Clerk's Stamp

COURT FILE NUMBER:	2403 00813
COURT:	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
PLAINTIFF:	JASPER SUMMERLEA SHOPPING CENTER LTD., by its Court-appointed Receiver and Manager, MNP LTD.
DEFENDANTS:	JUDY PING CHEN, also known as JUDY CHEN, KIN MIN LEE, JOHN DOE, JANE DOE, ABC CORPORATION, and ROYAL BANK OF CANADA
DOCUMENT:	**BRIEF OF MNP LTD.** **JANUARY 19, 2024, APPLICATION BEFORE JUSTICE J.J. GILL, SITTING ON THE COMMERCIAL LIST**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	**PARLEE McLAWS LLP** 1700 Enbridge Centre 10175 – 101 Street NW Edmonton, Alberta T5J 0H3 Attention: Steven A. Rohatyn Phone: 780-423-8177 Fax: 780-423-2870 File No: 839-64/SRO

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PART 1 FACTS

1. MNP Ltd. ("**MNP**" or the "**Receiver**") was appointed as the Receiver, without security, of all of the current and future assets, undertakings and properties, including all proceeds thereof (the "**Property**") of Jasper Summerlea Shopping Center Ltd. ("**Summerlea**") by Order (the "**Receivership Order**") of the Honourable Justice N. Whitling pronounced in Court File No. 2303 12261 on August 17, 2023 (the "**Receivership Date**").[1]

2. Pursuant to the terms of the Receivership Order, the Receiver is empowered and authorized to, *inter alia*:

   (a) Manage, operate, and carry on the business of Summerlea;

   (b) Take possession of and exercise control over the Property;

   (c) Receive, preserve, and protect the Property;

   (d) Receive and collect all monies and accounts then owed or thereafter owing to Summerlea, and to exercise all remedies of Summerlea in collecting those amounts; and

   (e) Initiate, prosecute, and continue the prosecution of any and all legal proceedings then pending or thereafter instituted with respect of Summerlea or the Property.[2]

3. The Receivership Order further compels all Persons, as defined therein, to provide to the Receiver copies of or access to all Records, also as defined therein, related to the business or affairs of Summerlea (the "**Disclosure Provisions**").[3]

4. The Defendant ("**Chen**") was and remains the sole registered Director and shareholder of Summerlea at all time material hereto. A search performed upon Summerlea at the Alberta Corporate Registry reveals her address to be in the City of Edmonton (the "**Edmonton Address**").[4]

5. Chen received notice of the Receivership Order through legal counsel, who had on Summerlea's behalf appeared to oppose the appointment of the Receiver. Immediately

[1] *First Report to the Court of MNP Ltd.* at Appendix A.
[2] *Ibid* at Appendix A para 3.
[3] *Ibid*, paras 4-5.
[4] *Ibid* at Appendix E.

following the Receivership Order's pronouncement, the Receiver requested, through the same legal counsel, that Ms. Chen deliver various financial information and items concerning the Property. Amongst the items requested were any undeposited cheques made payable to Summerlea.[5]

6. MNP notified the Canada Revenue Agency (the "**CRA**") of the Receivership on August 24, 2023.[6]

7. On December 21, 2023, the CRA advised MNP that a GST/HST refund in the amount of $587,667.21 was issued to Summerlea by way of a cheque dated August 23, 2023 (the "**Refund Cheque**"). The CRA further advised that the Refund Cheque was mailed to the Edmonton Address and had since been negotiated for deposit.

8. The Refund Cheque was not deposited to any account then known by MNP to be held by Summerlea.

9. By correspondence dated December 21, 2023, the Receiver demanded that Chen forthwith:

   (a) Provide full account particulars, if the Refund Cheque was deposited into an account held by Summerlea, but as yet undisclosed to MNP;

   (b) If the Refund Cheque was endorsed to a third party, disclose the identity of that third party; or

   (c) Pay the sum of $587,667.21, plus any interest or profits earned thereon, to the Receiver if the cheque was endorsed personally to Chen.[7]

10. To date, she has failed or refused to comply with or even acknowledge the Receiver's demand (the "**Demand**").

11. Upon obtaining and examining a copy of the cancelled Refund Cheque it was determined that it had been deposited to an account held at the Royal Bank of Canada ("**RBC**") on

[5] *Ibid* at Appendix B.
[6] *Ibid* at Appendices C and D.
[7] *Ibid* at Appendix G.

August 28, 2023, eleven days following the Receivership Date.[8] RBC later confirmed that the account was held in the name of Summerlea (the "**Account**").

12. The Account being in the name of Summerlea, various Records relating thereto and in respect of the numerous transactions that occurred thereon since the date of its opening (the "**Account Records**") were provided to the Receiver by RBC in accordance with its obligations under the Disclosure Provisions.

13. The Account Records reveal that the Account was opened under and pursuant to a Master Client Agreement for Business Clients naming Chen and Kin Min Lee ("**Lee**") as authorized signing officers (the "**Client Agreement**").[9]

14. Section "A" of the Client Agreement required that Chen and Lee certify to RBC that they each have the power and authority to exercise rights on behalf of Summerlea, and to conduct business and delegate power and authority on its behalf.

15. Various transactions occurred on the Summerlea Account (the "**Transactions**"), including but not limited to the following:

    (a) Numerous point of sale transactions relating to day to day consumer purchases, including several that followed the date of the Demand;

    (b) A $2,000.00 online transfer sent to Chen;

    (c) Various cash withdrawals;

    (d) Two withdrawals, one in the amount of $500,000.00 and the other in the amount of $40,000.00, concurrently deposited into RBC Account Nos. 5051032 and 5413760 ("**Account 032**" and "**Account 760**", but collectively, the "**Transfer Accounts**");

    (e) The issuance of several bank drafts made payable to third parties;

    (f) The issuance of two bank drafts totalling $11,600.00 and made payable to Chen.[10]

[8] *Ibid* at Appendix H.
[9] *Ibid* at Appendix J.
[10] *Ibid* at Appendix I and L.

16. On Summerlea's behalf, the Receiver has commenced this Action to establish its claim against Chen and Lee. By Order pronounced in this Action on January 15, 2024, this Honourable Court directed RBC to information relating to the Transfer Accounts of the nature described therein to the Receiver.[11]

17. On January 15, 2023, RBC confirmed that $20,754.22, representing the funds then remaining on deposit in the Account had been remitted to the Receiver. RBC has further confirmed that restrictions have been placed upon the Transfer Accounts as a result of the commencement of this Action.

18. The information disclosed pursuant to the January 15 Order[12] reveals, *inter alia*, that:

    (a) Account 032 received the $500,000.00 withdrawal from the Summerlea Account and is held in the name of Lee. On November 6, 2023, a branch-to-branch transaction resulted in a $460,000.00 debit to Account 032 (the "**$460k Transaction**"). It holds a balance of $68,928.57.

    (b) Account 760 received the $40,000.00 withdrawal from the Summerlea Account and is jointly held by Chen and Michelle Ming Lee. Several email transfers followed the deposit. The account was cleared by a $19,804.11 cash withdrawal on October 24, 2023, and holds a nil balance.

    (the "**Transfer Account Transactions**")

19. The Statement of Claim filed in this Action seeks proprietary and equitable remedies. The recipients of the funds transacted from the Transfer Accounts is unknown to the Plaintiff. RBC has refused to disclose information relating to those transactions, citing client confidentiality and privacy laws.

[11] *Second Report to the Court of MNP Ltd.* at Appendix D.
[12] *Ibid* at Appendices E and F.

PART 2 LAW

Attachment Orders

The Legislation

20. The Court may grant an attachment order under section 17(1) of the *Civil Enforcement Act* (the "***CEA***") where a claimant has commenced, or is about to commence, proceedings in Alberta to establish a claim. Under section 17(2), the Court must be satisfied that:

    (a) there is a reasonable likelihood that the claimant's claim against the defendant will be established, and

    (b) there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property,[13] or is likely to deal with that property,

        (i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and

        (ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.[14]

21. The claimant must also undertake to pay any damages that may occur from the granting of the order if the claim is ultimately unsuccessful.[15]

22. The *CEA* permits an application for an Attachment Order to be made without notice.[16] An Attachment Order must specify a date on which the order will expire unless extended by

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[13] Section 16 defines "exigible property" to mean property that would be exigible if the defendant were an enforcement debtor. Section 1 defines "exigible" to mean, with respect to property, not exempt from writ proceedings or distress proceedings. - **Tab 1**

[14] *Civil Enforcement Act*, RSA 2000, c C-15, ss 17(1)-(2) [*CEA*]. – Tab 1

[15] *Ibid* at s 17(4). See *Vue Weekly (Vue Magazine) v. See Magazine Inc.*, 1995 ABCA 461 at para 24 – **Tab 2**, which discusses undertakings provided in the context of applications for injunctive relief pursued by a Receiver.

[16] *CEA*, *supra* note 1 at s 18(1). – Tab 1

an application on notice to the Defendant. The specified date cannot be more than 21 days from the date that the without notice attachment order is granted.[17]

23. An Attachment Order should be granted in such a manner that it cause as little inconvenience to the Defendant as is consistent with achieving the purposes for which the Order is granted, and must not attach property that exceeds an amount or a value that appears to the Court to be necessary to meet the claimant's claim, including interest and costs, and any related writs, unless the Court is of the view that such a limitation would make the operation of the order unworkable or ineffective (the "**Proportionality Provisions**").[18]

The Case Law

24. The elements of the test for attachment orders are properly summarized by the Alberta Court of Appeal in *Bank of Nova Scotia v Five Star Motor Group Ltd*, 2020 ABCA 244 where the respondent challenged an attachment order that had been granted to the claimant in the context of an alleged 'cheque kiting scheme'. There the Court stated:

> [17] The substance of the test for an attachment order is found in s. 17(2). First there must be a "reasonable likelihood" the applicant's claim will be established. The "reasonable likelihood" test under the statute is arguably lower than the test of a "strong *prima facie* case" that might be needed for a common law *Mareva* injunction: *Cho v Twin Cities Power-Canada*, 2012 ABCA 47 at para. 5, 522 AR 154. The applicant need not prove the claim on a balance of probabilities, but something more than mere suspicion is required.
>
> [18] Secondly, there must be "reasonable grounds" that the defendant is likely to deal with its assets out of the ordinary course of business, and in a way that is "likely to seriously hinder the claimant" in recovering its claim. Again, something more than mere suspicion is required to meet this test. If the claim is in fraud or other similar misconduct, and if it is "reasonably likely" that the claim will be established under the first part of the test, that *may* support an inference that the defendant is likely to deal with its assets in a way that will satisfy the second part of the test: *Osman Auction Inc. v*

[17] *Ibid* at s 18(2). The Receiver has tentatively (subject to the outcome of this application) scheduled a February 9 hearing before the presiding Commercial List Justice for this purpose. – Tab 1
[18] *Ibid* at ss. 17(5) and (6). – Tab 1

> *Belland*, 1998 ABQB 1095 at para. 28. That, however, is not a universal or mandatory inference that should be drawn.[19]

25. In *Osman Auction*, the Court found that:

> …it does not take a strong *prima facie* case of fraud to provide reasonable grounds for believing that a person who is reasonably likely to be shown to be [or] have been fraudulent is likely to deal with his assets to avoid his creditor.[20]

26. This 'fraud exception' was discussed in *1773907 Alberta Ltd v Davidson*, 2016 ABQB 2 ["*Davidson*"], in the context of an application to continue an attachment order against the defendant. The case management judge noted that it was not inconsistent with s. 17 to conclude that:

> …the circumstances of the alleged fraud may give rise to an inference that there are reasonable grounds for believing that a defendant **is** likely to deal with her exigible property otherwise than for the purpose of meeting her reasonable and ordinary business or living expenses, and in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment it may obtain.[21]

27. The Court in *Ice District Development Partnership v Hahn*, 2020 ABQB 786, recently dealt with the 'fraud exception' in the context of missing deposits on condominium sales. While the order sought by the applicant in *Hahn* was a *Mareva* injunction the Court found that the 'inference analysis' (or 'fraud exception') from *Davidson* applies equally.[22]

28. In *Hahn* the judge drew an inference of a "real risk of a dissipation of assets" due to the fact deposit monies appeared to have been diverted to personal use and that the defendant could not provide sufficient evidence to explain the whereabouts of the funds. The judge went on to say:

> Someone who acts as Mr. Hahn has apparently acted is unlikely to suddenly become transparent and cooperative. Instead, his diversion-

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[19] *Bank of Nova Scotia v Five Star Motor Group Ltd*, 2020 ABCA 244 at paras 17-18 [*Five Star*]. – **Tab 3**
[20] *Osman Auction v Belland*, 1998 ABQB 1095 at para 29 [*Belland*]. – **Tab 4**
[21] *1773907 Alberta Ltd v Davidson*, 2016 ABQB 2 at para 83. The Order was later upheld by the Court of Appeal. – **Tab 5**
[22] *Ice District Development Partnership v Hahn*, 2020 ABQB 786 at para 43 [*Hahn*]. – **Tab 6**

> of-deposits behaviour signals a very material risk of assets being further placed beyond ICE's reach or placed so as to make collection of any eventual judgment more difficult.[23]

The Applicant's Duty

29. Courts have noted that there is a presumption that notice is to be given when making an application for an attachment order and that without notice applications are to be considered extraordinary.[24] However, situations where without notice submissions are appropriate include when "…the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given".[25]

30. When an application proceeds without notice, the Alberta Court of Appeal has affirmed that the applicant must act with the utmost good faith and make full, frank, and candid disclosure. Such disclosure must address all facts or defences that may assist the Defendant or defeat the application.[26]

Norwich Orders

The Case Law

31. A *Norwich* Order is an equitable bill of pre-trial discovery, an application for which can be brought before or during litigation.

32. In *AARC Society (Alberta Adolescent Recovery Centre) v Sparks*, this Honourable Court held that the applicant must demonstrate a legitimate purpose for the discovery. A legitimate purpose for equitable discovery has included the identification of a wrongdoer, the evaluation of whether a cause of action exists, to plead a known cause of action, to trace assets, and to preserve evidence or property. The Court held that in "its most common form, a *Norwich* order is available to an aggrieved party who cannot identify its

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[23] *Ibid* at paras 45-46.
[24] *Five Star*, *supra* note 4 at para 19. – Tab 3
[25] *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2017 ABCA 316 at para 41 [*Tiger Calcium*] (**Tab 7**) citing *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at para 25.
[26] *Tiger Calcium*, *supra* note 11 at paras 44-48. The same considerations apply to the Plaintiff's application for a *Norwich* Order. – Tab 7

wrongdoer and who seeks to obtain information from third parties that might assist in identifying the wrongdoer so that it can commence litigation against that wrongdoer".[27]

33. The applicant for a *Norwich* Order must show:

> (a) a *bona fide* claim against the unknown alleged wrongdoer;
>
> (b) the person from whom discovery is sought must be in some way involved in the matter under dispute, he must be more than an innocent bystander;
>
> (c) the person from whom discovery is sought must be the only practical source of information available to the applicants;
>
> (d) the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in addition to his legal costs;
>
> (e) the public interests in favour of disclosure must outweigh the legitimate privacy concerns.[28]

34. *Norwich* Orders are an exceptional remedy that should not be used when the information sought could be uncovered through the normal discovery process.[29]

PART 3 ARGUMENT

Attachment Order

35. The Plaintiff submits that the evidence before this Honourable Court is clear, convincing, and overwhelming in support of a conclusion that there is a reasonable likelihood that its claim against Chen and Lee will be established.

36. The Refund Cheque, having been issued following the Receivership Date, clearly formed part of the Property of Summerlea. Lee's relationship to Summerlea and Chen is

[27] *AARC Society (Alberta Adolescent Recovery Centre) v Sparks*, 2019 ABQB 87 at paras 21-22. – **Tab 8**
[28] *Ibid* at para 27 citing *Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38.
[29] *Ibid* at paras 29-32, citing *A.B. v. C.D.*, 2008 ABCA 51.

unknown and there is no evidence to suggest that Lee had knowledge of the Receivership Order. Despite this, Lee's receipt of those funds appears to have been gratuitous.

37. Chen did have knowledge of the Receivership Order. Chen was further aware of the Receiver's request for information and Property of Summerlea, which request made reference to undeposited cheques. Despite this, she took steps following the Receivership Date to, without the Receiver's knowledge and with Lee's involvement, open the Account, deposit the Refund Cheque, and utilize the funds resulting therefrom to her apparent benefit, and to the apparent benefit of Lee and perhaps (subject to it being discovered who benefited from the Transfer Account Transactions) others. Further, debits stemming from point-of-sale transactions continued to accrue on the Account following the date of the Demand.

38. The Transactions and Transfer Account Transactions signal the very "diversion-of-deposits behaviour" relied upon by this Honourable Court in *Hahn* to infer a real risk of a dissipation of assets.

39. The Proportionality Provisions must be kept in mind if the Court concludes that an Attachment Order is appropriate in this case. The purposes for which the Order is granted are paramount. An Attachment Order is aimed at dealing with the prospect of assets being dealt with so as to "seriously hinder" the Plaintiff's enforcement of a judgment.[30]

40. The following is relevant to that analysis. As noted above, the balance of the Account has been remitted to the Receiver, resulting in a partial recovery. RBC has been named as a Defendant in this Action for the sole purposes of s. 437(2) of the *Bank Act*,[31] thereby providing it with the legal authority to place restrictions on the Transfer Accounts; only one of which holds a balance, however, thereby providing the Plaintiff with only partial assurance that funds are available against which its claim may be asserted. As to the $460k Transaction, if the recipient is Chen or Lee, and if those funds remain on deposit with RBC, then RBC ought to be in a position to place similar account restrictions. However, the recipient of the $460k Transaction and the present whereabouts of those

[30] *Five Star* at para 27. – Tab 3
[31] *Bank Act*, SC 1991, c 46, s. 437. – **Tab 9**

funds is unknown to the Plaintiff; as is, therefore, the strength of its claim to trace those funds.

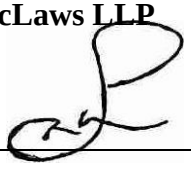
<u>*Norwich* Order</u>

41. It is crucial that the Plaintiff be in a position to identify the recipients of the Transfer Account Transactions in order to permit it to pursue a cause of action to trace and preserve those funds.

42. The Plaintiff submits that the test is met - its claim in and to those funds is clearly *bona fide*, RBC is involved as a Defendant in the action and is the only practical source of that information, and the interests of justice outweigh any legitimate privacy interest of any person involved with the Transfer Account Transactions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 17th day of January, 2024.

Parlee McLaws LLP

per 

Steven A. Rohatyn
Solicitors for MNP Ltd.

TABLE OF AUTHORITIES

TAB 1

Province of Alberta

CIVIL ENFORCEMENT ACT

Revised Statutes of Alberta 2000
Chapter C-15

Current as of April 1, 2023

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

Part 3
Prejudgment Relief

Definitions

16 In this Part,

(a) "claim" means a claim that may result in a money judgment being granted if the claim is established;

(b) "claimant" means a person asserting a claim;

(c) "dealing", in reference to property, includes transferring, mortgaging, charging, using, disposing of, creating an interest in or doing anything to the property;

(d) "defendant" means a person against whom a claim is asserted;

(e) "exigible property" means property that would be exigible if the defendant were an enforcement debtor;

(f) "third person" means a person other than a defendant or a claimant.

1994 cC-10.5 s16;1995 c23 s6(4)

Attachment order

17(1) A claimant may apply to the Court for an attachment order where

(a) the claimant has commenced or is about to commence proceedings in Alberta to establish the claimant's claim, or

(b) the claimant has commenced proceedings before a foreign tribunal to establish a claim if

(i) a judgment or award of the foreign tribunal could be enforced in Alberta by action or by proceedings under an enactment dealing with the reciprocal enforcement of judgments or awards, and

(ii) the defendant appears to have exigible property in Alberta.

(2) On hearing an application for an attachment order, the Court may, subject to subsection (4), grant the order if the Court is satisfied that

(a) there is a reasonable likelihood that the claimant's claim against the defendant will be established, and

(b) there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property,

(i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and

(ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

(3) In granting an attachment order, the Court may do one or more of the following:

(a) direct that the order applies

(i) to all or specific exigible property of the defendant, or

(ii) to any exigible property to be subsequently identified in writing by a bailiff;

(b) prohibit any dealing with exigible property of the defendant;

(c) impose conditions or restrictions on any dealings with exigible property of the defendant;

(d) require the defendant or a person who has possession or control of exigible property of the defendant to deliver up the property to a person identified in the order;

(e) authorize the clerk to issue a garnishee summons;

(f) appoint a receiver;

(g) include in the order any term, condition or ancillary provision that the Court considers necessary or desirable.

(4) The Court shall not grant an attachment order unless the claimant undertakes to pay any damages or indemnity that the Court may subsequently decide should be paid to the defendant or a third person and where the Court grants an attachment order, the Court may require the claimant

(a) to give any additional undertaking that the Court considers appropriate, and

(b) to provide security in respect of any undertaking.

(5) When an attachment order is granted, it should be granted in such a manner that it causes as little inconvenience to the defendant as is consistent with achieving the purposes for which the order is granted.

(6) An attachment order shall not attach property that exceeds an amount or a value that appears to the Court to be necessary to meet the claimant's claim, including interest and costs, and any related writs, unless the Court is of the view that such a limitation would make the operation of the order unworkable or ineffective.

(7) For the purposes of an order made under subsection (3), the following applies:

(a) if the clerk is authorized to issue a garnishee summons, Part 8, with any necessary modification, applies to that garnishment;

(b) if a receiver is appointed, Part 9, with any necessary modification, applies in respect of that receivership;

(c) if the order is to apply to exigible property to be subsequently identified in writing by a bailiff, the writing shall be considered to be included as a part of the order.

(8) Any interested person may apply to the Court to vary or terminate an attachment order.

1994 cC-10.5 s17

Ex parte attachment order

18(1) An application for an attachment order may be made ex parte.

(2) Subject to subsection (3), an attachment order granted on an ex parte application must specify a date, not more than 21 days from the day that the order is granted, on which the order will expire unless the order is extended on an application on notice to the defendant.

(3) If the Court is satisfied that it would be inappropriate for an attachment order granted on an ex parte application to expire automatically after 21 days, the order may specify a later expiry date or specify that it remains in effect until it terminates in accordance with section 19.

(4) The Court, on application on notice to the defendant, may direct that an attachment order that was granted on an ex parte application remains in effect until the order terminates in accordance with section 19 or as otherwise directed by the Court.

(5) If an application under subsection (4) cannot reasonably be heard and determined before the expiry date of the relevant attachment order, the Court may on an ex parte application extend the period of time during which the order remains in force pending the determination of the application.

(6) When an application on notice to the defendant is made under subsection (4) the following applies:

(a) the onus is on the claimant to establish that the attachment order should be continued;

(b) the Court shall not continue the attachment order unless the circumstances that exist at the time of hearing the application justify the continued existence of the order;

(c) the Court may terminate the order if the Court is satisfied that the claimant failed to make full and fair disclosure of the material information that existed at the time that the claimant made the ex parte application for the attachment order.

1994 cC-10.5 s18

Termination of attachment order

19(1) Subject to section 18 and except as otherwise ordered by the Court, an attachment order terminates on whichever of the following occurs first:

(a) on the dismissal or discontinuance of the claimant's proceedings;

(b) on the 60th day from the day of the entry of a judgment in favour of the claimant.

(2) The Court may extend the operation of an attachment order beyond the times set out in subsection (1) if it appears just and equitable to do so.

1994 cC-10.5 s19

Provision of alternative security

20 If property is under attachment pursuant to an attachment order,

(a) the defendant,

(b) any person claiming an interest in the attached property, or

(c) the person in whose possession the property was at the time of the attachment,

may have the property released from attachment by providing sufficient alternative security in a form and amount as determined by the Court, having regard to all the circumstances, including the apparent value of the defendant's interest in the attached property, or by agreement between all interested persons.

1994 cC-10.5 s20

Sale, etc. of attached property

21 On application the Court may authorize the sale or other disposition of property that is subject to an attachment order without the consent of the owner of the property if in the opinion of the Court

(a) the property

(i) will depreciate substantially in value, or

(ii) will be unduly expensive to keep under attachment,

or

(b) it is necessary or prudent to sell or dispose of the property for any other reason not referred to in clause (a).

1994 cC-10.5 s21

Registration of attachment order

22 An attachment order may be

(a) registered in the Personal Property Registry, and

(b) in the case of land under the *Land Titles Act*, registered against the certificate of title to the land.

1994 cC-10.5 s22

Priorities

23(1) Subject to subsection (2), priority between an attachment order and the interest of a third person in property to which the attachment order applies shall be determined in accordance with Division 2 of Part 4 as if the attachment order were a writ.

(2) A third person who in a transaction that is permitted under an attachment order acquires an interest in property to which the attachment order applies acquires that interest free of the attachment order.

(3) Where prior to the expiration of an attachment order

(a) a writ has been issued by a clerk to the claimant in respect of the same proceedings in which the attachment order was granted,

(b) the writ is registered in the Personal Property Registry, and

(c) in the case of land, the writ is also registered under the *Land Titles Act*,

that writ has the same priority as the attachment order.

1994 cC-10.5 s23

Commencement, etc. of writ proceedings

24(1) Subject to subsection (2), writ proceedings may be commenced or continued against property that is subject to an attachment order and any money realized through those proceedings may be distributed under Part 11 without regard to the attaching claimant's claim.

(2) On application the Court may, where the Court considers that it would be just and equitable to do so, order one or more of the following:

(a) that no writ proceedings be commenced or continued against property that is the subject of an attachment order without the permission of the Court until the attachment order terminates;

(b) that money realized through writ proceedings against property that is the subject of an attachment order not be distributed until the attachment order terminates;

(c) that the attachment creditor have the status of an instructing creditor for the purposes of the distribution of the proceeds.

RSA 2000 cC-15 s24;2014 c13 s18

Inconsistent actions

25(1) Where a person knowingly assists or participates in dealing with attached property in a manner that is inconsistent with the terms of the attachment order, the Court may order that person to compensate any claimant or enforcement creditor who suffers actual loss as a result of that dealing.

(2) The Court shall not make an order under subsection (1) against a person by reason only of the person having done something that was necessary to meet a legal duty that

(a) arose before the person acquired knowledge of the attachment order, and

(b) was owed to someone other than the defendant.

TAB 2

In the Court of Appeal of Alberta

Citation: Vue Weekly (Vue Magazine) v. See Magazine Inc., 1995 ABCA 461

Date: 19951101
Docket: 9503-0692-AC
Registry: Edmonton

Between:

**Vue Weekly, also known as Vue Magazine,
Ronald George Garth, 662812 Alberta Ltd.
and Maureen Fleming**

Appellants/
Defendants

- and -

**Peat Marwick Thorne Inc., the Receiver
and Manager of See Magazine Inc.**

Respondents/
Plaintiffs

The Court:

**The Honourable Chief Justice Fraser
The Honourable Mr. Justice Côté
The Honourable Madam Justice Russell**

Memorandum of Judgment

COUNSEL:

BJ. Willis, for the Appellants/Defendants

BJ. Kickham and C. Plante, for the Respondents/Plaintiffs

MEMORANDUM OF JUDGMENT

THE COURT:

[1] On October 20, 1995 a special panel of this Court heard an emergency appeal from an interlocutory injunction granted four days earlier. The injunction barred publication of a weekly newspaper. Thanks to hard work and organization by both counsel, in those four days we got bound volumes containing a transcript of the revised and edited reasons

of the chambers judge, all the evidence (neatly tabbed and indexed), and written arguments or factums from both sides. It is amazing how much work good counsel can do in a short time. The arguments which we heard were very thoughtful and helpful, even impressive. We are very indebted to counsel.

[2] We must add a caveat before describing the facts. The evidence now before us suggests that the conduct of the defendants here was discreditable in the early stages. Whether there was any partial justification for it will be decided at trial. We do not mean to whitewash the defendants' early conduct, nor to prejudice the trial by any of our remarks below. Indeed counsel for the defendants very fairly conceded that his clients' early "self-help measures" had been "ill advised", and he did not try to justify them. He said the early steps were taken without legal advice.

[3] We make our decision without going into all of that, for the issue before us is whether the injunction should continue.

[4] At issue here are some Edmonton weekly tabloid newspapers. They feature the entertainment scene, are distributed free off wire racks, and get all their revenue from advertising. Most Canadian cities have one or more of these newspapers. They come and go quickly, and all copy each other's format closely. Garth, one of the defendants, has run a number of the Edmonton ones.

[5] He ran an Edmonton tabloid called See, through his one-man company. Two of the employees lent him some money. These papers are prepared on a small computer with over-the-counter software costing under a thousand dollars. Gazette is an unrelated large and solvent company. It did the actual printing, and is the plaintiff in one of the two actions involved here. By agreement, Gazette also did a good deal of See's bookkeeping, money handling, and record keeping. See fell behind in paying its printing bills to Gazette, which had registered P.P.S.A. security over all of See's assets, including its goodwill.

[6] There is evidence (not disputed yet) that Gazette formed a plan to use a receiver to take over See and eliminate most of the employees and other creditors despite earlier promises to give equity to the lender-employees. But no trial has occurred yet, and there may well be another side to that story. In any event, Gazette and Garth agreed on a brief moratorium, and the debt was not brought into line within that time. Gazette then gave notice that it would sue and seek a receiver. It did so, and Garth did not oppose the appointment. The court appointed a receiver of the property of the company which published See. It was a very broad order, giving the receiver the powers which an experienced insolvency lawyer would ask for.

[7] The receiver arrived at See's premises to find only bare walls. The birds had flown. Some six or seven days before, Garth had met with the staff at a private residence, and they had agreed to start a new competing newspaper under a new company. Indeed, they actually did so, and distributed it on the streets the day before the receivership order was made. The new newspaper was called Vue.

[8] We stress that the steps taken to publish the first issue of Vue cannot be a breach of the receivership order, for the order did not yet exist then. Maybe those steps breached fiduciary duty, but we understand that that has not yet been pleaded.

[9] The regular issue of See scheduled for that week did not appear. However, within five days of his appointment, the receiver succeeded in publishing the next issue of See on time, and has continued to do so weekly ever since. Doubtless the receiver and Gazette worked closely together, using the experience and records of See which Gazette held all along.

[10] During argument of the appeal, by agreement counsel handed to us numerous copies of both publications, and we examined them. We cannot say that the issues of See published by the receiver are feeble, unattractive, jejeune, or wanting in big paying advertisements. See continues to publish regularly, and there is no evidence to suggest that it is unprofitable, or not viable, or that two such newspapers cannot exist in Edmonton. Indeed we notice that some advertisers now advertise in both newspapers. The evidence is that some advertisers went over from See to Vue, but that a major national agency did not.

[11] How was the first issue of Vue published the day before the receivership order? By using some physical assets which the old company either owned or leased. That was also true of the next issue of Vue, published about six days after the receivership order. However, later issues of Vue used little or no tangible assets of See, which had been virtually all returned to See by then. Of course we only recite the evidence before us; other evidence may emerge at trial.

[12] The parties clash on whether Vue used other intangible assets or goodwill belonging to See or its receiver to publish any edition of Vue after the receiver was appointed. The trial judge will decide that finally. It seems quite likely that the plaintiffs may recover damages at trial, and nothing in this Memorandum is intended to discourage that. For purposes of this interlocutory injunction, we must decide on the evidence before us now. That alleged use of goodwill is relevant to every test for an interlocutory injunction: arguable case, irreparable harm, and balance of inconvenience. It appears to us on the

evidence now before us that Vue did use the plaintiffs' goodwill in the early stages, but has by now clearly ceased doing so. (The trial judge will be free to find otherwise on fuller evidence.)

[13] We so conclude for this reason. It is arguable that the goodwill encompassed all the arrangements and advantages of business which See had in place when the receiver was appointed. We pick that day, for it was the receiver which moved for and got the injunction now appealed, not the creditor Gazette. It is arguable that lack of firm contracts with staff, advertisers, readers, or contributors, does not remove them from the scope of goodwill. Only one advertiser had an ongoing contract, and it stayed with See and the receiver. Nevertheless, it seems to us that lack of such contracts severely limits the extent, length, and value of the goodwill, when those people are few in number and easily found. It is obvious from the evidence that the defendants could have started up Vue without using any of the underhanded methods which they used. And they could have done so within two weeks, thus "missing" only one issue. There were no non-competition agreements. The advertisers and contributors were well known: any reader could pick up a free copy of See and see who they were. The evidence shows there were no secret contacts or lists, and the advertisers were easy to locate. The chambers judge said if clarity were desired, he would bar the defendants from soliciting former advertisers for six months. We see no evidence whatever to justify that. Obviously it was easy to find another printer, to buy or lease a computer, and to buy ordinary publishing software.

[14] The same is true of the employees. Furthermore, the evidence before us makes it very doubtful that the receiver had any interest in keeping most of the staff or contributors of See or Vue.

[15] We do not say that acts like the defendants' acts are not theft of goodwill. We say that the extent and duration of that goodwill depends on the precise facts.

[16] At first no one sought to enjoin publication of Vue or any other newspaper. At first, the plaintiffs' only motion was to prevent passing off. A narrow earlier consent injunction dealt successfully with that. All the steps called for in it were accomplished (leaving aside some paperboys' temporary errors in delivery). There is no longer any suggestion of ongoing passing off.

[17] The injunction now under appeal was first sought by a notice of motion filed October 2 and returnable October 3. That was 12 days after the first issue of Vue, and five days after the second. It was ultimately heard October 16. The evidence now before us indicates that by October 2, the tangible assets of See were no longer used or possessed

by the defendants, with possible trivial exceptions. And as noted, by then the defendants would have been able to publish Vue even if they had acted properly and done nothing illegal. That is even more true by October 16 when the injunction was given, and still more so by October 20 when we heard the appeal.

[18] Therefore, it seems to us that by the time that we heard the appeal (and probably earlier), the only evidence before the court must be characterized this way:

1. Any tortious activity (passing off) had ceased, and was not pled, and the consent order prohibiting such activity was never violated (with one possible minor exception since ended).
2. Any other invasion of property had ceased.
3. Any infringement of the order appointing the receiver had ceased.
4. Any loss or harm still accruing to the creditor or to the receiver was probably now flowing from open legal competition.
5. The advertisers in each newspaper were openly displayed permanently in each issue for all the world to see, so the revenues derived from each could be readily calculated.
6. Both parties keep records, and the creditor and the receiver have and always had all the financial records of See (with the possible exception of a few days just before the receiver was appointed).
7. The injunction prohibits the publication of Vue, or a newspaper similar in content, and that would shut down Vue. A significant gap in publication by such a newspaper will kill it, as all the witnesses agree.
8. Denying the injunction will not kill See. Indeed, See keeps running a large ad saying it is here to stay, whatever happens.
9. All the tangible property taken from See has been returned to its receiver.

[19] It is elementary law that an injunction is not intended to punish. A perpetual injunction after trial may be designed to undo harm. This is not such an injunction, and there is here no present harm to undo, save for paying money. An injunction cannot be used to do what money will properly do. An injunction, whether interlocutory or perpetual after trial, may be used to prevent future harm from illegal acts. But no future harm from illegal acts is here threatened.

[20] It seems to us that the only motive for getting this injunction, the only good that it would do anyone, is to kill off the defendants' business and so remove competition. It was expressed to us as "levelling the playing field", but that appears to us to mean having the court do a new wrong now in return for an old wrong done by the defendants. Two wrongs do not make a right. No authority was cited for such a novel use of injunctions, and we know of none. An injunction is to be used to prevent irreparable harm, not to create it. Ending a going business is always presumed to work irreparable harm.

[21] Therefore, we answer the three usual tests for interlocutory injunctions as follows:

(a) There may be arguable causes of action, but they are no longer germane to what is going on now.

(b) No irreparable harm is now being caused or threatened by any illegal act.

(c) The injunction would kill the defendant but not help the receiver or the creditor (save by ending legitimate competition). Therefore, the balance of inconvenience is completely one-sided, against any injunction.

[22] In addition, the injunction finally given was incapable of logical expression of its limits. If limited to the wrongs done, it had no scope, or was impossible to understand and comply with. If not so limited, it plainly would go beyond what the law allows. The continuing inability to define it on October 16 and later is symptomatic.

[23] Therefore, we do not need to consider arguments about freedom of the press, freedom to earn a livelihood, or the public interest.

[24] We wish to add one comment about the undertaking as to damages. Only the receiver sought the injunction, not the creditor Gazette. The receiver induced the chambers judge to limit its undertaking to the assets under administration, on the grounds that the receiver was the court's officer. Yet the evidence showed that (apart from the cause of action sued on), the assets were of dubious value. Even more curious is that the whole litigation is for the benefit of a large solvent creditor, who uses the same lawyers as does the receiver. The receiver was appointed because of Gazette's P.P.S.A. security, not because of any dispute over title or possession, and not for a number of creditors. A meaningful undertaking as to damages is a vital part of the balance of inconvenience; without it, an interlocutory injunction may well work irreparable harm, not prevent it. If the receiver could not be expected to give a meaningful undertaking, then the creditor or someone else should have volunteered one. If no one was willing to do so, then it is

doubtful that an interlocutory injunction should have been given. A lot of urgent litigation boils down to the unwillingness of either side to take any risk or be answerable for what it proposes; this suit has elements of that.

[25] At the end of oral argument we considered the matter. Then we allowed the appeal and dissolved the interlocutory injunction at once, with reasons to follow. Those reasons are found above.

[26] Along with the motion for an interlocutory injunction, the chambers judge heard one for contempt, and found it proved, but gave no other relief (beyond the injunction). It seems to us that the evidence of contempt is conflicting and uncertain. We repeat that much of the underhanded work of the defendants seems to have been done before the court made any orders at all. It may well be that there were some breaches of the receivership order, but how many, when, to what extent, and precisely by whom, are most unclear. The chambers judge thought that publishing Vue on October 5 and 12 was contempt, but did not really say why. We think that proposition is unclear, even doubtful. Nor do we understand contravening “the spirit of the” receivership order. As it seems to us highly unlikely that there is now any large ongoing contempt, there is no urgency in deciding that. And we lack the material to do so. One cannot weigh conflicting affidavits, and whether one can rely on hearsay is doubtful. Counsel suggested that clarification of the original receivership order would be helpful, but we cannot produce a declaratory judgment in four days, still less on this record. Therefore, from the bench we also upset the finding of contempt, and directed that it be tried before the trial judge. It may well be best to do so on the basis of all the trial evidence, but the trial judge can set the procedure which seems to him most just and convenient.

[27] After more argument, we gave the appellant defendants one set of costs of this appeal in any event on column 5, plus disbursements. They had almost total success on the issues appealed, and the trial cannot affect the main one, the interlocutory injunction. The appellants’ counsel suggested that costs in chambers should remain in the cause, and the respondents’ counsel did not object.

JUDGMENT DATED at EDMONTON, Alberta,
this 1st day of November,
A.D. 1995

TAB 3

In the Court of Appeal of Alberta

Citation: Bank of Nova Scotia v Five Star Motor Group Ltd, 2020 ABCA 244

Date: 20200619
Docket: 1903-0188-AC
Registry: Edmonton

Between:

The Bank of Nova Scotia

Respondent
(Plaintiff)

- and -

Five Star Motor Group Ltd., Five Star Auto Wholesale Inc., and Hassan Jammaz

Appellants
(Defendants)

- and -

Canadian Imperial Bank of Commerce, The Toronto-Dominion Bank, Royal Bank of Canada, Bank of Montreal, John Doe, ABC Ltd., 1923774 Alberta Ltd., Triple J. Distributors Ltd. o/a Wholesale Auto Parts, Jennie Jammaz, Ahmad Jammaz, Cannabis Nature & Co. Ltd., Fountain Tire Ltd., Ramzi Ghobar, Executrade Capital Corporation, Rifco National Auto Finance Corporation, 34873 British Columbia Ltd., Ali Pabah and Munish Nanda

Not Parties to the Appeal
(Defendants)

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment of the Honourable Mr. Justice Slatter
and the Honourable Madam Justice Khullar

Dissenting Memorandum of Judgment of the Honourable Mr. Justice O'Ferrall

Appeal from the Order by
The Honourable Madam Justice J.E. Topolniski
Dated the 12th day of July, 2019
Filed on the 30th day of July, 2019
(Docket: 1903 12509)

Memorandum of Judgment

The Majority:

[1] The respondent bank obtained an *ex parte* attachment order on June 28, 2019. That order was confirmed, on notice, by a second chambers judge on July 12, 2019. The appellants appeal the confirmation order.

Facts

[2] The appellants were involved in a car dealership and car financing business starting in 2008. They had a banking arrangement with the respondent throughout, although the respondent was not a secured creditor of the appellants. In 2018 the main corporate appellant recorded revenues of just under $17 million. On May 3, 2019 the respondent wrote to each of the appellants advising that it had decided to terminate certain banking relationship as of June 5, 2019, and recommending that the appellants make alternative banking arrangements. Some (but not all) of the termination letters advised that all future deposits would be subject to a four business day hold, but they did not allege any default by the appellants. The appellants proceeded to make banking arrangements with other banks.

[3] On May 20, 2019 the appellants entered into six agreements with a third party numbered company for the bulk sale of 58 motor vehicles for $1.7 million, and received six separate cheques for the purchase price, all postdated until June 3, 2019. The purchaser was not to obtain possession of the vehicles until the postdated cheques cleared. The appellants allege that this sale was in the ordinary course of their business, and that the principal of the numbered company was known to them, they had prior dealings with him, and he was believed to be reliable.

[4] On June 4, 2019 the cheques were deposited at different branches of the respondent bank, which was in the ordinary course of the appellants' business. In the end the postdated cheques were dishonoured due to insufficient funds. The appellants allege that they received no warning or notice from the numbered company that the cheques could not be relied upon, and they expended funds from their accounts on the assumption that the cheques would clear. They depose that all of the expenditures from the accounts were in the ordinary course of business and for legitimate business purposes. Many of the disbursements were made via bank drafts, which required the signature of two representatives of the respondent. They argue it would have been obvious to those representatives that the balance in the accounts depended on the recently deposited cheques clearing the banking system.

[5] On June 14, 2019 the respondent issued its statement of claim. It named as defendants not only the appellants, but also four other chartered banks at which the appellants maintained accounts. The statement of claim pulled no punches. It defined the appellants as the "Fraud

Defendants", and pleaded they had "perpetrated a cheque kiting scheme". The drafts and cheques that had been drawn on the appellants' accounts in the expectation that the postdated cheques would clear were described as the "Fraudulent Cheques/Drafts", and the funds that they represented were described as the "Fraudulent Funds". While the statement of claim alleged in places that the appellants "knew or ought to have known" that the postdated cheques would not clear, the tone of the statement of claim was clearly an allegation of intentional fraud. This was not pleaded as simply a case of carelessness or even recklessness. There was no allegation of any breach of a banking covenant, or of any claim in debt.

[6] The third party numbered company that had drawn the postdated cheques was not named as a defendant. This was unusual, in that if there was a large fraudulent "cheque kiting scheme" it is unclear why the respondent did not assume that the numbered company and its principal were also involved.

[7] The respondent did not serve the statement of claim on the appellants, but it did serve it on the other defendant chartered banks, resulting in a freeze of all of the appellants' banking accounts: *Bank Act*, SC 1991, c. 46, s. 437(2). Some of those banks returned funds to the respondent, apparently with the cooperation of the appellants.

[8] On June 28, 2019 (24 days after the cheques were negotiated, and 14 days after the statement of claim was issued) the respondent applied *ex parte* and obtained an attachment order under s. 17(2) of the *Civil Enforcement Act*, RSA 2000, c. C‑15. That order restrained the appellants from dealing with their assets other than in the ordinary course of business. It appointed an interim receiver to monitor the business of the corporate appellants, and authorized the receiver to seize assets on default of the order. It also restrained the individual appellant from dealing with lands he owned, and allowed the registration of the order against other lands owned by the appellants.

[9] The order was served on other lenders that held security over the appellants' inventory. Those secured creditors proceeded to repossess all of that inventory. The individual appellant asserts that the combined effect of the statement of claim and the *ex parte* attachment order has "resulted in businesses that I have worked very hard to establish over the past 11 years being destroyed almost overnight".

[10] On July 8, 2019 the statement of claim was amended to allege a breach of a Business Banking Services Agreement, and to add a claim against the individual appellant based on a personal guarantee. The allegations of fraud were not amended.

[11] The *ex parte* order provided that it could be reviewed or terminated on three days notice, and that it would expire on July 19, 2019. It was confirmed by a second chambers judge on July 12, 2019 at what she described as a "comeback hearing", where the appellants first had an opportunity to respond to the allegations. They cross-applied to set aside the order.

[12] The appellants presented evidence that the transactions were all made in good faith in the ordinary course of their business, and that the deposits and withdrawals were not inconsistent with the prior pattern of their banking activities. The sale of the vehicles was also in accordance with their ordinary business practices. They had no reason to distrust the third party purchaser or to suspect that the cheques would not be honoured. The appellants argued that the attachment order should never have been granted, and the application should not have been heard on an *ex parte* basis.

[13] The chambers judge noted that an attachment order is ". . . a significant order. It's an order that interferes with people's rights to use their property freely as they wish. And it's given really only in pretty exceptional circumstances." Attachment orders should not be granted without notice, unless there are "suspicious circumstances", for example that property might be dissipated if notice was given.

[14] The chambers judge found that the pattern of banking transactions seemed to be suspicious, but that on further examination it was not as suspicious as it initially appeared. Although she concluded the respondent had not misled the court, she found that much of the exculpatory information was available to the respondent, if it had looked through its records. The primary suspicious fact was that the cheques were deposited on June 4, the day before the respondent had indicated it was terminating the banking relationship. That, however, was not information known or relied on by the *ex parte* judge.

[15] The chambers judge found the nature of the pleadings to be "troubling", given that recklessness was not used to modify the allegations of intentional fraud. She noted that in a civil context "recklessness" can mean either a) proceeding in the face of a known risk or b) making a statement "without caring whether it was true or false". The chambers judge characterized as reckless the appellants' decision to delay delivery of the vehicles until the cheques cleared, but nevertheless to "use that money to pay down debt that wasn't due yet without taking the same precautions". Whether or not the *ex parte* attachment order should have been granted, the chambers judge was satisfied that the respondent had met the test for an attachment order at the confirmation stage.

Attachment Orders

[16] Attachment orders may be granted under s. 17 of the *Civil Enforcement Act*, RSA 2000, c. C‑15:

> 17(1) A claimant may apply to the Court for an attachment order where [the claim has a connection to Alberta].
>
> (2) On hearing an application for an attachment order, the Court may, subject to subsection (4), grant the order if the Court is satisfied that

(a) there is a reasonable likelihood that the claimant's claim against the defendant will be established, and

(b) there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property,

(i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and

(ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

(3) In granting an attachment order, the Court may do one or more of the following:

(a) direct that the order applies

(i) to all or specific exigible property of the defendant, or

(ii) to any exigible property to be subsequently identified in writing by a bailiff;

(b) prohibit any dealing with exigible property of the defendant; . . .

(f) appoint a receiver;

(4) The Court shall not grant an attachment order unless the claimant undertakes to pay any damages or indemnity that the Court may subsequently decide should be paid to the defendant or a third person and where the Court grants an attachment order, . . .

(5) When an attachment order is granted, it should be granted in such a manner that it causes as little inconvenience to the defendant as is consistent with achieving the purposes for which the order is granted.

(6) An attachment order shall not attach property that exceeds an amount or a value that appears to the Court to be necessary to meet the claimant's claim, including interest and costs, and any related writs, unless the Court is of the view that such a limitation would make the operation of the order unworkable or ineffective. . . .

[17] The substance of the test for an attachment order is found in s. 17(2). First there must be a "reasonable likelihood" the applicant's claim will be established. The "reasonable likelihood" test under the statute is arguably lower than the test of a "strong *prima facie* case" that might be needed for a common law *Mareva* injunction: ***Cho v Twin Cities Power-Canada***, 2012 ABCA 47 at

para. 5, 522 AR 154. The applicant need not prove the claim on a balance of probabilities, but something more than mere suspicion is required.

[18] Secondly, there must be "reasonable grounds" that the defendant is likely to deal with its assets out of the ordinary course of business, and in a way that is "likely to seriously hinder the claimant" in recovering its claim. Again, something more than mere suspicion is required to meet this test. If the claim is in fraud or other similar misconduct, and if it is "reasonably likely" that the claim will be established under the first part of the test, that *may* support an inference that the defendant is likely to deal with its assets in a way that will satisfy the second part of the test: ***Osman Auction Inc. v Belland***, 1998 ABQB 1095 at para. 28. That, however, is not a universal or mandatory inference that should be drawn.

Ex Parte Applications for Attachment Orders

[19] Section 18(1) of the *Civil Enforcement Act* provides that attachment orders may be obtained without notice. The presumption, however, is that notice is to be given of an application for an attachment order unless "serving notice of the application might cause undue prejudice to the applicant": R. 6.4(b) of the *Rules of Court*; ***Secure 2013 Group Inc. v Tiger Calcium Services Inc***, 2017 ABCA 316 at para. 41, 58 Alta LR (6th) 209. The application proceeded *ex parte*, with very limited analysis as to whether notice should have been given. The mere fact that a debtor might be in default of one of its banking covenants does not justify an application without notice.

[20] An applicant seeking an attachment order without notice to the opposing party is required to act with the utmost good faith and make full, fair and candid disclosure of the facts to the court. This disclosure must include relevant and material facts which are adverse to its position. Failure to comply with these obligations may result in the *ex parte* order being set aside: ***Tiger Calcium*** at paras. 44-47.

[21] The reviewing chambers judge held that there was "nothing false" in what the respondent told the Court during the *ex parte* application:

> There was nothing false in what the Bank said. The Bank had that information. It was not as fulsome [sic] as what was later unearthed but the Bank was not misleading the Court, in my view. . . .

In other words, while the respondent did not intentionally or actively mislead the original *ex parte* judge, it did not provide all the information known to it, and it overstated the implications of some of the conduct it identified. This reasoning understates the obligation of a party applying for an *ex parte* order. It is not sufficient that no inaccurate representations were made; the failure to make full disclosure is equally problematic.

[22] At the *ex parte* application, the respondent relied on a number of "suspicious" circumstances that were not necessarily suspicious, and neglected to point out some relevant facts:

- The dishonoured cheques were deposited at several different bank branches, but this was consistent with modern electronic banking and the appellants' past practices.
- The dishonoured cheques were negotiated at branches of the respondent that were not the "home branch" of the appellants, also consistent with the appellants' past practices.
- The deposits were in excess of the "average daily" transactions, however they were consistent with average monthly transactions;
- The funds were largely dispersed using bank drafts, which required the signature of two of the respondent's employees.
- The respondent alleged that one of the recipients of a bank draft was a person of bad character, because that person was a poker player;
- The respondent's employees had full access to the appellants' banking records and would be able to see that the availability of funds depended on the deposited cheques clearing the banking system, yet they issued the bank drafts.
- The appellants had cooperated in returning some of the funds to the respondent.
- No attempt was made to conceal the transactions.

The only reason that some of this information was "later unearthed" by the respondent was that it failed to properly examine its records before applying *ex parte* for the attachment order. The respondent had an obligation, since it was proceeding *ex parte*, to bring all this to the attention to the *ex parte* judge. Specifically, it was misleading for the respondent to represent that these facts were suspicious when an examination of the respondent's own records would have shown that there might be other explanations for them.

[23] In an age of electronic banking, the identity of the bank branch used is largely irrelevant, and in any event the disputed transactions were in accordance with the appellants' historical banking practices. If the respondent had examined its banking records, it would have realized that feature of the transactions was not necessarily suspicious. If the appellants had been given notice of the application, they would have been able to tell the *ex parte* judge about them. Since they were not given notice, it was incumbent on the respondent to fully and accurately inform the *ex parte* judge.

[24] Further, there was also no basis for proceeding *ex parte* due to delay. The very fact of delay may often serve as evidence that the perceived risk is not significant enough to warrant interlocutory relief: ***Tiger Calcium*** at para. 126. The appellants' known assets appeared to be bank accounts and vehicle inventory. The service of the statement of claim on the other banks had the effect of freezing all of the bank accounts. The assets subject to dissipation to the detriment of

creditors would therefore appear to be the vehicle inventory. There were other creditors with security over the vehicle inventory, meaning that the respondent, at best, had an interest in the surplus equity in those vehicles. Needless to say, the service of the receivership order resulted in the other secured creditors seizing all the inventory, likely eliminating any theoretical equity that the appellants may have had in it.

[25] The *ex parte* application was made 24 days after the cheques were negotiated, and 14 days after the statement of claim was issued. If this was, as the respondent suggested, a premeditated cheque kiting scheme, with a possible "test run" having been conducted in April, there was no reason to believe that any vulnerable vehicle inventory would still remain. There is no indication that the respondent or the receiver made any attempt to ascertain the status of the inventory. When asked during the *ex parte* application whether the businesses were still operating, counsel advised:

> I can tell you this personally, I drove by it last night and there were still cars on the lot and people milling about, . . .

In other words, there was not even any anecdotal indication, much less any evidence, of any attempt to spirit away the inventory. The potential inference identified in ***Osman Auction*** is not sufficient to overcome this gap in the factual record.

[26] The respondent also argues that it only sought a narrow form of relief. It only sought an "Interim Receiver with limited monitoring power", for limited purposes:

> (a) A determination of the level of inventory of Five Star be undertaken;
>
> (b) A determination of the debt level against Five Star be made; and
>
> (c) A monitoring of the cash flow of Five Star be undertaken,
>
> pending final determination on entitlement to Judgment in favour of the Plaintiff.

The immediate response to this argument is that the *ex parte* application and the attachment order went far beyond that relief. The order limited the ability of the appellants to deal with their assets, it froze certain real estate owned by the individual appellant, and authorized the receiver to locate, seize and take possession of the exigible property of the appellants in some circumstances. In any event, this argument cuts both ways.

[27] First of all, an attachment order under s. 17 of the *Civil Enforcement Act* is aimed at dealing with the prospect of the debtor's assets being dealt with so as to "seriously hinder" the creditors in enforcement of a judgment against the debtor. The primary purpose of an attachment order is not as an information gathering device. If the respondent merely wanted information about the inventory and cash flow of Five Star, there were much more proportionate methods of getting it than this attachment order. If the appellants had been given notice of the application, and if they

had seen that all the respondent wanted was information about its inventory and cash flow, they would have had the opportunity to provide that information before the return date.

[28] Secondly, even if the respondent had only applied for limited relief, that would be of no practical importance. No one who became aware of this order would think: "Oh, the bank only wants to monitor their cash flow". Once the statement of claim was served on the other banks, that had the effect of freezing all the appellants' bank accounts. When it was served on the other secured parties, they did what was entirely predictable: they seized all of the vehicle inventory. Given the practical impact of the attachment and receivership order, it had the effect of shutting down the appellants' businesses, notwithstanding the facially limited nature of the relief requested.

[29] In summary, there was no basis for the original application to have proceeded *ex parte*. Further, the respondent failed to discharge its obligation to make full, fair and candid disclosure of the facts to the Court. The respondent relied on suspicious circumstances which it ought to have known were not suspicious. Those considerations were sufficient to set aside the *ex parte* order.

The Confirmation Proceedings

[30] *Ex parte* attachment orders are properly given for a short period of time, and are always subject to review on short notice: ***Tiger Calcium*** at paras. 167-8. In this appeal, the *ex parte* order was to expire by its terms on July 19, 2019, and a review of the order was set down for July 12.

[31] On July 12, the respondent applied for an extension of the order. The appellants argued that the *ex parte* order should never have been granted, and brought a cross-application to set it aside. From a procedural point of view, the cross-application was a good practice, but it did not have any effect on the burden of proof. The burden of establishing the entitlement to an attachment order still rested on the respondent, and the fact that it had earlier obtained an *ex parte* attachment order did not reduce or displace that burden: ***Tiger Calcium*** at para. 169. The issue is not, as the confirming judge suggested, to see "if we should be changing this order in any way"; the issue was whether the respondent could establish that it was entitled to any attachment order.

[32] The confirming judge stated that attachment orders are granted where the creditor has "suspicions" about the actions or intentions of the borrower. She reasoned that to protect judgment creditors: "Courts can order assets to be held up to ensure that the potential judgment creditor isn't prejudiced". The statute, however, requires more than "suspicions", it requires a "reasonable likelihood" on the first part of the test, and "reasonable grounds" on the second part. Further, the statute is not merely concerned with protecting the rights of creditors. The interests of the debtor must also be considered: s. 17(5). As this appeal demonstrates, an attachment order may have dire consequences for any business. The onus was on the respondent to provide evidence on both branches of the test in order to establish that it was entitled to an attachment order.

[33] When an *ex parte* order is brought forward for review, the defendant has an unlimited opportunity to introduce new evidence. Having been denied an opportunity to make

representations and produce evidence at the original *ex parte* application, there is no basis on which the defendant's ability to do so can be limited: ***Tiger Calcium*** at para. 171. Whether the original applicant should be allowed to introduce new evidence to support the attachment order is a matter of judicial discretion. It can potentially be unfair to allow the applicant to provide a justification for the attachment order that was not known or relied on at the *ex parte* stage of the proceedings. Allowing bootstrap evidence can have the effect of undermining the obligation of the *ex parte* applicant to make full and complete disclosure to the court. The reviewing judge can, however, allow such evidence: ***Tiger Calcium*** at paras. 171-6.

[34] There was a considerable amount of new evidence relied on at the confirmation hearing, some of it introduced by the appellants, and some by the respondent. For example:

- It was disclosed that the respondent had given notice of its intention to terminate the banking relationship on June 5, the day before the postdated cheques were deposited;

- The deposit of the dishonoured cheques at different bank branches, which were not the "home branch" of the appellants' accounts, was shown to be consistent with their prior banking practices;

- The alleged "test run" of the alleged cheque kiting scheme on April 24 was shown to be a genuine transaction;

- The individual appellant swore an affidavit that he did not participate in any fraudulent scheme, all of his actions were in the ordinary course of business, and the appellants had no reason to believe that the postdated cheques would not be honoured;

- The six contracts with the third party numbered company for the bulk sale of vehicles were identified as the source of the postdated cheques. The prior business dealings between the appellants and the third party were disclosed;

- The purposes for which the various drafts were drawn was disclosed, and the individual appellant swore that they were all in payment of legitimate debts or on legitimate accounts;

The confirming judge permitted and relied on all of this evidence.

[35] While many of the supposedly suspicious circumstances relied on at the *ex parte* application were explained, the following matters of concern remained:

- The individual appellant was not prepared to give possession of the 58 vehicles to the third party numbered company purchaser until the postdated cheques had cleared, indicating an awareness of the risk that they would be dishonoured. He nevertheless expended the funds without waiting for the cheques to clear.

- Even if the bank drafts were used to discharge legitimate debts and obligations, it did not appear that any of them were overdue. There was no obvious reason why the individual appellant could not wait a few more days for the cheques to clear the banking system.

- None of the funds were used to pay for or discharge the liens on the 58 vehicles that were the subject of the bulk sale (although the individual appellant indicated that this was consistent with the nature of his business).

It was these unusual aspects of the transactions that were relied on to extend the attachment order.

[36] The ultimate issue is whether the respondent met the test for an attachment order. Specifically, was there a "reasonable likelihood that the claimant's claim against the defendant would be established", and was there a risk that property would be dealt with to "seriously hinder" the creditors in enforcement of judgments against the debtor.

Establishing the Claim

[37] As noted, the original statement of claim alleged an intentional fraud, based on a "cheque kiting scheme". On the facts as established at the confirmation hearing, the respondent will face some challenges in proving a fraudulent cheque kiting scheme. The appellants may have made some poor and risky business decisions, but unless the principal of the third party numbered company was involved in the conspiracy, it seems unlikely that there was any intentional fraud. Therefore, at the confirmation hearing the respondent retreated somewhat from its initial aggressive allegations. The respondent argued that even if there was no intentional fraud, the appellants "ought to have known" that it was imprudent to rely on the postdated cheques until they cleared.

[38] There is authority that fraud can be proven in the absence of intentional deceit, if the defendant was reckless. The term "recklessness" however, has subtly different meanings in different areas of the law. In the criminal law (and to some extent in the law of negligence) the term recklessness was defined in ***R. v Sansregret***, [1985] 1 SCR 570 at p. 582:

> . . . In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.

Recklessness is not the same thing as willful blindness:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry . . . .: ***Sansregret*** at p. 584.

Recklessness is sometimes used to contrast inadvertent negligence with advertent negligence: ***O'Grady v Sparling***, [1960] SCR 804 at p. 808; ***Alberta (Minister of Infrastructure) v Nilsson***, 2002 ABCA 283 at para. 99, 8 Alta LR (4th) 83, 320 AR 88.

[39] There is authority that fraud can be proven through "recklessness", but the term has a subtly different and stronger meaning in the law of deceit:

- "'Recklessly' in this context means that the statement was made 'without caring whether it was true or false'.": ***Motkoski Holdings Ltd v Yellowhead (County)***, 2010 ABCA 72 at para 58, 20 Alta. L.R. (5th) 43.

- "recklessness as to the truth of the representation" or "stating information in an authoritative way without having bothered at all to find out whether the information is accurate": ***Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd***, 2017 ABCA 378 at paras. 33-4, 60 Alta LR (6th) 57.

- "There is a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make.": ***Roper v. Taylor's Central Garages (Exeter), Ltd.***, [1951] 2 TLR 284 at p. 289 (KB).

- "moral recklessness and a callous disregard as to whether the statement is true or false": ***McLaughlin v Colvin***, [1941] 4 DLR 568 at p. 583 (ONCA).

If the respondent proposes to prove deceit through recklessness, it will have to meet this high standard.

[40] This test arises from ***Derry v Peek*** (1889), 14 App Cas 337 (HL), the seminal case on the mental element of civil fraud, which concerned an admittedly inaccurate statement in a prospectus. The prospectus represented that the proposed tramway had the right to use steam propulsion, instead of horses, but the right to use steam propulsion depended on permission being obtained from the Board of Trade. The House of Lords upheld the decision of the trial judge, who concluded

that there was no deceit involved because the directors of the company honestly believed in the accuracy of the statement, even though it was factually incorrect.

[41] The House of Lords disagreed with the Court of Appeal, which had held that the absence of objectively reasonable grounds to believe the inaccurate fact was sufficient to constitute deceit. The House of Lords held that if the belief was objectively unreasonable, that might be some evidence of whether it was honestly held, but an unreasonable belief is not itself fraudulent. Lord Herschell summarized the test at p. 374:

> . . . Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, carelessly whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. . . .

This statement of the law was adopted in ***Bruno Appliance and Furniture, Inc. v Hryniak***, 2014 SCC 8 at para. 18, [2014] 1 SCR 126.

[42] Lord Herschell's reasons are the source of the proposition that fraud can be proven by "recklessness". However, in context it is clear that his third category of recklessness, indifference to the truth, is equivalent to the second category of a lack of belief in the truth of the representation. It is recklessness with respect to whether the statement is true, not recklessness with respect to the underlying risk. The third category contemplates the situation where a fact is represented to be true, but the defendant has no idea whether it is true or false, and it is indifferent to its truth. Such a defendant does not honestly believe the representation to be true. Lord Herschell captured this concept at p. 369 by stating that ". . . belief in [the representation] was asserted without such belief existing".

[43] It follows that there is a subtle difference between the meaning of "recklessness" in the law of deceit, as compared to its meaning in other areas of the law. In the law of deceit, recklessness means an indifference to whether the statement is true or false. It would not be enough that the appellants carelessly or unreasonably failed to appreciate there was a risk that their implied representation that the postdated cheques would clear might be false, nor that they did not make inquiries that a reasonable person would have made about its truth. The appellants must have proceeded knowing that there was a risk the statement was false, and being indifferent to that risk, not caring whether the statement was true.

[44] To emphasize the point, in order to make out deceit the recklessness must relate to the truth of the implied representations. It is not recklessness with respect to the appellants' decision to expend the funds without waiting for the cheques to clear, or to pay down debt that was not due. The chambers judge concluded that recklessness can mean either a) proceeding in the face of a known risk or b) making a statement "without caring whether it was true or false". At a general

level that is true, but within the law of the deceit only the second aspect of recklessness is sufficient. The actions of the appellants may be evidence of the individual appellant's state of mind, but the issue is whether he was reckless with respect to the truth of the implied representations he had made.

[45] While the confirming judge referred to ***Precision Drilling***, she also referred to ***Machias v Mr. Submarine Ltd.***, [2002] OTC 190 at para. 146, 24 BLR (3d) 228 (Ont SCJ) which relied on generic dictionary definitions of recklessness. She concluded in her brief oral reasons:

> I've been referred to a number of cases which provide helpful definitions of what recklessness is, what knew or what ought to have known is, the distinction between a criminal threshold and a civil threshold. Recklessness, in the civil context, has two things. It's got two parts. First, it involves acting in such a manner as to create an obvious and serious risk; second, it involves doing so without giving any thought to the possibility of there being any such risk or having recognized that there was a risk involved and nevertheless deciding to take the risk. That is from paragraph 146 of *George Machias v. Mr. Submarine, . . .* (Emphasis added)

The "second" part referred to does not fully state the required mental element for deceit. Failing to consider or recognize that there is an objectively apparent risk is not recklessness, without more. Recognizing the risk but deciding to take the risk is also not necessarily deceit, although it would be advertent negligence. What is also required for deceit is that the person making the implied representation (here that the postdated cheques would be honoured) did not care whether the representation was true or not, but nevertheless proceeded in an authoritative way to rely on those cheques. If the individual appellant honestly believed that the cheques would be honoured, and was not indifferent to their validity, the respondent will have difficulty establishing deceit.

[46] Whether the respondent will succeed in its claim at trial is not without doubt, and will depend on the evidence at trial. The appellants clearly have to answer a strong case. However, to obtain an attachment order the respondent does not have to prove its cause of action on a balance of probabilities. It need only establish a "reasonable likelihood". The confirming judge found that the respondent met the test that there is a "reasonable likelihood that the claimant's claim against the defendant would be established". On the record at the comeback hearing, there is no sufficient basis for appellate review of that discretionary decision.

Dealing with Property to Seriously Hinder Creditors

[47] The *ex parte* order was both an attachment order under the *Civil Enforcement Act*, and a receivership order. The second part of the test for confirming the attachment order was whether there was a risk that property would be dealt with so as to seriously hinder the creditors in enforcement of a judgment against the debtor. For reasons previously discussed (*supra*, paras. 25-26) this part of the test could not be met at the time of the confirmation hearing; the attachment order was essentially spent.

[48] The corporate appellants appear to have had assets consisting of bank accounts and vehicle inventory. The bank accounts were effectively frozen under the *Bank Act* on service of the statement of claim. The vehicle inventory had all been seized by the secured creditors. Simply put, by the time of the confirmation hearing there were no further assets that the appellants could deal with to "seriously hinder" the creditors.

[49] It appeared that the individual appellant owned some real estate, and some of the drafts could possibly be traced into other mortgages or real property. Real property not being mobile, it cannot easily be dealt to the detriment of creditors. The respondent could have sufficiently protected its interests by filing notices of its claim at the Land Titles Office. An attachment order was overbroad for that purpose.

[50] By the time of the confirmation hearing, the receivership order was also largely or wholly spent. As previously noted, the respondent asserted it only wanted an "Interim Receiver with limited monitoring power", for limited purposes:

(a) A determination of the level of inventory of Five Star be undertaken;

(b) A determination of the debt level against Five Star be made; and

(c) A monitoring of the cash flow of Five Star be undertaken,

Since the respondent's proceedings had essentially shut down the businesses, there was no further cash flow to be monitored. The inventory had all been seized by the secured creditors, and a receiver was not needed to determine what had been seized. A determination of the appellants' debt level did not require the draconian remedy of a receiver.

[51] By the time of the confirmation hearing all of the bank drafts had been examined. As a result of the affidavit of the individual appellant, and cross examination on the affidavit, the payees had all been identified, together with the purposes for the payments. The affidavit of Thomas Barrow sworn the 27th day of June, 2019 confirms that the respondent already had much of this information by that date. As noted, if the appellants had been given notice of the application for the appointment of an interim receiver for merely informational purposes, they would have had an opportunity to produce the required information prior to the return date of the application. The predictable drastic effect of the appointment of a receiver has already been noted and would have been obvious to the appellants. In any event, all the missing information could have been obtained through the normal discovery process, and the respondent has not established why a receiver was necessary.

[52] In summary, by the time of the confirmation hearing both the attachment order and receivership order were no longer justified, given the record. The order that had previously been given *ex parte* should not have been extended or confirmed.

Conclusion

[53] In conclusion, the attachment and receivership order should not have been granted *ex parte*. Further, the respondent failed to make full, fair and candid disclosure of the facts during the *ex parte* application. That in itself was sufficient to set aside the order, but by the time of the confirmation hearing there was no further basis for an attachment order or a receivership order.

[54] In summary, there are two parts to the test for an attachment order. First there must be a "reasonable likelihood" the applicant's claim will be established. Secondly, there must be "reasonable grounds" that the debtor is likely to deal with its assets in a way that is "likely to seriously hinder the claimant" in recovering its claim. On the record as it was supplemented and clarified at the "comeback application", and on applying the correct legal test for "deceit", the respondent has met the first part of the test: see *supra*, para. 46. The respondent has not, however, met the second part of the test: see *supra*, paras. 49-51.

[55] The appeal is allowed, and the order is set aside.

Appeal heard on January 6, 2020

Memorandum filed at Edmonton, Alberta
this 19th day of June, 2020

Slatter J.A.

Khullar J.A.

O'Ferrall J.A. (dissenting):

I. Introduction

[56] With respect, I would have dismissed this appeal.

[57] The appellants are the defendants of a claim by the respondent bank that they defrauded the bank of more than $1 million by perpetrating a cheque kiting scheme. Alternately, the bank alleged that the defendants wrongly converted more than $1 million of the bank's money or, at the very least, were unjustly enriched with its money in that amount. In an amended claim filed later, the bank also alleged that the appellants breached their agreement to have sufficient funds on deposit to cover their withdrawals. That covenant was contained in a business banking services agreement executed by the appellants.

[58] The appellants object to an attachment order which the bank initially obtained upon an *ex parte* application pursuant to section 17 and 18 of the *Civil Enforcement Act*, RSA 2000, c C-15. The attachment order was confirmed and extended less than 21 days later following contested applications before another judge to have the attachment order either confirmed or terminated pursuant to s.18(6) of the *Civil Enforcement Act*.

[59] The order confirming or continuing the attachment order is the subject of the within appeal, although one of the grounds of appeal is that the chambers judge confirming it erred in not setting the first order aside on the basis that it was granted without notice.

[60] The test for an attachment order is three-fold. First, the Court must be satisfied that there is a reasonable likelihood that the claimant's claim will be established. Secondly, the Court must be satisfied that there are reasonable grounds for believing that the defendant is likely to deal with its exigible property otherwise than for the purpose of meeting its reasonable and ordinary business or living expenses. And thirdly, the court must be satisfied that there are reasonable grounds for believing that the defendant is likely to deal with its exigible property in a manner that would likely seriously hinder the claimant in the enforcement of any judgment ultimately obtained against the defendant.

[61] It is not seriously contested that at least one of the bank's claims against the appellants is reasonably likely to be established. The majority appears to be of the view that there is no reasonable likelihood that the bank's claim in fraud would be established. However, the bank need only prove that one or more of its claims has a reasonable likelihood of being established. Both chambers judges were satisfied that there was a reasonable likelihood that the bank's claim against the appellants, whether that claim was in conversion, unjust enrichment, fraud or contract, would be established. Deference ought to be accorded those views. Reduced to its essence, the bank's claim is little more than a claim for moneys had and received (money paid under a mistake of fact). All the bank seeks is to have its funds be returned.

The majority also concluded that there were no reasonable grounds for believing that the appellants were likely to deal with exigible property in a manner which would seriously hinder the bank in the enforcement of any judgment it might obtain against them. If fraud is indicated, such reasonable grounds are presumed; but in my view, with or without the presumption triggered by evidence of fraud, the finding of the chambers judges that the appellants were likely to deal with their property in a manner which would hinder enforcement was fully supported by the evidence. The appellants had already dealt with the bank's money, clearly exigible property, in a manner which was likely to seriously hindered the bank from enforcing any judgment requiring its return.

II. Facts

A. Background

[62] On May 3, 2019, the branch manager of the respondent's 160th Avenue branch on 81st Street in the City of Edmonton, wrote the appellants letters notifying them that the bank was terminating its banking relationship with them and that their accounts would be closed in one month, on June 5, 2019. Prior to receiving these letters, the appellants' bank accounts were "no holds" accounts such that uncertified cheques or other non-cash deposits into their accounts were not routinely held for a period of time after deposit. The appellants could draw on such deposits immediately. In its letters terminating the banking relationship, the bank informed the appellants that effective immediately, all deposits of a non-cash nature made to their accounts would be subject to a typical four-business-day hold after the date of deposit unless those deposits were certified. However, for some reason, the four-business-day hold on the accounts was not effectively communicated to other branches of the bank or otherwise enforced.

[63] The letters from the bank's branch manager terminating the bank's relationship with the appellants also recommended that the appellants take immediate steps to make alternative banking arrangements. The appellants made those alternate banking arrangements, setting up new accounts with another bank on or about May 28, 2019, a full week before presenting $1.685 million worth of NSF cheques to various branches of the respondent bank and then immediately requesting bank drafts enabling the withdrawal of all of those funds. The defendants would not likely have been able to make those immediate withdrawals with their new bank which, the evidence disclosed, had imposed holds of between five and ten days on all non-cash deposits.

[64] On May 20, 2019, the appellants entered into six agreements with a numbered company, which had only been incorporated earlier in the year, for the sale of 58 motor vehicles to that numbered company for approximately $1.685 million. The numbered company provided six post-dated cheques totaling approximately $1.685 million. The cheques were post-dated to June 3, 2019, two days before the appellants' banking relationship with the respondent terminated.

[65] On June 4, 2019, the day prior to their bank accounts being closed , the appellants presented the post-dated cheques, not to their new bank, but to the respondent bank. The cheques were presented not at the branch where the appellants had their accounts and which had terminated

their banking privileges, but rather at three other branches of the respondent bank. Four of the six cheques were presented at the bank's Albany branch (16716-127 Street) by the appellant, Jammaz. One was presented by a female employee at the respondent's Terra Losa Centre branch (9740-170 Street); and one was presented by another female employee at the respondent's Oliver Square branch (11550-104 Ave). Thus, six cheques from the same maker were presented by three different people at three different branches, none of which was the branch where the appellants kept their accounts.

[66] Immediately following the presentation of these cheques, totaling $1.685 million, the appellants sought and obtained twelve bank drafts from two of the branches where the cheques were presented (the Terra Losa Centre and Oliver Square branches) as well as from another branch of the respondent, its North City Centre Branch at 13232-137 Street, which, like the others, was not the branch where the appellants kept their accounts. Twelve bank drafts totaling $1,685,000, payable to a variety of payees, were obtained.

[67] The people and companies to whom these 12 bank drafts were payable suggested that the funds were being paid out for purposes other than for the purpose of meeting the reasonable and ordinary business expenses of the appellant companies. Several of the bank drafts were used to pay off personal loans owing by the appellant Jammaz to others who appeared to have little to do with his business. Others were used to pay off what were said to be business loans. Those drafts were payable to Mr. Jammaz's sister ($68,000), to a fellow named R.G. ($41,500), to a cannabis company ($500,000) and to a person named A.P. ($200,000). This last bank draft was cashed shortly thereafter at a gambling casino in Vancouver.

[68] None of the bank drafts were used to pay for the 58 vehicles to be sold to the numbered company, notwithstanding that 47 of the 58 vehicles were not owned by the appellants when the sale took place. None of the bank drafts were used to discharge encumbrances registered against 11 of the 58 vehicles which were in the appellants' inventory. Indeed, the disbursement of the funds received by the appellants from the numbered company for the purchase of these 11 vehicles was alleged to have constituted a breach of a covenant in a security agreement which required the appellants to retain such purchase monies in trust pending discharge of the security. It was that alleged breach, not the attachment order, which caused the security holder to repossess the 11 vehicles in question. Apparently, this was not the first time that this covenant had been breached by the appellants. When cross-examined on his affidavit, the appellant Jammaz disclosed that there had been problems before of vehicles being sold without the security holder being paid out of the purchase monies as agreed. Indeed, the security holder had previously felt the need to exercise its audit rights to inspect the appellants' inventory to determine whether vehicles which were supposed to be subject to security agreements were still on the appellants' lots.

[69] In any event, after all of the bank drafts had been cashed, it became apparent that because the numbered company's cheques were no good, there were insufficient funds to cover the bank

drafts such that the appellants' accounts with the respondent bank had been overdrawn by about $1,496,722.81.

B. Procedural History

[70] Less than 10 days after it was determined that the appellants had withdrawn an amount equal to the NSF cheques, the respondent bank filed a Statement of Claim (June 14, 2019) against the appellants and the parties to whom the drafts were made payable. While the Statement of Claim was framed in fraud, conversion and unjust enrichment, the banking relationship between the bank as depository and the appellants as depositors was clearly alleged in the initial statement of claim put before the first chambers judge. It was clear from the outset that this was a relationship governed by either express or implied contractual terms, as well as by the law of banking, bills and notes.

[71] The particulars of the fraud alleged were that the appellants made false representations when they presented the numbered company's cheques for payment because they knew or ought to have known that the account on which the cheques were drawn did not have sufficient funds to cover them and when the appellants immediately requested bank drafts knowing that the account would not have funds available to cover them.

[72] In its Statement of Claim, the respondent sought, among other remedies, an order permitting it to trace the funds and an order restraining the appellants and others from selling, depleting, encumbering, spending or otherwise using any assets acquired with the funds. In other words, the attachment order sought was a form of interlocutory relief analogous to what was sought in the main action. Against those who received the funds, including several banks, the respondent bank sought an order permitting it to trace the funds into the hands of the recipients and a declaration that the funds and any assets purchased with them were held in trust for the bank.

[73] On June 28, 2019, the respondent applied *ex parte* to the Court of Queen's Bench, pursuant to s.17(3) of the *Civil Enforcement Act*, for an attachment order prohibiting the appellants from dealing with their exigible property and appointing a receiver for the limited purpose of determining the net available equity in the appellants' business. Specifically, the respondent bank sought a determination of the amount of inventory the appellants' business had, a determination of its debt levels and a monitoring of its cash flow pending a court determination of the bank's entitlement to judgment. In granting an attachment order, section 17(3)(f) of the *Civil Enforcement Act* expressly authorizes the court to appoint a receiver.

[74] The application was heard by Associate Chief Justice Nielsen who found that the granting of an attachment order was warranted on a without notice basis. *Ex parte* attachments orders are expressly permitted by s.18 of the *Civil Enforcement Act*. The Associate Chief Justice was also satisfied that there was a reasonable likelihood that the bank's claim against the appellants would be established. He was also satisfied that there were reasonable grounds for believing that the appellants were dealing or likely to be dealing with their exigible property otherwise than for the

purpose of meeting their reasonable and ordinary business or living expenses and in a manner which would be likely to seriously hinder the bank in the enforcement of any judgment ordered against them. He also noted that the bank had executed the required undertaking for any damages suffered by the appellants should the bank's claims not be proven as required by section 17(4) of the *Civil Enforcement Act*.

[75] The Associate Chief Justice then ordered that the appellants were restricted from dealing with their assets except in the ordinary course of business for the next 21 days.. In addition, the appellant Jammaz was prohibited from dealing with certain lands owned by him personally. This prohibition was made because there was evidence that $300,000 of the funds paid out by the bank on the strength of the appellants' alleged misrepresentations were used to pay off or pay down a mortgage on Mr. Jammaz's personal residence. Section 17(3)(b) of the *Civil Enforcement Act* empowers the court to prohibit any dealing with exigible property and section 17(3)(c) permits the court to impose conditions or restrictions on any dealings with exigible property. There was no prohibition, only a restriction, imposed on dealings with the appellants' business assets. That restriction was simply a requirement that business assets be dealt with only for business purposes.

[76] The order was served on the appellants the day it was made, June 28, 2019. The order expired according to its terms and as required by section 18(2) of the *Civil Enforcement Act* 21 days later unless extended by the court upon application by the bank on notice to the appellants.

[77] On July 8, 2019, the bank amended its Statement of Claim to add a claim for breach of contract against the appellants, namely a breach of the business banking services agreement between the bank and the appellants. The bank also claimed indemnification from the appellant Jammaz personally on the basis of a personal guarantee he gave of the obligations of the corporate appellants.

[78] On July 9, 2019, the appellants filed a Statement of Defence to the bank's claim, denying that they perpetrated fraud on the bank. They asserted they had no reason to believe that the cheques they received from the numbered company would not be honoured. The defendants claimed that the cheques and bank drafts they requested to be issued were sought in good faith and the funds obtained were used in the ordinary course of business and in payment of legitimate debts.

[79] In addition to filing a Statement of Defence, the appellants filed an application to terminate the attachment order on the basis that it ought not to have been granted *ex parte* (i.e. without notice to them) and on the ground that the legislated conditions precedent to granting such an order did not exist. The evidence, they argued, raised only suspicion, not reasonable grounds for belief. The appellants also based their application to terminate the attachment order on what they argued was the bank's failure to make full and fair disclosure of material information in accordance with the duty of utmost good faith required of applicants for orders on a without notice basis. The information not disclosed, they argued, might reasonably have resulted in the order not being granted.

[80] The appellants also argued that the attachment order ought not to be extended because another creditor had seized substantially all of the assets and inventory of the appellants' business. In other words, there was no point of the order. However, the appellants made no mention of the receivables they were receiving on a regular basis from their vehicle-financing business. The appellants' business was not simply one of selling cars.

[81] The following day, July 10, 2019, the bank filed an application to confirm and extend the attachment order for the same reasons as it advanced in its original application; although the bank did supplement the record with a further affidavit sworn by one of its senior investigators.

C. The "Comeback Hearing" and Decision

[82] The two applications were argued July 12, 2019 and a decision rendered on the same day. Justice Topolniski dismissed the appellants' application to terminate the attachment order. She continued the attachment order but reduced the amount of the attachment to $1 million. She also made that amount subject to adjustment as and when the final amount owing became more precisely ascertained. The reason for the adjustment was that some of the funds had been returned. She also left it open to the appellants to provide alternate security.

[83] In arriving at her decision, Justice Topolnski made it clear that the burden remained on the bank to satisfy her that an attachment order was appropriate. She was very much alive to the dictates of section 18(6)(a) of the *Civil Enforcement Act* which stipulates that at the application on notice to extend the attachment order the onus remains on the claimant to establish that the attachment order should be continued. She was also very much aware that section 18(6)(b) makes it clear that it is the circumstances existing at the time of the comeback hearing which determine whether the continued existence of the attachment order is justified. The parties themselves agreed at the outset that this was a *de novo* hearing of the propriety of the attachment order.

[84] Justice Topolnski had the transcript and the evidence from the proceedings before the Associate Chief Justice, plus an additional affidavit sworn by the bank's senior investigator in the interim attaching three letters dated May 3, 3019, which the bank had sent to the three appellants terminating their accounts as of June 5, 2019 and imposing a four-business-day hold on all deposits of a non-cash nature unless certified. Two of the three letters imposed the hold on certain identified accounts of both the appellant Jammaz and the appellant Five Star Motor Group Ltd. The third letter to the appellant Five star Auto Wholesale Inc. did not contain the paragraph which the letters to the other two appellants contained imposing a hold. The evidence that the bank had given notice of termination of its banking relationship with all three appellants effective June 5, 2019 was new evidence which the bank conceded was available to it at the time of the initial application, but had not been provided to counsel. In the view of the comeback hearing judge, the new evidence only strengthened the bank's case for an attachment order.

[85] Justice Topolniski also had the appellant Jammaz's affidavit filed in support of the appellants' termination application, as well as the transcripts of the cross-examination of both Mr. Jammaz and the bank's investigator on their respective affidavits.

[86] Justice Topolniski properly instructed herself as to the exceptional nature of attachment orders and the requirement that *ex parte* orders are only to be sought in the most urgent of circumstances:

> Let me start at the beginning. The order of Justice Nielsen was clearly an *ex parte* order. *Both the Rules of Court and other procedural case authorities indicate that ex parte* orders are only to be sought in the most urgent of circumstances.
>
> …
>
> *Ex parte* applications are typically made on notice unless there's a really good reason for not telling the other party why you're going to court.
>
> …
>
> The Court has to be satisfied that in fact that concern is real, otherwise, the Court has to send the party away who's asking for the relief to say, Oh, no, two sides of this story have to be heard here. And at the hearing before Justice Nielsen, there was evidence put forward to support suspicious circumstances that would warrant the granting of the order without notice. A high threshold and serious business.

[87] However, having addressed her mind to their exceptional nature of *ex parte* applications, Justice Topolniski was nevertheless of the view that the circumstances put before the Associate Chief Justice warranted the granting of the attachment order *ex parte*. She noted that the *Civil Enforcement Act* provides that an application for an attachment order may be made *ex parte*. The protection provided by the legislation is that such orders automatically expire within 21 days if they are not extended. In other words, the scheme of the legislation is such that more than one application is necessary to sustain an attachment order for any length of time.

[88] With respect to the requirement of full disclosure on *ex parte* applications, Justice Topolniski was of the view that there had been no failure which would disentitle the bank to relief. She stated in her decision:

> At that time [i.e. at the time of the *ex parte* application], there was discussion of the NSF cheque, the bank drafts, the timing of everything that occurred. Note was made, as counsel for the corporate and individual respondents had indicated numerous times, note was made that there were deposits to three different banks, and three different banks were used. Drafts taken from here, deposits put there. And that seemed curious.

> Subsequently, it has been determined that maybe that wasn't so curious because there had been a past history of using other banks. Other branches. Not banks, other branches of the same bank. That information may well have been available had the Bank gone through and sifted and combed through years of records, but it didn't. It looked at, and I could be wrong on the exact number of months, but I think it was about a six-month period - November to June 2018 through '19. And that date was just selected randomly to say let's look at that period and see what's going on.
>
> The bank also looked at the volume and value, more importantly, of deposits and saw that, from the records that had been reviewed in that six-month window, the impugned deposit, which has led to all of these problems for everybody, was double the amount of the highest deposit that it saw for that period.
>
> There was nothing false in what the Bank said. The Bank had that information. It was not as fulsome as what was later unearthed but the Bank wasn't misleading the Court, in my view. The Bank went, quite honestly, with its suspicions and said we have a real concern here and we're continuing to investigate but, in the meantime, we've got to make sure that no more money goes flying out the window. That is really what these orders are all about. Because if it's not stopped, then we, the potential judgment creditor, will be so prejudiced that, frankly, we're not going to recover from it on this case. I'm not saying a bank won't recover from the loss. But the point is, is that you -- the legislation is there to ensure that where there is a threshold test met, Courts can order assets to be held up to ensure that the potential judgment creditor isn't prejudiced.

[89] On the one hand, time is of the essence when exigible assets appear to be being improperly dissipated. On the other, courts expect full disclosure. What constitutes full disclosure is a contextual call for the court charged with hearing these applications to make.

[90] Justice Tololniski was of the view that further evidence adduced by both the bank and the appellants on the "comeback hearing" simply strengthened the case for an attachment order. The further evidence included information about the timing of the "deposits" and "withdrawals" on June 4, 2019, the day before the appellants were told their accounts were to be closed; the use of the funds for purposes other than those for meeting the appellants' reasonable and ordinary business expenses; and the disbursement of the funds to recipients which would likely hinder recovery, all on the strength of cheques which, the evidence disclosed, even the appellants suspected might not be good.

[91] Indeed, it was the appellants' evidence on that comeback hearing which Justice Topolniski found most damning:

> [T]he damaging piece of evidence for Mr. Jammaz in this regard, is the coincidental timing of these payments layered with the fact that he was not going to let Mr.

> [Terrabain] or 217 [Mr. Terrabain's numbered company] have those vehicles until the cheques cleared. But he was prepared to use that money to pay down debt that wasn't due yet without taking the same precautions and doing it with an institution where the account was closing the next day. That's very damaging information. And it's information that is properly considered in the context of this hearing for whether the attachment order should be terminated on a comeback.

III. Grounds of Appeal

[92] The appellants stated grounds of appeal in their factum were as follows:

(a) That the chambers judge on the comeback application restricted her review of the prior order to the evidence which was before Associate Chief Justice Nielsen and failed to consider further evidence.

(b) That there was no evidentiary basis on which to conclude that the appellants were likely to deal with their exigible property

(i) otherwise than for the purpose of meeting their reasonable and ordinary business or living expenses, and

(ii) in a manner that would be likely to seriously hinder the bank in enforcing any judgment.

(c) That the chambers judge restricted her review of the prior order such that she failed to properly consider whether the prior order ought to have been made at all or whether it ought to have been granted on a without notice basis.

(d) That the chambers judge breached procedural fairness by preventing counsel for the appellants from referring to new or additional evidence.

IV. Standard of Review

[93] Granting an attachment order involves the exercise of judicial discretion. The standard of review is deferential unless the judge granting it proceeded arbitrarily, on a wrong principle or failed to consider or improperly considered the applicable test (*Peters & Co Limited v Ward*, 2015 ABCA 6 at para 10). Both judges hearing this matter applied the correct test and neither acted arbitrarily.

[94] The *Civil Enforcement Act* provides that the court "may" make any attachment order if it is "satisfied" that certain conditions precedent exist. The court must be satisfied that there are reasonable grounds for believing in certain likelihoods. One of those is the likelihood that the defendant is likely to deal with exigible property in a manner that would hinder the claimant from

enforcing a judgment against it. It is a predictive exercise, based on inferences drawn from prior conduct. Being "satisfied" in this context does not mean, as it does in other contexts, being furnished with definitive proof. Being "satisfied" means having a reasonable expectation that a defendant will act in a certain manner going forward.

V. Discussion

[95] The appellants' stated grounds of appeal, (a), (c) and (d), reproduced in paragraph [39] hereof, are completely without merit. The transcript of the proceedings before Justice Topolniski July 12, 2019 and her reasons for decision demonstrate there is no basis for suggesting that she restricted her review of the prior order in any manner whatsoever or that she restricted her consideration of whether circumstances favoured continuation of the attachment order. Nor did she prevent either party from referring to the new or additional evidence. Nor did she fail to consider whether it was appropriate for the prior order to be granted on a without notice basis.

[96] The issue on this appeal has little to do with the process or disclosure. But to the extent that it did, one needs to keep in mind that not every omission will result in a finding of a failure to be full, frank and fair. Any omissions must be assessed in context. An attachment order is sought at an early stage of the litigation. Assertions about what an affiant or a party ought to have known must be realistic. Informing oneself to even questioning level preparation is not required. Reasonable people can disagree about what matters are material and ought to have been disclosed. Had the information which was not put before the Associate Chief Justice been put before him, the attachment order could still have reasonably been made. Indeed, there would have been a better case for it. In my view, this is not a situation in which the applicant on an *ex parte* application held back information that was potentially harmful to its case. The appellants' prior dealings with the bank had little to do with how it conducted itself after they received notice from the bank that the relationship was being terminated.

[97] The real issue is whether or not the two judges below ought to have been satisfied that there were reasonable grounds for believing that the appellants were likely to deal with exigible property otherwise than for meeting their reasonable and ordinary business or living expenses and in a manner that would be likely to seriously hinder the bank in the enforcement of any judgment it might obtain.

[98] Section 17(2) of the *Civil Enforcement Act* requires a reasonable likelihood that the claimant's claim against the defendant will be established, that the defendant is dealing with its exigible property other than for the purpose of its reasonable and ordinary business or living expenses and that such property is being dealt with by the defendant in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

[99] In my view and for the reasons below, the chambers judge's decision extending the attachment order was reasonable, grounded in the evidence and entitled to deference.

A. Reasonable likelihood a claim would be established

[100] Whether there was a reasonable likelihood that one or more of the bank's claims against the appellants would be established was not really an issue. There seems to have been little doubt that the bank would establish its claim to a judgment against the defendants for the funds withdrawn. The nature of the bank's claim was the subject of much argument, but only because if the claim in fraud is found likely to be established, then the reasonable grounds for believing the appellants are likely to deal with their exigible property for improper purposes and in the prohibited manner are presumed, absent evidence to the contrary.

[101] The evidence before the "comeback" chambers judge clearly satisfied the requirements for the granting of an attachment order set forth in section 17(2) of the *Civil Enforcement Act*. The evidence disclosed that there was a reasonable likelihood that the respondent bank's claim against the appellants, whether founded in fraud, conversion, unjust enrichment or contract (debt), would be established. Indeed, as indicated above, not much argument was adduced with respect to this requirement, with the exception of the claim founded in fraud.

B. Dealing with property for purposes other than business

[102] Even without relying on fraud and the presumption which accompanies it (discussed below), there was plenty of evidence to ground a reasonable belief that the appellants were dealing with their exigible property (arguably, the bank's property) otherwise than for the purpose of meeting their reasonable and ordinary business expenses. This was not a case of mere suspicion. The bank's money was being paid out for purposes which appeared to have had little to do with the appellants' business. Significant personal benefits accrued to the appellant Jammaz through the deposit of cheques and then the immediate withdrawal of an amount which roughly equated the amount deposited. At the very least, the connection between what appeared to be significant personal benefits and the business was not satisfactorily explained to the chambers judge.

C. Hindering enforcement of judgment

[103] For the purposes of assessing the chamber judge's grounds for believing that the appellants were likely to deal with exigible property in a manner which would likely seriously hinder the bank from enforcing any judgment against them, it is important that a distinction be drawn between facts which cannot be controverted and the appellants' explanations of those facts which may or may not ultimately be proven to be factual. Clearly the chambers judge hearing the bank's application to confirm and continue the attachment order did not believe many of the appellants' explanations. In dealing with the bank's money as quickly and as completely as the appellants did, a reasonable inference is that they were dealing with the funds in a manner and with the intention of hindering the bank in security their return.

[104] Without relying on fraud, the evidence clearly grounded a reasonable belief that the appellants had, in fact, dealt with exigible property (the bank's money) in a manner which would

likely seriously hinder the bank in the enforcement of any judgment against the appellants. Most of the funds obtained from the bank on the strength of the NSF cheques (i.e. much exigible property) had been dissipated. The appellants emptied their accounts of the bank's money, and not by transferring those funds to their new bank. The fact that no vehicles were improperly disposed of by the appellants is irrelevant. It was the appellants' disposition of the bank's money which provided the reasonable grounds for believing that the appellants were likely to deal with their exigible property in a manner that would likely seriously hinder the bank in the enforcement of any judgment ultimately obtained.

D. Hindering enforcement may be inferred from evidence of fraud

[105] In dealing with the requirement that there be reasonable grounds for believing that the appellants were dealing or were likely to deal with their exigible property otherwise than for their reasonable and ordinary business or living expenses and in a manner that would likely seriously hinder the bank in enforcement of a judgment, both chambers judges also relied on the principle articulated in *Osman Auction Inc v Belland*, 1998 ABQB 1095 that *prima facie* evidence of fraud can provide reasonable grounds for believing a defendant is likely to deal with his property in a manner which would likely seriously hinder the enforcement of a judgment. At paragraph 29 of *Osman Auction*, Justice Burrows of the Alberta Court of Queen's Bench had this to say about the second part of the test for the granting of an attachment order:

> The requirement in respect of the second aspect of the test is only that there be grounds for a reasonable belief. In my view, it does not take a strong *prima facie* case of fraud to provide reasonable grounds for believing that a person who is reasonably likely to be shown to be have been fraudulent is likely to deal with his assets to avoid his creditor.

[106] As a consequence, there was much argument below and before us about whether there was sufficient evidence of fraud to trigger the presumption. In my view, there was; but, as indicated above, quite apart from fraud, there was independent evidence that the appellants were dealing with the bank's funds (exigible property) other than for business expenses and that the appellants were dealing with the bank's property in a manner which was likely to hinder the bank in enforcing any judgment obtained.

[107] The majority suggests the presenting of the dishonoured cheques at three different branches of the respondent bank was consistent with modern electronic banking and the appellant's past practices. Firstly, it was not established, it was merely alleged, that this was consistent with past practices. There was no evidence of multiple cheques from one maker in connection with one transaction all being deposited on the same date by three different people at three different branches and then immediately withdrawn at two of the three branches plus one other branch. The appellant Jammaz deposited four of the six cheques. An employee deposited one cheque at the Terra Losa Branch and another employee deposited a cheque at the Oliver Square Branch. That the cheques were being deposited at branches of the respondent bank and not the

appellants' new bank was suspicious in and of itself. The appellants' banking relationship with the respondent bank was, for all intents and purposes, over when these transactions took place.

[108] Also providing reasonable grounds to believe that the appellants' actions were fraudulent was the fact that the bank drafts were obtained the same day by other employees or representatives of the appellants at two of the three branches where the cheques were presented and at a third branch, the North City Centre branch which, incidentally, was not that far from the appellants' home branch.

[109] Most importantly, the appellants' alleged past practices were not undertaken literally on the eve of a termination of a banking relationship. To suggest that the sale of the 58 vehicles was in accordance with the appellants' ordinary business practices may simply be indicative of the questionable nature of the appellants' business practices. But to suggest that the appellants had no reason to distrust the third-party purchase or to suspect that its cheques might not be honoured simply does not accord with the evidence. Clearly the appellants themselves suspected that the cheques might not be good. Mr. Jammaz conceded as much.

[110] This was the largest simultaneous deposit-withdrawal that the appellants had ever undertaken. There was apparently another simultaneous deposit-withdrawal in early May in connection with a bulk sale of vehicles on the strength of cheques written by a well-known Edmonton car dealer. But the amount deposited was less than half of the $1.685 million involved in the subject transactions and the withdrawals were about a fifth of the size.

[111] What also supported the chambers judges being satisfied that there was a reasonable likelihood that fraud would be established is how the appellants might have known the suspension of the no-holds term of their previous arrangement was not being implemented by the bank. The appellants had been told that there would be a four-day hold on all non-cash deposits and yet they succeeded in immediately withdrawing funds on the strength of a non-cash deposit. It begs the question of whether there may indeed have been a prior "test run" in May. The fact that the so-called "test run" was a genuine transaction misses the point. It is what the appellants may have learned as a result of that transaction, namely that the bank was not enforcing its holds policy, which was important. At the very least, it begs the question of how the appellants might have known the bank was going to be so careless.

[112] The bank may have made a mistake approving the drafts without a hold on the cheques deposited, but the appellants took advantage of that mistake. Therein may lie the fraud. The appellants knew there was supposed to be a hold on non-cash deposits (at least in the account of Five Star Motor Group Ltd. which was issued three of the six cheques for a total value of $900,000) and yet they attempted to have the bank disburse funds prior to confirmation that sufficient funds were available and succeeded in doing so with cheques which even the appellant Jammaz suspected might not be good.

[113] That the drawer of the cheques, the numbered company, was not named as a defendant by the bank is not necessarily contra-indicative of fraud by the appellants. If one receives post-dated cheques on terms that they are not to be cashed until the happening of a certain event (which is what the appellant Jammaz says Bert Terrabain, the principal of the numbered company told him, but which Mr. Jammaz denies) and one presents the cheques for cashing knowing the event has not taken place and therefore knowing the cheques are no good, the only perpetrator of fraud is the payee who presents the cheques for payment, not the writer of the cheque. Also, if one cashes a cheque knowing that it will not be honoured, the person cashing the cheque may be guilty of fraud and yet the drawer of the cheque may not be a party to that fraud if restrictions imposed on the cashing of the cheque were breached. Likewise, if one cashes a cheque knowing the drawer is not good for it, then the fraud may be that of the person cashing the cheques, regardless of the whether the drawer is fraudulent.

[114] The nature of the transaction which gave rise to the cheques was suspicious in many ways. It purported to be a wholesale sale of 58 identified vehicles for $1.685 million. The appellants only owned 11 of the 58 vehicles and were unable to produce any documentation of their right to acquire and therefore sell the remaining 47 vehicles. They claimed to have oral agreements with the unidentified owners of these vehicles.

[115] With respect to the withdrawal of funds, two of the bank drafts totalling $500,000 payable to a cannabis company were said to pay back a personal loan owed by the appellant Jammaz to a fellow named Sam Terrabain. When asked whether Sam Terrabain was a relative of Bert Terrabain, the principal of the numbered company who wrote the cheques, Mr. Jammaz was unable to say, notwithstanding that he previously testified that he was very familiar with Bert Terrabain. Mr. Jammaz was asked why there were two bank drafts payable to the cannabis company and why they were to be made payable to the cannabis company and not to the alleged creditor, Sam Terrabain. His only explanation was that those were the instructions he received.

[116] The appellant Jammaz's efforts to get some of the bank's money back was argued to be proof that there was no fraud, but it may be found to be simply a transparent attempt to avoid a finding of fraud. Significantly, the funds Mr. Jammaz claims credit for returning to the bank did not include any of the funds he received to his benefit.

E. The case for an attachment order

[117] If one ignores the evidence of fraud, what we have here is a bank error or negligence resulting in the appellants' accounts being credited with roughly $1.685 million to which they were not entitled. The bank simply wants the return of the money credited in error. Not even the appellants have argued that the bank is not entitled to the return of their money. However, the appellants have declined or are unable to return the funds. As a consequence, the bank sued with a view to obtaining a judgment against the appellants for conversion, unjust enrichment, fraud or breach of contract. In the interim, the bank sought an attachment order which did no more than restrict the corporate appellants from dealing with their assets except in the ordinary course of their

business. As well, the appellant Jammaz is prohibited by the orders from dealing with certain lands he owns because $300,000 of the bank's $1.685 million went toward discharging mortgages against his home and condo.

[118] The restriction on the appellants' ability to deal with their business assets in the attachment orders is limited. It does not restrain dealings in the ordinary course of business. In contrast, the prohibition on dealing with the appellant Jammaz's real properties is not as limited. But both the restriction and the prohibition are subject to further order of the court.

[119] The restriction and the prohibition on dealing with assets in the attachment orders is simply to prevent further dissipation of funds to which the bank is likely entitled or exigible property the bank may have a right to execute on. They are simply intended to preserve whatever equity there is in the assets of the business. By way of example, the restriction in the attachment order may prevent the appellants from dealing with receivables from their car financing business except in the ordinary course of business. This restriction may be of value to the respondent bank even if the appellants' businesses have no vehicle inventory. The appellants may have substantial receivables. That is what the receiver was appointed to ascertain. The prohibition against the individual appellant Jammaz from dealing with his two properties simply attempts to preserve whatever equity he has in them in case that equity is properly available to satisfy any judgment the bank may obtain, keeping in mind that he is sole directing mind of the corporations and has personally guaranteed their indebtedness to the bank.

[120] An attachment order may be registered at Land Titles and at the Personal Property Registry (*Personal Property Security Act*, RSA 2000, c P-7 [*PPSA*], s.22); but it is not a writ of enforcement. It does not permit a sale of real property or a disposition of chattels. Any person who acquires an interest in an asset to which the attachment order applies pursuant to a permitted transaction acquires the interest free of the attachment order (*PPSA*, s. 23).

[121] If the bank obtains a judgment against the appellants, any writ of enforcement arising out of that judgment will have the priority of the date of the attachment order (*PPSA*, s. 23); but, like any other writ of enforcement, it will only give the bank the right to enforce its judgment in accordance with the priorities set out in the *Civil Enforcement Act* (ss 31 and ff). The bank may have to share the proceeds of any executions with other writ-holders *pro rata*.

[122] The attachment order provides only a modicum of protection for the bank and causes as little inconvenience to the appellants as is consistent with achieving the purpose for which the order was granted. The bank was not conferred with a security interest in any of the appellant's assets by virtue of the granting of the attachment order. No right to seize assets was conferred. Only if the appellants fail to cooperate with the receiver, who is little more than an auditor, is there a right to take possession of any of the appellants' assets. The bank may never recover all of its money notwithstanding the attachment order. An attachment order does not even preserve the *status quo*. It is business as usual for the parties to which it applies. It simply attempts to restrain

improper dissipation of assets by a party which has already indicated by its actions that it might do so.

[123] With respect to the propriety of appointing a receiver for the limited purpose of determining what assets the appellant debtors had, the legislation provides for the appointment of a receiver in an attachment order. Attachment orders are issued because there is a likelihood that a defendant debtor will hide or dissipate assets. In such cases, receivers are sometimes appointed for the purpose of obtaining information about what assets there are. The receiver was appointed not to take possession of any assets, but rather to examine the records of the debtor to determine if any preference had been given and to assist in the tracing of assets. In this case, the receiver may discover that the appellants' car financing business is a source of exigible income.

[124] The appellants argue that the attachment order decimated their business. In my view, this argument does not withstand scrutiny. What the argument fails to recognize is that at the very least this was a case of "found money" which came into the hands of the appellants without having given anything up in consideration for it. The chambers judge did no more than to simply permit the bank to attach exigible assets of a value equal to that which the bank was clearly owed. The appellants did not give up any assets or transfer any vehicles in return for money they were clearly not entitled to. The appellants never did transfer the 58 vehicles to the numbered company. The appellants suffered no loss. Being subject to an attachment order pending the return of the money one receives for nothing ought not to be the cause of any business failure. Furthermore, the claimant in this case undertook, as it must, to pay damages or indemnity that the court may subsequently decide should be paid to the appellants (*Civil Enforcement Act*, s.17(4)).

VI. Conclusion

[125] In conclusion, for the foregoing reasons, I would have dismissed the appeal an upheld the attachment order as amended.

Appeal heard on January 6, 2020

Memorandum filed at Edmonton, Alberta
this 19th day of June, 2020

O'Ferrall J.A.

Appearances:

D.R. Bieganek, Q.C./Z. Soprovich
for the Respondent

R.B. Hajduk
for the Appellants

TAB 4

Osman Auction Inc. v. Belland, 1998 ABQB 1095

Date: 19981223
Action No. 9803-19633

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

OSMAN AUCTION INC.

Plaintiff

- and -

GUY BELLAND,
GUY BELLAND operating as G. B. MANAGEMENT, G. B. MANAGEMENT,
LYLE STEWART,
LYLE STEWART operating as STEWART PROPERTY MANAGEMENT,
STEWART PROPERTY MANAGEMENT,
AND STEWART BELLAND & ASSOCIATES INC.

Defendants

MEMORANDUM OF DECISION
OF
THE HONOURABLE MR. JUSTICE BRIAN R. BURROWS

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[1] On November 30, 1998 I set aside two *ex parte* orders granted on November 10, 1998 to Osman. One was an Anton Pillar Order authorizing a search and seizure of documents at the residence of Guy Belland and the offices of Stewart Belland & Associates Inc.. The other was a prejudgment attachment order which prohibited activity on certain bank accounts of G. B. Management, Mr. Belland, Stewart Belland & Associates Inc. and Stewart Property Management. The prejudgment attachment order also prohibited any dealing with the interest of Mr. Belland in his residential property and securities he owns.

[2] Osman now applies with further affidavits for a fresh prejudgment attachment order of the same scope as that which I set aside.

[3] Osman does not seek restoration of the Anton Pillar Order. In another application brought on December 15 I directed the parties to file Affidavits of Documents in this action by close of business today. Counsel for the defendants gave undertakings to

preserve copies of the seized documents pending document production and any dispute as to the producibility of any document seized but not produced. Accordingly there is no need to revive the Anton Pillar order.

[4] As to the prejudgment attachment order, I set aside the original order because I found that neither of the two requirements set out in s. 17(2) of the *Civil Enforcement Act* had been satisfied. Mr. Belland had provided a plausible explanation for the suspicions raised by Osman on the original *ex parte* application. Osman had not, in the 16 days following its obtaining the *ex parte* orders, obtained evidence from any of the parties who it alleged had been harmed by the defendants, to establish that they believed they had been harmed. Accordingly I held that Osman had not shown a reasonable likelihood that its claim against the defendants would be established.

[5] I also held that the second requirement was not satisfied. Reasonable grounds for believing that Mr. Belland was dealing with his exigible property, or was likely to deal with it, otherwise than in the ordinary course and in a manner likely to seriously hinder Osman in the enforcement of any judgment it might recover, were not shown.

[6] I dealt with one submission Osman had made in respect of this requirement as follows:

> Osman's counsel submitted that reasonable grounds for believing that Mr. Belland is likely to dispose of his exigible assets exist because a person accused of the serious frauds is very likely to take steps to hide and protect the product of his fraud. This amounts to a suggestion that by simply making serious allegations against a defendant, a plaintiff can satisfy the requirement that he show reasonable grounds that the defendant is likely to conceal his exigible assets.
>
> If there is any merit to that argument it would require at very least that the allegation against the defendant be supported by evidence at least sufficient to satisfy the first part of the test for a prejudgment attachment order. As I have already indicated, in my view, that does not exist in the materials put before me.

[7] On this application, Osman offers new evidence to show a reasonable likelihood that its claim against Mr. Belland will be established. It argues that having now established a reasonable likelihood that Mr. Belland has committed fraud, the argument I rejected in the above quoted passage should now be accepted.

Reasonable Likelihood of Establishing Claim

[8] The new evidence provided by Osman is very complicated. The portion of it which I believe is of the greatest significance to this application is in relation to 3 specific consignments of vehicles to Osman. There is a similar pattern to the documentation in all 3 cases. I will describe one instance in detail.

[9] On October 11, 1997 Osman took a 1988 Chev Camaro on consignment for auction. The seller was shown as Asset Recovery. The lot number was 0698R. The car was sold. The purchaser paid $9025.45 including price, GST, and fees. The net proceeds payable to the consignor were $8447.65. A cheque for $5494.45 was issued to Asset Recovery by Mr. Belland on Osman's trust account on October 17, 1997.

[10] There was another sales agreement, also dated October 11, 1997 for the same vehicle with the seller shown as Bill McCulloch. On this contract the vehicle is assigned lot number 1698R. The accompanying sales agreement contract shows that the vehicle was sold to G. B. Management on the same day, October 11, 1997. The total payment required is shown as $9025.45, the same amount as on the other sales contract. The sales agreement contract further shows two credits against this amount – $5221.60 received and $3803.85 in respect of an "adjustment". An Osman trust cheque dated October 16, 1997, in the amount of $8474.40 originally payable to Bill McCulloch but amended in handwriting and made payable to "G. B. Management" completes the documentation.

[11] Mr. Belland's evidence in response to the original materials filed by Osman was that in some cases he bought vehicles from the consignor for an agreed price and then sold them at auction. If they sold for more than he paid for them he made a profit. If he sold them for less he suffered the loss.

[12] It is difficult to reconcile the documentation described above to such an arrangement. If this is an example of the type of transaction Mr. Belland described in his affidavit why would there be two auction sales agreements? One would expect that he would have made his purchase arrangement directly with Mr. McCulloch – that no auction would be involved in that transaction. Why would there be a commission and fee paid to Osman in respect of both sales? The documentation appears to indicate that Osman earned a commission of $480 in respect of each sale. If G. B. Management bought the vehicle from the original consignor why is the cheque issued to that consignor drawn on Osman's trust account? Why is it dated after the cheque payable to G. B. Management?

[13] Most important, why is there record of only one receipt by Osman – of the amount paid by the third party purchaser. Mr. Osman has expressly sworn that Osman did not receive payment from Mr. Belland or G. B. Management in respect of a purchase of the vehicle. It appears that in the transactions involving this vehicle, Osman paid out a total of $13968.85 but received only $9025.45. It lost the difference, $4943.40 plus its commission and fees and the other expenses it paid in respect of the transactions.

[14] In addition, it appears reasonably likely that the original consignor, Asset Recovery did not recover the full sale proceeds it was entitled to recover. It received $5494.45. There appears to be a reasonable likelihood that it should have received $7895.00. Its loss appears to be $2400.55. Mr. Osman swears that Asset Recovery has informed an officer of Osman that it holds Osman responsible for the shortfall.

[15] The documentation in respect of the other two instances is similar. In one case it appears Osman paid out $2664.30 to Asset Recovery and $3680.80 to G. B. Management for a total of $6345.10. It received only $3942.95. Osman's loss appears to be $1278.65. Asset Recovery's loss appears to be $757.70.

[16] In the third similar transaction, Osman paid $3536.35 to Asset Recovery and $4033.90 to G. B. Management for a total of $7570.25. It received only $4317.45. Osman's loss appears to be $3252.80. Asset Recovery's loss appears to be $233.65.

[17] Mr. Belland has not provided any explanation for these transactions. In my view, on the materials now before the court, there is a reasonable likelihood that Osman's claim will be established.

[18] I note that the Statement of Claim by which this action was commenced does not appear to make any claim for the loss suffered by Osman. It appears only to claim indemnity from Mr. Belland and the other defendants in respect of liability Osman anticipates it may have to consignor customers who as yet have made no claim – though now according to the hearsay in Mr. Osman's affidavit and an affidavit of a former bankruptcy trustee, such claims are threatened.

[19] Mr. Osman's new affidavit also refers to another transaction which make him suspicious that Mr. Belland may have purported to sell a vehicle for storage costs but kept about $1000 of the proceeds himself. The documentation in respect of this transaction is incomplete. I have been unable in the time available to assess it to the point where I can tell whether or not it gives rise to anything more than a suspicion. It is not a situation of Osman having made two payouts. At the most, the documentation supports the proposition that Osman lost $1000. It is not clear to me that a consignor creditor lost anything.

[20] In addition Mr. Osman exhibits a series of documents included amongst which are cheques, generally in amounts around $200 (though in two cases significantly more than that). Curiously though these cheques are made out to payees other than G. B. Management and the payee has not been altered, the cheques appear to have been negotiated by G. B. Management. How this was possible is at this point a mystery. However there is nothing I can see in the documentation to establish that in all but the two instances where the amount is significantly more than $200, these are not examples of the type of situation which Mr. Belland explained in his affidavit – instances where his firm performed a service to the creditor for which it received payment out of the proceeds of the sale. In respect of all of the transactions there is nothing to indicate that the original payee of the cheques disputes the entitlement of G. B. Management.

[21] In my view, though these cheques raise questions, in the absence of any evidence that any third party has any claim arising out of the transactions to which these cheques relate, the evidence provided is not of the quality required to show Osman is reasonably likely to succeed in a claim for indemnity from the defendants in respect of such a claim.

[22] Osman has also filed an affidavit sworn by Paul Pope C.A. who was the trustee in bankruptcy who instructed the vehicle sale which I described in paragraph 11 of my November 30 reasons. Mr. Pope swears that he never received an accounting for the difference between the auction proceeds and the amount paid to the trustee in bankruptcy – the sum of $3959.00. He says it would be unusual for a trustee in bankruptcy to sell a vehicle to someone like Mr. Belland and not by public auction. He says the sale of the vehicle ought to have proceeded by public auction with the net proceeds being paid to Browning Smith. He says the $3959.00 is unaccounted for. He says he has a right to pursue Osman for the recovery of this fund.

[23] My conclusion is that the evidence now placed before the court shows there is a reasonable likelihood that Osman will establish the claim it has raised in the Statement of Claim – the claim for indemnity. The amount of that claim – the total of the three claims by Asset Recovery referred to above and the claim by Browning Smith – appears likely to be $7350.90. In addition the materials appear to show a reasonable likelihood that Osman could establish a claim that it has itself lost $9474.85 as a result of Mr. Belland's actions. As noted, that claim has not yet been made.

Reasonable likelihood that assets will be dealt with

[24] As noted above, Osman submits that having established a reasonable likelihood that its claim will succeed, given that the cause of action is fraud by Mr. Belland, there are also reasonable grounds for believing Mr. Belland will deal with his assets to Osman's prejudice.

[25] There is authority that allegations of fraud shown to have reasonable foundation will justify a prejudgment attachment. See *J. R. Paine and Assoc. Ltd. v. Cairns* (1987) 82 A.R. 323 (Alta Q.B.) per Andrekson J. at 344; *Aetna Financial Services v. Fieglman* [1985] 1 S.C.R. 2 per Estey J. at 14; *Mills and Mills v. Petrovic* (1980), 118 D.L.R. (3d) 367; *Canadian Pacific Airlines Ltd. v. Hind* (1981) 122 D.L.R. (3d) 498. All of these cases preceded the enactment of the *Civil Enforcement Act* and were decided in the context of applications for Mareva injunctions.

[26] See also the discussion of the "pre Mareva" prejudgment remedy in cases of fraud found in the Report of the Alberta Institute of Law Research and Reform, No. 50, *Prejudgment Remedies for Unsecured Claimants,* February, 1998 at page 113. This is the report that led to the enactment of s. 17 of the *Civil Enforcement Act*. In the discussion, though the pedigree of the idea that a cause of action in fraud may be sufficient on its own to support a prejudgment attachment is doubted, there is no suggestion the idea is wrong.

[27] I note that in the Institute report at page 169 the Nova Scotia Civil Procedure Rules are quoted. These set out a list of circumstances in which a claimant may obtain an attachment order. One of the listed circumstances is that the defendant "has fraudulently incurred a debt or a liability in issue in a proceeding".

[28] I am satisfied that where the cause of action is in fraud and the plaintiff has shown a reasonable likelihood that the cause of action will be established, the court may conclude, on that basis alone, that there are reasonable grounds for believing the defendant is likely to deal with his exigible property to the plaintiff's prejudice.

[29] I recognize that in some of the cases referred to above, the likelihood that fraud would be established was of a higher degree than in the case before me. They were all Mareva injunction cases where the requirement was that a strong *prima facia* case be shown. The first test for a prejudgment attachment order under the *Civil Enforcement Act* is not as strict. The requirement in respect of the second aspect of the test is only that there be grounds for a reasonable belief. In my view, it does not take a strong *prima facie* case of fraud to provide reasonable grounds for believing that a person who is reasonably likely to be shown to be have been fraudulent is likely to deal with his assets to avoid his creditor.

[30] Accordingly, I find that the new material satisfies the second requirement for a prejudgment attachment.

PreJudgment Attachment Orders

[31] Section 17(6) of the *Civil Enforcement Act* provides:

> An attachment order shall not attach property that exceeds an amount or a value that appears to the Court to be necessary to meet the claimant's claim, including interest and costs, and any related writs, unless the Court is of the view that such a limitation would make the operation of the order unworkable or ineffective.

[32] The materials before me indicate that the amount necessary to meet Osman's claim for indemnity is $7,350.90. I will assume that interests and costs in respect of that claim would increase the amount to $9,000.00. The materials indicate that Osman has a reasonable likelihood of establishing a claim for $9,474.85 which it has not yet made. In respect of that claim I will assume that interests and costs would bring the total to $11,000.00.

[33] I intend to grant two prejudgment attachment orders. They will limit the attachment to these amounts of the claims Osman has established in the affidavit materials filed. The order in respect of the second amount will not be signed until Osman amends its claim to include a claim for its own loss.

[34] Counsel for Osman indicated that Osman or its principal will provide security for an undertaking to pay damages that the court may hereafter decide should be paid by Osman to Mr. Belland or G. B. Management because of any order I might grant. I do not at this point require that such security be provided. I do however require that the written undertaking of Sam Osman in that regard be filed in Court before the formal Orders resulting from this application are signed. There is to be a separate undertaking in respect of each of the orders.

[35] Section 17(3) contemplates that a prejudgment attachment order can take a number of different forms. Section 17(3)(d) contemplates that the Court may "require the defendant or a person who has possession or control of exigible property of the defendant to deliver the property up to a person identified in the order". I intend to invoke that section in the orders I will grant.

[36] First, subject to one condition, I grant a prejudgment attachment Order requiring:

a. The Province of Alberta Treasury Branches, Terrace Plaza, 4445 Calgary Trail South, Edmonton, Alberta, to pay to the Clerk of the Court from the account of G. B. Management, being account #1024574.24, the sum of $9,000.00 or, if the balance in the account is less than that sum, the entire balance of the account.

b. The Bank of Montreal at 63 Avenue & 97 Street, Edmonton, Alberta to pay to the Clerk of the Court from the account of Guy Belland, account #2532-3088-984, the sum which the Clerk of the Court shall certify is required to bring the total balance held by the Clerk of the Court pursuant to this order to $9,000.00, or, if the balance in the account is less than that sum, the entire balance of the account.

and will permit the plaintiff to apply on 24 hours notice to the defendant, for a further order in respect of other exigible property, if there are not sufficient funds in the two accounts to permit payment of $9,000.00.

[37] The one condition is that the Order will not be signed until the plaintiff has filed the undertaking of Sam Osman mentioned in paragraph 34 above.

[38] I also grant, subject to two conditions, a second prejudgment attachment order. This Order will require:

a. The Province of Alberta Treasury Branches, Terrace Plaza, 4445 Calgary Trail South, Edmonton, Alberta, to pay to the Clerk of the Court from the account of G. B. Management, being account #1024574.24, the sum of $11,000.00 or, if the balance in the account is less than that sum, the entire balance of the account.

b. The Bank of Montreal at 63 Avenue & 97 Street, Edmonton, Alberta to pay to the Clerk of the Court from the account of Guy Belland, account #2532-3088-984 the sum which the Clerk of the Court shall certify is required to bring the total balance held by the Clerk of the Court pursuant to this order to $11,000.00, or, if the balance in the account is less than that sum, the entire balance of the account.

and will permit the plaintiff to apply on 24 hours notice to the defendant, for a further order in respect of other exigible property, if there are not sufficient funds in the two accounts to permit payment of $11,000.00.

[39] The first condition in this case is that the formal Order will not be signed until the plaintiff has amended its claim to add a claim against Guy Belland or G. B. Management or both in respect of the loss which in the materials filed in support of

this application it alleges Osman has suffered. If the defendants do not consent to such an amendment the plaintiff may apply to me on 2 hours notice for leave to amend the claim in that regard.

[40] The second condition is that the formal Order will not be signed until the plaintiff has filed the undertaking of Sam Osman described in paragraph 34 of these reasons in respect of the second order.

[41] If Counsel have any difficulty settling the terms of my orders, they may contact me. I am the assigned duty judge on December 28, 29 and 30, 1998.

DATED at Edmonton, Alberta this 23rd day of December, 1998.

J.C.Q.B.A.

APPEARANCES:

J. H. Chadi and G. R. Hogle,
Chadi & Company
Solicitors for the Plaintiff

P. Michalyshyn,
Chatwin Cox Michalyshyn
Solicitors for the Defendants

TAB 5

Court of Queen's Bench of Alberta

Citation: 1773907 Alberta Ltd v Davidson, 2016 ABQB 2

Date: 20160104
Docket: 1301 06993
Registry: Calgary

Between:

1773907 Alberta Ltd.

Plaintiff

- and -

Shelley Davidson and Richard Davidson and John Doe Corporation

- and -

Defendants

Carolyn Parent also known as Carolyn Trenerry,
John Doe and ABC Corporation

Third Party Defendants

- and between -

Shelley Davidson

Plaintiff by Counterclaim

- and -

Silverado Oilfield Ventures Ltd.

Defendant by Counterclaim

Corrected judgment: A corrigendum was issued on February 18, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] The current plaintiff in this litigation, 1773907 Alberta Ltd., applies for a revised attachment order against the defendants Shelley Davidson and Richard Davidson pursuant to Section 17(2) of the *Civil Enforcement Act*, RSA 2000, c. C-15, as amended. Previous attachment orders have been issued, *ex-parte*, by consent and otherwise, for the benefit of the previous plaintiff, Silverado Oilfield Ventures Ltd., but a full hearing with respect to entitlement, terms and scope of the order has been delayed by a series of unexpected changes in the status of the parties and the appeal of a striking order.

[2] The primary issues are whether the so-called "fraud exception" to the statutory requirement of evidence of dissipation before an attachment order is granted applies in this case and whether sufficient evidence has been established to continue the attachment order against Mr. Davidson. I gave oral reasons, to be followed by this written decision.

II. Background

[3] This matter has a lengthy history of pre-trial motions. The first Statement of Claim was filed by Silverado on November 1, 2011, and named Shelley Davidson and Richard Davidson as defendants. It alleged fraud, breaches of fiduciary duty and misappropriation against Ms. Davidson, and knowing receipt and unjust enrichment against Mr. Davidson. Silverado alleged that Ms. Davidson stole money from Silverado in three ways:

a) through the unauthorized use of company credit cards;

b) by electronic transfer of funds to herself as payroll; and

c) by depositing Silverado cheques on to her own credit cards and showing them in Silverado's records as payments to vendors. Randy Hofer, the CEO of Silverado, said that he signed some of these cheques believing that they were to pay Silverado's credit cards or his own, and alleged that Ms. Davidson forged his signatures on others.

[4] Ms. Davidson says that she was authorized to use the credit cards and denies the other allegations. Mr. Davidson denies any knowledge of the alleged misappropriation.

[5] Silverado (and now 177) rely on certain documents that they say that Ms. Davidson signed on May 7, 2012, including a forbearance agreement in which Ms. Davidson makes certain admissions, a consent judgment, a GSA and a mortgage on her real property. Ms. Davidson says that she believed she was signing an employment agreement, and was not aware of the nature of the other documents. There are a number of credibility issues with respect to the execution of the documents.

[6] On November 10, 2011, the Statement of Claim was discontinued against Mr. Davidson. Silverado said that this was pursuant to the forbearance agreement but the date of the forbearance agreement is May 7, 2012. There is nothing in the forbearance agreement that relates to a discontinuance against Mr. Davidson.

[7] At some point in time, a new Statement of Claim naming Mr. Davidson was filed. On December 12, 2012, Silverado applied *ex-parte* for a Mareva injunction and an attachment order against the Davidsons. Two attachment orders were granted, one against the Davidsons jointly and one against Mr. Davidson and "John Doe Corporation," both under the same file number. On December 17, 2012, both a Statement of Claim naming both the defendants, and an amended Statement of Claim adding John Doe Corporation to the defendants were filed, again all under the original court file number.

[8] On December 18, 2012, Silverado obtained an order directing that the December 12, 2012 *ex-parte* attachment orders would continue until January 7, 2013, unless extended by application.

[9] On January 7, 2013, the parties agreed to a consent attachment order. This order was in a standard form and prohibited the Davidsons from dealing with their exigible property other than in the ordinary course, for reasonable living expenses or to pay legal fees. It attached their real property and vehicles. This order was extended by consent until September 3, 2013. Orders to produce bank records were granted.

[10] On April 11, 2013, Silverado's previous counsel ceased to act and new counsel commenced acting for Silverado. By consent, the file was transferred to Calgary.

[11] Case management commenced in June, 2013, and pleadings and amended pleadings were filed from June to September, 2013. The Davidsons filed a third-party notice against Carolyn Parent (Trenerry), alleging that she was negligent when acting as financial manager of Silverado and in her investigation of Ms. Davidson and she falsified and destroyed financial records of Silverado and committed fraud against Ms. Davidson by way of identity theft. Ms. Parent is now married to Mr. Hofer. Ms. Davidson filed a counter-claim against Silverado, claiming unpaid commissions and work expenses.

[12] In May, 2013, counsel for Silverado applied for, among other relief, an order amending the previous attachment order:

a) to permit service of the attachment order on all financial institutions that held assets belonging to the Davidsons and on Mr. Davidson's employer;

b) setting the maximum amount the Davidsons could spend for living expenses at $5,000 a month; and

c) directing a monthly accounting of living expenses.

[13] The relief requested in the application was expanded over time, as explained later in these reasons.

[14] In August, 2013, Ms. Davidson was charged criminally with two counts of fraud over $5,000.

[15] The application to revise the attachment order was scheduled to be heard on September 18, 2013 as a special hearing. In the interim, the existing attachment order was continued by consent orders. The date of the hearing was later moved to September 20, 2013.

[16] Voluminous materials were filed. Just before the scheduled hearing, counsel for Silverado filed additional affidavit evidence, resulting in an adjournment of the application to December 3, 2013 to allow reply affidavits and cross-examination.

[17] At this point, Silverado's application to expand the provisions of the consent attachment order included seeking orders prohibiting any further borrowing on credit or otherwise, requiring advance approval from counsel to Silverado before the Davidsons paid any legal fees including amount and proposed method of payment, and attaching all interests in their property, vehicles and sports equipment. Silverado also sought an order requiring the Davidsons to limit their spending on living expenses and legal fees to $7,500 a month and to deposit the rest of their income in trust as security for Silverado's claims pending trial, or alternatively to allow the Davidsons' employers to be issued a garnishee for amounts beyond $7,500 per month. The relief sought included the requirement that the Davidsons provide a complete accounting of their earnings, expenses and investments every month, and prohibiting them from making payments to or withdrawals from their pension and investment accounts, including contributions to Mr. Davidson's pension and benefits plans from his employer.

[18] I issued a revised interim attachment order on September 20, 2013. It is similar on its terms to the previous consent order, except that it provides that the Davidsons are to provide a monthly accounting of expenditures to counsel for Silverado and to the Court.

[19] On October 17, 2013, unbeknownst to the Court or the Davidsons, a Receiver was appointed over the current and future assets, undertakings and properties of Silverado pursuant to the provisions of a General Security Agreement executed by Silverado in favour of HSBC Bank Canada. The assets of Silverado, including this litigation, were seized by the Receiver.

[20] Again without the knowledge of the Davidsons, the Receiver negotiated a sale of the assets of Silverado to the current plaintiff, 1773907 Alberta Ltd, over the following few weeks, culminating in 177's offer to purchase Silverado's assets for $675,000. This offer was conditionally accepted by the Receiver on November 19, 2013, subject to court approval. The principals of 177 are Tom and Donna Trenerry, the parents of Carolyn Hofer, whom the Davidsons allege is responsible for the allegations against Ms. Davidson. 177 was incorporated by the Trenerrys on October 25, 2013.

[21] The sale of assets was to be clear of all encumbrances and liabilities of Silverado, except that any liabilities with respect to the operation of the business from the closing date forward would be the responsibility of the purchaser. The assets were purchased on an "as is, where is" basis with no representation as to fitness for purpose.

[22] The sale documentation states specifically that Silverado retains all its existing liabilities, including liabilities to employees. Thus the sale leaves Ms. Davidson with a counter-claim for unpaid wages and commissions against an insolvent company stripped of its assets, and renders

the undertaking as to damages filed by Silverado with respect to the attachment orders a worthless security.

[23] Despite the receivership, Silverado conducted questioning in this litigation on November 8, 2013. Counsel to the Davidsons had heard rumors of a receivership, but, during questioning, Mr. Hofer refused to acknowledge the fact. Counsel for the Davidsons nevertheless contacted the Receiver in mid-November, 2013, advising that Ms. Davidson was a creditor arising from the litigation and should be added to the creditor list.

[24] On November 19, 2013, the same day the Receiver accepted 177's offer to purchase the Silverado assets, the Receiver obtained an order from a Master that allowed 177's offer to be deleted from the Receiver's affidavit relating to the proposed sale when the affidavit was filed with the Court. It is not clear from the record before this Court the reasons why the terms of the offer were deleted from the Receiver's affidavit.

[25] On November 30, 2013, counsel for the Davidsons contacted the Receiver to enquire about information she had received that a hearing to approve the sale of Silverado's assets was to be held on December 5, 2013. She asked for a copy of the materials filed with the Court. Counsel for the Receiver responded on December 1, 2013, advising that the application was scheduled for December 4, 2013 and that the sale had closed on November 19, 2013, subject to court approval.

[26] Immediately prior to the December 3, 2013 hearing relating to the attachment order application, the Davidsons asked Silverado whether the action had been transferred. Silverado took the position that the action had "not been assigned as per requirements of Section 20(1) of the *Judicature Act*" and that, thus, the action had not been stayed by operation of Rule 4.34 of the Alberta Rules of Court. Rule 4.34 provides that if the interest or liability of a party is transferred to another person by assignment, bankruptcy, death or other means, the action is stayed until an order to continue the action by or against the other person has been obtained.

[27] On December 3, 2013, counsel for the Davidsons advised this Court of the receivership and took the position that the application for a revised attachment order was stayed by operation of Rule 4.34, as carriage of the action had been transferred to the Receiver as part of the assets of Silverado. Counsel for the Davidsons also raised a concern about 177's legal representation, as it appeared that 177 was represented by a partner of Ms. Davidson's counsel in pending criminal charges, thus raising, concerns about a conflict of interest with respect to the sale and purchase of Silverado's assets.

[28] Counsel for Silverado took a narrower view of Rule 4.34 and argued that carriage of the action was not in the hands of the Receiver. However, he acknowledged that he was not counsel to the Receiver. I adjourned the application to December 12, 2013 and directed that counsel to the Receiver and counsel to 177 on the sale appear to address the situation.

[29] On December 4, 2013, Justice Eidsvik approved 177's offer to purchase Silverado's assets and authorized the Receiver to conclude the purchase and sale transaction. It appears from materials filed in the receivership that the assets of Silverado were valued by Century Services, and no value was assigned to the litigation against the Davidsons. Nor did the Receiver or 177 attribute any specific value to the litigation in the offer to purchase the assets of Silverado, which were in any event purchased for less than their assessed value.

[30] On December 9, 2013, counsel for Silverado provided notice of the assignment of the action and Justice Eidsvik's order to counsel for the Davidsons.

[31] On December 12, 2013, counsel for the Receiver appeared before me and confirmed that, as of the date of the receivership, carriage of the action would have rested with the Receiver and that counsel for Silverado had not been retained to act for the Receiver on December 3, 2013 and during previous questioning. However, since the sale of the litigation to 177 had now been approved by Justice Eidsvik, the issue was moot. Counsel to 177 on the sale explained that she had not been aware of any potential conflict, and in any event, had acted for 177 solely on the purchase and sale of the Silverado assets.

[32] Since at that point the action had been transferred to 177 as part of Silverado's assets, Rule 4.34 clearly applied to stay the action, whether or not it had been stayed earlier by the receivership.

[33] On December 19, 2013, submissions with respect to Silverado's application for a more onerous attachment order proceeded despite the stay, with the consent of all parties. Counsel for the Davidsons explained that since all pre-application steps had been taken, briefs had been filed and the parties were ready to address the issue, they would agree to having the application heard without prejudice to their position that the action should be struck for abuse of process. I heard the application, but deferred a decision until Silverado's application to lift the stay and the Davidsons' cross-application to strike the action could be heard. That application was scheduled for January 24, 2014.

[34] On January 24, 2014, 177 applied to lift the stay imposed by Rule 4.34 and to amend the Amended Statement of Claim to add itself as a plaintiff in the action. The Davidsons in response applied for summary dismissal of the action on the basis that the new plaintiff's case would depend upon an assignment tainted by champerty, making 177's pursuit of the action improper, vexatious and an abuse of process.

[35] I heard these applications on January 24, 2014 and issued a decision on April 11, 2014, lifting the stay and allowing 177 to be substituted as the new plaintiff, but striking the action as an abuse of process on the basis of the principles of champerty and maintenance: ***Silverado Oilfield Ventures Ltd. v. Davidson***, 2014 ABQB 218.

[36] Although the result was that the attachment order was lifted, that portion of the decision was stayed by the Court of Appeal pending an appeal.

[37] I also issued an order dated January 24, 2014, varying the interim attachment order of September 20, 2013 by removing the Davidsons' Gull Lake property from the order, to allow the Davidsons to sell the property to the co-owner, Mr. Davidson's father, and to use the proceeds to pay out the mortgage, with the remainder to be paid in trust and applied to the Davidsons' legal fees. This sale has not yet taken place, as Mr. Davidson's father was unable to arrange refinancing, and 177 now moves to vacate the order as it pertains to the Gull Lake property. Mr. Davidson's father is now deceased.

[38] The appeal of the striking order was heard on October 7, 2014 and allowed by decision dated May 1, 2015: ***1773907 Alberta Ltd. v. Davidson***, 2015 ABCA 150.

[39] On June 5, 2014, while the appeal was under reserve, Martin, J.A. granted an order that, among other things, directed that this Court determine the source of payment of the Davidsons legal bills, whether from the Davidsons' monthly employment income or from other assets, pending a decision on the appeal. I issued a decision on that issue dated January 15, 2015 which was appealed by 177. By decision dated May 8, 2015, the Court of Appeal found that my

decision was made in the shadow of the striking order. It noted that, "not surprisingly", this circumstance affected the reasoning and resulted in the appellants not being provided with copies of all documents relied upon by the Court.

[40] This arose because the Court of Appeal stay order specified that a $20,000 per month spending limit be imposed on the Davidsons' and that this Court be provided with monthly accountings of the Davidson's expenditures from January 20, 2014 until further order of the Court of Appeal on a confidential basis in order to ensure that the Davidsons stayed within that limit.

[41] The issue was remitted back to me for fresh consideration.

[42] The Davidsons sought leave to appeal the Court of Appeal's May 1, 2015 decision to the Supreme Court of Canada, and leave to appeal has recently been denied. They are also seeking leave to file for a late appeal of the decision of Eidsvik J. on December 4, 2013 approving the sale of the assets of Silverado to 177, given certain comments made by the Court of Appeal in the May 1, 2015 decision.

[43] Shortly after the Court of Appeal's decision on the striking order, I met with the parties to discuss the next steps in the litigation. It was agreed that, given the substantial time that had elapsed from the hearing on December 13, 2013, I would need updated information and submissions with respect to the application to amend the attachment order.

[44] A new hearing with respect to the attachment order could not be scheduled until August 11, 2015. However, I held a case management hearing on July 13, 2015. A number of issues were discussed, including 177's application for an accelerated trial date. The Davidsons updated the Court on their need for funds to pay legal fees, and sought approval to access $35,000 from Mr. Davidson's savings plan with Suncor.

[45] There was considerable discussion about what the Court of Appeal in the legal fees appeal had said about the right of 177 to cross-examine on certain documentation, and whether 177, now the plaintiff in the action, had to apply for an attachment order or whether it could rely on Silverado's application.

[46] I directed 177 to make an application for an attachment order, specifying what terms it was seeking, as the terms sought by Silverado had changed from time to time in the interim. I directed that the issues of the attachment order, legal fees and an expedited trial date be heard on August 11, 2015. 177 refused to agree to the Davidsons' request to use the Suncor savings plan to pay legal fees, despite Mr. Davidson filing an affidavit setting out the details of the plan, so that issue was also put over to August 11, 2015.

[47] Counsel for 177 stated that it wanted affidavits from the Davidsons setting out complete financial disclosure since December, 2013, and that it had a right to cross-examine on these affidavits. I noted that the Davidsons had disclosed the affidavit that was before the Court of Appeal and the monthly accounting statements the Court had been receiving. I also ordered disclosure of the outstanding legal fees. It was clear that, with the short time period until hearing and counsel availability over the summer, cross-examination on that material would be difficult to schedule, and I made no order directing further disclosure that would delay the August 11, 2015 hearing.

[48] On July 27, 2015, I received 177's application to continue the attachment order made September 20, 2013 as modified by the Court of Appeal's June 5, 2014 order, which limited the

Davidsons' spending on living expenses and legal fees to $20,000 and sought an order that, with the exception of their monthly employment income, the Davidsons would not use, transfer, dispose of or encumber any of their exigible property to pay legal fees without the consent of 177 or an order of the Court. 177 also sought an order vacating the previous order allowing the Davidsons to sell the Gull Lake property and for an order that this matter be set down for trial on the first available date after February 1, 2016.

[49] Very shortly afterwards, I received a letter from counsel for 177 stating that the parties could not agree on the extent of pre-hearing financial disclosure. The Davidsons had provided 177 with:

a) an affidavit of Mr. Davidson sworn April 29, 2015, attaching a letter to the Court dated July 25, 2014, a Statement of Earnings and Deductions from his employer as of June 12, 2014, some excerpts from an employee benefits pamphlet containing information about the administration of Mr. Davidson's Suncor benefit plans and a statement of legal fees as of July 25, 2014

b) the monthly accounting statements from January 2014 to June 2015 as required by Martin, J.A. to be delivered to me as case management justice pending the appeal; and

c) a letter dated July 23, 2015 from counsel for the Davidsons providing an updated summary of unpaid legal fees.

[50] In a letter dated July 23, 2015, 177 indicated that it wanted the court to direct the Davidsons to provide affidavit evidence dealing with their complete financial picture, including:

a) their employment incomes, bonuses and benefits, with back-up in the form of pay stubs and tax returns;

b) their assets, including bank accounts, investment/RRSP/RESP accounts, and Mr. Davidson's Suncor benefit accounts, which at that time included Stock Appreciation Rights, Restricted Share Units, a Personal Retirement Account, a Defined Benefit Ancillary Account, and a Suncor Savings Plan, with back-up in the form of account statements; and

c) their liabilities, including mortgages on the Cochrane and Gull Lake properties, and their line of credit and credit card balances, with back-up in the form of mortgage and credit line statements.

[51] It should be noted that extensive questioning had previously occurred with respect to the Davidsons' financial circumstances. 177, however, wanted fresh affidavit evidence.

[52] 177 submitted in the letter that it was entitled to this information, both for the purposes of its application for an attachment order and for the purpose of addressing payment of legal fees in the face of an attachment order. As counsel for 177 was aware, counsel for the Davidsons was out of the country, and therefore, I did not direct an earlier hearing to discuss these submissions.

[53] The hearing with respect to the attachment order, the payment of legal fees and an application to set a trial date took place on August 11, 2015. I reserved decision on the attachment order and the payment of legal fees. I gave oral reasons on 177's application for a trial date to be set for the first available date after February 1, 2016. 177's application for an accelerated date was predicated on obtaining the Davidsons' agreement that cross-examination transcripts be adopted as questioning transcripts. The Davidsons did not agree to give up their

right of questioning. The application also sought an order that the Davidsons' questioning of plaintiff's witnesses be completed by October 15, 2015, that the plaintiff's expert report be provided by September 30, 2015 and that the Davidsons would have three months to prepare and file a rebuttal expert report. Finally, 177 sought an order that any pre-trial applications be heard by November 15, 2015.

[54] The Davidsons pointed out that neither party had commenced questioning, that neither party had at that point produced or exchanged expert reports, and that, since there had been no questioning, undertakings had not been addressed. They noted their outstanding appeals. They suggested a more reasonable set of deadlines that would result in questioning and production being completed by July 31, 2016.

[55] I found that, given the history of the matter and the absence of even the plaintiff's expert report, the time-table suggested by 177 was unrealistic.

[56] I made it clear that I was not staying the action pending the appeals, but listed the outstanding applications that needed to be addressed, particularly the payment of legal fees. A more reasonable time-table was discussed with the parties.

[57] On August 11, 2015, for the first time, counsel for 177 submitted that it had the right to cross-examine the Davidsons even in the absence of any affidavit evidence from them, pursuant to Rule 6.8 and the decision in ***Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd***., 2013 ABQB 492. No reference to this rule or case had been made in 177's brief for the hearing. Counsel for the Davidsons asked for time to address this new argument, and I directed counsel to provide me with short briefs on the issue. In addition, counsel for the Davidsons submitted during argument that there were irregularities on the face of the execution pages of the forbearance agreement that 177 alleges was signed by Ms. Davidson. While this material had been previously filed in one of the six boxes of the court file, I asked counsel for the Davidsons to provide me with copies of what they were referring to, to save me having to review the entire record. I asked for further details of those irregularities.

[58] I received a brief from the Davidsons on these matters on August 27, 2015 and a brief from 177 on August 31, 2015. The brief from 177 included a newly-filed affidavit from former counsel to Silverado that attempts to explain some of the irregularities in the forbearance agreement. Counsel for the Davidsons strenuously objected to the filing of this new affidavit and asked me either to disregard it in my deliberations or to allow them the right to cross-examine on it.

[59] On October 5, 2015, I received a letter from counsel to 177, advising that Martin, J.A. had directed him to write to me. The letter states:

> The parties attended before Justice Martin at the Court of Appeal on Thursday, October 1, 2015 in regard to the Davidsons' applications (the "Applications") to extend the time to appeal the Vesting Order of the Honourable Madam Justice Eidsvik (the "Extension Application"), and to compel answers to undertakings and objections arising from the questioning of Tom Trenerry on an affidavit filed for the Extension Application.
>
> Counsel for the Davidsons requested that Justice Martin grant an adjournment of the Applications. In response, counsel for 177 expressed concern that such an adjournment could impact the setting of a trial date. Counsel for the Davidsons

> replied that this matter had been argued before My Lady and should be left in your hands. In response to this concern, Justice Martin directed the parties to write to you and indicate that Justice Marin was receptive to setting a trial date for the earliest opportunity, and that he was willing to assist in setting such a trial date if this issue remained unresolved by October 14, 2015, when the parties are again scheduled to be in front of the Court of Appeal.

[60] The Davidsons received 177's expert report with accompanying schedules on October 6, 2015.

[61] I met with counsel for 177 and with co-counsel for the Davidsons on October 13, 2015. The lead counsel for the Davidsons was out of the county. Counsel for 177 suggested that, given the letter of October 5, 2015, if I did not set a trial date, Justice Martin would do so. Counsel for the Davidsons disagreed that this was what Justice Martin had said, and submitted that any request by 177 to have the Court of Appeal set a trial date was inappropriate and contrary to Rule 4.14(2) of the Rules of Court.

[62] Counsel for 177 pressed for a trial date in January of 2017, prior to Ms. Davidson's criminal trial, which is set from February 27 to March, 2017. I agreed that it appeared that the parties would be ready for trial in the civil action in early 2017, but concerns were expressed with respect to the timing of the criminal trial, and the fact that the Davidsons' lead counsel was not present to address this issue. No precise trial date had been reserved by the plaintiff with the trial co-ordinators, but I agreed that a trial date could be set, subject to hearing any concerns from counsel for the Davidsons.

[63] On October 23, 2015, I heard from lead counsel for the Davidsons, giving valid reasons why the civil trial should not be heard until after the criminal trial. She suggested that under a reasonable schedule, the first trial date could be on or after April 30, 2017.

[64] By letter dated October 29, 2015, 177 agreed to the Davidsons' proposed litigation plan. It is therefore adopted, subject to the outcome of the Davidsons' appeal.

[65] On September 28, 2015, the Court of Appeal issued a decision with respect to the costs of Court of Queen's Bench hearing and the appeal, awarding costs of roughly $43,380.75 against the Davidsons. 177 asked counsel for the Davidsons for a proposal on paying the costs, and had received no answer by October 31, 2015. Without further notice, 177 served a garnishee summon on Mr. Davidson's employer and on several other financial institutes. Given certain ambiguities in the garnishee summons, it appeared that more than the amount owing in costs would be deposited in Court and the Davidsons would be left with no resources to pay monthly expenses. Counsel for the Davidsons asked for an emergency case management hearing to address this situation. I directed that, once funds sufficient to pay the costs award were deposited, the garnishee summons should be stayed.

[66] It is in the context of this summary of litigation that I address the issue of a revised attachment order. The history is important, not just for the context, but because Silverado, and now 177, allege that the Davidsons have sought to delay the trial of this civil action. It is correct that the Davidsons resisted the imposition of a revised attachment order in the fall of 2013 that would have severely limited their expenditures on living expenses to a level substantially below their current monthly liabilities and that would have given Silverado the right to approve their expenditures of legal fees to defend against the litigation. The resolution of that application was

interrupted by a receivership and sale of assets conducted in circumstances that put control of the litigation in the hands of parties related to the third party, and that left Ms. Davidson with a counter-claim against an insolvent corporation. The Davidsons brought their striking motion in that context. They opposed an application for an accelerated trial date that would have essentially eliminated or limited their rights of pre-trial questioning and would have left them with inadequate time to prepare a rebuttal expert report.

[67] The Davidsons resist the current application for a revised attachment order on grounds that cannot be characterized as frivolous. While this litigation has become complex and prolonged, it cannot be said to be due to the conduct of the Davidsons.

III. Order Sought

[68] 177 applied for an order continuing the attachment order of September 20, 2013, as modified by the Court of Appeal on June 5, 2015, until the determination of this action. The form of order sought is attached as Appendix A. It is less onerous in certain respects than the orders previously sought by Silverado.

[69] 177 also applied for an order to the effect that, with the exception of their monthly employment income, the Davidsons may not use, transfer, dispose of or encumber any of their exigible property to pay legal fees without the consent of 177 or an order of the Court.

IV. Analysis

[70] An attachment order is a statutory remedy. The applicant, 177, bears the onus of demonstrating to the Court that the tests set out in section 17(2) of the *Civil Enforcement Act* have been satisfied.

[71] Section 17(2) of the *Civil Enforcement Act* states that the Court may grant the order if it is satisfied that:

> (a) there is a reasonable likelihood that the claimant's claim against the defendant will be established, and
>
> (b) there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property,
>
> i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary living expenses, and
>
> ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

[72] An attachment order is an exceptional remedy, and can only be granted when the statutory criteria have been met. The extraordinary nature of a pre-judgment attachment is recognized in the legislation, in that section 17(5) of the *Civil Enforcement Act* provides that, when an attachment order is granted, it should be granted in such a manner that it causes as little inconvenience to the defendant as is consistent with achieving the purposes for which the order is granted.

[73] Professor Ronald C.C. Cuming[1] describes the purpose of pre-judgment preservation orders as follows:

> It has long been accepted in common law jurisdictions that the legal system must provide measures designed to reduce the opportunity for a defendant to frustrate the enforcement of a money judgement that may be ultimately obtained against him or her by dissipating, destroying or disposing of exigible property or moving it out of the jurisdiction of the court. However, there are very important public policy considerations involved in the design and implementation of these measures. By definition, they restrict the freedom of the defendant and, in some cases, third persons to deal with their property at a time when the plaintiff has only a claim that has not been proved through court proceedings. Of greater concern is the potential use of these measures as a tactical weapon against a defendant who has a valid defence to the claim. A defendant might be induced to settle a groundless or doubtful claim simply to recover control of assets subject to a legal asset preservation measure. If the defendant is deprived of the use of income earning assets, he or she may not have the resources to defend an invalid claim.

[74] Justice Robert J. Sharpe in his book "Injunctions and Specific Performance" says the following:

> 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. Unless strictly limited to cases where the plaintiff's prospect of ultimate success is strong and to cases where the defendant is bent on flouting the court's process, restraining the defendant's freedom to deal with his or her property upon the filing of an unsecured claim could well produce serious injustice.
>
> On the other hand, it is equally difficult to justify the invariable refusal of such relief. The rationale underlying the ordinary interlocutory injunction is surely met where the plaintiff is able to show that there is a strong case on the merits and that, if the defendant is not stopped, the plaintiff's right to an appropriate remedy at trial will be lost. The purpose of interlocutory injunctive relief is to prevent the effective destruction of the plaintiff's rights in the period of delay awaiting trial. If the risk that the plaintiff's right will be destroyed exceeds the risk that the defendant may be unduly interfered with, an interlocutory injunction is justified. That purpose is surely met where the plaintiff can demonstrate that a money judgment will be rendered useless if the defendant is not prevented from evading the reach of the court's process.

[1] Ronald C.C. Cuming, "The Enforcement of Money Judgements Act S.S. 2010, C. E-9.22, Analysis and Commentary" Law Foundation of Saskatchewan, 2010 at pg 17

[75] These comments are located in Justice Sharpe's discussion of Mareva injunctions, but apply with equal relevance to pre-trial attachments of assets generally.

[76] Recently, Veit, J. in ***Gilks v. Green Clean Squad Inc***., 2015 ABQB 83 noted that:

> Apart from compliance with the provisions of s. 17 of the CEA, where an application is made for pre-trial/pre-judgment relief, a court must consider other principles. While s.17 of the CEA does not explicitly say so, it is a general principle of the common law that all pre-judgment relief is exceptional.

[77] I must determine whether the statutory requirements have been established by 177 against Ms. Davidson and Mr. Davidson separately.

[78] With respect to Ms. Davidson, the "reasonable likelihood" that the claimant's claim will be established part of the test has been met, although I note that Ms. Davidson vigorously disputes the allegations. The test does not require a guarantee of success.

[79] The more difficult issue is whether 177 has established that there are reasonable grounds for believing that Ms. Davidson is dealing with her exigible property, or is likely to deal with that property, otherwise than for the purpose of meeting her reasonable and ordinary business or living expenses and in a manner that would be likely to seriously hinder 177 in the enforcement of a judgment against her, should it obtain one.

[80] There is no evidence that Ms. Davidson is dealing with her income or assets other than to meet her living expenses and pay legal fees. There is no evidence of any attempt to move assets out of the jurisdiction or to hide them. However, 177 argues that the so-called "fraud exception" applies, which would not require such evidence.

[81] This "exception" has been the subject of controversy and inconsistent decisions. In ***Sibley & Associates LP v. Ross***, 2011 ONSC 2951, Strathy, J. (as he then was) traced the origin of the exception and analyzed the arguments for and against such an exception in the case law and the academic literature. He noted that the exception originated in cases where there had been an allegation of fraudulent conveyance and the injunction sought pertained to the very property that was the subject of the litigation. After a thorough review, he concluded as follows:

> [62] From ***Chitel v. Rothbart*** to the present day, the law has sought to draw a fair balance between leaving the plaintiff with a "paper judgment" and the entitlement of the defendant to deal with his or her property until judgment has issued after a trial. In my respectful view, a plaintiff with a strong *prima facie* case of fraud should be in no more favoured position than, say, a plaintiff with a claim for libel, battery or spousal support. On the other hand, there may be circumstances of a particular fraud that give rise to a reasonable inference that the perpetrator will attempt to perfect the deception by making it impossible for the plaintiff to trace or recover the embezzled property. To this extent, it seems to me that cases of fraud may merit the special treatment they have received in the case law.
>
> [63] Rather than carve out an "exception" for fraud, however, it seems to me that in case of fraud, as in any case, the *Mareva* requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to

> show that the defendant has bought an air ticket to Switzerland or has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.
>
> [64] The risk of removal or alienation can be inferred by evidence suggestive of the defendant's fraudulent criminal activity ...

[82] While the relief sought in ***Sibley*** was a Mareva injunction, the decisions and academic literature treat Mareva injunctions and attachment orders, both species of pre-judgment relief, in much the same way. The "fraud exception", for example, originated in cases involving Mareva injunctions before it was used by Burrows, J. in ***Osman Auction Inc. v. Belland***, 1998 ABQB 1095 in a case involving an attachment order. In ***Interclaim Holdings Ltd. v. Down*** 1999 ABCA 329 at para 83, the Court of Appeal noted that in granting either a Mareva injunction or a preservation order, a court should be guided by the principles of the Civil Enforcement Act.

[83] I adopt the reasoning in ***Sibley***, particularly since the requirements for an attachment order are set out in statutory form and not in the common law, and do not provide a statutory "exception" in the case of allegations of fraud. However, consistent with the wording of Section 17, the circumstances of the alleged fraud may give rise to an inference that there are reasonable grounds for believing that a defendant is likely to deal with her exigible property otherwise than for the purpose of meeting her reasonable and ordinary business or living expenses, and in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment it may obtain.

[84] The question is whether this is one of those cases. While this is not a case where the plaintiff seeks to preserve the asset that is the subject of the dispute, as in an action for wrongful conversion, 177 seeks to connect the acquisition of assets by Ms. Davidson to receipt of money alleged to have been fraudulently obtained. Ms. Davidson has been charged criminally, and, while she is entitled to the presumption of innocence, the allegations against her are strong. She does not admit the fraud, however, nor has she let the allegations stand without answer, as has been the situation in other cases that apply the "fraud exception".

[85] However, given the nature of the fraud alleged against Ms. Davidson, which includes allegations of attempting to conceal the alleged fraud, the balance is tipped in favour of continuing an attachment order against Mrs. Davidson, particularly since 177 no longer applies for the overly onerous provisions of previous applications.

[86] Mr. Davidson is in a different position. There is no evidence connecting him directly with the alleged fraud, and he has not been charged criminally. The plaintiff's case against him is essentially that, given the marital relationship and the fact that the plaintiff alleges that some of the misappropriated money was used to make payments on Mr. Davidson's credit cards, he must have known about the fraud. The plaintiff also refers to a statement in the forbearance agreement to the effect that Ms. Davidson admits the contents of the Statement of Claim filed by Silverado, including these against her husband.

[87] This allegation is problematic in that it appears that at the time Ms. Davidson executed the forbearance agreement (which she denies knowing was a forbearance agreement), the claim had been discontinued against Mr. Davidson.

[88] It should be noted that Mr. Davidson was extensively questioned by counsel to Silverado in 2013, with no resulting admissions or evidence that Mr. Davidson was aware of the alleged fraud or participated in it any way. He strongly contests the allegations made by the plaintiff. He testified to his belief that Ms. Davidson earned about $70,000 in salary and also earned commissions. He testified that she was in charge of the family finances.

[89] The standard required with respect to whether the plaintiff has established that its action has a reasonable likelihood of success is higher than that which is employed on an application for summary judgment dismissing the claim, in which the question would be whether on the material presented there was a reasonable issue to be tried, and lower than a requirement to demonstrate a strong *prima facie* case: ***Osman Auction Inc. v. Belland***, 1998 ABQB 964 at para 39. The evidence against Mr. Davidson does not demonstrate a strong *prima facie* case. The issue is whether it meets the lower required standard.

[90] On the extensive materials before me, I am not satisfied that there is a reasonable likelihood that the plaintiff's claim against Mr. Davidson will be established at trial. There is a paucity of evidence linking Mr. Davidson to the alleged fraud. Conflicts in the evidence would require me to make credibility findings on that issue that should be reserved for trial. Thus, the plaintiff has not met its onus of establishing the first part of the attachment order test.

[91] Even if I am wrong in this determination, however, there is no persuasive evidence of dissipation by Mr. Davidson, or either Davidson for that matter.

[92] As noted by Thomas, J. in ***Welcome Ford Sales Limited v. Hellec***, 2011 ABQB 753 at 43:

> [42] As this extraordinary remedy developed at common law, proof of actual or anticipated dissipation was a core issue in obtaining a Mareva injection. That common law remedy is now provided for in the CEA. However, the law continues to be that if there is no risk of dissipation of assets, then the claimant must prove its case before it can secure judgment. Evidence of dissipation includes evidence that assets have disappeared, or evidence that assets have been sold to non-arm's length parties for less than market value.

[93] There is no such evidence. There is no evidence that the Davidsons have taken any unusual action to dispose of any assets, or that they have attempted to move assets out of the jurisdiction. There is no evidence, despite fulsome financial disclosure and extensive questioning, of any hidden bank accounts.

[94] The plaintiff submits that the Davidsons have breached the existing attachment order and dissipated assets in the following ways:

a) Mr. Davidson cashed out about $103,578 in restricted share units. 177 says they consented to this on the understanding that the proceeds would go to the payment of legal fees. 177 complains that $10,000 of the proceeds have not been accounted for. The Davidsons have established that, of the roughly $60,000 in net proceeds, $50,000 went to payment of legal fees in the civil action and the balance to payment of fees in the criminal action and to property taxes. This is not dissipation, nor a breach of the attachment order.

b) The plaintiff alleges that one of the Davidson's vehicles has been sold. This Court allowed the Davidsons to sell that vehicle and a trailer by order of January 15, 2015. The

Davidsons have satisfied me that the vehicles have not yet been sold. This is neither dissipation nor a breach of any order of this Court.

c) The Plaintiff alleges that the September 20, 2013 order requires that the Davidsons redirect $375 bi-weekly that they had previously been depositing into registered accounts into their lawyers' trust accounts. I agree with the Davidsons that the order does not require funds to be paid, but merely directs that if funds were to be paid to an RRSP or RESP, they instead be paid into trust. Ms. Davidson has stopped contributing to her RESP and RRSP accounts and used funds for living expenses and legal fees. This is not dissipation nor a breach of the September, 2013 order.

[95] Similarly in the December, 2013 application, Silverado was unable to present persuasive evidence of dissipation, arguing Mr. Davidson's contributions to pensions, benefits and investments funds were dissipation, as was interest payments on their mortgages and use of Mr. Davidson's bonuses towards their living expenses and legal fees. None of the alleged examples of dissipation amount to anything beyond the use of funds for reasonable and ordinary living expenses.

[96] Nor is there any evidence of fraud on Mr. Davidson's behalf that may be a factor in assessing the risk of dissipation. The allegations of knowing assistance, which may amount to fraud, are not supported by evidence other than speculation, and the other allegations against Mr. Davidson are not based on fraud. Allegations of fraud unsupported by any persuasive evidence are not sufficient to raise the inference of dissipation.

[97] 177 submits that I should not make a decision with respect to the attachment order without giving its counsel an opportunity to cross-examine the Davidsons pursuant to Rule 6.8. Given my decision with respect to Ms. Davidson, that issue is moot with respect to her. I have decided that it is not appropriate for 177 to use Rule 6.8 to cross-examine Mr. Davidson in the absence of an affidavit from him in an application for an attachment order, and I will set out the reasons for that decision separately.

[98] I also decline to adjourn this application any further. There is no formal application before me by 177 to use the Rule 6.8 process and this issue was not raised by 177 until the day of hearing. It may well be appropriate to allow the use of Rule 6.8 with respect to the issue of the payment of legal fees out of attached property, but that issue has not yet been decided.

[99] Thus, 177 has not satisfied its onus in establishing either of the two requirements for an attachment order against Mr. Davidson, and an attachment order against Ms. Davidson will not apply to any of Mr. Davidson's solely-owned assets, such as his vehicles, any of his RESP, RRSP, investment, stock, retirement funds, pension funds or other accounts held in his name through Suncor Energy Inc., Solium Capital Inc, Sunlife Financial, Investors Group or any other institution or firm. Nor is he to be included in the prohibition against dealing with his exigible property. However, given the complexities of jointly-owned property, the interest he owns jointly with Ms. Davidson in real property will continue to be the subject of the revised attachment order and he will have to continue to provide a joint monthly statement with Ms. Davidson, in order to ensure that the statement provides adequate information on Ms. Davidson's use of funds.

[100] I decline to vacate any portions of the order made on January 24, 2014. Given the Davidsons' need to access funds to cover legal fees, that order will remain in effect to allow them to pursue this source of funds, for the same reasons for which it was originally granted.

[101] Given my decision that the attachment order against Mr. Davidson should be lifted, the situation with respect to access to funds to pay legal fees has changed. Counsel should now have an opportunity to assess whether access to any of the property covered by the revised attachment order against Ms. Davidson is necessary to cover legal fees. If so, the Davidsons may bring a revised application.

[102] Even if I had come to a different decision with respect to an attachment order against Mr. Davidson, I would have allowed the Davidson's application to apply the proceeds of Mr. Davidson's savings account to legal fees. The plaintiff has not provided sufficient evidence that these funds are tainted with fraud, and they are reasonably necessary to allow the Davidsons to continue to retain counsel on both the civil matter and the criminal matter.

[103] If the parties are unable to agree on costs, they may make submissions on them.

Dated at the City of Calgary, Alberta this 31st day of December, 2015.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Matti Lemmens and Locklyn E. Price
for Shelley Davidson and Richard Davidson

Trevor McDonald and Robert Martz
for Silverado Oilfield Ventures Ltd and
1773907 Alberta Ltd

TAB 6

Court of Queen's Bench of Alberta

Citation: Ice District Development Partnership v Hahn, 2020 ABQB 786

Date: 20201215
Docket: 2003 15921
Registry: Edmonton

Between:

Ice District Development Partnership, formerly EAD Development Partnership, by its Partners Katz Group Real Estate Inc. and One Properties Corporation; Legends Condo Development Limited Partnership, by its General Partner Legends Condo Development Corp.; Katz Group Properties Inc.; WAM EAD Limited Partnership by its General Partner WAM EAD GP Inc.

Plaintiffs

- and -

Larry Hahn, 1771354 Alberta Ltd., Michael Smith, 2014154 Alberta Ltd., 9676287 Canada Ltd., Adibi Hahn and Medina Hahn

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice M. J. Lema

A. Introduction

[1] A condominium developer seeks a Mareva injunction against a realtor and associated persons, including family members, in the context of missing deposits on condominium-unit sales arranged, in whole or in part, by the realtor. The developer points to its agency agreement

2. Real risk of asset dissipation?

[42] Our Court of Appeal has recognized that, in cases of fraud, the court considering a Mareva injunction application may be able to infer such a risk. Per ***Secure 2013 Group Inc v Tiger Calcium Services Inc***[8]:

> There is no evidence that Hu was dealing with his assets other than in the ordinary course or that he will dispose of, dissipate or conceal his assets. **In some cases of alleged fraud, even in the absence of such evidence, courts have been prepared to draw an inference from all of the circumstance, including the circumstance of the fraud itself, that there is a serious risk that a defendant will attempt to dissipate assets or put them beyond the reach of the plaintiffs:** *1773907 Alberta Ltd v Davidson*, 2016 ABQB 2 at paras 81–83, [2015] AJ No 1463 (QL). The evidence regarding the misrepresentations alleged to have been made by Hu and his other conduct while a Tiger employee is not sufficient to justify drawing the inference in this case.

[43] ***1773907 Alberta Ltd v Davidson*** (cited in ***Tiger Calcium***) was appealed (unsuccessfully)[9]. In its decision, the Court of Appeal upheld (among other aspects) Romaine J.'s decision to infer, from fraud-reflecting circumstances, a risk of asset dissipation. The context was a *Civil Enforcement Act* attachment order, but I find that the "inference analysis" applies equally in a *Mareva* context. Here is the key excerpt from the Court of Appeal's decision on the inference drawn:

> In the context of whether the fraud exception is applicable in an application for an attachment order, the case management judge [Romaine J.] quoted several passages from the decision of Strathy, J (as he then was) in *Sibley& Associates LP v Ross*, 2011 ONSC 2951, 334 DLR (4th) 645 where he attempted to reconcile inconsistent decisions on this issue in the context of a *Mareva* injunction.
>
> Included in the case management judge's reasons at para 81 was the following quote from *Sibley*:
>
> > [63] Rather than carve out an "exception" for fraud, however, it seems to me that **in case of fraud, as in any case, the Mareva requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland or has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff**.
> >
> > [64] The risk of removal or alienation can be inferred by evidence suggestive of the defendant's fraudulent criminal activity . . .
>
> The case management judge at para 83 adopted the *Sibley* reasoning:

[8] 2017 ABCA 316 at paras 154-156
[9] 2017 ABCA 267 at paras 31-33 and 35-36

> . . . particularly since the requirements for an attachment order are set out in statutory form and not in the common law, and do not provide a statutory "exception" in the case of allegations of fraud. However, consistent with the wording of Section 17, **the circumstances of the alleged fraud may give rise to an inference that there are reasonable grounds for believing that a defendant is likely to deal with her exigible property otherwise than for the purpose of meeting her reasonable and ordinary business or living expenses, and in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment it may obtain.**
>
> While the case management judge noted at para 84 that Shelley Davidson now does not admit fraud, the case management judge was clearly entitled, when assessing the strength of the allegations against Shelley Davidson, to bear in mind all the evidence that had been placed before her.
>
> We conclude that the case management judge did not apply the common law fraud exception in the manner alleged by the appellant; rather, she gave a proper interpretation to the requirements of section 17(2)(b) of the *Act*. No appellate intervention is warranted.
>
> [emphasis added]

[44] See also the decision of Sanfilippo J. in ***Woods v Jahangiri***[10], to the same effect.

[45] So too here. I am prepared to draw, and do draw, an inference of a real risk of a dissipation of assets, anchored primarily on Mr. Hahn's apparently unauthorized diversion of deposit monies and application of them, in part, to personal purposes, coupled with the emptying of the 177 account and the absence of any evidence from Mr. Hahn explaining the current whereabouts of the balance of the diverted deposit monies or their application.

[46] Someone who acts as Mr. Hahn has apparently acted is unlikely to suddenly become transparent and cooperative. Instead, his diversion-of-deposits behaviour signals a very material risk of assets being further placed beyond ICE's reach or placed so as to make collection of any eventual judgment more difficult.

[47] On this theme, I note that Mr. Hahn's real estate licence was recently suspended, as reflected in the following announcement by the Alberta Real Estate Council:

> *Calgary, Alberta*—On October 13, 2020, the Administrator of the Real Estate Council of Alberta (RECA) suspended the real estate licence of Larry Hahn. Mr. Hahn is not authorized to trade in real estate.
>
> RECA determined it is in the public interest to temporarily suspend Mr. Hahn. Allegations against Mr. Hahn include:
>
> - acting dishonestly
> - making intentional, misleading representations
> - participating in fraudulent or unlawful activities

[10] 2020 ONSC 7404 at paras 26-29

- engaging in conduct that undermined public confidence in the industry, harmed the integrity of the industry, or brought the industry into disrepute

Mr. Hahn's licence will remain suspended until current proceedings, under Part 3 of the Real Estate Act concerning his conduct, are concluded.

Mr. Hahn was most recently registered as a real estate associate with Re/Max Real Estate (Edmonton) Ltd. o/a Re/Max Real Estate.

3. Irreparable harm and balance of convenience

[48] On irreparable harm, I draw again on ***Woods*** (cited above) (paras 26, 27 and 29);

> **"Irreparable harm" means harm to the moving party that cannot be monetarily quantified, or which cannot be cured, usually because one party cannot collect damages from the other**: *RJR-MacDonald*, at p. 341; *Christian-Philip v. Rajalingam*, 2020 ONSC 1925, at para. 33. In *Amphenol Canada Corp v. Sundaram*, 2020 ONSC 328 (Div. Ct.), at paras. 37-39, F.L. Myers J. stated that "the defendants' ability to pay is very much a part of the interlocutory injunction calculus". …
>
> … On the evidence in this motion, the Plaintiff submitted that Mr. Jahangiri's **ability to pay a judgment** rendered in favour of Ms. Woods is **contingent on the net sale proceeds** from the Hensall Property. Ms. Woods and Ms. Slenys deposed that they have only been able to identify one other property in Ontario in which Mr. Jahangiri has an interest, and that it has modest value. Ms. Woods submitted that she will **be irreparably harmed if Mr. Jahangiri transfers out of Ontario the net sale proceeds from the sale of the Hensall Property**.
>
> **…In the absence of any evidence of a means to satisfy any judgment if the single asset identified by the Plaintiff of sufficient value to meet her claim is transferred out of Ontario, the Plaintiff has, in my determination established irreparable harm** through the serious risk of dissipation of the net sale proceeds from the sale of the Hensall Property. [emphasis added]

[49] Mr. Hahn has not put forward any evidence of his assets, liabilities, income or expenses. He appears to reside in a rented condominium on Vancouver Island, and his apparently former home in Edmonton is in the sole name of his wife.

[50] Without the assistance of the requested injunction, it is not clear that ICE has any actual way of collecting an eventual judgment.

[51] ICE has cleared the irreparable-harm hurdle.

[52] As for **balance of convenience**, I emphasize the root phenomenon here i.e. the diversion of deposit monies away from ICE's earmarked trustee without any apparent authorization and with no explanation or apparent intention to set things right.

[53] In circumstances like this, I am not sure how often the balance of convenience will favour the person who has diverted trust monies (or, more precisely here, diverted monies intended to be held in trust, before they reached the intended trustee). As the author of the problem, the diverting party should not be particularly surprised, and cannot realistically be held to complain,

TAB 7

In the Court of Appeal of Alberta

Citation: Secure 2013 Group Inc v Tiger Calcium Services Inc, 2017 ABCA 316

Date: 20171018
Docket: 1703-0001-AC;
1703-0003-AC;
1703-0004-AC;
1703-0005-AC
Registry: Edmonton

Between:

Appeal No. 1703-0001-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), by its General Partner, Parallel49 Equity UGP (Fund V) Inc.

- and -

Respondents
(Plaintiffs)

Clark Sazwan, Shilo Sazwan, Lianguang Hu, Also Known As, Stephen Hu, Andrea Sazwan, Denise Sazwan, Smokey Creek Ranch Ltd., 1793068 Alberta Ltd., Secure Developments Inc., Secure Resources Inc., Jane Doe, John Doe, and ABC Corp.

Respondents
(Defendants)

- and -

Secure 2013 Group Inc., Secure Rentals Inc., Scott Weinrich and Weinrich Holdings Ltd.

Appellants
(Defendants)

And Between:

Appeal No. 1703-0003-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), by its General Partner, Parallel49 Equity UGP (Fund V), Inc.

Respondents
(Plaintiffs)

- and -

Secure Developments Inc.

Appellant
(Defendant)

- and -

Clark Sazwan, Shilo Sazwan, Lianguang Hu, Also Known As, Stephen Hu, Andrea Sazwan, Denise Sazwan, Smokey Creek Ranch Ltd., 1793068 Alberta Ltd., Secure 2013 Group Inc., Secure Rentals Inc., Secure Resources Inc., Scott Weinrich, Weinrich Holdings Ltd., Jane Doe, John Doe, and ABC Corp.

Respondents
(Co-Defendants)

And Between:

Appeal No. 1703-0004-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V) by its General Partner, Parallel49 Equity UGP (Fund V), Inc.

Respondents
(Plaintiffs/ Applicants)

- and -

Lianguang Hu, Also Known As, Stephen Hu

Appellant
(Defendant/ Respondent)

- and -

Clark Sazwan, Shilo Sazwan, Andrea Sazwan, Denise Sazwan, Smokey Creek Ranch Ltd., 1793068 Alberta Ltd., Secure 2013 Group Inc., Secure Developments Inc., Secure Rentals Inc., Secure Resources Inc., Scott Weinrich, Weinrich Holdings Ltd., Jane Doe, John Doe, and ABC Corp.

Respondents
(Defendants/ Respondents)

And Between:

Appeal No. 1703-0005-AC

Tiger Calcium Services Inc., Tiger Tanklines (2011) Ltd., Parallel49 Equity (Fund V) BC, Limited Partnership, by its General Partner, Parallel49 Equity GP (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V), Inc., and Parallel49 Equity (Fund V), Limited Partnership, by its General Partner, Parallel49 Equity UGP (Fund V) Inc., by its General Partner, Parallel49 Equity UGP (Fund V) Inc.

Respondents
(Plaintiffs)

- and -

Shilo Sazwan, Andrea Sazwan, 1793068 Alberta Ltd., Secure Resources Inc.

Appellants
(Defendants)

- and -

Clark Sazwan, Lianguang Hu, Also Known As, Stephen Hu, Denise Sazwan, Smokey Creek Ranch Ltd., Secure 2013 Group Inc., Secure Developments Inc., Secure Rentals Inc., Scott Weinrich, Weinrich Holdings Ltd., Jane Doe, John Doe, and ABC Corp.

Respondents
(Co-Defendants)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Jo'Anne Strekaf

Reasons for Judgment Reserved of The Honourable Madam Justice Strekaf
Concurred in by The Honourable Mr. Justice Berger
Concurred in by The Honourable Mr. Justice McDonald

Appeal from the Orders by
The Honourable Mr. Justice K.D. Yamauchi
Dated the 30th day of November, 2016
Filed on the 1st day of December, 2016
(Docket: 1601 16191; 1603 22128)

Reasons for Judgment Reserved of
the Honourable Madam Justice Strekaf

I. Introduction

[1] These four appeals are from a combined *ex parte Mareva* injunction and attachment order ("*Mareva*/attachment Order") against four individuals[1] and seven corporations[2], and six *ex parte Anton Piller* orders, ("*Anton Piller* Orders") against some of the same parties[3] and three third-party service providers.[4]

[2] A chambers judge granted the orders on November 30, 2016 (collectively, "Orders"). The Orders impose severe remedies on fourteen parties.

[3] The appeals raise questions about when *ex parte Mareva* injunctions, attachment orders and *Anton Piller* orders should be granted, the duties on applicants and their counsel when making such applications, the orders' scope and the process to review them.

[4] The appeals are allowed and the Orders are set aside, except for the *Mareva*/attachment Order against Clark Sazwan and Smokey Creek Ranch Ltd, which was not appealed (but a set aside application is pending in the Court of Queen's Bench).

II. Background

[5] The plaintiffs commenced an action against six individuals and seven corporations arising from the acquisition of a 67% interest in the plaintiff Tiger Calcium Services Inc ("Tiger"), a family-owned business operating since 1964. The plaintiff Tiger Tanklines (2011) Ltd ("Tiger Tanklines") is a wholly owned subsidiary of Tiger. The remaining plaintiffs (collectively, "P49 Group") acquired their interest in Tiger in August 2014 from the defendant Smokey Creek Ranch Ltd ("Smokey Creek").

[6] Smokey Creek, owned by the defendants Clark Sazwan ("Clark") and Denise Sazwan, continues to own the remaining 33% of Tiger. At the time of the acquisition, Clark Sazwan was Tiger's President and CEO, the defendant Shilo Sazwan (Clark's son) was Vice-President of Operations ("Shilo") and the defendant Lianguang (aka Stephen) Hu ("Hu") was the Engineering Manager. The defendant Andrea Sazwan is Shilo's wife, both of whom are equal shareholders in the defendant 1793068 Alberta Ltd ("179").

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[1] Shilo Sazwan, Clark Sazwan, Lianguang Hu (aka Stephen Hu), Scott Weinrich

[2] 1793068 Alberta Ltd., Secure 2013 Group Inc., Secure Developments Inc., Secure Rentals Inc., Secure Resources Inc., Weinrich Holdings Ltd., and Smokey Creek Ranch Ltd.

[3] Shilo Sazwan, Clark Sazwan, Lianguang Hu (aka Stephen Hu), Scott Weinrich, Secure Rentals Inc., Secure Resources Inc.,

[4] RMLO LLP, All-Type Office Services Ltd, SVS Group LLP

[7] The defendant Scott Weinrich ("Weinrich") is a friend of Shilo. Weinrich owns the defendant Weinrich Holdings Ltd ("Weinrich Holdings"), which owns the defendant Secure 2013 Group Inc ("Secure 2013"), which in turn owns the defendant Secure Rentals Inc ("Secure Rentals") (collectively, "Weinrich Defendants").

[8] The defendant Secure Developments Ltd ("Secure Developments") is owned equally by Weinrich and Shilo. The defendant Secure Resources Inc ("Secure Resources") is owned equally by Weinrich Holdings and Sazwan Holdings Ltd ("Sazwan Holdings").

[9] A chart showing the defendants' relationships is attached as Schedule A.

[10] The 86-page statement of claim advances multiple causes of action against numerous defendants including broad allegations of conspiracy. Among the principal claims are the following:

a. P49 Group was induced to invest $102 million to acquire a 67% interest in Tiger from Smokey Creek pursuant to a Share Purchase Agreement dated August 14, 2014. As a result of material misrepresentations by Clark, Shilo and Hu the P49 Group overpaid for the Tiger shares by $44.3 million.

b. The misrepresentations were that Tiger had designed, constructed and operated a successful Pilot Project and needed equity financing to construct a large industrial-scale plant using the Pilot Project technology at an initial estimated cost of $12 million ("Pastille Plant"). Problems emerged following the commencement of construction of the Pastille Plant in September 2014. It is alleged that the Pastille Plant was poorly designed, and construction was mismanaged, over budget and behind schedule. It is contended that the process used in the Pastille Plant damaged the equipment and the ultimate product would not meet market specifications and may not be saleable. This information, known only by Clark, Shilo and Hu, was concealed from Tiger's board of directors.

c. Tiger and Tiger Tanklines claim damages not less than $87.6 million for misrepresentations and concealment of information about the Pastille Plant detailed above; breach of the defendants' employment contracts, fiduciary duties, non-compete/non-solicitation obligations, confidentiality obligations, and restrictive covenants; intentional interference with Tiger's contractual relations; misuse of confidential information to enable Secure Resources to compete with Tiger; and theft of proprietary records, among other wrongs.

d. Both before and after the P49 Group acquisition, Shilo misappropriated Tiger labour and resources for his personal benefit, which Clark condoned, at an estimated cost of at least $2.5 million.

e. In late 2014, after Tiger's new owners advised Shilo that Tiger would be leasing equipment and not purchasing, Shilo and Weinrich colluded to have Tiger lease equipment from

Secure Rentals at unconscionably high rates and concealed Shilo's involvement in Secure Rentals, at an estimated cost to Tiger of at least $2 million.

A. Procedural History

a. Timing

[11] On September 9, 2016, the plaintiffs' counsel sought to have set down on the Calgary commercial list on October 6, 2016 an urgent hearing of an *ex parte* application for a *Mareva* injunction against (at least) Shilo and *Anton Piller* orders against (at least) Shilo, Hu, Secure Rentals and associated corporate entities. Five affidavits were sworn in September 2016 in support of the application.

[12] Plaintiffs' counsel cancelled the October 6 date and rescheduled it to November 30, 2016. On that day, an expanded application was brought against additional parties. On November 25, 2016, the plaintiffs had delivered unfiled copies of their application, eleven affidavits consisting of almost 2000 pages and a 54-page bench brief ("Brief") to the chambers judge assigned to hear the application.

[13] Parties are frequently under significant time constraints when applying for an *ex parte* attachment order, *Mareva* injunction or *Anton Piller* order. They are often dealing with information that has just come to their attention and are moving quickly to get into court on short notice to obtain temporary relief so as to maintain the *status quo* or preserve documents pending an application on notice to the opposing party. This context is important when examining the materials put forward in support of such an application as it may explain why some information is missing or the relief claimed is not as clearly thought out as it might otherwise be.

[14] This case is not like that. The delays and timing of the application raise concern. By September 9, 2016, the plaintiffs had a clear understanding of the relief they were seeking as demonstrated by the letter to the court to schedule their application. While they characterize the matter as urgent, the original court date of October 6 was cancelled and the application was not heard until November 30, 2016, about eight weeks later.

[15] It is not clear why, if the plaintiffs were sufficiently concerned on September 9, 2016 that they needed this urgent relief to prevent the destruction of documents or dissipation of assets, they waited almost twelve weeks until November 30, 2016 to have their application heard. While it can be difficult to schedule matters, the Court of Queen's Bench can usually accommodate truly urgent matters on reasonably short notice. This delay is discussed in more detail later in these reasons.

b. Orders Granted

[16] On November 30, 2016, the chambers judge, who had reviewed the affidavits and Brief in advance, heard submissions and granted the Orders largely in the form presented.

[17] He was satisfied that the plaintiffs had met the requirements for the *Anton Piller* Orders. He outlined the four factors from *Celanese Canada Inc v Murray Demolition Corp*, 2006 SCC 36 at para 36, [2006] 2 SCR 189 and acknowledged that it is "almost impossible for an applicant to produce direct proof that a defendant will destroy the material", citing *Capitanescu v Universal Weld Overlays Inc* (1996), 192 AR 85 at para 22, 46 Alta LR (3d) 203 (QB). He was satisfied with respect to the individuals (other than Denise Sazwan and Andrea Sazwan) that "because of their actions in the past as outlined in the affidavit, there is from my perspective a risk of destruction of the materials" and that the Orders "are certainly within line with the manner of proceeding and the structure of the orders as outlined in the *Celanese Canada* case".

[18] With respect to the *Mareva*/attachment Order, he was satisfied that the plaintiffs had shown "that there is not only a reasonable likelihood of success, but they've also shown that there is a strong *prima facie* case" and that the safeguards outlined in the *Mareva* injunction cases and the *Civil Enforcement Act*, RSA 2000, c C-15 have been met, including undertakings as to damages.

[19] He granted the following orders:

a. One combined *Mareva* injunction and attachment order against Clark, Shilo, Weinrich, Hu, 179, Secure 2013, Secure Developments, Secure Rentals, Secure Resources, Weinrich Holdings, and Smokey Creek Ranch;

b. *Anton Piller* Orders against each of Clark, Shilo, Weinrich, Hu, Secure Rentals and Secure Resources;

c. *Anton Piller* Orders against RMLO LLP (a law firm), SVS Group LLP (an accounting firm) and All-Type Office Services Ltd (a bookkeeping firm) (collectively the "Third Party *Anton Piller* Orders"); and

d. a Restricted Court Access Award that kept the orders and all supporting materials sealed until the day following the earlier of execution of the *Anton Piller* Orders or determination of the plaintiffs' petition to have the orders recognized and enforced in British Columbia.

[20] The *Anton Piller* Orders were executed on December 6, 2016.

c. Application to Change Venue and Set Aside the Orders

[21] The plaintiffs' selection of the judicial district of Calgary proved to be problematic. Of the seven plaintiffs, the Tiger-related enterprise is headquartered in Nisku and the Pastille Plant is in Slave Lake. The remaining five plaintiffs are located in British Columbia and the United States. Eight of the six *Anton Piller* Orders were executed in Edmonton, the ninth in Wetaskiwin. The defendants' residences and places of business as well as the third-party service providers are

located in Edmonton. Of the plaintiffs' affiants, seven are located in Edmonton or northern Alberta, two are in Calgary and one is in Vancouver. For all these reasons, the action was subsequently transferred to the judicial district of Edmonton by order on December 12, 2016, despite the plaintiffs' objection.

[22] On December 12, 2016, the Weinrich Defendants applied to set aside the part of the *Mareva/*attachment Order that applied to them pursuant to, among other things, rule 9.15(1)(a) of the *Alberta Rules of Court*, Alta Reg 124/2010 ("Rules").

[23] The difficulty the plaintiffs' choice of judicial district created was that it made it inconvenient for the chambers judge who granted the Orders to hear the set aside applications when the action was transferred to Edmonton. That application was brought on December 16, 2016 in the Court of Queen's Bench before another chambers judge. He advised them that if they wished to revisit the Orders based on the record before the chambers judge who granted them, they should appeal them. The set aside application was not heard at that time.

[24] However, some aspects of *Mareva/*attachment Order were varied by consent. In particular, the *Mareva/*attachment Order was set aside against Weinrich, Weinrich Holdings and Secure Resources by consent. Subsequently other consent orders were granted permitting individual defendants to spend greater amounts than initially specified.

[25] A subsequent order by the chambers judge dated December 22, 2016 stated that the defendants were permitted to apply to have the Orders set aside or further varied.

[26] On January 20, 2017 the same chambers judge was advised of the now extant appeals and the forthcoming set aside applications. He noted that in "the end, I have no doubt that you're going to go to the Court of Appeal" but in the meantime, he said the set aside applications should be heard.

[27] Set aside applications were filed February 24, 2017 by Clark Sazwan, Denise Sazwan and Smokey Creek Ranch pursuant to rule 9.15(1)(a). They were also granted permission to file a factum as a respondent in these proceedings: *Tiger Calcium Services Inc v Sazwan*, 2017 ABCA 172, [2017] AJ No 562 (QL).

[28] Consequently, some defendants have appealed and not brought set aside applications; other defendants brought set aside applications and did not appeal but were permitted to participate in the appeal as respondents; and some defendants have both appealed and pursued set aside applications. These simultaneous proceedings are duplicative, costly and inefficient.

[29] Following preliminary submissions, we agreed to hear these appeals in the particular circumstances; however, direction is provided later in these reasons regarding the better procedure for the review of orders granted without notice (formerly known as *ex parte* orders) in future cases.

III. The Appeals

[30] Notices of Appeal were filed on January 3, 2017 as follows:

a. Appeal No 1703-0001AC by Secure 2013, Secure Rentals, Scott Weinrich and Weinrich Holdings;

b. Appeal No. 1703-0003AC by Secure Developments;

c. Appeal No. 1703-0004AC by Hu; and

d. Appeal No 1703-0005AC by Shilo Sazwan, Andrea Sazwan, 179, and Secure Resources.

[31] Clark Sazwan, Denise Sazwan and Smokey Creek are not appellants, nor are the three parties enjoined by the Third Party *Anton Piller* Orders.

[32] The appeals raise numerous issues that can be classified into two broad categories: (i) issues arising from the process used to review the Orders, and (ii) those arising from the granting of the Orders. In the first category is the correct process for the review of a without notice order granted in the Court of Queen's Bench.

[33] In the second category are:

a. the expectations on a party seeking the extraordinary relief of a *Mareva* injunction, a *Civil Enforcement Act* attachment order or an *Anton Piller* order without notice;

b. the legal requirements to obtain a *Mareva* injunction, an attachment order, or an *Anton Piller* order;

c. whether the applicants satisfied their disclosure obligations;

d. whether the Third Party *Anton Piller* Orders were justified;

e. whether the terms of the other *Anton Piller* Orders overreached;

f. whether the terms of the *Mareva/*attachment Order overreached; and

g. whether the record justified the Orders against each party enjoined.

IV. Standard of Review

[34] Granting a *Mareva* injunction, an attachment order or an *Anton Piller* order involves the exercise of judicial discretion. The standard of review is deferential unless the judge proceeded

arbitrarily, on a wrong principle or failed to consider or properly apply the applicable test in which case the standard is correctness: *Peters & Co v Ward*, 2015 ABCA 6 at para 10, 588 AR 365; *Drew Energy Services v Wenzel*, 2008 ABCA 290 at para 10, 440 AR 273.

[35] In the ordinary course there ought to have been a full hearing in the Court of Queen's Bench on whether or not to continue or vary the Orders prior to this appeal. However, these appeals are not "ordinary course" appeals. As the procedural history above demonstrates, the parties have not yet been heard *inter partes*.

V. Positions of the Parties

[36] In brief, all the appellants challenge whether the plaintiffs satisfied the duties of candour and full disclosure on the without notice applications. They also submit that the Orders were overbroad and overreaching, and the chambers judge erred in granting them without due consideration or balancing their interests, and by failing to adequately consider and impose terms designed to mitigate harm caused by the Orders.

[37] The Weinrich Defendants, Secure Developments, Hu, Secure Resources and 179 deny that the record supports any relief against them.

[38] Shilo does not dispute, for the purposes of this appeal, that there was evidence capable of meeting the legal test for a *Mareva* injunction and an *Anton Piller* order as against him. However, he contends that no consideration was given to the strength of the claims against him, and submits that the nature and scope of the orders against him go well beyond what would have been necessary to preserve his records and assets sufficient to secure the claims against him.

[39] As noted, Clark Sazwan, Denise Sazwan and Smokey Creek did not appeal but filed materials supporting the position taken by the other appellants challenging the process and nature of the Orders.

[40] The respondents submit that the Orders were reasonable, granted after considered review and supported by the chambers judge's view that there was a risk of destruction of relevant materials and dissipation of assets. They say the Orders are discretionary and this Court should not reweigh the evidence or the chambers judge's conclusion that their claims against the defendants (conspiracy, collusion, fraud, misappropriation, misrepresentation, breach of contract, fiduciary breaches, etc.) satisfied the legal requirements for the Orders.

VI. Analysis

A. Legislation and Applicable Legal Principles

a. Without Notice Applications Generally

[41] Applications without notice (formerly, *ex parte* applications) are extraordinary since it is a fundamental principle that parties have a right to be heard before their rights are negatively affected:

> *Ex parte*, in a legal sense, means a proceeding, or a procedural step, that is taken or granted at the instance of and for the benefit of one party only, without notice to or argument by any adverse party .... The circumstances in which a court will accept submissions *ex parte* are exceptional and limited to those situations in which the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given. For instance, temporary injunctions are often issued *ex parte* in order to preserve the *status quo* for a short period of time before both parties can be heard ...

Ruby v Canada (Solicitor General), 2002 SCC 75 at para 25, [2002] 4 SCR 3 (citations omitted)

[42] "Notice of an application is not required to be served on a party if an enactment so provides or permits or the Court is satisfied that ... serving notice of the application might cause undue prejudice to the applicant": r 6.4(b). *Anton Piller* orders and *Mareva* injunctions, by their nature, usually fall under rule 6.4(b).

[43] The *Civil Enforcement Act* permits applications for attachment orders to be brought *ex parte*: s 18(1).

[44] An applicant proceeding without notice to the opposing party is required to act with the utmost good faith and make full, fair and candid disclosure of the facts and this disclosure must include facts which would militate against the application: *Royal Bank v W. Got & Associates Electric Ltd* (1994), 150 AR 93 (QB), aff'd (1997), 196 AR 241 (CA), aff'd [1999] 3 SCR 408.

[45] "The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld. ... Virtually all codes of professional conduct impose such an ethical obligation on lawyers ...": *Ruby* at para 26.

[46] This obligation applies to applicants and their counsel who have "an obligation to make full, fair and candid disclosure of all non-confidential, non-privileged material facts known to the lawyer, including those which are adverse to his position": *Hover v Metropolitan Life Insurance Co*, 1999 ABCA 123 at para 23, 237 AR 30. Said another way, "counsel in *ex parte* applications bear a heavy obligation to ensure that appropriate safeguards are in place to protect the integrity of

the legal system": *Alberta (Treasury Branches) v Ghermezian*, 2002 ABCA 101 at para 15, 303 AR 63.

[47] Failure to comply with these obligations may result in an *ex parte* order being set aside: *Duke Energy Corporation v Duke/Louis Dreyfus Canada Corp*, 1998 ABCA 196 at para 4, 219 AR 38, held:

> It is trite law that a party applying to the court *ex parte* has a duty of disclosure; it is sometimes said to be a duty of the utmost good faith. He or she must disclose to the court all facts material to the motion in question. It is also settled law in Alberta (and elsewhere) that the court is not always compelled to set aside an order for breach of that duty, but that the court will sometimes set it aside on that ground alone. We will not attempt to define the precise circumstances in which the order will or will not be set aside for non-disclosure. But obviously a very relevant factor is how important was the evidence not disclosed to the court on the *ex parte* application. …

[48] The disclosure obligation also applies to defences. It was the failure to meet this obligation that led to an order for service *ex juris* being set aside in *Duke*, at para 8:

> Counsel for the respondent plaintiffs submitted very firmly that the matters not disclosed were matters of defence, not absence of a cause of action. We do not agree. … In any event, we cannot see the significance of the distinction postulated. We repeat that we are here talking about setting aside an order got *ex parte* because of failure to make full disclosure. … The duty to disclose material facts extends to obvious defences, or bars to the relief sought.

[49] The prospect of a review or set aside application is no justification for including overreaching terms that are not demonstrably necessary, or for a failure to take into consideration appropriate provisions to protect the reasonable interests of the party against whom an order is granted. Restraint is required and, without notice, orders should not be approached on the basis that unreasonable terms can always be modified after the fact on a review application.

[50] How the obligations on an applicant seeking an order without notice are discharged will depend on the circumstances. In a complex commercial case with substantial materials, a bench brief provided in advance (as was done in this case) is one mechanism to provide the chambers judge hearing the application with the opportunity to digest the material. The brief and oral submissions should outline the applicable legal tests, fairly highlight the relevant evidence, address possible defences, explain why the test is satisfied in respect of each of the parties against whom an order is sought and articulate why the relief claimed is necessary and appropriate against each party.

b. Process to Review Without Notice Applications

[51] By their nature, *Mareva* injunctions, attachment orders and *Anton Piller* orders impose severe remedies. It is recognized that the "harshness of the *Mareva* injunction, issued usually *ex parte*, is relieved against or justified in part by the Rules of [Court] which allow the defendant, faced by risk of loss, an opportunity to move against the injunction immediately": *Aetna Financial Services v Feigelman*, [1985] 1 SCR 2, 15 DLR (4th) 161 at para 27 (emphasis added), r 9.15(1)(a).

[52] The opportunity to move against the Orders "immediately" was foreclosed owing to delay and the timing of the initial application and the action's subsequent transfer to another judicial district. It was further delayed by comments made by the chambers judge before whom the set-aside application by the Weinrich Defendants was brought on December 16, 2016. He suggested that a party who wished to challenge a without notice order on the basis of the record before the court when the order was granted was required to proceed by way of an appeal. That is not a correct interpretation of rule 9.15.

[53] Rule 9.15(1)(a) provides that the Court of Queen's Bench "may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made (a) without notice to one or more affected persons". Rule 9.16 states that such an application "must be decided by the judge or master who granted the original judgment or order unless the Court otherwise orders". That became inconvenient when the action was transferred from the judicial district of moved Calgary to Edmonton. As a result, a second Queen's Bench justice was asked to revisit the almost 2000 page record and review the decision.

[54] This Court has previously indicated that the appropriate forum to address concerns about without notice orders is a review application in the Court of Queen's Bench and not an appeal to this Court. "Normally this court will not entertain appeals from *ex parte* orders when they can be cured in the court below": *Dahlseide v Dahlseide*, 2011 ABCA 237 at para 2, [2011] AJ No 875 (QL). If the possibility of a review of an order granted without notice in the Court of Queen's Bench exists, that must be done before an appeal can be launched, absent exceptional circumstances: *Thompson v Procrane Inc (Sterling Crane)*, 2016 ABCA 71 at para 6, [2016] AJ No 237 (QL).

[55] There are good reasons why this practice should be followed, not the least of which is to avoid appeals by some parties and set aside applications by others, or both an appeal and a set aside application by some parties, all of which occurred here. These overlapping and duplicative proceedings caused confusion and additional expense for everyone and were not an efficient use of court resources.

c. Anton Piller Orders

[56] An *Anton Piller* order is a form of civil search warrant that "displaces the normal rules on discovery of records": *Catalyst Partners Inc v Meridian Packaging Ltd*, 2007 ABCA 201 at para 6, 417 AR 7. It enables the applicant "to attend at the premises of the defendant, without notice, and take possession of the records of the defendant. They are highly intrusive orders ... subject to a number of procedural limitations designed to protect the defendant": *ibid*.

[57] It is "an exceptional remedy and should only be granted on clear and convincing evidence. It is a highly intrusive measure that, unless sparingly granted and closely controlled, is capable of causing great prejudice and potentially irremediable loss": *British Columbia (Attorney General) v Malik*, 2011 SCC 18 at para 5, [2011] 1 SCR 657.

[58] *Catalyst Partners* summarizes the requirements (set out in *Celanese Canada* at para 35) as follows at para 7:

> a) The plaintiff must demonstrate a strong *prima facie* case;
>
> b) The damage to the plaintiff of the defendant's alleged misconduct must be very serious;
>
> c) There must be convincing evidence that the defendant has in its possession incriminating documents or things; and
>
> d) It must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work.
>
> Since the *raison d'etre* of an *Anton Piller* order is to preserve documents that might otherwise be destroyed, the fourth criterion is of central importance.

[59] While the legal test to obtain an *Anton Piller* order is well established, its application and the crafting of an appropriate order remains a challenge. There "has emerged a tendency on the part of some counsel to take too lightly the very serious responsibilities imposed by such a severe order. It should truly be exceptional for a court to authorize the passive intrusion, without advance notice, of a privately orchestrated search on the privacy of a business competitor or other target party": *Celanese Canada* at para 30. Their "terms should be carefully spelled out and limited to what the circumstances show to be necessary": *ibid* at para 32.

[60] *Celanese Canada* provides guidance on recommended basic protections that should be included in *Anton Piller* orders: para 40. Ontario and British Columbia have model orders[5] but Alberta does not.

[61] When an *Anton Piller* order is sought without notice, there is a duty of candour and full disclosure on the applicant which extends to its counsel and counsel carrying out the search. A motions judge "necessarily reposes faith in the candour and complete disclosure of the affiants, and as much or more so on the professional responsibility of the lawyers participating in carrying out its terms": *Celanese Canada* at para 36. An *Anton Piller* order may be set aside if there is material non-disclosure, whether negligently or deliberately: *Peters* at para 11.

[62] The standard of disclosure is not met if the affiant's opinions are based on speculation instead of observation: *Celanese Canada* at para 37.

d. Attachment Orders Made Pursuant to the Civil Enforcement Act

[63] Part 3 of the *Civil Enforcement Act* provides a statutory mechanism for a party to obtain prejudgment relief in certain circumstances. The requirements for an attachment order are set out in sections 17(1) and 17(2). In the context of this matter, the respondents were required to establish that:

a. They had or were about to commence proceedings in Alberta to establish their claim;

b. There is a reasonable likelihood that their claim against the defendant would be established; and

c. There are reasonable grounds for believing that the defendant is dealing, or is likely to deal, with its exigible property other than for the purpose of meeting its reasonable and ordinary business and living expenses and in a manner than would likely seriously hinder the claimant in the enforcement of a judgment against the defendant.

[64] The *Civil Enforcement Act* imposes the following statutory requirements and limitations on an attachment order:

a. The applicant is required to undertake to pay any damages or indemnity required by the Court: s 17(4);

[5] www.ontariocourts.ca/scj/files/forms/com/anton-piller-order-EN.doc; http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/model_orders.aspx

b. The order must be granted in such a manner that it causes as little inconvenience to the defendant as is consistent with achieving the purposes for which the order is granted: s 17(5);

c. The order must not attach property that exceeds an amount necessary to meet that claimant's claim (including interest, costs and related writs), unless such a limitation would make operation of the order unworkable: s 17(6); and

d. The order must specify an expiry date not more than 21 days from the date it is granted on which day the order will expire unless otherwise specified in accordance with sections 18 and 19.

Sections 18 and 19 provide:

> 18(1) An application for an attachment order may be made *ex parte*.
>
> (2) Subject to subsection (3), an attachment order granted on an *ex parte* application must specify a date, not more than 21 days from the day that the order is granted, on which the order will expire unless the order is extended on an application on notice to the defendant.
>
> (3) If the Court is satisfied that it would be inappropriate for an attachment order granted on an *ex parte* application to expire automatically after 21 days, the order may specify a later expiry date or specify that it remains in effect until it terminates in accordance with section 19.
>
> (4) The Court, on application on notice to the defendant, may direct that an attachment order that was granted on an *ex parte* application remains in effect until the order terminates in accordance with section 19 or as otherwise directed by the Court.
>
> (5) If an application under subsection (4) cannot reasonably be heard and determined before the expiry date of the relevant attachment order, the Court may on an *ex parte* application extend the period of time during which the order remains in force pending the determination of the application.
>
> (6) When an application on notice to the defendant is made under subsection (4) the following applies:
>
> > (a) the onus is on the claimant to establish that the attachment order should be continued;

> (b) the Court shall not continue the attachment order unless the circumstances that exist at the time of hearing the application justify the continued existence of the order;
>
> (c) the Court may terminate the order if the Court is satisfied that the claimant failed to make full and fair disclosure of the material information that existed at the time that the claimant made the *ex parte* application for the attachment order.
>
> 19(1) Subject to section 18 and except as otherwise ordered by the Court, an attachment order terminates on whichever of the following occurs first:
>
> (a) on the dismissal or discontinuance of the claimant's proceedings;
>
> (b) on the 60th day from the day of the entry of a judgment in favour of the claimant.
>
> (2) The Court may extend the operation of an attachment order beyond the times set out in subsection (1) if it appears just and equitable to do so.

e. Mareva Injunctions

[65] A *Mareva* injunction provides similar relief to an attachment order under the *Civil Enforcement Act*, but is granted pursuant to the court's equitable jurisdiction to grant injunctive relief: *Judicature Act*, RSA 2000, c J-2, s 13(2).

[66] While provincial legislation (and federal legislation in the case of the *Bankruptcy Act*) provides some overlapping remedies, the much broader equitable remedy of a *Mareva* injunction continues to be available: *Aetna*. To the extent remedies are sought within Alberta that are comparable to those available under the *Civil Enforcement Act*, similar protections for the interests of the defendants to those contemplated in the legislation should be considered by the court, absent exceptional circumstances. "[I]n granting a *Mareva* injunction or a preservation order a court should be guided by the principles in the [*Civil Enforcement*] *Act*": *Interclaim Holdings Ltd v Down*, 1999 ABCA 329 at para 83, 250 AR 94.

[67] The requirements for a *Mareva* injunction are outlined in *Cho v Twin Cities Power-Canada*, 2012 ABCA 47 at para 5, 522 AR 154:

> There are a number of procedural requirements, and the usual tripartite test for ordinary injunctions probably also must be satisfied. On the merits, the plaintiff must show a strong *prima facie* case for his suit, and also that there is a real risk that the respondent will remove assets from the jurisdiction, or dissipate them, in order to avoid execution (enforcement) under a judgment.

[68] Ontario and British Columbia both have model *Mareva* injunction orders[6], but Alberta does not.

B. The Orders

a. The Third Party Anton Piller Orders

[69] There are significant concerns about the nature of the disclosure provided with respect to the Third Party *Anton Piller* Orders and the justification for those orders.

[70] Searching the registered office of a defendant (often a law firm) or its accountant is generally "unwarranted": *Ontario Realty Corp v P Gabriele & Sons Ltd*, [2000] OTC 797, [2000] OJ No 4341 (QL) at para 37 (Sup Ct J) *per* Farley J:

> It should have been more than sufficient to merely notify those firms and ask that they hold any [of the defendants' documents] in suspension and ask that their appropriate clients give an undertaking not to request "originals" back from the law firm and have the law firm confirm that arrangement. ... That is the way in which any documents which are (or were but for the seizure) at the law firms should and therefore are to be handled now. The same goes for the accounting firms.

[71] The fourth requirement for an Anton Piller order is that "it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work": *Celanese Canada* at para 35 (with emphasis). Granting the Third Party *Anton Piller* Orders suggests that these third parties would, merely at the request of their clients, destroy material in their possession despite the statement in paragraph 39 of the Third Party *Anton Piller* Orders that: "[n]othing in the granting or execution of this Order implied or suggested any wrongdoing being alleged as against the [third parties]".

[72] No mention was made in the Brief that *Anton Piller* Orders were being sought against any third parties although the application did so. In oral submissions to the chambers judge, the plaintiffs' counsel described the category of *Anton Piller* Orders sought that dealt with these three non-parties as "trickier" stating:

> And you'll see one is All-Type Office Services, that's the company that does all of their – their accounting and bookkeeping for almost all of them. We have a law firm as well that does all of their corporate work. We have [SVS Group] that does, again, all of their accounting work. And all of the affidavits identified the common addresses for these common defendants.

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[6] www.ontariocourts.ca/scj/files/forms/com/*Mareva*-order-EN.doc; www.courts.gov.bc.ca/supreme.../Model_Order_for_Preservation_of_Assets.docx

[73] These submissions are a material overstatement of the evidence.

[74] The only evidence with respect to All-Type was Patric Nagel's affidavit which indicated that All-Type had an office in the same office building listed as the registered office of 179, Secure Rentals and Secure Resources (none of which otherwise had an identified office in that building); that All-Type advertised that it provided bookkeeping services, packaged office rentals and office support services and that as a result Mr Nagel believed that the business and corporate records of each of 179, Secure Rentals and Secure Resources will likely be located at All-Type's offices; and that such records "will likely evidence Shilo's relationship, either direct or indirect, to these corporate entities and any payment made by these entities, either directly or indirectly, to Shilo, by way of dividends or otherwise". The submission by the plaintiffs' counsel that All-Type was doing "all of their accounting and bookkeeping for almost all of them" constituted a representation that All-Type was doing all of the accounting and bookkeeping for almost all of the defendants. This was not a reasonable inference when the only evidence in the record (other than Mr Nagel's speculation) was that three of the corporate defendants had a registered office in the same building where All-Type was located.

[75] The only evidence regarding RMLO was that its address was the registered office of Secure Developments, Weinrich Holdings, Secure 2013, Secure Rentals and Secure Resources. Mr Nagel stated that as a result he believed that corporate records, including minutes books, and files and correspondence would be located at RMLO that "will likely evidence Shilo's relationship, either direct or indirect, to these corporate entities and any payments made by these entities, either directly or indirectly, to Shilo, by way of dividends or otherwise." The submission by the plaintiffs' counsel that RMLO was a law firm "that does all of their corporate work" was not justified by the evidence on the record. Acting as the registered office for five of the corporate defendants is not the same as doing all of the corporate work for the 15 named defendants.

[76] The only evidence regarding SVS Group LLP ("SVS Group") are some emails between it and Shilo and Weinrich in relation to the 2013 year end of Secure Developments (of which they were both directors), including information about payments made to each of them. Mr Nagel states that he believes that Secure Developments is one of the corporate entities through which monies generated from entities such as Secure Rentals may be conveyed to Shilo, however, he acknowledges that he has been unable to determine what business Secure Developments is engaged in beyond noting that it has generated a fairly significant amount of money. He states that he believes that "records regarding Secure Developments' financial affairs, including its source of funds, the persons to whom funds are paid, the financial arrangement between [Shilo] and Weinrich, and the length of time for which this arrangement has been in place, will likely be found at the SVS Group LLP place of business.": Nagel Affidavit at para 80.

[77] The representation made by counsel for the plaintiffs to the chambers judge that SVS Group "does all of their accounting work" is not supported by the record. There was no evidence that SVS Group did accounting work for any defendant other than Secure Developments.

[78] Two additional paragraphs added to each of the Third Party *Anton Piller* Orders stated:

> 23. Without invitation by the Possessor, its solicitor, officers, directors, servants, agents, employees or anyone acting on its behalf to further or otherwise to enter the Premises, the Supervising Solicitor shall remain in the public reception area of the Premises while the Possessor, its officers, directors, servants, agents, employees or anyone acting on its behalf assembles the records for removal as required by this order.
>
> [...]
>
> 39. Nothing in the granting or execution of this Order implied or suggested any wrongdoing being alleged as against the Possessor.

[79] With the exception of those additional paragraphs, the Third Party *Anton Piller* Orders were essentially identical to those granted in respect of the defendants.

[80] In summary, the Third Party *Anton Piller* Orders are problematic in many respects, including:

a. The exceptional nature of obtaining an *Anton Piller* order against a third party, particularly a law firm or an accounting firm, should have been expressly drawn to the chambers judge's attention, which was not done.

b. The submissions of counsel in relation to these Third Party *Anton Piller* Orders contained material misstatements that went well beyond the affidavit evidence, as outlined above.

c. Other than Mr Nagel's speculation, the limited evidence on the record that RMLO and All-Type had the same address or were the registered office for certain of the corporate defendants and that SVS Group prepared the 2013 financial statements for Secure Developments does not satisfy the third requirement for an *Anton Piller* Order that there be "convincing evidence" that those parties had "incriminating records in their possession": *Celanse Canada* at para 35.

d. There was no evidence on the record that addressed the fourth requirement for an *Anton Piller* Order; that is, that there was a real possibility that any incriminating records in the third parties' possession would be destroyed.

e. Assuming that it could have been established that the third parties had incriminating documents in their possession, less severe alternatives could have been used such as obtaining an undertaking or a court order prohibiting the third parties from dealing with such records or releasing them to the defendants pending

further court order. No explanation was provided to the chambers judge or this Court why such remedies would not have been adequate and why any seizure of any records from these third parties was required.

f. The *Anton Piller* Order provided for privilege claims by the third parties without any provision for privilege claims over documents in the third parties' possession by the defendants who possessed the privilege. The *Anton Piller* Orders did not provide for any notice to be given to the defendants whose documents were subject to seizure from the third parties. In *Canada (Attorney General) v Chambre des notaires du Quebec*, 2016 SCC 20, [2016] 1 SCR 336 provisions in the *Income Tax Act* that did not require notice to be provided to a party when their records were sought from a notary or lawyer and which placed an inappropriate burden on the lawyer or notary to protect the client's right to professional secrecy were declared unconstitutional. The Supreme Court pointed out that "the right to claim professional secrecy does not belong to the legal adviser. The constitutionality of a seizure cannot rest on the unverifiable expectation that a legal advisor will always act diligently and solely in the client's interest when faced with a seizure by the state": para 48. Similar concerns apply with respect to seizure of the defendants' potentially privileged material from a third party by way of an *Anton Piller* Order.

g. The orders in respect of the third parties were in essentially the same form as those directed at the defendants. As a result, these third parties (against whom no wrongdoing was alleged) were subjected, without notice or rational justification, to intrusive searches that could potentially damage their reputation and affect their business. For example, the Third Party *Anton Piller* Orders contained the following provisions:

    i. "the Supervising Solicitors and a Bailiff for MNP shall be entitled to be present in reception area of the Premises to ensure that there is no destruction of records" during the 90 minute window provided to seek legal advice (para 10). No one was permitted to enter the third party's premises following service of the *Anton Piller* Order until the conclusion of the Search unless the Supervising Solicitors were present or the parties agreed otherwise in writing (para 31). These provisions could cause significant disruption to the business of these third parties without any explanation why such provisions were warranted.

    ii. a police enforcement clause (para 20).

    iii. MNP was authorized to seize the third party's computers and conduct forensic searches (para 26).

iv. The third party was required to unlock any locked door, cabinet, safe or safety deposit box and provide the Supervising Solicitor on request with all user identification and passwords for the computers, software application and any web based or other email accounts (para 29).

v. The third party and its employees were restrained until further order of this court or until written agreement "from deleting, erasing, or altering the following property or records situated at the Premises ... computers, personal digital assistants (PDAs), smart phones, cellular telephones, servers, external and internal drives and external storage media" (para 34). On its face, this provision appears broad enough to prohibit an employee of one of the third parties from deleting any personal emails from their personal cell phone pending further court order if the cell phone was in the office at the time of the search.

h. There was no provision for compensation to these third parties for any costs they incurred as a result of the *Anton Piller* Orders. This is a typical provision in a Norwich Order imposed for pre-action discovery of a party against whom the applicant has no cause of action and is not a party to the contemplated litigation but is in some way connected to or involved in the misconduct: see generally *Alberta (Treasury Branches) v Leahy*, 2000 ABQB 575 at para 106, aff'd 2002 ABCA 101, leave to appeal to SCC refused [2002] SCCA No 235.

[81] The Third Party *Anton Piller* Orders are set aside in their entirety.

b. The Plaintiffs' Disclosure

[82] These appeals also raise concerns about the nature and extent of disclosure made by the plaintiffs on their without notice application.

i. The Share Purchase Agreement

[83] P49 Group's claim for $44 million is based upon alleged misrepresentations that led to its 67% acquisition of Tiger. While the plaintiffs provided almost 2000 pages of evidence to the chambers judge, the plaintiffs did not include the complete Share Purchase Agreement dated August 2014. Only fourteen highly redacted pages of the 63-page agreement, which were characterized as "the relevant provisions", were produced. While the clause dealing with the vendor's representations was at least 30 pages long and contained at least 49 representations, the excerpt provided from that clause disclosed only four of the representations made by the vendor. This limited disclosure in the context of a claim for misrepresentation is inexcusable.

[84] The indemnification provision in Article 7 of the Share Purchase Agreement provided that the "representations and warranties contained in this Agreement and any Ancillary Agreement will

survive Closing and continue in full force and effect for a period of eighteen (18) months after the Closing Date". As the Share Purchase Agreement was dated August 14, 2014, the representations and warranties would have expired on February 14, 2016, subject to certain specified exceptions including "(e) there is no limitation as to time for claims involving fraud or fraudulent misrepresentation". Accordingly it is at least arguable that misrepresentations not rising to the level of fraud or fraudulent misrepresentation are no longer actionable.

[85] There is no indication whether or not the Share Purchase Agreement contained an "entire agreement" clause, which would not be unusual. The failure to disclose the entire Share Purchase Agreement or, at the very least, the complete clause containing the representations and whether there was an "entire agreement clause" constitutes material non-disclosure in respect of P49 Group's claim for alleged misrepresentations that induced it to enter into that agreement.

ii. Other Relevant Information Not Disclosed to the Chambers Judge

[86] Other relevant matters were not disclosed to the chambers judge. Two examples illustrate this.

a. Prior to August 1, 2014, Tiger was owned by Clark Sazwan, Denise Sazwan and the Sazwan Family Trust. The Brief suggests that Shilo was using corporate resources for his own benefit during that period and Clark condoned or turned a blind eye to that. To the extent that the Brief relies on misappropriation of Tiger property prior to P49 Group's acquisition, it was not drawn to the chamber judge's attention that if Shilo was using Tiger resources for personal benefit during that period with the knowledge of his father, that may well have been an issue for taxing authorities but it may not be an actionable wrong vis-à-vis Tiger or the P49 Group. Further, such claims may be statute-barred if Clark was aware and chose not to have Tiger take action against Shilo. *Duke* indicates that there is an obligation to raise potential defences when seeking relief without notice.

b. There is affidavit evidence that Shilo had Tiger carry out maintenance and repairs on Secure Rentals equipment at no charge. The chambers judge was not told that the Equipment Rental Agreements provide that the lessee (Tiger) is responsible for repairs and maintenance.

iii. Unsubstantiated Speculation

[87] The affidavits filed in support of the applications include numerous unsubstantiated speculations. Shortcomings specific to each defendant follow later in these reasons but a few general examples illustrate the point and are similar to the type of speculation criticized in *Celanese Canada* at para 37.

a. When discussing security video footage showing Hu (while still employed but on medical leave) exiting Tiger's office with a box the deponent states (with emphasis added): "The

contents of the box cannot be determined from the security footage. I believe the box may have contained Tiger's proprietary and confidential information, including information regarding the Pastille Plant Project, the plant design and construction materials, or both."

b. The Nagel Affidavit includes a statement that Secure Developments is believed to be "one of the corporate entities through which monies generated from other entities, such as Secure Rentals, may be conveyed to Shilo Sazwan". The support for this claim is a bank statement that shows that the entity generated a "fairly significant amount of money". The deponent concedes that he has no idea what the business of Secure Developments is. The affidavit of Nagel regarding Secure Developments was based in part on emails relating to the 2013 year-end which refer to Weinrich, Shilo and SVS Group. It should have been made very clear to the chambers judge that this information related to a period before the P49 Group acquired its interest in Tiger.

iv. Overstatements in the Brief

[88] In addition to the overstatements made by the plaintiffs' counsel in his submissions on the application about the Third Party *Anton Piller* Orders on the application, the Brief also contained overstatements of the evidence. A few examples are:

a. The Brief suggests that Hu may have misappropriated corporate assets when it states "legitimate questions arise about the provenance of the funds that enabled Hu to enter into these transactions, including whether the funds were diverted from Tiger". This claim is based on highly speculative and circumstantial evidence, including an unexecuted 2005 loan agreement found on Hu's laptop between a Tiger supplier and Hu personally for $675,000 and his purchase of three properties between 2012 to 2014 for a total acquisition cost of $452,250 while his income from Tiger between 2010 to 2013 was $579,145. It requires a substantial amount of speculation to infer that Hu may have misappropriated Tiger assets for the purchase of these properties. All of the properties were purchased with another party and there is no indication whether Hu had other assets or what the assets and income of the other party. Moreover, the Brief states that Hu "obtained a loan in the approximate amount of $675,000" when the only evidence is a ten-year old unexecuted loan agreement found on his laptop and there is no information that the agreement was ever executed or the loan ever advanced.

b. The Brief makes the repeated assertion that Secure Resources entered into a business that competes with Tiger. This contradicts evidence that Secure Resources plans to produce sulphur-based fertilizer, not the calcium chloride products produced by Tiger. The production of sulphur-based fertilizer is not included under the definition of Tiger's business in the Non-Competition Agreement signed by Clark.

c. Overreaching Terms in the Anton Piller Orders

[89] The *Anton Piller* Orders are very broad and contain essentially the same provisions against each defendant despite there being significant differences in the nature of the claims advanced against, and circumstances of, the various defendants. Many of *Anton Piller* Orders' terms are overreaching and go well beyond what would be reasonably required in the circumstances.

i. Scope of the Documents Covered by the Anton Piller Orders

[90] The scope of records to be seized under an *Anton Piller* order must be clearly identified and be "no wider than necessary": *Celanese Canada* at para 40(1)(iii). "The evidence sought should be specifically defined to ensure that the AP Order is not overbroad": Footnote 8 of the Ontario Model Order.

[91] The scope of records covered by the *Anton Piller* Orders is very broad and the wording is ambiguous and open to interpretation. Paragraph 23 identified the documents that the Possessor was required to deliver up to the Supervising Solicitors as follows (emphasis added):

> The Possessor and any other person or person having notice of this Order are hereby ordered and directed to surrender up and deliver to the Supervising Solicitors all files, correspondence, minute books, share certificates, billing account, permit application, document, agreements, business plans, accounting records, bank statements, credit card records, asset purchase records, net worth documents, tax returns, financial reporting, invoices, payment records and any other records in their possession, whether located at the Premises or stored off site and whether stored in paper or electronic data form if such records related to the Defendants , or any of them, and the assets and financial records of Shilo Sazwan ("Shilo"), Lianguag Hu, also known as Stephen Hu ("Hu"), or any of 1793068 Alberta Ltd ("179") Secure 2013 Group Inc (Secure 2013"), Secure Resources Inc ('Secure Resources"), and Secure Rentals Ince, including but not limiting the generality of the foregoing, any record, in any form, taken at any time, by anyone, from the Plaintiffs.

[92] This language appears to require production of all records which relate to any of the defendants' financial information. Production of such records goes beyond the allegations in the Statement of Claim and constitutes a form of prejudgment examination-in-aid-of-execution.

[93] Paragraph 24 identified the records that the Authorized Persons were entitled to search and seize from files, computers, smart phones and other electric media as follows (emphasis added):

> The Possessor, his servants, agents, employees or anyone acting on his behalf, shall disclose the location of and permit the Authorized Persons to carry out a search and seizure of the Possessors' files, documents, books, records, computers, computer

fifes, computer equipment, hard disk drives, cell phones, smart phones, personal digital assistants (PDA), digital storage devices, electronic media and any other storage medium, including electronic and paper copies, and all other records that relate to, or may relate to:

(a) any of the Plaintiffs:

(b) any matter pertaining, relating or dealing with the facility constructed by Tiger at Slave Lake, Alberta for the purposes of manufacturing three forms of dry calcium chloride (the “Pastille Plant”), including, but not limited to:

(i) the decisions and activities of Clark, Shilo, Hu, or any of them with respect to all aspects of the Pastille Plant project, including the plans, specifications, procurement of equipment for, drawings, and construction of the Pastille Plant project; and

(ii) the market and demand for the pastille form of calcium chloride; the expenditures on the Pastille Plant project and any underlying records; the timeline for achieving production from the Pastille Plant; and the ability and expertise of Shilo and Hu to oversee and direct the Pastille Plant project;

(c) Clark, Shilo, and Hu's obligations of confidentiality to Tiger Calcium Services Inc. and Tiger Tanklines (2011) Ltd. (collectively, "Tiger") and the disclosure, retention, withholding, or any other use of Tiger's confidential information, including, but not limited to:

(i) engineering information regarding Tiger's manufacture of liquid and dry calcium chloride;

(ii) information regarding the inputs and feedstock and costs of the Inputs for the manufacturing processes, the rate of production, the quality of the manufactured product, and the margins on the manufactured product;

(iii) information regarding the location of the Tiger's wells near Slave Lake, Alberta; the stratigraphic formation from which Tiger's wells produce; and the nature and extent of the brine reserve from which Tiger's walls produce; and

(iv) all aspects of Tiger's business, Including information regarding their financial position, customers and competitors, and business plans (collectively, the "Confidential Information").

(d) Clark, Shilo, and Hu's fiduciary obligations to Tiger, including, but not limited to, that relate to the misappropriation of corporate resources; knowledge of and failure to investigate wrongdoings of management employees; and obtaining personal benefits to the detriment of Tiger, including, but not limited to;

(i) Shilo's purchase, ownership, and/or sale of various personal vehicles, including, but not limited to, a Porsche, a red Dodge Viper; a two-door Bentley, a Ford F-250 truck, a Lincoln Navigator, a fifth-wheel holiday trailer, and a black Freightliner on which Tiger resources were expended or otherwise;

(ii) the services and materials provided by Tiger and Tiger employees to Shilo in relation to Shilo's previous personal residences located in Slave Lake and Sherwood Park, Alberta and Mission Hill, Kelowna, British Columbia, and his current personal residences in Beaumont, Alberta and located at […] Road, Kelowna, British Columbia or otherwise;

(iii) the services and materials provided by S&K Ready Mix Ltd., Direct Current, D'Lanne Electro Controls Ltd., and any other third party service provider at Shilo's personal residences or otherwise;

(iv) personal financial records that reflect Shilo's misappropriation of the Tiger's resources or otherwise;

(v) communications with Weinrich, Hu, and others using Shilo's personal email account of […] and the email account with Secure Rentals with the address of […]; Hu's personal email account of […] and Weinrich's Secure Rentals' email account of […]:

(e) Clark, Shilo, and Hu's obligations to not compete with Tiger, including their involvement, relationship or any other connection or dealings with Secure Resources, and Brimstone Sulphur Inc., and their use of the Confidential Information:

(f) the performance by Clark, Shilo and Hu of their employment duties;

(g) Shilo's Involvement, direct or indirect, in any of 179 Alberta, Weinrich Holdings Ltd. ("Weinrich Holdings"), Secure 2013, Secure Developments (previously called 1690307 Alberta Ltd.), and Secure Rentals;

(h) any payments or financial benefits received by Clark, Shilo, or any of the Defendants directly or indirectly from one or more of 1793068, Weinrich Holdings, Secure 2013, Secure Developments, Secure Resources, Secure Rentals, or Weinrich;

(i) the financial status or affairs of any of Clark, Shilo, Hu, 1793068, Weinrich, Weinrich Holdings, Secure 2013, Secure Developments. Secure Resources, and Secure Rentals; and

(j) records or items that are the property of or relate to the business of any of 179 Alberta, Secure 2013, Secure Developments, Secure Resources, and Secure Rentals

(collectively, the "Search").

[94] This clause is very broad. It authorizes the seizure of all records that relate to the listed categories, and also records that *may* relate to those categories. This greatly expands the potential scope of the *Anton Piller* Orders and it is uncertain how this provision would be applied or why it is necessary or reasonable.

[95] It is not clear why many of the documents referred to in paragraph 24 would be relevant to the litigation. For example:

a. Paragraph 24(a) refers to records that relate to "any of the Plaintiffs". Clark Sazwan was the principal of Tiger prior to the sale and continues to have a 33% interest through Smokey Creek. He likely has numerous records which relate to Tiger that are unrelated to any of the issues in the litigation.

b. Paragraph 24(h) refers to records that relate to "any payments or financial benefits received by... any of the Defendants directly or indirectly from ... Weinrich Holdings, Secure 2013, Secure Developments, Secure Resources, Secure Rentals or Weinrich". There is no temporal limit in this clause and it would seem to require unlimited production of all financial payments made within the group of Weinrich Defendants, even if they relate to other businesses that have no relationship with Tiger or any of the other defendants.

c. Paragraph 24(i) refers to records that relate to "the financial status or affairs of any of Clark, Shilo, Hu, 1793068, Weinrich, Weinrich Holdings, Secure 2013, Secure Developments, Secure Resources, and Secure Rentals", which appears to constitute a form of prejudgment examination-in-and-of-execution.

d. Paragraph 24(j) refers to "records or items that are the property of or relate to business of any of 179 Alberta, Secure 2013, Secure Developments, Secure Resources, and Secure Rentals". This is broad enough to include all business records of these companies, some of

which may contain commercially sensitive information, even if they predate the P49 Group acquisition or otherwise have no relevance to the litigation.

ii. Unlimited Scope of Persons Required to Produce Records

[96] The opening language of paragraph 23 expands the scope of the obligation to produce records pursuant to the *Anton Piller* Orders in an unlimited fashion to "any other person or person having notice of this Order". Nothing in the affidavits suggests that such breadth is warranted. It potentially broadens the *Anton Piller* Orders to require an unidentified and unlimited number of individuals upon whom the *Anton Piller* Orders could be served to produce financial information regarding the defendants.

iii. Forensic Search

[97] Paragraph 26 to 28 set out a process for a forensic search to be conducted by MNP of the computers and any other relevant digital storage devices at the premises (emphasis added):

> 26. For the purposes of the Search, MNP may:
>
> (a) seize the Possessor's computers, and any other relevant digital storage devices (collectively, the "Electronic Media"), situate at the Premises;
>
> (b) perform Bit Stream Imaging (the "Imaging") of the Possessor's Electronic Media situate at the Premises to preserve the evidentiary integrity of any data they contain and provide information for further investigation; and
>
> (c) forensically search all levels of the relevant hard disk drives, <u>including for occurrences of key words determined to be relevant by the Plaintiffs</u> or evidence of any confidential or proprietary information of Tiger (the "Key Word Search")
>
> (collectively, the "Forensic Search").
>
> 27. MNP shall undertake the Forensic Search at the Premises. Alternatively, with the Supervising Solicitors' agreement, MNP may take the Electronic Media into its possession and remove it from the Premises to MNP's business premises for the purposes of the Imaging and conducting the Key Word Search. The Electronic Media may be removed into the possession of MNP for a period of up to 14 days, or such further period agreed to by the parties or ordered by the Court.
>
> 28. Upon completion of the Forensic Search, if practicable, MNP shall make a detailed list of all documents and data, including the Imaging, located through the Forensic Search and provide that list to the Supervising Solicitors. Following the Forensic Search, the results of the Forensic Search, including the Imaging, shall be remanded into the custody of the Supervising Solicitors, until counsel for the

> Possessor have been given a reasonable opportunity to review them to advance legal privilege claims, after which the Supervising Solicitors shall release to the Plaintiffs copies of those records that are relevant and not privileged.

[98] The forensic search included performing bit stream imaging "to preserve the integrity of any data that they contain", to forensically search for "occurrences of key words determined to be relevant by the Plaintiffs", to provide a detailed listing of all documents and data and the imaging to the Supervising Solicitors. After counsel for the Possessor reviewed them "to advance legal privilege claims", the Supervising Solicitors would release to the plaintiffs copies of those records that are relevant and not privileged.

[99] Aside from the concerns raised elsewhere, this seems to be a significant intrusion on the privacy interests of individual defendants whose computers and other electronic storage devices would be imaged in their entirety and the contents listed. The rationale for permitting the plaintiffs to unilaterally determine the key words to be searched on all of the defendant's hard disk drives is not apparent.

iv. Access to Seized Documents

[100] The *Anton Piller* Orders are ambiguous about when and how access to the non-privileged seized records was to be provided by the Supervising Solicitors to the plaintiffs' solicitors.

[101] Paragraphs 16, 19 and 28 suggest that this would occur automatically without further court order:

> 16. The Supervising Solicitors shall, within 10 business days after the implementation of this Order, report to this Honourable Court and to each party served with this Order in writing as to:
>
> ....
>
> (d) what disclosure, if any, of the contents of any of the Records seized in the Search has been made to the Plaintiffs or to their solicitors or agents, and provide particulars of any such communications, including any correspondence of memoranda evidencing any such communications;
>
> […]
>
> 19. The Supervising Solicitors will deliver to the Plaintiffs' solicitors, copies of the non-privileged records which are seized, retained, and/or copied. The Plaintiffs' solicitors shall ensure a list is made of all of the records delivered up pursuant to this Order and shall serve a copy of that list upon the Possessor. The Plaintiffs

> solicitors shall ensure that all of the records delivered up to it are kept in safe custody.
>
> 28. ...Following completion of the Forensic Search, the results of the Forensic Search, including the imaging, shall be remanded into the custody of the Supervising Solicitors, until counsel for the Possessor have been given a reasonable opportunity to review them to advance legal privilege claims, after which the Supervising Solicitors shall release to the Plaintiffs copies of those records that are relevant and not privileged.

[102] The respondents submit that the *Anton Piller* Orders do not permit the release of the materials to them without further order of the Court as paragraph 36 stated:

> The Plaintiffs may schedule a return date for a hearing date for the review and release of the materials seized, copied and/or removed from the Premises pursuant to the terms of the Order that are in custody or control of the Supervising Solicitors.

[103] Even if that were the intention, the *Anton Piller* Orders would not necessarily be read in that fashion. Paragraphs 19 and 28 contain mandatory language requiring delivery of records to the plaintiffs' solicitors and paragraph 16(b) suggests that seized documents may have been turned over to the plaintiffs or their solicitors within 10 days after the seizure. Paragraph 36 merely permits the plaintiffs to bring an application for release of materials in the custody of the Supervising Solicitors and it could be read as applying to documents other than those required to be turned over to the plaintiffs' solicitors.

[104] If it was intended that no documents would be released by the Supervising Solicitors pending further court order, the *Anton Piller* Order should have been drafted accordingly. This is the approach adopted in paragraph 21 of the British Columbia Model Order which states:

> The plaintiff and its representatives are not, after completion of the search, entitled to inspect the Evidence for Seizure seized and held in the custody of the Independent Supervising Solicitor pursuant to this Order, unless the defendant consents or the Court otherwise Orders.

[105] Paragraph 29 of the Ontario sample order provides that the Plaintiff is not "permitted to access the Evidence seized [on an *Anton Piller* Order] prior to the delivery of the Defendants' affidavit of documents, unless the Defendant consents or this Court orders otherwise." The associated footnote explains "[t]he primary purpose of an AP Order is preservation: *Celanese Canada*, *supra* at para. 52. Accordingly, the Plaintiff will usually not have access to the Evidence seized until discovery."

v. Failure to Provide a Mechanism to Address the Appellants' Confidential or Commercially Sensitive Non-privileged Information

[106] The *Anton Piller* Orders do not prescribe a mechanism to protect the appellants' non-privileged confidential information or commercially sensitive information.

[107] One of the basic protections is that a "term setting out the procedure for dealing with solicitor-client privilege or other confidential material should be included [in the *Anton Piller* Order] with a view to enabling defendants to advance claims of confidentiality over documents before they come into the possession of the plaintiff or its counsel, or to deal with disputes that arise": *Celanese Canada* at para 40 (emphasis added).

vi. No Confidentiality Requirements Imposed on the Authorized Person

[108] While the *Anton Piller* Orders designate the Supervising Solicitor as an officer of the court, they do not expressly impose an obligation on Authorized Persons who may have access to the seized documents (the Supervising Solicitor, MNP and the bailiffs) to maintain the confidentiality of information obtained as a result of the order. This is an expressly contemplated provision in the BC Model Order, section 23(b).

vii. Length of the Anton Piller Orders

[109] The *Anton Piller* Orders provided that they would remain in force for a period of 60 days (para 37) but the plaintiffs could apply to extend that time period and upon filing such an application the order would remain in effect until the hearing of the application (para 38).

[110] This time period is lengthy compared to that contemplated in *Celanese Canada* where the Court noted that such *Anton Piller* Orders "are generally time-limited (e.g., 10 days in Ontario under Rule 40.02 (*Rules of Civil Procedure*, RRO 1990, Reg 194) and 14 days in the Federal Court, under Rule 374(1) (*Federal Courts Rules*, SOR/98-106))": para 40.

viii. Limits on the Use of the Seized Records

[111] Paragraph 33 of the *Anton Piller* Orders limit the use of the records seized "for the purposes of the civil proceeding related hereto or for the purpose of instructing counsel and pursuing or preserving assets of the Defendants in the Action, any related Action, or Any Action or proceeding by the within Plaintiffs in any jurisdiction, including in British Columbia" (emphasis added). The highlighted language would appear to permit seized records to be used to pursue assets of the defendants in unrelated actions in any jurisdiction. This goes well beyond the implied undertaking that limits the permitted use of documents obtained through discovery to the subject litigation, unless a court orders otherwise.

[112] This language is a significant expansion of the recommended limited use clause contemplated in *Celanese Canada* that "items seized may only be used for the purposes of the pending litigation": para 40 at 1(v). It is also much broader than the standard limited use provision in paragraph 21 of the Ontario Precedent Order that evidence seized "shall be used by the Plaintiff only for purposes of this action, unless the Court orders otherwise." The BC Model Order also provides that the evidence seized "shall be used by the plaintiff only for the purposes of this action, unless the parties agree otherwise in writing or the Court orders otherwise" (para 28) while recognizing that such a clause may not be appropriate in every case (footnote 11).

[113] When broader use of documents seized on an *Anton Piller* Order is sought that goes beyond the subject litigation and the usual implied undertaking rule, one would have expected that the justification for doing so would have been specifically addressed in the affidavit materials and submissions. That was not done.

ix. Prohibitions on Dealing with Records

[114] Paragraph 35 stated that despite the contemplated imaging, the Possessor and its employees were "restrained, until further order of the court or until written agreement from deleting, erasing, or altering ... computers, personal digital assistants (PDAs), smart phones, cellular telephones, servers, external and internal drives and external storage media".

[115] On its face, this provision appears broad enough to prohibit an employee of one of the third parties or defendants from deleting any personal emails and text messages from their personal cell phone pending further court order if the cell phone was in the office at the time of the search.

d. Overreaching Terms in the Mareva/attachment Orders

[116] The chambers judge conflated the attachment order and the *Mareva* injunction and granted a combined order. This combination is discouraged because it makes it difficult to determine whether the provisions of the *Civil Enforcement Act* are intended to govern or whether principles of the law of equity apply.

i. No Financial Cap

[117] The *Mareva/*attachment Order contemplated unlimited attachment of the assets of four individuals and seven companies, without any financial caps in respect of any of the parties. A *Mareva/*attachment Order granted against multiple parties against whom different causes of action are alleged should have contained different financial caps depending upon the claims advanced and evidence furnished against each defendant.

[118] An unlimited *Mareva* injunction or attachment order will be granted only if justified by compelling evidence. Section 17(6) of the *Civil Enforcement Act* requires that an attachment order "not attach property that exceeds an amount or a value that appears to the Court to be necessary to

meet the claimant's claim, including interest and costs, and any related writs, unless the Court is of the view that such a limitation would make the operation of the order unworkable or ineffective."

[119] This provision and the unlimited nature of the *Mareva*/attachment Order sought was not brought to the chambers judge's attention, nor was any evidence provided or submissions made to demonstrate why a financial cap would make the operation of the order "unworkable or ineffective."

[120] The lack of financial caps is particularly problematic where, as here, the quantum of the claims against the various defendants are significantly different. At the hearing of the appeal, respondents' counsel estimated the following damage claims:

a. P49 Group's claims against Clark, Shilo and Hu for misrepresentations in relation to the share acquisition were $26 million;

b. Tiger's claims against Clark, Shilo and Hu for wasted expenditures in relation to the Pastille Plant were $26.5 million;

c. Tiger's claim against Clark, Shilo and Hu for loss of profits relating to other aspects of the business was $6 million;

d. Tiger's claims against Shilo for wrongful expenditures were between $2 million to $3 million;

e. Tiger's claims for the overcharges against Weinrich, Secure 2013, Secure Rentals and Shilo relating to the equipment leasing scheme were estimated at $1.2 million; and

f. Tiger's claims against Secure Resources were not quantified.

[121] The *Mareva* injunction which the plaintiffs obtained in British Columbia against Clark and Shilo had a cap of $87 million.

ii. Failure to Specify an Expiry Date

[122] The *Mareva*/attachment Order failed to address the statutory requirements in sections 18 and 19 of the *Civil Enforcement Act*. An attachment order must have a specified expiry date (usually not more than 21 days from the date the order is granted) unless the court is satisfied that it would be inappropriate, in which case "the order may specify a later expiry date or specify that it remains in effect until it terminates in accordance with section 19": s 18(3). This order failed to do any of these three things, which is mandatory for any attachment order granted under the *Civil Enforcement Act*.

[123] While sections 18(4) through (6) provide a mechanism for review of an attachment order upon application, the existence of a review mechanism is no excuse for failing to comply with the statutory requirement in section 18(3) that an *ex parte* order address one of the three specified options as to its expiry.

iii. Spending Limits

[124] The limits on spending by the individuals covered by the order of $5000 per month for living expenses and $10,000 per month for legal expenses, were unrealistically low in the context of this action.

e. Delay and its Consequences

[125] As mentioned at the outset, there was an eight-week delay after the October 6 application date was cancelled and rescheduled to November 30, 2016. No explanation for this delay was provided. Moreover, five of the affidavits filed in support of the application were sworn in September 2016, ten weeks before the application was heard.

[126] An applicant otherwise entitled to an injunction may lose that right on account of delay: Robert J Sharpe, *Injunctions and Specific Performance*, (Aurora, Ont: Canada Law Book, 1998) (loose-leaf 2015 supplement, release 24) at ¶1.830. "The very fact of delay by the plaintiff, quite apart from any question of prejudice to the defendant, may often serve as evidence that the risk is not significant to warrant interlocutory relief": ¶1.990. "To justify an *ex parte* injunction, there must be such urgency that the delay necessary to give notice might entail serious and irreparable harm to the plaintiff": ¶2.30.

[127] One consequence of the delay to November 30, 2016 was that the searches were not executed until December 6, 2016 so that, by the time the defendants became aware of the Orders, there was only a short window before the Christmas break to have the set aside applications brought in the Court of Queen's Bench.

f. Applying the Substantive Tests for the Anton Piller Orders and Mareva/attachment Order

[128] To obtain an *Anton Piller* order, *Mareva* injunction or attachment order the applicant must establish that it has met each of the requirements with respect to each party.

[129] As already indicated, Shilo conceded that these tests were met with respect to him for the purposes of this appeal. The other appellants deny that these tests were satisfied based upon the record.

[130] While the chambers judge concluded that the tests were met with respect to all the parties against whom the Orders were sought, this conclusion was not reasonable with respect to some of the parties having regard to the record and the concerns outlined above.

i. Weinrich Defendants

[131] The claims against Weinrich Defendants arise out of alleged collusion between Weinrich, Shilo and their companies. They do not relate to the misrepresentation claims or claims that unnecessary expenses were incurred in relation to the Pastille Plant, which represent the bulk of the damages claimed.

[132] The *Mareva/*attachment Order against Weinrich and Weinrich Holdings was set aside by consent, but remains against Secure 2013 and Secure Rentals. There are also *Anton Piller* Orders against Secure Rentals and Weinrich personally.

[133] Weinrich and Shilo are friends. It is alleged that in late 2014, after Tiger's new owners advised Shilo that Tiger would be leasing and not purchasing equipment, they founded Secure Rentals and used it to enter into a series of inflated equipment rental contracts, estimated to be 15 to 20% above market rates. Secure Rentals is owned by Secure 2013, which is owned by Weinrich Holdings, which is owned by Scott Weinrich.

[134] The only claims against Secure 2013 in the Statement of Claim are general claims of conspiracy. No substantive submissions were made in respect of Secure 2013 in the Brief or in oral submissions. While the corporate searches do not disclose any connection between Shilo and Secure Rentals, there is affidavit evidence that Tiger rents all of its equipment from Secure Rentals, including equipment which Shilo advised Jody Penton he had personally purchased but which Penton stated was apparently purchased by Secure Rentals. Penton stated that Shilo told him in May 2016 that "nobody can trace Secure Rentals back to me", and "they can search and search and they wouldn't be able to find a paper trail" because he billed Secure Rentals for his services using his numbered company. There is affidavit evidence that Shilo had Tiger provide improvements to a Secure Rentals campsite and instructed Tiger employees to carry out maintenance and repairs on Secure Rentals equipment at no charge. As already mentioned, the chambers judge was not told that the Equipment Rental Agreements provide that the lessee (Tiger) is responsible for repairs and maintenance.

[135] The conspiracy allegations against the Weinrich Defendants are largely speculative, based upon suspicion and statements by Shilo. Even if Tiger paid more than the market rate for equipment rentals (estimated at $2 to 3 million) there is no evidence of a real risk of dissipation and removal of assets by Secure 2013 and Secure Rentals sufficient to justify an unlimited *Mareva/*attachment Order. Moreover, Tiger is in possession of the equipment it leases from Secure Rentals and there is no suggestion that the equipment is encumbered.

[136] With respect to the *Anton Piller* Order against Scott Weinrich and Secure Rentals, the plaintiffs submit that they believe that Scott Weinrich may direct the destruction or concealment of corporate records based upon his alleged involvement in the Secure Rentals scheme. As this Court noted in *Catalyst Partners* at paras 34–35, when setting aside an *Anton Piller* order:

> In the circumstances, it is not sufficient that an inference of dishonesty can be drawn from the evidence. The inference of dishonesty, and that there is a 'real possibility' that evidence will be destroyed, must be compelling before the court should presume prospectively that the defendant will do so... The analysis must also lead to the conclusion that an inference of dishonesty, and an inference that the appellants are the type of persons who would destroy evidence, can be drawn from that evidence. Further, given the extraordinary and intrusive nature of the *Anton Piller* remedy, the inference that the appellants would destroy evidence must be strong.

The record with respect to Weinrich Defendants is insufficient to justify the inference that they would destroy documents.

[137] The *Mareva/*attachment Order and *Anton Piller* Orders against the remaining Weinrich Defendants are set aside.

ii. Secure Resources - Anton Piller Order

[138] The *Mareva/*attachment Order against Secure Resources was set aside by a consent order but the *Anton Piller* Order remains.

[139] Shilo and Weinrich are the directors of Secure Resources and each owns 50% of the shares through their respective companies, Sazwan Holdings and Weinrich Holdings. The Statement of Claim alleges that Shilo breached his fiduciary obligations to Tiger by providing to other defendants, including Secure Resources, confidential information regarding mineral leases, which they used to apply for permits on lands adjoining Tiger's mineral leases. Those permits were never granted. It is also alleged that Secure Resources' interests are being furthered in an unspecified manner by confidential information provided to a competitor. No specific loss is alleged to have been suffered by Tiger (or other plaintiffs) as a result of the allegations against Secure Resources.

[140] The evidence with respect to the claims against Secure Resources was limited and the submissions made to the chambers judge with respect to Secure Resources contained some misstatements and overstatements. These include:

a. Paragraph 77 of the Brief states that following the termination of Shilo's employment with Tiger, Shilo and Clark "appear to have become involved in a new company in the Secure Group of Companies – Secure Resources Inc – which appears to be entering a business that will compete with the Companies." However, the related footnote refers to paragraph 87 of

the Nagel Affidavit, which discusses the rental contracts and contains no information regarding Secure Resources.

b. Paragraph 106(b) of the Brief states that Shilo "established a business in direct competition with Tiger, being Secure Resources Inc..."

c. Paragraph 107 of the Brief alleges that Clark breached various non-competition clauses by "advising Shilo with respect to Shilo's involvement in Secure Resources Inc."

[141] While there is some evidence from which it could be inferred that Secure Resources may have received some of Tiger's confidential information (although there is no evidence other than speculation that Secure Resources was the entity that applied unsuccessfully for the permits on lands adjoining Tiger's mineral leases), there does not appear to be any basis for the submission that Secure Resources is competing with Tiger. Secure Resources manufactures sulphur fertilizer. There is no evidence that Tiger is in that business nor is that business included in the definition of the "Business" in Clark Sazwan's Non-Competition Agreement or Unanimous Shareholders' Agreement with which he undertook not to compete.

[142] One of the principal concerns expressed by Secure Resources with respect to the *Anton Piller* Order is that it contains no provisions to protect any of its confidential or commercially sensitive information, particularly in view of the breadth and scope of the searches contemplated in the *Anton Piller* Order. For example, paragraph 23 requires production of all records that "relate to the Defendants ... and the assets and financial records of ... Secure Resources". Paragraph 24 permits a search of "all records that relate to, or may relate to: ... (i) the financial status or affairs of ... Secure Resources ...:; and (j) records or items that are the property of or relate to the business of ...Secure Resources".

[143] The record does not demonstrate that the respondents have suffered any "serious" damage as a result of the alleged misconduct by Secure Resources, which is a requirement to obtain an *Anton Piller* order.

[144] The *Anton Piller* Order against Secure Resources is set aside.

iii. Secure Developments – Mareva/attachment Order

[145] Secure Developments is owned by Shilo (50%) and Weinrich Holdings (50%). Shilo and Weinrich were its directors from 2011 to 2015. The only specific reference in the Statement of Claim to Secure Developments (other than in the style of cause and description of the parties) is paragraph 327(d) where it is alleged to be a party to a conspiracy to carry out and conceal the diversion of secret profits received by Secure Rental, Shilo and Weinrich.

[146] The only substantive reference to Secure Developments in the evidence is the Nagel Affidavit. Nagel states that he believes that Secure Developments "is one of the corporate entities

through which monies generated from entities, such as Secure Rentals, may be conveyed to Shilo." He states that although he has been "unable to determine the business in which Secure Developments Ltd is engaged, based on the very limited records available to me, it appears that Secure Development Inc has generated a fairly significant amount of money in the past". He attached copies of emails relating to the 2013 year-end which are from or refer to Weinrich, Shilo and SVS Group. These statements are dated and the payments occurred before the P49 Group acquired its interest in Tiger.

[147] From the materials it appears that the order against Secure Developments is based on allegations of wrongdoing of various kinds against Shilo, and to a lesser degree Weinrich, and that because they own Secure Developments its assets should be frozen. This evidence does not meet the test for either an attachment order or a *Mareva* injunction and does not justify the freezing of Secure Developments' assets.

[148] Given the paucity of the evidence to support the *Mareva/*attachment order against Secure Developments, it is set aside.

iv. Hu Orders

[149] Hu was employed as an engineer at Tiger from 1997 until October 2016. When he left the company (it is in dispute whether he was terminated or resigned) he was its chief engineer. He was not a party to the Share Purchase Agreement. When the plaintiffs sought the first date for the without notice applications, Hu was still employed by Tiger.

[150] The claims against Hu are that he fraudulently misrepresented material facts about the cost and capability of the Pastille Plant; the availability and financial opportunity related to salt production at the Tiger plant; and breached various contractual and other duties he owed to Tiger with respect to equipment procurement and manufacturing processes.

[151] In addition to the substantive allegations against him, the plaintiffs submitted in their Brief that an *Anton Piller* Order and *Mareva/*attachment Order were justified because he had engaged in the following questionable conduct:

a. In 2010 Hu plead guilty to a strict liability environmental offence of providing false and misleading data for which Tiger was fined $100,000;

b. In March 2015 a lawsuit was commenced against Hu and others in relation to alleged misrepresentations made by Shilo and Andrea on the sale of a property. It was alleged that renovations were performed negligently and that Hu stamped the plans, which exceeded the scope of his expertise as a chemical engineer. The lawsuit was discontinued in early 2017 when an undisclosed settlement was reached between Shilo and the purchasers; and

c. Security footage shows Hu removing a box from Tiger's office on September 4, 2016 while the office was closed and his security clearance was deactivated because he was on medical leave. On the same day Tiger documents were scanned to his work email address. Hu was prevented from removing records from Tiger's office on September 6, 2016. He was employed by Tiger at this time and claimed he was gathering personal items and was taking the records to work from home. When Hu's employment ended on October 25, 2016, he was also prevented from removing materials from his office.

[152] Neither of the first two instances lead to a reasonable inference that Hu would destroy documents or dissipate or conceal assets. A guilty plea to a strict liability environmental offence for which Hu received an absolute discharge, without more, does not indicate that he would destroy documents or conceal assets. Nor does the settlement of a lawsuit, on undisclosed terms.

[153] While the third instance involves allegations that Hu was surreptitiously removing documents, his explanation at the time was that he was removing personal items or taking the records to work at home. Tom Hodson indicated that he believed Hu may have been working at home on occasion and there was no evidence Hu was prohibited from doing so. While the circumstances of Hu's attempts to remove records from Tiger while on medical leave and on the occasion of his termination/resignation are somewhat ambiguous, there is insufficient evidence that supports drawing the necessary "strong inference" that he would destroy evidence to justify the granting of the *Anton Piller* Order.

[154] To support the *Mareva/*attachment Order, the plaintiffs alleged that between 2012 and 2014 Hu and another party purchased properties cumulatively valued at $3 million with down payments of $453,250. At that time Hu was earning $140,000 per year. The plaintiffs submit that this evidence and the unexecuted loan agreement support the inference that Hu may have wrongfully and unlawfully directed funds from Tiger.

[155] All three properties were purchased with another individual. In the absence of any information about Hu's financial circumstances (beyond his salary) or those of the other individual, it is not reasonable to infer that these property transactions suggest that Hu was diverting Tiger resources.

[156] There is no evidence that Hu was dealing with his assets other than in the ordinary course or that he will dispose of, dissipate or conceal his assets. In some cases of alleged fraud, even in the absence of such evidence, courts have been prepared to draw an inference from all of the circumstance, including the circumstance of the fraud itself, that there is a serious risk that a defendant will attempt to dissipate assets or put them beyond the reach of the plaintiffs: *1773907 Alberta Ltd v Davidson*, 2016 ABQB 2 at paras 81–83, [2015] AJ No 1463 (QL). The evidence regarding the misrepresentations alleged to have been made by Hu and his other conduct while a Tiger employee is not sufficient to justify drawing the inference in this case.

[157] The *Anton Piller* Order and *Mareva/*attachment Order against Hu are set aside.

v. 179 – Mareva/attachment Order

[158] 179 is a corporation owned equally by Shilo and Andrea, of which Shilo is the sole director. It is mentioned only twice in the Statement of Claim, once in the description of the parties (para 20) and again in paragraph 327 in which a general allegation of conspiracy in respect of which no specific particulars as against 179 were plead.

[159] The mention of 179 in the Brief was the description of the parties that identified Shilo as 179's director and 50% shareholder (para 15) and the statement that the plaintiffs believe that Shilo has possession and control of the records of 179 and may destroy or conceal 179's incriminating records. No mention was made of 179 in the submissions to the chambers judge.

[160] The evidence in respect of 179 included:

a. Penton deposed that Shilo told him he made up a phony bill of sale for Tiger to sell a bobcat and pickup truck to Shilo's numbered company, which he believes may be 179, which were leased to Secure Rentals which leased them back to Tiger, that there is no paper trail between him and Secure Rentals and that he billed Secure Rentals using his numbered company;

b. Nagel provided information regarding the 179 corporate search results which indicates that the registered office of 179 and business address of Secure Rentals and Secure Resources is a two-storey building located at a specified address in Edmonton and states that he believes that the business and corporate record of 179 would be located at the All-Type Office Services office located in the same building. He also stated that Penton told him that Shilo told him that his means of getting money out of Secure Rentals was by sending invoices for "services rendered from his numbered company to Secure Rentals"; and

c. Schwartz stated that he became aware when drafting a lease agreement for Shilo's personal vehicle from 179 that 179 had the same address as Secure Rentals.

[161] 179 was subject to the unlimited *Mareva/*attachment Order. No *Anton Piller* Order was granted in respect of any location in which 179 was identified as the Possessor, however, the *Anton Piller* Order granted in respect of the other defendants and the third parties required production of any records that relate to 179's "assets and financial records" (*Anton Piller* Order, para 23), "Shilo's involvement, direct or indirect" in 179 (*Anton Piller* Order, para 24(g)), "any payments or financial benefits received by Clark, Shilo, or any of the Defendants directly or indirectly" from 179 (*Anton Piller* Order, para24(h)), " the financial status or affairs" of 179 (*Anton Piller* Order, para 24(i)) and "records or items that are the property of or relate to the business of" 179 (*Anton Piller* Order, para 24(j)).

[162] The record before the chambers judge with respect to 179 was not sufficient to establish a strong *prima facie* case or reasonable likelihood that the claim of conspiracy against 179 would be established, without considering the evidence in respect of Shilo. To the extent that 179 was an entity controlled by Shilo who conceded for the purpose of this appeal that the evidence on the record was capable of meeting the test for a *Mareva* injunction against him, the *Mareva/*attachment Order against 179 and Shilo will be dealt with in the same fashion, as outlined below.

g. Shilo - Mareva/attachment Order and Anton Piller Order

[163] Shilo conceded for the purpose of this appeal that there was evidence capable of meeting the test for a *Mareva*/attachment order and *Anton Piller* order with respect to him. However, he sought to have the orders set aside because they were granted without due consideration or balancing of his interest and failed to adequately consider and impose terms to mitigate potential damage to him as a result.

[164] *Anton Piller* orders, attachment orders and *Mareva* injunctions granted without notice which are obtained without full candour and which overreach will not necessarily be set aside on review or appeal: *Peters* at para 11. However, that may be the appropriate remedy in some cases having regard to the overall circumstances. This is such a case as a result of the concerns outlined above regarding: the process followed by the plaintiffs; the delays; the disclosure issues; the overreaching aspects of the *Mareva/*attachment Order; the failure to comply with the statutory requirements in the *Civil Enforcement Act*; the unjustified Third Party *Anton Piller* Orders; the overbreadth of the *Anton Piller* Orders; the lack of differentiation amongst the defendants; and the failure to take appropriate account of the legitimate interests of the defendants on a without notice application.

[165] The *Anton Piller* Order and *Mareva/*attachment Order against Shilo and 179 are also set aside.

C. General Comments

[166] This appeal raises issues relating to the temporal scope of without notice *Mareva* injunctions and *Anton Piller* orders and the evidence that can be adduced on an application to continue an order granted without notice or on a review application made pursuant to rule 9.15(1)(a).

a. Temporal Scope of the Orders

[167] Sharpe states that injunctions granted without notice are "typically made for a strictly limited time" and cites appellate authority for the proposition that "in no case" should the order be for an unlimited period but rather should be "limited to the shortest possible time so that notice can be given to the parties affected by it" (emphasis added). Further, "the moving party is required to

notify the affected party and to bring a further motion to have the injunction continued ... [and] … [t]he party affected ... is entitled to present its case after receiving notice of the order, either by way of motion to set aside the *ex parte* order, or on the hearing of the motion to continue" it: ¶2.25.

[168] Absent exceptional circumstances, the 21-day limit in the *Civil Enforcement Act* for a without notice application is also an appropriate temporal guideline for without notice *Mareva* injunctions. As to *Anton Piller* orders, the "shortest possible time" should be granted.

[169] The onus at the hearing to continue an order granted without notice is on the party who brought the original application to demonstrate that the injunction should continue; the without notice injunction does not create a *status quo* that shifts the onus to the party enjoined: *Catalyst Canada Services LP v Catalyst Changers Inc*, 2013 ABQB 73 at para 32, 560 AR 22.

b. Permissible Evidence on an Application to Maintain or Set Aside an Order Obtained Without Notice

[170] A party against whom an order without notice has been granted can bring an application to set aside or vary the order prior to its expiry pursuant to rule 9.15(1)(a).

[171] It is self-evident that the enjoined party (which had no opportunity to present evidence because it was not given notice) is at liberty to file evidence and cross-examine the original applicant's deponents. The question is whether the original applicant is entitled to supplement the record and adduce the fruits of the injunction to bolster its position to continue the order or defend against.

[172] As a starting point, a chambers judge's decision to admit new evidence from the original applicant is a matter of discretion: *Marcil v Ellefson*, 2014 ABCA 169 at para 8, 575 AR 189.

[173] The general rule is that these applications are heard *de novo*. In "most cases, it is appropriate to treat an application to set aside an *ex parte* order as a new application for the same order, without any restriction on the type of evidence the party with the benefit of the order may produce in its support": *Marcil* at para 23.

[174] The party moving to set the order aside is also entitled to give new evidence "which establishes some legal bar to granting the order. And the order can also be set aside if the original evidence failed to disclose material facts, given the duty of good faith lying upon anyone making an *ex parte* application": *Hansraj v Ao*, 2004 ABCA 223 at para 84, 354 AR 91.

[175] The appellants contended that an appeal has the advantage of being a review limited to the record before the court that granted the initial application, which enables the reviewing court to properly consider whether the order had been appropriately granted on the record. In our view a chambers judge hearing the variation application has the discretion to use this approach if circumstances warrant it.

[176] Attempts by the original applicant to bootstrap the record by putting in additional evidence that was available at the time of the initial without notice application should be treated with caution. As noted earlier in these reasons, the duty to present all evidence, including available defences, means that such evidence should have formed part of the original application. That said, the "fruits of the search" have been considered on applications to review an *Anton Piller* Order: *Peters* at para 8. Whether that approach is inappropriate in the circumstances of a particular case is a matter to be considered by the chambers judge on such an application.

VII. Conclusion

[177] Having regard to all of the circumstances, the Orders are unreasonable and are set aside (with two exceptions) for the following reasons:

a. the failure on the part of the respondents and their counsel to satisfy their duty of candour;

b. the overreaching nature of the *Mareva/*attachment Order, including its failure to address the statutory requirements in the *Civil Enforcement Act* without reason or justification;

c. the overreaching terms of the *Anton Piller* Orders which go well beyond what could be reasonably needed and authorize intrusive searches of third party premises without demonstrated need and the homes and businesses of the defendants without reasonable limitations or providing appropriate protection;

d. the respondents' failure to proceed in a timely fashion when seeking equitable relief without notice; and

e. the record does not demonstrate that there was justification to grant attachment orders, *Mareva* injunctions or *Anton Piller* orders against most of the defendants.

[178] Third parties enjoined by the *Anton Piller* Orders did not appeal, nor did Clark Sazwan, Denise Sazwan and Smokey Creek. In the case of the Third Party *Anton Piller* Orders, it was the defendants whose documents were subject to seizure and those orders can be set aside by virtue of their appeals.

[179] While Clark Sazwan, Denise Sazwan and Smokey Creek did not appeal and instead are proceeding with set aside applications in the Court of Queen's Bench, they were granted status to participate as respondents on this appeal. Because the broad scope of the *Anton Piller* Orders authorized seizure of documents which may relate to other defendants and to matters not covered by the litigation, it is appropriate to set aside the *Anton Piller* Order against Clark Sazwan as well.

[180] Clark Sazwan and Smokey Creek did not appeal the *Mareva/*attachment Order and, as a result, that order remains as against them, to be dealt with in their set aside application having regard to these reasons.

[181] The Supervising Solicitors are directed to return the documents seized to the parties from whom they were seized or their counsel. The appellants, Clark Sazwan and Smokey Creek, must discharge their obligation to produce an affidavit of records listing all relevant and material documents that were seized under the *Anton Piller* Orders: see generally *Catalyst Partners* at para 36.

[182] The parties are at liberty to submit written representations regarding costs, not to exceed ten pages, within 60 days.

Appeal heard on June 7, 2017

Reasons filed at Edmonton, Alberta
this 18th day of October, 2017

Strekaf J.A.

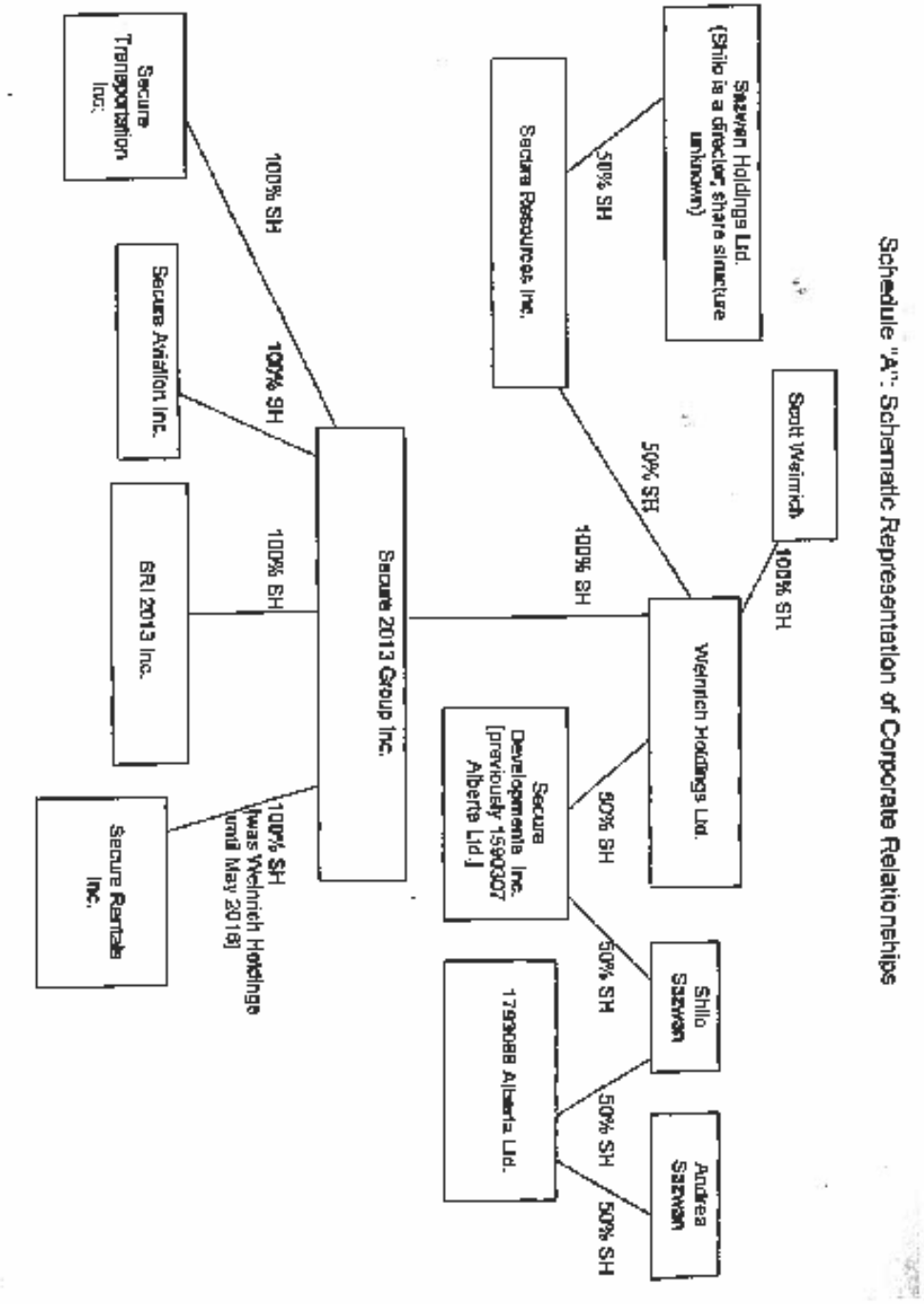
I concur:

Berger J.A.

I concur:

McDonald J.A.

SCHEDULE A



Appearances:

A.Z. Breitman and J.J. Bourchier
for the Respondents Tiger Calcium Services Inc. and others

M.J. Hewitt and K.A. Maw
for the Appellant/ Respondent Shilo Sazwan and others

M.A. Pruski and S.B. Bachelet
for the Appellant/ Respondent Lianguang Hu aka Stephen Hu

M.A. Wolowidnyk and M.A.A. Shepherd
for the Appellants/ Respondent Scott Weinrich and others

E.C. Duffy
for the Appellants/Respondents Secure 2013 Group Inc and Secure Development and others

W.E.B. Code, Q.C. and A.M. Cooper
for the Respondents Clark Sazwan and others

TAB 8

Court of Queen's Bench of Alberta

Citation: AARC Society (Alberta Adolescent Recovery Centre) v Sparks, 2019 ABQB 87

Date: 20190225
Docket: 1101 06250
Registry: Calgary

Between:

AARC Society (Alberta Adolescent Recovery Centre)

Applicant

- and -

Amy Sparks, Brian Fish, The CBC, Gillian Findlay Tammi Brown and Greg Elliott

Respondents

Corrected judgment: A corrigendum was issued on February 27, 2019; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision of the Honourable Madam Justice Nancy F. Dilts (Delivered Orally on January 28, 2019)

Introduction

[1] The Plaintiff AARC filed an application seeking an order:

(a) requiring Brown and Elliott, non-parties to the action, to attend questioning to disclose what AARC records they reviewed, who they received them from and what has been done with those records;
(b) prohibiting and restraining Brown and Elliott from using any confidential and proprietary information belonging to AARC;
(c) requiring Brown and Elliott to return all property belonging to AARC, including all confidential and/or proprietary information or copies thereof, and any devices upon which such information is copied or stored that is in their possession or control; and
(d) requiring Brown and Elliott to permanently remove all online references or postings referencing the confidential and/or proprietary information belonging to AARC.

[2] In argument before me, counsel for AARC narrowed its request and advised that AARC seeks a Norwich order to require Elliott and Brown to properly inform themselves and attend at questioning by the Plaintiff.

Position of the Applicant

[3] This litigation was commenced in 2011 and is scheduled for 9 days of trial commencing April 2019.

[4] AARC alleges that 35,000 – 40,000 pages of its confidential and proprietary information was wrongly accessed, taken and disseminated by the Defendants (the "AARC Confidential Information").

[5] It further alleges that Elliott and Brown are in possession of some of the AARC Confidential Information as evidenced by postings made by them on public online sites and attached as Exhibits to the Affidavit of James Ironside sworn January 3, 2019.

[6] AARC argues that as (to the best of its knowledge) the Defendants are the only people outside of AARC that have the AARC Confidential Information, it must follow that Elliott and Brown received the AARC Confidential Information from one or more of the Defendants.

[7] AARC says that as part of the Action against the Defendants, it needs to determine from Elliott and Brown how they received the AARC Confidential Information and what they have done with it. Its interest in doing so, it argues, is to trace and preserve its records and to challenge the credibility of the Defendants, each of who deny providing the AARC Confidential Information to Elliott and Brown.

[8] AARC argues that the interests of justice favour that the Court grant a Norwich order. As Elliott and Brown are hostile witnesses, it says it is unrealistic to expect that either would voluntarily cooperate with inquiries from it as to how they came to be in possession of the AARC Confidential Information.

[9] Counsel for AARC says that while it may have been possible to bring this application earlier in the litigation, the fact that it brings it now should not raise concerns as the Defendants have produced new information as recently as this month and questioning is not yet completed. It argues that it does not lie in the Defendants' mouths to argue prejudice arising from the late timing of this application.

Position of the Respondents Sparks, Fish, CBC and Findlay

[10] The Respondents Sparks, Fish, CBC and Finlay were effectively of one voice in resisting the application of AARC. They argue that as a Norwich order is an equitable remedy, their interests must also factor into the Court's consideration.

[11] Their argument against the Norwich order is threefold: first, they say that the issue of Brown and Elliott's access to and use of the AARC Confidential Information is irrelevant to the proceedings against the Defendants.

[12] Second, they say AARC is late in making this application. They say AARC had knowledge much earlier than now of Elliott and Brown's use of the AARC Confidential Information. To raise this issue now puts at risk the parties' readiness for trial.

[13] Third, they say a Norwich order is not intended to boost the trial process. They say that if the Plaintiff wants to challenge the credibility of the Defendants, it can do so at trial by subpoenaing witnesses and through cross examination. Furthermore, they say that as there is no property in a witness, counsel for AARC could try to obtain the information it seeks in other ways.

Position of the Respondents Brown and Elliott

[14] To avoid any contravention of the implied undertaking rule, counsel for AARC did not provide the Ironside Affidavit to the Respondents Brown and Elliott prior to this matter being argued in chambers on January 17, 2019.

[15] When the application was heard, all counsel waived any concern that sharing the Ironside Affidavit would breach the implied undertaking rule. Counsel for AARC therefore agreed to provide Brown and Elliott with a copy of the Affidavit.

[16] Although invited to make submissions at the hearing on January 17, 2019, as neither Elliott nor counsel for Brown had the benefit of reviewing the Ironside Affidavit, they were invited to make additional submissions this morning.

Evidence

[17] The evidence in the Ironside Affidavit establishes the following:

- AARC has tried to determine how Elliott and Brown came into possession of the AARC Confidential Information since as early as January 2012.
- By September 5, 2018, AARC was asserting that Fish provided certain of the AARC Confidential Information to Elliott.
- Each Fish, Sparks and Finlay stated under oath that he/she did not provide the AARC Confidential Information to Elliott or Brown. The Fish denial is recorded in questioning that took place on November 12, 2015 and November 20, 2018. The Sparks denial is recorded in questioning that took place on January 5, 2012 and November 30, 2018. The Finlay denial is recorded in questioning that took place on July 10, 2017.
- Brown was in contact with the CBC in March 2009.
- In September 2011 and January 2017, Brown appears to have published on public websites a document that forms part of the AARC Confidential Information.

- Elliott published information that appears in the AARC Confidential Information in September 2011 and June and July 2012. Recent online activity involving Elliott in 2018 includes what appears to be the publication of certain of the AARC Confidential Information and online discussions involving the Defendants Fish and Sparks.

[18] By a review of the online dialogue included in the Ironside Affidavit, it is reasonable to conclude that Elliott and Brown are highly unlikely to voluntarily cooperate with inquiries from AARC or its counsel. In reaching this conclusion, I refer to the materials at Exhibits 6, 7, 8, 9, 11 and 12 of the Ironside Affidavit.

The Issue

[19] The issue then is whether in these circumstances, AARC should be entitled to question Elliott and Brown under a Norwich order.

The Law

[20] A Norwich order is a form of pre-trial discovery grounded in equity: *A.B. v C.D.*, 2008 ABCA 51.

[21] To obtain a Norwich order, the applicant must demonstrate that there is a legitimate purpose for the discovery: *GEA Group AG v Ventra Group Co.*, 2009 ONCA 619 para 91. A legitimate purpose for the discovery has included i) the identification of a wrongdoer; ii) the evaluation of whether a cause of action exists; iii) to plead a known cause of action; iv) to trace assets; and v) to preserve evidence or property.

[22] In its most common form, a Norwich order is available to an aggrieved party who cannot identify its wrongdoer and who seeks to obtain information from third parties that might assist in identifying the wrongdoer so that it can commence litigation against that wrongdoer. Norwich orders are also used to find and preserve evidence and to trace and preserve assets: *ATB v Leahy*, 2000 ABQB 575.

[23] An application for a Norwich order can be brought either prior to litigation being commenced or within existing litigation.

[24] In *ATB v. Leahy*, *supra* the Court observed that as an equitable remedy, the application of the Norwich order must continue to evolve.

[25] Not surprising, then, litigants have used Norwich orders in the on-line context to obtain the identity of internet users. In a number of recent cases, parties have brought applications against internet service providers to compel the ISP to disclose the identity of internet users in the face of allegations of i) unlawfully sharing music files, ii) publishing anonymous and allegedly defamatory material, iii) anonymously defrauding others, or iv) allegedly infringing a copyright: see *Google Inc. v Equustke Solutions Inc.*, [2017] 1 SCR 824 and *BMG Canada Inc. v John Doe*, 2005 FCA 193; *York University v Bell Canada Enterprises* , 2009 CanLII 46447 (OSC); *Straka v Humber River Regional Hospital*, 2000 CanLII 16979 (OCA).

[26] In the evolution of the Norwich order, there appear to be two broad principles underlying its availability in an action: first, that a third party against whom an order is sought has an equitable duty to assist the applicant in pursuing its rights: *Norwich Pharmacal Co. v Commrs.*

of Customs and Excise, [1974] AC 133 (HL). And second, that a Norwich order should be available to enable justice to be done.

[27] The test to be met to obtain a Norwich order was summarized by the Alberta Court of Queen's Bench in *ATB v Leahy, supra* and was recently articulated by the Supreme Court of Canada in *Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38 at para 18:

> Originally cast as an equitable bill of discovery (*Norwich; Glaxo Wellcome PLC v M.N.R.*, 1998 CanLII 9071 (FCA), [1998] 4 F.C. 439 (C.A.)), a *Norwich* order is a type of pre-trial discovery which, inter alia, allows a rights holder to identify wrongdoers (*Alberta (Treasury Branches) v Leahy*, 2000 ABQB 575 (CanLII), 270 A.R. 1, at para. 59, aff'd 2002 ABCA 101 (CanLII), 303 A.R. 63). The elements of the test for obtaining a *Norwich* order (although sometimes described as "factors" to be considered (*Leahy* (Q.B.), at para. 106)), are not in dispute before us. A [party seeking the order] must show:
>
> (a) [a *bona fide* claim] against the unknown alleged wrongdoer;
>
> (b) the person from whom discovery is sought must be in some way involved in the matter under dispute, he must be more than an innocent bystander;
>
> (c) the person from whom discovery is sought must be the only practical source of information available to the applicants;
>
> (d) the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in addition to his legal costs;
>
> (e) the public interests in favour of disclosure must outweigh the legitimate privacy concerns. [Emphasis added.]
>
> (see *BMG Canada Inc. v John Doe*, 2005 FCA 193 (CanLII), [2005] 4 F.C.R. 81, at paras. 15 and 32, quoting *BMG Canada Inc. v John Doe*, 2004 FC 488 (CanLII), [2004] 3 F.C.R. 241, at para. 13; *Voltage Pictures LLC v John Doe*, 2015 FC 1364, at para. 37 (CanLII); see also *Voltage Pictures LLC v John Doe*, 2014 FC 161 (CanLII), [2015] 2 F.C.R. 540, at para. 45)

[28] The use of the Norwich order received relatively recent comment from the Alberta Court of Appeal in the 2008 decision of *A.B. v C.D., supra.* The Court of Appeal stressed that caution must be used in considering an application for a Norwich order:

> It must be remembered that the Norwich order – like other forms of pre-trial discovery or execution processes – has been considered somewhat draconian in effect: *Design Group Staffing Inc. v Fierlbeck*, [2006] A.J. No. 538 at para 8 per Slatter J (as he then was). Therefore, the discretion to grant such orders must be exercised cautiously. (para 15)

[29] The Alberta Court of Appeal expressly states that a Norwich order is not intended to be used to circumvent the normal discovery process in litigation.

[30] In *A.B. v C.D., supra*, amid allegations of fraud against the respondent, the appellant sought a Norwich order to require several financial institutions to provide the respondent's banking records. In addition, the appellant sought an order to require those financial institutions

to provide the banking records of nine other individuals who were not parties to the action. There was no evidence that the banking records were at risk of destruction or disappearance. The Appellant argued that the information was necessary to confirm the suspected fraud and its extent.

[31] In denying the appeal, the Alberta Court of Appeal quoted the decision of the Chambers judge with approval:

> This application departs considerably from the original Norwich situation: here, the plaintiff has started proceedings against the defendant, whom it clearly considers to be the ultimate wrongdoer, and is entitled to standard discovery of that party. The financial records of the defendant, to which the plaintiff is entitled under standard discovery processes, are likely to supply to the plaintiff any additional fact "crucial to the proper allegation" of the defendant's liability. In other words, here the plaintiff/applicant does not require equitable discovery. (para 16).

[32] Based on the decision of the Alberta Court of Appeal in *A.B. v. C.D.*, while a Norwich order as an equitable remedy is to remain flexible, it continues to be regarded an exceptional remedy.

Decision

[33] Turning then to the case at hand, I am satisfied that a Norwich order should not be granted in the circumstances before me because there is not a legitimate purpose for the discovery.

[34] AARC does not seek a Norwich order to uncover the identity of its alleged wrongdoers – those alleged wrongdoers are known. AARC chose to commence proceedings against these particular Defendants.

[35] Furthermore, AARC does not seek a Norwich order to evaluate a cause of action or to trace and preserve assets. Based on the history of questioning in this litigation, AARC has long been aware of Elliott and Brown's involvement in the on-line dialogue involving certain of the AARC Confidential Information. Had AARC been concerned with the preservation of its information, it would have taken action years ago to protect against the alleged misuse of the AARC Confidential Information by Elliott and Brown.

[36] Elliott and Brown are no more than witnesses with potential knowledge of the actions or inactions of the Defendants.

[37] While AARC is undoubtedly correct in concluding that Brown and Elliott are unlikely to cooperate with it in its pursuit of answers regarding the Defendants' use of the AARC Confidential Information, frankly, that does not place AARC in a unique position. Litigants often face uncooperative or hostile witnesses and there are accommodations in the rules of evidence to allow for those very circumstances.

[38] I am satisfied that the driving force behind this application is to obtain evidence that would discredit the Defendants. AARC has offered no other credible purpose for pursuing a Norwich order at this very late stage of the litigation – in essence on the eve of trial. With

respect, I cannot agree that this is a legitimate use of an equitable discovery tool or that the public interest favours granting a Norwich order in this context.

[39] A Norwich order is not to be used by a party in an effort to generate different information than what has already been testified to by the Defendants in discovery. A Norwich order is not a tool by which a litigant can test, affirm or disprove the evidence of the Defendants. That is the purpose of a trial.

[40] If, however, I am wrong in reaching this conclusion, I am similarly satisfied that AARC fails to meet the test for a Norwich order as expressed in the *ATB v Leahy* case and in *Rogers Communications, supra*. Looking at the elements of the test, I am not satisfied that the Elliott and Brown are the only sources of the information sought. In fact, the question to which AARC seeks further answer has been asked and answered of the Defendants – whether they are the people who shared the AARC Confidential Information with Elliott and Brown. While AARC is dissatisfied with the answer and doesn't accept it to be true, that does not then entitle them to equitable discovery of Elliott and Brown.

[41] The Plaintiff's application is dismissed.

Heard on the 17th day of January, 2019. Decision delivered orally on the 28th of January, 2019.
Dated at the City of Calgary, Alberta this 25th day of February, 2019.

Nancy F. Dilts
J.C.Q.B.A.

Appearances:

Grant N. Stapon, QC and Cathy Lane-Goodfellow, QC
for the Plaintiff- AARC Society

Matthew A. Woodley
for the Defendants CBC and Gillian Findlay

Michael MacIsaac
for the Defendant- Brian Fish

Dale Ellert
for the Defendant- Tammi Brown

Erika Norheim
for the Defendant- Amy Sparks

Greg Elliott- self represented

Corrigendum of the Reasons for Decision
of
The Honourable Madam Justice Nancy F. Dilts

Page 1- Citation has been changed.

TAB 9

CANADA

CONSOLIDATION

CODIFICATION

Bank Act

Loi sur les banques

S.C. 1991, c. 46

L.C. 1991, ch. 46

Current to November 27, 2023

Last amended on June 30, 2023

À jour au 27 novembre 2023

Dernière modification le 30 juin 2023

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a bank is, on the acquisition of that warehouse receipt or bill of lading, vested with all the right and title of the owner of the goods, wares and merchandise, subject to the right of the owner to have the same re-transferred to the owner if the debt or liability, as security for which the warehouse receipt or bill of lading is held by the bank, is paid.

Possessor

(2) For the purposes of this section, a person shall be deemed to be the possessor of goods, wares and merchandise, or a bill of lading, receipt, order or other document,

(a) who is in actual possession thereof; or

(b) for whom, or subject to whose control the goods, wares and merchandise are, or bill of lading, receipt, order or other document is, held by any other person.

Regulations — aircraft objects

436.1 (1) The Governor in Council may make regulations respecting the application of sections 426 to 436 to aircraft objects, including regulations

(a) removing classes of aircraft objects from the application of those sections or reinstating their application to those classes of aircraft objects; and

(b) eliminating rights and powers acquired under those sections in relation to aircraft objects.

Definition of *aircraft objects*

(2) In subsection (1), *aircraft objects* has the same meaning as in subsection 2(1) of the *International Interests in Mobile Equipment (aircraft equipment) Act*.

2005, c. 3, s. 10.

Deposit Acceptance

Deposit acceptance

437 (1) A bank may, without the intervention of any other person,

(a) accept a deposit from any person whether or not the person is qualified by law to enter into contracts; and

(b) pay all or part of the principal of the deposit and all or part of the interest thereon to or to the order of that person.

la banque est, dès l'acquisition du récépissé d'entrepôt ou du connaissement, investie du droit et du titre du propriétaire des effets, denrées ou marchandises, sous réserve du droit du propriétaire de se les faire rétrocéder en honorant la dette ou l'obligation en garantie de laquelle la banque détient le récépissé d'entrepôt ou le connaissement.

Possesseur

(2) Pour l'application du présent article, est réputée possesseur des effets, denrées ou marchandises ou d'un connaissement, reçu, ordre ou autre document toute personne :

a) qui en a la possession réelle;

b) pour le compte de qui une tierce personne détient les effets, denrées ou marchandises ou le connaissement, reçu, arrêté ou autre document.

Règlement — biens aéronautiques

436.1 (1) Le gouverneur en conseil peut, par règlement, régir l'application des articles 426 à 436 aux biens aéronautiques, et notamment :

a) soustraire toute catégorie de biens aéronautiques à l'application de ces articles ou rétablir leur application à son égard;

b) supprimer les droits et pouvoirs acquis sous le régime de ces articles relativement aux biens aéronautiques.

Définition de *biens aéronautiques*

(2) Au paragraphe (1), *biens aéronautiques* s'entend au sens du paragraphe 2(1) de la *Loi sur les garanties internationales portant sur des matériels d'équipement mobiles (matériels d'équipement aéronautiques)*.

2005, ch. 3, art. 10.

Dépôts

Dépôts

437 (1) La banque peut, sans aucune intervention extérieure, accepter un dépôt d'une personne ayant ou non la capacité juridique de contracter de même que payer, en tout ou en partie, le principal et les intérêts correspondants à cette personne ou à son ordre.

Exception

(2) Paragraph (1)(b) does not apply if, before payment, the money deposited in the bank pursuant to paragraph (1)(a) is claimed by some other person

(a) in any action or proceeding to which the bank is a party and in respect of which service of a writ or other process originating that action or proceeding has been made on the bank, or

(b) in any other action or proceeding pursuant to which an injunction or order made by the court requiring the bank not to make payment of that money or make payment thereof to some person other than the depositor has been served on the bank,

and, in the case of any such claim so made, the money so deposited may be paid to the depositor with the consent of the claimant or to the claimant with the consent of the depositor.

Execution of trust

(3) A bank is not bound to see to the execution of any trust to which any deposit made under the authority of this Act is subject.

Payment when bank has notice of trust

(4) Subsection (3) applies regardless of whether the trust is express or arises by the operation of law, and it applies even when the bank has notice of the trust if it acts on the order of or under the authority of the holder or holders of the account into which the deposit is made.

1991, c. 46, s. 437; 2001, c. 9, s. 111.

Unclaimed Balances

Unclaimed balances

438 (1) Where

(a) a deposit has been made in Canada that is payable in Canada and in respect of which no transaction has taken place and no statement of account has been requested or acknowledged by the creditor during a period of 10 years

(i) in the case of a deposit made for a fixed period, from the day on which the fixed period terminated, and

(ii) in the case of any other deposit, from the day on which the last transaction took place or a statement of account was last requested or acknowledged by the creditor, whichever is later, or

Exception

(2) Le paragraphe (1) ne s'applique pas en ce qui concerne le paiement qui y est prévu si, avant le paiement, les fonds déposés auprès de la banque conformément à ce paragraphe sont réclamés par une autre personne :

a) soit dans le cadre d'une action ou autre procédure à laquelle la banque est partie et à l'égard de laquelle un bref ou autre acte introductif d'instance lui a été signifié;

b) soit dans le cadre de toute autre action ou procédure en vertu de laquelle une injonction ou ordonnance du tribunal enjoignant à la banque de ne pas verser ces fonds ou de les verser à une autre personne que le déposant a été signifié à la banque.

Dans le cas d'une telle réclamation, les fonds ainsi déposés peuvent être versés soit au déposant avec le consentement du réclamant, soit au réclamant avec le consentement du déposant.

Exécution d'une fiducie

(3) La banque n'est pas tenue de veiller à l'exécution d'une fiducie à laquelle est assujetti un dépôt effectué sous le régime de la présente loi.

Application du paragraphe (3)

(4) Le paragraphe (3) s'applique que la fiducie soit explicite ou d'origine juridique et s'applique même si la banque en a été avisée si elle agit sur l'ordre ou sous l'autorité du ou des titulaires du compte dans lequel le dépôt est effectué.

1991, ch. 46, art. 437; 2001, ch. 9, art. 111.

Soldes non réclamés

Versement à la Banque du Canada

438 (1) Au plus tard le 31 décembre de chaque année, la banque verse à la Banque du Canada le montant du dépôt ou de l'effet en cause, plus éventuellement les intérêts calculés conformément aux modalités y afférentes, dans les situations suivantes :

a) un dépôt payable au Canada y a été fait et, pendant une période de dix ans, il n'a fait l'objet d'aucun mouvement — opération, demande ou accusé de réception d'un état de compte par le déposant —, le point de départ de cette période étant l'échéance du terme, dans le cas d'un dépôt à terme, ou, dans le cas de tout autre dépôt, la date de la dernière opération ou, si elle est postérieure, celle de la dernière demande ou du dernier accusé de réception d'un état de compte;