line of credit, and that without the mistaken funds, the policing in the last week of June would almost certainly have led B of M to make decisions different from those they in fact made at the time.

(2) Unjust Enrichment — Former Directors of Carpita

44 If TD is unsuccessful in what it candidly admits is its main claim, the one against B of M, then it advances an alternative claim against the former directors of Carpita. TD sets out succinctly this claim at para. 39 of its factum:

> 39. If for any reason, the Toronto-Dominion Bank is not entitled to the relief claimed against the Bank of Montreal, then clearly Carpita and its Directors will have been unjustly enriched. The Directors will have benefited in that they have been relieved of the obligation to make substantial wage payments.

45 The last sentence in para. 39 is a reference to s. 131 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, which provides inter alia:

> 131. — (1) [*Directors' liability to employees for wages*] The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the *Employment Standards Act*, and the regulations thereunder, or under any collective agreement made by the corporation.
>
> (2) [*Limitation*] A director is liable under subsection (1) only if,
>
> (*a*) the director is sued while he or she is a director or within six months after ceasing to be a director; and
>
> (*b*) the action against the director is commenced within six months after the debts became payable ...

46 TD's argument is that the trust fund for employee salaries was established only because of the money that was deposited by mistake into B of M's account. Without the trust fund, TD says, there might not have been sufficient money to pay the employees which might have provoked them to sue the directors under this provision. By avoiding this potential liability the directors have received a benefit — unjustly, asserts TD.

47 I do not agree with this argument. In a recent case, *Peel (Regional Municipality) v. Ontario*, (sub nom. *Peel (Regional Municipality) v. Canada)* [1992] 3 S.C.R. 762, McLachlin J., for a unanimouscourt, discussed in some detail the concept of benefit in the context of juristic reason, the third component of the test for unjust enrichment. She reviewed many cases and the two leading texts, Goff and Jones, *The Law of Restitution*, 3rd ed. (1986), and Maddaugh and McCamus, *The Law of Restitution* (1990), and concluded that a claim for unjust enrichment can succeed only if, inter alia, the benefit received by the

person enriched is "incontrovertible" or "demonstrable" or "unquestionable" (p. 797).

48 None of these words comes anywhere close to describing the benefit that TD alleges the directors of Carpita received in this case. No employee ever made a claim under s. 131 of the Ontario *Business Corporations Act*. Nor did any of the directors receive one penny of the money in the trust fund. Accordingly, the directors received no direct benefit. As for indirect benefit, it was remote and speculative in 1990 and it disappeared entirely when no one initiated the s. 131 process. In short, the situation in this case is, in my view, completely divorced from any realistic notion of "incontrovertible" benefit.

49 I note as well that the directors had no idea throughout the difficult days of late June 1990 that Carpita had received a windfall through TD's mistake. Their receipt and use of the windfall was completely innocent. Moreover, they served faithfully at a difficult time. Unlike one director, the defendant directors did not resign when the financial storm clouds blew in; rather they stayed, took important steps to protect their employees, and generally tried to manage the company in turbulent waters. During the same days, TD was slow and inept in its attempts to recover the money. In other words, the equities are with the directors, not TD. Since unjust enrichment is an equitable doctrine, it follows that TD should not succeed in its attempt to invoke it.

Conclusion and Disposition

50 In *LePage*, supra, Finlayson J.A. said, at p. 7 [p. 505, 120 D.L.R. (4th)]:

> The problem on appeal, is not that the bank does not have a remedy, but that its customer, the party against whom it has the remedy, is insolvent.

This passage is, in my view, a perfect description of TD's problem in this case.

51 The action is dismissed against all defendants. Costs may be spoken to, if necessary.

Action dismissed.

Footnotes

1 The provisions of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, to which Finlayson J.A. referred are:
2. ...
"acceptance" means an acceptance completed by delivery or notification;
. . . . .
38. Every contract on a bill, whether it is the drawer's, the acceptor's or an endorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto, but where an acceptance is written on a bill and the drawee gives notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.
127. The acceptor of a bill by accepting it engages that he will pay it according to the tenor of his acceptance.

DEL EQUIPMENT INC.
Applicant

Court File No. CV-19-629552-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
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BRIEF OF AUTHORITES OF THE RESPONDING PARTY GIN-COR INDUSTRIES INC.

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