Court File No. CV-18-608271-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

GARY STEVENS, LINDA STEVENS and 1174365 ALBERTA LTD.

Applicants

– and –

SANDY HUTCHENS, also known as SANDY CRAIG HUTCHENS, also known as S. CRAIG HUTCHENS, also known as CRAIG HUTCHENS, also known as MOISHE ALEXANDER BEN AVROHOM, also known as MOISHE ALEXANDER BEN AVRAHAM, also known as MOSHE ALEXANDER BEN AVROHOM, also known as FRED HAYES, also known as FRED MERCHANT, also known as ALEXANDER MACDONALD, also known as MATHEW KOVCE, also known as ED RYAN, and TANYA HUTCHENS, also known as TATIANA HUTCHENS, also known as TATIANA BRIK, also known as TANYA BRIK-HUTCHENS

Respondents

BOOK OF AUTHORITIES OF THE APPLICANTS
(Motion to Appoint a Receiver returnable February 28, 2019)

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Cases

1. *Weig v. Weig*, 2012 ONSC 7262,

2. *Aly v. Tohamy*, 2013 ONSC 7738

3. *Miller v. Debartolo-Taylor*, 2015 ONSC 5465

4. *Carmen Alfano Family Trust v. Piersanti*, 2011 ONSC 4971

5. *Loblaw Brands Ltd. v. Thornton* [2009] O.J. No. 1228 (S.C.J.)

6. *Continental Casualty Co. v. Symons*, 2016 ONSC 4555

7. *Akagi v. Synergy Group (2000) Inc*., 2015 ONCA 368

8. *Chevron Corp. v. Yaiguaje*, 2015 SCC 42

9. *Mongolia v. Taskin*, 2011 ONSC 6083, aff'd 2012 ONCA 220

10. *Bank of Mongolia v. Taskin*, 2012 ONCA 220

11. *Continental Casualty Co. v. Symons*, 2015 ONSC 6394

12. *Oz Optics Ltd. v. Dimensional Communications Inc*., [2004] O.J. No. 4543

13. *Four Embarcadero Center Venture v. Mr. Greenjeans Corp* (1988), 64 O.R. (2d) 746 (H.C.J.)

14. *Arrowmaster Inc. v. Unique Forming Ltd*. (1993), 17 O.R. (3d) 407 (Gen. Div.)

15. *Blizzard v. Simpson*, 2012 ONSC 4312

16. *Disney Enterprises Inc. v. Click Enterprises Inc*. (2006), 267 D.L.R. (4th) 291 (Ont. S.C.J.)

17. *Johnson & Johnson Finance Corp. v. Kavoussi Estate*, 2014 ONSC 2600

TAB 1

2012 ONSC 7262
Ontario Superior Court of Justice [Commercial List]

Weig v. Weig

2012 CarswellOnt 16525, 2012 ONSC 7262, [2012] O.J. No. 6092, 224 A.C.W.S. (3d) 338

Matvei Weig, Applicant and Roman Weig, Leib Broner, Lev Spitzin, Benjamin Finkelstein, 2014210 Ontario Ltd. c.o.b. Deluxe International Group, 2014052 Ontario Ltd. c.o.b. Deluxe Windows of Canada, 2014213 Ontario Ltd. c.o.b. Oakwood Fine Products, 1275330 Ontario Ltd., 973590 Ontario Ltd., Cleidons Deluxe Doors Inc., Cleidons Deluxe Windows Inc., Deluxe Developments International Inc., Deluxe Window Industries Inc., Deluxe Windows International Inc., Riz Management Inc., Royal Deluxe Profiles Limited, 1321867 Ontario Ltd., Northview Windows & Doors Inc., Evrica Enterprises Inc., Pride Windows and Doors Inc., 976017 Ontario Ltd., Floating Residence Inc., Oakwood Architectural Lumber Inc., Shrimp Deluxe Ltd., Vildrom Construction Ltd., Vimach Delux Arches Inc., Riga-22 Weg, LLC, MTI Ltd., California Deluxe Windows Industries, Inc., Wrought Iron Art Ltd., Royal Deluxe Windows International, Inc. (U.S.), Stone Mason and Architectural Carvers Creators Ltd., Roman W. Marketing and 1273268 Ontario Ltd., Respondents

Sofia Weig and Faina Prupes, Applicants and Matvei Weig, Roman Weig, Leib Broner, Lev Spitzin, Benjamin Finkelstein, 2014210 Ontario Ltd. c.o.b. Deluxe International Group, 2014052 Ontario Ltd. c.o.b. Deluxe Windows of Canada, 2014213 Ontario Ltd. c.o.b. Oakwood Fine Products, 1275330 Ontario Ltd., 973590 Ontario Ltd., Cleidons Deluxe Doors Inc., Cleidons Deluxe Windows Inc., Deluxe Developments International Inc., Deluxe Window Industries Inc., Deluxe Windows International Inc., Riz Management Inc., Royal Deluxe Profiles Limited, 1321867 Ontario Ltd., Northview Windows & Doors Inc., Evrica Enterprises Inc., Pride Windows and Doors Inc., 976017 Ontario Ltd., Floating Residence Inc., Oakwood Architectural Lumber Inc., Shrimp Deluxe Ltd., Vildrom Construction Ltd., Vimach Delux Arches Inc., Riga-22 Weg, LLC, MTI Ltd., California Deluxe Windows Industries, Inc., Wrought Iron Art Ltd., Royal Deluxe Windows International, Inc. (U.S.), Stone Mason and Architectural Carvers Creators Ltd., Roman W. Marketing and 1273268 Ontario Ltd., Respondents

D.M. Brown J.

Heard: October 2, 2012; October 5, 2012
Judgment: December 21, 2012
Docket: 05-CL-5949, CV-11-9340-00CL

Proceedings: additional reasons at *Weig v. Weig* (2013), 2013 CarswellOnt 2806, 2013 ONSC 1548 (Ont. S.C.J. [Commercial List])

Counsel: S. Rosen, for Matvei Weig
B. Salsberg, for Respondents
M. Wise, for Avital Weig, Frances Weig
S. Zeitz, I. Klaiman, for Sofia Weig, Faina Prupes

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

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MOTION by judgment creditor for appointment of receiver over assets, undertaking and properties of judgment debtor; APPLICATION by judgment debtor's wife for declarations that she held valid security interests in shares owned by judgment debtor in certain companies in priority to judgment creditor.

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

I. Overview

1 Bitter litigation between two brothers, Matvei Weig and Roman Weig, was settled by an agreement dated March 19, 2007 in respect of which Matvei obtained from Spence J. a January 7, 2008 [*Weig v. Deluxe Windows*, 2008 CarswellOnt 8391 (Ont. S.C.J.)] judgment (the "Judgment"). The depth of the bitterness between the two brothers found expression in the following evidence given by Roman on his 2009 judgment debtor examination:

> Q. I'd like to know which companies from all of the companies that Matvei Weig sued are the ones who borrowed from the money?

[Roman]. Who is Matvei Weig?

> Q. You don't know your brother, sir?
>
> A. Ah, my brother, he's not my brother.
>
> Q. Not your brother?
>
> A. No, he's my bloodsucker. [1]

2 Roman has not paid the Judgment. Matvei now moves for the appointment of a receiver over all of the assets, undertaking and properties of Roman, together with directions and declarations in respect of certain assets which Matvei contends belong to Roman. Not surprisingly, Roman resists the motion.

3 Part of a second proceeding also was before me. Roman's wife, Sofia Weig, together with Faina Prupes, commenced an application (CV-11-9340-00CL) seeking declarations that they hold valid security interests in all of the shares owned by Roman and Lev Sptizin in Shrimp Deluxe Inc. and 2014210 Ontario Ltd. c.o.b. Deluxe International Group in priority to any rights of Matvei. At the hearing I was advised that Faina Prupes was not proceeding with her application at the time.

4 By endorsements dated May 23 and July 24, 2012, I gave directions for a one day hearing of the motion brought by Matvei and the application brought by Sofia and Faina. A "hybrid trial" of issues took place on October 2 and 5, 2012. In addition to the affidavits and transcripts previously filed, *viva voce* evidence was called. Both Avital Weig and Frances Weig were given the opportunity to file evidence. Avital did. Both were represented by counsel at the trial.

II. Background history

5 In 2005 Matvei commenced litigation against his brother and the Deluxe Group of Companies. The details of that litigation were not placed before me. Ultimately the brothers entered into a settlement agreement. Matvei then obtained the Judgment to enforce the Settlement Agreement. Under the Judgment Roman was to pay Matvei:

(i) $725,000, to be held in trust pursuant to the provisions of the Settlement Agreement;

(ii) $355,000, to be paid "forthwith" to Matvei; and,

(iii) $1,587,000, to be paid to Matvei by way of 12 monthly payments.

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The Judgment required Matvei, upon receipt of the $355,000, to deliver to Roman "his interests in the Deluxe Group and in the business in the Ukraine".

6 Roman appealed the Judgment. By order dated September 23, 2008 the Court of Appeal varied part of the Judgment — requiring Roman to provide a promissory note or guarantee as security for the payment of the $725,000 — but otherwise dismissed Roman's appeal.

7 Payment of the amounts due under the Judgment was tied to the timing of the disposition of an action against Matvei by Marina Bibik who had sued Matvei for damages for sexual assaults. By the terms of the promissory note, Roman was to pay Matvei the $725,000 "forthwith upon there being final determination" in the Bibik action. By consent order dated November 4, 2008, Conway J. ordered that "all monies, funds or payments to be paid or payble" to Matvei under the Judgment were to be held in trust "until such time as the plaintiff [Bibik] has obtained a judgment against the defendant Mickey Weig..."

8 In 2010 a jury held Matvei liable to Ms. Bibik for assault and battery and awarded her $468,969.18 in damages. The trial judge fixed costs in the amount of $150,000.00. By Reasons dated March 2, 2012 the Court of Appeal dismissed Matvei's appeal from that judgment.[2] Matvei also was convicted of criminal charges in relation to the assaults and served a term of imprisonment.

9 By order of Newbould J. made April 20, 2009, the $355,000 was paid into the trust account of Mr. Salsberg, Roman's counsel, subject to the terms of the order of Conway J., pending the completion of the transfer of business interests specified in the Judgment.

10 Roman argued before Newbould J. that the $1,587,000 owing under the Judgment was not payable until the transfer of the assets specified in the Judgment. By order made April 21, 2009, Newbould J. rejected that argument and refused to vacate writs of execution which Matvei had issued. Newbould J. wrote:

> It is quite apparent that Roman Weig has taken every possible step to delay having to make any payment pursuant to the judgment of Spence J. He delayed the signing of the judgment by his counsel not even responding to a draft judgment sent to him. Mr. Salsberg further did not respond to the request of Mr. Rosen for the name of commercial counsel for Roman Weig who could then deal on the transfer of assets. He then delayed the signing of the order in the Court of Appeal by Mr. Salsberg not agreeing to the draft order until a motion for that purpose was brought before the Registrar. It was only when the writs of execution filed on behalf of Matvei Weig caused a problem for the closing of the sale of the condominium that Mr. Salsberg took any steps. I do not fault with Salsberg [sic]. He no doubt acted on the instructions of his client.

11 The process of Matvei transferring to Roman his interests in the Deluxe Group companies and in the business in the Ukraine as required by the Judgment was a tortured one, at one stage requiring intervention by Newbould J. in August, 2009 to resolve closing disputes which had arisen between the brothers. At that time Newbould J. also dismissed a motion by Roman to stay execution on the Judgment:

> The failure of the transfer of the business interest to Roman Weig cannot be blamed entirely on Matvei Weig or his advisors. Roman Weig has been attempting to obtain terms which are beyond what are required, as I have so held.

Matvei delivered documents to Roman for the transfer of his interests in the Ukranian companies in September, 2010.

12 Roman has not paid the Judgment and at present owes Matvei $1.587 million under it, together with interest.

13 A judgment debtor examination was conducted of Roman on May 8, 2009 (the "2009 JD Examination"). In his August 13, 2009 [2009 CarswellOnt 4781 (Ont. S.C.J. [Commercial List])] order Newbould J. also ordered Roman to

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pay to Matvei the costs of $12,500 which he had ordered against Roman in his April 21, 2009 order. He also ordered Roman to pay $10,000 in additional costs "forthwith" to Matvei.

III. The issues before the Court

14 In his Amended Notice of Motion Matvei Weig requested the following relief:

(i) The appointment of Schwartz Levitsky Feldman Inc. as receiver, without security, of all of the assets, undertaking and properties of Roman Weig;

(ii) Orders requiring Roman to deliver up to the Sheriff of the Toronto Region all his shares in the respondent corporations and directions for the sale of such shares;

(iii) An order setting aside any security interests granted by Roman to non-arms length individuals, including his wife Sofia Weig;

(iv) A declaration that Roman is the beneficial owner of a cottage property municipally known as 990 Arnold St., Innisfil, Ontario (the "Cottage"), an order discharging a May 31, 2007 mortgage on that property granted in favour of First National Financial GP Corporation and directions regarding the sale of the Cottage;

(v) An order that 2014210 Ontario Ltd, c.o.b. Deluxe International Group, 2014052 Ontario Ltd., c.o.b. Deluxe Windows of Canada, and Shrimp Deluxe Ltd. pay to Matvei the monies which Roman paid to those respondent companies from the proceeds of the March, 2008 Scotiabank mortgage on the residence of Matvei and his wife, Sofia; and,

(vi) Orders that Roman attend for a further examination-in-aid of execution and Sofia attend to be examined in aid of execution of the Judgment.

Matvei filed a consent dated August 7, 2012 from Schwartz Levitsky Feldman to act as receiver.

15 In her application (CV-11-9340-00CL) Sofia Weig sought a declaration that she holds a valid and enforceable security interest ranking in priority to any rights of Matvei Weig in (i) all of the assets, property and undertaking of Shrimp Deluxe Ltd. and (ii) all of the shares owned by Roman Weig in the capital of Shrimp Deluxe Ltd. and any other company in the Deluxe group of companies listed in Schedule "A" to her Notice of Application.

IV. Motion to appoint an equitable receiver in aid of execution

A. Positions of the parties

16 In his Amended Notice of Motion Matvei identified the following grounds in support of his request for the appointment of a receiver in aid of execution:

(i) After Spence J. granted the January 7, 2008 Judgment, but before the Judgment could be issued and entered and a writ of seizure and sale registered, Roman placed a $1.17 million mortgage on his 18 Franklin Avenue, Thornhill residence;

(ii) Roman paid the proceeds of the mortgage to the respondent corporations;

(iii) Roman caused 2014052 Ontario Ltd. to fail to respond to a notice of garnishment which Matvei served on it and 2014052 Ontario Ltd. failed to pay to the Sheriff monies which it pays to Roman as a regular draw or salary;

(iv) Roman continues to be the president and majority owner of the respondent corporations and lives an extravagant lifestyle while showing almost no income from the respondent companies;

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(v) Roman gave false evidence on his 2009 JD Examination about the value of his assets;

(vi) Roman has not paid the Judgment;

(vii) Roman in fact is the owner of the Cottage, not his daughters, Avital Weig and Frances Weig, but the Sheriff will not sell the Cottage because of a collateral mortgage in favour of First National Financial GP Corporation; and,

(viii) The appointment of a receiver is the only relief which will enable enforcement of the Judgment.

17 Roman and the corporate respondents opposed the motion on several grounds: (i) Roman's shares were pledged to his wife, Sofia, and not available for delivery to him; (ii) the Cottage was owned by Roman's daughters; (iii) any claim in respect of the payment of the proceeds of the 2008 residential house mortgage to the Deluxe Group of Companies should be brought by way of action; and, (iv) Matvei had failed to tender any evidence that Roman had improperly caused himself to be judgment proof and nothing in the record disclosed that Roman had organized his affairs to make execution practically impossible.

B. Governing legal principles

18 Ontario jurisprudence recognizes that a receiver may be appointed to enforce an order for the payment of money where special circumstances exist which would render the normal methods of execution ineffective or impractical or where certain property of the debtor might not be exigible for execution. [3] Gray J. in *Canadian Film Development Corp. v. Perlmutter* reviewed, at length, the historical origins of the appointment of equitable receivers or receivers in aid of execution. In his text, *Bennett on Receiverships, Third Edition*, Frank Bennett provided a nice summary of that history:

> A creditor could only invoke the appointment of a receiver by way of equitable execution where there was a legal impediment in seizing the debtor's property or where the common-law remedy was likely to be ineffective. The appointment by way of equitable execution as a remedy assumes that all ordinary remedies to collect have been exhausted.
>
> Where the creditor could not seize the debtor's property through execution of law, garnishment or attachment, the creditor could apply for the appointment of the receiver to seize or intercept specific property.
>
> . . .
>
> In view of the expanded application of garnishment proceedings in the province of Ontario, the need for and the types of situations where a court may appoint a receiver to enforce an order for the payment of money after judgment have diminished. [4]

Bennett went on to note that under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the court has the jurisdiction to grant broad powers to the receiver given the circumstances of the case despite the earlier law that a receiver would be appointed to seize only a specific asset. [5]

19 Amongst the criteria which a judgment creditor must meet in order to secure the appointment of an equitable receiver, Bennett listed the following:

> The debtor must own or have an interest in an asset which is not exigible at common law. As a result of legislative changes over time, there are more assets that can be seized under a writ of seizure and sale. In Ontario, the scope for the appointment of a receiver by way of equitable execution has been limited by such other legislation.
>
> . . .

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> The court also considers whether there is some kind of legal or practical impediment to seizure at common-law. In the alternative, if the creditor could not establish this, the court often looked at the "special circumstances" of the case to justify the appointment. If the creditor could not enforce the judgment by legal execution or where legal execution was difficult, if not impossible, there might exist special circumstances. The creditor must show that there are special circumstances and that without an order appointing a receiver, it would be practically very difficult, if not impossible, to obtain any fruit of the judgment. However, it is doubtful that a court would appoint a receiver if the creditor were merely inconvenienced in pursuing a legal remedies.
>
> Last, it is generally incumbent upon a creditor to show that some benefit will be gained by the appointment and that that benefit is sufficient to justify the making of an order. As a practical matter, the court reviews the amount of the debt owed to the creditor, the amount or amounts likely to be collected if a receiver were appointed, the type of asset that cannot be seized through legal execution, the nature of the debtor's interest, and the probable cost that will be incurred in the appointment of receiver. [6]

20 As J.R.H. Turnbell J. noted in his recent decision in *College of Optometrists (Ontario) v. SHS Optical Ltd.*:

"Special circumstances" that warrant the appointment of a Receiver include cases involving contrived or elaborate business structures, or where large amounts of money are at stake that may not be realized without the appointment. [7] In *Canadian Film Development Corp. v. Perlmutter*, Gray J. concluded that the judgment debtor was using certain corporations as debt avoidance vehicles, nominally providing his services for free to those corporations, but having the corporations — owned by a family member — pay his on-going expenses, while not making any payments on the outstanding judgments against him. [8]

21 In discussing the special circumstances in which the court might appoint an equitable receiver, Bennett observed that where the garnishment process might involve difficult mechanics, expense and be ineffective, the court might regard that situation as a special circumstance. [9] Also:

> [T]he court may also appoint an equitable receiver in a situation where the debtor has arranged his or her affairs in such a way that there is an appearance that the assets have been sheltered and that there is more than a substantial impediment in the way of ordinary methods of recovery. [10]

22 In the *Canadian Film Development Corp.* case Gray J. appointed a receiver in aid of execution because no reasonable prospect of recovery on the judgments otherwise existed. In doing so he quoted the pithy comment made by Vaughan Williams L.J. in an English decision regarding the objective in appointing such a receiver:

> [The applicant] must shew that the circumstances are such as to render it practically very difficult, if not impossible, to obtain any fruit of his judgment, unless what has been called equitable execution be granted to him. [11]

C. Evidence

C.1 The Deluxe Group of companies

23 Before reviewing the evidence concerning the steps taken by Matvei to enforce the Judgment, it would be helpful to provide an overview of the Deluxe Group of companies which played a significant role in those enforcement efforts.

24 Matvei deposed that Roman owns at least 40% of the shares of each of the companies in the Deluxe Windows Group of companies which, he alleged, consisted of 2014210 Ontario Ltd. (Deluxe International), 2014052 Ontario Ltd. (Deluxe Canada), Shrimp Deluxe Ltd., Northview Windows & Doors Ltd., Action Windows, Evrica Enterprises Inc., Pride Windows & Doors Inc. and Lifetime Best Buy Windows & Doors.

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25 Roman disputed that evidence. He testified that he owned 25% of the shares of the Deluxe Group of Companies and three other shareholders each owned 25% of the shares. The dispute turns on who obtained Matvei's shares following the settlement.

26 The only evidence placed before me showed that on November 17, 2009 Matvei transferred to Roman all his shares in 2014052 Ontario Ltd. and 2014210 Ontario Limited. That would increase Roman's shareholdings to 40% of the outstanding shares of those companies. Roman did not file the current share register for either company.

27 According to Roman's March 2012 testimony, the Deluxe Group of companies consists of three main companies: Deluxe Windows of Canada (20141052 Ontario Ltd.) which manufactures and sells windows; Deluxe International (2014210 Ontario Ltd.) which sells the windows to home builders; and, Shrimp Deluxe which owns two buildings in Toronto, one located at 2 Shale Gate and the other at 25 Milvan.

28 Roman testified that he was the president of most of the companies and that his shares in the companies could not be transferred without the unanimous consent of all of the shareholders. Roman acknowledged that as President of Deluxe International, Deluxe Windows and Shrimp Deluxe he works full-time for those companies, but he stated that he receives no income from them for his services.

29 Roman deposed that he had pledged his shares in Shrimp Deluxe, Deluxe International and Deluxe Canada to Sofia in April, 2005 and Faina Prupes in May, 2005 to secure the repayment of loans they made to the Deluxe Group. Roman deposed that as of August, 2011 Sofia was owed $1.427, plus US $591,800, and Faina was owed $614,500. Roman stated that the funds originated with Sofia: "None of the said monies emanated from or belonged to me." The evidence showed that statement to be inaccurate; part of the monies came from his joint account with his wife. I will return to this issue later.

30 At trial Roman testified that the Deluxe Group of companies were not treated as different companies, but as companies all under the same roof. Roman treated them like one business; he considered them married to each other, and they did intercompany business and transactions.

31 The two Shrimp Deluxe properties generate just under $100,000 each month in rent. Roman estimated that both properties were worth about $9.24 million. Each was subject to mortgages in favour of First National Financial GP Corporation. First National took a May, 2007 $5.675 million charge against both Shrimp Deluxe properties. The charge came to term around June, 2011. The evidence disclosed that the charge against the Milvan property was renewed around April 29, 2011 for the principal sum of $3.85 million. As a condition of granting that charge First National required that Roman provide a personal guarantee. Roman did so, as principal debtor, by Guarantee and Postponement of Claim signed April 29, 2011. A $1.65 million charge was granted over the Shalegate property, also guaranteed by Roman. On his March 2012 Examination Roman refused to produce copies of the documents which Shrimp Deluxe gave to First National to renew the charges.

32 Roman did not produce any financial records of the Deluxe companies in which he has an ownership interest. On his March 2012 Examination Roman refused to produce the 2009, 2010 and 2011 financial statements for Shrimp Deluxe, Deluxe Canada and Deluxe International.

33 Matvei left the Deluxe Group of companies in 2005 or 2006 and he does not have any personal knowledge of their internal affairs since that time. [12] On his out-of-court cross-examination Matvei refused to reveal the identity of people inside those companies from whom he contended he had received information, save for one person who had died. [13]

C.2 Roman's Thornhill Residence

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34 Matvei deposed that Roman lives in a $1.5 million house in a prestigious Thornhill neighbourhood (the "Thornhill Residence"). Roman deposed that he and his wife, Sofia, had owned the house jointly since its acquisition in 1993 or so, and the property initially had been subject to a $400,000 mortgage since that time.

35 Matvei obtained the Judgment on January 7, 2008.

36 Two months later, before the Judgment was settled and a writ of seizure and sale filed, Roman re-financed the mortgage on the Thornhill Residence, increasing it to about $1 million, together with a $170,000 line of credit (the "Line of Credit") secured against the property. In his April 20, 2009 Reasons Newbould J. described how that came about:

> It is quite apparent that Roman Weig has taken every possible step to delay having to make any payment pursuant to the judgment of Spence J. He delayed the signing of the judgment by his counsel not even responding to a draft judgment sent to him...I do not fault with Salsberg (sic). He no doubt acted on the instructions of his client.
>
> . . .
>
> I also note that during the delay before Mr. Rosen could have the judgment of Spence J. signed and entered on March 5, 2008, two months after Spence J. delivered his decision, Roman put a large mortgage loan in the amount of $1.17 million against his home. That of course could not have happened if the judgment had been signed earlier and the writ of execution obtained.

C.2.a Use of the mortgage proceeds

37 Of the proceeds received from the March 5, 2008 mortgage, Matvei deposed that Roman, on his 2009 JD Examination, had produced deposit slips showing $827,200 of the mortgage proceeds were paid by him to Deluxe International and Shrimp Deluxe. The deposit slips actually recorded the following transactions: [14]

Payor as shown on deposit slips	*Payee*	*Date*	*Amount*
R. Weig	2014210 Ontario Ltd. (Deluxe International)	Illegible	$200,000
R. Weig	Shrimp Deluxe Ltd. (notation: "loan")	Mar. 14/08	$595,000
R. Weig	Deluxe International	Dec. 8/08	$55,000
R. Weig	Deluxe International	Oct. 10/08	$25,000
R. Weig	Deluxe International	Nov. 17/08	$65,700
R. Weig	Deluxe International	Nov. 18/08	$15,000
R. Weig	Deluxe International	May 4/09	$7,000
	Total		$962,700

In his August 22, 2011 affidavit Roman did not dispute Matvei's evidence as to the amounts advanced, but he did depose that "the said funds were lent by Sophia and are not owed or repayable to me." Later in that affidavit, when referring to all the monies Sofia contended she had loaned to Deluxe Group, Roman deposed:

> Sophia and Faina advanced their own monies to the corporations. None of the said monies emanated from or belonged to me. None of the said monies are owed to me.

38 In her affidavit and at trial Sofia acknowledged that the funds for the March 14, 2008 and December 8, 2008 advances of $595,000 and $55,000 to Shrimp Deluxe and Deluxe International came from the mortgage proceeds. On her March 2012 examination Sofia testified that it was their "joint money" which had been advanced to Deluxe. [15] Sofia testified that the proceeds of the re-financing were loaned to the Deluxe business, which is why Deluxe provided them with money to service the monthly mortgage payments. Sofia acknowledged that the money loaned to Deluxe as a result

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of the mortgage was joint money from her and Roman. [16] Sofia was not certain which of the Deluxe companies was paying the mortgage. [17]

39 By contrast, Roman testified that the Deluxe companies made the $5,030 monthly mortgage and tax payments on his home [18] - which Deluxe company made the payment varied from time to time: "it comes from variable companies who have the money that pays" [19] — and the reason they did so was because Sofia was owed the money since she had signed the mortgage for the businesses. [20] Yet later in his trial testimony Roman stated that the funds advanced from the mortgage proceeds to the companies were "our money". However, he remained firm in his position that the companies were obligated to pay the money back to Sofia, not to him.

40 I must pause here to comment on the evidence concerning the March 14, 2008 payment of $595,000 to Shrimp Deluxe. The Shrimp Deluxe Ltd. deposit slip produced by Roman pursuant to undertakings given on his 2009 JD Examination clearly recorded a $595,000 deposit as "R Weig Loan". [21] In her affidavit Sofia deposed that the deposit was of "my cheque in the amount of $595,000", and she attached a copy of that deposit slip as Exhibit H to her August 11, 2011 affidavit. Although her exhibit copy was not as clear as that produced by Roman, Sofia's exhibit showed the source as "S Weig Loan". To my eye, on Sofia's Exhibit H someone had changed the "R" Weig to "S" Weig by altering the "R". On her March 2012 cross-examination Sofia contended that the "S" really looked like an "R". [22] I will return to this point later in these Reasons.

41 As to the December 8, 2008 payment of $55,000 to Deluxe International which Sofia described as made by her cheque, the signature was not legible on the copy produced, and the Deluxe International deposit slip recorded the advance as coming from "R. Weig".

42 It was Roman's evidence that the Deluxe companies provide Roman and Sofia with monthly cheques to make those monthly payments. [23] By contrast, Sofia testified that Deluxe automatically deposited funds into their joint RBC account to pay the mortgage. [24] Roman testified that he was not keeping track of how much of the $595,000 the Deluxe companies were repaying. [25]

43 Sofia's evidence at trial was that the Deluxe companies pay the annual realty taxes of about $16,000. According to Sofia, the companies have made those payments since the mortgage went on in 2008. (Interestingly, on her March, 2012 examination Sofia had refused to answer any questions about the realty taxes for the home.) On cross-examination she agreed that to date mortgage payments by the companies had amounted to about $300,000.

44 On his March, 2012 cross-examination Roman was asked to produce a copy of the current mortgage statement for his home. He refused. The basis of his refusal was outlined by his counsel in the following exchange:

> Mr. Rosen: I would like a copy of the statement, please.
>
> Mr. Salsberg: For now we'll decline that.
>
> Mr. Rosen: What's the ground for the refusal?
>
> Ms. Salsberg: As soon as I think of one, I'll let you know.
>
> Mr. Rosen: Interesting. [26]

45 At one point on her March 2012 examination Sofia stated that only interest was paid on the mortgage; she later said that she really did not know whether principal was being repaid as well; later still she contended it was interest only. [27] At trial, she testified that about $700,000 to $800,000 remained outstanding on the mortgage. On her March

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2012 examination Sofia undertook to produce a current mortgage statement, which she did. Sofia ended up producing a BNS statement for December 31, 2011 which showed:

(i) $943,442.85 remained outstanding on the mortgage;

(ii) $158,257.47 remained due on the Line of Credit;

(iii) in 2011 the sum of $15,784.25 was paid against the mortgage principal and $23,692.03 was paid on account of interest; and,

(iv) property taxes were paid through BNS.

46 On her March 7, 2012 Examination Sofia refused to produce the bank statements for the RBC joint account she had with Roman from which the monthly mortgage payments are taken, and refused to produce the statements for their joint BNS bank account. At trial Sofia testified that those accounts were their private accounts from which they paid their living expenses and had nothing to do with the Deluxe businesses. I disagree. As the joint bank accounts of a judgment debtor, those statements should have been produced and Sofia's refusal was improper.

47 At trial Sofia contended that of the mortgage proceeds paid over to the Deluxe companies, half the money was hers and half was Roman's. As the Deluxe company deposit slips showed, the name of the payor was recorded as "R. Weig".

C.2.b Use of the Line of Credit secured by the house mortgage

48 Roman testified that he and his wife used the Line of Credit to pay realty taxes on the cottage ($11,000/year) and the Cottage mortgage ($31,200/year). He said they also used Sofia's income to help pay those expenses. On her March 2012 examination Sofia testified that some money from the Line of Credit went into the Deluxe business. [28]

49 On her March 2012 examination Sofia testified that they only made the minimum required payments on the Line of Credit and the funds came out of their joint bank account at RBC. [29] However, when Sofia produced bank statements for the joint line of credit for 2009 and 2010, they recorded some very significant payments against the line of credit: August 13, 2009, $70,000; September 18, 2009, $40,000; September 25, 2009, $5,000; November 6, 2009, $8,000; December 17, 2009, $11,500. In sum, in a four month period $134,500 was paid down against their joint line of credit in circumstances where Roman testified that he earned no income and Sofia stated her annual income was approximately $72,000. [30] Sofia contended that she had some leftover money from investments in the United States which her brother remitted to her. She testified that the money "was all in his name". [31] Given the inconsistency between Sofia's "we only pay the minimum charge" testimony and the evidence of major repayments of the Line of Credit, I do not accept that Sofia has provided accurate information about the source of payments she and her husband made against the Line of Credit.

50 Roman testified that as of March, 2012 he and his wife owed about $160,000 on the Line of Credit. [32]

C.3 Expenses of Roman paid for by the Deluxe Group of Companies

51 Roman deposed that although he worked full-time at Deluxe Windows, [33] he did not receive any income from the Deluxe Companies and the living expenses of Sofia and himself were paid out of Sofia's personal financial resources and draws against the Line of Credit.

52 The tax returns produced by Roman disclosed the following amounts he claimed as (i) his employment and taxable income and (ii) Sofia's net income:

Year	*Roman's Employment Income ($)*	*Roman's Taxable Income ($)*	*Sofia's Net Income ($)*
2005	36,000	36,000	36,000

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2006	48,000	48,000	0
2007	54,000	27,845	24,000
2008	33,000	33,064.16	24,000
2009	12,000	12,000	44,000
2010	Blank	Blank	42,899.18

Roman testified that he received no income from Deluxe in 2011, but he did win $8,000.00 gambling on a trip to Nassau.

53 Roman deposed that the vehicles he and his wife drive — currently an Infiniti QX56 SUV and Audi A6 - are leased for them by the Deluxe Group. He deposed that similar arrangements had been in place for many years pre-dating the Judgment for the other shareholders and their wives, including at one point Matvei. The Deluxe Group reimbursed Roman for his gasoline expenses, cell phone and laptop.

54 Roman testified that he had a business Guest credit card paid for by Deluxe, and he used a corporate TD VISA credit card for which the company paid the bills. Roman refused to disclose copies of the credit card statements for 2010 and 2011. [34] Those refusals were improper in light of the issues about the payment of his living expenses stemming from his assertion that he earned no income. Roman stated that he did not have a personal credit card.

55 Roman testified that he has no money and that his wife buys everything for him that he needs. [35] Sofia testified at trial that utilities on the house and cottage are paid from their joint account using her salary.

56 Matvei admitted that he could not tell from where Roman's lifestyle was funded. [36]

C.4 Sofia's employment with the Deluxe Group

57 At one point on his March, 2012 Examination Roman testified that Sofia had worked at Deluxe during the past five years, but she was not working there at the time. [37] Roman stated that for the past year Sofia had operated a recycling company which sold materials to Deluxe. He testified that Sofia's company rented premises at 25 Milvan. However, later during his cross-examination Roman testified that in 2010 and 2011 Sofia had worked for Deluxe Canada and Deluxe International, but he refused to find out much the companies had paid her. [38] In the circumstances of this case where Roman contended his wife paid their living expenses, that refusal was improper.

58 On her March 7, 2012 Examination Sofia testified that she had worked at Deluxe Windows Canada and Shrimp Deluxe for the past five years selling chemical additives. Initially she said she was paid by Shrimp Deluxe, but then testified that she was paid by Deluxe Windows International, earning about $6,000 a month. [39] She deposited her pay cheque into the joint RBC bank account with Roman to pay the bills. At trial Sofia maintained that she earned $6,000 each month from the Deluxe business.

59 Sofia's evidence about her salary at Deluxe International is difficult to reconcile with the amounts of net income Roman reported for her on his 2005 to 2010 income tax returns. The highest net income he reported for Sofia was $44,000, far short of the $72,000 in employment income she claimed to earn.

C.5 Effort to garnish amounts due to Roman

60 In August, 2009 Matvei caused notices of garnishment to be served on Deluxe International, Deluxe Canada and Shrimp Deluxe. Matvei testified that none of the garnishees filed garnishees' statements.

C.6 The Cottage

Ownership and use

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61 Roman is the registered owner of a cottage on Lake Simcoe at 990 Arnold Street, Innisfil (the "Cottage").

62 On his 2009 JD Examination Roman testified that he had paid for the purchase of the Cottage with part of his inheritance. Initially the title showed that his nephew, Yuda Mundrian, had acquired the Cottage on April 15, 1999. Although Roman stated that Yuda had held the Cottage in trust for him, the April 12, 1999 Transfer did not identify Yuda as a trustee. Yuda conveyed title to Roman on August 28, 2003. The transfer described Roman as "trustee", although the Land Transfer Tax Statement did not identify Roman as a trustee to whom the land was being conveyed, rather as a transferee. Ellena Steiner, the lawyer whom Roman hired in 2003 to prepare the declarations of trust for the benefit of his two daughters, testified that she had not been aware of any previous trust and was under the impression that Roman was discussing with her property which he owned.

63 Roman deposed he always had considered that he held the cottage in trust for his daughters. Roman produced two August 28, 2003 declarations of trust in favour of his daughters. Although when asked on his 2012 out-of-court cross-examination about the basis for his assertion of the trust declarations Roman replied "I don't want to answer right now", [40] following his examination Roman produced declarations of trust dated August 28, 2003 purporting to show that he held title in trust for his daughters, Avital and Frances, each as to a 50% interest. The declarations stated that Roman held title "as a bare trustee in trust for and on behalf of the Beneficiary forever". The declarations did not grant any powers to Roman as trustee.

64 Ellena Steiner, the lawyer, provided an affidavit and testified at the trial. She stated that in 2003 Roman told her that he was acquiring the Cottage and wanted to gift it to Avital and Frances. Roman would hold legal title "in trust for them because of their young ages". Ms. Steiner acted on those instructions and prepared the declarations of trust. She had suggested using declarations of trust until the youngest daughter, Frances, came of age.

65 At the time Roman made the declarations of trust in 2003, Avital Weig was 23 years old and Frances Weig was 14 years old.

66 Avital deposed that in 2003 her parents told her that they were gifting the property to the two daughters. At trial she testified that she had not previously seen the 2003 transfer of the land, but she had seen the declarations of trust. According to Avital, her father paid all the expenses on the Cottage. Avital also testified that the Cottage was treated as a family cottage. Her father kept his fishing boats there and did lots of fishing on the lake. Avital stated that they all did.

2003 BNS mortgage

67 Four months after signing the trust declarations, Roman mortgaged the Cottage to the Bank of Nova Scotia on December 1, 2003. That mortgage was discharged on June 23, 2004.

68 Avital did not mention that mortgage in her evidence.

2004 CIBC mortgage

69 On May 26, 2004 Roman mortgaged the Cottage to CIBC for $588,000; the mortgage payments are $3,880 a month. [41] On his March 2012 Examination Roman testified that $426,000 remained outstanding on the mortgage. In her August, 2012 affidavit Avital deposed that about $360,000 remained owing on the Cottage mortgage. Roman receives the mortgage statements at his home. [42] However, on his March, 2012 Examination Roman refused to produce an up-to-date copy of the CIBC mortgage statement for the cottage. [43] That refusal was improper; the information was relevant to an asset in the name of the judgment debtor.

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70 Avital deposed that at the time Roman had told her the mortgage was required in order to raise funds to lend to Matvei and "because he was my father and I love him dearly I agreed". Sofia also testified that Roman had taken out the mortgage on the cottage to help his brother. [44]

71 Roman testified that the monthly Cottage mortgage payments came out of one of the joint accounts he had with his wife, he believed it was the BNS bank account. At trial Sofia testified that the funds came out of the RBC joint account. When Roman was asked on his March 2012 Examination, which served also as his annual JD examination, for copies of the 2009 to date bank statements for their joint BNS and RBC accounts, he refused the request. [45] Roman also refused to produce evidence of every mortgage payment made on the cottage in 2010 and 2011 or to disclose the source of the funds used to make those payments. Those refusals were improper.

72 Avital testified that at the time of the 2004 CIBC mortgage her sister, Frances, was a minor. Born in 1989, Frances would have been 15 years old. Avital testified that she would do whatever her father asked of her because he had done a lot for her over her life and he paid for the Cottage. Avital confirmed that neither she nor her sister had put any money into the Cottage or made any payments on the mortgage. Frances did not provide evidence in this proceeding.

2007 First National collateral mortgage

73 On May 31, 2007, Roman granted a $5.675 collateral mortgage on the Cottage to First National Financial GP Corporation as security for an obligation of Shrimp Deluxe in respect of a $5.675 mortgage on its two Toronto properties. The Charge did not record that Roman held the Cottage in trust for any person.

74 Roman deposed that he used the Cottage as collateral security "with the express agreement of my children who are the beneficial owners of the property". On his March, 2012 Examination Roman testified that he had not obtained his daughters' consent in writing: "I don't have to ask, I say I need it, and when I need it, we have a rule in the family...They agree with me, I have to do that." [46]

75 In her August 31, 2012 affidavit Avital made no mention of this collateral mortgage. She was not questioned on this mortgage at trial. Frances gave no evidence in this proceeding.

2012 efforts to sell the Cottage

76 According to an October 18, 2010 MLS listing, Roman listed the cottage for sale in April, 2010, with an asking price of $1.487 million. On the listing the seller was identified as Roman Weig. Avital deposed that her father had asked her permission to list the Cottage to test its approximate market value. She had agreed, but no offers to purchase were received.

Matvei's efforts to have the Sheriff sell the Cottage

77 Although Matvei sought to have the Sheriff of Simcoe County sell the cottage to satisfy the Judgment, the Sheriff was not prepared to proceed because the amount of the collateral mortgage exceeded the value of the cottage and the amount due under the CIBC mortgage could not be ascertained.

C.7 The results of Roman's examinations-in-aid-of-execution

78 On the 2009 JD Examination Roman testified that he owned a number of expensive watches and jewellery which he kept in a safety deposit box in a bank - a Jacobs watch, three IWCs, one which he received "as a present as a best diver in Australia", and two which were made in the 15th Century. [47] By order made August 13, 2009, Newbould J. required Roman to deliver up the watches to the Sheriff, which he did. A May, 2010 forced liquidation auction appraisal valued all the watches at no more than $500. On his March, 2012 Examination Roman contended that all the appraisals

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used for the auction were fakes and lies. [48] When asked on that examination whether he recalled saying that one of the watches was a prize he won at a diving competition, Roman said "I don't remember". [49]

79 Matvei's counsel sought to conduct a second judgment debtor examination of Roman on November 29, 2010 and served the appropriate notice. Roman did not attend. Roman produced a letter from his counsel advising Matvei's counsel that he was not available that date and proposing several dates a few weeks later. Roman ultimately submitted to a further examination on March 4, 2012.

80 On his March, 2012 Examination Roman gave 14 undertakings; he failed to answer six of them, notwithstanding follow-up requests by Matvei's counsel. Roman made 18 refusals. I have reviewed the list of refusals. [50] The questions were all proper questions. Roman's refusal to answer questions properly asked and to provide answers to all undertakings given on his March 2012 examination reflects his pronounced unwillingness to reveal the full extent of his financial affairs to his judgment creditor and to obstruct efforts to enforce the Judgment.

C.8 Roman's effort to quash enforcement steps

81 Matvei filed a writ of seizure and sale in 2008. In April, 2009, Roman moved before Newbould J. to quash all writs of execution and other steps taken by Matvei to enforce the judgment of Spence J. and to quash the notice of examination in aid of execution issued on behalf of Matvei Weig. In Reasons released April 20, 2009 Newbould J. held: "There is no basis to vacate the writs of execution or to quash the notice of examination."

82 A September 21, 2012 execution certificate against Roman revealed that in addition to the 2008 writ filed by Matvei, two writs were filed in 2012. One was in respect of the default judgment Sofia obtained against her husband which I shall describe shortly.

C.9 The loans and security interests advanced by Sofia

C.9.a. Sofia's financial background

83 Sofia filed a responding affidavit deposing that she came "from a very established family which wealth I eventually inherited" [51] , and she had worked until 1985 in Israel, earning an annual salary of up to $90,000. Sofia did not file a statement of net worth. She stated that before marrying Roman in 1978 she had invested money in the stock market and in real property in the United States. She deposed that her investments in United States realty continued after her marriage and came to an end around 2005. Sofia did not produce a list of her assets, past or present.

84 Sofia deposed that between 1986 and 1988 she worked with a Toronto real estate agent, Joseph Shem-Tov and earned $400,000 through various real estate deals she did with him. Mr. Shem-Tov disputed Sofia's assertions, describing them as false:

> At no time did Sofia Weig or Roman Weig participate in any real estate investments with me, as an investor or otherwise. The only business I ever did with Sofia Weig and her husband Roman Weig was to act as their real estate agent in connection with them purchasing one or possibly two properties as their family home. I did not pay any monies to Sofia Weig as she alleges in her affidavit, or at all.

Sofia filed a reply affidavit contending that Mr. Shem-Tov did not recall transactions that occurred some 25 years ago "or he does not want to admit to the same due to the cash nature of the transaction".

85 Sofia deposed that starting in 2005 she began to loan significant amounts of money to the Deluxe Group of companies. At the same time, on her March, 2012 Examination, Sofia contended that starting in 2005 she began to encounter financial problems and money became very, very tight. [52]

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86 Sofia stated that she had earned profits on real estate investments in the U.S. with her brother and sold some family jewellery ($500,000) [53] . She deposed that when the Deluxe business encountered difficulties around 2005, she agreed to loan the company money. She stated that she could not provide records of her own wealth:

> Roman and I have been married for 34 years and we do not segregate our money into "his" or "her" accounts. Our money is and has always been commingled and therefore I am not in a position to provide financial records in the nature of what a business might be expected to maintain from 1985 to the date hereof.
>
> It must also be noted that just as Roman had the benefit of using the funds I earned through my investments, so too have I had the benefit of the monies he earned through the Deluxe Companies. We are husband and wife and have always considered our funds to be just that, "our funds".

C.9.b First loan: May, 2005

87 Sofia deposed that by loan agreement dated May 4, 2005 with Shrimp Deluxe as borrower, she agreed to provide a second mortgage on the Thornhill Residence as security for a loan The Equitable Trust Company made to Shrimp Deluxe. Title in that home was in the names of Sofia and Roman. (The second mortgage in favour of Equitable Trust was discharged some time ago.) As well, she advanced U.S. $390,000 to Shrimp Deluxe. Roman was one of the guarantors of Shrimp Deluxe's obligations under the 2005 Loan.

88 Sofia adduced copies of 2005 and 2006 cheques and a wire transfer from R.R.W. Holdings, LLC, an American company of which she deposed she was the sole shareholder, to Shrimp Deluxe. Sofia testified that Roman had helped her set up RRW, together with a New York lawyer, Alex Herman. One of the cheques ($180,000) was signed by Roman, not herself. [54] It showed the address for R.R.W. Holdings, LLC as 2 Shale Gate, North York. Sofia testified that she gave Roman authority to use the RRW money as he saw fit. [55]

89 Sofia stated the she gained some money for herself back in 1973, but "most financial decisions and business decisions is my husband". [56] When asked on her March, 2012 Examination where the RRW money for the first loan came from, her counsel directed her not to answer the question stating, "We are not going to allow you to go back behind RRW". [57] Sofia also refused to produce copies of all bank account statements for RRW from its inception until July, 2006 [58] or the RRW account statements showing the amounts of her money Sofia testified her brother had put into RRW. [59] Later Sofia testified that she put money into RRW at "different times", but she stated that she had never been to RRW's bank nor had she seen any bank account statements for RRW — "My husband dealed with all that financings...I gave him the full trust to use my money, because this was time of the need." [60]

90 Sofia testified that RRW's money came from investments made in the United States, [61] as well as the profits from the re-sale of two houses in Canada. At trial Sofia testified at length about how her brother, Aaron Adirim, who lived in the States, was investing her personal funds and around 2003 he told her that he was ready to give her the returns on her investment. According to Sofia, that is how RRW came about. Sofia stated that her brother, Aaron Adirim, runs Deluxe Windows in California. When Sofia was asked on her March, 2012 Examination to produce all supporting documents for the transfers of money she contended her brother made to RRW, she refused. [62]

91 Although Sofia stated that she was the 100% shareholder of RRW, she testified that Roman conducted all the dealings with RRW's investments. [63] For example, Sofia did not know whether the profits from the two house sales were reported to the Internal Revenue Service. Also, she was not able at trial to identify the source of $225,000 in funds deposited into RRW's Brooklyn bank account on February 18, 2005. The bank statement recorded the funds as coming by wire transfer from "Riga — 22 WEG LLC". Sofia testified that she was not familiar with that company, and was not "that much involved in the mechanics of all of it". That was surprising testimony. Riga22 Weg, LLC, is one of the

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respondents which Sofia has sued in her application which is before me. For Sofia to profess ignorance about the identity of one of the parties whom she is suing suggests either an attempt by Sofia to mislead the court or reflects that although she may be the nominal shareholder of RRW, others control and direct the operations of that company.

92 Amongst the security Sofia received for the granting of the second mortgage and advancing the funds was a May 4, 2005 Share Pledge Agreement from Roman, as guarantor, of his shares in Deluxe, which was defined to include the Deluxe companies named as respondents in these proceedings.

93 Sofia registered a *PPSA* financing statement on July 5, 2005 against Shrimp Deluxe and Roman. She deposed that that registration lapsed on July 5, 2008. Sofia filed a new *PPSA* registration against Shrimp Deluxe on September 7, 2010. The record did not contain a current *PPSA* registration print-out as against Roman Weig as debtor. However, Sofia deposed that at the time of the execution of the Share Pledge Agreement she obtained possession of all of Roman's pledged share certificates.

94 The May 4, 2005 Share Pledge Agreement executed by Roman in favour of Sofia to secure his guarantee of the loan of $390,000 provided, in section 2.1:

> As security for the payment and satisfaction of any and all Obligations, the Pledgor hereby assigns, mortgages, charges, hypothecates and pledges to Lender, and grants to Lender a continuing and specific security interest in and to, the Pledged Shares.

Article 1.1 of the Share Pledge Agreement defined "Obligations" as follows:

> 1.1(b) "Obligations" — all obligations, liability and indebtedness of Pledgor to the Lender under the Agreement, and any amendments and supplementations thereof, present or future, direct or indirect, absolute or contingent, matured or unmatured, extended or renewed...

The term "Agreement" was defined to mean the $390,000 Loan Agreement and the guarantee delivered pursuant thereto.

95 I would observe that the subsequent loan agreements made between Sofia and Shrimp Deluxe, and which were guaranteed by Roman, described the new loans as re-borrowings of the amounts previously loaned pursuant to the "Original Agreement(s)", and recited that the guarantors were prepared to guarantee such loan. While the subsequent loan agreements were accompanied by new guarantees executed by Roman, no new Share Pledge Agreement was executed. The question then arises: do the "Obligations" secured by the pledge of shares under the May 4, 2005 Share Pledge Agreement include the further amounts loaned? Did the subsequent loans constitute indebtedness under "any amendments and supplementations" to the 2005 $390,000 Loan Agreement? If they were not, is Sofia's security interest in Roman's pledged shares limited to no more than $390,000? The parties did not address those questions, either in their evidence or their factums.

C.9.c Second loan: August 9, 2006

96 Sofia deposed that at the request of Shrimp Deluxe she agreed to re-lend the original $390,000 and advance a further $490,000. A second loan agreement was entered into with Shrimp Deluxe; Roman again signed as guarantor. Sofia deposed that R.R.W. Holdings LLC advanced a further U.S. $144,455.94 to Shrimp Deluxe and other Deluxe companies.

97 Amongst the security Sofia obtained from Shrimp Deluxe for the second loan were guarantees from each guarantor, including Roman, and a Personal Property Security Agreement executed by Shrimp Deluxe.

C.9.d Third loan: March 14, 2008

98 Sofia stated that she agreed to re-lend the funds owing under the second loan agreement and advance a further $650,000. A second loan agreement was entered into with Shrimp Deluxe; Roman again signed as guarantor.

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99 Sofia deposed that she advanced $595,000 to Shrimp Deluxe on March 14, 2008 and $55,000.00 on December 8, 2008 to Deluxe International. The funds for both advances came from the proceeds of the March 18, 2008 mortgage placed on the Thornhill Residence and were drawn on their joint bank account. Sofia agreed that of the $595,000 and $55,000 paid to Shrimp Deluxe, half the money was hers and half was Romans. [64]

100 Amongst the security Sofia obtained from Shrimp Deluxe for the third loan were guarantees from each guarantor, including Roman, and a Personal Property Security Agreement executed by Shrimp Deluxe.

C.9.e Fourth loan: January 17, 2009

101 According to Sofia, by way of a January 17, 2009 loan agreement she agreed to loan Shrimp Deluxe $168,000. In the result she advanced Deluxe International a further $112,700 by way of four separate cheques drawn on her "personal account at Bank of Nova Scotia". In fact her "personal account" was a joint account she held with her husband.

102 Amongst the security Sofia obtained from Shrimp Deluxe for the third loan were guarantees from each guarantor, including Roman, and a Personal Property Security Agreement executed by Shrimp Deluxe.

C.9.f Fifth loan: February 4, 2009.

103 Sofia deposed that by way of a February 4, 2009 loan agreement she agreed to loan Shrimp Deluxe $150,000. In the result she advanced Deluxe International a further $150,000 by way of a single bank draft from the Toronto-Dominion Bank. On her March, 2012 Examination Sofia could not recall where the $150,000 came from, although "it could have been my personal money." [65] Later she testified that "you can say maybe it was my lover's cash", but her lover had died. [66] In response to an undertaking regarding the source of these funds Sofia produced a promissory note dated February 4, 2009 for $150,000 which she had signed in favour of Aleksander Rhevsky. At trial she testified that she still owed Alex the money.

104 Amongst the security Sofia obtained from Shrimp Deluxe for the third loan were guarantees from each guarantor, including Roman, and a Personal Property Security Agreement executed by Shrimp Deluxe.

C.9.g Sixth loan: March 9, 2009

105 Sofia deposed that by way of a March 9, 2009 loan agreement Sofia agreed to loan Shrimp Deluxe $400,000. According to her evidence on the March 2012 Examination, Sofia said she gave $88,500 to Deluxe International in five separate cheques between May, 2009 and January 26, 2010, drawn on the joint account with Roman. Sofia testified that the funds came from their joint line of credit secured against the home. [67]

106 Sofia deposed that she signed a promissory note for $400,000 in favour of Sara Ifraimov on March 9, 2009. On her March, 2012 Examination she could not remember who Sara Ifraimov was. [68] She explained: "My husband have to remind me who she was exactly and then I'll remember better." [69] In a May 17, 2012 undertaking response, Sofia advised that she had received the additional $400,000 from Sara Ifraimov, a private investor, as evidenced by the promissory note. These funds were loaned to Deluxe on March 9, 2009 at which time it gave a promissory note to Sofia. In her undertaking responses Sofia produced June, 2010 cheques from 2014210 Ontario (Deluxe International) showing the repayment of the loan from Sara Ifraimov.

107 Amongst the security Sofia obtained from Shrimp Deluxe for the third loan were guarantees from each guarantor, including Roman, and a Personal Property Security Agreement executed by Shrimp Deluxe.

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108 So, the funds for this March, 2009 loan originated with a third party and were repaid by Deluxe. As of June 7, 2010 no indebtedness by Deluxe to any party, including Sofia, existed in respect of this transaction. Notwithstanding that state of affairs:

(i) On July 19, 2011 Sofia's counsel, Dickinson Wright, included that amount in the sums demanded from Roman;

(ii) Sofia, in her August 11, 2011 affidavit sworn over one year after repayment had been made, included the $400,000 in the debts due to her;

(iii) Sofia, in her March 12, 2012 Statement of Claim against Roman, included the $400,000 as one of the debts owed to her; and,

(iv) Sofia obtained a default judgment which included that amount on June 25, 2012, over one month after her counsel had informed Matvei's that Deluxe had repaid the money directly to Ms. Ifraimov in 2010.

From this sequence of events I can only conclude, to put the matter at its most charitable, that Sofia was indifferent to the accuracy of her August, 2011 affidavit, her March, 2012 Statement of Claim and the resulting June 25, 2012 default judgment (the "Default Judgment"). This evidence strongly indicated that Sofia was prepared to put before the court information which was inaccurate - and which she should have known was inaccurate - for the purpose of assisting her husband in maximizing his so-called secured indebtedness to her, to the prejudice of his other creditors. Further, this evidence undermines seriously Sofia's overall credibility on the issue of the true state of the financial affairs of herself and her husband.

C.9.h Other loans

109 Sofia deposed that she also directed R.R.W. Holdings LLC to advance U.S. $57,356.45 to Shrimp Deluxe in September and October, 2005. Sofia characterized this as a demand loan.

C.9.i Demand for payment and default judgment

110 On July 19, 2011 Sofia demanded payment from Roman under the guarantees in the amounts of $1,427,000 and U.S. $591,812.43. As of March, 2012 Sofia had not received any re-payment of those monies, either principal or interest.

111 On March 12, 2012 Sofia commenced an action against Shrimp Deluxe and Roman for repayment of loans to Shrimp Deluxe made May 4, 2005, August 9, 2006, March 14, 2008, January 17, 2009, February 4, 2009 and March 9, 2009. Neither defended the action.

112 Shrimp Deluxe and Roman were noted in default. On June 25, 2012 Sofia obtained the Default Judgment against both Shrimp Deluxe and Roman for $1,734,051.63 and U.S. $719,054.83.

113 At trial Sofia acknowledged that part of the Default Judgment included the $595,000 and $55,000 payments made to the Deluxe Group from the mortgage proceeds.

V. Analysis

114 For the reasons which I set out below, I conclude that the evidence demonstrates that it would be just or convenient to appoint a receiver over the property of Roman Weig in aid of execution of the Judgment because the special circumstances which exist in this case would render the normal methods of execution ineffective or impractical.

115 First, it is evident that Roman has no intention of voluntarily paying the Judgment, a judgment which resulted from a settlement to which he agreed. Obviously a profound rupture took place between the two brothers in 2005 and 2006. Notwithstanding the emotions engendered by those events, a Judgment of this court must be honoured.

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116 Not only will Roman not pay the Judgment, the evidence disclosed that he has worked to obstruct the enforcement of the Judgment. In his April 21, 2009 endorsement Newbould J. wrote that it was "quite apparent that Roman Weig has taken every possible step to delay having to make any payment pursuant to the" Judgment. Roman frustrated the effectiveness of a writ of seizure and sale against the Thornhill Residence by withholding his approval to the form of the Judgment and, in the meantime, placing a very large mortgage against the property. The games which Roman played on his 2009 JD Examination about the value of his watches — which turned out to be worth very little — displayed a disdain for the process of the Court. On that examination and his subsequent March 2012 examination, as I noted above, Roman refused to produce documents and information relevant to the issues enumerated in Rule 60.18(2) of the *Rules of Civil Procedure* on which a judgment creditor is entitled to examine. Roman does not want his brother to gain a clear understanding of his financial affairs, and Roman has withheld material information which renders resorting to traditional enforcement mechanisms very difficult and ineffective.

117 Second, it is clear that Roman has enlisted his wife, Sofia, in his efforts to obstruct the enforcement process:

(i) The main bank accounts used by Roman are joint accounts with his wife; both refused proper questions to produce statements from those accounts. By so refusing, it becomes very difficult to gain an understanding of how much money the Deluxe Group has furnished to Roman and his wife and how the two of them are able to make ends meet on the resources they have: Sofia's evidence about her income ($6,000/month) stands at odds with the net income Roman declared for her on his tax returns, and Roman professes to earn nothing from Deluxe for which he works full-time;

(ii) Roman took the position that the Thornhill Residence mortgage proceeds advanced to the Deluxe companies represented Sofia's money alone. At least Sofia had the good sense on her examinations to acknowledge they were joint funds. However, the deposit slip which Sofia produced for the March 14, 2008 transfer of $595,000 to Shrimp Deluxe displayed alterations which did not appear on the copy produced by Roman, raising serious questions about the deliberate alteration of documents in order to shield Roman from claims by creditors;

(iii) Sofia testified that the funds loaned to the Deluxe companies by RRW Holdings came from her inheritance and subsequent investments, but both her brother-in-law, Matvei, and Joseph Shem-Tov disputed her assertions of independent wealth. Tellingly, Sofia refused to produce documents which would identify the source of the RRW funds. Such documents are relevant because on Sofia's own evidence she allowed Roman to direct RRW's funds. That admission demands a careful scrutiny of the source of the RRW funds - which are being put forward as the basis for a prior, secured claim by Sofia — especially when the address for RRW on one cheque was the Shale Gate premises and Sofia's brother, whom she said fed her investment returns through RRW, operates a Deluxe company in California. If the fund RRW funds were Sofia's own money, that would be one thing. If, however, they were funds in which Roman had an interest or were Deluxe Group funds, then the security structure surrounding the RRW loans takes on the appearance of a device to make Roman judgment proof. Sufficient questions arise from the evidence and refusals of Sofia to merit investigation on this point. I have no confidence in the accuracy of the evidence which Sofia gave about her joint financial affairs with her husband and the source of the RRW funds; and,

(iv) Sofia's affidavit evidence about the $400,000 secured from Sara Ifraimov and lent to Shrimp Deluxe was wrong and misleading. Including that already-paid-debt in her 2012 Statement of Claim and then seeking Default Judgment after disclosing to Matvei's counsel that the debt had been paid reflected a willingness to use the court process for an improper purpose. From the evidence placed before me, I have no doubt that Sofia's 2011 demand for payment of the loans, her 2012 statement of claim and the resulting Default Judgment were part of a strategy in which her husband had a hand. The "sweetheart" noting in default and subsequent Default Judgment were rather transparent and ham-fisted efforts to make it more difficult to enforce the Judgment. There was no subtlety in the strategy used by Sofia and Roman.

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118 Third, Roman also secured the co-operation of his fellow shareholders in obstructing Matvei's efforts to enforce the Judgment. Whether Roman owns 40% of the Deluxe shares, as Matvei contends and the only documentary evidence supports, or 25%, as Roman asserts — a question which cannot be resolved in the absence of corporate records which Roman will not produce — the fact remains that neither Deluxe International, Deluxe Canada nor Shrimp Deluxe filed a garnishee's statement disputing any indebtedness to Roman in response to the 2009 notices of garnishment, yet they have paid nothing under the garnishment notices. All the while the Deluxe companies make monthly payments into the joint account of Roman and Sofia allegedly in repayment of monies advanced to them out of the joint account of Roman and Sofia and which were recorded on Deluxe deposit slips as coming from "R. Weig". I conclude that Roman is able to exercise sufficient control or suasion over his fellow shareholders so that Deluxe International, Deluxe Canada and Shrimp Deluxe do not comply with their obligations under Rule 60.08(11) as garnishees.

119 Fourth, Roman has ignored the limitations the law places on his ability, as purported trustee, to deal with the Cottage and has treated the Cottage as his own property to his own advantage, while at the same time taking the position that the property is not available for execution by his creditors. The evidence about the August, 2003 transfer of the Cottage into Roman's name in trust and the execution of the declarations of trust was consistent with an intention, at that point of time, to gift the Cottage to his two daughters, Avital and Frances. Those transactions occurred well before the melt-down in the relations between the two brothers and the start of the 2005 litigation.

120 However, since executing the declarations of trust in August, 2003, Roman has treated the Cottage as if it was his own property. No evidence was adduced that the adult beneficiary, Avital, consented to the December 1, 2003 mortgage on the Cottage to the Bank of Nova Scotia. Although Avital testified that she agreed to the 2004 CIBC mortgage going on, at the time Frances was a minor. The declarations of trust made Roman a bare trustee. He possessed no authority to encumber a minor's interest in the Cottage without court approval; none was sought or obtained. As to the 2007 First National mortgage, Avital provided no evidence of her consent and Frances remained a minor at the time.

121 Matvei submitted that the trust created by the 2003 declarations of trust in fact was a sham. To establish that assertion Matvei must demonstrate that all of the parties to the sham had a common intention that the acts done or documents executed did not create the legal rights and obligations which they gave the appearance of creating. [70] When viewed as a whole, the evidence concerning Roman's use of the Cottage to secure financing, including the First National financing for his business at Deluxe, and the payment by Roman of all expenses related to the Cottage with the daughter-beneficiaries contributing nothing, raises pointed questions about the validity of the 2003 trusts. On his examination Roman refused to produce the documentation regarding the underwriting of the First National collateral mortgage on the Cottage. In my view, before any formal declaration of ownership can be made about the Cottage, the receiver should investigate further the circumstances surrounding the encumbrances of the property by Roman to ascertain whether Roman represented he was dealing with the property as trustee or as his own.

122 Finally, the circumstances in the present case resemble those in the *Canadian Film Development Corp.* case in which the judgment debtor used a complex of corporations as debt avoidance vehicles — nominally providing his services for free to the corporations, but arranging for a stream of payments by the corporations to look after on-going family expenses. Normal enforcement mechanisms lose much of their utility in the circumstances of a shareholding in a closely-held corporation, necessitating the appointment of an officer of the court in order to ensure that closely-held corporate machinations do not deprive judgment creditors of the fruits of their judgments. It is incongruous, to say the least, that in 2011 a financial institution such as First National Financial would take a personal guarantee from Roman as security for $6 million in mortgages when, according to Roman, he owns nothing and earns nothing. Of course, Roman refused to produce the documents for that transaction. A receiver should be able to pierce through the shelter which Roman has tried to erect around his wealth-generating capacity.

123 For these reasons, I am satisfied that Matvei has demonstrated that without the appointment of an equitable receiver, or receiver in aid of execution, as judgment creditor he stands no reasonable prospect of recovery on the Judgment and a receiver should be appointed.

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VI. Orders

124 Therefore, effective immediately, I appoint Schwartz Levitsky Feldman Inc. as receiver, without security, of all of the assets, undertaking and properties of Roman Weig. In aid of that order I make the following further orders:

(i) Despite repeated requests to counsel, I was not provided with a draft form of receivership order, although I understand that some draft might have circulated amongst counsel. Given Roman's obstruction of efforts to settle the Judgment, I need to ensure that neither Roman, nor his wife whom I have found has co-operated with him to prevent the enforcement of the Judgment, dissipate assets before the receivership order is settled. I therefore order, on an interim basis, that Roman and Sofia are restrained, until the entry of this order, from disposing of, encumbering or dealing with in any way any of their property, including the Cottage registered in Roman's name, save to pay ordinary, day-to-day living expenses;

(ii) If the parties cannot settle the form of the receivership order by January 2, 2013, they shall appear before me no later than January 4, 2013 at which time I will issue the order;

(iii) The powers of the receiver shall include powers of investigation, including powers (i) to investigate any interest of Roman or Sofia in, or any benefit they may receive, from the Deluxe Group of companies, (ii) to investigate and determine the amount of money transferred to Roman, or to a joint account of Roman, by a Deluxe company since the service of the 2009 notices of garnishment, and (iii) to require any third party to provide the receiver with information or documents to which Roman would be entitled in his personal right; and,

(iv) The Receiver must retain independent counsel.

125 Further, I declare that the Default Judgment has no force or effect against the creditors of Roman until the court can consider the report of the receiver which I direct it below to prepare. That Default Judgment is based on some demonstrably false allegations and was the product of improper collusion between Sofia and Roman.

126 As to Sofia's application for a declaration with respect to the validity of her security interest in the property of Shrimp Deluxe and the shares of Roman in Deluxe, I defer final consideration of her application until such time as the receiver files an independent opinion on the validity of that security. Questions exist regarding the amount of indebtedness secured by the Share Pledge Agreement, the source of the funds emanating from RRW, the inclusion in the alleged indebtedness of the full amount of funds jointly owned by Roman and Sofia, and the inclusion of paid-off debt in Sofia's claim for enforcement. These are all matters requiring further inquiry and an independent legal opinion. To facilitate that inquiry, I order Sofia to provide to the receiver, within 10 days of the receiver's demand, with all documentation explaining the source of the funds loaned by RRW to the Deluxe Group, including the information requested of her (and refused) on the following questions on her March 7, 2012 examination: QQ. 388, 415, 451, 719 and 755. I expect the receiver to file a report on this issue no later than the end of the first quarter of 2013. Further, I restrain Sofia from taking any steps to enforce her security over Roman's shares or Shrimp Deluxe until such time as the receiver reports to the Court on her security. I defer consideration of the costs of Sofia's motion until such report is filed.

127 I will remain seized of all matters in Matvei's proceeding (05-CL-5949) and the application by Sofia and Faina Prupes (CV-11-9340-00CL). No motion or other steps can be taken in either proceeding without first requesting a motion date through a 9:30 attendance before me.

VII. Costs

128 I would encourage the parties to try to settle the costs of Matvei's motion. If they cannot, Matvei may serve and file with my office written cost submissions, together with a Bill of Costs, by January 11, 2013. Roman may serve and file with my office responding written cost submissions by January 25, 2013. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

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VIII. Concluding remarks

129 The bitterness between the brothers in this case was palpable. I am not blind to the fact that Matvei became involved in legal proceedings concerning Marina Bibik. He swore his May 5, 2011 affidavit while serving his sentence at the Pittsburg Institution in Joyceville. Those events no doubt contributed to the present bitter estrangement between the brothers. Strong views of right and wrong surely exist on both sides of this fight. However, Matvei has served his sentence, and the highest court in this province upheld the Judgment based on the settlement to which Roman agreed. The reality is that the Judgment must be paid. I would encourage the parties to come to grips with that reality. If Roman does not pay the Judgment, these enforcement proceedings risk going longer and consuming more of the parties' money and emotional reserves.

Motion granted; application deferred.

Footnotes

1 Examination in aid of execution of Roman Weig, April, 2009, QQ. 47 to 49.

2 2012 ONCA 135 (Ont. C.A.) .

3 *Canadian Film Development Corp. v. Perlmutter* [(1986), 53 O.R. (2d) 283 (Ont. H.C.)], paras. 28 and 36.

4 Frank Bennett, *Bennett on Receiverships, Third Edition* (Toronto: Carswell, 2011), pp. 790-791.

5 *Ibid.*, p. 793.

6 *Ibid.*, pp. 791-792.

7 2010 ONSC 3786 (Ont. S.C.J.).

8 *Canadian Film Development Corp.*, para. 38.

9 Bennett, p. 800.

10 *Ibid.*

11 *Goldschmidt v. Oberrheinische Metallwerke*, [1906] 1 K.B. 373, p. 375.

12 Matvei April 17, 2012 cross-examination, QQ. 38 to 42.

13 *Ibid.*, QQ. 42; 51-52.

14 Matvei May 5, 2011 Affidavit ("Matvei 2011 Affidavit"), Ex. W. I should note that the full transcript of the 2009 JD Examination was not filed in evidence.

15 Sofia 2012 CX, Q. 143.

16 Sofia 2012 CX, Q. 143; 273; 309.

17 Sofia 2012 CX, Q. 336.

18 Roman 2012 CX, QQ. 861-866.

19 Roman 2012 CX, Q. 864.

20 For example, see Roman 2012 CX, Q. 826.

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21 Matvei 2011 Affidavit, Ex. W, p. 213. On his March 2012 CX Roman acknowledged that the notation referred to his name — Q. 849 — and that the funds came from the mortgage proceeds.

22 Sofia 2012 CX, QQ. 314-316.

23 Roman 2012 CX, Q. 901.

24 Sofia 2012 CX, Q. 131-2.

25 Roman 2012 CX, Q. 881.

26 Roman 2012 CX, QQ. 742-746.

27 Sofia 2012 CX, Q. 322.

28 Sofia 2012 CX, Q. 328.

29 Sofia 2012 CX, QQ. 123-127.

30 Sofia 2012 CX, Q. 641.

31 Sofia 2012 CX, Q. 644.

32 Roman 2012 CX, Q. 1130.

33 Roman 2012 CX, QQ. 25, 128 and 260-264.

34 Roman, 2012 CX, QQ. 585-588.

35 Roman 2012 CX, QQ. 933-941.

36 Matvei 2012 CX, Q. 117.

37 Roman 2012 CX, Q. 181, 191.

38 Roman 2012 CX, QQ. 597-605.

39 Sofia 2012 CX, Q. 61, 173.

40 Matvei 2012 CX, Q. 177.

41 At trial Sofia put the mortgage payments at $2,500 per month, but she did not know the amount of the taxes paid monthly.

42 Roman 2012 CX, Q. 684.

43 Roman 2012 CX, QQ. 688-697.

44 Sofia 2012 CX, Q. 176.

45 Roman 2012 CX, QQ. 714-728.

46 Roman 2012 CX, QQ. 1172-1175.

47 Extracts from Roman May 8, 2009 JD Examination, Matvei 2011 Affidavit, Ex. DD.

48 Roman 2012 CX, QQ. 86-88.

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49 Roman 2012 CX, Q. 104

50 Cameron Smith July 23, 2012 affidavit, Ex. C.

51 Sofia 2012 CX, Q. 689.

52 Sofia 2012 CX, QQ. 748 to 749.

53 Sofia 2012 CX, Q. 707.

54 Sofia 2012 CX, Q. 383.

55 Sofia 2012 CX, QQ. 370-1.

56 Sofia 2012 CX, Q. 375.

57 Sofia 2012 CX, Q. 389.

58 Sofia 2012 CX, Q. 415.

59 Sofia 2012 CX, Q. 719.

60 Sofia 2012 CX, QQ. 410-1.

61 Sofia 2012 CX, Q. 422.

62 Sofia 2012 CX, Q. 755.

63 Sofia 2012 CX, Q. 447.

64 Sofia 2012 CX, Q. 309, 562.

65 Sofia 2012 CX, QQ. 585-597.

66 Sofia 2012 CX, QQ. 617-621.

67 Sofia 2012 CX, Q. 635.

68 Sofia 2012 CX, QQ. 657-662.

69 Sofia 2012 CX, Q. 663.

70 *Forsyth, Re*, 2010 BCSC 1720 (B.C. S.C. [In Chambers]), para. 16; See also, *Merklinger v. Merklinger* (1992), 11 O.R. (3d) 233 (Ont. Gen. Div.), para. 48.

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TAB 2

2013 ONSC 7738
Ontario Superior Court of Justice [Commercial List]

Aly v. Tohamy

2013 CarswellOnt 17628, 2013 ONSC 7738, 236 A.C.W.S. (3d) 398, 8 C.B.R. (6th) 124

Nashaat Aly, Taghreed Aly and Naiema Elfeky Applicants and Adel Tohamy and Tamer Investments Inc. Respondents

D.M. Brown J.

Heard: December 16, 2013
Judgment: December 16, 2013
Docket: CV-13-10311-00CL

Counsel: R. Fisher, J. Lagoudis for Applicants
B. Jenkins for Respondents
S. Nassabi for CIBC
D. Di Iulio for Mortgagee, Muskowitz Capital
D. Magisano for Proposed receiver in aid of execution

Subject: Corporate and Commercial; Contracts; Insolvency; Property

APPLICATION by judgment creditors for appointment of receiver in aid of execution, or certain other relief.

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

I. Application for the appointment of a receiver in aid of execution and the approval of an agreement of purchase and sale for realty

1 The applicants, judgment creditors of the respondents by virtue of the Judgment of Ricchetti J. made April 5, 2013, applied either for the approval of a proposed agreement of purchase and sale for the respondents' property located at 2687 Kipling Avenue, Toronto, Ontario (the "Property") or, alternatively, the appointment of the Fuller Landau Group Inc. as the receiver of the Property in aid of execution of the Judgment.

2 At the conclusion of the hearing I stated that I was granting an order appointing a receiver in aid of execution. These are my reasons for so doing.

II. The trial decision and subsequent settlement

3 In May and June, 2012, Ricchetti J. conducted a 15-day trial into the liability issues in three proceedings. The first involved claims by Nashaat Aly and Taghreed Aly of an ownership in a Halal meat supermarket known as Halal Meats and Variety operated, in part, by the respondent Tamer Investments Inc., of which the individual respondent, Adel Tohamy, is the principal. The other two proceedings were brought by the applicant, Naiema Elfeky, against her spouse, Adel Tohamy, for a variety of relief stemming from the breakdown of their marriage. In the result, Ricchetti J. found for the applicants.

4 Following the release of the trial judge's 176-page Reasons for Judgment on March 25, 2013, the parties entered into Minutes of Settlement on April 4, 2013. Under those Minutes the respondents were to pay the Aly Applicants $2.275 million and Elfeky $3.4 million, including costs. The Property was to be sold to finance payment of those amounts. The terms of that settlement were embodied in the formal Judgment dated April 5, 2013.

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5 With respect to the sale of the Property, which is a commercial retail mall, paragraph 17 of the Judgment stated:

> 17. The defendants, and each of them, shall comply with the terms for the refinancing or sale of the Kipling Ave. property owned by Tamer Investments Inc. as set out in paragraphs 1, 2, 3, 5 and 6 of the Minutes of Settlement including the term that, if the Kipling Ave. property is not refinanced or sold within 120 days of the date of the Minutes of Settlement, the Kipling Ave. property may be sold by the Plaintiffs, with the assistance of this court if necessary, and the net proceeds of sale applied to the monetary obligations of the Defendants to the Plaintiffs set out in this judgment.

Paragraphs 1, 2, 3, 5 and 6 of the Minutes of Settlement established a timetable for the re-financing or sale of the Property:

> [1] The defendants undertake to apply for and evidence mortgage refinancing within 2 weeks of today's date [i.e. by April 19, 2013];
>
> [2] In the event that a term sheet is not forthcoming within the 2 week period of time the Defendants will list the Kipling Ave property for sale [i.e. by April 19, 2013];
>
> [3] If the property is not sold within 120 days thereof [i.e. by August 17, 2013] the Plaintiffs are at liberty to have the property listed with an agent of their choice;
>
> . . .
>
> [4] Upon closing of any sale or refinancing the funds referenced herein will be paid to the Plaintiffs;
>
> [5] On any refinancing or sale closing of the Kipling Ave Mr. Tohamy will execute directions in satisfaction of these Minutes of Settlement.

6 The respondents did not sell the Property by August 17, 2013. Indeed, as of today's date the Property remains unsold, although the Applicants seek court approval of an October 18, 2013 offer made by Soneil International Limited.

III. Governing principles of law

7 In *Weig v. Weig* [1] I attempted to summarize the principles relating to the appointment of a receiver in aid of execution:

> [18] Ontario jurisprudence recognizes that a receiver may be appointed to enforce an order for the payment of money where special circumstances exist which would render the normal methods of execution ineffective or impractical or where certain property of the debtor might not be exigible for execution. Gray J. in *Canadian Film Development Corp. v. Perlmutter* reviewed, at length, the historical origins of the appointment of equitable receivers or receivers in aid of execution. In his text, *Bennett on Receiverships, Third Edition*, Frank Bennett provided a nice summary of that history:
>
> > A creditor could only invoke the appointment of a receiver by way of equitable execution where there was a legal impediment in seizing the debtor's property or where the common-law remedy was likely to be ineffective. The appointment by way of equitable execution as a remedy assumes that all ordinary remedies to collect have been exhausted. Where the creditor could not seize the debtor's property through execution of law, garnishment or attachment, the creditor could apply for the appointment of the receiver to seize or intercept specific property.
> >
> > . . .
> >
> > In view of the expanded application of garnishment proceedings in the province of Ontario, the need for and the types of situations where a court may appoint a receiver to enforce an order for the payment of money after judgment have diminished.

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Bennett went on to note that under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the court has the jurisdiction to grant broad powers to the receiver given the circumstances of the case despite the earlier law that a receiver would be appointed to seize only a specific asset.

[19] Amongst the criteria which a judgment creditor must meet in order to secure the appointment of an equitable receiver, Bennett listed the following:

> The debtor must own or have an interest in an asset which is not exigible at common law. As a result of legislative changes over time, there are more assets that can be seized under a writ of seizure and sale. In Ontario, the scope for the appointment of a receiver by way of equitable execution has been limited by such other legislation.
>
> . . .
>
> The court also considers whether there is some kind of legal or practical impediment to seizure at common-law. In the alternative, if the creditor could not establish this, the court often looked at the "special circumstances" of the case to justify the appointment. If the creditor could not enforce the judgment by legal execution or where legal execution was difficult, if not impossible, there might exist special circumstances. The creditor must show that there are special circumstances and that without an order appointing a receiver, it would be practically very difficult, if not impossible, to obtain any fruit of the judgment. However, it is doubtful that a court would appoint a receiver if the creditor were merely inconvenienced in pursuing a legal remedies.
>
> Last, it is generally incumbent upon a creditor to show that some benefit will be gained by the appointment and that that benefit is sufficient to justify the making of an order. As a practical matter, the court reviews the amount of the debt owed to the creditor, the amount or amounts likely to be collected if a receiver were appointed, the type of asset that cannot be seized through legal execution, the nature of the debtor's interest, and the probable cost that will be incurred in the appointment of receiver.

[20] As J.R.H. Turnbell J. noted in his recent decision in *Ontario College of Optometrists v. SHS Optical Ltd. (c.o.b. Great Glasses)*:

> "Special circumstances" that warrant the appointment of a Receiver include cases involving contrived or elaborate business structures, or where large amounts of money are at stake that may not be realized without the appointment.

In *Canadian Film Development Corp. v. Perlmutter*, Gray J. concluded that the judgment debtor was using certain corporations as debt avoidance vehicles, nominally providing his services for free to those corporations, but having the corporations — owned by a family member — pay his on-going expenses, while not making any payments on the outstanding judgments against him.

[21] In discussing the special circumstances in which the court might appoint an equitable receiver, Bennett observed that where the garnishment process might involve difficult mechanics, expense and be ineffective, the court might regard that situation as a special circumstance. Also:

> [T]he court may also appoint an equitable receiver in a situation where the debtor has arranged his or her affairs in such a way that there is an appearance that the assets have been sheltered and that there is more than a substantial impediment in the way of ordinary methods of recovery.

[22] In the *Canadian Film Development Corp.* case Gray J. appointed a receiver in aid of execution because no reasonable prospect of recovery on the judgments otherwise existed. In doing so he quoted the pithy comment made by Vaughan Williams L.J. in an English decision regarding the objective in appointing such a receiver:

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> [The applicant] must shew that the circumstances are such as to render it practically very difficult, if not impossible, to obtain any fruit of his judgment, unless what has been called equitable execution be granted to him.

8 As can be seen from this jurisprudence, courts have countenanced the appointment of an equitable receiver, or a receiver in aid of execution, where (i) some legal impediment would prevent the seizure and sale of the debtor's property under general execution procedures or (ii) where special circumstances existed which would render the normal methods of execution ineffective or impractical. The methods of execution available under Rule 60 of our *Rules of Civil Procedure* in practice often prove cumbersome, can involve considerable delays and, most significantly, frequently require judgment creditors to incur significant costs in the face of resistance offered by recalcitrant judgment debtors. That practical reality requires courts to take a very pragmatic view of what the jurisprudence historically has termed "special circumstances".

9 The availability of the equitable remedy of a receiver in aid of execution should be measured, in part, by the need to ensure that those who have gained the status of judgment creditor by reason of an order of this Court can secure the benefit of that judgment in a cost-effective way. While the appointment of a receiver inevitably brings its own costs, often those costs pale in comparison to those which would result from a protracted resort to the various execution mechanisms founds in Rule 60. As the old saying goes, "time is money", and the inability of our traditional rules of execution to place money in the pockets of judgment creditors in a timely fashion often signals the need to appoint a receiver in aid of execution.

10 At the start of this year, in the case of *Di Felice v. 1095195 Ontario Ltd.*, I gave detailed directions for the sale of three properties by a brokerage firm in consultation with the parties. [2] By last June it was apparent that on-going disputes amongst the parties were frustrating the contemplated sales process, which led me to appoint a receiver to conduct the sales process. [3] Notwithstanding that the appointment of a receiver would generate its own costs, I concluded that the benefit of a process controlled by a court-appointed receiver outweighed the costs of such an appointment:

> [15] I find considerable merit in the position taken by Aldo Di Felice that the court should appoint an officer to supervise the sale of the Properties. Although the moving parties did not request such relief, and although Aldo Di Felice did not file a notice of cross-motion, I conclude that in order to ensure that the parties do not frustrate the performance of my January Order, I must appoint a receiver over the Properties who will aid in the execution of the sale order which I made at the start of this year.
>
> [16] That Receiver need not take possession of the Properties, but the Receiver will possess the power to market and sell the Properties, with the assistance of Colliers, and to convey title, under court-supervision. Colliers will act as the listing agent. The Receiver will be versed in the *Royal Bank of Canada v. Soundair* paradigm which governs the court-supervised sale of assets in this province, and in the Receiver the parties will have the comfort that the process is under the control of an officer of the court who must consider the interests of all parties. As matters now stand, my January Reasons determined the legal rights of the parties in the Properties, so all that is left to do is to maximize the proceeds on the realization of those assets. A Receiver possesses the expertise to perform that role.
>
> [17] The combination of a Receiver experienced in the sale and marketing of real estate assets, together with an experienced broker such as Colliers, will enable the Properties to be sold in such a way as to reasonably ensure that they fetch the highest prices possible in the market. Such a combination will also reduce the transaction delays which have resulted from the bickering between the parties, and it will allow the routine details of a sales, marketing and bidding process to be handled by experienced professionals. With such a combination in place, I would foresee the need for only two more court attendances — of course, on notice to the parties - before the Properties are sold: (i) the approval of a sales and marketing process, if required in light of the extensive directions which I have already given; and, (ii) requests for approval and vesting orders in respect of the sale of each Property.

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> [18] Although the appointment of a receiver to aid in the execution of my January Order will add some costs to the process, the costs would be proportionate in the circumstances: the parties agree that the Properties are worth in the neighbourhood of $20 million. Against the costs of a receiver one must weigh the costs of further attendances by the parties were I to permit them continued direct participation in the sales and marketing process. When I asked at the hearing whether, in the event that I made the directions requested by the applicants, the parties could guarantee that they would not be back before me again, quite understandably counsel stated that no such guarantee could be given. Also, by placing the direct supervision of the sales, marketing and bidding process in the hands of an experienced professional, one increases the prospects of enhancing the prices fetched for the properties.

IV. Analysis

11 Similar pragmatic considerations apply in the present case. First, the timelines contained in the Judgment reasonably contemplated that the Property would be sold this year. That has not happened. Second, paragraph 17 of the Judgment specifically provided that if the respondents failed to refinance or sell the Property by mid-August, the applicants could request the assistance of this Court to sell the Property.

12 Third, even when the Judgment authorized the applicants to take control of the sale process, the evidence disclosed that Mr. Tohamy failed to provide the requisite level of timely co-operation to the applicants' listing agent in a variety of ways, including his delay in providing accurate, up-to-date rental information and leading the applicants to believe that he had accepted some offer to purchase by 1569465 Ontario Ltd., an offer which proved ephemeral at day's end. Consequently, the sales process for the Property must be run in a fashion which does not depend upon Mr. Tohamy's "yeah or nay" to move forward.

13 Fourth, although the applicants point to an October 11 offer to purchase as one of real value, as the current listing agreement was reaching its expiration this month, four new offers hit the table. While none of those offers were at a price equivalent to the October 11 one, they did demonstrate a level of interest in the Property which is a multi-million dollar one. However, the rather undisciplined sale process used to date — a simple listing — does not provide me with the confidence that the process has met the *Royal Bank v. Soundair Corp.* [1991 CarswellOnt 205 (Ont. C.A.)] principles and the flurry of recent offers holds out the possibility that a more disciplined sales process may well result in a higher offer. Any sales process must take into account the economic interests of the three parties interested in the Property — the mortgagee, Muskowitz Capital, the applicants and the respondents — and I am not satisfied that the process used up until this time has done so. A sales process controlled by the receiver is much more likely to do so.

14 Accordingly, for these reasons I concluded that it was just and reasonable to appoint Fuller Landeau as the receiver of the Property with the power to sell the property.

15 The applicants submitted a form of draft order on which counsel for the respondents and the proposed Receiver offered comments. Counsel shall file a revised order for my issuance which deals with the following:

> (i) The appointment clause, paragraph 2, should refer to the appointment of the Receiver over both the Property and the rents derived from that Property;
>
> (ii) Paragraph 3(g) should be amended to provide simply that court approval is required for any sale of the Property; and,
>
> (iii) The standard stay provisions contained in the Model Order — paragraphs 9 and 10 — should be included in the appointment order.

Counsel may either file an approved order with the Commercial List Office for my signature or "walk-in" an approved order at any 9:30 this week.

V. Costs

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16 As to costs, the Aly Applicants seek an award of partial indemnity costs in the amount of $33,340.67 and Ms. El Feky seeks an award of $19,614.42. The respondents submitted that those requests were excessive and that a more appropriate level of partial indemnity costs would be $20,000 for the Aly Applicants and $5,000 to $10,000 for Ms. El Feky.

17 I have considered those submissions, together with the Costs Outlines filed by both the applicants.

18 I have taken into account the factors enumerated under Rule 57, including the time spent, the result achieved, and the complexity of the matter, as well as the application of the principle of proportionality: Rule 1.04(1). In addition, I have considered the principles set forth by the Court of Appeal in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.) and *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (Ont. C.A.), specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant.

19 The applicants filed four affidavits, two from the current listing agent of the Property and two which discussed the background to the Judgment and the relationship amongst the parties. The respondent filed two affidavits, including one from the former listing agent for the Property. Four cross-examinations were conducted *seriatim* on the same day. Although factums were filed, the law was not complex. The hearing took less than one hour.

20 The applicants succeeded on their application. They are entitled to partial indemnity costs. But, the amounts requested are disproportionate to the relative simplicity of this motion. Rule 5.02(1) contemplates that co-applicants will be represented by the same lawyer of record. Here, two lawyers represented different applicants. While I understand why that was so given who represented whom at trial, the simplicity of this application did not merit two counsel for the applicants, even senior and junior counsel. Consequently, I assess the reasonableness of the claimed costs on the basis that one lawyer would have been adequate for this application.

21 Approached in that fashion, I conclude that an award of partial indemnity costs in the amount of $10,000.00 would be a reasonable one in the circumstances, and I order the respondents to pay the applicants that amount within 30 days.

Application granted.

Footnotes

1 2012 ONSC 7262 (Ont. S.C.J. [Commercial List])

2 2013 ONSC 1 (Ont. S.C.J.)

3 2013 ONSC 4236 (Ont. S.C.J. [Commercial List])

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TAB 3

2015 ONSC 5465
Ontario Superior Court of Justice

Miller v. Debartolo-Taylor

2015 CarswellOnt 14680, 2015 ONSC 5465, 258 A.C.W.S. (3d) 324

Suzanne Miller, Plaintiff and Rosetta Debartolo-Taylor, 2070935 Ontario Inc. and (James) Kevin Taylor, Defendants

Vallee J.

Judgment: September 1, 2015
Docket: CV-12-111399-00

Counsel: Ms Miller, for herself
M.L. Biggar, for Defendants

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

MOTION by creditor to appoint receiver in aid of execution of judgment against debtor; MOTION by debtor to discharge certificate of pending litigation registered against his home.

***Vallee J.*:**

Nature of the Motions

1 Ms. Miller is Mr. Taylor's judgment creditor. She brings this motion in writing to appoint a receiver. Mr. Taylor also brings a motion in writing to discharge a certificate of pending litigation, obtained by Ms. Miller, which is registered against his matrimonial home.

Events Leading to the Motions

2 Ms. Miller and Mr. Taylor were business partners. On May 9, 2005, Mr. Taylor transferred his interest in the matrimonial home to his wife. Sometime prior to July 27, 2007, Mr. Taylor began misappropriating money from the business for his own purposes.

3 On March 12, 2008, Ms. Miller brought an action against Mr. Taylor. Ms. Miller obtained judgment against Mr. Taylor on November 28, 2008. Two months prior to the trial, Mr. Miller transferred his interest in the business to his wife's company.

4 After attempting various methods to collect the amount of the judgment, Ms. Miller carried out an examination in aid of execution of Mr. Taylor on June 3, 2011. One week before he was required to answer his related undertakings, he made an assignment in bankruptcy.

5 On her application and with the consent of the trustee, the bankruptcy court assigned to Ms. Miller the trustee's rights to pursue assets for which Mr. Taylor had not provided an accounting and to commence an action.

6 Ms. Miller commenced a fraudulent conveyance action against Mr. Taylor and his wife on October 3, 2012. On October 9, 2012 Ms. Miller obtained a certificate of pending litigation.

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7 On April 24, 2015, I determined that Mr. Taylor's transfers of his interests in the matrimonial home and the business were made with the intent to defeat, hinder, delay and defraud creditors including Ms. Miller. I allowed Ms. Miller's motion for summary judgment. See *Miller v. Debartolo-Taylor*, 2015 ONSC 2654 (Ont. S.C.J.).

The Issues

Would it be just or convenient to appoint a receiver in aid of execution of judgment?

Do special circumstances exist in this matter which would render the normal methods of execution ineffective or impractical?

Applicable Law

8 Section 60.02(1)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 states that in addition to any other method of enforcement provided by law, an order for the payment or recovery of money may be enforced by the appointment of a receiver.

9 The purpose of appointing a receiver in aid of execution is to protect the interests of the claimant seeking the order where there is a real risk that their recovery would otherwise be in serious jeopardy. See *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.*, [1987] O.J. No. 2315 (Ont. H.C.) at par 6.

10 In *Weig v. Weig*, 2012 ONSC 7262 (Ont. S.C.J. [Commercial List]), the court referred to *Bennett on Receiverships*, 3 rd ed. (Toronto: Carswell, 2011) in which the author stated on page 800,

The court may also appoint an equitable receiver in a situation where the debtor has arranged his or her affairs in such a way that there is an appearance that the assets have been sheltered and that there is more than a substantial impediment in the way of ordinary methods of recovery.

Mr. Taylor's position

11 Mr. Taylor states that Ms. Miller has not described any of the following in her motion record:

• the amount likely to be collected if a receiver were appointed;

• the nature of the assets including that one of the principal assets is a matrimonial home which, for the purpose of this proceeding, is jointly owned;

• the probable cost that will be incurred in the appointment of a receiver; or,

• the amount of debt owed to her.

12 Mr. Taylor states that the appointment of a receiver in aid of execution is not just or convenient. Mr. Taylor and his wife have obtained a commitment letter to be registered against the matrimonial home to finance all outstanding judgments and debts. The parties have agreed on the amount owing, subject to interest adjustments to be made. Ms. Miller's certificate of pending litigation needs to be discharged so that the financing can be put in place to allow for the payment of the funds.

Analysis

13 Clearly, Mr. Taylor has taken every possible step to delay or defeat payment of the judgment dated November 28, 2008. He fraudulently transferred his assets to his wife and her company, thereby placing them out of Ms. Miller's reach. He made an assignment in bankruptcy. He failed to account for some of his assets in the bankruptcy proceedings. Ms.

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Miller has had to pursue Mr. Taylor in two civil actions over seven years to attempt to obtain payment of the money that he misappropriated from their business.

14 I have heard four motions in this action including Mr. Taylor's motion to strike the claim in which he alleged that the fraudulent conveyance action was brought outside the applicable limitation period. I have heard and read evidence in those motions regarding the amount of the first judgment, the amount that the Taylors paid for their matrimonial home and the consideration paid by Ms. DeBartolo-Taylor's company for the transfer of Mr. Taylor's interest in the business. The fact that Ms. Miller has not included these details in her motion record does not concern me.

15 With respect to Mr. Taylor's concern regarding the amount that will be incurred in the appointment of a receiver, this cost could have been completely avoided had Mr. Taylor simply made arrangements to pay the amount of the judgment dated November 28, 2008.

Conclusion

16 Given Mr. Taylor's efforts to hinder and defeat Ms. Miller's attempts to collect the judgment, I find that the appointment of a receiver in aid of execution of a judgment is just and convenient and that special circumstances exist in this matter that render the normal methods of execution ineffective or impractical.

17 The motion for the appointment of a receiver is allowed.

18 Ms. Miller may serve and file a draft appointment order, together with an affidavit of service, for my consideration. Counsel for Mr. Taylor may provide submissions in writing regarding the draft within 10 days of service. The documents shall be filed with the trial co-ordinator in Barrie to the attention of my assistant, Nicole Anderson.

The Certificate of Pending Litigation

19 Mr. Taylor and his wife request that the CPL registered against their matrimonial be discharged to permit funding to be advanced in order to pay the amount of the judgment. They state that the parties have agreed on the amount, subject to interest adjustments. On the parties' last court attendance, Ms. Miller strongly denied that she had agreed to the amount proposed by the defendants. There is no subsequent indication from her that she has now agreed on the amount.

20 Given the fact that seven years have passed since the date of the original judgment, interest will comprise a significant component of the amount that Mr. Taylor owes. Discharging the CPL at this time is premature. The parties must either come to an agreement regarding the full amount owed or obtain a determination of that amount before the defendants can assert that they have obtained a commitment letter sufficient to ensure payment. Subsequently, the parties must agree on a procedure to discharge the CPL and guarantee payment of the amount owing.

21 The defendants are granted leave to return their motion in writing on seven days' notice after the steps set out above have been taken. A further affidavit must be filed. Ms. Miller may provide responding materials if she wishes.

Creditor's motion granted; Debtor's motion dismissed.

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TAB 4

2011 ONSC 4971
Ontario Superior Court of Justice [Commercial List]

Carmen Alfano Family Trust v. Piersanti

2011 CarswellOnt 8850, 2011 ONSC 4971, 207 A.C.W.S. (3d) 556

Bertina Alfano, Trustee of the Carmen Alfano Family Trust, Bertina Alfano, Italo Alfano, trustee of the Italo Alfano Family Trust, Italo Alfano, Ulti Alfano Trustee of the Ulti Alfano Family Trust and Ulti Alfano, Plaintiffs and Terry Piersanti also known as Terry Scatcherd, Christian Piersanti, Piersanti and Co. Barristers and Solicitors, Piersanti and Co. Professional Corporation, 1269906 Ontario Limited, 1281111 Ontario Limited, 1281038 Ontario Limited, 1314112 Ontario Limited, 1281633 Ontario Limited, 1281632 Ontario Limited, 1466556 Ontario Limited, 3957331 Canada Inc., 3964400 Canada Inc., 3968626 Canada Inc., 4002598 Canada Inc., 4011902 Canada Inc., 6051685 Canada Inc., 6060439 Canada Inc., 6260365 Canada Inc., 6292470 Canada Inc., 6306560 Canada Inc., 6324223 Canada Inc., 6792715 Canada Inc., Yonge Centre Properties Inc., 6335144 Canada Inc., TMJ Investments, Tara Piersanti also known as Tara Piersanti-Blake, Justin Piersanti and Morgan Piersanti, Defendants

Newbould J.

Judgment: August 22, 2011
Docket: CV-11-9318-00CL

Counsel: Kevin D. Sherkin, James F. Damond, for Applicants

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

MOTION by creditors on ex parte basis for Mareva injunction and for order appointing receiver over debtors' corporations.

***Newbould J.*:**

1 The plaintiffs move *ex parte* for a Mareva injunction and for the appointment of a receiver over all of the assets of the defendant corporations.

Mareva injunction

2 The test for a Mareva injunction is well known. See *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.). A Mareva injunction may be granted if the following criteria are met:

> (1) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.
>
> (2) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant. The plaintiff must establish a strong prima facie case on the merits.
>
> (3) The plaintiff should give some grounds for believing that the defendants have assets here.

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

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

3 The plaintiffs in this action are plaintiffs in prior proceedings commenced in this court that resulted in a judgment in their favour. The defendants Christian Piersanti and his wife Terry Piersanti were defendants in the prior proceedings, as were a number of the other defendants in this action.

4 The prior action involved the actions of the defendant Piersanti and his wife in connection with a paving business known as Osier Paving Inc. ("Osier"). The Alfano family were the majority shareholders in Osier. Piersanti was the lawyer for Osier and the Alfano family and the minority shareholder in Osier. MacDonald J., the trial judge in the prior proceeding, held that through a complicated fraudulent scheme orchestrated by Piersanti and his wife, the interests of the Alfano family in Osier were fraudulently acquired.

5 MacDonald J. released her reasons for judgment on September 3, 2010 [2010 CarswellOnt 6769 (Ont. S.C.J. [Commercial List])]. It took many months to settle the terms of the judgment which was eventually signed and entered on March 7, 2011. Judgment was granted in favour of the plaintiffs against Piersanti and his wife for $20 million. Piersanti was also ordered to pay punitive damages of $250,000. Further, in order to remedy their breach of a Mareva injunction that had been granted on June 18, 2002, the defendant 1281632 Ontario Limited, a company owned and controlled by Piersanti, was ordered to pay $2,500,000 into court on or before October 3, 2010. No such payment has been made to date.

6 Included in the findings of fact made by MacDonald J. were the following statements. The headings were not in the reasons:

Ongoing Deliberate Non-Disclosure

a) "This late delivery of this affidavit was one of many episodes throughout trial wherein there were issues about the quality of disclosure from the Defendants".

b) "The duty to make full disclosure was largely ignored by the Defendants in this case. They chose the documents that they would disclose. The same occurred by the Plaintiff in the Gold action. As the trial progressed, I became increasingly aware that the Piersanti Defendants and the Plaintiff in the Gold action were on a path to deliberately confuse the Court on the relevant issues in this case. The Defendants are clever and experienced litigants."

c) "The attitude of the Defendants towards their obligation to make full and timely production of all relevant documents was appalling, if not defiant. Collectively or individually, they held back many documents from the very early stages of these proceedings. They picked or chose the documents that they would produce. For example, there has been almost no production of the documents listed in paragraphs 1, 2, 3, and 4 of the notice of motion." (Mid-trial ruling dated June 22, 2009.

Fraud and Tendering Forged Documents

d) "I find that Piersanti created a second version of the USA (Unanimous Shareholders Agreement) to gain control of the Osier company when he knew that, particularly after Carmen's death, the remaining brothers, Italo, Ulti and Frank had little or no interest in the details of legal documentations such as the USA."

e) "I find that this was a conscious decision on his part hoping that if there was no arbitration and the Alfanos became engaged in a lengthy litigation they would in effect 'fold their tents and go home' because Mr. Piersanti knew that they had no means to defend or pursue litigation in relation to the USA."

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The Impact upon the Alfano family

f) "The fact that all of this transpired has had a profound effect on the Alfanos' position in this litigation. Aside from any other aspect of damages which may be awarded to them to compensate them for alleged losses, the fact that this agreement was manipulated and altered to the extent that it was, with the ramifications to the Alfano family, is a major factor in my consideration of damages. Essentially, the second and fraudulent version eliminated their interests in Osier."

Piersantis' Credibility

g) "I did not believe Mr. Piersanti when he said that the agreement attached by him to his affidavit sworn at the time of the injunction proceeding before Molloy J. on June 18, 2002 was the true USA. I find that this version of the agreement was purposely concocted in his office to suggest that the Alfanos had options to purchase shares that they had chosen to not exercise."

h) "I leave the subject of the USA by making one following comment. I found it shocking that a barrister and solicitor of the sophistication and expertise of Mr. Piersanti would engage in such a fraud."

I) "Once again, this is an example of Mr. Piersanti's devious behavior in dealing with matters that pertained to the Alfano family."

j) "When he was working with the receiver, Mr. Piersanti called him and asked him to change the numbers. In answer to a question from Mr. Sherkin in chief; Q. 'which numbers' A. 'The profit numbers to show a loss'"

k) "I found Chriss Smith to be a credible and truthful witness. I accept as true that he had never been asked by a client other than Mr. Piersanti to change financial statements to show a false loss."

l) "For reasons that are apparent in this judgment, I cannot rely on anything that Mr. Piersanti says." "She [Mrs. Piersanti] was an exceptionally evasive witness...Overall, her evidence was entirely unreliable particularly in respect of the new mortgages of the malls in the face of the injunction."

Disregard of court orders

m) "On Mr. Piersanti's part, I find that he was attempting to use Chriss Smith to achieve his objectives, and those of his wife Terry, which were to ensure the demise of Osier and get rid of the Alfanos.

n) "Both Mr. and Mrs. Piersanti are accomplished business people in real estate development. The record of all of the motions and endorsements in the commercial court leading up to the commencement of this trial demonstrates that the Piersanti's were 'ungovernable' to use the description of them by Mr. Diamond. There is evidence of land transfer tax fraud on two separate occasions. There was the use of accounting practices which were referred to as circular cheques and what was referred to by Ms. Piersanti as "day light loans". These practices were a ruse to make it appear that the Piersantis were assisting Osier on a daily basis."

o) "The evidence is that they have conducted the operation of 1281632 Ontario Limited (the mall property - sic) without regard to the injunction."

How Piersanti Shows Others as Owners of his Businesses when he is the True Owner

p) "Carey was a director of Gold Corporation while he was doing advisory work for Mr. Piersanti on the MAP properties. As far as Mr. Carey knew, Mr. Piersanti was the owner of Gold at the time. Carey was the sole officer and director of Gold at that time. Carey took on this role because Mr. Piersanti asked him to do it with the understanding that the position would be temporary."

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q) "I find that the request by Mr. Piersanti to have Carey act as the sole officer and director of Gold at that time is consistent with the modus operandi that Mr. Piersanti utilized on a regular basis".

r) "Prior to moving to 340 Bowes Road, OPCL was operated from 198 Osier Avenue in the City of Toronto which had been the Alfanos' home for many years."

7 In short, the decision of MacDonald J. was a strong indictment of fraudulent activity on the part of Piersanti and those that he used, which fraudulent activity included the concealing of assets through companies and other individuals, including his wife, whom he named as officers and directors so that others would be unaware of his dealings.

8 The decision of MacDonald J. is under appeal to the Court of Appeal and is now scheduled to be heard on November 8 and 9, 2011.

9 Upon filing their notice of appeal, the defendants obtained a certificate of stay from the registrar of the Court of Appeal. The plaintiffs took the position that the notice of appeal did not stay the part of the judgment ordering 1281632 Ontario Limited to pay $2,500,000 in the court caused by the prior breach of the June 18, 2002 Mareva injunction. On June 7, 2011 MacFarland J.A. set aside the certificate of stay as it related to the $2,500,000 payment required to be made by 1281632 Ontario Limited. The money has not been paid into court and a motion has been served by the appellants seeking to set aside the order of MacFarland J.A.

10 This current action is brought in an attempt to collect on the judgment of MacDonald J. The theory of the claim is that assets owned by Piersanti or his wife have been hidden in corporations ostensibly owned by others but in fact held for the benefit of Piersanti or his wife. A number of the defendants were defendants in the previous action, including many numbered companies. Other corporations discovered since the previous action, some of which existed at the time that action was commenced but were unknown to the plaintiffs, have been added as defendants in this action as have three children of Piersanti and his wife: Justin Piersanti born in 1979, Morgan Piersanti born in 1980 and Tara Piersanti born in 1983. The plaintiffs allege that some of the properties are owned by corporations in which the sole officer is one of the children and that some of the properties have been mortgaged in favour of corporations which list the children as officers and directors.

11 The plaintiffs have done considerable research to support their allegations. The factum in support of this motion contains several pages of details and charts. I have attached as an appendix to this endorsement excerpts taken verbatim from the factum.

12 The plaintiffs expect that Piersanti, his wife and their children will take the position in this new action that each of these new properties are in fact beneficially owned by the Piersanti children and any mortgage granted in favour of related, non-arm's length companies are real, valid mortgages. The plaintiffs have also set out in their factum, apart from what is in Appendix 1, facts regarding positions that might be taken by the defendants in this new action. I have set out in Appendix 2 some of these.

13 The plaintiffs, however, contend that given the history of the misconduct and the untruthfulness of Piersanti and his wife, as found by MacDonald J., the fact that the pattern of shielding their assets from the public appears to repeat itself incessantly, and that a majority of these new transactions were undertaken after the original proceedings were commenced, it is their position that all of the newly discovered properties are truly owned, directly or indirectly, by Piersanti and his wife and that the non-arm's length mortgages are sham transactions and no money was ever advanced between the related corporations, which are in any event truly owned, directly or indirectly, by Piersanti and his wife.

14 I am satisfied based on the evidence before me that the plaintiffs have made out a strong *prima facie* case that there has been fraudulent conduct in the dealings in the properties disclosed in the statement of claim. MacDonald J. found fraudulent activity on the part of Piersanti and his wife. She said she could not rely on anything Piersanti said and that his wife's evidence was entirely unreliable.

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15 MacDonald J. also found that having someone act as the officer and director of a company controlled by Piersanti was part of the *modus operandi* that Piersanti utilized on a regular basis to protect disclosure of his interest in various properties. See paras. 130 and 133 of her reasons for judgment. This finding is particularly relevant in the present case.

16 I am also satisfied that there is a strong risk that Piersanti and his wife will further dissipate assets pending trial for the purpose of avoiding the consequences of a judgment against them. They have done so in the past, having acted contrary to a previous Mareva injunction granted in 2002, and their actions as disclosed in the affidavit material before me indicates a strong likelihood that they will do so again if not enjoined.

17 In the result, a Mareva injunction is ordered.

Receiver

18 In *Anderson v. Hunking*, 78 C.P.C. (6th)189 (Ont. S.C.J.), Strathy J. summarized the principles to be applied in considering the appointment of a receiver in circumstances where the applicant is not someone with security over the defendant's assets. He stated:

> 15. Section 101 of the Courts of Justice Act provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:
>
> > (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);
> >
> > (b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);
> >
> > (c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Limited v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Gen. Div.);
> >
> > (d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. S.C.J.);
> >
> > (e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;
> >
> > (f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton* [2009] O.J. No. 1228; 78 C.P.C. (6th) 189, [2009] O.J. No. 1228.

19 This is an extraordinary case. The plaintiffs already have a judgment against Piersanti and his wife for fraudulent conduct. For essentially the same reasons that I have granted a Mareva injunction, the appointment of a receiver is justified. The plaintiffs have established a strong prima facie case that assets have been transferred to hide their true owners and there is evidence that their recovery is in serious jeopardy if a receiver is not appointed. A prior Mareva

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injunction was ignored and there is obvious concern that the Mareva injunction ordered today may be ignored. If that proved to be the case, the plaintiffs would suffer irreparable harm.

20 I have considered the balance of convenience and which party would suffer greater harm from the granting or refusing the appointment of a receiver. Certainly the plaintiffs would suffer from a refusal. The properties that would be run by the receiver are commercial properties. There is no reason to think that a receiver would be less capable than the defendants in running them.

21 The plaintiffs point out that it is possible that the appointment of a receiver could, in theory, trigger default under the "non-sham" mortgages which are registered in favour of non-Piersanti lenders and financial institutions. As an example, the $10 million mortgage registered on December 16, 2010 against title to two of the Orillia parcel (PINs 58670-0019 and 58670-0139) in favour of TCC Mortgage Holdings Inc. contain a receivership clause that includes as an act of default under that mortgage:

a) any representation or warranty made by the chargor which is not true, and

b) any "execution or other process of the court which becomes enforceable against the chargor" provided it is not in good faith being disputed by the chargor.

22 The plaintiffs say that it is unknown what representations were made to TCC as part of the application for the mortgage, or who made any such representations. They say, however, that it is not their intention to trigger any default provision under those mortgages, but on the contrary to ensure that those mortgages are and continue to be properly serviced from the income generated by the properties.

23 While there may be a risk that the appointment of a receiver would trigger default clauses, it is also the case that a receiver might well provide some comfort to the mortgagees so long as the properties produce sufficient income to pay the mortgages in accordance with their terms.

24 In any event, in light of the circumstances, the strong *prima facie* case outweighs in my view the risk of a mortgage default. It will be practically difficult, if not impossible, for the plaintiffs to obtain the fruits of their judgment if a receiver is not appointed.

25 In the result, I order that a receiver be appointed of the assets of the defendant corporations with the power to manage, operate and carry on the business of these corportions.

Conclusion

26 A Mareva injunction and the appointment of a receiver are ordered. The plaintiffs' motion is to be returnable within 10 days in accordance with the rules.

27 The plaintiffs have undertaken to abide by any order concerning damages which the court may make if the relief granted causes damage to the defendants.

Motion granted.

Appendix 1

Parties to the Original Proceedings

1. Some of the Defendants in this new proceeding were also Defendants in the original proceedings. These common Defendants are Ontario corporations known as Gold, 1281632, 1281038 Ontario Limited ("12810"), 1281111 Ontario Limited ("12811") and a federal corporation known as 3964400 Canada Inc. ("3964").

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2. All of the above Ontario corporations list their head office as 445 Edgeley Blvd., Unit 10-11, Concord, Ontario. This is the address for Piersanti PC.

3. In addition, three of the above Ontario corporations are the owners of the following Ontario commercial plaza properties (as set out in the Judgment of MacDonald J.):

12810 Hanlon Park Mall

12811 Tottenham Plaza

1281632 Glenwoods Centre Mall

4. Of note, pursuant to the Judgment, Ulti was granted a 1/12 ownership interest in those three properties owned by 12810, 12811 and 1281632 respectively.

5. Although more will be said on this issue hereinafter, those three properties are currently subject to a restrictive Order made by MacDonald J. during the trial of the original proceedings (and registered against title). The mortgages in favour of 3964 and Gold were registered on title to give the appearance of stripping away the asset value that accumulated in the properties prior to their registration.

6. 3964 lists its head office as 2550 Finch Avenue West, Unit 7207, Weston, Ontario M9M 2G3. This is a storage facility.

7. As found by MacDonald J., and as was maintained by the Plaintiffs from the outset of the original proceedings, each of the above corporations is owned and controlled directly or indirectly by Piersanti and Terry.

Newly Discovered Companies (created pre-original proceedings)

8. As found by MacDonald J, the fraud perpetrated against the Plaintiffs by Piersanti and Terry commenced in late 1996 and as early as 1994. The following companies were incorporated between then and the commencement of the original proceedings (June 17, 2002),

Name	Date of Incorporation	Head Office	Director(s)
Yonge Centre Properties Inc. ("Yonge Centre")	November 13, 1996.	Piersanti PC office	Terry
1269906 Ontario Limited ("126")	35768	Piersanti PC office	Terry
1281633 Ontario Limited ("1281633")	35836	Piersanti PC office	Terry and Linda Hall (former legal secretary at Piersanti PC)
1314112 Ontario Limited ("131")	36047	Piersanti PC office	Morgan
1466556 Ontario Limited ("146")	36955	Piersanti PC office	Morgan
3957331 Canada Inc. ("395")	37178	14-3650 Langstaff Road, Woodbridge, Ontario (a UPS store which, *inter alia*, rents mailboxes)	Terry
3968626 Canada Inc. ("3968")	37201	Piersanti PC office	Morgan
4002598 Canada Inc. ("400")	37276	14-3650 Langstaff	Terry
4011902 Canada Inc. ("401")	37297	14-3650 Langstaff	Justin

Newly Discovered Companies (created during the original proceedings)

9. The following companies were incorporated after the commencement of the original proceedings (June 17, 2002):

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Name	Date of Incorporation	Head Office	Director(s)
6051685 Canada Inc. ("605")	37627	14-3650 Langstaff Road, Woodbridge, Ontario office	Terry
6060439 Canada Inc. ("606")	37651	2550 Finch Avenue West, Weston, Ontario	Tara
6260365 Canada Inc. ("626")	38182	Piersanti PC office	Morgan
6292470 Canada Inc. ("629")	38260	14-3650 Langstaff Road, Woodbridge, Ontario office	Morgan
6306560 Canada Inc. ("630")	38294	14-3650 Langstaff Road, Woodbridge, Ontario	Morgan
6324223 Canada Inc. (632")	38334	14-3650 Langstaff Road, Woodbridge, Ontario	Justin
6335144 Canada Inc. ("633")	38364	14-3650 Langstaff Road, Woodbridge, Ontario	Justin
6792715 Canada Inc. ("679")	39251	Piersanti PC office	Morgan

Name	Date of Incorporation	Head Office	Director(s)
6051685 Canada Inc. ("605")	37627	14-3650 Langstaff Road, Woodbridge, Ontario office	Terry
6060439 Canada Inc. ("606")	37651	2550 Finch Avenue West, Weston, Ontario	Tara
6260365 Canada Inc. ("626")	38182	Piersanti PC office	Morgan
6292470 Canada Inc. ("629")	38260	14-3650 Langstaff Road, Woodbridge, Ontario office	Morgan
6306560 Canada Inc. ("630")	38294	14-3650 Langstaff Road, Woodbridge, Ontario	Morgan
6324223 Canada Inc. (632")	38334	14-3650 Langstaff Road, Woodbridge, Ontario	Justin
6335144 Canada Inc. ("633")	38364	14-3650 Langstaff Road, Woodbridge, Ontario	Justin
6792715 Canada Inc. ("679")	39251	Piersanti PC office	Morgan

10. A review of corporate searches of the above companies disclose that the Piersanti children have not complied with Sections 106 and 113 of the *Canada Business Corporations Act*, which requires that the director list their residential address on the director forms. The listed addresses in all of the corporate searches are all business addresses whether it be 14-3650 Langstaff Road, Woodbridge which is the UPS mail centre, Units 10-11, 445 Edgeley Boulevard, Concord which is the Piersanti PC office, or 2550 Finch Avenue, Toronto, which is a storage facility

Properties owned or controlled by Christian and Terry Piersanti

11. A true copy of a Schedule of all the newly discovered properties which the Plaintiffs state are truly owned, indirectly or directly, by Piersanti and Terry can be found at Tab 2 GG of the Plaintiffs' Motion Record. This Schedule is attached to the Plaintiffs' Statement of Claim and sets out all the newly discovered property which they seek to make subject to the interlocutory relief.

Hanlon Park Mall - 218 Silvercreek Parkway North, 17A, Guelph (PINS 71272-0005 & 71272-0257)

12. As stated above, this property was the subject matter of the original proceedings. Property searches for the Hanlon Mall disclose the following:

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Hanlon Park Mall (Guelph) - 71272-0005(LT)

History of Dealings	Company Information	Current Owner	Current Charges
1995/05/02 Transfer (power of sale) from RBC to Hanlon Properties Inc. ($2)	Hanlon Properties Inc. Inc. date 1995/04/04. Director/Officer Robert Carey	1281038 Ontario Limited	1281038 Ontario Limited to *Insurance Corporation of British Columbia* ($6,300,000.00 no sec interest)
1998/02/10 Transfer from Hanlon Properties Inc. to 1281038 Ontario Limited	1281038 Ontario Limited. Inc. date 1998/02/09. Officer/Director Terry Piersanti		2006/11/06 Charge from 1281038 Ontario Limited à *3964400 Canada Inc.* ($4,150,000)
2006/11/20 Charge from 1281038 Ontario Limited to Insurance Corporation of British Columbia ($6,3,000) 2006/11/06 Charge from 1281038 Ontario Limited to 3964400 Canada Inc. ($4,150,000)	3964400 Canada Inc. Inc. date 2001/10/31. Officer Terry Piersanti.		

Hanlon Park Mall (Guelph) 71272-0257 (LT)

History of Dealings	Company Information	Current Owner	Current Charges
1998/02/10 Transfer from Hanlon Properties Inc. to 1281038 Ontario Limited	1281038 Ontario Limited. Inc. date 1998/02/09. Officer/Director Terry Piersanti	1281038 Ontario Limited	2000/05/30 Charge from 1281038 Ontario Limited to *Credit Union Central of Ontario Limited* ($3,400,000)
2000/05/30 Charge from 1281038 Ontario Limited to Credit Union Central of Ontario Limited ($3,400,000)	Hanlon Properties Inc.—Inc. date 1995/04/04. Director/Officer Robert Carey		
2000/06/06 Charge from 1281038 Ontario Limited to Gold Financial Corp. ($17,000,000)	Gold Financial Corp. Inc. date 1995/02/23. Officer/Director Terry Piersanti	from 1281038	2000/06/06 Charge Ontario *Limited to Gold Financial Corp.* ($17,000,000)

Glenwoods Centre - *443 The Queensway S., Keswick (PIN 03476-0309, 03476-1107 & 03476-1308)*

13. This property was the subject matter of the original injunction. Property searches for the Glenwoods Centre disclose the following:

Glenwoods (03476-0309)

History of Dealings	Company Information	Current Owner	Current Charges
1998/02/16 Transfer from Glenwoods Properties Inc. to 1281632 Ontario Limited	Glenwoods Properties Inc. Inc. date 1995/04/04. Officer Robert Carey.	1281632 Ontario Limited	2003/12/31 Charge from 1281632 Ontario Limited to *CIBC Mortgages Inc* ($6,775,000)
2003/12/31 Charge from 1281632 Ontario Limited to CIBC ($6,775,000)	1281632 Ontario Limited. Inc. date 1998/02/11. Director/Officer Terry Piersanti		2007/01/31 Charge from 1281632 Ontario Limited to *CIBC Mortgages Inc* ($4,300,000)

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2007/01/31 Charge from 1281632 Ontario Limited to CIBC ($4,300,000) 2007/01/31 Charge from 1281632 Ontario Limited to 396440 Canada Inc. ($4,364,918)	3964400 Canada Inc.—Inc. date 2001/10/31. Officer Terry Piersanti.		2007/01/31 Charge from 1281632 Ontario Limited to *3964400 Canada Inc*. ($4,364,918)

Glenwoods (03476-1107)

History of Dealings	Company Information	Current Owner	Current Charges
2007/06/29 Transfer from Chau, Takata, Wong, Yien & Yien to Justin Piersanti 2007/6/29 Charge from Justin Piersanti to Pace Savings & Credit Union Limited ($171,000) 2008/07/08 Transfer from Justin Piersanti to 6792715 Canada Inc. ($2.00 - trustee to trustee)	6792715 Canada Inc.—Inc. date 2007/06/19 Officer Morgan Piersanti.	6792715 Canada Inc.	2007/6/29 Charge from Justin Piersanti to Pace Savings & Credit Union Limited ($171,000)

Glenwoods (03476-1318)

History of Dealings	Company Information	Current Owner	Current Charges
2000/12/15 Transfer from TD Bank to 1314112 Ontario Limited ($300,000)	1314112 Ontario Limited Inc. date 1998/09/10. Officer Morgan Piersanti	1314112 Ontario Limited	2001/11/05 Charge from 1314112 Ontario Limited to *3964400 Canada* Inc. ($5,000,000) postponed to Pace mortgage below
2001/11/05 Charge from 1314112 Ontario Limited to 3964400 Canada Inc. ($5,000,000) subsequently postponed to Pace mortgage below	1281632 Ontario Limited. Inc. date 1998/02/11. Director/Officer Terry Piersanti		
2009/11/10 Charge from 1314112 Ontario Limited to Pace Savings & Credit Union Limited ($480,000)	3964400 Canada Inc.—Inc. date 2001/10/31. Officer Terry Piersanti.		2009/11/10 Charge from 1314112 Ontario Limited to Pace Savings & Credit Union Limited ($480,000)

14. Only the first Glenwoods property search (03476-0309) was part of the original proceedings. The Plaintiffs only discovered the existence of the second and third portions of the Glenwoods property after obtaining the Judgment.

15. The second Glenwoods parcel (03476-1107) was purchased by Justin one year before the commencement of the trial of the original proceedings. It was then transferred from "trustee to trustee" (according to the Transfer registered as Instrument YR1011470,) to 679, but no further particulars are provided in Justin's Land Transfer Tax Affidavit.

16. The third Glenwoods parcel appears to be a "pod" upon which is a stand-alone Pizza Pizza franchise. 131 obtained title to the third Glenwoods parcel pursuant to a Transfer dated December 15, 2000. Terry signed on behalf of 131 and one can only assume that she was at one time an officer and/or director of 131 before Morgan.

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17. The purported mortgage dated November 5, 2001 was granted by 131 (a Terry company at the time) to 3964400 (another Terry company) registered as Instrument #YR70464. This alleged $5,000,000.00 mortgage was postponed in favour of the $480,000.00 Pace mortgage. It is the Plaintiffs' position that it is a sham like all of the mortgages sought to be set aside in their Claim.

Tottenham Plaza (PIN 58168-0062)

18. This property was the subject matter of the original proceedings. A true copy of a property search for the Tottenham Plaza discloses the following:

History of Dealings	Company Information	Current Owner	Current Charges
1998/02/11 Transfer from Tottenham Properties Inc. to 1281111 Ontario Limited ($2 Trustee to trustee)	Tottenham Properties Inc. Inc. date 1995/04/04. Officer/Director Robert Carey	1281111 Ontario Limited	2009/09/08 Charge from 1281111 Ontario Limited to *Central 1 Credit Union* ($2,940,000)
2009/09/08 Charge from 1281111 Ontario Limited to Central 1 Credit Union ($2,940,000)	1281111 Ontario Limited Inc. date 1998/02/09, Officer/Director Terry Piersanti.		2009/09/09 Charge from 1281111 Ontario Limited to *3964400 Canada Inc*. ($5,000,000)
2009/09/09 Charge from 1281111 Ontario Limited to 3964400 Canada Inc. ($5,000,000)	396440 Canada Inc. Inc. date 2001/10/31. Officer Terry Piersanti.		

Sobey's Mall, 39 Huron Street, Collingwood (PIN 58287-0066)

19. This and the other properties which follow are newly-discovered properties.

20. On or about June 28, 2005, BMM Properties Inc. (another Piersanti-related company) transferred the Sobeys Mall to 630 (listed as trustee to trustee for $2.00). A copy of a corporate search of BMM Properties indicates it to be a Piersanti-related company.

21. A property search for the Sobeys Mall discloses the following:

History of Dealings	Company Information	Current Owner	Current Charges
2005/06/28 Transfer from BMM Properties Inc. to—6306560 Canada Inc. (Trustee to Trustee for $2)	BMM Properties Inc.—Director: Terry Piersanti	6306560 Canada Inc.	2007/09/19 Charge from 6306560 Canada Inc. to *Insurance Corporation of British Columbia* ($3,150,000)
2005/06/28 Notice of Lease from 6306560 Canada Inc. to Sobeys Capital Incorporated	6306560 Canada Inc. Director Morgan Piersanti		2007/09/21 Charge from 6306560 Canada Inc. to *6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc.* ($2,000,000)
2007/09/19 Charge from 6306560 Canada Inc. to Insurance Corporation of British Columbia	6060439 Canada Inc.—Inc. date 2003/01/31. Officer/Manager in Ontario Tara Piersanti		
2007/09/20 Charge from 6306560 Canada Inc. to—HSBC Bank Canada ($565,000)	3968626 Canada Inc.—Inc. date 2001/11/07. Officer/Manager in Ontario Morgan Piersanti		
2007/09/21 Charge from 6306560 Canada Inc. to 6060439 Canada	4011902 Canada Inc.—Inc. date 2002/02/11. Officer/Manager in Ontario Justin Piersanti		

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Inc., 3968626 Canada Inc.,
4011902 Canada Inc.

22. On June 28, 2005, the Sobey's Mall was transferred from BMM Properties Inc. (Terry listed as sole director) to 630 (Morgan listed as sole officer and director) pursuant to a "trustee-trustee" transaction for $2.00 consideration.

23. In addition to the registered encumbrance of $3,150,000 (2007/09/19) to Insurance Corporation of British Columbia, on September 21, 2007 (in the middle of the original proceedings) 630 granted a $2,000,000.00 mortgage in favour of 606, 3968 and 401 jointly which, according to corporate searches disclosed above, are allegedly controlled by the Piersanti children.

24. While this may possibly be true, it is very doubtful given the age of the children and the fact that it is completely consistent with the *modus operandi* of Piersanti and Terry to use people close to them to act as "fronts" to frustrate and evade creditors.

New Tecumseth Property (PIN 58145-0389)

25. A property search for the New Tecumseh property discloses the following:

History of Dealings	Company Information	Current Owner	Current Charges
2006/12/08 Transfer from Warren Gibson Limited to 6324223 Canada Inc. ($2,839,331)	6324223 Canada Inc.—Inc. date 2004/12/14. Officer/manager in Ontario Justin Piersanti	6324223 Canada Inc.	2008/05/29 Charge from 6324223 Canada Inc. to *C.A. Bancorp G.P. Inc.* ($2,500,000). 2009/08/04 Charge From 6324223 Canada Inc. to *6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc*. ($6,000,000)
2008/05/29 Charge from 6324223 Canada Inc. to C.A. Bancorp G.P. Inc. ($2,500,000).	3968626 Canada Inc.—Inc. date 2001/11/07. Officer/Manager in Ontario Morgan Piersanti		
2009/08/04 Charge From 6324223 Canada Inc. to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc ($6,000,000)	4011902 Canada Inc.—Inc. date 2002/02/11. Officer/Manager in Ontario Justin Piersanti 6060439 Canada Inc. Inc. date 2003/01/31. Officer/Manager in Ontario Tara Piersanti C.A. Bancorp G.P. Inc. Inc. date 2007/12/21. Officer John F. Driscoll, Director Paul Haggis, Managing Director Michael Lovett, Officer Helen Martin		

26. On December 8, 2006 (in the midst of the original proceedings) the New Tecumseth property was purchased by 632 for the sum of $2,839,331.00. In addition to the registered encumbrance of $2,500,000.00 (2008/05/29) to C.A. Bancorp G.P. Inc., on August 4, 2009 (after the conclusion of the trial of the original proceedings but prior to Judgment) 632 granted a $6,000,000.00 mortgage to be registered in favour of 606, 39686 and 401 jointly (as with the Sobey's mall).

27. At Exhibit "TT", some of the registered instruments which show the Piersanti PC firm having prepared the documents can be found.

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28. As an aside, and with a view to ensuring that full disclosure of all relevant facts is made, Joseph Chetti placed an offer to purchase the New Tecumseth property and had many discussions and dealings in respect of the negotiations solely with Piersanti, who represented that he was indeed the owner of the property.

Kenora Mall (PIN 42163-0204)

29. A property search for the Kenora Mall discloses the following:

History of Dealings	Company Information	Current Owner	Current Charges
2005/11/23 Transfer from Canadian Tire Incorporated to 6292470 Canada Inc. ($2,100,000)	6292470 Canada Inc. Inc. date 2004/10/01.—Officer: Morgan Piersanti	6292470 Canada Inc.	2005/11/23 Charge from 6292470 Canada Inc. to *Insurance Corporation of British Columbia* ($2,940,000 no sec interest)
2005/11/23 Charge from 6292470 Canada Inc. to Insurance Corporation of British Columbia. ($2,940,000)	6060439 Canada Inc. Inc. date 2003/01/31.—Officer: Tara Piersanti		2008/11/07 Charge from 6292470 Canada Inc. to *C.A. Bancorp G.P. Inc.* ($500,000)
2008/11/07 Charge from 6292470 Canada Inc. to C.A. Bancorp Group Inc. ($500,000)	3968626 Canada Inc. Inc. date 2001/11/07. Officer Morgan Piersanti		
2008/11/10 Charge from 6292470 Canada Inc. to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc.	4011902 Canada Inc. Inc. date 2002/02/11. Officer Justin Piersanti		2008/11/10 Charge from 6292470 Canada Inc. to *6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc.* ($2,000,000)

30. On November 23, 2005 (in the midst of the original proceedings) the Kenora Mall was purchased by 629 for $2,100,000.00. In addition to registered encumbrances of $2,940,000.00 (2005/11/23) to Insurance Corporation of British Columbia and $500,000.00 (2008/11/07, in the midst of the trial of the original proceedings) to C.A. Bancorp G.P. Inc., on November 10, 2008, 629 granted a $2,000,000.00 mortgage registered in favour of 606, 3968 and 401.

31. Copies of the supporting instruments can be found at Tab 2 WW of the Plaintiffs' motion material.

Wasaga Beach Property - 964 Shore Lane, Wasaga Beach (PIN 58321-0006)

32. A property search for the Wasaga Beach property discloses the following:

History of Dealings	Company Information	Current Owner	Current Charges
2001/03/16 Transfer from 789533 Ontario Limited to 1466556 Ontario Limited (Trustee to Trustee for $2)	789533 Ontario Limited. Inc. date 1998/08/08. Director/Officer Terry Scatchard	1466556 Ontario Limited	2001/02/27 Charge from 789533 Ontario Limited to *RBC* ($350,000)
	1466556 Ontario Limited. Inc. date 2001/03/06 Director/Officer Terry Piersanti		2010/12/22 Charge from 1466556 Ontario Limited to *Home Trust Company*— ($560,000)
2001/02/27 Charge from 789533 Ontario Limited to RBC ($350,000)			
2005/08/12 Charge from 1466556 Ontario Limited to TD Bank ($570,000)	TMJ Investments. (No such company)		

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2010/12/22 Charge from 1466556 Ontario Limited to Home Trust Company—($560,000)

33. 146 is a company in which Morgan is the director. It acquired title to the Wasaga Beach property from 789533 Ontario Limited as "trustee to trustee for $2.00 and other valuable consideration". The corporate search for 789533 Ontario Limited lists Terry as the officer and director.

The Piersanti Residence - 110 Greenbrook Drive, Woodbridge (PIN 03327-0094)

34. For the sake of full disclosure, the Alfano family claimed an interest in this property during the original proceedings, claiming that Piersanti used some of the family's money to purchase the property, and they requested an equitable tracing order into the Piersanti residence.

35. However, at the start of the trial before MacDonald J., the Defendants provided substantiation that demonstrated to the Alfanos that prior to the purchase they could not prove that some of their monies found their way into the said property and they abandoned the claim for an equitable interest in the Piersanti residence.

36. Notwithstanding, it is the contention in this new proceeding that Piersanti and Terry are the owners of the Piersanti residence. Below is a discussion of the various positions taken by Piersanti and Terry with respect to the ownership of their residence, including on some occasions their contention that the Piersanti residence is owned by some family trust. A property search for the Piersanti residence is very confusing, as it seems to contain numerous clerical errors showing multiple owners granting multiple mortgages to different parties. Perhaps it was a mistake in the new Land Registry system. In any event, it appears that the following has taken place:

History of Dealings	Company Information	Current Owner	Current Charges
1996/05/09 Transfer from Justin Properties Inc. to Morgan Ventures Inc. (Trustee to Trustee for $2)	Justin Properties Inc. Inc. date on 1991/10/10. Director/officer/ president Terry Piersanti	1269906 Ontario Limited	2009/04/03 Charge from 1269906 Ontario Limited to *Home Trust Company* ($825,000)
1997/12/09 Transfer from Morgan Ventures Inc. to 1269906 Ontario Limited ($250,000)	Morgan Ventures Inc. (no record of company)		
	1269906 Ontario Limited. Inc. date 1997/12/05. Director/Officer Terry Piersanti		2009/04/03 Charge from 1269906 Ontario Limited to *Home Trust Company* ($50,000)
2005/08/12 Charge from 1269906 Ontario Limited to TMJ Investments ($595,000) subsequently postponed to Home Trust Company mortgages below	TMJ Investments (No record of company)		2005/08/12 Charge from 1269906 Ontario Limited to *TMJ Investments* ($595,000)
2009/04/03 Charge from 1269906 Ontario Limited to Home Trust Company ($825,000)			
2009/04/03 Charge from 1269906 Ontario Limited to Home Trust Company ($50,000)			

37. On May 9, 1996, the Piersanti residence was transferred from Justin Properties Inc. to Morgan Ventures Inc. from trustee to trustee for $2.00 and other valuable consideration. On December 9, 1997, the property was transferred from Morgan Ventures to 126 for a claimed price of $250,000.00.

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38. During the course of the original proceedings, on August 12, 2005, a charge was registered by 126 in favour of "TMJ Investments" in the amount of $595,000.00 (this charge was subsequently postponed in favour of the Home Trust charges).

39. There is no business name-style search that could be found in favour of TMJ Investments. A corporate search located a TMJ Investments Inc. It does not appear to be a Piersanti-related company, and the addresses used for TMJ Investments in the charge is completely different than the address used for TMJ Investments Inc. on the corporate search. Obviously, the letters "TMJ" may relate to Tara, Morgan and Justin, and although there is no definitive proof that this mortgage is another Piersanti-controlled sham transaction, that appears to be true for the reasons set above.

40. During the course of the trial of the original proceedings before MacDonald J., 126 registered two mortgages in the amounts of $825,000.00 and $50,000.00 respectively in favour of Home Trust. TMJ postponed its mortgage in favour of these Home Trust mortgages.

The Whistler Condominiums - 4800 Spear Head Drive, units 215 and 305 (PID 018-533-388 and 018-533-523)

41. Property searches for the Whistler condominiums disclose the following:

Unit 215

History of Dealings	Company Information	Current Owner	Current Charges
Registered Owner in Fee Simple-6051685 Canada Inc.	6051685 Canada Inc. Inc. date 2003/01/07. Officer/manager in Ontario Terry Piersanti	6051685 Canada Inc.	Borrower — *6051685 Canada Inc. and Christian Piersanti and Terry Piersanti* Lender — HSBC Bank Canada Amount - $342,750.00

Unit 305

History of Dealings	Company Information	Current Owner	Current Charges
Registered owner in fee simple - 4002598 Canada Inc.	4002598 Canada Inc. Inc. date 2002/01/21. Officer/manager in Ontario Terry Piersanti	4002598 Canada Inc.	Borrower - *4002598 Canada Inc. and Christian Piersanti and Terry Piersanti.* Lender — HSBC Bank Canada Amount - $350,000.00

42. Of note, a Canada411.com search of the Whistler condominiums lists "C. Piersanti" as the contact for those properties.

The Woodbridge Condominiums - 445 Edgeley Boulevard, Unit 10 and Unit 11 (PINs 29194-0010 and 29194-0011)

43. Unit 10 is the office of both Piersanti PC and its successor the Defendant Piersanti & Co. Professional Corporation. Unit 11 is apparently Terry's office.

44. Property searches for the Woodbridge condominiums disclose the following:

Unit 10

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History of Dealings	Company Information	Current Owner	Current Charges
2001/10/19 Transfer from 789533 Ontario Limited to 3957331 Canada Inc. (Trustee to Trustee for $2)	789533 Ontario Limited. Inc. date 1998/08/08. Director/Officer Terry Scatchard	3957331 Canada Inc.	2003/10/23 charge from 3957331 Canada Inc. to *Greater Toronto Area Savings & Credit Union Ltd.* ($175,000)
2003/10/23 Charge from 3957331 Canada Inc. to GTA Savings & Credit Union Ltd. ($175,000)	3957331 Canada Inc. Inc. date 2001/10/15. Officer/Manager in Ont. Terry Piersanti		2007/10/22 Charge from 3957331 Canada Inc. to *Pace Savings & Credit Union Limited* ($275,000)
2007/10/22 Charge from 3957331 Canada Inc. to Pace Savings & Credit Union Limited			
2007/10/23 Charge from 3957331 Canada Inc. to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc.			2007/10/23 Charge from 3957331 Canada Inc. to *6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc.* ($2,000,000)

45. On October 19, 2001 unit 10 was transferred from 789533 Ontario Limited (Terry listed as sole officer and director) to 395 as another "trustee-trustee" transaction for $2.00 consideration. In addition to the registered encumbrances of $ 175,000.00 (2003/10/23) to Greater Toronto Area Savings & Credit Union Limited and $275,000.00 (2007/10/22) to Pace Savings & Credit Union Limited, on October 23, 2007 (in the midst of the original proceedings) 395 granted a $2,000,000.00 mortgage (2007/10/23) to 606, 3968 and 401 jointly.

Unit 11

History of Dealings	Company Information	Current Owner	Current Charges
2005/10/03 Transfer to 6335144 Canada Inc.	6335144 Canada Inc. Inc. date 2005/01/13. Director Morgan Piersanti	6335144 Canada Inc.	2007/10/22 Charge from 6335144 Canada Inc. to *Pace Savings & Credit Union Limited* ($275,000)
2007/10/22 Charge from 6335144 Canada Inc. to Pace Savings & Credit Union Limited ($275,000)			
2007/10/23 Charge from 6335144 Canada Inc. to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc. ($2,000,000)			2007/10/23 Charge from 6335144 Canada Inc. to *6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc.* ($2,000,000)

46. On October 3, 2005 (in the midst of the original proceedings), 633. purchased unit 11 at 445 Edgeley Blvd.. In addition to the registered encumbrance of $275,000.00 (2007/10/22) in favour of Pace Savings & Credit Union Limited, on October 23, 2007 (2 years after its purchase) 633 granted a $2,000,000.00 mortgage in favour of 606, 3968 and 401 jointly. Once again, 395 (a Terry company) and 633 (a Justin company) granted mortgages to the same three Piersanti children companies (3968, 606 and 401), this time in the amount of $2,000,000.00.

The Yonge Centre Mall 17440 Yonge Street, Newmarket (PIN 03579-0006)

47. A property search for the Yonge Centre Mall discloses the following:

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History of Dealings	Company Information	Current Owner	Current Charges
1996/12/03 Transfer from Canadian Tire Corporation Limited to Yonge Centre Properties Inc. ($4,040,000)	Yonge Centre Properties Inc. date 1996/11/13. Officer Terry Piersanti	Yonge Centre Properties Inc.	2007/06/06 Charge from Yonge Centre Properties Inc. to *Insurance Corporation of British Columbia* ($6,750,00.00)
2007/06/06 Charge from Yonge Centre Properties Inc. to Insurance Corporation of British Columbia ($6,750,00.00)	3964400 Canada Inc. Inc. date 2001/10/31. Officer Terry Piersanti.		2008/09/29 Charge from Yonge Centre Properties Inc. to *C.A. Bancorp. G.P. Inc. and C.A.B. Realty Finance L.P.* ($1,200,000)
2008/09/29 Charge from Yonge Centre Properties Inc. to C.A. Bancorp. G.P. Inc. and C.A.B. Realty Finance L.P. ($1,200,000)			
2008/09/29) Charge from Yonge Centre Properties Inc. to 3964400 Canada Inc. ($5,000,000)			2008/09/29 Charge from Yonge Centre Properties Inc. to *3964400 Canada Inc.* ($5,000,000)

48. On December 3, 1996 (around the time the fraud commenced as found by MacDonald J.), the Yonge-Centre mall was purchased by Yonge Centre Properties Inc. (Terry listed as the sole officer and director) for $4,040,000.00. In addition to the registered encumbrance on the property of $6,750,000.00 (2007/06/06) in favour of Insurance Corporation of British Columbia and $1,200,000.00 (2008/09/29) in favour of C.A. Bancorp G.P. Inc. and C.A.B. Realty Finance L.P. (jointly), on September 29, 2008 (the eve of trial of the original proceedings) Yonge Centre Properties Inc. (a Terry company) granted a charge to 3964 (a Terry company) in the amount of $5,000,000.00. This makes little to no sense, and similar sham transactions were already commented upon by MacDonald J.

Orillia Mall -130 Atherley Road, Orillia (PIN 58670-0138, 58670-0139, 58670-0119 and 58670-0023)

49. Property searches for the Orillia Mall disclose the following:

PIN 58670-0138 (LT)

History of Dealings	Company Information	Current Owner	Current Charges
2006/11/30 Transfer from	Atherley-Gill Shopping Centre (Orillia) Limited to 6260365 Canada Inc. (As in 58670-0139) Inc. date 2004/07/15. Director Morgan Piersanti.	6260365 Canada Inc. The Corporation of Town of Orillia	None
2008/06/03 Transfer from— 6260365 Canada Inc. to	The Corporation of Town of Orillia		

PIN 58670-0139 (LT)

History of Dealings	Company Information	Current Owner	Current Charges
2006/11/30 Transfer from Atherley- Gill Shopping Centre (Orillia) Limited to 6260365 Canada Inc.	6260365 Canada Inc. Inc. date 2004/07/15. Director Morgan Piersanti.	6260365 Canada Inc.	2010/12/16 Charge from 6260365 Canada Inc. to TCC Mortgage Holdings Inc. ($10,000,000.00)
2008/05/05 Charge from 636035 Canada Inc. to HSBC Bank Canada ($3,750,000)	6060439 Canada Inc. Inc. date 2003/01/31. Officer/Manager in Ontario Tara Piersanti		2010/12/21 Charge from 6260365 Canada Inc. to 6060439 Canada Inc.,

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			3968626 Canada Inc., 4011902 Canada Inc. ($3,000,000)
2008/05/06 Charge from 6260365 Canada Inc. to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc. ($3,000,000)	3968626 Canada Inc. Inc. date 2001/11/07. Officer/Manager in Ontario Morgan Piersanti		
2010/12/16 Charge from 6260365 Canada Inc. to TCC Mortgage Holdings Inc. ($10,000,000.00) 2010/12/21 Charge from 6260365 Canada Inc. to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc. ($3,000,000)	4011902 Canada Inc. Inc. date 2002/02/11. Officer/Manager in Ontario Justin Piersanti		

PIN 58670-0119 (LT)

History of Dealings	Company Information	Current Owner	Current Charges
2007/02/28 Transfer from The Corporation of Town of Orillia to 6260365 Canada Inc. ($65,500)	6260365 Canada Inc. Inc. date 2004/07/15. Director Morgan Piersanti.	6260365 Canada Inc.	2010/12/16 Charge from 6260365 Canada Inc. to TCC Mortgage Holdings Inc. ($10,000,000.00) 2010/12/21 Charge from 6260365 Canada Inc. to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc. ($3,000,000.00)
2008/05/05 Charge from 636035 Canada Inc. to HSBC Bank Canada	6060439 Canada Inc. Inc. date 2003/01/31. Officer/Manager in Ontario Tara Piersanti		
2008/05/06 Charge from 6260365 Canada Inc. to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc. ($3,000,000)	3968626 Canada Inc. Inc. date 2001/11/07. Officer/Manager in Ontario Morgan Piersanti		
2010/12/16 Charge from 6260365 Canada Inc. to TCC Mortgage Holdings Inc. ($10,000,000.00) 2010/12/21 Charge from 6260365 Canada Inc. to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc. ($3,000,000)	4011902 Canada Inc. Inc. date 2002/02/11. Officer/Manager in Ontario Justin Piersanti		

PIN 58670-0023 (LT)

History of Dealings	Company Information	Current Owner	Current Charges
2006/11/30 Transfer from Atherley-Gill Shopping Centre (Orillia) Limited to 6260365 Canada Inc.	6260365 Canada Inc. Inc. date 2004/07/15. Director Morgan Piersanti.	6260365 Canada Inc.	2008/05/06 Charge from 6260365 Canada Inc. to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc. ($3,000,000)
2008/05/05 Charge from 6260365 Canada Inc. to HSBC Bank Canada ($3,750,000) (now discharged)	6060439 Canada Inc. Inc. date 2003/01/31. Officer/Manager in Ontario Tara Piersanti		

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2008/05/06 Charge from 6260365 Canada Inc. to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc. ($3,000,000)	3968626 Canada Inc. Inc. date 2001/11/07. Officer/Manager in Ontario Morgan Piersanti		
	4011902 Canada Inc. Inc. date 2002/02/11. Officer/Manager in Ontario Justin Piersanti		

50. On November 30, 2006 the Orillia mall (municipally known as 130 Atherley Road, Orillia, Ontario and consisting of several parcels) was purchased by 626. In addition to the registered encumbrances on two parcels in the amount of $10,000,000.00 (2010/12/16) in favour of TCC Mortgage Holdings Inc., on May 6, 2008 (near the end of the trial of the original litigation) Piersanti and Terry caused 626 to grant a purported $3,000,000.00 mortgage on title in favour of 606, 3968 and 401, which was subsequently discharged and replaced with a new $3,000,000.00 mortgage from 626 in favour of 606, 3968 and 401 registered on December 21, 2010.

The Value Mart Plaza - HWY#25 East, Meaford (PIN 37118-0116)

51. A property search for the Value Mart Plaza discloses the following:

History of Dealings	**Company Information**	**Current Owner**	**Current Charges**
2003/04/29 Transfer from The Corporation of the Municipality of Meaford to 1281633 Ontario Limited ($8,100)	1281633 Ontario Limited— Inc. date 1998/02/11. Director Linda Hall. Director/officer Terry Piersanti	1281633 Ontario Limited	2006/04/04 Charge to Insurance Corporation of British Columbia ($2,300,000)
2006/04/04 Transfer from Meaford Properties Inc. to 1281633 Ontario Limited ($2.00)	Meaford Properties Inc. Inc. date 1995/09/26. Director Robert Carey.		2011/06/06 Charge to Canadian Mortgage Loan Services Limited ($2,400,000)
2006/04/04 Charge to Insurance Corporation of British Columbia ($2,300,000)	6060439 Canada Inc. Inc. date 2003/01/31. Officer/Manager in Ontario Tara Piersanti		2011/06/08 Charge to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc. ($3,000,000)
2006/04/04 Charge to HSBC Bank Canada			
2006/11/07 Charge to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc. ($3,000,000)	3968626 Canada Inc. Inc. date 2001/11/07. Officer/Manager in Ontario Morgan Piersanti		
2011/06/06 Charge to Canadian Mortgage Loan Services Limited ($2,400,000)	4011902 Canada Inc. Inc. date 2002/02/11. Officer/Manager in Ontario Justin Piersanti		
2011/06/08 Charge to 6060439 Canada Inc., 3968626 Canada Inc., 4011902 Canada Inc. ($3,000,000)			

52. On April 29, 2003, 1281633 purchased the Value Mart Plaza. In addition to the registered encumbrances on the property of a $2,300,000.00 charge (2006/04/04) to the Insurance Corporation of British Columbia and a $2,400,000.00 charge (2011/06/06) to Canadian Mortgage Loan Services Limited, on November 7, 2006 (in the midst of the original litigation) 1281633 granted a $3,000,000.00 mortgage in favour of 606, 3968 and 401 jointly which was subsequently discharged and replaced on June 8, 2011 with a new $3,000,000.00 charge in favour of 606, 3968 and 401 jointly.

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Appendix 2

1. Mindful of the Plaintiffs' obligations to make full and fair disclosure of all material facts known to them, it is prudent to summarize what it is believed the Defendants will likely state in response.

2. To begin, there is the Personal Net Worth Statement signed by Piersanti on February 22, 1995 (this document was part of an Exhibit marked at the trial before MacDonald J.). On this statement, Piersanti declares that he owned, *inter alia*, the Glenwoods Centre, the Hanlon Park Mall, the Tottenham Plaza, the Wasaga Beach property and the Piersanti Residence.

3. Despite what appears to be clearly stated on this Exhibit both Piersanti and Terry have taken various positions as to who owned the properties which were at issue in the original proceedings. While the Plaintiffs believe that the shares in all the Defendant companies on title to the properties are owned directly, indirectly or beneficially by Piersanti and Terry, the Plaintiffs' solicitors have combed through numerous transcripts to create the following summary of positions previously taken by Piersanti and Terry for the benefit of this Honourable Court in deciding this motion on an *ex parte* basis.

Examination for Discovery - Piersanti

Date	Page(s)	Position Taken
37564	29-30	The shares in the company involved in MAP Properties (aka Pier Properties) were owned "by his family"
	32	Pier Properties was owned by Terry
	42	When he was fired, "he" was already in real estate investments through MAP Properties
37565	234-235	Gold seems to be owned "by Terry...by my family"
	258	Yonge Centre Properties Inc was Terry's company
	40607	Gold Financial Trust ("GFT") is a shareholder in Gold, and GFT is a family trust for the Piersanti children
37567	442-443	He may have told Norman Dagenais that MAP Properties was a corporation controlled by the Piersanti family
	448-449	Robert Carey was the officer, director and shareholder in Gold. At incorporation he did not hold the shares in Gold in trust for anyone
37573	533-534	He and Terry live in the Piersanti residence, which was bought in 1992 by his children and owned by them ever since. At the time of purchase, his oldest child was 13 years old, and his youngest was 9 years old
	536	His children have always owned the Piersanti residence and they are not "fronts" for him
39756	15-18	The Piersanti residence was owned at one point in 1992 by Pier Properties. It was transferred from Justin Properties for nil consideration, and then back to Justin Properties - he cannot recall why. The statutory declarations in support of the purchase of the Piersanti Residence were signed by Terry and commissioned by Piersanti.
	19-23	He and Terry signed for Justin Properties and guaranteed the mortgage on the Piersanti residence
39757	107-108	Terry put up $2,000,000.00 of her own funds to purchase the MAP Properties plazas.

Examination for Discovery - Terry

Date	Page(s)	Position Taken
37915	68	When asked how Piersanti paid for the shares in Osier ($1,662,000.00), Terry calls Piersanti "a very wealthy man"

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	87	Terry was not an owner, directly or indirectly, in MAP Properties. Pier Properties was a "family company"
	90-93	Terry does not know who are the owners of 1281111 or 1269906
	102	Piersanti had no involvement with Gold
	110	Terry is not the principal of companies that made loans to Osier
	153	Piersanti PC rents their office from Terry or a company Terry owns
	206	When asked about the MAP Properties plaza companies, Terry "is never the owner of a company"

Trial - Piersanti

Date	Page(s)	Position Taken
39918	30	Piersanti owned the "Osier group of companies" and Terry owned the "Gold group of companies",
39924	40-42	Despite the financial statements stating that Osier and Gold are "related due to common control", Piersanti says the reading of the statement is "technical" and the Osier group and Gold group are not related or under common control
39930	59-63	Piersanti's personal net worth statement (Exhibit YY attached hereto) lists "companies" that own the assets, and he may not own the shares in those companies. Piersanti did own the shares in the company that owned the condominium. Piersanti owned the shares in the company that owned "one of his houses". Glenwoods was owned indirectly by Piersanti. The MAP Properties plaza companies were owned ultimately by Terry.
39944	40605	Terry's companies did buy the three MAP Properties plazas
	6	MAP Properties was owned by the Piersanti family
	21	Piersanti was not the owner of the MAP Properties companies

Trial - Terry

Date	Page(s)	Position Taken
39957	15	Pier Properties is a family company set up for the Piersanti children
	17	Piersanti would do the investments and acquisitions and she would take over on and after closings
	28-29	She and Piersanti chose the plazas as good investments
	46	Each of the plaza companies is "held individually" and then "I guess in trust for the family"
	57	Piersanti has no control or signing authority over the plaza companies
	112	She granted mortgages over the cottage property
	145-147	All the Piersanti companies are for the benefit of the Piersanti children
	153	She never personally owned the plaza companies
	154	The plaza companies are owned by corporations. At the end of the day, the companies are held for her children.
39960	60-61	Piersanti's personal net worth statement (Exhibit YY) is in fact a joint net worth statement for her and her husband They owned more assets at that time than set out in the net worth statement
	63	They (her and her husband) bought the Piersanti residence

4. For completeness of the record, the Plaintiffs have also obtained PPSA searches of the new corporate Defendants. As of July 13, 2011 (the date of the searches) there were the following registrations against the Defendants 1281038, 1281111, 1281632, 395, 629, 630, 632, and 1314112. They disclose the following registrations (it is not know if all of them are current):

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Defendant	Date	Secured Party
1281038	September 27, 2005	CIBC Mortgages Inc.
	November 2, 2006	Insurance Corporation of British Columbia
1281111	September 2, 2009	Central 1 Credit Union
1281632	December 12, 2003	CIBC Mortgages Inc.
	January 31, 2007	CIBC Mortgages Inc.
395	March 19, 2003	GTA Savings & Credit Union Limited
	March 19, 2003	Gold Financial Trust
629	November 22, 2005	Insurance Corporation of British Columbia
	November 7, 2008	C.A. Bancorp G.P. Inc.
630	September 17, 2008	Insurance Corporation of British Columbia
632	May 29, 2008	C.A. Bancorp G.P. Inc.
1314112	July 24, 2001	GTA Savings & Credit Union Limited
1314112	March 24, 2005	Toronto Dominion Bank
1314112	November 4, 2009	GTA Savings & Credit Union Limited

5. Of note, Gold Financial Trust is a Piersanti-related corporation.

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TAB 5

2009 CarswellOnt 1588
Ontario Superior Court of Justice

Loblaw Brands Ltd. v. Thornton

2009 CarswellOnt 1588, [2009] O.J. No. 1228, 176 A.C.W.S. (3d) 141, 78 C.P.C. (6th) 189

Loblaw Brands Limited v. Paul Thornton, Christopher Thornton, TD Bank Financial Group and TD Canada Trust

D.M. Brown J.

Heard: March 20, 2009
Judgment: March 23, 2009
Docket: CV-09-373422

Counsel: J. Patterson, M. Ward for Plaintiff / Moving Party

Subject: Civil Practice and Procedure; Property; Insolvency

MOTION by plaintiff for order appointing investigatory receiver over property of defendant and his related entity for purpose of locating, investigating and monitoring such property.

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

I. Motion for Appointment of Investigatory Receiver

1 Loblaw Brands Limited seeks an order appointing an investigatory receiver over the property of Paul Thornton and his related entity, IBL, for the purpose of locating, investigating and monitoring such Property.

II. Background

2 Paul Thornton worked in the packaging department of Loblaw from April, 2001, until February 12, 2009, when Loblaw terminated his employment. Loblaw did so because it concluded Mr. Thornton had misused his authority over a program under which Loblaw received rebate payments from packaging suppliers and thereby had defrauded Loblaw of substantial sums of money. Loblaw's investigations disclosed that Mr. Thornton had directed suppliers to make rebate payments to his related entity, IBL, instead of to Loblaw.

3 Loblaw first came before me on March 2, 2009 seeking a *Norwich Pharmacal* order, which I granted. At that time Loblaw's investigations had identified misappropriations by Mr. Thornton of at least $2.1 million.

4 On March 6, 2009, I granted Loblaw a *Mareva* injunction in respect of the assets of Mr. Thornton and IBL, and certificates of pending litigation against Mr. Thornton's residence on Zinnia Place, Mississauga, and a cottage on the Lake of Bays, both registered in the name of his son, Christopher Thornton.

5 Loblaw then served my orders on Paul and Christopher Thornton and, as well as notices of examination under Rule 39.03. Paul Thornton did not show up for his scheduled March 11 examination. A similar notice was served on Christopher Thornton, and he was examined on March 12.

6 On the March 16 attendance to continue my orders Paul Thornton did not appear, but counsel for his son advised, by letter, that Christopher Thornton did not oppose the continuation of the orders.

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7 In the affidavit filed in support of the present motion the Loblaw representative deposed that, based on investigations conducted since March 2, Loblaw had determined that Paul Thornton had diverted $4.2 million from Loblaw's suppliers to his entity, IBL. However, the current balance in IBL's bank account stands at only $43,706.63, and that of Mr. Thornton's at $5,756.69.

8 The examination to date of the IBL bank account has revealed transfers out of slightly over $900,000 in respect of payments to car dealerships, for the purchase a cottage, to pay for a mortgage and home improvements, as well as transfers to Christopher Thornton ($250,000.00).

9 Execution of the *Norwich Pharmacal* order identified several accounts in the name of Volha Pranovich, Mr. Thornton's common law spouse, over which Mr. Thornton had signing authority. Current balances in those accounts amount only to $39,000.00. As well, Loblaw's investigation has disclosed four cars (2005-2008 model years) registered in the name of Christopher Thornton, as well as one in the name of Volha Pranovich.

10 Loblaw's representative deposed that without the appointment of a receiver, Loblaw's right to recovery would be seriously jeopardized because (i) the amounts found in the accounts of IBL and Mr. Thornton are miniscule in comparison to the $4.2 million identified as diverted to IBL, and (ii) Mr. Thornton failed to attend his examination and has not responded to the court proceedings.

11 Loblaw seeks the appointment of Mr. Ted Baskerville, of LAC Limited, operating as Navigant Consulting, as interim receiver of the assets of Paul Thornton and IBL. LAC has filed its consent to act as receiver, and Mr. Baskerville's CV discloses that he is well qualified to act as receiver in the circumstances of this case.

12 Loblaw has filed a further undertaking as to damages.

13 Although properly served, neither Paul Thornton, Christopher Thornton, nor Volha Pranovich appeared on the return of this motion.

III. Analysis

A. Appointment of an investigatory receiver

14 An interim receiver may be appointed under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, in cases where the plaintiff can demonstrate a strong case that the defendant has engaged in fraud and that without the appointment of a receiver the plaintiff's right to recovery would be in serious jeopardy: Robert van Kessel, *Interim Receivers and Monitors*, p. 45; *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.*, [1987] O.J. No. 2315 (Ont. H.C.), at para. 6.

15 This court has appointed receivers whose main function was to monitor and investigate the assets and affairs of a defendant: *Century Services Inc. v. New World Engineering Corp.* (July 28, 2006), Doc. 06-CL-6558 (Ont. S.C.J.), (unreported decision of Morawetz J.); *Pandya v. Simpson* (November 17, 2005), Doc. 05-CL-6159 (Ont. Gen. Div.), (unreported decision of Ground J.). In his endorsement in *Century Services* Morawetz J. concluded that the plaintiff had satisfied the test for injunctive relief set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) and that the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation can be undertaken".

16 In my endorsement of March 6, 2009, I found that Loblaw had demonstrated a very strong *prima facie* case of fraud against Paul Thornton. The evidence filed by Loblaw on this motion only reinforces the strength of its case. Given the huge disparity between the amount of money that Loblaw has discovered was diverted to IBL and the value of the known assets of the defendants, as well as the failure of Paul Thornton to respond to these proceedings, I am satisfied that without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized. The balance of convenience overwhelmingly favours granting the appointment of a receiver.

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17 I therefore appoint LAC as Receiver, without security, over all the assets and properties of Paul Thornton and IBL, and over all assets and properties that can be traced from any account of IBL through and to whatever form, person or entity, and any related documents, records or other property of every nature and kind whatsoever, and wherever situate, including all proceeds thereof. The purpose of the appointment is to locate, investigate, and monitor such Property and to secure access for the Receiver to such books, records, documents and information the Receiver considers necessary to conduct an investigation of transfers of funds by or from Paul Thornton or IBL, or their banks or trust accounts, to the other defendants or other persons.

B. Terms of the appointment

18 Loblaw submitted a draft order drawn largely from the form of receivership order commonly used in cases on the Toronto Region Commercial List. While most of the proposed terms are reasonable and appropriate, I have concerns about one — the power of the Receiver to enter residential premises.

19 Although the order sought would empower the Receiver "to act at once in respect of the Property", the thrust of the order is not to preserve and manage the Property of Paul Thornton and IBL, but to give the Receiver investigatory powers so that it can trace and locate property of Paul Thornton and IBL and, as well, review information collected in order to ascertain what happened to the money diverted to IBL.

20 To that end Loblaw seeks to obtain for the Receiver two significant powers:

(a) First, Loblaw asks for an order authorizing the receiver to enter the Muskoka cottage and Paul Thornton's residence at Zinnia Place; and,

(b) Loblaw also requests an order under which the persons at those two premises must allow entry to the Receiver, and up to two other individuals, to the premises in order to locate and determine the existence of Property. Those persons would be required to answer any questions posed by the Receiver about the Property and any other materials relevant to the Property.

21 The second power of entry resembles that found in *Anton Piller* orders; the first, however, goes beyond the language of the standard *Anton Piller* order — i.e. the defendants shall permit entry into premises — to, in effect, authorize the Receiver to enter residential premises. Often receivers are appointed in circumstances where the defendant debtor, in security documents, has agreed that the plaintiff creditor can appoint a receiver who can enter into the defendant's premises to realize on the security. In other cases the need to continue a business as a going concern justifies authorizing the receiver to enter into, and take control of, business premises. That is not this case. Here Loblaw seeks an order that would allow the Receiver to enter into residential premises for investigative purposes, albeit on 24 hours notice. In *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189 (S.C.C.), the Supreme Court of Canada observed that *Anton Piller* orders, unlike search warrants, do not authorize forcible entry, but expose the target to contempt proceedings unless permission to enter is given: para. 28. I think that the powers of entry granted to an investigative receiver in respect of residential premises should be no greater than those found in standard *Anton Piller* orders.

22 For these reasons I am not prepared to grant the Receiver the powers of entry as described in paragraphs 7(f) and (g) of the draft order. I am satisfied that it would be just and convenient in the circumstances to grant the Receiver powers to request entry into the two residential premises similar to the powers found in the following paragraphs of the model Commercial List *Anton Piller* order: paras. 2, 5, 6, 7, 8, 9 (with the reference to the Independent Supervising Solicitor changed to the Receiver), and 12. Those provisions should be modified so as to require Paul Thornton, Christopher Thornton, or Volha Pranovich, to attend the premises along with the Receiver for the purpose of assisting the Receiver in determining the existence of and locating the Property and to cooperate with the Receiver by identifying and answering questions with respect to the Property and any other material matters relevant to the Property.

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23 I grant Loblaw's request for an order abridging the time for service of this motion, as well as its request to add Volha Pranovich as a defendant to this action.

24 An order shall go in accordance with the draft filed, subject to the modifications that I have directed in paragraph 21 above.

Motion granted.

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TAB 6

2016 ONSC 4555
Ontario Superior Court of Justice

Continental Casualty Co. v. Symons

2016 CarswellOnt 10913, 2016 ONSC 4555, 269 A.C.W.S. (3d) 290, 39 C.B.R. (6th) 65

Continental Casualty Company, Plaintiff and Robert Symons, as successor in interest to G. Gordon Symons also known as Gerald Gordon Symons and as Trustee of the Estate of Gerald Gordon Symons, Alan G. Symons, The Estate of Gerald Gordon Symons, Symons International Group, Inc., IGF Holdings, Inc., Granite Reinsurance Company, Ltd. and Goran Capital Inc., Defendants

E.M. Morgan J.

Heard: June 27, 2016
Judgment: July 11, 2016 [* **]
Docket: CV-14-516561

Counsel: Lou Brzezinski, Varoujan Arman, for Plaintiff
Sean Zeitz, for Defendants

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

MOTION by judgment creditor to lift stay of execution of Ontario judgment and to appoint investigative receiver to assist in locating debtor's assets and enforcing judgment.

***E.M. Morgan J.*:**

1 This is a motion to lift a stay of execution of an Ontario judgment that the Plaintiff obtained on October 21, 2015. The Plaintiff also moves to appoint an investigative receiver in order to assist it in locating the Defendants' assets and in enforcing its judgment.

2 The Plaintiff is a judgment creditor of the Defendants pursuant to a judgment for USD $44,231,536 (including pre-judgment interest) issued by the U.S. District Court for the Southern District of Indiana on July 14, 2014. The judgment accumulates post-judgment interest at the rate of USD $139 per day.

3 At time of the transactions in issue, Gerald Gordon Symons ("GG Symons") was the chairman of the board of the corporate Defendants. GG Symons is now deceased and his son, the Defendant Robert Symons, is the executor of his father's estate and has been deemed GG Symons' legal successor in interest in this matter by the U.S. court. Robert Symons resides in Caledon, Ontario.

4 The late Gerald Gordon Symons was a fraudster. The U.S. court found that, together with his other sons, Alan Symons and Douglas Symons, GG Symons had engaged in a series of fraudulent transfers of funds from the Symons family-owned corporations for their own personal gain. This led the U.S. court to pierce the corporate veil and issue a joint and several judgment against Alan Symons, the estate of GG Symons, and the family-owned corporations. The U.S. court's fact finding goes on for 135 pages; it is detailed in terms of the specific transactions and quantum of the fraud.

5 The GG Symons Estate and other judgment debtors filed an appeal of the U.S. trial judgment in the U.S. Court of Appeals for the Seventh Circuit. The Appeal was argued on February 9, 2015.

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6 On October 13 2015, the Plaintiff moved for summary judgment for recognition ad enforcement of the U.S judgment in Ontario. Summary judgment to that effect was granted by Glustein J. on October 21, 2015: *Continental Casualty Co. v. Symons*, 2015 ONSC 6394 (Ont. S.C.J.). The judgment of Glustein J. contained an interim interim stay of enforcement based on the fact that the Seventh Circuit court had not yet released its decision in the Defendants' appeal of the trial judgment. The stay was fashioned to remain in place until "the date the Indiana appellate Court releases its decision and the defendants' rights of appeal have either expired or been exhausted..."

7 On March 22, 2016, the Seventh Circuit court released its decision denying the appeal by the GG Symons Estate and affirming the trial judgment. In response, the GG Symons Estate filed a Petition for Rehearing En Banc before the Seventh Circuit. That petition was denied by the Seventh Circuit on May 17, 2016. The only route of appeal left to the GG Symons Estate in the U.S. court system is a petition for certiorari to the U.S Supreme Court. As of the date of the hearing before this court, no such petition had been filed. However, counsel for the Defendants has advised that his clients have instructed U.S. counsel to prepare such a petition. They have 90 days from May 17, 2016 in order to file their petition with the U.S. Supreme Court.

8 As of the date of the hearing, the Plaintiff had recovered only USD $11,000,000 of the USD $44,231,536 it is owed. Counsel for the Plaintiff advises that the Plaintiff expects to be able to recover an additional USD $10,500,000 from funds held by the trial court in the United States. That leaves the balance of the judgment to be realized by locating and seizing assets belonging to the Defendant (or which have been fraudulently conveyed away).

9 The affidavit evidence filed in this motion indicates that in GG Symons' Will dated January 19, 2006 — some five years after commencement of the underlying litigation leading to the U.S. judgment in issue here — GG Symons's assets included:

a) a safety deposit box in Toronto;

b) a penthouse condominium in Toronto;

c) works of art;

d) a Jaguar automobile;

e) a home in Florida;

f) a collection of gold coins;

g) a cash gift of $1,000,000 to a friend, Susannah Daugharty;

h) a trust in Barbados;

i) cash gifts of $10,000 to each of GG Symons' grandchild and great-grandchildren; and

j) miscellaneous cash gifts totaling $31,000.

10 In addition, in separate litigation in London, Ontario, GG Symons' employee and paramour Susannah Daugharty, deposed that she maintained a detailed index of financial records on GG Symons' behalf. She has produced a list of accounts held by GG Symons. It is evident from all of this that during his lifetime GG Symons had amassed substantial wealth.

11 Despite all appearances, Robert Symons, on behalf of the GG Symons Estate, delivered an estate inventory that indicates that the GG Symons Estate's net value is USD $14,103.21.

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12 Evidence filed in this court summarizes evidence filed in the U.S. court that suggests that the GG Symons Estate and other family members continue to engage in the fraudulent transfer of assets away from the judgment debtors. Among other things, GG Symons swore an affidavit in the Susannah Daugharty litigation in which he expressly stated that he had discharged a mortgage he held over a London, Ontario property in an effort to avoid creditors - specifically, the Plaintiff. This maneuver was confirmed by Robert Symons, who deposed that he conferred with his father's former legal counsel and was told that, "the principal reasons for the discharge of my father's mortgage related to creditor protection. All of the planning in late 2009 and 2010 was focused on securing my father's position in the face of potential judgment creditors executing in Ontario."

13 In addition, Ms. Daugharty swore an affidavit dated November 22, 2011 which stated:

> I was very meticulous in my accounting and bookkeeping of Gordon's accounts. I had all of the financial documents, including but not limited to his banking and investments organized by year in boxes. All of the relevant documents from 2004 and onwards were removed from the 14 Tynedale Avenue property while I was away on respite. I believe that Gordon or Gordon's children removed the financial documents as they were the only ones that had access to the property, apart from the staff who would have been supervised by the Symons family.

14 On December 5, 2014, the U.S. trial court granted the Plaintiff a wide array of post-judgment discovery rights for enforcement purposes against all of the judgment debtors in issue, including Robert Symons in his capacity as successor in interest to GG Symons. Upon receiving this Order, the Plaintiff served on Robert Symons a Document Request seeking a large number of financial information and specific documents. Robert Symons has to date failed to answer this Document Request, despite the expiry of the prescribed 30-day deadline. The documents in issue are matters of which Robert Symons is well aware; his sworn affidavit in the Daugharty litigation makes this clear.

15 On January 26, 2015, Robert Symons brought a motion in the U.S. court for a protective order allowing him not to respond to the Plaintiff's documentary request. He contended that responding to the Plaintiff's request would impose an undue burden on him. In making this response, he deposed that there are "many volumes" of documents and computers in Ontario that would be subject to inspection by the Plaintiff if the protective order is not granted. On March 20, 2015, Robert Symons' motion for a protective order was dismissed by the U.S. court. Robert Symons was ordered to respond to the Plaintiff's discovery request within 14 days.

16 Robert Symons failed to adequately respond to the discovery request served by the Plaintiff. As a consequence, on June 3, 2016, the U.S. court found him to be in contempt of court and ordered sanctions against him. The June 3, 2016 Order requires:

> a) that Robert Symons pay sanctions of USD $1,000 within 14 days;
>
> b) that Robert Symons completely and unequivocally respond to the Plaintiff's outstanding discovery requests within 30 days;
>
> c) that Robert Symons file a Notice of Compliance including an affidavit that lists in detail all of the documents produced in response to the Contempt Order;
>
> d) that should Robert Symons fail to comply with the Contempt Order, he will be subject to an additional contempt sanction of USD $100 per day until full compliance is reached; and
>
> e) that Robert Symons pay the Plaintiff USD $6,247.50 in costs.

17 It is Plaintiff's counsel's position that, "once a fraud always a fraud". The judgment debtors here have a track record of disposing of assets and conveying them away to avoid creditors. They have been found to have done so by a U.S. court, and they continue to hide assets and financial records even in the face of a substantial judgment and outstanding court orders for production.

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18 In *Sibley & Associates LP v. Ross*, 2011 ONSC 2951 (Ont. S.C.J.), at para 64, Strathy J (as he then was) indicated that, "The risk of removal or alienation [of assets] can be inferred by evidence suggestive of the defendant's fraudulent criminal activity... It seems to me, however, that in some cases a pattern of prior fraudulent conduct may support a reasonable inference that there is a real risk that the conduct will continue." [citations omitted] In these circumstances, appointment of an investigative receiver with the power to assist the judgment creditor is an appropriate remedial tool.

19 As the Court of Appeal observed in *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368 (Ont. C.A.), at para 66, "Clearly there are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions - including even, in proper circumstances, the affairs of and transactions concerning related non-parties - will be a proper exercise of the court's 'just and convenient' authority under s. 101 of the *Courts of Justice Act*."

20 Counsel for the Defendants submits that the motion to appoint an investigative, or equitable receiver is premature. Citing the judgment of Penny J. in *Haunert-Faga v. Caprara*, 2015 ONSC 6438 (Ont. S.C.J.), at para 50, he contends that, "The law is clear that the appointment of an equitable receiver in aid of execution is only available where special circumstances exist which would render the normal methods of execution ineffective or impractical. The appointment of a receiver by way of equitable execution assumes that all ordinary remedies to collect have been exhausted." Here, the Defendants submit, the ordinary execution remedies have been exhausted, as there has been a stay of execution in place for Ontario. Since the litigation has not proceeded in Ontario after the initial judgment by Glustein J., the Defendants state that no "special circumstances" exist to take this case outside of the ordinary route for enforcing a judgment.

21 The need for special circumstances was best described by Brown J. (as he then was) in *Aly v. Tohamy*, 2013 ONSC 7738 (Ont. S.C.J. [Commercial List]). He indicated that execution of judgments under the methods set out in the *Rules of Civil Procedure* often prove cumbersome and can entail significant delay and cost. Accordingly, at paras 8-9, Brown J explained:

> ...courts have countenanced the appointment of an equitable receiver, or a receiver in aid of execution, where (i) some legal impediment would prevent the seizure and sale of the debtor's property under general execution procedures or (ii) where special circumstances existed which would render the normal methods of execution ineffective or impractical... [P]ractical reality requires courts to take a very pragmatic view of what the jurisprudence historically has termed 'special circumstances'.

22 The present one entails enforcement of a U.S. judgment where the Defendants are already found by the U.S. court to have engaged in a pattern of fraud on their creditors and, in addition, have been held in contempt for failure to comply with financial disclosure orders. When this is combined with the evidence in the record of ongoing financial misdeeds in Ontario, it makes for an ideal case for an investigative receiver. The Plaintiff does not have to "exhaust" remedies by engaging in the same kind of futile discovery process that has led the U.S. court to hold the Defendants in contempt of court. The court's discretionary jurisdiction to act under section 101 of the *Courts of Justice Act* is not limited to ensuring that costly and fruitless procedural steps are followed for no substantive purpose.

23 In evaluating the Plaintiff's request, I can do no better than to again quote the Court of Appeal in *Akagi*, at para 90, where the type of situation here — i.e. a party already found to be a fraudster posing a risk to a plaintiff's recovery — was specifically addressed:

> The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery... The primary objective of investigative receivers is to gather information and 'ascertain the true state of affairs' concerning the financial dealings and assets of a debtor...Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property...

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24 It is common ground between the parties that, statistically, very few cases are granted certiorari to the U.S. Supreme Court each year. Nevertheless, both counsel also agree that it is not for this court to engage in conjecture as to whether the present case will on the merits be one of those case. That is for the U.S. court alone to decide.

25 That said, there is no reason under the circumstances to wait until the 90 days expires to see if the Defendants apply for certiorari, or to wait however long it takes for the court to rule on that petition if it is filed. The Defendants have used every procedure available to them to defer enforcement of the judgment, and the Plaintiff's rights have thereby been put at risk. Glustein J. envisioned that the interim interim stay of execution would be revisited if too much time passes without the Plaintiff being able to start enforcement procedures. The time has come to lift the stay so that the Plaintiff can proceed with enforcing its rights.

26 The stay imposed by Glustein J. in his Order of October 21, 2015 is hereby vacated. In the event that the U.S. Supreme Court grants certiorari to hear the case at some point down the road, the Defendants shall be at liberty to move to re-impose the stay pending the outcome of that appeal.

27 Further, the Plaintiff has met the threshold for appointment of a receiver with powers to investigate the Defendant's assets in aid of the Plaintiff's execution of judgment. The appointment of a receiver to seize, freeze, and otherwise preserve assets would require strong evidence that the Plaintiff's right to recovery has been seriously jeopardized. Although in the present case there is indeed such strong evidence, what the Plaintiff seeks is the more benign remedy of an investigative receiver. The threshold for a receiver with powers of investigation only is lower than the usual receiver who takes over the debtor's affairs: *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136 (Ont. S.C.J. [Commercial List]), at para 88.

28 The Plaintiff has certainly met the burden of establishing the need for an investigative receiver. This mechanism is designed to counteract the "informational imbalance" between creditors such as the Plaintiff, who are very much in the dark due to the manipulations engaged in by the Defendants, and debtors such as the Defendants, who are in possession of detailed knowledge and documents which the Plaintiff requires in order to enforce its rights.

29 The Plaintiff shall have an Order substantially in the form provided by counsel for the Plaintiff at Schedule C of their factum.

30 Paragraph 9 of the Order must provide that the Plaintiffs will only have access to the business and residential premises of Robert Symons after providing reasonable notice to him through his counsel.

31 In addition, paragraph 10 of the Order will extend the time in which Robert Symons must provide the Receiver with a statement of assets, liabilities, and transactions to 60 days (instead of 21 days, as in Plaintiff's counsel's draft). Further, the transactions to be listed by Robert Symons will be all transactions in excess of $10,000 (instead of $5,000, as in Plaintiff's counsel's draft).

32 I understand that Glustein J reserved costs of the summary judgment motion of October 2015 to the judge hearing the present motion. Plaintiff's counsel has submitted Costs Outlines seeking costs in the total amount of over $29,000 for this motion and just over $30,000 for the summary judgment motion, all on a partial indemnity basis. Defendants' counsel has submitted Costs Outlines seeking costs in the total amount of just over $24,000 for this motion and just over $29,000 for the summary judgment motion, also on a partial indemnity basis. Both are within the range of what one would expect for motions of this complexity in a case of this value, and which entailed an evidentiary record as well as substantial legal research.

33 Under Rule 57.01(1)(0.b), I am authorized to take into account, *inter alia*, "the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed." Given their proximity in range, neither side would be surprised at the cost requests of the other.

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34 The Defendants shall pay the Plaintiff costs in respect of this motion as well as the summary judgment motion in the total amount of $60,000, inclusive of all fees, disbursements, and tax.

Motion granted.

Footnotes

* A corrigendum issued by the court on July 12, 2016 has been incorporated herein.

** Additional reasons at *Continental Casualty Co. v. Symons* (2016), 2016 ONSC 4750, 2016 CarswellOnt 11989 (Ont. S.C.J.), and at *Continental Casualty Co. v. Symons* (2016), 2016 ONSC 4789, 2016 CarswellOnt 12195 (Ont. S.C.J.).

End of Document

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TAB 7

2015 ONCA 368
Ontario Court of Appeal

Akagi v. Synergy Group (2000) Inc.

2015 CarswellOnt 7407, 2015 ONCA 368, 125 O.R. (3d) 401, 254
A.C.W.S. (3d) 186, 25 C.B.R. (6th) 260, 334 O.A.C. 279, 74 C.P.C. (7th) 45

Trent Akagi, Applicant (Respondent) and Synergy Group (2000) Inc. (aka Synergy Group Inc., Synergy Group 2000 Inc., The Synergy Group 2000 Inc., The Synergy Group, Inc., (2000), The Synergy Group Incorporated, The Synergy Group 2000 Incorporated) and Integrated Business Concepts Inc., Respondents (Appellants)

Janet Simmons, R.A. Blair, R.G. Juriansz JJ.A.

Heard: December 12, 2014
Judgment: May 22, 2015
Docket: CA C57582, C59494, C59496, C59497, C59498, C59499, C59500, C59508, C59509, C59510, C59511

Counsel: J. Lisus, J. Renihan for Appellants, Student Housing Canada and R.V. Inc.
J. Spotswood and W. McDowell for Appellants, Integrated Business Concepts Inc. and Vincent Villanti
D. Magisano, S. Puddister for Appellant, Ravendra Chaudhary
M. Katzman for Appellants, Synergy Group (2000) Inc., Shane Smith, Nadine Theresa Smith, David Prentice, and Jean Lucien Breau and 1893700 Ontario Limited.
J. Leon, R. Promislow for Respondent, J.P. Graci & Associates (the court appointed receiver)
T. Corsianos for Respondent, Trent Akagi

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

APPEAL by respondents from judgment dismissing application to set aside receivership orders.

***R.A. Blair J.A.*:**

Overview

1 The appointment of a receiver in a civil proceeding is not tantamount to a criminal investigation or a public inquiry. Regrettably, those responsible for obtaining the appointment in this case thought that it was. As a result, the receivership proceeded on an entirely misguided course.

2 Mr. Akagi contributed funds to a tax program, marketed and sold by the Synergy Group. It was supposed to generate tax loss allocations for him, but did not. He sued Synergy Group (2000) Inc. ("Synergy") and certain individuals associated with it for fraud and obtained default judgment in the amount of approximately $137,000. On June 14, 2013, Mr. Akagi applied for, and obtained, an *ex parte* order appointing a receiver over all assets, undertakings and property of Synergy and an additional company, Integrated Business Concepts Inc. ("IBC").

3 The primary evidence in support of the application consisted of a three-page affidavit sworn by Mr. Akagi and copies of three affidavits from representatives of the Canadian Revenue Agency (the "CRA"). The representatives' affidavits outlined the details of a CRA investigation into the tax loss allocation scheme and indicated that, besides Mr. Akagi, there may be as many as 3800 other investors who were defrauded. The materials did not disclose that the CRA investigation had been terminated in February 2013 — some four months before Mr. Agaki brought the *ex parte* application.

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4 Subsequently, through a series of further *ex parte* applications, the receivership order morphed into a wide-ranging "investigative receivership", freezing and otherwise reaching the assets of 43 additional individuals and entities (including authorizing the registration of certificates of pending litigation against their properties). None of the additional targets was a party to the receivership proceeding, only three had any connection to the underlying Akagi action, and only two were actually judgment debtors.

5 On September 16, 2013, the appellants moved before the application judge in a "come-back proceeding" to set aside the receivership orders. Their application was dismissed. They now appeal from the September 16 order and the previous *ex parte* orders.

6 All of the receivership orders were sought and obtained pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which gives the court broad powers to make such an order "where it appears to a judge of the court to be just or convenient to do so." Accordingly, the appeal does not involve issues that may arise in connection with the appointment of a receiver under the numerous other statutes that contain such powers, or by way of a private appointment by a secured creditor under a security document. Nor does the appeal concern a class proceeding or other form of representative action.

7 Mr. Akagi is an unsecured judgment creditor. However, it is apparent from the record that the relief sought was intended to reach far beyond his interests in that capacity. It was intended to empower the Receiver to root out the details of the broader tax allocation scheme as it affected a large number of other investors beyond Mr. Akagi — although to what end is unclear, as there is no pending or intended proceeding on behalf of those investors.

8 For the reasons that follow, I would allow the appeal and set aside all of the contested orders.

Factual Background

The Tax Loss Allocation Scheme

9 Mr. Akagi invested more than $100,000 through Synergy in what he understood were small businesses managed by IBC that would generate legitimate business losses. Synergy's "Tax Reduction Strategy" program was misrepresented to him as a means of achieving substantial tax savings through the allocation to him of his proportionate share of those losses.

10 Mr. Akagi made an initial investment of $20,000 in November 2006. He received documentary confirmation: that he and Synergy agreed "to explore alternative income tax strategies by purchasing units in small to medium businesses"; that Synergy, as Transfer Agent, was to act as liaison between Mr. Akagi and IBC "to facilitate the placement of capital into...small and medium sized, privately owned businesses"; and that "IBC agree[ed] to execute the purchase on behalf of the Purchaser, provide complete documentation to support the purchase and any related tax benefit and provide all necessary follow-up documentation and service in the event that [the CRA] requests substantiating proof of Purchaser's Participation and any resulting Income Tax Deduction Claims."

11 In March 2007, Mr. Akagi received a documentary package from Synergy for the purposes of preparing his 2006 tax returns. The business entity in which he had purportedly invested was said to have suffered a total loss of $164,500, of which his proportionate share was $104,000. Mr. Akagi deducted that amount and received a tax credit of $27,262.10.

12 Having received that benefit, Mr. Akagi invested a further $90,000 with Synergy for the purposes of his 2007 taxation year. He received the same type of documentary confirmation. At the end of February 2008, he received a letter from an entity known as the International Business Consultants Association ("IBCA") enclosing a cheque in the amount of $248.78, purportedly representing his share of IBCA's profits for the 2007 year.

13 The honeymoon was short-lived, however. On March 19, 2008, Mr. Akagi received a letter from the CRA stating that an audit was being conducted on IBC with respect to the 2006 taxation year. A few days later, Synergy sent a letter

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advising Mr. Akagi that the CRA did not "approve of [Synergy's] Profit and Loss Business Development Program", and that Synergy would not be issuing tax forms for the 2007 tax year until it had cleared matters with the CRA. Mr. Akagi was given the option of filling in and returning a form to obtain a refund of his investment for 2007. Although he did so, his $90,000 investment was not returned.

14 In December 2008, the CRA advised Mr. Akagi that it was questioning his loss claim for 2006 and that it was the position of CRA that the IBCA loss arrangement "constitutes a sham or sham transactions." In May 2009, Mr. Agaki received a Notice of Re-Assessment for the 2006 taxation year, completely disallowing his claimed business losses of $104,000. In the end, the CRA waived some penalties and interest, and Mr. Akagi repaid $54,842.58.

The Underlying Proceedings: The Akagi Action

15 In August 2009, Mr. Akagi commenced an action against Synergy and four individuals connected with it — Shane Smith, David Prentice, Sandra Delahaye, and Jean Lucien Breau (the "Akagi action"). Smith acted and held himself out as the president of Synergy. Prentice acted and held himself out as its vice-president. Delahaye, a chartered accountant, was the salesperson who sold the investment to Mr. Akagi. Breau, according to the corporate records, was the sole shareholder and director of Synergy.

16 In the action, Mr. Akagi claimed $116,575.98 in damages, representing the monetary losses he had sustained as a result of what he alleged to be an unlawful conspiracy to defraud him. He also claimed punitive damages. The defendants were noted in default (except for Breau, who was never served), and Mr. Akagi moved, without further notice, for default judgment. In May 2010, Cullity J. granted default judgment, awarding Mr. Akagi the claimed compensatory damages plus $25,000 in punitive damages. He dismissed Mr. Agaki's claim for equitable tracing because he had failed to identify any fund or property in the pleadings to which the funds could be traced.

17 Immediately upon learning of the default judgment, the defendants moved to set it aside. Justice Whitaker did so on September 3, 2010. His order was upheld on appeal, subject to the following conditions: (i) the defendants were to pay Mr. Akagi $15,000 in costs thrown away, plus $7,000 for his costs on appeal; and (ii) the defendants were to pay $60,000 to the credit of the action pending the outcome of the proceedings.

18 The defendants complied with these conditions.

19 Mr. Akagi subsequently moved for summary judgment against Synergy and the defendants Smith and Prentice. [1] On May 14, 2012, McEwen J. granted summary judgment in the amount of $90,000, representing Mr. Akagi's outstanding 2007 investment. However, McEwen J. declined to grant summary judgment on the claims for fraud and conspiracy to defraud on the basis that the defendants' materials raised triable issues on those claims. By agreement of the parties, the $60,000 earlier paid into court to the credit of the action remained in court and was not be applied to the $90,000 judgment.

20 The saga continued, however. Mr. Akagi moved once again to strike the statements of defence of Synergy, Smith and Prentice, and for an order directing that the $60,000 be paid out to him in partial satisfaction of his $90,000 partial summary judgment. On October 5, 2012, Roberts J. granted that relief. On January 18, 2013, Roberts J. made a further order: (i) directing the Registrar to note Synergy, Smith and Prentice in default; and (ii) directing Mr. Akagi to proceed to trial to determine the issues left to be tried by McEwen J.

21 Justice Chiappetta heard the undefended trial of the remaining issues and, on April 24, 2013 — on the basis of the fraud and conspiracy to defraud claims in the Akagi action — awarded Mr. Akagi $116,575.98 in compensatory damages, $30,000 in punitive damages, and $17,000 in costs. On January 23, 2015, a different panel of this court dismissed the appeal from this judgment.

22 I note here that the $90,000 sum awarded by McEwen J. is a component of the $116,575.98 compensatory damages awarded by Chiappeta J. In the end, Mr. Akagi's outstanding claim against Synergy, Smith and Prentice is approximately

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$182,000, consisting of: (i) $116,575.98 in compensatory damages; (ii) $30,000 in punitive damages; and (iii) $36,000 in costs. From this must be subtracted the $60,000 already paid, leaving a balance of approximately $122,000.

23 It is this claim that spawned the sprawling receivership outlined below.

The Initial Ex Parte Receivership Application

24 No steps appear to have been taken to effect recovery on the judgment. Nevertheless, on June 14, 2013 — less than two months after the judgment was granted — Mr. Akagi brought an *ex parte* application before the Commercial List in Toronto, seeking the appointment of J.P. Graci & Associates as Receiver of the assets, property and undertakings of Synergy and IBC (IBC had not been made a defendant in the Akagi action).

25 In support of the initial application, Mr. Akagi filed a three-page affidavit characterizing himself as a victim of fraud perpetrated by Synergy, Smith and Prentice (as set out in the summary judgment materials before McEwen J.), and as a judgment creditor of Synergy, Smith and Prentice (the "Debtors") as a result of Chiappetta J.'s judgment awarding him compensatory and punitive damages.

26 In addition, without swearing as to his belief in the truth of their contents, Mr. Akagi attached three documents relating to an investigation by the CRA into the affairs of Synergy and IBC: (i) a copy of an Information to Obtain Production Order, presented by a CRA officer, Andrew Suga, to a judge five years earlier (in July 2008); (ii) a copy of an affidavit sworn three years earlier (on June 25, 2010) by a CRA officer, Sophie Carswell; and (iii) a copy of a second affidavit sworn by Ms. Carswell on March 2, 2012. Also attached, again without swearing as to his belief in the truth of their contents, were copies of three newspaper articles regarding the execution of search warrants by the RCMP on June 6, 2013 (in a matter unrelated to Mr. Akagi, but purporting to relate to Synergy and Smith).

27 The thrust of the information contained in the CRA documents was that, at the time the documents were executed, the CRA was conducting a criminal investigation relating to Synergy and IBC's tax allocation program. In particular, CRA officials were investigating the affairs of Synergy, IBC, Smith, Prentice and Breau, as well as those of the appellants Vincent Villanti (the president of IBC) and Ravendra Chaudhary (a chartered accountant working with IBC and Villanti) and various other persons. The tax scheme (defined by Ms. Carswell as the "Tax Plan") was described as follows:

> In the Tax Plan, arm's length individuals who purchased "units" as part of the Tax Plan have deducted certain losses in their 2004, 2005 and 2006 T1 individual income Tax Returns ("T1 Returns"), which they were led to believe were partnership losses validly deductible against other income. These losses purportedly originated from the operations of struggling small and medium sized enterprises ("Joint Venture Partners" or "JVPs" hereinafter) who contributed them to a pool of losses by way of signing Joint Venture Partnership Agreements with the Independent Business Consulting Association (hereinafter "IBCA"). No such losses are deductible in the T1 Returns of the Unit Purchasers.
>
> The net result of the Alleged Offenders' activities is that:
>
>> a) Purchasers of units in the Tax Plan (hereinafter "Unit Purchasers") were defrauded of the money they had paid to the Allege Offenders, because what they received for the money paid was not deductible in their Income Tax Returns, contrary to what they were led to believe.
>>
>> b) The Unit Purchasers claimed losses in their respective T1 Returns for the calendar years 2004, 2005 and 2006, resulting in the understatement of their income taxes payable to the Crown, and
>>
>> c) The Alleged Offenders understated their income from their participation in the promotion and sale of the Tax Plan, thus understating the taxable income and consequent income tax thereon in their own respective income tax returns (corporate and individual) for the taxation years 2004, 2005 and 2006.

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> As a result of its findings in the investigation to date, the essence of the CRA's theory of the offences currently is that the individuals cited above as Alleged Offenders ... acting personally or through corporations or entities which they controlled, participated in the promotion and sale of the Tax Plan which the Affiant believes to be fraudulent because the overwhelming majority of JVPs' losses as shown on their financial statements were fraudulently inflated in arriving at the loss figures shown on the T2124 Statements of Business Activities issued by the Alleged Offenders to the Unit Purchases as part of the Tax Plan.

28 The Suga Information to Obtain, referred to above, described a similar tax scheme, although in much greater detail.

29 As noted, Mr. Akagi did not say what, if any, knowledge he had of the information contained in the Carswell and Suga material or that he believed in the truth of their contents. Nor did he or the Receiver — then or at any time during the subsequent *ex parte* applications discussed below — disclose that the CRA had terminated its investigation in February 2013, four months before the receivership application (albeit, as it later turned out, the RCMP was, at the same time, conducting a continuing investigation into the same alleged scheme).

30 On the basis of this record, on June 14, 2013, the application judge granted the receivership order sought, stating in a brief four-line endorsement that he was "satisfied that the grounds for relief sought have been made out and that a Receiving Order [should] issue in the form filed." The Order was made pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I shall refer to this Order as the "Initial Order".

31 Mr. Akagi submits that "the application judge appointed the receiver for the purpose of investigating the Synergy Alternative Tax Investment Program *on behalf of all investors therein*, and not just on behalf of Mr. Akagi" (emphasis added). However, the Initial Order makes no mention of the Synergy Alternative Tax Investment Program, much less of the power to investigate any such program. That said, the Receiver appears to have treated the Initial Order as entitling it to embark on such an inquiry, and at some point in the evolution of the receivership the application judge appears to have accepted that he had put an "investigative receivership" into place.

32 What follows is a brief description of how the receivership evolved.

The Subsequent Ex Parte Expansions of the Receiver's Powers

June 24, 2013

33 Just ten days after the Initial Order, the Receiver applied *ex parte* for expanded powers. It sought authorization to direct financial institutions to disclose information and documentation regarding payments and transfers of funds not only by Synergy and IBC (the only entities subject to the Initial Order), but also by or at the direction of an expanded list of targets: Independent Business Consulting Association, Independent Business Consultants Association, Integrated Business Consultants Association, 565819 Ontario Ltd., Vincent Villanti, Jean Breau, Larry Haliday, Joe Loshiavo, Shane Smith, David Prentice, Ravendra Kumar Chaudhary and Nadine Smith.

34 The Receiver did not file a notice of motion, notice of application or a factum. The only additional material filed beyond that which informed the Initial Order was the Receiver's First Report. In another brief endorsement, the application judge granted the order sought.

35 As I shall explain later, it is at this point that the receivership truly began to embark on its impermissible voyage. The expanded order was sought on the premise that "[t]he Receivership concerns a tax scheme...described by Canada Revenue Agency", as set out in the excerpt from Ms. Carswell's affidavit, set out above. Based on CRA's documents, the "scheme" was described as involving 3,815 "victims", and the list of "Alleged Offenders" in Ms. Carswell's affidavit became the expanded target list outlined above.

June 28, 2013

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36 Still, the Receiver was not content.

37 Four days later, on June 28, the matter was back before the application judge, again *ex parte* with no notice of motion or application, no further evidence and no factum. This time, there was not even an additional Receiver's Report. The Receiver sought a further expansion of its powers, authorizing it, amongst other things, to examine the financial account statements and related records in the hands of any financial institutions of the Debtors and IBC, as well as the others on the expanded target list. The enlarged authority was granted. In another brief endorsement the application judge stated that "[h]aving heard from counsel [he was] satisfied the relief sought is in the circumstances [was] appropriate and so approved in terms of the draft order signed."

August 2, 2013

38 On August 2, 2013 the Receiver obtained what can only be described as a breathtakingly broad extension of the Initial Order. Recall that the only judgment debtors of Mr. Akagi were — and are — Synergy, Smith and Prentice. The only respondents on the initial application — and the only entities made subject to the Initial Order — were Synergy and IBC. IBC is not, and never has been, a debtor of Mr. Akagi.

39 Here is what happened leading up to August 2.

40 On July 30, 2013, the Receiver e-mailed the application judge with a copy of its Second Report, dated that same date. On July 31, counsel for the Receiver appeared before the application judge, but there is nothing in the court file to indicate what submissions were made. On August 1, counsel for the Receiver e-mailed the application judge again, attaching a draft order that would become the August 2 Order. In the e-mail, counsel offered to make themselves available if the judge "would like a call to discuss the draft order." There is no record of any such discussion. On August 2, the application judge sent an e-mail to counsel for the Receiver, stating: "I hereby authorize the attached order to issue." No reasons were provided.

41 Again, this order was sought and obtained *ex parte*, without any formal notice of motion or application, and without any evidence other than the filing of the Receiver's Second Report.

42 The Second Report summarized the results of the Receiver's investigations after serving the June 24 and June 28 "Disclosure Orders" on various financial institutions. The information received included bank statements of a large number of individuals and corporations named in the earlier orders or in some way associated or affiliated with them. The Receiver's conclusion was "that the alleged offenders have set up a complex matrix of companies and bank accounts". It also identified certain properties said to be associated with the appellant Chaudhary and others, and certain information obtained from the appellants Smith and Prentice at their examinations in aid of execution held on July 26, 2013.

43 What makes the reach of the August 2 Order breathtakingly broad is the following:

• It extended the Receiver's powers to include and apply to: a list of 43 additional individuals and entities identified in Schedule "A" to the Order; any affiliates of those individuals or entities (as defined in the *Ontario Business Corporations Act* ("OBCA")); any corporations or other entities directly or indirectly controlled by the individuals listed or of which they were directors or officers; any corporation in respect of which the listed individuals were entitled to conduct financial transactions; and finally, any entity with a registered head office at the premises occupied by Synergy and IBC.

• The Schedule "A" list was inaccurately defined as comprising "Additional Debtors". Of those on the list, only Synergy, Smith and Prentice were debtors to Mr. Akagi.

• The Order contained sweeping injunctive provisions — operating on a worldwide scale — enjoining all of the 45 listed individuals and entities from dealing with their assets, property or undertakings, wherever located, in any way,

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and freezing their accounts by enjoining any financial institution served with the order from "disbursing, transferring or dealing with any funds or assets deposited in all [their] accounts".

• The Order authorized the Receiver to register certificates of pending litigation against the properties of not only the Debtors and IBC, but the 41 "Additional Debtors" listed in Schedule "A", despite no action or application having been commenced seeking such relief. [2] The Court's attention was not drawn to s. 103 of the *Courts of Justice Act*, which requires the commencement of an action claiming an interest in land as a condition to issuing a certificate of pending litigation.

• Not only did the Order freeze the accounts of the Debtors and the "Additional Debtors", it granted the Receiver a $500,000 borrowing charge against the frozen funds to fund the Receiver's activities.

44 All of this evolved out of a receivership that could only have been granted in aid of execution of Mr. Akagi's outstanding judgment of, at most, approximately $122,000, against the three judgment Debtors — Synergy, Smith and Prentice. As noted above, Smith and Prentice were not even subject to the Initial Order, nor were they examined in aid of execution until July 26, 2013, more than a month *after* the Initial Order was made. Nor was there any evidence before the application judge on the initial application — or thereafter for that matter — indicating that Mr. Akagi had taken any steps to enforce his judgment or that his recovery was likely to be in any jeopardy. As far as the record shows, none of the Debtors or "Additional Debtors" is insolvent.

45 I shall refer to the *ex parte* Orders of June 24, June 28 and August 2, 2013, as the "Subsequent Orders".

The September 16, 2013 "Come-back Hearing"

46 Sometime after the August 2 Order was granted, the various appellants were notified of the Initial and Subsequent Orders. On August 14, 2013, they applied to the application judge to have the orders set aside. On September 16, 2013, their requests were dealt with by way of a "come-back hearing", and dismissed for written reasons delivered that day. I shall refer to this Order as the "Come-Back Hearing Order".

47 At the come-back hearing, the Receiver filed its Third, Fourth and Fifth Reports dated August 15, September 8 and September 16, 2013. Mr. Akagi filed a responding motion record, as did the appellants.

48 The application judge dismissed the complaint that the Receiver had breached its obligations to the court and to the parties to make full disclosure, by failing to disclose the fact that the CRA had terminated its investigation several months before the application for the initial order. He was satisfied there was no lack of full disclosure. There was evidence on the June 14 application that the RCMP was investigating the matter and, while there was no specific evidence that the CRA had referred the matter to the RCMP, this was implicit in the reference to recent search warrant executions by the RCMP. The application judge concluded that there was "no suggestion that CRA [had] discontinued to pursue what is its concern, namely fraudulent activity in the sale of tax losses to investors which lacked reality."

49 Secondly, the application judge rejected the appellants' argument that the materials filed did not satisfy the test for injunctive relief (as applied to interim receivers) set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at paras. 47-48. He concluded:

> The second ground for setting aside namely, that the *RJR MacDonald* test was not met, does not in my view succeed on this material. It is conceded that there is a serious issue of fraud alleged and given the large number of investors (over 3800) of relatively small sums ($10-15,000) I conclude it was appropriate that there be an investigative Receiving Order issued. Otherwise many investors would not know of the potential fraud. The irreparable harm on the material clearly extends beyond Mr. Akagi and does extend to a great number of other investors who have not the resources to pursue to judgment as has Mr. Akagi who remains an unsatisfied judgment debtor.

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50 Thirdly, the application judge rejected the argument that the Initial and Subsequent Orders constituted execution before judgment, analogous to a *Mareva* injunction. In his view, the relief sought was simply a "freezing subject to further order in support of an ongoing investigation."

51 Finally, after recognizing the "powerful and important intrusion" of a receivership order under s. 101 of the *Courts of Justice Act*, and acknowledging that the test for the appointment of a receiver was "comparable" to the test for interlocutory injunctive relief, the application judge concluded:

> Comparable does not mean precisely. This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaws Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer the legitimate concerns of investors.

Final or Interlocutory Order

52 Counsel for Mr. Akagi advanced two arguments that he submits undermine this Court's jurisdiction to hear the current appeal.

53 First, he argued that the orders under attack are interlocutory and therefore this Court does not have jurisdiction to deal with them. In the circumstances here, I disagree.

54 The Initial Order was obtained on application. No relief was claimed other than the appointment of a receiver. There was nothing more to be disposed of once that relief was granted. In the context of the proceedings, it was not intended to be interim or interlocutory in nature pending the outcome of a proceeding involving Mr. Akagi or anyone else.

55 Although Mr. Akagi's counsel refers to the orders as "separate receivership orders", the character of the Subsequent Orders is unclear because the Receiver did not file a notice of motion, notice of application or any formal record on any of the subsequent *ex parte* proceedings.

56 In any event, they are subsumed in the September 16, 2013 Come-Back Hearing Order, which is a final order. It finally disposes of the receivership issues between the parties to the Initial Order and between the Receiver and the numerous non-parties caught by the Subsequent Orders. There is no action or application in which any further rights will be determined. There will be no pleadings defining the issues and giving the appellants the opportunity to defend. This conclusion is consistent with decisions of this court, faced with similar circumstances, holding that a receivership order obtained by way of application is a final order from which an appeal lies directly to this Court: see e.g., *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (Ont. C.A.); *Ontario v. Shehrazad Non Profit Housing Inc.*, 2007 ONCA 267, 85 O.R. (3d) 81 (Ont. C.A. [In Chambers]).

57 Secondly, counsel for Mr. Akagi argued that a direct appeal to this court from the Initial and Subsequent Orders is inappropriate because the *Rules of Civil Procedure* provide for the steps to be taken to set aside an *ex parte* order. Again, I disagree. This argument overlooks the fact that the come-back hearing effectively provided that very procedure.

58 For these reasons, an appeal lies to this Court from the Come-Back Hearing Order.

Discussion and Analysis

59 It will be apparent from the foregoing narration that, in my view, the receivership orders must be set aside. They stand on a fundamentally flawed premise and are unjustifiably overreaching in the powers they grant. Procedurally, they call for at least a word of caution as well, although it is not necessary to dispose of the appeal on this basis in view of the more substantive issues raised by the orders. The procedural concerns arise out of the *ex parte* nature of

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this developing set of extraordinary orders, the somewhat casual manner in which they were processed, and the failure to make full disclosure.

60 I will return momentarily to these issues, and to the particulars of this case. First, however, it may be useful (i) to revisit the framework of this proceeding, and (ii) to comment briefly on the relatively new notion of an "investigative receiver" — so named for the powers the receiver is granted — as it begins to stride across the commercial law landscape.

The Framework of This Proceeding

61 The Initial Order and Subsequent Orders were sought and obtained by relying on s. 101 of the *Courts of Justice Act.* Mr. Akagi is an unsecured judgment creditor with a judgment based on fraud.

62 This is not the case of a secured creditor requesting the appointment of a receiver under its security instrument by court order rather than by private appointment. Nor is it a case involving the appointment of a receiver under insolvency legislation, such as the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), or under the *Securities Act*, R.S.O. 1990, c. S.5 (where the court has the power to appoint a receiver to protect investors in certain circumstances). As noted earlier, it is not a class proceeding or other form of representative action.

63 This is a case where a judgment creditor seeks to use an unsatisfied judgment as an entrée to obtain a receivership in order to freeze the assets and investigate the affairs of not only the debtors, but also of a complex mix of related and not-so related entities and individuals. And to do so not to protect his own interests, but those of some 3800 other investors who may have been victims of a similar fraud, but who have not sought to assert a similar claim.

64 This is made clear in the initial notice of application, both in the outline of the factual grounds for the receivership and in the summary of why Mr. Akagi said it was in the interests of justice that the Receiver be appointed. Ground 10 in the notice of application states:

> It is in the interests of justice that a Receiver be appointed over Synergy and IBC:
>
>> (a) Judicial process will ensure that an independent court officer will control the process and address competing claims.
>>
>> (b) The Court appointed Receiver can investigate and work with authorities to locate and realize upon assets for the benefit of all creditors.
>>
>> (c) The complex business structure would make litigation by individuals untenable. The Court appointed Receiver can deal with such complexities on behalf of all victims.
>>
>> (d) The Court appointed Receiver can prevent further wasting of assets and help to preserve assets for the benefit of all victims/creditors.

"Investigative" or "Investigatory" Receiverships

65 The idea of appointing a receiver or monitor with investigative powers — and sometimes, with only those powers — has emerged in recent years. This Court has not previously been asked to consider whether, or in what circumstances, a s. 101 receiver may be empowered in this fashion. For the purposes of this appeal, it is not necessary that the contours of such an appointment be traced in a detailed manner. Suffice it to say that the idea of appointing a receiver to investigate into the affairs of a debtor is not itself unsound. Rather, it is the runaway nature of the use to which the concept has been put in this case that gives rise to the problem.

66 Indeed, whether it is labelled an "investigative" receivership or not, there is much to be said in favour of such a tool, in my view — when it is utilized in appropriate circumstances and with appropriate restraints. Clearly, there are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions —

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including even, in proper circumstances, the affairs of and transactions concerning related non-parties — will be a proper exercise of the court's "just and convenient" authority under s. 101 of the *Courts of Justice Act*. See, for example, *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Ont. Gen. Div. [Commercial List]), aff'd [1995] O.J. No. 1949 (Ont. Div. Ct.); *Pandya v. Simpson* [2005 CarswellOnt 10517 (Ont. S.C.J. [Commercial List])] (17 November 2005), Toronto, 05-CL-6159; *Century Services Inc. v. New World Engineering Corp.* [2007 CarswellOnt 9945 (Ont. S.C.J.)] (28 July 2006), Toronto, 06-CL-6558; *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (Ont. S.C.J.); *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136 (Ont. S.C.J. [Commercial List]), aff'd 2011 ONSC 4704 (Ont. Div. Ct.); *DeGroote v. DC Entertainment Corp.*, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]); *East Guardian SPC v. Mazur*, 2014 ONSC 6403 (Ont. S.C.J.); *236523 Ontario Inc. v. Nowack*, 2013 ONSC 7479 (Ont. S.C.J. [Commercial List]) (relief denied); *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.).

67 It goes without saying that the root principles governing the appointment of any receiver remain in play in this context, however, and in this respect, two "bookend" considerations, are particularly germane. On the one hand, the authority of the court to appoint a receiver under s. 101 of the *Courts of Justice Act* "where it appears...just or convenient to do so" is undoubtedly broad and must be shaped by the circumstances of individual cases. At the same time, however, the appointment of a receiver is an extraordinary and intrusive remedy and one that should be granted only after a careful balancing of the effect of such an order on all of the parties and others who may be affected by the order. In the case of a receivership in aid of execution, at least, the appointment requires evidence that the creditor's right to recovery is in serious jeopardy. It is the tension between these two considerations that defines the parameters of receivership orders in aid of execution.

68 A review of some of the authorities referred to above will illustrate how these tensions have been resolved in the particular context of a receivership clothed with investigative powers.

Stroh v. Millers Cove Resources Inc.

69 The first is *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Ont. Gen. Div. [Commercial List]), aff'd [1995] O.J. No. 1949 (Ont. Div. Ct.). Because it involved an oppression remedy claim, the appointment of an inspector under the *OBCA* was an available option. [3] Justice Farley appointed a receiver to take control of the assets of a company and to investigate and conduct an independent review of certain self-dealing transactions by the company's majority shareholder, of which the company's directors were unaware. In affirming his decision, the Divisional Court underlined that "the main thrust" of the order was to ensure that the company's assets and arrangements "[could] be fully examined and considered so that future actions [could] then be planned": para. 7.

70 It is important to note that in *Stroh* the defendant corporation was not an operating company and that Farley J. only granted the receivership remedy after giving counsel the opportunity to re-attend before him and make further submissions about whether the officer to be appointed should be a receiver/manager, a monitor, an inspector or something else. He ultimately concluded that the only way the investigation stood any chance of success (because of the secrecy of the majority shareholder and the power it exercised) was to appoint a receiver with the authority he granted.

71 In other words, Farley J. carefully fashioned the remedy to meet the needs of the oppression remedy claimants in the proceeding.

Udayan Pandya v. Courtney Wallis Simpson and Century Services v. New World Engineering Corporation

72 A decade later, Ground J. made a similar order in *Pandya v. Simpson* (17 November 2005), Toronto, 05-CL-6159, as did Morawetz J. in *Century Services Inc. v. New World Engineering Corp.* (28 July 2006), Toronto, 06-CL-6558. Both cases involved the appointment of a receiver for the primary purpose of monitoring and investigating the assets and affairs of defendants.

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73 As Morawetz J. reasoned in *Century Services*, the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation [could] be undertaken." No power was given to seize or freeze assets and the order was very specific that the receiver "shall not operate or unduly interfere with the business of the corporate defendants."

74 In short, the focus was on investigating the affairs of *the defendants* in order to protect the rights of *the plaintiff*. That is, the relief granted was carefully designed to meet the needs of the particular proceeding itself (unlike here, where the investigative receivership reached numerous non-party "alleged offenders" unrelated to the underlying proceedings to protect the interests of thousands of unrelated, non-party "victims").

Loblaw Brands Ltd. v. Thornton and General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living

75 It appears to have been D.M. Brown J. (as he then was) who adopted the terminology of an "investigative" or, as he called it, an "investigatory" receiver. As far as I can determine from the Canadian, American, British and other common law jurisprudence, his decisions in *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (Ont. S.C.J.), and *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136 (Ont. S.C.J. [Commercial List]), aff'd 2011 ONSC 4704 (Ont. Div. Ct.), are the first to have recognized such a receiver as, in effect, a specific class of receiver. Neither of these authorities assists the respondent in justifying the receivership as it evolved here, however.

76 *Loblaw Brands* — a decision upon which the application judge relied — is not this case at all. It involved a fraud perpetrated against Loblaw by an employee (Thornton) who diverted about $4.2 million in supplier rebate payments from Loblaw to his own company (IBL).

77 Prior to the appointment of the "investigatory receiver", Brown J. had granted a *Norwich Pharmacal*[4] order followed by a *Mareva* injunction against the assets of Thornton and IBL. Based on the investigation following those orders, Loblaw learned that IBL's bank account contained less than $44,000 and Thornton's less than $6,000. On the other hand, the accounts revealed outgoing transfers of over $900,000 for payments to various car dealerships, the purchase of a cottage, mortgage payments, home improvements and cash transfers to Thornton's son.

78 Based on these facts, Brown J. appointed a receiver "to locate, investigate, and monitor" the property of Thornton and IBL and "to secure access for the Receiver to such books, record, documents and information the Receiver considers necessary to conduct an investigation of transfers of funds by or from Paul Thornton or IBL, or their banks or trust accounts, to the other defendants or other persons": para. 17.

79 In one sense, this was quite a broad order. However, *Loblaw Brands* is markedly different from the present case in a number of ways.

80 First, the *Loblaw* receivership was grounded in necessity in relation to the collection of the defrauded funds by the claimant Loblaw: given the huge disparity between the amount of money diverted from Loblaw to IBL ($4.2 million) and the value of Thornton and IBL's known assets (approximately $50,000), Brown J. concluded that "without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized": para. 16. These circumstances do not apply here. Mr. Akagi is owed approximately $122,000. There is no evidence of any dramatic disparity between the assets of Synergy, Smith and Prentice (much less IBC) and the amount of the outstanding judgment. Nor is there any evidence that Mr. Akagi's right to recover on the judgment is in jeopardy.

81 Secondly, the *Loblaw* receivership was very carefully tailored to preserve Loblaw's right to recover without providing the Receiver with overreaching powers to interfere with the rights of others. The *Loblaw* Receiver's mandate was "to locate, investigate and monitor" (para. 17); it was not empowered to seize and freeze, as was the Receiver here. Nor were the targeted individuals and entities whose assets were encumbered and affairs interfered with anywhere nearly as wide-spread or tangentially associated with the parties to the proceeding as is the case here.

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82 Finally, the *Loblaw* receivership was also very carefully crafted to protect the interests of Loblaw alone. Here, however, the receivership is more concerned — if not entirely concerned — with protecting the interests of the 3800 other investors who are said to have been defrauded in the tax allocation scheme. The assets being chased in this receivership are not those needed to protect Mr. Akagi's interests at all; they relate to the interests of those 3800 unrelated, non-party individuals who may or may not find themselves in the same situation as Mr. Akagi.

83 Nor does Brown J.'s decision in *General Electric* — a bankruptcy proceeding — provide a basis for justifying the orders here.

84 *General Electric* involved four bankrupt companies and two related non-bankrupt companies that were part of a group of companies called the Liberty Group. The Liberty Group owned and operated a number of retirement homes. Prior to their bankruptcies, the four bankrupt companies defaulted on their secured obligations to General Electric. The Receiver subsequently assigned the companies into bankruptcy and became the trustee in bankruptcy under the BIA.

85 In the course of the bankruptcy proceeding, it became apparent that, during the bankrupt companies' period of insolvency, there had been a series of intercompany payments from them to the two related but solvent corporations under the Liberty Group umbrella: Liberty Assisted Living Inc. ("Liberty") and 729285 Ontario Limited ("729285"). Liberty had been the manager of the retirement homes and 729285 was a shareholder of the company that held all of the shares of the bankrupt companies. In addition, three retirement residences had been sold in the face of court orders prohibiting such sales.

86 The trustee tried to obtain financial information regarding these transactions from the bankrupt companies and from Liberty and 729285. In spite of court orders requiring disclosure of the information and requiring the companies' officers to attend for examinations under s. 163 of the BIA, the information was either not provided or, if provided, was inconsistent, unreliable and misleading. Faced with this stonewalling, the trustee sought the appointment of an "investigative receiver" to investigate the affairs of Liberty and 729285.

87 Justice Brown granted the order with respect to 729285, but declined to do so with respect to Liberty. He concluded there was a strong case that the bankrupt companies had made preference payments to 729285 while insolvent. Because the companies had provided unreliable and inconsistent information on their s. 163 examinations and had compounded that problem by making misrepresentations to the court about the true state of the transferred proceeds, he was satisfied, at para. 103, that:

> Those factors point[ed] to the need to allow an independent third party (a) to look into the transactions which took place between the Bankrupt Companies and 729285, (b) to ascertain the true state of 729185's interest in any of the [funds] — whether they were in trust for others or whether the company enjoyed a beneficial interest in them — and, (c) to figure out the true state of the affairs regarding those to whom the [funds] were paid.

88 With respect to Liberty, however, Brown declined to grant such an order. Since Liberty had managed the bankrupt companies, there were contract-based reasons for payments to and from the companies and there was no evidence that the proffered explanations were unreliable.

89 Again, then, *General Electric* is a case where the investigative powers granted to the Receiver were carefully weighed and carefully tailored to protect the rights of the applicant in relation to the affairs of companies closely related to the bankrupt companies.

90 Some consistent themes emerge from these authorities:

- The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery: *Loblaw Brands*, at paras. 10, 14 and 16.

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• The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric*, at para. 15. One authority characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, 2014 ONSC 6403 (Ont. S.C.J.), at para. 75.

• Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see e.g., *Loblaw Brands*, at para. 17; *Century Services*.

• Finally, in all cases the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends.

91 An additional theme that is reflected in the authorities relates to the application of the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald*, at paras. 47-48. The *RJR-MacDonald* test requires the applicant to demonstrate: (i) that there is a serious issue to be tried; [5] (ii) that the creditor will suffer irreparable harm if the relief is not granted; and (iii) that the balance of convenience favours the creditor. The test is often applied where the receivership order is purely interlocutory and ancillary to the pursuit of other relief claimed — where it is, in effect, execution before judgment.

92 Although the application judge applied the test at the time of the Comeback Hearing — concluding that it had been met here — I need not dwell on whether that was so, or on the role of *RJR-MacDonald* in the receivership context generally, for the purposes of this appeal. The Initial Order, Subsequent Orders, and Come-Back Hearing Order must be set aside in any event, in my view, for the reasons that follow.

The Investigative Receivership in This Case

93 In spite of the positive features of investigative receivers, as set out above, there are risks as well. This appeal provides a case in point. The Receiver, in particular, took a useful concept and ran too far with it. In addition, a number of procedural safeguards were at least obscured in the dust of the chase.

The Procedural Issues

94 Because of the substantive frailties undermining the receivership, it is not necessary to determine this appeal based on the procedural issues raised. [6] It bears noting, however, that if the matter had not proceeded through the numerous steps on an *ex parte* basis, as it did, it would have been less likely to have gone astray, as it did. The same may be said of the somewhat relaxed procedural approach taken to the proceedings. Had the normally salutary processes of the Commercial List — carefully designed to permit the parties to get to the merits of a dispute and resolve them in "real time" without trampling their procedural rights — not been permitted to become overly casual, as they did, the galloping nature of the receivership may well have been reined in.

95 *Ex parte* proceedings are to be taken sparingly, and only then on full disclosure and in circumstances where it is demonstrated that notice to other parties would undermine the purpose of the proceeding. As Penny J. noted recently in *CanaSea PetroGas Group Holdings Ltd., Re*, 2014 ONSC 6116 (Ont. S.C.J.), at para. 28, applicants are under "high obligations of candor and disclosure on an *ex parte* application."

96 At best, the steps taken in pursuit of the orders here sailed very close to this line. There is a reason for requiring a proper record of steps taken, including a notice of motion or application, a motion or application record, a proper evidentiary foundation and adequate judicial reasons: it is otherwise impossible to determine subsequently what was at

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issue and the basis for the order made. This is particularly so where the relief sought involves the extraordinary, *Mareva*-like nature of a receivership order, much less a receivership order of the sweep that emerged from these proceedings.

97 Beyond the Receiver's failure to prepare any of the above-listed documents, the appellants place considerable emphasis on the Receiver's failure to disclose, during the *ex parte* steps in the proceeding, that the CRA had discontinued its investigation — on the particulars of which the applicant relied — in February 2013, several months before the initial receivership application was made. It was not until almost two weeks *after* the August 2 Order that the termination of the CRA investigation was first brought to the Court's attention, and even then, it was raised indirectly: in its Third Report, dated August 15, 2013, the Receiver confirmed that the CRA had referred its investigation to the RCMP.

98 There was some indication in the materials filed when the Initial Order was sought, however, that the RCMP was also investigating the matter. Based on this — despite the absence of evidence that the CRA had referred the matter to the RCMP or that the CRA had itself discontinued its investigation — the application judge "was satisfied there was no lack of full disclosure."

99 The application judge was well-positioned to determine whether he had been misled by any material non-disclosure, and his decision in that regard is entitled to deference. That said, in my view, the failure to disclose that the very investigation upon which the *ex parte* receivership application was founded had been discontinued, at the very least, sailed close to the line of failing to make full and fair disclosure.

The Substantive Issues

The "Roving Receivership"

100 The fundamental flaw underlying the Initial and Subsequent Orders is the faulty premise that the Receiver could be appointed in these circumstances to carry out a broad, stand-alone, investigative inquiry — the civil equivalent of a criminal investigation or public inquiry — for the purposes of determining whether wrongs were suffered by an unidentified hodgepodge of non-party persons who were not represented by anyone in the proceedings, who had expressed no interest in becoming parties or in having their rights protected in the proceedings, and whose interests did not need to be protected to preserve the interests of the appointing creditor. This flawed premise is compounded by the overreaching nature of the relief granted, namely, the authority to both: (i) investigate, without notice, the private financial affairs of a myriad of targets only indirectly, if at all, related to the defendants, as well as further potential targets far beyond the actual debtors and the need to protect Mr. Akagi's interests; and (ii) tie up and freeze the assets and property of those targets, again without notice, pending the termination of the receivership.

101 Mr. Akagi sought the appointment of a receiver because he had an unsatisfied judgment against Synergy, Smith and Prentice for approximately $122,000. The purpose of appointing a receiver in aid of execution under s. 101 of the *Courts of Justice Act* is to protect the interests of the claimant seeking the order where there is a real risk that its recovery would otherwise be in "serious jeopardy": *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.*, [1987] O.J. No. 2315 (Ont. H.C.), at para 6.

102 Put simply, the reach of the Subsequent Orders granting the Receiver enhanced powers is beyond the scope of what could be justified in a single-creditor receivership involving an outstanding claim of, at most, perhaps $122,000. To the extent the Initial Order was granted for the same roving purpose — as the Receiver submits it was — that Order must also be vacated.

103 That the receivership was intended from the beginning to be — and certainly became — an investigation of the affairs of those involved in the broad tax scheme (and of others even beyond that) on behalf of 3800 non-party investors is apparent from both the position taken by the Receiver and the application judge's following comment from his September 16 reasons:

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> This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaw Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer legitimate concerns of investors.

104 As explained above, *Loblaw Brands* is distinguishable from the present case. While I agree that s. 101 provides an equitable remedy for the appointment of an investigative receiver in appropriate circumstances, the type of receivership envisaged and put into place by the application judge goes beyond what is authorized by that provision.

The Initial Order of June 14, 2013

105 Even if the Initial Order was not granted for the "roving" purpose discussed above, but only to aid the execution of Mr. Akagi's judgment (the only legal or equitable basis upon which it could have been granted pursuant to s. 101 of the *Courts of Justice Act*), it must still be set aside.

106 It is true that the judgment against Synergy, Smith and Prentice was based on fraud. However, this is insufficient, by itself, to support such an order, in my view. In this context, Mr. Akagi is a judgment creditor. He was required to show that a receivership order freezing and otherwise interfering with the debtors' assets — and, in this case, not only the debtors' assets but the assets of others as well — was needed to protect his ability to recover on the debt.

107 However, the record reflects no evidence of any attempt by Mr. Akagi to collect on the judgment in any fashion other than to apply for the appointment of the Receiver. Nor was there any evidence that Synergy or the other defendants had insufficient assets to satisfy the judgment, much less that it was necessary to reach the assets of IBC (which was not a party to the Akagi action) in order to protect Mr. Akagi's interests. Finally, with respect to the *ex parte* nature of the application, there was no evidence of urgency or of any reason to believe that, if given notice, Synergy or IBC (or Smith or Prentice, for that matter) would take steps to frustrate the legal process or undermine Mr. Akagi's prospects of recovery.

108 The Initial Order must be set aside on this basis as well.

The Certificates of Pending Litigation

109 The final Subsequent Order, granted *ex parte* on August 2, 2013, authorized the Receiver to register certificates of pending litigation not only against the property of Synergy and IBC (the original targets of the receivership application) but also against the property of the 43 "Additional Debtors" sought to be added to the receivership, only two of which were debtors to the underlying Akagi action.

110 There are at least two problems with this aspect of the Order.

111 First, no action or application has been commenced by Mr. Akagi, or anyone else, asserting a claim to an interest in land or requesting a certificate of pending litigation. Pursuant to s. 103 of the *Courts of Justice Act* and rule 42.01(2), these requirements are mandatory before an order authorizing the issuance of a certificate of pending litigation can be made: *Chilian v. Augdome Corp.* (1991), 78 D.L.R. (4th) 129, 2 O.R. (3d) 696 (Ont. C.A.), at p. 714; *Erdman, Re*, 2012 ONSC 3268 (Ont. S.C.J.), at para. 65. Nor was it asserted before this Court that Mr. Akagi, or anyone else, intended to commence such an action.

112 Secondly, there is no indication that either Mr. Akagi's claim or the claims sought to be protected on behalf of the 3800 unnamed investors give rise to any claims to an interest in land. The thrust of the claim is that they were all victims of a fraudulent tax allocation scheme, not a fraudulent land investment scheme. While there may be other ways of immobilizing the lands of targeted entities — such as the "freezing" orders otherwise attacked in these proceedings — a certificate of pending litigation cannot be issued in the air against unknown and undescribed lands regarding which no claim is, or could be, asserted.

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113 For these reasons, the August 12 Order authorizing the issuance of certificates of pending litigation must be set aside.

Disposition

114 For the foregoing reasons, I would set aside the Initial Order dated June 24, 2013, the Subsequent Orders dated June 24, 2013, June 28, 2013 and August 2, 2013, and the Come-Back Hearing Order dated September 16, 2013.

115 If the parties cannot agree on costs, they may make brief written submissions, not to exceed 8 pages in length, within 30 days of the release of these reasons.

***Janet Simmons J.A.*:**

I agree

***R.G. Juriansz J.A.*:**

I agree

Appeal allowed.

Footnotes

1 The defendant Breau was never served with the proceedings, and by the time of the summary judgment motion, the defendant Delahaye had made an assignment in bankruptcy.

2 The Receiver now concedes that an error was made in granting this authorization, but argues that the lands should remain encumbered in some other fashion.

3 Legislation governing the affairs of corporations provides for the appointment of an "an inspector" to carry out "an investigation" into the business and affairs of a corporation or its affiliates: see the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), ss. 229-230; the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"), s. 161. In general, this relief is available at the instance of a shareholder where it is apparent that the corporation's books and records are not properly kept or are inaccurate, or where there has been some deceit or oppressive conduct practiced against the shareholders: *Baker v. Paddock Inn Peterborough Ltd.* (1977), 16 O.R. (2d) 38 (Ont. H.C.), at p. 39. Its purpose is to ensure that a corporation discharges its core obligation to provide shareholders with an accurate picture of its financial position: *Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd.*, [2007] O.J. No. 993 (Ont. S.C.J. [Commercial List]), at para. 13. The court has broad powers to make any order it thinks fit, but, in particular, is empowered to appoint an inspector to conduct an investigation and to authorize the inspector to enter any premises in which the court is satisfied there might be relevant information, to examine anything and to make copies of any document or record found on the premises, and to require any persons to produce documents or records to the inspector. While this case does not concern this corporate statutory framework, the notion of a receiver with investigative powers appears to have been born in that context. Nothing in these reasons is meant to suggest that an investigative receiver is intended to supplant the appointment of an inspector under the relevant legislation.

4 That is, an order providing for discovery of a non-party prior to trial.

5 It is not necessary to comment here on the debate in the authorities as to whether it is necessary for a creditor seeking the appointment of an investigative receiver to demonstrate fraud. It is accepted in this case that there has been fraud; Mr. Akagi's judgment is based on that finding.

6 I will deal with the issues surrounding the authorization of certificates of pending litigation separately.

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TAB 8

2015 SCC 42, 2015 CSC 42
Supreme Court of Canada

Chevron Corp. v. Yaiguaje

2015 CarswellOnt 13353, 2015 CarswellOnt 13354, 2015 SCC 42, 2015 CSC 42, [2015] 3 S.C.R. 69, 136 O.R. (3d) 384 (note), 22 C.C.L.T. (4th) 1, 256 A.C.W.S. (3d) 583, 335 O.A.C. 201, 388 D.L.R. (4th) 253, 38 B.L.R. (5th) 171, 474 N.R. 1, 73 C.P.C. (7th) 1, J.E. 2015-1413

Chevron Corporation and Chevron Canada Limited, Appellants and Daniel Carlos Lusitande Yaiguaje, Benancio Fredy Chimbo Grefa, Miguel Mario Payaguaje Payaguaje, Teodoro Gonzalo Piaguaje Payaguaje, Simon Lusitande Yaiguaje, Armando Wilmer Piaguaje Payaguaje, Angel Justino Piaguaje Lucitante, Javier Piaguaje Payaguaje, Fermin Piaguaje, Luis Agustin Payaguaje Piaguaje, Emilio Martin Lusitande Yaiguaje, Reinaldo Lusitande Yaiguaje, Maria Victoria Aguinda Salazar, Carlos Grefa Huatatoca, Catalina Antonia Aguinda Salazar, Lidia Alexandria Aguinda Aguinda, Clide Ramiro Aguinda Aguinda, Luis Armando Chimbo Yumbo, Beatriz Mercedes Grefa Tanguila, Lucio Enrique Grefa Tanguila, Patricio Wilson Aguinda Aguinda, Patricio Alberto Chimbo Yumbo, Segundo Angel Amanta Milan, Francisco Matias Alvarado Yumbo, Olga Gloria Grefa Cerda, Narcisa Aida Tanguila Narvaez, Bertha Antonia Yumbo Tanguila, Gloria Lucrecia Tanguila Grefa, Francisco Victor Tanguila Grefa, Rosa Teresa Chimbo Tanguila, Maria Clelia Reascos Revelo, Heleodoro Pataron Guaraca, Celia Irene Viveros Cusangua, Lorenzo Jose Alvarado Yumbo, Francisco Alvarado Yumbo, Jose Gabriel Revelo Llore, Luisa Delia Tanguila Narvaez, Jose Miguel Ipiales Chicaiza, Hugo Gerardo Camacho Naranjo, Maria Magdalena Rodriguez Barcenes, Elias Roberto Piyahuaje Payahuaje, Lourdes Beatriz Chimbo Tanguila, Octavio Ismael Cordova Huanca, Maria Hortencia Viveros Cusangua, Guillermo Vincente Payaguaje Lusitante, Alfredo Donaldo Payaguaje Payaguaje and Delfin Leonidas Payaguaje Payaguaje, Respondents and International Human Rights Program at the University of Toronto Faculty of Law, MiningWatch Canada, Canadian Centre for International Justice and Justice and Corporate Accountability Project, Interveners

McLachlin C.J.C., Abella, Rothstein, Cromwell, Karakatsanis, Wagner, Gascon JJ.

Heard: December 11, 2014
Judgment: September 4, 2015
Docket: 35682

Proceedings: affirming *Yaiguaje v. Chevron Corp.* (2013), 52 C.P.C. (7th) 229, 370 D.L.R. (4th) 132, 2013 CarswellOnt 17574, 2013 ONCA 758, 313 O.A.C. 285, 118 O.R. (3d) 1, 15 B.L.R. (5th) 285, C.W. Hourigan J.A., E.E. Gillese J.A., J.C. MacPherson J.A. (Ont. C.A.); reversing in part *Yaiguaje v. Chevron Corp.* (2013), [2013] O.J. No. 1955, 2013 ONSC 2527, 15 B.L.R. (5th) 226, 361 D.L.R. (4th) 489, 2013 CarswellOnt 5729, D.M. Brown J. (Ont. S.C.J. [Commercial List]); additional reasons at *Yaiguaje v. Chevron Corp.* (2013), 2013 CarswellOnt 7602, 2013 ONSC 3325, D.M. Brown J. (Ont. S.C.J. [Commercial List])

Counsel: Clarke Hunter, Q.C., Anne Kirker, Q.C., Robert Frank, for Appellant, Chevron Corporation
Benjamin Zarnett, Suzy Kauffman, Peter Kolla, for Appellant, Chevron Canada Limited
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Murray Klippenstein, Renu Mandhane, W. Cory Wanless, for Interveners, International Human Rights Program at the University of Toronto Faculty of Law, MiningWatch Canada and the Canadian Centre for International Justice
A. Dimitri Lascaris, James Yap, for Intervener, Justice and Corporate Accountability Project

Subject: Civil Practice and Procedure; Corporate and Commercial; International; Torts

APPEAL from decision reported at *Yaiguaje v. Chevron Corp.* (2013), 2013 ONCA 758, 2013 CarswellOnt 17574, 15 B.L.R. (5th) 285, 118 O.R. (3d) 1, 313 O.A.C. 285, 370 D.L.R. (4th) 132, 52 C.P.C. (7th) 229 (Ont. C.A.), lifting stay and recognizing foreign judgment.

POURVOI formé à l'encontre d'une décision publiée à *Yaiguaje v. Chevron Corp.* (2013), 2013 ONCA 758, 2013 CarswellOnt 17574, 15 B.L.R. (5th) 285, 118 O.R. (3d) 1, 313 O.A.C. 285, 370 D.L.R. (4th) 132, 52 C.P.C. (7th) 229 (Ont. C.A.), ayant annulé le sursis et reconnu un jugement étranger.

***Gascon J.* (*McLachlin C.J.C., Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.* concurring):**

I. Overview

1 In a world in which businesses, assets, and people cross borders with ease, courts are increasingly called upon to recognize and enforce judgments from other jurisdictions. Sometimes, successful recognition and enforcement in another forum is the only means by which a foreign judgment creditor can obtain its due. Normally, a judgment creditor will choose to commence recognition and enforcement proceedings in a forum where the judgment debtor has assets. In this case, however, the Court is asked to determine whether the Ontario courts have jurisdiction to recognize and enforce an Ecuadorian judgment where the foreign judgment debtor, Chevron Corporation ("Chevron"), claims to have no connection with the province, whether through assets or otherwise. The Court is also asked to determine whether the Ontario courts have jurisdiction over a Canadian subsidiary of Chevron, Chevron Canada Limited ("Chevron Canada"), a stranger to the foreign judgment for which recognition and enforcement is being sought.

2 The courts below found that jurisdiction existed over Chevron. They held that the only connection that must be proven for recognition and enforcement to proceed is one between the foreign court and the original action on the merits; there is no preliminary need to prove a connection with Ontario for jurisdiction to exist in recognition and enforcement proceedings. They also found there to be an independent jurisdictional basis for proceeding against Chevron Canada due to the place of business it operates in the province, and at which it had been duly served.

3 I agree with the outcomes reached by the courts below with respect to both Chevron and Chevron Canada and I would dismiss the appeal. In an action to recognize and enforce a foreign judgment where the foreign court validly assumed jurisdiction, there is no need to prove that a real and substantial connection exists between the enforcing forum and either the judgment debtor or the dispute. It makes little sense to compel such a connection when, owing to the nature of the action itself, it will frequently be lacking. Nor is it necessary, in order for the action to proceed, that the foreign debtor contemporaneously possess assets in the enforcing forum. Jurisdiction to recognize and enforce a foreign judgment within Ontario exists by virtue of the debtor being served on the basis of the outstanding debt resulting from the judgment. This is the case for Chevron. Jurisdiction also exists here with respect to Chevron Canada because it was validly served at a place of business it operates in the province. On the traditional jurisdictional grounds, this is sufficient to find jurisdiction.

II. Backgrounds and Facts

4 The dispute underlying the appeal originated in the Lago Agrio region of Ecuador. The oil-rich area has long attracted the exploration and extraction activities of global oil companies, including Texaco, Inc. ("Texaco"). As a result of those activities, the region is said to have suffered extensive environmental pollution that has, in turn, disrupted the lives and jeopardized the futures of its residents. The 47 respondents (the "plaintiffs") represent approximately 30,000 indigenous Ecuadorian villagers. For over 20 years, they have been seeking legal accountability as well as financial and

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environmental reparation for harms they allegedly have suffered due to Texaco's former operations in the region. Texaco has since merged with Chevron.

5 In 1993, the plaintiffs filed suit against Texaco in the United States District Court for the Southern District of New York. In 2001, after lengthy interim proceedings, the District Court dismissed their suit on the grounds of international comity and *forum non conveniens*. The following year, the United States Court of Appeals for the Second Circuit upheld that judgment, relying in part on a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts should its motion to dismiss succeed: *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (U.S. C.A. 2nd Cir. 2002).

6 In 2003, the plaintiffs filed suit against Chevron in the Provincial Court of Justice of Sucumbîos. Several years of litigation ensued. In 2011, Judge Zambrano ruled in the plaintiffs' favour, and ordered Chevron to pay US$8.6 billion in environmental damages, as well as US$8.6 billion in punitive damages that were to be awarded unless Chevron apologized within 14 days of the judgment. As Chevron did not apologize, the punitive damages award remained intact. In January 2012, the Appellate Division of the Provincial Court of Justice of Sucumbîos affirmed the trial judgment. In November 2013, Ecuador's Court of Cassation upheld the Appellate Division's judgment, except on the issue of punitive damages. In the end, the total amount owed was reduced to US$9.51 billion.

7 Meanwhile, Chevron instituted further U.S. proceedings against the plaintiffs' American lawyer, Steven Donziger, and two of his Ecuadorian clients, seeking equitable relief. Chevron alleged that Mr. Donziger and his team had corrupted the Ecuadorian proceedings by, among other things, ghost-writing the trial judgment and paying Judge Zambrano US $500,000 to release it as his own. In 2011, Judge Kaplan of the United States District Court for the Southern District of New York granted preliminary relief in the form of a global anti-enforcement injunction with respect to the Ecuadorian judgment: *Chevron Corp. v. Donziger*, 768 F.Supp.2d 581 (U.S. Dist. Ct. S.D. N.Y. 2011). The United States Court of Appeals for the Second Circuit overturned this injunction in 2012, stressing that "[t]he [plaintiffs] hold a judgment from an Ecuadorian court. They may seek to enforce that judgment in any country in the world where Chevron has assets": *Chevron Corp. v. Naranjo*, 667 F.3d 232 (U.S. C.A. 2nd Cir. 2012), at pp. 245-56. In 2014, Judge Kaplan of the District Court held that the Ecuadorian judgment had resulted from fraud committed by Mr. Donziger and others on the Ecuadorian courts: *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (U.S. Dist. Ct. S.D. N.Y. 2014). That decision and the underlying allegations of fraud are not before this Court.

8 Since the initial judgment, Chevron has refused to acknowledge or pay the debt that the trial court said it owed, and it does not hold any Ecuadorian assets. Faced with this situation, the plaintiffs have turned to the Canadian courts for assistance in enforcing the Ecuadorian judgment, and obtaining their financial due. On May 30, 2012, after the Appellate Division's decision but prior to the release of the 2013 judgment of the Court of Cassation, they commenced an action for recognition and enforcement of the Ecuadorian judgment against Chevron, Chevron Canada and Chevron Canada Finance Limited in the Ontario Superior Court of Justice. The action against the latter has since been discontinued.

9 Chevron, a U.S. corporation incorporated in Delaware, was served at its head office in San Ramon, California. Chevron Canada, a Canadian corporation governed by the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, with its head office in Alberta, is a seventh-level indirect subsidiary of Chevron, which has 100 per cent ownership of every company in the chain between itself and Chevron Canada. The plaintiffs initially served Chevron Canada with their amended statement of claim at an extra-provincially registered office in British Columbia. Later, they served the company at a place of business it operates in Mississauga, Ontario.

10 In serving Chevron in San Ramon, the plaintiffs relied upon Rule 17.02(m) of Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, ("Rules") which provides that service may be effected outside of Ontario without leave where the proceeding consists of a claim "on a judgment of a court outside Ontario". In serving Chevron Canada at its Mississauga office, the plaintiffs relied upon Rule 16.02(1)(c), which requires that personal service be made on a corporation "by leaving a copy of the document ... with a person at any place of business of the corporation who appears to be in control or management of the place of business".

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11 In their amended statement of claim, the plaintiffs sought: (a) the Canadian equivalent of the award of US $18,256,718,000 resulting from the 2012 judgment of the Appellate Division of the Provincial Court of Justice of Sucumbîos; (b) the Canadian equivalent of costs to be determined by the Ecuadorian court; (c) a declaration that the shares of Chevron Canada are available to satisfy the judgment of the Ontario court; (d) the appointment of an equitable receiver over the shares and assets of Chevron Canada; (e) prejudgment interest from January 3, 2012; and (f) all costs of the proceedings on a substantial indemnity basis, plus all applicable taxes. In response, the appellants each brought a motion in which they sought substantially the same relief: (1) an order setting aside service *ex juris* of the amended statement of claim; and (2) an order declaring that the court had no jurisdiction to hear the action, and dismissing or permanently staying it.

III. Judicial History

A. Ontario Superior Court of Justice (Commercial List) (Brown J.), 2013 ONSC 2527, 361 D.L.R. (4th) 489 (Ont. S.C.J. [Commercial List])

(1) Order Setting Aside Service Ex Juris

12 The motion judge was asked to determine the prerequisites for establishing that an Ontario court has jurisdiction in an action to recognize and enforce a foreign judgment. Chevron contended that the "real and substantial connection" test for establishing jurisdiction articulated by this Court in *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, [2012] 1 S.C.R. 572 (S.C.C.), applies not only to the question whether a court can assume jurisdiction over a dispute in order to decide its merits, but also to whether an enforcing court has jurisdiction in an action to recognize and enforce a foreign judgment. The plaintiffs replied that the "real and substantial connection" test for jurisdiction does not apply to the enforcing court. Rather, in an action for recognition and enforcement, it need only be established that the foreign court had a real and substantial connection with the dispute's parties or with its subject matter. The motion judge ruled in the plaintiffs' favour, dismissing Chevron's motion. He offered five reasons for his conclusion.

13 First, in his view, this Court's leading cases on recognition and enforcement — *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), and *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416 (S.C.C.) — contain no suggestion that a real and substantial connection between the foreign judgment debtor and Ontario is needed. Second, he found that there is nothing in *Van Breda* to suggest that it altered the principles laid down in *Morguard* and *Beals*. Third, requiring that Rule 17.02(m) be read "within the (un-stated) context of the Ontario court otherwise enjoying some real and substantial connection to the defendant would render the sub-rule meaningless" because the Ontario court will, of course, have no connection with the subject matter of the judgment, given that "it is a foreign judgment which by its very nature has no connection with Ontario": para. 80. Nor will there be an *in personam* connection between the defendant and Ontario, as "the sub-rule specifically contemplates that a non-Ontario resident will be the defendant in the action": *ibid*. Fourth, the judge held that there may be legitimate reasons (for instance, the practical reality that assets can exit a jurisdiction quickly) for seeking the recognition and enforcement of a foreign judgment against a non-resident debtor who has no assets in Ontario. To insist that the debtor have assets in the jurisdiction before a judgment creditor can seek recognition and enforcement could harm the creditor's ability to recover the debt. Fifth, the motion judge considered two analogous Ontario statutes — the *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R.6, and the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 — and found that neither of these legislative schemes establishes a requirement that the defendant be located or possess assets in Ontario before a creditor can register a foreign judgment or arbitral award. In "an age of global commerce", he added, it would be misguided to have a more restrictive common law approach than a statutory one: para 82.

14 The motion judge also found that jurisdiction existed over Chevron Canada, which had initially contended that because it was not a judgment debtor, there was no basis upon which to serve it *ex juris* in British Columbia. The judge observed, however, that the situation had changed since Chevron Canada had brought its motion: the plaintiffs had served the corporation at a "bricks and mortar" office it operates in Mississauga, Ontario (para. 87). This constituted

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a "place of business" within the meaning of Rule 16.02(1)(c), and service at that location was sufficient to establish jurisdiction.

(2) Order of a Stay Under Section 106 of the Courts of Justice Act

15 In spite of these conclusions, the motion judge found that this was an appropriate case in which to exercise the court's power to stay a proceeding "on its own initiative" pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. He so held for several reasons. First, Chevron does not own, has never owned, and has no intention of owning assets in Ontario. Second, Chevron conducts no business in Ontario. Third, there is no basis for asserting that Chevron Canada's assets are Chevron's assets for the purposes of satisfying the Ecuadorian judgment. Chevron does not own Chevron Canada's shares. Nor is there a legal basis for piercing Chevron Canada's corporate veil. In the judge's view, even though "[i]mportant considerations of international comity accompany any request for the recognition of a judgment rendered by a foreign court ..., the evidence [in this case] disclosed that there is nothing in Ontario to fight over", and thus no reason to allow the claim to proceed any further: para. 111.

B. Ontario Court of Appeal (MacPherson, Gillese and Hourigan JJ.A.), 2013 ONCA 758, 118 O.R. (3d) 1 (Ont. C.A.)

16 The plaintiffs appealed the stay entered by the motion judge. Chevron and Chevron Canada cross-appealed his conclusion that the Ontario courts have jurisdiction.

(1) Entering of the Stay

17 To maintain consistency with their jurisdictional challenge, Chevron and Chevron Canada made no submissions before the Ontario Court of Appeal in support of the stay that had been granted. They made no submissions on this point before this Court either. This issue is therefore not before us.

18 In this regard, I would simply note that the Court of Appeal rejected the view that this was an appropriate case in which to impose a discretionary stay under s. 106. MacPherson J.A., writing for the court, emphasized that Chevron and Chevron Canada — both "sophisticated parties with excellent legal representation" — had decided not to attorn to the jurisdiction of the Ontario courts: para. 45. They referenced s. 106 in their submissions only insofar as it potentially supported a stay on the basis of lack of jurisdiction, not on the basis on which it had ultimately been granted. The stay was entirely the initiative of the motion judge. According to the Court of Appeal, a s. 106 stay should only be granted in rare circumstances, and the bar to granting it should be raised even higher when it is not requested by the parties. In fact, the s. 106 stay in this case constituted a "disguised, unrequested and premature Rule 20 and/or Rule 21 motion": para. 57. In MacPherson J.A.'s view, the motion judge had effectively imported a *forum non conveniens* motion into his reasoning on the stay, even though no such motion had been before him. The issues that the motion judge had addressed deserved to be fully canvassed on the basis of a complete record and full legal argument.

19 I note as well that the Court of Appeal found that although the motion judge's analysis with respect to jurisdiction relied on the notion of comity, he underplayed comity's importance in the reasons he gave in support of the stay. The Court of Appeal disagreed that allowing the case to be heard on the merits would constitute a mere "academic exercise": para. 70. In its view, in light of Chevron's considerable efforts to stall proceedings up to that point, the plaintiffs "[did] not deserve to have their entire case fail on the basis of an argument against their position that was not even made, and to which they did not have an opportunity to respond": *ibid*. It found that while the plaintiffs may not ultimately succeed on the merits, or in collecting from the judgment debtor, this was not relevant to a determination of whether to grant a discretionary stay at this stage of the proceedings. For the Court of Appeal, "[t]his case crie[d] out for assistance, not unsolicited and premature barriers": para. 72.

(2) Jurisdiction to Determine Whether the Ecuadorian Judgment Should Be Recognized and Enforced

20 On the jurisdictional issue, the Court of Appeal agreed with the motion judge's analysis. It found this Court's judgment in *Beals* to be "crystal clear" about how the real and substantial connection test is to be applied in an action

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for recognition and enforcement of a foreign judgment. The sole question is whether the foreign court properly assumed jurisdiction, in the sense that it had a real and substantial connection with the subject matter of the dispute or with the defendant. In other words, there need not be an inquiry into the relationship between "the legal dispute in the foreign country and the domestic Canadian court being asked to recognize and enforce the foreign judgment".

21 MacPherson J.A. found that this Court's decision in *Van Breda* did not alter this analysis. In his view, *Van Breda* applies to actions at first instance, not to actions for recognition and enforcement. In a first instance case, "an Ontario court exceeds its constitutional authority when it assumes jurisdiction of a case where there is no real and substantial connection to Ontario": para. 32. Assuming jurisdiction in such a case "offends the principle of comity because one or more other jurisdictions have a real and substantial connection to the subject matter of the litigation and Ontario does not": *ibid*. No constitutional issues or comity concerns arise when merely recognizing and enforcing a foreign judgment, "because the Ontario court does not purport to intrude on matters that are properly within the jurisdiction of the foreign court": para. 33. In the result, MacPherson J.A. held that "it is clear that the Ecuadorian judgment for US$9.51 billion against Chevron satisfied the requirement of rule 17.02(m)": para 35. Thus, "an Ontario court has jurisdiction to determine whether the Ecuadorian judgment against Chevron may be recognized and enforced in Ontario": *ibid*.

22 With respect to Chevron Canada, the Court of Appeal held that the motion judge had been "correct to note Chevron Canada's bricks-and-mortar business in Ontario": para. 38. In addition, the court found that "Chevron Canada's significant relationship with Chevron" was also relevant to whether jurisdiction was legitimately found: *ibid*. An Ontario court thus has jurisdiction to adjudicate a recognition and enforcement action against Chevron that also names Chevron Canada as a defendant.

IV. Issues

23 The appeal raises two issues:

(a) In an action to recognize and enforce a foreign judgment, must there be a real and substantial connection between the defendant or the dispute and Ontario for jurisdiction to be established?

(b) Do the Ontario courts have jurisdiction over Chevron Canada, a third party to the judgment for which recognition and enforcement is sought?

V. Analysis

A. Establishing Jurisdiction Over Foreign Debtors in Actions to Recognize and Enforce Foreign Judgments

24 Chevron submits that before proceeding with an action to recognize and enforce a foreign judgment, an Ontario enforcing court must follow a two-step process. First, it must determine its own jurisdiction by applying the real and substantial connection test articulated by this Court in *Van Breda*. For Chevron, this test applies to actions to recognize and enforce foreign judgments just as it does to actions at first instance. Chevron suggests that one way — and in many cases the only way — in which this first component can be satisfied is if the defendant has assets in Ontario, or if there is a reasonable prospect of his or her having assets in Ontario in the future. Second, if jurisdiction is found, then the enforcing court should proceed to assess whether the foreign court appropriately assumed jurisdiction. Chevron does not dispute that this second component is satisfied here: a real and substantial connection undoubtedly existed between the subject matter of the litigation, Chevron and the Ecuadorian court that rendered the foreign judgment.

25 In support of its position, Chevron relies on a passage from this Court's decision in *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612 (S.C.C.), at para. 28: "Under the traditional rule [that only monetary judgments were enforceable], *once the jurisdiction of the enforcing court is established*, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced (Chevron's factum, at para. 52 (emphasis added by Chevron)). It contends that the requirement of a preliminary finding of jurisdiction did not need to be addressed in the

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Court's previous leading cases on recognition and enforcement — *Morguard* and *Beals* — as in each of those cases, the judgment debtor was resident in the province.

26 Chevron further argues that this position is consistent with *Van Breda*. There, the Court emphasized that pursuant to the Constitution, Canadian courts can only adjudicate disputes where doing so constitutes a legitimate exercise of state power: para. 31. Chevron suggests that in actions to recognize and enforce foreign judgments, this constitutional legitimacy must still exist. Ontario courts risk jurisdictional overreach if they assume jurisdiction in cases like this one, in which the province has no interest. Moreover, assuming jurisdiction in such a case risks undermining, not furthering, the notion of comity. The rules for service *ex juris* create mere presumptions of jurisdiction that are "rebuttable if there is no real and substantial connection with the province": Chevron's factum, at para. 57.

27 I agree with the Ontario Court of Appeal and the motion judge that the approach favoured by Chevron is sound neither in law nor in policy. Canadian courts, like many others, have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments. To recognize and enforce such a judgment, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied. It is true that in any case in which a Canadian court exercises authority over a party, some basis must exist for its doing so. It does not follow, however, that jurisdiction is and can only be established using the real and substantial connection test, whether that test is satisfied by the existence of assets alone or on another basis. In actions to recognize and enforce foreign judgments within the limits of the province, it is the act of service on the basis of a foreign judgment that grants an Ontario court jurisdiction over the defendant. I arrive at this conclusion for several reasons. First, this Court has rightly never imposed a requirement to prove a real and substantial connection between the defendant or the dispute and the province in actions to recognize and enforce foreign judgments. Second, the distinct principles that underlie actions for recognition and enforcement as opposed to actions at first instance support this position. Third, the experiences of other jurisdictions, convincing academic commentary, and the fact that comparable statutory provisions exist in provincial legislation reinforce this approach. Finally, practical considerations militate against adopting Chevron's submission.

(1) Jurisprudential Guidance Prior to Van Breda

28 Contrary to Chevron's contention, this Court has never required there to be a real and substantial connection between the defendant or the action and the enforcing court for jurisdiction to exist in recognition and enforcement proceedings.

29 This Court's modern judgments on recognition and enforcement begin with the 1990 decision in *Morguard*. There, the Court expanded the traditionally limited bases upon which foreign judgments could be recognized and enforced. Before *Morguard*, a foreign judgment would be recognized and enforced only if the defendant in the original action had been present in the foreign jurisdiction, or had consented to the court's jurisdiction: S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2010), at p. 53; *Morguard*, at p. 1092. These traditional bases for recognition and enforcement attracted criticism as being unduly restrictive, particularly as between sister provinces: see, e.g., V. Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989) 9 *Oxford J. Legal Stud.* 547.

30 In *Morguard*, La Forest J., writing for the Court, held that the judgments of another province could and should also be recognized and enforced where the other province's court assumed jurisdiction on the basis of a real and substantial connection between the action and that province: pp. 1102 and 1108. In his view, the traditional grounds for recognition and enforcement had been retained based on a misguided notion of comity, unsuited to "the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner": p. 1096. Moreover, the traditional recognition and enforcement rules were tailored to circumstances that had existed at a time when it would have been difficult for the defendant to defend "an action initiated in a far corner of the world in the then state of travel and communications": p. 1097. The need to revisit the traditional rules was particularly acute in a federal state like Canada, to which "considerations underlying the rules of comity apply with much greater force": p. 1098.

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31 In arriving at his conclusions, La Forest J.'s analysis focused entirely on whether the court of the other province or territory had "properly, or appropriately, exercised jurisdiction in the action": p. 1102. He intimated no need to interrogate the enforcing court's jurisdiction, either in his discussion of the law or in its application to the facts of the case. Instead, once a real and substantial connection between the original court and the action is demonstrated, and it is clear that the original court had jurisdiction, the resulting judgment "should be recognized and be enforceable" in the other provinces: p. 1108.

32 This Court revisited the prerequisites to recognition and enforcement in 2003 in *Beals*. It held that the real and substantial connection test should also apply to the money judgments of other countries' courts. In reasons written by Major J., the majority of the Court found that the principles of order, fairness, and comity that underlay the decision in *Morguard*, while originally cast in the interprovincial context, were equally compelling internationally: paras. 25-27. According to Major J., "[i]nternational comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law": para. 28. Where a real and substantial connection existed between the foreign court and the action's subject matter or its defendants, the foreign judgment should be recognized and enforced: para. 29.

33 Here again, the Court did not articulate or imply a need to inquire into the enforcing court's jurisdiction; the focus remained squarely on the foreign jurisdiction. In Major J.'s view, the following conditions must be met before a domestic court will enforce a judgment from a foreign jurisdiction:

> The enforcing court, in this case Ontario, must determine whether the foreign court had a real and substantial connection to the action or the parties, at least to the level established in *Morguard*, *supra*. A real and substantial connection is the overriding factor in the determination of jurisdiction. ...
>
> If a foreign court did not properly take jurisdiction, its judgment will not be enforced. ...
>
> . . . . .
>
> Once the "real and substantial connection" test is found to apply to a foreign judgment, the court should then examine the scope of the defences available to a domestic defendant in contesting the recognition of such a judgment.
>
> (*Beals*, at paras. 37-39)

34 Thus, in the recognition and enforcement context, the real and substantial connection test operates simply to ensure that the foreign court from which the judgment originated properly assumed jurisdiction over the dispute. Once this is demonstrated, the defendant has an opportunity to prove that one of the defences to recognition and enforcement should apply. No mention is made of any need to prove a connection between the enforcing jurisdiction and the action. In the end, the test articulated for recognition and enforcement in *Morguard* and *Beals* is "seemingly straightforward": T. J. Monestier, "Jurisdiction and the Enforcement of Foreign Judgments" (2014), 42 *Adv. Q.* 107, at p. 110.

35 Three years later, in *Pro Swing*, the Court once more extended the scope of Canadian recognition and enforcement law, this time in relation to non-monetary foreign judgments. Traditionally, to be recognizable and enforceable, a foreign judgment had to be "(a) for a debt, or definite sum of money" and "(b) final and conclusive": para. 10, quoting *Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 1, Rule 35, at pp. 474-75). In *Pro Swing*, the Court held that non-monetary foreign judgments should also be capable of being recognized and enforced in Canada. In its view, "the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce": para. 31. Chevron contends that it was in the course of this judgment that the Court clearly expressed what had been implicit in *Morguard* and *Beals*: the need to assess the Canadian forum's jurisdiction before recognizing and enforcing the foreign judgment. In this regard, Chevron points to para. 28 of the majority's reasons, where Deschamps J. wrote: "Under the traditional rule, once the jurisdiction of the enforcing court is established, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced."

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36 I cannot accede to Chevron's submission that this phrase was intended to alter this Court's clear guidance in *Morguard* and *Beals* for two reasons. First, this Court's insistence in *Pro Swing* that jurisdiction must be established prior to determining whether the foreign judgment should be recognized and enforced is hardly controversial: jurisdiction must, of course, always be established regardless of the type of action being brought. Otherwise, the court will lack the power to hear and determine the case. Where Chevron's submission fails, however, is in assuming that the only way to establish jurisdiction is by proving the existence of a real and substantial connection between the foreign judgment debtor and the Canadian forum. In my view, jurisdiction in an action limited to recognition and enforcement of a foreign judgment within the province of Ontario is established when service is effected on a defendant against whom a foreign judgment debt is alleged to exist. There is no requirement, nor need, to resort to the real and substantial connection test.

37 Second, Deschamps J. clearly stated the prerequisites to recognition and enforcement elsewhere in her reasons, and did not insist or expand upon such a requirement. She wrote:

> The foreign judgment is evidence of a debt. All the enforcing court needs is proof that the judgment was rendered by a court of competent jurisdiction and that it is final, and proof of its amount. The enforcing court then lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms.
>
> (*Pro Swing*, at para. 11)

This statement is consistent with *Morguard* and *Beals*: there is no need to probe the relationship between the enforcing forum and the action or the defendant. Deschamps J.'s one prior, passing reference to the need for the enforcing court to have jurisdiction cannot serve as a basis for inferring the existence of a significant, and previously unstated, hurdle to recognition and enforcement that simply does not exist. As is evident from her reasons, she retained the focus on jurisdiction in the original foreign proceeding.

(2) Effect of Van Breda

38 Chevron also places considerable reliance upon this Court's decision in *Van Breda*. In my view, this reliance is misplaced. While there is no denying that the *Van Breda* decision carries great importance in many areas of Canadian conflict of laws, its intended scope should not be overstated. Nothing in *Van Breda* altered the jurisdictional inquiry in actions to recognize and enforce foreign judgments as established by this Court in *Morguard*, *Beals* and *Pro Swing*.

39 In *Van Breda*, LeBel J. clearly specified the limited areas of private international law to which the decision was intended to apply. First, he noted at para. 16 that three categories of issues are "intertwined" in private international law: jurisdiction, *forum non conveniens* and the recognition of foreign judgments. Although he acknowledged that "[n]one of the divisions of private international law can be safely analysed and applied in isolation from the others", LeBel J. nonetheless cautioned that "the central focus of these appeals is on jurisdiction and the appropriate forum", that is, only two of the three categories of issues at play in private international law: para. 16. He went on to propose an analytical framework and legal principles applicable to the assumption of jurisdiction (one way of establishing jurisdiction *simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*). Nowhere did he purport to analyze or modify the principles applicable to the recognition and enforcement of foreign judgments, the area of private international law that is the central focus of this appeal.

40 Second, LeBel J. further — and repeatedly — confined the principles he developed in *Van Breda* to the assumption of jurisdiction in tort actions. For example, he said: "... this Court must craft more precisely the rules and principles governing the assumption of jurisdiction by the courts of a province over tort cases in which claimants sue in Ontario, but at least some of the events that gave rise to the claims occurred outside Canada or outside the province": para. 68. He later added the following: "Before I go on to consider a list of presumptive connecting factors for tort cases, I must define the legal nature of the list": para. 80. Perhaps most tellingly, LeBel J. stated, at para. 85: "The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to

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be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law."

41 To accept Chevron's argument would be to extend *Van Breda* into an area in which it was not intended to apply, and in which it has no principled reason to meddle. In fact, and more compellingly, the principles that animate recognition and enforcement indicate that *Van Breda*'s pronouncements should not apply to recognition and enforcement cases. It is to these principles that I will now turn.

(3) Princip les Underlying Actions for Recognition and Enforcement

42 Two considerations of principle support the view that the real and substantial connection test should not be extended to an enforcing court in an action for recognition and enforcement. First, the crucial difference between an action at first instance and an action for recognition and enforcement is that, in the latter case, the only purpose of the action is to allow a pre-existing obligation to be fulfilled. Second, the notion of comity, which has consistently underlain actions for recognition and enforcement, militates in favour of generous enforcement rules.

(a) Purpose of Recognition and Enforcement Proceedings

43 Canadian law recognizes that the purpose of an action to recognize and enforce a foreign judgment is to allow a pre-existing obligation to be fulfilled; that is, to ensure that a debt already owed by the defendant is paid. As Pitel and Rafferty explain, such an action "is based not on the original claim the plaintiff had pursued against the defendant but rather on the obligation created by the foreign judgment": p. 159; see also P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at ¶11.177. The following comment made by McLachlin C.J. in *Pro Swing* (although in dissent) also reflects this logic: "Barring exceptional concerns, a court's focus when enforcing a foreign judgment is not on the substantive and procedural law on which the judgment is based, but instead on the obligation created by the judgment itself": para. 77.

44 Important consequences flow from this observation. First, the purpose of an action for recognition and enforcement is not to evaluate the underlying claim that gave rise to the original dispute, but rather to assist in enforcing an already-adjudicated obligation. In other words, the enforcing court's role is not one of substance, but is instead one of facilitation: *Pro Swing*, at para. 11. The court merely offers an enforcement mechanism to facilitate the collection of a debt within the jurisdiction. This entails that the enforcing court does not exercise jurisdiction in the same way as it does in actions at first instance. In a first instance case like *Van Breda*, the focus is on whether the court has jurisdiction to determine the merits of a substantive legal claim; in a recognition and enforcement case, the court does not create a new substantive obligation, but instead assists with the fulfillme nt of an existing one.

45 It follows that there can be no concern that the parties are located elsewhere, or that the facts underlying the dispute are properly addressed in another court, factors that might serve to undermine the existence of a real and substantial connection with the forum in first instance adjudication. The defendant will, of course, not have a significant connection with the forum, otherwise an independent jurisdictional basis would already exist for proceeding against him or her. Moreover, the facts underlying the original judgment are irrelevant, except insofar as they relate to potential defences to enforcement. The only important element is the foreign judgment itself, and the legal obligation it has created. Simply put, the logic for mandating a connection with the enforcing jurisdiction finds no place.

46 Second, enforcement is limited to measures — like seizure, garnishment, or execution — that can be taken only within the confines of the jurisdiction, and in accordance with its rules: *Pro Swing*, at para. 11; J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), at p. 11-52. The recognition and enforcement of a judgment therefore has a limited impact: as Walker states, "[a]n order enforcing a foreign judgment applies only to local assets" (p. 14-11). The enforcing court's judgment has no coercive force outside its jurisdiction. Whether recognition and enforcement should proceed depends entirely on the enforcing forum's laws. The dispute does not contain a foreign element that would make resort to the real and substantial connection test necessary. Walker adds that, as a result, since enforcement concerns

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only local assets, "there is no basis for staying the proceedings on the grounds that the forum is inappropriate or that the judgment debtor's principal assets are elsewhere": *ibid.*

47 Third, and flowing from this reality, any potential constitutional concerns that might sometimes emerge in conflict of laws cases simply do not arise in recognition and enforcement proceedings. In *Morguard*, the Court elaborated a conflict of laws rule and also hinted, without deciding, that the test might have constitutional foundations: pp. 1109-10. In *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.), the Court confirmed that *Morguard* had created a constitutional principle that was applicable to the assumption of jurisdiction. LeBel J. later reaffirmed and clarified this in *Van Breda*, where he noted that the real and substantial connection test has a dual nature: first, it serves as a constitutional principle; second, it constitutes a conflict of laws rule: at paras. 22-24. He stated that "in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication"; he added that the test "suggests that the connection between a state and a dispute cannot be weak or hypothetical", as such a connection "would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute": para. 32.

48 No concern about the legitimacy of the exercise of state power exists in actions to recognize and enforce foreign judgments against judgment debtors. As I have explained, when such an action comes before a Canadian court, the court is not assuming jurisdiction over the parties in the same way as would occur in a first instance case. The enforcing court has no interest in adjudicating the original rights of the parties. Rather, the court merely seeks to assist in the enforcement of what has already been decided in another forum. As Deschamps J. aptly stated in *Pro Swing*, "[t]he enforcing court ... lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms": para. 11. The manner in which the court exercises control over the parties is thus different — and far less invasive — than in an action at first instance.

49 In most recognition and enforcement proceedings, the only factor that draws a foreign judgment creditor to the province is the potential for assets upon which to ultimately enforce the judgment. Enforcement is limited to the seizable assets found within the province. No constitutional concern about the legitimacy of this exercise of jurisdiction emerges. I acknowledge that, under provincial legislation, a recognition and enforcement judgment issued in one province may be capable of being "registered" in another province, thus offering some advantage to plaintiffs who have already successfully obtained a recognition and enforcement judgment. Nevertheless, the existence of such legislation does not alter the basic fact that absent some obligation to enforce another forum's judgments, the judicial system of each province controls access to its jurisdiction's enforcement mechanisms, whenever a foreign judgment creditor seeks to seize assets within its territory in satisfaction of a foreign judgment debt.

50 In addition, the obligation created by a foreign judgment is universal; there is no competing claim to jurisdiction with respect to it. If each jurisdiction has an equal interest in the obligation resulting from a foreign judgment, it is hard to see how any concern about territorial overreach could emerge. Simply put, there can be no concern about jurisdictional overreach if no jurisdiction can reach further into the matter than any other. The purposes that underlie recognition and enforcement proceedings simply do not require proof of a real and substantial connection between the dispute and Ontario, whether for constitutional reasons or otherwise.

(b) The Notion of Comity in Recognition and Enforcement Proceedings

51 Beyond this, it must be remembered that the notion of comity has consistently been found to underlie Canadian recognition and enforcement law. In *Morguard*, this Court stated that comity refers to "the deference and respect due by other states to the actions of a state legitimately taken within its territory", as well as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws": pp. 1095-96, quoting with approval the U.S. Supreme Court's foundational articulation of the concept of comity in *Hilton v. Guyot*, 159 U.S. 113 (U.S. N.Y. Sup. 1895), at pp. 163-64; see also *R. v. Spencer*, [1985] 2 S.C.R. 278 (S.C.C.), at p. 283, per Estey J., concurring.

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52 The Court's formulation of the notion of comity in *Morguard* was quoted with approval in *Beals*: para. 20. In *Hunt*, the Court observed that "ideas of 'comity' are not an end in themselves, but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions": p. 325. In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.), the Court again referred to the notion of comity, stating that it entails respect for the authority of each state "to make and apply law within its territorial limit", and that "to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, [states] will in great measure recognize the determination of legal issues in other states": p. 1047. In *Pro Swing*, the Court described comity as a "balancing exercise" between "respect for a nation's acts, international duty, convenience and protection of a nation's citizens": para. 27. Finally, in *Van Breda*, LeBel J. emphasized that the goal of modern conflicts systems rests on the principle of comity, which, although a flexible concept, calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity: para. 74. This is true of all areas of private international law, including that of the recognition and enforcement of foreign judgments.

53 As this review of the Court's statements on comity shows, the need to acknowledge and show respect for the legal acts of other states has consistently remained one of the principle's core components. Comity, in this regard, militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored. The concepts of order and fairness in which comity is grounded are not affronted by rejecting Chevron's proposed extension of the real and substantial connection test. This is so for several reasons.

54 First, in recognition and enforcement proceedings, order and fairness are protected by ensuring that a real and substantial connection existed between the foreign court and the underlying dispute. If such a connection did not exist, or if the defendant was not present in or did not attorn to the foreign jurisdiction, the resulting judgment will not be recognized and enforced in Canada. The judgment debtor is free to make this argument in the recognition and enforcement proceedings, and indeed will have already had the opportunity to contest the jurisdiction of the foreign court in the foreign proceedings. Here, for instance, it is accepted that Chevron attorned to the jurisdiction of the Ecuadorian courts. As Walker writes, "[t]he jurisdictional requirements of order and fairness considered in the context of *direct* jurisdiction operate to promote the international acceptance of the adjudication of a matter by a Canadian court": p. 14-1 (emphasis in original). There is no similar requirement of international acceptance in the context of the recognition and enforcement of a foreign judgment.

55 Second, no unfairness results to judgment debtors from having to defend against recognition and enforcement proceedings. In essence, through their own behaviour and legal noncompliance, the debtors have made themselves the subject of outstanding obligations. It is for this reason that they may be called upon to answer for their debts in various jurisdictions. Of course, the principles of order and fairness are also protected by providing a foreign judgment debtor with the opportunity to convince the enforcing court that there is another reason why recognition and enforcement should not be granted: see *Beals*, at paras. 39 *et seq*.

56 Third, contrary to Chevron's argument, a requirement that the defendant have a real and substantial connection with the enforcing court in the sense of being present or having assets in the province would only undermine order and fairness. In recognition and enforcement proceedings, besides an unlikely attornment by the defendant, the only way a real and substantial connection with the enforcing forum could be achieved, in the end, is through presence or assets in the jurisdiction. However, presence will frequently be absent given the very nature of the proceeding at issue. Indeed, Rule 17.02(m) is implicitly based on an expectation that the defendant in a claim on a judgment of a court outside Ontario will not be present in the province. Requiring assets to be present in the jurisdiction when recognition and enforcement proceedings are instituted is also not conducive to order or fairness. For one thing, assets such as receivables or bank deposits may be in one jurisdiction one day, and in another the next. If jurisdiction over recognition and enforcement proceedings were dependent upon the presence of assets at the time of the proceedings, this may ultimately prove to only benefit those debtors whose goal is to escape rather than answer for their liabilities, while risking depriving creditors of access to funds that might eventually enter the jurisdiction.

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57 In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality. The motion judge rightly opined as follows on this subject:

> In an age of electronic international banking, funds once in the hands of a judgment debtor can quickly leave a jurisdiction. While it is highly unlikely that a judgment debtor would move assets into a jurisdiction in the face of a pending recognition action, in some circumstances judgment debtors may not control the timing or location of the receipt of an asset due to them; control may rest in the hands of a third party as a result of contract or otherwise. Where a judgment creditor under a foreign judgment learns that its judgment debtor may come into possession of an asset in the foreseeable future, it might want the recognition of its foreign judgment in advance of that event so that it could invoke some of the enforcement mechanisms of the receiving jurisdiction, such as garnishment. To insist that the judgment creditor under a foreign judgment await the arrival of the judgment debtor's asset in the jurisdiction before seeking recognition and enforcement could well prejudice the ability of the judgment creditor to recover on its judgment. Given the wide variety of circumstances - including timing - in which a judgment debtor might come into possession of an asset, I do not think it prudent to lay down a hard and fast rule that assets of the judgment debtor must exist in the receiving jurisdiction as a pre-condition to the receiving jurisdiction entertaining a recognition and enforcement action. [para. 81]

I note that in one Ontario lower court decision, albeit in the context of *forum non conveniens*, the existence of assets has been held to be irrelevant to the jurisdictional inquiry: see *BNP Paribas (Canada) v. Mécs* (2002), 60 O.R. (3d) 205 (Ont. S.C.J.).

58 In this regard, I find persuasive value in the fact that other common law jurisdictions — presumably equally concerned about order and fairness as our own — have also found that the presence of assets in the enforcing jurisdiction is not a prerequisite to the recognition and enforcement of a foreign judgment.

59 In *Tasarruf Mevduati Sigorta Fonu v. Demirel* [2007] 1 W.L.R. 2508, for example, the England and Wales Court of Appeal (Civil Division) held that "a claimant seeking to enforce a foreign judgment by action does not have to show that there are assets in the jurisdiction. To require him to do so would be tantamount to construing the rule as if it were limited in that way": para. 29. The court also held that to be granted permission to serve *ex juris* (permission that is needed under the applicable English procedural rules), the claimant is required to show "that he has a good arguable case in the action, that is that he has a good arguable case that judgment should be given based upon the foreign judgment": para. 29. The court continued, holding that the claimant "must ordinarily ... show further that he can reasonably expect a benefit from such a judgment": *ibid*. However, on the facts of the case, it held that service *ex juris* should be permitted where the defendant did not possess assets in England at the time, but had a "reasonable possibility" of having assets in London "one of these days": para. 40.

60 The High Court of Ireland followed a similar approach in *Yukos Capital S.A.R.L. v. OAO Tomskneft VNK*, [2014] IEHC 115 (Ireland H.C.), in an arbitration context, holding that "the presence of assets within the jurisdiction is not a pre-requisite for the granting of leave to serve out of the jurisdiction on an application to enforce a Convention Award": para. 112. Although the court quoted with approval the passages from *Tasarruf* to the effect that the applicant must demonstrate that some potential benefit would accrue should the recognition and enforcement action succeed, it nevertheless accepted, with no hesitation, that "the seeking of recognition and enforcement of an award in a country where the losing party may have no assets in order to obtain the imprimatur of a respected court upon the award is acceptable": para. 128.

61 The U.S. courts appear to be divided on the prerequisites to recognition and enforcement: see R. A. Brand, "Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments" (2013), 74 *U. Pitt. L. Rev*. 491. Some, as exemplified by the decision in *Lenchyshyn v. Pelko Elec., Inc.* (2001), 723 N.Y.S.2d 285 (U.S.

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N.Y.A.D. 2001), take a broad approach. In *Lenchyshyn*, the Supreme Court of New York, Appellate Division, held that personal jurisdiction need not be established over judgment debtors for recognition and enforcement to proceed. In the court's view, "[r]equiring that the judgment debtor have a 'presence' in or some other jurisdictional nexus to the state of enforcement would unduly protect a judgment debtor and enable him easily to escape his just obligations under a foreign country money judgment" (p. 292); moreover, no constitutional obligation exists to satisfy such a requirement (p. 289). The court concluded that "even if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment ... and thereby should have the opportunity to pursue all such enforcement steps *in futuro*, whenever it might appear that defendants are maintaining assets in New York": p. 291. The same court recently reiterated the *Lenchyshyn* approach in *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Co.*, 986 N.Y.S.2d 454 (U.S. N.Y.A.D. 1st Dept. 2014). Other state and district courts have also adopted its reasoning: *Haaksman v. Diamond Offshore (Bemuda) Ltd.*, 260 S.W.3d 476 (U.S. Tex. Civ. App. Houston 14th Dist. 2008); *Pure Fishing, Inc. v. Silver Star Co.*, 202 F.Supp.2d 905 (N.D. Iowa 2002).

62 As the motion judge below correctly pointed out, some U.S. courts have taken a different approach. For instance, the Michigan Court of Appeals stated the following in *Electrolines, Inc. v. Prudential Assurance Co., Ltd.*, 677 N.W.2d 874 (U.S. Mich. Ct. App. 2003):

> We hold that where plaintiff failed to identify any property owned by defendants in Michigan, the trial court erred in holding that it was unnecessary for plaintiff to demonstrate that the Michigan court had personal jurisdiction over defendants in this common-law enforcement action.
>
> . . . . .
>
> We have not found any authorities indicating that the foundational requirement of demonstrating a trial court's jurisdiction over a person or property is inapplicable in enforcement proceedings. [pp. 880 and 884]

Other U.S. courts have adopted an even more extreme position, holding that "attachment of assets of the judgment debtor within the state is not sufficient to provide jurisdiction, and that personal jurisdiction over the judgment debtor is necessary": Brand, at p. 506, citing *Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208 (U.S. C.A. 4th Cir. 2002), *cert.* denied, 537 U.S. 822 (U.S. Sup. Ct. 2002).

63 As this review of the case law indicates, many courts in common law jurisdictions have been hesitant to make the presence of assets a prerequisite to jurisdiction in recognition and enforcement proceedings. While it is true that some have nonetheless seen fit to limit the existence of jurisdiction in other ways (notably, by requiring that judgment creditors prove that a benefit will result from successful recognition and enforcement proceedings), they have done so in the context of different procedural rules and distinct constitutional considerations.

64 Turning to the works of Canadian conflict of laws scholars, most support the view that requiring a real and substantial connection through the defendant being present or having assets in the province is not necessary for the purposes of a recognition and enforcement action. Walker, for instance, writes:

> The security of crossborder transactions rests on the confidence that the law will enable the prompt and effective determination of the effect of judgments from other legal systems. For this reason, there are no separate or additional jurisdictional requirements, such as the residence of the defendant or the presence of the defendant's assets in the jurisdiction, for a court to determine whether a foreign judgment may be recognized or enforced. [Emphasis added; p. 14-1.]

65 Perell and Morden express a similar view:

> Subject to the defences, a Canadian court will enforce a foreign judgment if the foreign court or foreign jurisdiction had a "real and substantial connection" to the dispute. However, it is not necessary for the plaintiffs to establish that Ontario has a real and substantial connection with the litigation; it is sufficient to show that the foreign court that gave the judgment had a real and substantial connection with the matter. [Footnotes omitted; ¶11.181.]

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66 Pitel and Rafferty take a somewhat different position in the following passage:

> Because an action on the foreign judgment is a new legal proceeding, issues of jurisdiction ... must be considered at the outset. If the defendant is resident in the country in which recognition and enforcement is sought, it will be easy to establish jurisdiction. But in many cases the defendant will not be resident there: he or she will only have assets there, which the plaintiff is going after to enforce the judgment. Typically the presence of assets in a province is an insufficient basis for taking jurisdiction over a foreign defendant. But most provinces have made specific provision to allow for service *ex juris* in such cases. For example, in Ontario service outside the province can be made as of right where the claim is "on a judgment of a court outside Ontario." ... [T]he plaintiff would still need to show a real and substantial connection to the province in which enforcement was sought. Under this test, the presence of assets may be insufficient to ground substantive proceedings but they should virtually always be sufficient to ground proceedings for recognition and enforcement.
>
> [Footnote omitted; pp. 159-60.]

67 This statement, however, has been criticized by at least one lower court judge who "decline[d] to follow that theory for the following reasons: (1) they cite no authority for the theory that they advance (neither case law nor academic commentary); and (2) the preponderance of precedent is to the contrary": *CSA8-Garden Village LLC v. Dewar*, 2013 ONSC 6229, 369 D.L.R. (4th) 125 (Ont. S.C.J.), at para. 43. I am inclined to agree with this criticism. Pitel and Rafferty's statement does not accord with the principles discussed above that underlie actions for the recognition and enforcement of foreign judgments.

68 In my view, there is nothing improper in allowing foreign judgment creditors to choose where they wish to enforce their judgments and to assess where, in all likelihood, their debtors' assets could be found or may end up being located one day. In this regard, it is the existence of clear, liberal and simple rules for the recognition and enforcement of foreign judgments that facilitates the flow of wealth, skills and people across borders in a fair and orderly manner: Walker, at p. 14-1. Requiring a real and substantial connection through the presence of assets in the enforcing jurisdiction would serve only to hinder these considerations, which are important for commercial dealings in an increasingly globalized economy. It is true that the absence of assets upon which to enforce a foreign judgment may, in some situations, have an impact on the legitimate use of the judicial resources of an enforcing court, and in turn on the court's exercise of its discretionary power to stay the proceeding. The absence of assets may also influence the appropriateness of the choice of a given forum for the enforcement proceedings. These issues do not relate, however, to the existence of jurisdiction, but to its exercise; as this Court emphasized in *Van Breda*, "a clear distinction must be drawn between the existence and the exercise of jurisdiction": para. 101.

69 Facilitating comity and reciprocity, two of the backbones of private international law, calls for assistance, not barriers. Neither this Court's jurisprudence nor the principles underlying recognition and enforcement actions requires imposing additional jurisdictional restrictions on the determination of whether a foreign judgment is binding and enforceable in Ontario. The principle of comity does not require that Chevron's submissions be adopted. On the contrary, an unambiguous statement by this Court that a real and substantial connection is not necessary will have the benefit of providing a "fixed, clear and predictable" rule, which some say is necessary in this area: T. J. Monestier, "A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2007), 33 *Queen's L.J.* 179, at p. 192. Such a rule will clearly be consistent with the dictates of order and fairness; it will also allow parties "to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect", as LeBel J. in *Van Breda* insisted they should be able to do: para. 73. Moreover, a clear rule will help to avert needless and wasteful jurisdictional inquiries that merely thwart the proceedings from their eventual resumption. As some have noted, our courts "should exercise care in interpreting rules and developing legal principles so as not to encourage unnecessary motions", since "[i]n many cases, the defendant's challenge to service *ex juris* is just another dilatory tactic that provincial rules of civil procedure have sought to avoid": G. D. Watson and F. Au, "Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard" (2000), 23 *Adv. Q.* 167, at p. 205. To accept Chevron's submissions would be to ignore this wise counsel.

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(4) Relevant Legislation

70 Finally, the choices made by the Ontario legislature provide an additional useful perspective, one that reinforces the validity of the approach favoured by this Court's jurisprudence and the principles discussed above. Two points are of note. First, the Rules do not require that the court probe the relationship between the dispute and the province, whether by inquiring into the existence of assets or otherwise. Rule 17.02 establishes the bases upon which a party can serve an adversary with an originating process or notice of a reference outside Ontario without needing to seek leave of the court to do so. Rule 17.02(m) provides that one basis for service exists where the claim is "on a judgment of a court outside Ontario", which, naturally, contemplates recognition and enforcement proceedings. While the Rules do not in and of themselves confer jurisdiction (see Perell and Morden, at ¶2.306), they nevertheless "represent an expression of wisdom and experience drawn from the life of the law" (*Van Breda*, at para. 83) and offer useful guidance with respect to the intentions of the Ontario legislators. That the legislators have not seen fit to craft specific jurisdictional rules respecting foreign judgments is indicative of their intention to have the Rules alone govern, and therefore to maintain the existence of broad jurisdictional bases in actions for recognition and enforcement.

71 Second, analogous provisions found in other Ontario statutes do not impose an obligation on the plaintiff to establish that the defendant has assets in the province or some other conceivable connection with the forum. For example, the Ontario *International Commercial Arbitration Act*, which permits registration of foreign arbitral awards, does not require that the debtor be present or have assets in Ontario. Article 35(1) of the Schedule to that Act provides that "[a]n arbitral award ... shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36." Article 36(1) lists various grounds for refusing recognition or enforcement of such awards. None of those grounds is based upon the absence of a real and substantial connection between either the underlying dispute or the defendant and Ontario, or upon an absence of assets. Similarly, the *Reciprocal Enforcement of Judgments (U.K.) Act*, which facilitates the recognition and enforcement of judgments from the United Kingdom, does not permit a debtor to escape enforcement by demonstrating that no real and substantial connection exists between the debtor or the dispute and the forum. Finally, the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5, which supplies an expedited mechanism for registering and enforcing the judgments of the other Canadian provinces and territories, contains no such requirement either.

72 I note that all the common law provinces and territories have statutes providing for the recognition and enforcement of foreign arbitral awards or of judgments from the United Kingdom. They also have similar statutes providing for the expedited registration or recognition of judgments from specified jurisdictions. In Quebec, it is art. 3155 of the *Civil Code of Québec* that provides for the recognition and enforcement of foreign decisions. It notably does not require a connection between the foreign debtor and the province. In *Lépine c. Société Canadienne des postes*, 2009 SCC 16, [2009] 1 S.C.R. 549 (S.C.C.), this Court found that "the basic principle laid down in art. 3155 ... is that any decision rendered by a foreign authority must be recognized unless an exception applies": para. 22. The Court acknowledged that the enumerated exceptions are "limited": *ibid.* I note that none of them concerns a jurisdictional hurdle in the enforcing state. This shows that the Quebec legislature did not intend a connection between the foreign debtor and the province to be a prerequisite to recognition and enforcement.

73 I acknowledge that the Uniform Law Conference of Canada ("ULCC") took a different approach in drafting the *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA") (online) in the 1990s. The CJPTA has been passed, with some variations, in five jurisdictions (Saskatchewan, Prince Edward Island, Yukon, British Columbia, and Nova Scotia), though it has only come into force in three of them. Section 3(e) of the CJPTA provides that one circumstance in which a court has territorial competence in a proceeding is if "there is a real and substantial connection between [*the enacting province or territory*] and the facts on which the proceeding against that person is based" (emphasis in original; text in brackets in original). Section 10 states that a real and substantial connection "is presumed to exist if the proceeding ... (k) is for enforcement of a judgment of a court made in or outside [*the enacting province or territory*] or an arbitral award made in or outside [*the enacting province or territory*]" (emphasis in original; text in brackets in original). Thus, the foreign judgment creates a rebuttable presumption of jurisdiction, which the judgment debtor can contest. Yet, in

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spite of this possibility, V. Black, S. G. A. Pitel and M. Sobkin point out that, as of 2012, "no defendant [had] succeeded in rebutting a s. 10 presumption" in the provinces in which the CJPTA was in force at that time: *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (2012), at pp. 146-47. As this Court observed in *Van Breda*, "[l]egislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system": para. 34. The legislatures are therefore free to adopt legislation like the CJPTA that departs from the common law, so long as they do so within constitutional limits. Ontario, however, has not done so.

74 As a result, to find in this case that there is no requirement of a real and substantial connection between the forum and the dispute in an action for recognition and enforcement would neither pervert the Ontario legislators' intentions, nor risk some other unforeseen outcome. Instead, such a finding would be respectful of the legislative choices already made by the province, while leaving open legal space in which it is free to develop its own conflict of laws rules, if it so chooses. This decision is limited to common law recognition and enforcement principles.

(5) Summary

75 Case law, principle, relevant statutes and practicality all support a rejection of Chevron's contention. Jurisdiction in an action for recognition and enforcement stems from service being effected on the basis of a foreign judgment rendered in the plaintiff's favour, and against the named defendant. There is no need to demonstrate a real and substantial connection between the dispute and the enforcing forum. To conclude otherwise would undermine the important values of order and fairness that underlie all conflicts rules: *Van Breda*, at para. 74, quoting *Morguard*, at p. 1097. Moreover, such a conclusion would be inconsistent with this Court's statement in *Beals* that the doctrine of comity (to which the principles of order and fairness attach) "must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility": para. 27. Cross-border transactions and interactions continue to multiply. As they do, comity requires an increasing willingness on the part of courts to recognize the acts of other states. This is essential to allow individuals and companies to conduct international business without worrying that their participation in such relationships will jeopardize or negate their legal rights.

76 In this case, jurisdiction is established with respect to Chevron, which was served *ex juris* pursuant to Rule 17.02(m) of the Rules. The plaintiffs alleged in their amended statement of claim that Chevron was a foreign debtor as a result of "the final Judgment of the Appellate Division of the Provincial Court of Justice of Sucumbios of Ecuador of January 3, 2012": Joint A.R., vol. 1, p. 102. While this judgment has since been varied by the Court of Cassation, this occurred after the amended statement of claim had been filed. The original judgment remains largely intact, although, as noted, the Court of Cassation reduced the total amount owed. The plaintiffs have sufficiently pleaded the Ontario courts' jurisdiction over Chevron.

77 In closing on this first issue, I wish to emphasize that when jurisdiction is found to exist, it does not necessarily follow that it will or should be exercised: A. Briggs, *The Conflict of Laws* (3rd ed. 2013), at pp. 52-53; see also *Van Breda*, at para. 101. Establishing jurisdiction merely means that the alleged debt merits the assistance and attention of the Ontario courts. Once the parties move past the jurisdictional phase, it may still be open to the defendant to argue any or all of the following, whether by way of preliminary motions or at trial: that the proper use of Ontario judicial resources justifies a stay under the circumstances; that the Ontario courts should decline to exercise jurisdiction on the basis of *forum non conveniens*; that any one of the available defences to recognition and enforcement (i.e. fraud, denial of natural justice, or public policy) should be accepted in the circumstances; or that a motion under either Rule 20 (summary judgment) or Rule 21 (determination of an issue before trial) of the Rules should be granted. The availability of these potential arguments, however, does not oust the jurisdiction of the Ontario courts over the plaintiffs' action for recognition and enforcement.

B. Jurisdiction With Respect to Chevron Canada

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78 For its part, Chevron Canada contends that — whatever might be the case for Chevron — jurisdiction cannot be established over it, a stranger to the original foreign judgment. It advances two primary submissions. First, in its view, the Court of Appeal erroneously found jurisdiction over Chevron without inquiring into the nature of the relationship between that defendant or the subject matter of the action and Ontario. This error allegedly had important consequences on the issue of whether jurisdiction exists over Chevron Canada. Given that I have found that jurisdiction properly exists over Chevron, this submission is now moot.

79 Chevron Canada's second submission is that the other factors relied upon by the Court of Appeal to find jurisdiction (C.A. reasons, at para. 38) — namely, Chevron Canada's "bricks-and-mortar business in Ontario" and its "economically significant relationship" with Chevron — do not in fact establish jurisdiction. Chevron Canada argues that while corporations domiciled in Ontario can be brought before the province's courts even in the absence of a relationship between the claim and that province, the same cannot be said for corporations that merely carry on business in Ontario. Relying on *Van Breda*, it argues that in such cases, Ontario courts only have jurisdiction if there is a connection between the subject matter of the claim and the business conducted in the province. According to Chevron Canada, while the Court in *Van Breda* maintained the traditional jurisdictional grounds of presence and consent, it also limited the instances in which presence-based jurisdiction can be said to exist. For corporations, the Court recognized that the existence of an office other than the head office is not an independent jurisdictional ground, but is properly considered part of carrying on business in the province. In Chevron Canada's view, carrying on business from an office is only a presumptive connecting factor that can be rebutted by showing that there is no connection between the claim and the business the corporation conducts in the province. This flows from the constitutional limits on the state's exercise of power and applies regardless of whether service is effected *ex juris* or *in juris*.

80 Chevron Canada further submits that the existence of its "economically significant relationship" with Chevron is insufficient to find jurisdiction: Chevron Canada's factum, at para. 65. Such a finding would disregard the concept of separate corporate personality, "a bedrock principle of law" since *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.). This case is not one of the limited instances in which piercing the corporate veil is permissible. Chevron Canada adds that in every action, there must be a "good arguable case" that a sufficient connection with Ontario exists before the province's courts can exercise jurisdiction: Chevron Canada's factum, at para. 86, citing *Ontario v. Rothmans Inc.*, 2013 ONCA 353, 115 O.R. (3d) 561 (Ont. C.A.), at para. 54. In its submission, there is none here.

81 I do not accept Chevron Canada's submissions. *Van Breda* specifically preserved the traditional jurisdictional grounds of presence and consent. Chevron Canada erroneously seeks to conflate the rules on presence-based jurisdiction and those on assumed jurisdiction, even though they have always developed in their respective spheres. Here, presence-based jurisdiction is made out on the basis of Chevron Canada's office in Mississauga, Ontario, where it was served *in juris*. Carrying on a business in Ontario at which the defendant is served is sufficient to find presence-based jurisdiction. Several Ontario courts have found this to be the case. The reference in *Van Breda* to constitutional conflict of laws principles does not change the fact that a sufficient jurisdictional basis exists to allow the plaintiffs' case to proceed against Chevron Canada. In any event, even in the context of the rules on assumed jurisdiction, which I do not need to consider in this case, it would be inappropriate to import the connecting factors for tort claims identified in *Van Breda* into the recognition and enforcement context without further analysis.

(1) Van Breda and the Traditional Jurisdictional Grounds

82 *Van Breda* was a case about assumed jurisdiction, one of three bases for asserting jurisdiction *in personam* over an out-of-province defendant. The other two bases, known as the "traditional" jurisdictional grounds, are presence-based jurisdiction and consent-based jurisdiction: *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.), at para. 19.

83 Chevron Canada's appeal concerns the traditional ground of presence. Presence-based jurisdiction has existed at common law for several decades; its historical roots "cannot be over-emphasized": S. G. A. Pitel and C. D. Dusten, "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006),

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85 *Can. Bar Rev.* 61, at p. 69. It "is based upon the requirement and sufficiency of personal service of the originating process within the province or territory of the forum (service *in juris*)": J.-G. Castel, *Introduction to Conflict of Laws* (4th ed. 2002), at p. 83. If service is properly effected on a person who is in the forum at the time of the action, the court has jurisdiction regardless of the nature of the cause of action: T. J. Monestier, "(Still) a 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013), 36 *Fordham Int'l L.J.* 396, at p. 449. Assumed jurisdiction, for its part, emerged much later and developed through the adoption of rules for service *ex juris*: Pitel and Rafferty, at p. 53. When a court finds that it has jurisdiction on this basis, that jurisdiction is limited to the specific action at issue before it.

84 While *Van Breda* simplified, justified, and explained many critical aspects of Canadian private international law, it did not purport to displace the traditional jurisdictional grounds. LeBel J. explicitly stated that, in addition to the connecting factors he established for assumed jurisdiction, "jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established". In other words, "[t]he real and substantial connection test does not oust the traditional private international law bases for court jurisdiction": para. 79.

85 To establish traditional, presence-based jurisdiction over an out-of-province corporate defendant, it must be shown that the defendant was carrying on business in the forum at the time of the action. Whether a corporation is "carrying on business" in the province is a question of fact: *Wilson v. Hull* (1995), 174 A.R. 81 (Alta. C.A.), at para. 52; *Ingersoll Packing Co. v. New York Central & Hudson River Railway* (1918), 42 O.L.R. 330 (Ont. C.A.), at p. 337. In *Wilson*, in the context of statutory registration of a foreign judgment, the Alberta Court of Appeal was asked to assess whether a company was carrying on business in the jurisdiction. It held that to make this determination, the court must inquire into whether the company has "some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time": para. 13. These factors are and always have been compelling indicia of corporate presence; as the cases cited in *Adams v. Cape Industries Plc* (1989), [1990] 1 Ch. 433 (Eng. C.A.), at pp. 467-68, per Scott J., demonstrate, the common law has consistently found the maintenance of physical business premises to be a compelling jurisdictional factor: LeBel J. accepted this in *Van Breda* when he held that "carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there": para. 87.

86 The motion judge in this case made the following factual findings concerning Chevron Canada's Mississauga office:

> Chevron Canada operates a business establishment in Mississauga, Ontario. It is not a mere "virtual" business. It runs a bricks and mortar office from which it carries out a non-transitory business with human means and its Ontario staff provides services to and solicits sales from its customers in this province. [para. 87]

These findings have not been contested. They are sufficient to establish presence-based jurisdiction. Chevron Canada has a physical office in Mississauga, Ontario, where it was served pursuant to Rule 16.02(1)(c), which provides that valid service can be made at a place of business in Ontario. Chevron Canada's business activities at this office are sustained; it has representatives who provide services to customers in the province. Canadian courts have found that jurisdiction exists in such circumstances: *Inc. Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (Ont. C.A.), at para. 36; *Prince v. ACE Aviation Holdings Inc.*, 2013 ONSC 2906, 115 O.R. (3d) 721 (Ont. S.C.J.), appeal dismissed and cross-appeal allowed 2014 ONCA 285, 120 O.R. (3d) 140 (Ont. C.A.); *Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105, 92 B.L.R. (4th) 324 (Ont. S.C.J.), aff'd 2012 ONCA 211, 110 O.R. (3d) 256 (Ont. C.A.); *Wilson*; *Charron v. Banque provinciale du Canada*, [1936] O.W.N. 315 (Ont. H.C.).

87 The motion judge's analysis was correct, and the Ontario Court of Appeal had no need to go beyond these considerations to find jurisdiction. As several lower courts have noted both prior to and since *Van Breda*, where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists: *Inc. Broadcasters Ltd.*, at para. 29, cited with approval in *Prince* (C.A.), at para. 48; *Patterson v. EM Technologies, Inc.*, 2013 ONSC 5849 (Ont. S.C.J.), at paras. 13-16. In other words, the question of whether jurisdiction exists over Chevron Canada should begin and end with traditional, presence-based jurisdiction in this case.

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(2) Effect of the Constitutional Principles Developed in Van Breda

88 Nonetheless, Chevron Canada adds constitutional flavour to its submissions, contending that LeBel J.'s comments in *Van Breda* on the prerequisites for assuming jurisdiction over corporate defendants should apply to all types of jurisdiction — presence-based, consent-based, and assumed — by virtue of the real and substantial connection test as a constitutional principle: Chevron Canada's factum, at paras. 42-50. As noted in my discussion of Chevron, LeBel J. articulated this constitutional principle as suggesting that "the connection between a state and a dispute cannot be weak or hypothetical", as such a connection "would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute": *Van Breda*, at para. 32.

89 In my view, the real and substantial connection test as a constitutional principle does not dictate that it is "illegitimate" to find jurisdiction over Chevron Canada in this case. Chevron Canada has elected to establish and continue to operate a place of business in Mississauga, Ontario, at which it was served. It should therefore have expected that it might one day be called upon to answer to an Ontario court's request that it defend against an action. If a defendant maintains a place of business in Ontario, it is reasonable to say that the Ontario courts have an interest in the defendant and the disputes in which it becomes involved. As the Ontario Court of Appeal put it in *Inc. Broadcasters Ltd.*, at para. 33, "[t]here is no constitutional impediment to a court asserting jurisdiction over a person having a presence in the province", at least as presence is established in this case. To accept Chevron Canada's submission to the contrary would be to endorse an unduly "narrow" view of jurisdiction, one towards which this Court has shown no prior inclination: J. Blom, "New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet" (2013) 53 *Can. Bus. L.J.* 1, at p. 12. For Ontario courts to have jurisdiction over Chevron Canada in this case, mere presence through the carrying on of business in the province, combined with service therein, suffices to find jurisdiction on the traditional grounds. There is no need to resort to the *Van Breda* criteria for assumed jurisdiction in tort claims in such a situation. To accept Chevron Canada's submissions would be to permit a total conflation of presence-based and assumed jurisdiction. As Briggs has noted, "[c]ommon law jurisdiction draws a fundamental distinction between cases where the defendant is and is not within the territorial jurisdiction of the court when the proceedings are commenced": p. 112.

90 Because jurisdiction over Chevron Canada exists on the basis of the traditional grounds, I need not consider how jurisdiction might be found over a third party who is not present in and does not attorn to the jurisdiction of the Ontario courts, but who is alleged to be capable of satisfying a foreign judgment debt. I offer only two comments in this regard.

91 First, it should be remembered that the specific connecting factors that LeBel J. established in *Van Breda* were designed for and should be confined to the assumption of jurisdiction in tort actions. His comments with respect to carrying on business in the jurisdiction, at paras. 85 and 87, were tailored to that context. The same is true of the examples he gave to show how the presumption of jurisdiction can be rebutted in respect of the connecting factors he identified. LeBel J.'s statement that the presumptive connecting factor of "carrying on business in the province ... can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province" must be confined accordingly: para. 96. The connecting factors that he identified for tort claims did not purport to be an inventory covering all claims known to law, and the appropriate connecting factors can reasonably be expected to vary depending on the cause of action at issue.

92 In the recognition and enforcement context, it would hardly make sense to require that the carrying on of business in the province relate to the subject matter of the dispute. The subject matter of recognition and enforcement proceedings is the collection of a debt. A debt is enforceable against any and all assets of a given debtor, not merely those that may have a relationship to the claim. For instance, suppose a foreign judgment is validly rendered against Corporation A in a foreign country as a result of a liability of its Division I, which operates solely in that country. If Corporation A operates a place of business for its separate and unrelated Division II in Ontario, where all its available and recoverable assets happen to be located, it could not be argued that the foreign judgment creditor cannot execute and enforce it in Ontario against Corporation A because the business activities of the latter in the province are not related to the liability created by the foreign judgment.

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93 Second, one aspect of the plaintiffs' claim in this case is for enforcement of Chevron's obligation to pay the foreign judgment using the shares and assets of Chevron Canada to satisfy its parent corporation's debt obligation. In this respect, the subject matter of the claim is not the Ecuadorian events that led to the foreign judgment to which Chevron Canada is a stranger, but rather, at least arguably, the collection of a debt using shares and assets that are alleged to be available for enforcement purposes. In an enforcement process like this for the collection of a debt against a third party, assets in the jurisdiction through the carrying on of business activities are undoubtedly tied to the subject matter of the claim. From that standpoint, seizable assets are not merely the subject matter of the dispute, they are its core. In this regard, the third party is the direct object of the proceedings. When a plaintiff seeks enforcement against a third party to satisfy a foreign judgment debt, the existence of assets in the province may therefore well be a highly relevant connecting factor of the sort needed for such an action to proceed. Indeed, it is hard to identify who, besides the province, would have jurisdiction over a company for enforcement processes against that company's assets in the province.

(3) Conclusion

94 Chevron Canada was served *in juris*, in accordance with Rule 16.02(1)(c), at a place of business it operates in Mississauga, Ontario. Traditional, presence-based jurisdiction is satisfied. Jurisdiction is thus established with respect to it. As indicated for Chevron, the establishment of jurisdiction does not mean that the plaintiffs will necessarily succeed in having the Ecuadorian judgment recognized and enforced against Chevron Canada. A finding of jurisdiction does nothing more than afford the plaintiffs the opportunity to seek recognition and enforcement of the Ecuadorian judgment. Once past the jurisdictional stage, Chevron Canada, like Chevron, can use the available procedural tools to try to dispose of the plaintiffs' allegations. This possibility is foreign to and remote from the questions that must be resolved on this appeal.

95 Further, my conclusion that the Ontario courts have jurisdiction in this case should not be understood to prejudice future arguments with respect to the distinct corporate personalities of Chevron and Chevron Canada. I take no position on whether Chevron Canada can properly be considered a judgment-debtor to the Ecuadorian judgment. Similarly, should the judgment be recognized and enforced against Chevron, it does not automatically follow that Chevron Canada's shares or assets will be available to satisfy Chevron's debt. For instance, shares in a subsidiary belong to the shareholder, not to the subsidiary itself. Only those shares whose ownership is ultimately attributable to the judgment debtor could be the valid target of a recognition and enforcement action. It is not at the early stage of assessing jurisdiction that courts should determine whether the shares or assets of Chevron Canada are available to satisfy Chevron's debt. As such, contrary to the appellants' submissions, this is not a case in which the Court is called upon to alter the fundamental principle of corporate separateness as reiterated in *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), at least not at this juncture. In that regard, the deference allegedly owed to the motion judge's findings concerning the separate corporate personalities of the appellants and the absence of a valid foundation for the Ontario courts' exercise of jurisdiction is misplaced. These findings were reached in the context of the s. 106 stay. As I stated above, the Court of Appeal reversed that stay, and this issue is not on appeal before us.

VI. Disposition

96 For these reasons, I would dismiss the appeal, with costs.

Appeal dismissed.

Pourvoi rejeté.

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TAB 9

2011 ONSC 6083
Ontario Superior Court of Justice (Divisional Court)

Mongolia v. Taskin

2011 CarswellOnt 11725, 2011 ONSC 6083, [2011] O.J. No. 4572, 285 O.A.C. 263

Bank of Mongolia, Applicant and Senol Taskin, Respondent

Hoy J.

Heard: September 29, 2011
Judgment: October 14, 2011
Docket: CV-11-428416

Counsel: George J. Karayannides, Alejandro Manevich, for Applicant
Anser Farooq, for Respondent

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

APPLICATION for recognition and enforcement of foreign judgment.

***Hoy J.*:**

1 Bank of Mongolia (the "Bank") brings this application to recognize and enforce in Ontario two default judgments of the United States District Court, Southern District of Florida (the "District Court") - one on liability (the "Liability Judgment") and one determining the quantum of damages (the "Damages Judgment", and together with the Liability Judgment, the "Florida judgments"), against the respondent Senol Taskin ("Taskin"). The District Court found Taskin liable for treble damages in the amount of $67,639,921.62 under the *Racketeer Influenced and Corrupt Organizations Act* ("RICO"), 18 U.S.C. 1961 *et seq.* and for civil theft. All appeal periods have expired.

2 My analysis is mandated by *Beals v. Saldanha*, [2003] 3 S.C.R. 416 (S.C.C.) and *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612 (S.C.C.):

1. Did the District Court properly assume jurisdiction according to the Canadian rules of conflict of laws? (Was there a "real and substantial connection"?)

2. Have any of the defences of fraud, breach of natural justice, or public policy been established such that the Court should refuse to enforce the Florida judgments?

3. Having regard to the motion brought by Taskin in Florida on September 2, 2011 pursuant to Rule 60 of the United States Federal Rules of Civil Procedure for relief from the Florida judgments (the "Rule 60 Motion"), are the Florida judgments final and conclusive? (Should enforcement of the Florida judgments be stayed?)

3 I conclude that the District Court properly assumed jurisdiction according the Canadian rules of conflict of laws, and none of the above defences are made out. Accordingly, the Florida judgments should be recognized in Ontario. However, having regard to the pending Rule 60 Motion, enforcement of the Florida judgments should be stayed pending the dismissal, withdrawal or abandonment of the Rule 60 Motion.

1. Did the District Court properly assume jurisdiction according to the Canadian rules of conflict of laws?

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4 The overriding factor to be considered in making this determination is the common law "real and substantial connection" test.

5 There is no dispute as to the nature of that test:

> The 'real and substantial connection' test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign court's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.
>
> *Beals*, para. 32
>
> The core of the real and substantial connection test is the connection that the plaintiff's claim has to the forum and the connection of the defendant to the forum, respectively. [...]
>
> [T]he Supreme Court of Canada has rejected the notion that there is a precise or mechanical test to define the nature or degree of connections required. In [*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), at 1104-1109], the Court variously described a real and substantial connection as a connection 'between the subject-matter of the action and the territory where the action is brought', 'between the jurisdiction and the wrongdoing', 'between the damages suffered and the jurisdiction', 'between the defendant and the forum province', 'with the transaction or the parties', and 'with the action'.
>
> *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84 (Ont. C.A.) at paras. 84-85.

6 Nor is it disputed that the real and substantial connection standard is the same whether the foreign judgment resulted from contested proceedings or, as in the case here, by default, absent unfairness or "equally compelling reasons." *Beals*, para. 31

7 The Bank and Taskin disagree, however, on the facts I should consider in determining if the real and substantial connection test is made out.

8 The Bank says Taskin made a conscious decision not to defend the actions against him in District Court. The facts in the pleadings became the facts that were the basis for the Florida judgments. The Bank submits that I should consider those facts, and the facts found by the District Court in its January 13, 2011 decision (the "Jurisdiction Decision") regarding its jurisdiction over Taskin, discussed below, and apply the real and substantial connection test to them.

9 The Bank submits its approach is implicit in the *Beals* determination, at paras. 50-55, of what evidence can be submitted to the court by a defendant alleging the fraud defence to enforcement: a defendant must demonstrate that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment. As *Beals* notes, this test applies equally where the foreign judgment is a default judgment. At para. 54:

> In the present case, the appellants made a conscious decision not to defend the Florida action against them. The pleadings of the respondents then became the facts that were the basis for the Florida judgment. As a result, the appellants are barred from attacking the evidence presented to the Florida judge and jury as being fraudulent.

10 In *Beals*, the parties had agreed that the real and substantial connection test had been met. The analysis of the court focussed on the second question before me.

11 Counsel for Taskin argues that the critical determination of whether or not the real and substantial connection test is met should be based on the evidence before me on this application, and not the facts in the pleadings or the facts found by the District Court in the Jurisdiction Decision.

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12 I am inclined to agree with the Bank's position. Ultimately, however, I need not determine that issue. I have considered the facts plead by the Bank, the fact findings in the Jurisdiction Decision and the evidence filed on this Application. I have concluded that a real and substantial connection is made out, regardless of the fact set relied on.

The pleadings

13 The Bank's Amended Complaint is sixty-six pages (395 paragraphs) in length.

14 The Bank, Mongolia's central bank, pleads that a complex fraud was perpetrated on it by Taskin together with others.

15 In very simple terms, the Bank sought to raise $1 Billion for an affordable housing project in Mongolia's capital. Mongolia is a developing country. The international banks did not consider it "bankable". Taskin, the defendant Burton Greenberg, and a George Chalmers represented that they could raise the money from private investors but needed something to show the investor community that the Bank was a serious player. At first, the Bank issued documents styled "Guarantees" for an aggregate face amount of $200 million. The defendants (including Taskin) attempted to transact these for their own purposes but could not find a bank that would accept them. Taskin came up with the idea of having the Bank issue documentary letters of credit ("DLCs") for commodities transactions. Taskin was involved in crafting the language of the DLCs. The defendants then convinced the Bank to issue US$200 million of documentary letters of credit ("DLCs") to them, again purportedly to establish that the Bank was a serious player. The DLCs were not to be presented and were to be returned to the Bank at maturity. The defendants began transacting some of the DLCs for their own benefit as soon as they were issued. More than US$24 million of the DLCs have been presented for payment to various banks around the world.

16 The other defendants were Florida based: M&P Global Financial Services, Inc. ("M&P"), a Florida company (para. 6 of the Amended Complaint); M&P Global Financial Services Europe, AG ("M&P Europe"), which shared office space in Florida with M&P and had the same two directors - Burton and Joel Greenberg - as M&P (para. 8): GT International Holdings, Inc. ("GTI"), a Florida company owned by the Greenbergs (paras. 10 and 11); Joel Greenberg, a lawyer licensed to practice in Florida with the same Florida office as Burton Greenberg, M&P, M&P Europe, GTI and Burton Greenberg; Burton Greenberg, Joel's father; Suzanne Greenberg (Burton's wife); and James R. Halperin, the President of a Florida company, and previously convicted of embezzlement.

17 The Bank ultimately obtained judgments against all of Taskin's co-defendants.

18 Relevant facts plead include: Taskin is the Senior Vice-President of M&P and M&P Europe and is an owner and director of GTI (para. 24); he does not separate his personal business from M&P, M&P Europe and GTI (para. 25); Taskin has been doing business in Florida and/or has continuous and systematic contacts with Florida, has committed acts in Florida from which the action arises and on several occasions during the relevant period travelled to Florida to conduct acts of the enterprise (para. 27); the defendants (which includes Taskin) used their businesses located in Florida (Switzerland, Canada and elsewhere) to facilitate their fraud against the Bank (para. 61); the defendants (which includes Taskin) made representations to the Bank that they could raise US$1 Billion from investors for Mongolia's affordable housing project if the Bank issued US$200 million in DLCs to the defendants (para. 62); the court-ordered forensic examination revealed thousands of internal e-mails among the defendants (para. 68); the internal communications reveal that the defendants had no intention of finding investors for the Bank's affordable housing project and that the defendants intended to utilize the DLCs for separate, unrelated transactions for their own benefit (para. 69); the defendants began transacting some of the DLCs as soon as they were issued (para. 71); in an e-mail, Taskin acknowledged that the defendants. activities with regard to the Bank were "an international financial crime and fraud" (para. 76); together, and acting in concert with other unnamed members of the enterprise, the defendants perpetrated a scheme to defraud the Bank out of more than US$24 million by causing the Bank to issue the DLCs to the defendants, which have been presented for payment to various banks worldwide (para. 81); Taskin, Burton Greenberg and a George Chalmers

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represented to the Bank that they could raise the funds for the affordable housing project with the assistance of the other defendants (para. 103); Taskin was involved in e-mail communications discussing how to get the Bank to agree to issue the DLCs (para. 117); the defendants communicated regularly by telephone and e-mail (para. 119); M&P, Burton Greenberg, Joel Greenberg and Taskin brought the DLCs to various banks in the world in an effort to cash them in (para. 131); Taskin came up with the idea of having the Bank issue DLCs (para. 139); Taskin made sure that he would be contacted if the Bank had any questions with the wording of the DLCs (para. 152); Burton Greenberg and Taskin had frequent contact with the Bank in order to cause it to issue the DLCs (para. 158).

19 On the facts plead, Taskin operated in concert with the Florida-based defendants to effect the fraud, was an officer and shareholder of Florida companies involved in the fraud and was involved in extensive communications with the Florida based defendants in the course of executing the fraud. There is a significant connection between the causes of action under RICO and for civil theft in Florida.

The Jurisdiction Motion and Jurisdiction Decision

20 On November 7, 2010, after the Florida judgments had issued, Taskin filed a document dated October 22, 2010, entitled "Declaration", with the District Court. He challenged the jurisdiction of the Florida courts over him, and the validity of the service of the Summons and Amended Complaint. The District Court construed this filing as a Motion to Alter/Amend a Judgment or for Relief from a Judgment (the "Jurisdiction Motion"). Had it not done so, it would not have been able to grant any relief.

21 The Bank filed a detailed response, including transcripts and evidence from the Florida action, regarding Taskin's contacts with Florida. The Bank sent its response to Taskin by regular mail to the address in Istanbul, Turkey, provided in his Declaration.

22 In its decision dated January 13, 2011, the District Court rejected every one of the points made by Taskin, and, further, determined that the Respondent had had actual notice of the Summons and Amended Complaint by January 2010 but chose to wait until November 2010 to respond. The District Court agreed with the Bank that Taskin had "sufficient minimum contacts with Florida" (and therefore had jurisdiction over Taskin) because the Bank's cause of action arose from or was directly related to Taskin's contacts with Florida.

23 The Court noted the following evidence offered by the Bank: (1) although Taskin stated he visited Florida only once on personal business, the defendant Suzanne Greenberg (wife of Burton) testified that Taskin visited the office of the defendants in Florida on several occasions; (2) although Taskin contends that he does not have a bank account in Florida, Suzanne Greenberg testified that Taskin had one account that was used for transactions involving M&P; (3) while Taskin claims he never conducted any business in Florida, the defendant Burton Greenberg introduced Taskin to others as an officer of M&P and Taskin spent a large amount of time working for M&P Global; (4) while Taskin contends he did not know he was an officer of GTI, the assertion is not credible given that the papers listing Taskin as an officer were signed by Taskin's close associate Joel Greenberg, the documents listing Taskin as an officer were publically listed, and Taskin use a GTI e-mail address to conduct business from 2008 onwards.

24 At page 9 of its decision, the District Court wrote, "Taskin's conduct manifested a continual course of business dealing with the other Defendants in Florida over a period of several years that relates directly to [the Bank's] claims in the Complaint such that Taskin availed himself of the privilege of conducting activities in Florida and reasonably could have anticipated being sued here."

25 While the legal test for asserting jurisdiction in Florida is not the "real and substantial connection test", and I am not bound by the District Court's determination of jurisdiction, the facts found by the District Court in the Jurisdiction Decision make out a real and substantial connection under Ontario law.

The Evidence on this Application

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26 In his affidavit sworn September 13, 2011 in response to this Application, and in his cross-examination, Taskin baldly denied any connection to Florida. On his cross-examination he improperly refused to answer many questions relating to documents which established the connection between Florida and Taskin's activities in respect of the transaction at issue.

27 Admissions Taskin did make, however, support a finding of a real and substantial connection. He admitted: (a) working extensively with Burton Greenberg and his companies; and (b) having been involved in the transactions at issue in the Florida action and having received payments for those activities from a Florida bank account.

28 In response to Taskin's affidavit, the Bank has filed its response to the Jurisdiction Motion, including the evidence that was before the Court on the Jurisdiction Motion, some of which is summarized above. I concur with the findings of fact of the District Court on the Jurisdiction Motion. The Bank also filed copies of further internal communications between Taskin and the other defendants obtained through a court-ordered forensic examination of the defendants. computers and copies of documents obtained from the Florida defendants. accountant, all of which were disclosed in the Florida action. These further documents establish both Taskin's activities in Florida and his knowledge of the Florida action.

29 The further evidence includes: e-mails where Taskin represents he is a signatory of M&P (as noted above, a Florida corporation and co-defendant); an e-mail in which Taskin refers to money transferred to his and Suzanne Greenberg's joint account in Florida; the email, referred to in the pleadings (para. 76), in which Taskin - using the e-mail address "mandpcanada@cogeco.ca - acknowledged that the defendants. activities with regard to the Bank were "an international financial crime and fraud"; and a copy of an income tax election form of GTI (as noted above, another Florida corporation and co-defendant) signed by Taskin representing he owns 40% of the shares of GTI and bank records of GTI showing transfers of funds to Taskin.

30 Taskin takes the position that his signature on the income tax election form is a forgery.

31 Taskin also argued that the evidence of his co-defendants as to his involvement should not be accepted because they are fraudsters, and therefore not credible witnesses. That evidence, viewed as a whole, shows that the co-defendants attempted to, in fact, shield Taskin.

32 Taskin does not challenge the authenticity of the numerous e-mails or the banking records.

33 In my view, there is sufficient evidence, based on Taskin's own admissions, coupled with the evidence produced by the Bank (even discounting the document that Taskin says is a forgery) to find a real and substantial connection based on his active involvement in transactions he knew to be fraudulent and his connection to his Florida-based co-defendant fraudsters. His connection to the transaction and his Florida co-defendants was not "fleeting" or "unimportant".

34 In his factum, dated September 26, 2011, counsel for Taskin submitted that this Application should be converted to an action and the plaintiff required to post security for costs in the amount of $500,000. He had not brought a motion seeking such relief. At the outset of the hearing, I offered Taskin's counsel an adjournment to permit him to do so, with a schedule to be set. He determined that he wished to proceed with the Application, and, on that basis, I proceeded. Having reviewed the voluminous materials filed, I am satisfied that, even if this matter turns on the evidence on this Application, and not on the facts in the pleadings and the fact-findings of the District Court on the Jurisdiction Motion, this matter appropriately proceeded as an Application. Taskin's bald denials could not be sustained in the face of his own admissions and the compelling documentary evidence.

2. Have any of the defences of fraud, breach of natural justice, or public policy been established such that the Court should refuse to recognize and enforce the Florida judgments?

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35 The burden of proof lies on Taskin, as respondent, to establish, on a balance of probabilities, the applicability of any of the defences to the enforcement of the Florida judgments. *Beals*, at paras. 47, 59 and 64.

36 Taskin raises the defences of fraud and breach of natural justice.

The fraud defence

37 Where a foreign judgment was obtained by fraud that was undetectable by the foreign court, it will not be enforced domestically. *Beals*, para. 52.

38 As noted in *Beals*, paras. 50 to 55, a defendant alleging the fraud defence to enforcement must demonstrate that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment, and this test applies equally where the foreign judgment is a default judgment.

39 Taskin makes vague allegations of fraud. He points to an October 18, 2008 Internet posting that the Authority Against Corruption demanded the impeachment of O. Chuluunbat, who was Bank governor during at least some of the relevant times, and an April 15, 2011 Internet posting to the effect that former Bank governor O. Chuluunbat is facing charges he made illegal contracts with several foreign mining companies. He submits that these documents suggest that the fraud was wider in scope than plead by the Bank.

40 Given the date of the first Internet posting, the facts could have been just as easily discovered before the obtaining of the Florida judgments and given the seeming implausibility of the scheme accepted by the Bank, I suspect that Taskin may not have been surprised by the allegations of corruption against Bank officials. Moreover, even if the scope of the fraud was wider than reflected in the Bank's pleadings, it does not diminish Taskin's role in it.

41 As noted above, in challenging the jurisdiction of the District Court, Taskin alleged that his signature on a tax election by GTI is a forgery. If true, this could have been discovered had Taskin participated in the Florida action and therefore cannot be raised now as a fraud defence to enforcement.

Denial of natural justice

42 In order to establish the defence of denial of natural justice, Taskin must establish that the Florida action was contrary to Canadian notions of fundamental justice. The defence is limited to the procedure of the foreign court, and does not address the merits of the case. *Beals*, paras. 59-64.

43 Natural justice includes that, "a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend." *Beals*, para. 65.

44 As stated by Herman J. in *United States v. Shield Development Co.* (2004), 74 O.R. (3d) 583 (Ont. S.C.J.), at para. 30, "...proceedings are not regarded as contrary to natural justice merely because of a procedural irregularity on the part of the foreign court, provided that the unsuccessful party was given an opportunity to present his or her case."

45 The Summons and Amended Complaint were served on Taskin on January 7, 2010 via registered mail to his last known address. In arguing a denial of natural justice, Taskin correctly submits that the *Rules of Civil Procedure* in Ontario require personal service of originating documents. The District Court found in the Jurisdiction Decision that Taskin had actual notice of the Summons and Amended Complaint by January 2010 but chose to wait until November 2010 to respond. As indicated above, I agree with that finding. Taskin admits he consulted an Ontario lawyer in January of 2010. Attachments to his Declaration, which triggered the Jurisdiction Motion, include excerpts from the *Rules of Civil Procedure* setting out the requirement for personal service, marked as exhibits to an affidavit sworn before the Ontario lawyer on January 25, 2010. It is apparent that Taskin was aware of this procedural issue as of that date. Taskin was given adequate notice of the claim made against him and an opportunity to defend. Assuming that conflicts laws required

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service in conformity with Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, this procedural irregularity does not result in the proceedings being contrary to natural justice.

46 Moreover, Taskin was given notice of all subsequent steps in the proceeding. The Bank served its motions for default judgment and to enter default judgment on Taskin by regular mail. Taskin did not respond to either. The District Court served Taskin by regular mail with an Order to Show Cause, requiring Taskin to respond to the Bank's motion to enter the default judgment by April 16, 2010. Taskin did not respond. The District Court provided its recommendation regarding the quantum of damages to Taskin. Taskin did not respond.

47 In cross-examination, Taskin admitted that he maintained addresses in both Oakville, Ontario and Turkey, where the documents were served, and that in the normal course he received documents mailed to him during that period at both those addresses.

48 Taskin has not satisfied me that the procedure of the Florida court leading up to the Florida judgments which the Bank seeks to enforce was contrary to Canadian notions of fundamental justice.

49 The District Court's order issued as a consequence of Taskin's Declaration, referring the Declaration for hearing as a motion seeking to alter or obtain relief from the Liability Judgment, was served on Taskin by regular mail, at both his Ontario address and his address in Turkey, given by Taskin in his Declaration. Taskin did not respond. Taskin correctly notes that the order does not specifically indicate that he has a right of reply, or when reply materials had to be filed by. He advances this, and the failure of the District Court to hold a hearing with viva voce evidence before determining the jurisdiction issue, as grounds in his Rule 60 Motion. Taskin raised the jurisdiction issue only after the Florida judgments issued. I have separately considered the jurisdiction issue, from an Ontario perspective. I am not satisfied that any irregularities with this post-judgment process make the procedure leading to the granting of the Florida judgments contrary to Canadian notions of fundamental justice. To the extent there are any legitimate issues with respect to the District Court's determination of the jurisdiction issue, they will be addressed on the Rule 60 Motion.

Public Policy

50 The defence of public policy applies to prevent the enforcement of a foreign judgment based on a law contrary to the Canadian concept of justice or basic morality. The defence is narrowly construed. *Beals*, paras. 71, 72 and 75

51 Taskin does not argue that RICO, which provides for treble damages, is contrary to the Canadian concept of justice. *Beals*, at para. 76, indicates that the public policy defence is not meant to bar enforcement of a judgment on the basis that the claim in the foreign jurisdiction would not yield comparable damages.

52 There is nothing before me to indicate any defence can be made out based on public policy.

53 I address Taskin's arguments regarding the finality of the Florida judgments separately, below.

3. In light of the Rule 60 Motion, are the Florida judgments final and conclusive? (Should enforcement be stayed?)

54 This application was filed on June 20, 2011 and first scheduled to be heard on August 8, 2011. On that day, it was adjourned to September 29, 2011. The Rule 60 Motion was filed with the District Court only on August 31, 2011. Taskin has retained Florida counsel on his Rule 60 Motion. The Bank's response to the Rule 60 Motion was due September 19, 2011, and Taskin's reply, if any, was due by September 26, 2011.

55 Counsel for Taskin argues that until the Rule 60 Motion is determined, the Florida judgments are not final.

56 Counsel for the Bank argues that Pro Swing specifically notes that judgments can be final even in not the last step in the litigation process, all appeal periods have passed, the Rule 60 Motion is merely an attempt to re-litigate the Jurisdiction Motion already determined by the District Court on notice to Taskin, and the Florida judgments are final.

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57 I note that, at the outset of the hearing, I raised with counsel my inclination, in the interests of judicial efficiency, to adjourn this application until the Rule 60 Motion was determined by the District Court. All counsel, having incurred the cost of preparing for the hearing, wished me to proceed to hear the application, notwithstanding the pending Rule 60 Motion and I therefore did so.

58 *Pro Swing Inc.* delineates the restrictions on the enforcement of non-monetary foreign judgments. It explains the requirement of finality and clarity, applicable to both monetary and non-monetary judgments (para. 10). It noted that the requirement of finality and clarity is based on the principles of judicial economy and the separateness of judicial systems (para. 91):

> An order that is not final may be changed by the foreign court, with the result that the enforcing court finds itself enforcing something that is no longer an obligation in the foreign country. Finally, an enforcing court should not be obliged to relitigate foreign disputes or use valuable resources to duplicate what would be best done in the originating jurisdiction. For these reasons, courts should decline to enforce foreign non-monetary orders that are not final and clear. (para. 92)
>
> Finality demands that a foreign order establish an obligation that is complete and defined. The obligation need not be final in the sense of being the last possible step in the litigation process. Even obligations in debt may not be the last step; orders for interest and costs may often follow. But it must be final in the sense of being fixed and defined. The enforcing court cannot be asked to add or subtract from the obligation. The order must be complete and not in need of future elaboration (para. 95).

59 The Rule 60 Motion is pending. It is more than a "possible step". My understanding is that it will be determined relatively promptly. While I am dubious that Taskin will prevail on the Rule 60 Motion, until it is determined there remains the risk that this Court could find itself enforcing something that is no longer a Florida obligation. In the result, I conclude that this Court, having utilized judicial resources to hear and consider the application, should, in the interests of judicial efficiency, recognize the Florida judgments, but stay their enforcement in Ontario, pending the dismissal, withdrawal or abandonment of the Rule 60 Motion.

Costs

60 If successful, the Bank seeks costs on a partial indemnity scale in the amount of $52,269.89, inclusive of taxes and disbursements.

61 If successful, Taskin seeks costs on a partial indemnity scale in the amount of $40,880, again inclusive of taxes and disbursements.

62 Counsel agree that the amount each party seeks is reasonable and fair, and I agree.

63 If the Rule 60 Motion is dismissed, withdrawn or abandoned, the Bank shall accordingly be entitled to costs in the amount of $52,269.89, all inclusive, and if Taskin succeeds on its Rule 60 Motion, Taskin shall be entitled to costs in the amount of $40,880, all inclusive.

Application allowed in part.

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TAB 10

2012 ONCA 220
Ontario Court of Appeal

Bank of Mongolia v. Taskin

2012 CarswellOnt 3980, 2012 ONCA 220, [2012] O.J. No. 1469

Bank of Mongolia, Applicant (Respondent in Appeal) and Senol Taskin, Respondent (Appellant)

Doherty J.A., LaForme J.A., Turnbull J. (ad hoc)

Heard: April 2, 2012
Judgment: April 4, 2012
Docket: CA C54612

Proceedings: affirming *Bank of Mongolia v. Taskin* (2011), 2011 CarswellOnt 11725, 2011 ONSC 6083, 285 O.A.C. 263 (Ont. Div. Ct.)

Counsel: Anser Farooq, Hashim Syed, for Respondent / Appellant
George Karayannides, Alejandro Manevich, for Applicant / Respondent

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

APPEAL from judgment reported at *Bank of Mongolia v. Taskin* (2011), 2011 CarswellOnt 11725, 2011 ONSC 6083, 285 O.A.C. 263 (Ont. Div. Ct.).

***Per curiam*:**

1 The appellant chose not to defend the proceedings in Florida. The respondent obtained judgment in Florida and then sought an order enforcing the judgement in Ontario. The application judge granted the order.

2 The application judge asked herself the proper question — was there a real and substantial connection between Florida, the claim and the appellant? The application judge reviewed the pleadings (paras. 13-19). She was entitled to accept the factual allegations in those pleadings as true given the decision not to defend. On the pleadings, there was ample basis for a finding of real and substantial connection.

3 We see no basis to interfere with the application judge's finding that the appellant did not make out either the "fraud" or the "denial of natural justice" defence.

4 The application judge was correct in holding that despite the outstanding motion in Florida, the judgment was final for the purposes of the enforcement of the judgment in Ontario. We also note that the Florida motion was dismissed subsequent to the application judge's reasons. She had stayed her ordered pending that determination.

5 The appeal is dismissed. Costs to the respondent in the amount of $22,000 "all in".

Appeal dismissed.

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TAB 11

2015 ONSC 6394
Ontario Superior Court of Justice

Continental Casualty Co. v. Symons

2015 CarswellOnt 16510, 2015 ONSC 6394, 127 O.R. (3d) 758, 260 A.C.W.S. (3d) 61

Continental Casualty Company, Plaintiff and Robert Symons, as successor in interest to G. Gordon Symons also known as Gerald Gordon Symons, Alan G. Symons, The Estate of Gerald Gordon Symons, Symons International Group., Inc., IGF Holdings, Inc., Granite Reinsurance Company, Ltd. and Gordon Capital, Inc., Defendants

Glustein J.

Heard: October 13, 2015
Judgment: October 21, 2015
Docket: CV-14-516561

Counsel: Lou Brzezinski, Varoujan Arman, for Plaintiff
Sean N. Zeitz, for Defendants

Subject: Civil Practice and Procedure; Estates and Trusts; International

MOTION by plaintiffs for summary judgment to enforce foreign judgment.

***Glustein J.*:**

1 The plaintiff, Continental Casualty Company ("Continental"), brings a motion for summary judgment recognizing and enforcing in Ontario an "Amended Final Judgment" (the "Indiana Judgment") issued against the defendants on July 14, 2014 by the United States District Court, Southern District of Indiana, Indianapolis Division (the "Indiana Court"), plus its taxable court costs and accrued interest on the Indiana Judgment as may be converted to an amount in Canadian currency in accordance with s. 121 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 (the "*CM*").

2 The defendants oppose the motion and seek summary judgment dismissing Continental's action to recognize and enforce the Indiana Judgment.

3 In the alternative, the defendants seek an order staying enforcement of the Indiana Judgment pursuant to s. 106 of the *CJA* and Rule 20.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"*)*, until such time as the United States Court of Appeals for the Seventh Circuit (the "Indiana Appellate Court") releases its decision and the defendants' rights of appeal have either expired or been exhausted.

4 The defendant, Robert Symons ("Robert"), in his capacity as executor of the estate of Gerald Gordon Symons ("Gordon"), seeks an order restricting the domesticated judgment and any ensuing writs of seizure and sale to refer to the defendant as "The Estate of Gerald Gordon Symons" rather than to "Robert Symons, as successor in interest to G. Gordon Symons also known as Gerald Gordon Symons, and as Trustee of the Estate of Gerald Gordon Symons".

5 Robert (as executor of Gordon's estate) also submits that the Indiana Judgment against Gordon did not comply with the principles of natural justice.

6 At the hearing, Continental sought an adjournment of the interim stay request of the defendants in order to file responding evidence, on the basis that the issue of a stay was only raised in the defendants' factum delivered prior to the

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hearing. Counsel agreed that (i) Continental could return to court upon filing such additional evidence; and (ii) if the court ordered recognition and enforcement of the Indiana Judgment, the only issue for the present hearing in relation to the stay would be the terms of an "interim interim" stay, *i.e.*, a stay until the full hearing of an interim stay could be addressed by the court.

7 For the reasons I discuss below, I grant Continental's motion for recognition and enforcement of the Indiana Judgment. I stay execution of this order until the earlier of (i) the date the Indiana Appellate Court releases its decision and the defendants' rights of appeal have either expired or been exhausted, and (ii) December 15, 2015, the date on which counsel are to return with any additional evidence and argument on the interim stay issue. With respect to Robert, the Indiana Judgment is recognized and enforced against Robert in his capacity as executor of the estate of Gordon.

The Indiana Action

8 Continental obtained the Indiana Judgment in Civil Action No. 1:01-cv-00799-RLY-MJD (the "Indiana Action") in respect of default under a transaction and agreement entered into between Continental and three Indiana corporations (the "IGF Companies") controlled by Gordon and his sons, Alan and Douglas Symons. In the Indiana Action, Continental's claims proceeded by counterclaim in proceedings initially commenced by the defendants.

9 All of the defendants entered affirmative defences to Continental's counterclaim and were represented by counsel in the Indiana Action. On March 22, 2007, the Indiana Court granted Continental summary judgment in its favour on the IGF Companies' claims against Continental. On March 31, 2007, the Indiana Court granted Continental summary judgment on Continental's claim against the IGF Companies.

10 The remaining claims ("counts" is the term used in the Indiana Action) were considered by the Indiana Court at a trial on November 18-21, 2008 and January 8 and 9, 2009. The defendants in the Indiana Action were represented by counsel and remain represented by counsel in the pending appeal discussed below.

11 At that trial, Gordon brought a successful motion to be excused from testimony at trial, on the basis that travel to Indiana from his home in Florida would have an adverse impact on his health. In an affidavit filed for that motion, Dr. Zimmerman, Gordon's Florida physician, stated that he had treated Gordon for "non-Hodgkin's lymphoma requiring chemotherapy, hypertension, an abdominal aortic aneurysm, chronic low back pain, degenerative joint disorder in both knees that required left knee replacement 1 $^{1}/_{2}$ years ago, spinal stenosis, chronic lower extremity pain, chronic sacroiliac pain, and short term memory loss".

12 In Dr. Zimmerman's medical opinion, Gordon's "age, prior medical history, and memory impairment not only jeopardizes his health but also his ability to testify competently" and "the stress of testifying, whether it be near his current residence in Florida or at a trial in Indianapolis, would not only be detrimental to [Gordon's] health, but also threaten his life and that requiring him to travel would also be detrimental to his health and threaten his life".

13 Gordon did not move to strike Continental's counterclaims against him or otherwise request any other relief with respect to the Indiana Action on the basis of his alleged mental incompetency. Gordon did not seek a stay due to health issues. He only asked to be relieved of the requirement under subpoena to testify and the Indiana Court granted that request after Continental opposed the motion.

14 In a 135-page judgment, dated October 19, 2009, the Indiana Court ruled that the individual defendants, Gordon and his sons, Alan and Douglas Symons, had engaged in a series of acts involving the fraudulent transfer of funds from the IGF Companies and that the individual defendants had personally gained from those fraudulent activities. The Indiana Court pierced the corporate veil and issued judgment against the individual defendants, as well as against the IGF Companies.

15 Between October 19, 2009 and July 14, 2014, a number of procedural issues were addressed which prevented the issuance of a final judgment. On July 14, 2014, the Indiana Court issued an order summarizing the procedural history

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of the case and directing that an amended final judgment be issued. The Indiana Judgment (labelled as the "Amended Final Judgment" by the Indiana Court) was issued on July 14, 2014, for judgment in the amount of US $46,231,536, with post-judgment interest at US $139 per day since July 14, 2014.

16 The defendants appealed the Indiana Judgment and argument was heard on February 9, 2015. The Indiana Appellate Court has not yet issued its decision.

17 The defendants did not post the *supersedeas* bond necessary under Indiana law to obtain a stay of enforcement and did not move for a stay of enforcement pending appeal. Consequently, there is no stay pending the appeal of the Indiana Judgment.

Analysis

18 The defendants make four submissions:

(i) The Indiana Judgment is not final since an appeal has been heard and a decision by the Indiana Appellate Court is pending;

(ii) Robert (as executor of Gordon's estate) submits that there was a breach of natural justice before the Indiana Court since Gordon was allegedly mentally incompetent during the trial;

(iii) Even if the Indiana Judgment can be recognized and enforced in Ontario, the court should order a stay of enforcement of the Indiana Judgment pursuant to s. 106 *CJA* and Rule 20.08 "until such time as the Indiana Appellate Court releases its decision and the Defendants' rights of appeal have either expired or been exhausted"; and

(iv) Robert (as executor of Gordon's estate) submits that any recognition and enforcement of the Indiana Judgment in Ontario as against Gordon should be against "The Estate of Gerald Gordon Symons" and not against "Robert Symons, as successor in interest to G. Gordon Symons also known as Gerald Gordon Symons, and as Trustee of the Estate of Gerald Gordon Symons".

19 I address each issue below.

Issue 1: Is the Indiana Judgment final?

20 The defendants submit that the Indiana Judgment is not final as the appeal has been heard and a decision by the Indiana Appellate Court is pending. However, the cases below establish that a decision is final when the court disposes of the issues and no jurisdiction remains in the court to abrogate or vary it, regardless of whether an appeal is pending.

21 In *Four Embarcadero Center Venture v. Mr. Greenjeans Corp.*, [1988] O.J. No. 210 (Ont. H.C.) *("Four Embarcadero")*, Henry J. dismissed the defendants' motion for summary judgment and determination of a point of law. The defendants sought an order dismissing the action for enforcement of a money judgment obtained in the courts of California since the decision was under appeal (see the issue as set out at *Four Embarcadero*, at paras. 1 and 11).

22 The defendants in *Four Embarcadero* submitted that the judgment could not be final while it was under appeal (*Four Embarcadero*, at para. 21). The applicable law in California, as in Indiana in the present case, was that the judgment was not stayed pending appeal unless the appellant posted a *supersedeas* bond. Henry J. stated (*Four Embarcadero*, at para. 38):

> In summary, under the law of California the trial court no longer has jurisdiction to reopen the judgment; enforcement of the judgment may however proceed because no undertaking or appeal bond has been provided by the defendants and the Court of Appeal has refused a writ of supersedeas and a stay.

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23 Henry J. then conducted a thorough review of Commonwealth and Ontario case law which had considered the issue of whether a foreign judgment was final even though under appeal {*Four Embarcadero*, at paras. 40-62). Henry J. held that the law for enforcement of a foreign judgment for the payment of money requires "finality" in the sense that the foreign court cannot abrogate or vary the judgment, but is not dependent on whether an appeal is pending. Henry J. held:

> At this point I conclude that the law of Ontario defining the conditions upon which a foreign judgment for the payment of money to the plaintiffs may found an action to recover the judgment debt, has adopted the rule in Nouvion v. Freeman, and has applied it to both judgments adjudicated upon the merits and to judgments by default. Under the law of Ontario the question to be asked is: 'What are the characteristics of the foreign judgment that enable the judgment debt to be recovered by action in Ontario?' The answer is: **'A judgment that, under the laws of the jurisdiction where it was made, is final between the parties in the sense that under the foreign law the court that made it has no jurisdiction or residual power to abrogate or vary it or to retry the issue that it has decided. The fact that an appeal is pending which may result in its being rescinded or varied does not deprive the judgment of its finality in the sense mentioned.'** *(Four Embarcadero*, at para. 63);
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> The matter has therefore gone beyond the reach of the trial court except for enforcement. By reason of ss. 916 and 917.1 of the California Code of Civil Procedure, which apply to a money judgment, **enforcement of the judgment is not stayed by the appeal unless the defendants give an undertaking or post an appeal bond as described;** or the Court of Appeal has issued a writ of supersedeas and a stay. None of these conditions has occurred. *(Four Embarcadero*, at para. 66);
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> There is here a certain anomaly — **the action by California statute law is still 'pending' and in that sense is neither final nor res judicata; yet it is a final judgment for purposes of appeal because it is not interlocutory, there being no further judicial action required by the trial court to determine the rights of the parties. It is also final in the sense that it is at present enforceable in California, by statute.** *(Four Embarcadero*, at para. 67);
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> In my opinion, **notwithstanding the statutory rule that while the appeal is pending the action is also deemed to be pending, in the eyes of Ontario law it is final because it meets the test that the court that made it no longer has jurisdiction to abrogate or vary it, and moreover it is enforceable in California as a judgment debt.** *(Four Embarcadero*, at para. 68);
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> The question remaining therefore is whether the aspect that it is not regarded as res judicata under California law bars the Ontario action. In my opinion it does not. *(Four Embarcadero*, at para. 69); and
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> Third An *[sic]* **action may be commenced in Ontario to enforce a foreign money judgment that is final in the above sense, notwithstanding that it is under appeal where there is no stay of enforcement so that under the foreign law it may be enforced notwithstanding pendency of an appeal.** The preservation of enforceability of the judgment in the foreign jurisdiction, notwithstanding a pending appeal, is an additional important and relevant, but not essential, factor. **If the judgment may be enforced in the foreign jurisdiction there is no sound reason of justice why it should not be enforced in Ontario; to do so in this jurisdiction requires the judgment creditor to proceed by action, whatever may be his procedural recourse in the foreign country** *(Four Embarcadero*, at para. 72).
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> [Emphasis added.]

24 The defendants submit that the court should not follow the reasons of Henry J. because the Indiana Judgment is not *res judicata* and Henry J. stated, in *Four Embarcadero Center Venture v. Kalen*, 1988 CarswellOnt 412 (Ont. H.C.) *("Kalen")* that, to enforce a foreign judgment, it must be *res judicata (Kalen*, at para. 33).

25 However, in *Kalen*, Henry J. referred to *Four Embarcadero* as the basis for the principle that a "judgment of the foreign Court is final in the sense that the Court that made it no longer has the power to rescind or vary it; this test is not altered by reason that the judgment is under appeal" (*Kalen*, at para. 33). Further, in *Four Embarcadero*, Henry J. expressly held that "the action by California statute law is still 'pending' and in that sense is neither final nor

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res judicata" (*Four Embarcadero*, at para. 67). Consequently, Henry J. held that a foreign judgment was final for the purposes of enforcement when there was no power in the foreign court to vary or abrogate the judgment, even though the foreign judgment was not "final" or "*res judicata*" in the sense that it was subject to appeal.

26 Henry J.'s thorough analysis was followed by MacPherson J. (as he then was) in *Arrowmaster Inc. v. Unique Forming Ltd.*, [1993] O.J. No. 2737 (Ont. Gen. Div.) *("Arrowmaster")*.

27 In *Arrowmaster*, MacPherson J. granted the defendant's motion to enforce a monetary judgment of the Illinois court against the plaintiff. The appeal of the Illinois judgment had been argued but the decision was pending (just as in the present case). The plaintiff filed a statement of claim in Ontario seeking to recover the amounts it had been awarded by the Illinois court (*Arrowmaster*, at paras. 3-5). MacPherson J. granted the motion for summary judgment. He held that the Illinois decision was final (*Arrowmaster*, at para. 14):

> **In the present case, the judgment and order of the United States District Court are final.** In its original and amended orders (September 21 and December 18, 1992) that court has dealt with all the matters before it. Its decision has been appealed and, indeed, the appeal has been heard. **Put simply, the litigation has completely and irrevocably passed out of the hands of the District Court.**
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> [Emphasis added.]

28 MacPherson J. further held (*Arrowmaster*, at para. 17):

> In conclusion, the plaintiff Arrowmaster has a stronger case here for summary judgment than the plaintiffs in both *Morguard Investments* and *Four Embarcadero v. Kalen*. In those cases the plaintiffs sought the enforcement of default judgments obtained in 'foreign' (Alberta and California) jurisdictions. Here the defendants attorned to the jurisdiction of the Illinois court by making a full defence on the merits (including a counterclaim) and by participating in a three-day trial. Moreover, the judgment of the Illinois court is a full judgment dealing with all of the relevant issues. In those circumstances, the Illinois judgment is worthy of enforcement in Ontario. In *Morguard Investments*, La Forest J. said, at p. 1096:
>
> In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.
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> **The state line in *Morguard Investments* was the Alberta-British Columbia border. Here the nexus would be Illinois and Ontario. In my view, nothing turns on this difference. The underlying philosophy of *Morguard Investments* and the safeguards enunciated by Henry J. in *Embarcadero v. Kalen*, taken together, provide the appropriate framework for considering whether true 'foreign', i.e., non-Canadian, court orders should be enforced in Ontario. The Illinois court order at issue in this case should be enforced.** Moreover, in my view, there is no triable issue with respect to its enforcement in Ontario. Hence Arrowmaster is entitled to an order for summary judgment under Rule 20.
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> [Emphasis added.]

29 Similarly, in *Oz Optics Ltd. v. Dimensional Communications Inc.*, [2004] O.J. No. 4543 (Ont. S.C.J.) ("OZ *Optics*"*)*, Quigley J. adopted the approach in both *Four Embarcadero* and*Arrowmaster*. Quigley J. granted the application by the defendant for (i) enforcement of a New Jersey monetary judgment against the plaintiff, and (ii) dismissal of the plaintiff's claim.

30 In *OZ Optics*, as in the present case, the plaintiff had "initiated an appeal of the judgment in New Jersey by way of notice of appeal filed on or about March 23, 2004", but "has not petitioned for a stay of the New Jersey judgment nor has it posted a superseded *[sic]* bond as is required under New Jersey law for an application to stay a judgment" (*OZ Optics*, at paras. 19-20).

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31 Quigley J. reviewed the settled law that enforcement of foreign judgments in Ontario requires that it be final and conclusively establish the debt, regardless of whether there is an appeal. Quigley J. relied on *Four Embarcadero* and held (*OZ Optics*, at para. 27):

> The finality contemplated in the test for enforcement of foreign judgments simply requires that the court that pronounced the judgment no longer has jurisdiction to abrogate or vary it.

32 Recently, in *Van Damme v. Gelber*, [2012] O.J. No. 5394 (Ont. S.C.J.) *("Van Damme")*, affirmed [2013] O.J. No. 2750 (Ont. C.A.), leave to appeal to SCC refused [2013] S.C.C.A. No. 342 (S.C.C.), Lederer J. followed the same approach for a non-monetary foreign judgment. After lengthy litigation, the applicant, Van Damme, had obtained judgment in New York requiring delivery of a painting. The respondent, Gelber, had taken many steps to set aside rulings in the past, and was appealing the New York judgment (although he had not perfected the appeal at the date of the hearing).

33 Lederer J. relied on the decision of Henry J. in *Four Embarcadero* and held (*Van Damme*, at paras. 25-26):

> I find that there is no stay in place which would act as an impediment to an order enforcing the various orders and judgment of Mr. Justice Fried.

34 Justice Lederer's decision that a non-monetary judgment could be enforced in the same manner as a monetary judgment (even though an appeal was pending in New York) was upheld by the Court of Appeal. Doherty J.A. held ([2013] O.J. No. 2750 (Ont. C.A.), at para. 3):

> I would dismiss the appeal. The appellant attorned to the jurisdiction of the New York court by litigating the merits of the claim in that jurisdiction. **That attornment provided a basis upon which an Ontario court could properly recognize the New York judgment.** Furthermore, the motion judge did not err by exercising his discretion in favour of enforcing the New York judgment, even though it was not a money judgment, but rather an order for specific performance,
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> [Emphasis added.]

35 In addition to the submission that the Indiana Judgment is not "final" since it is not "*res judicata*" as an appeal is pending (which I rejected above), the defendants further rely on the decisions of the Supreme Court in *Beals v. Saldanha*, 2003 SCC 72 (S.C.C.) ("*Beals*"*)* and *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52 (S.C.C.) *("Pro-Swing")*, in which the Court affirmed the principle that enforcement of foreign judgments is consistent with principles of comity and require a final and conclusive decision.

36 However, those decisions do not alter the common law principles of finality and conclusiveness relied upon in all of the above decisions. Foreign judgments are "final" and "conclusive" when they cannot be varied or abrogated, regardless of whether under appeal {*Four Embarcadero*, at para. 44).

37 The decisions in *Beals* and *Pro-Swing* confirm the common law (from *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.) which was considered by MacPherson J. in *Arrowmaster*) that a final judgment is required to be enforced under the principles of comity, but do not alter the law as to the meaning of "final" and "conclusive" in the context of a pending appeal. To the contrary, both *Beals* and *Pro-Swing* were considered by the court in *Van Damme*.

38 Further, the principle of comity to permit enforcement of final foreign judgments (even if an appeal is pending) is consistent with the most recent Supreme Court of Canada decision on enforcement of foreign judgments. In *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 (S.C.C.) *("Chevron")*, Gascon J. held (*Chevron*, at para. 44):

> [T]he purpose of an action for recognition and enforcement is not to evaluate the underlying claim that gave rise to the original dispute, but rather to assist in enforcing an already-adjudicated obligation. In other words, the enforcing court's role is not one of substance, but is instead one of facilitation ... The court merely offers an enforcement

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mechanism to facilitate the collection of a debt within the jurisdiction. ...in a recognition and enforcement case, the court does not create a new substantive obligation, but instead assists with the fulfillment of an existing one.

39 The above language in *Chevron* is consistent with the detailed review of the law by Henry J. in *Four Embarcadero*, and the subsequent case law. A foreign judgment is final and conclusive when the foreign court cannot vary or abrogate that decision. The foreign judgment is enforceable in the foreign jurisdiction when there is no stay and no *supersedeas* bond has been posted. The court in *Chevron* affirmed that the role of the Ontario courts is to facilitate that enforcement under the principles of comity.

40 The defendants rely on a series of cases decided by C. Brown J. (*CSA8-Garden Village LLC v. Dewar*, 2013 ONSC 6229 (Ont. S.C.J.) *("CSA8"); Kavoussi v. Moos*, 2014 ONSC 2612 (Ont. S.C.J.) *("Kavoussi");* and *Smythe v. Lymburner*, 2015 ONSC 2719 (Ont. S.C.J.)) *("Smythe"))*. However, in all of those cases, the judgment was either not under appeal (*CSA8*, at para. 34), had been appealed and dismissed (both to the California appeal court and Supreme Court in *Kavoussi*, at para. 44), or had not been appealed (*Smythe*, at para. 36). None of these cases stand for the proposition that if a judgment is appealed, it no longer becomes final.

41 The defendants rely on the Ontario *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5 (the "*Act*"*)*. Section 3 of the *Act* ("section 3") provides that no judgment shall be ordered to be registered under the *Act* if it is shown to the registering court that an appeal is pending or the judgment debtor is entitled and intends to appeal against the judgment.

42 The defendants' position is that the requirement for registration under section 3 that no appeal be pending supports a similar requirement under the common law for foreign judgments. However, that submission is not supported by any of the case law discussed above.

43 Further, the fact that section 3 was expressly included in the *Act* with respect to registration of a Canadian provincial or territorial judgment could just as easily be supportive of a common law position that registration and enforcement of a foreign judgment could proceed despite an appeal. Under Ontario law, there is an automatic stay of a monetary judgment pending appeal (Rule 63.01) and the *Act* applies that same approach to judgments from Canadian provinces and territories subject to the *Act*. There was no material before the court to demonstrate whether those provinces have similar stays of monetary judgments pending appeal in their Rules of Practice.

44 Using the converse logic to the defendants' submission, if the legislature had considered it appropriate to prohibit recognition and enforcement of final foreign judgments under appeal (or even if there is an intention to appeal), it could have done so but did not.

45 In any event, it is not even clear that the *Act* prohibits court recognition and enforcement of provincial and territorial decisions when under appeal. Continental submits that the *Act* is limited to a registration process with a registrar or clerk (s. 2(3) of the *Act)* and does not prohibit enforcement by the court when the decision is under appeal. It is not necessary for me to decide this issue as the *Act* is limited to subscribing provinces and territories and cannot be read to alter the settled common law applied in the cases I discuss above.

46 The defendants submit that "the Supreme Court of Canada [in *Pro-Swing*] effectively applied this requirement of registration in the *[Act]* as a condition precedent applicable to the Dominion as a whole". However, the Supreme Court cases support the comity of enforcing judgments. There is no suggestion in either*Beals*, *Pro-Swing*, or *Chevron* that an enforceable foreign judgment should not be recognized and enforced in Ontario just because it is under appeal.

47 Further, the foreign jurisdictions considered by the courts in *Four Embarcadero*,

Arrowmaster, *OZ Optics*, and *Van Damme*, all had statutory provisions that no stay of a monetary judgment is permitted under appeal, unless the appellant posts a *supersedeas* bond, as in the present case.

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48 Consequently, final foreign judgments under appeal are enforceable in Ontario and the role of the Ontario court ought to be one of "facilitation" (as per Gascon J. in *Chevron*), consistent with the law set out in the authorities reviewed in *Four Embarcadero* and followed by Ontario courts.

49 For the above reasons, I find that the Indiana Judgment is final even though an appeal decision is pending.

Issue 2: Was there any denial of natural justice?

50 The defendant, Robert, as executor of the estate of Gordon, submitted that Gordon was not mentally competent at the time of the trial, and asked this court to find a breach of natural justice based on the evidence filed before the court. I do not agree that this is the proper approach on an enforcement application.

51 In *Beals*, the Court explained that enforcement could be denied in cases of a deprivation of natural justice. The analysis of natural justice, however, depends on the *process* of the trial, not a determination by the enforcing court of whether a party was competent at trial.

52 A domestic court "must be satisfied that minimum standards of fairness have been applied to the Ontario defendants by the foreign court" and that the defendant had a "fair process". The burden of alleging unfairness in the foreign legal system rests with the defendant in the foreign action. Fair process "reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system" and "this assessment is easier when the foreign legal system is either similar to or familiar to Canadian courts" (*Beals*, per Major J., at paras. 59-62).

53 Lebel J., in *Beals*, (dissenting, but not on this point) stated that "The defence [of natural justice] concerns the procedure by which the foreign court reached its decision. The clearest examples of a deprivation of natural justice occur when the defendant lacks notice of the foreign proceedings or an opportunity to present his case to the court" (*Beals*, at para. 235).

54 In *Pro-Swing*, Deschamps J. spoke for the majority and held (*Pro-Swing*, at para. 12):

> ... absent evidence of fraud or a violation of natural justice or of public policy, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction in which the judgment sought to be enforced domestically was rendered.

55 The defence of natural justice does not relate to the merits of the claim. It is about the procedure or process. In *Sincies Chiementin S.p.A. (Trustee of) v. King*, [2010] O.J. No. 5124 (Ont. S.C.J.), Whalen J. held, at para. 194:

> **The defence of natural justice does not relate to the merits of the claim. Rather, it is about the procedure or process by which the foreign court arrived at its judgment, for example some failure of the Canadian standard of due process. For the Defendant to succeed on this line of defence, the foreign court must have offended the Canadian concept of natural justice.** Similarly, to succeed in a public policy defence, the Defendant must satisfy the court that the judgment of the foreign court was based on foreign law that is contrary to the fundamental morality of the Canadian justice system, for example the judgment was the result of bias or corruption. **The Defendant bears the onus of proof in both instances.**
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> [Emphasis added.]

56 In *Van Damme*, Lederer J. reviewed the above principles and held that the New York decision was not in violation of natural justice. He held (*Van Damme*, at para. 58):

> The procedures in the foreign court, in this case the courts of the State of New York, need not replicate the procedures followed in Canada in order to meet the minimal standards of procedural fairness or conform to the requirements of Ontario public policy. There is nothing inherently unfair or contrary to Ontario concepts of public

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policy in judicial determinations being made based on transcripts and a written record, by an impartial decision-maker, following an adequate opportunity to be heard. There is no reason to find that there was a denial of natural justice in the proceedings undertaken in New York.

57 Consequently, it is not the role of the enforcing court to make a finding as to whether a defendant was incompetent at the time of trial. The role of the court is to review the process before the foreign court to be assured that the process was fair.

58 In the present case, there is no evidence that the Indiana Court took any steps to deny the defendants a fair process. Gordon successfully sought an order that he not give evidence at trial. The Indiana Court then heard all of the evidence led by the parties in the Indiana Action. The defendants were represented by competent counsel at trial, who continues to represent the defendants on appeal. There is no suggestion that the defendants were not given notice of the proceedings or were not given a fair opportunity to present their case in court.

59 If Gordon believed he was going to be denied natural justice because he was incompetent or could not testify for medical reasons, he had the opportunity to bring a motion to adjourn the trial or take other steps before the Indiana Court. His counsel took no such steps, and did not raise this issue as a ground of appeal. If the issue of mental competency had been raised in the Indiana Action, the Indiana Court would have been able to deal with the issue as part of its trial process, and unless that process to consider the issue was not fair, it is not for an enforcing court to make a substantive finding of competency at trial. The issue is whether the trial process was unfair.

60 The defendants also seek to transform the substantive decision of the Indiana Court into a lack of fair process. The defendants submit that Gordon could not have been found personally liable for fraud "without any relevant evidence" and "notwithstanding the fact the Indiana Court *granted* [Gordon's] request to avoid having to attend at Trial" [italics in original.] At the hearing of this motion, the defendants submitted that there was a higher standard of proof required to establish fraud or to lift the corporate veil, and, as such, Gordon ought not to have been found personally liable when he did not give evidence at trial.

61 However, the Indiana Court considered all of the evidence before it and found Gordon personally liable for fraud. There is no evidence that such a determination was made without fair process. The choice of Gordon to bring a motion for an order that he was not required to testify, which was accepted by the Indiana Court, was part of that process and it cannot be said that a decision based on the existing evidence is a violation of natural justice.

62 Similarly, the submission that the Indiana Court "discloses no reliance on any direct evidence from [Gordon]" is a substantive complaint, not a procedural fairness issue. The Indiana Court released a 135-page judgment in which it found, on the evidence, that Gordon was personally liable for fraud. Robert submits that there was an error of natural justice since no reference was made to Gordon's "direct evidence", but Gordon sought exactly that result before the Indiana Court, *i.e.*, he successfully brought a motion that he not be required to testify.

63 The defendants' submission that the Indiana Court denied natural justice since a higher standard of proof is required for fraud as compared to proving "ordinary matters" is again a substantive issue and does not address procedural unfairness of the trial.

64 Consequently, there is no evidence to support a finding of procedural unfairness before the Indiana Court and, as such, this defence to enforcement fails.

65 For this reason, I make no finding as to whether Gordon was mentally incompetent at the time of the trial. While both parties led some evidence on the issue, it is not necessary (or appropriate) for me to make a finding for the reasons I set out above.

66 For the above reasons, I grant summary judgment for recognition and enforcement of the Indiana Judgment.

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Issue 3: Is a stay of enforcement appropriate?

67 The defendants submit that a stay of enforcement of the summary judgment is appropriate pending the decision of the Indiana Appellate Court and until "the Defendants' rights of appeal have either expired or been exhausted".

68 In *Four Embarcadero*, Henry J. held that a stay of execution of enforcement could be appropriate to safeguard the rights of a judgment debtor pending appeal (*Four Embarcadero*, at para. 72). He did not have to decide that issue as he dismissed the motion by the defendants to dismiss the plaintiff's enforcement action.

69 In *Arrowmaster*, MacPherson J. considered the issue of "whether a stay of execution should be granted" with respect to the enforcement of a foreign judgment when the appeal was brought "in a timely fashion and the results of that appeal are imminent" *Arrowmaster*, at para. 1). The defendants in that case advanced the same alternative argument as in the present motion.

70 MacPherson J. noted that the defendants had acted promptly to bring and hear the appeal. He further noted that the decision from the appellate court would likely be released four to six months after the hearing (*Arrowmaster*, at para. 19).

71 As in the present case, there was no evidence before the court in *Arrowmaster* as to whether the refusal of a stay would render the appeal nugatory or whether one or both parties would suffer some loss if the stay was either granted or refused. MacPherson J. did not accept the bald assertion that the defendants would suffer irreparable harm if the stay was refused, and there was no evidence from the plaintiff about the importance of immediate enforcement (*Arrowmaster*, at paras. 25-26).

72 MacPherson J. also held that it would not be "realistic" or "desirable" for a motions judge to make a determination of the *bona fides* or substance of the appeal (*Arrowmaster*, at paras. 22-24).

73 MacPherson J. held that on the issue of a stay, it was appropriate to consider "one other particularly important factor, namely, the chronology and conduct of the litigation in the foreign jurisdiction, especially with respect to the appeal component of the litigation" *Arrowmaster*, at para. 24). MacPherson J. considered that conduct and granted a stay. He held:

> On the chronology point, **the defendants' argument for a stay is based on the following factors — the defendants attorned to the jurisdiction of the Illinois trial court, they defended fully and fairly (e.g., without any delay) in that court, they appealed the decision promptly, the appeal has been heard, and a judgment from the appellate court is imminent. In these circumstances, say the defendants, it is appropriate to permit the Illinois litigation to come to a full and final conclusion before permitting execution on the defendants' assets in Ontario.** *(Arrowmaster*, at para. 30);
>
> **I find this argument persuasive.** The case law makes it clear that a stay of execution pending a decision in an appeal is a matter of judicial discretion. ... *(Arrowmaster*, at para. 31);
>
> In the present case, I believe that a stay of execution is warranted. In *International Corona Resources*, *supra*, Goodman J.A. said, at p. 255:
>
> > I am of the view that as a general rule it is in the interest of justice that the '*status quo*' be maintained pending an appeal where such can be done without prejudicing the interest of the successful party. {*Arrowmaster*, at para. 35)
>
> The fact situation in *International Corona Resources* (a huge mining operation) is very different from the simple contract action in this case. **Nevertheless, in all the circumstances of this case I believe it appropriate to maintain the *status quo* until the Illinois appellate court has rendered its decision.** The case involves a monetary amount and there is no evidence before me that the plaintiff will be prejudiced if it receives the principal amount and accumulated interest a few months from now if the defendants' appeal is unsuccessful. **Moreover, the appeal has been argued and**

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> **the information, admittedly more informal that one would like, about a decision in four to six months from September 15, 1993 strikes me as reasonable. As well, both parties have, up to this time, conducted the litigation, fully and fairly, in the Illinois court. In all of these circumstances, my conclusion is that the hardship factor cuts about equally for both parties but the chronology and process of litigation factor tells in favour of the defendants. They are entitled to an order staying execution of the summary judgment obtained by the plaintiff until after the United States Appellate Court has rendered its decision.** *(Arrowmaster*, at para. 36)
>
> [Emphasis added.]

74 Finally, MacPherson J. rejected the plaintiffs submission that the failure to post a *supersedeas* bond was a basis to deny a stay. He held (*Arrowmaster*, at para. 29):

> The short answer to the plaintiff's argument on this point is that Rule 62 deals with stays of execution in Illinois. Since, presumably, the defendants have no assets in Illinois it was unnecessary for them to give a supersedeas bond. A conclusion that, by inference or extension, Rule 62 should be interpreted as laying down a procedural requirement for staying an execution on an Illinois court order in Illinois and in foreign jurisdictions would be, in my view, both outside the wording of Rule 62 and contrary to the fundamental principle that laws are intended to operate within their territorial limits.

75 In *OZ Optics*, Quigley J. granted a motion by OZ Optics "for a stay of the enforcement of this judgment ... pending the final determination of the New Jersey action" (*OZ Optics*, at para. 41).

76 In *Van Damme*, the defendant Gelber sought a stay of Justice Lederer's enforcement decision pending the outcome of the New York appeal (*Van Damme*, at para. 27). Lederer J. held that there was no automatic right to a stay {*Van Damme*, at para. 28):

> This does not mean that, in every circumstance where there is no stay, the court will allow for enforcement but stay that determination until after the appeal in the foreign jurisdiction has been completed and determined. The question of whether, in such circumstances, a stay will be granted, is a matter of judicial discretion (see: *Arrowmaster Inc. v. Unique Forming Ltd* (1993) 17 O.R. (3d) 407, at para. 34).

77 As in *Arrowmaster*, Lederer J. found that the evidence did not support particular hardship on either side. He then reviewed the conduct of the various appeals to consider "whether Gelber has proceeded with his various appeals, not in a good faith effort to resolve the matter but, rather, to delay its resolution. Has he been and is he continuing to 'rag the puck'?" (*Van Damme*, at para. 34).

78 Lederer J. noted that the motion before him was the "sixth attempt brought on behalf of Gelber to re-open the matter and contest the finding that Gasiunasen was his authorized agent" and expressed a concern that "The court is not a hockey rink and its proceedings are not a game. This is not a place to rag the puck. Ultimately, the court has to protect its own process" (*Van Damme*, at para. 68).

79 Despite his concerns, Lederer J. granted "what I hope will be a short stay" which would remain in place until the appeal was determined, provided that Gelber perfect his appeal by the date of issuance of reasons. Lederer J. further held that the stay would be lifted "regardless of any appeals of that decision" (*Van Damme*, at paras. 69-70).

80 On the current evidence before the court, there is no evidence of hardship to either side. Further, the current evidence demonstrates prompt conduct by the defendants in bringing the appeal. Consequently, I rely on *Arrowmaster* and *Van Damme* and grant the interim interim stay until the earlier of (i) the date the Indiana Appellate Court releases its decision and the defendants' rights of appeal have either expired or been exhausted, or (ii) December 15, 2015, when I will hear submissions and review evidence on the interim stay.

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81 Continental sought an adjournment of the decision for an interim stay in order to introduce evidence to address the relevant evidentiary elements to oppose a stay and respond to the request for a stay set out in the defendants' factum. The defendants reasonably agreed to the adjournment of that issue, subject to the interim interim stay I have ordered above.

82 However, I note the cautionary words of Lederer J. in *Van Damme*. My order granting the interim interim stay or any subsequent order for an interim stay, if appropriate, is without prejudice to Continental bringing a motion to the court to lift the stay upon evidence that the defendants are not moving promptly to exhaust their rights of appeal. The court's exercise of its discretion to the defendants ought not to be taken as *carte blanche* to delay enforcement for an indefinite period while dragging out appeal rights.

83 Finally, Continental sought terms of the interim interim stay that it be permitted to (i) register writs of seizure and sale and (ii) examine Robert as executor of the estate of Gordon on a list of assets provided in an undertaking. I do not agree that such terms are appropriate.

84 Under a stay of execution, the general rule is that it is in the interest of justice to preserve the *status quo* pending an appeal (*Arrowmaster*, at paras. 35-36). In the present case, permitting the registration of a writ of execution is a step in the execution process. The only exception under the *Rules* to permit such a step for Ontario judgments is pending an appeal (Rule 63.03(3)), and to expand such relief would permit a form of execution when a stay has been ordered. Further, such term would be inconsistent with the stay of execution ordered in all of the cases cited above.

85 Similarly, an examination of Robert as executor of the estate of Gordon on a list of assets would be an enforcement step and would also be inconsistent with the stay of execution ordered in all of the cases cited above.

Issue 4: Should enforcement of the judgment be restricted to "The Estate of Gerald Gordon Symons"

86 Robert (as executor of Gordon's estate) submits that he was not a party to the foreign litigation and was never intended to be a principal judgment debtor in accordance with the terms of the Indiana Judgment. Robert further submits that Ontario does not recognize the foreign concept of "successor in interest" and, as such, it should not be recognized in this jurisdiction.

87 Robert also submits that a judgment against him as a "successor in interest" could cause a reasonable person to be confused that Robert is personally liable either as a "successor in interest" to his late father or due to personal wrongdoing in Gordon's estate to the extent of over US $45 million in fraud. Robert submits that the interests of justice and balance of convenience militate in favour of narrowing the identity of the judgment debtor to "The Estate of Gerald Gordon Symons".

88 At the hearing, Continental did not ask the court to recognize and enforce the Indiana Judgment against Robert as "successor in interest" as that term does not exist in Ontario law. However, I agree with Continental that it is appropriate to recognize and enforce the Indiana Judgment against Robert in his capacity as executor of Gordon's estate.

89 Rule 9.01 provides for proceedings to be brought against the executor of an estate and, as such, there is no legal basis to restrict the recognition and enforcement to "The Estate of Gerald Gordon Symons".

90 While Gordon's counsel submitted that there may be confusion as to whether Robert was personally involved in the impugned conduct or might be personally liable, I adopt the comments of the Indiana Court which considered a similar issue when Robert sought an order "changing the caption and paragraph C of the Amended Final Judgment from 'Robert Symons, as successor in interest of G. Gordon Symons', to 'Robert Symons, as Executor of the Estate of G. Gordon Symons'" (see Reasons, dated December 12, 2014, at p. 2). Chief Judge Young held (at pp. 2-3):

> Under either scenario, Symons, who was substituted as a party pursuant to Federal Rule of Civil Procedure 25 [just as Robert is named as an executor under Rule 9], is a defendant only in his capacity as a representative of the Estate of G. Gordon Symons. Accordingly, Symons' Motion to Amend [the Indiana Judgment] is **DENIED.**

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[Emphasis and block letters in original]

91 Similarly, my order that recognition and enforcement be permitted against Robert in his capacity as executor of Gordon's estate does not suggest any improper conduct by Robert or his personal liability with respect to the matters arising from the Indiana Action.

Order and costs

92 I grant Continental's motion for summary judgment and order the recognition and enforcement of the Indiana Judgment against all of the defendants, with the order concerning Robert to be against him in his capacity as executor of Gordon's estate. I grant the interim interim stay until the earlier of (i) the date the Indiana Appellate Court releases its decision and the defendants' rights of appeal have either expired or been exhausted, or (ii) December 15, 2015, when I will hear submissions and review evidence on the interim stay.

93 The defendants submit that costs should be reserved until the Indiana Appellate Court releases its decision and the defendants' rights of appeal have either expired or been exhausted. I am not prepared to make such an order at this time as the standard procedure is for a court to order costs upon conclusion of the motion and there is no basis at this time to postpone costs until possibly many years of appeal have been exhausted.

94 However, I reserve costs of this motion to the hearing of the remaining issues on the interim stay. While Continental was successful in seeking recognition and enforcement, the defendants successfully obtained an interim interim stay without the terms sought by Continental. Also, the motion for an interim stay returnable December 15, 2015 will incur further costs. All of those costs should be considered collectively at the hearing of the interim stay.

95 On consent, I also amend the title of proceedings by substituting the name for the defendant, "Goran Capital, Inc." with "Goran Capital Inc." wherever it appears in the title of proceedings.

96 I thank counsel for their thorough written and oral submissions which were of great assistance to the court.

Motion granted.

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TAB 12

2004 CarswellOnt 4551
Ontario Superior Court of Justice

Oz Optics Ltd. v. Dimensional Communications Inc.

2004 CarswellOnt 4551, [2004] O.J. No. 4543, 134 A.C.W.S. (3d) 1002

Oz Optics Limited (Plaintiff) v. Dimensional Communications Inc. (Defendant)

Quigley J.

Heard:
Judgment: November 5, 2004
Docket: Ottawa 03-CV-025912

Counsel: Stephen Victor, for Plaintiff
Andrew M. Robinson, for Defendant

Subject: International; Civil Practice and Procedure; Contracts

APPLICATION for enforcement of foreign judgment; MOTION for order dismissing action on basis of issue estoppel.

***Quigley J.*:**

1 There are two main issues before this court for determination.

(i) Firstly, an application by Dimensional Communications Inc., ("DCI"), which is a New Jersey corporation with its principal place of business in Northvale, New Jersey, for the enforcement in Ontario of a judgment against OZ Optics Limited, ("OZ"), a Canadian corporation, with its principal place of business in Ottawa, Ontario. This application is brought under Rule 14 of the *Rules of Civil Procedure*.

(ii) Secondly, a motion for judgment by DCI under Rule 20.01 (1)(a)(b) and 21.01 (3)(a)(c) and (d) on a claim brought by OZ in the Province of Ontario.

2 DCI engages in the design, fabrication and technological presentation of sophisticated multimedia trade show exhibits.

3 OZ designs, manufactures and markets fibre optic components.

4 The parties entered into an agreement whereby DCI was to construct an exhibit for OZ. As a result of a dispute between the parties over payment of extras, an action was commenced in New Jersey by DCI against OZ on October 22nd, 2002 by way of a complaint and demand for trial. DCI's claim was in the principal amount of $534,810.92 U.S. for merchandise and services provided in relation to the trade show booth it had constructed for OZ.

5 OZ filed a statement of defence to the New Jersey action and pleaded the affirmative defence of a right to set-off.

6 Prior to trial, OZ brought a motion to amend its pleading to assert a counter-claim against DCI. The motion was denied by the presiding judge. The appeal of this order by OZ was also denied.

7 A pretrial conference was held in the New Jersey action before Magistrate Arleo on September 26, 2003. The final pretrial order identified, among the contested facts, the following:

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> 10. DCI has refused to return 57 large crates containing the components of the trade show exhibit and other loose materials from the first quarter of 2001 through today.
>
> 11. Due to DCI's wrongful possession of these materials, OZ has been forced to expend vast resources in obtaining another booth for use at trade shows.

8 Part D of paragraph 4 of the pretrial order set forth the defendant's proposed stipulated facts that were rejected by the plaintiff, which included the following:

> 22. DCI presently possesses the booth and has advised OZ that it will not return the booth so long as OZ owes monies to DCI.

9 Part 10 of the pretrial order set forth the legal issues to be tried, which included the following:

> 9. Whether DCI is liable to OZ for monies incurred by OZ in connection with its new trade show booth.
>
> 10. Whether DCI may properly possess the trade show exhibit.

10 On December 9, 2003, the trial of the action proceeded in New Jersey before a jury for a period of five days. At the opening of trial, an issue arose with respect to the legal issue identified in paragraph [9] above, of whether DCI was liable to OZ for monies incurred in connection with its new trade show booth. In particular, the question was raised as to whether OZ could lead evidence with respect to damages it had allegedly suffered as a result of DCI holding the trade show booth.

11 Counsel for OZ, Mr. Wallach, argued that OZ should be permitted to submit to the jury, and the jury should be allowed to consider, evidence in respect of the damages incurred by OZ as a result of DCI's withholding possession of the trade show booth in relation to set-off or recoupment.

12 The trial judge ruled in OZ's favour in finding that, when OZ had pleaded set-off, it was really pleading recoupment. His specific ruling was as follows:

> THE COURT: The issue is whether the defendant can be precluded from seeking a reduction of damages, if awarded, by the plaintiff by virtue of the affirmative defense pled as a set-off.
>
> In a strictly maybe common law parsing of what took place here the plaintiff may be correct. But we're here to do basic justice. And while it's correct, generally speaking, that a set-off has to be asserted by a counter-claim, everyone knew exactly what the defendant meant when the set-off was pled. This is not a surprise. And my reducing of what the defense has here is, technically speaking, a recoupment, which simply means that the amount being sought can be reduced by the amount owed, if any, by the plaintiff.
>
> I don't want to spend a lot time on this because we're — I think all the jury is here. But if you look at the definition of a recoupment and the definition of set-off in *Black's Law Directory*, that gives you some idea.
>
> ...it's fair to invoke that concept here. But in all fairness, while I'm going to permit the affirmative defense to be construed as a counter-claim, I will permit an amendment of the pretrial order, of the pleadings to reflect that, in effect, the set-off is really being pled as a recoupment.

13 In keeping with the trial judge's ruling permitting the legal issue of recoupment to be dealt with at the trial, OZ led evidence and argued that the trade show booth was wrongly held by DCI and that it had suffered damages as a result. OZ's counsel, in his closing remarks to the jury, requested that any damages awarded to DCI be set-off by OZ's claim.

14 The trial judge specifically instructed the jury to consider OZ's affirmative defence of recoupment/set-off by way of Instruction.

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> ...the burden is on OZ to establish an affirmative defense by a preponderance of the evidence. OZ does not have to establish all of its affirmative defenses, however. If you determine that OZ has sustained its burden of establishing any one of the affirmative defenses, then you proceed no further as to that specific breach alleged by DCI, and your verdict on that specific breach must be for OZ. If you find that DCI had established the essential elements of its case and that OZ has not sustained its burden of any of the affirmative defenses, then you proceed to consider the issue of damages.
>
> OZ has raised the affirmative defense of recoupment/set-off to DCI's breach of contract claim.
>
> If you find that DCI has proved by a preponderance of the evidence any of its breach of contract claims, you must then consider whether DCI's recovery should be reduced or extinguished by the amount of damages suffered by OZ as a result of actions taken by DCI. Recoupment is the reduction of a claim because of an offsetting claim arising out of exactly the same transaction.
>
> To prevail on this affirmative defense, OZ must demonstrate that:
>
> 1. its claim for recoupment arose out of the identical transaction that provided DCI with a cause of action; and
>
> 2. no affirmative relief may be granted independent of DCI's claim.

15 The jury returned its verdict and found that:

(a) OZ owed U.S. $492,766.01 to DCI; and

(b) OZ did not establish a defence of recoupment/set-off.

16 Judgment was entered by the court on December 29, 2003 for the principal amount of the judgment. In a subsequent judgment dated March 22, 2004, pre-judgment interest was granted in the amount of U.S. $78,628.21. Post-judgment interest accrues on the total amount of the judgments (U.S. $571,394.22) at a rate of 1.28% per annum.

17 Following the entry of the judgment, OZ brought a motion for judgment as a matter of law, or in the alternative, a new trial, pursuant to U.S. Federal Rule Civil Procedure 59. Among the grounds relied on by OZ in support of the motion was the jury's finding in respect of OZ's claim for set-off:

> Even viewing the evidence in the light most favourable to DCI, there is no rational basis for the jury's determination to deny OZ an off-set of costs incurred as a result of DCI's actions.
>
> Properly viewed through the lens of the standard set forth above, the jury erred in failing to reduce its verdict by monies that OZ lost in connection with DCI's wrongful seizure of OZ's trade show booth and associated equipment. The jury's determination in this respect was an unauthorized departure from the jury instructions provided by the court and should be set aside.
>
> According to the testimony of both parties, DCI took possession of OZ's trade show booth, along with several plasma televisions, without OZ's authorization in or about July of 2001... DCI had no legal right to engage in this self-help, a conclusion DCI did not challenge. As a result of DCI's actions, OZ was deprived of the use and enjoyment of the $420,000 exhibit booth it owned and was forced to sign a contract with another exhibit house for a replacement trade show booth at an additional cost of approximately $160,000.

18 The relief requested by OZ was denied by order dated March 1, 2004. The court dealt with OZ's submissions in respect to the set-off claim in the following manner:

> 1. Defendant's Recoupment Claim — Defendant argues that the jury erred in failing to reduce its verdict by monies that defendant lost when plaintiff took possession of defendant's trade show booth and several plasma

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> televisions as security for the monies defendant owed. Defendant contends that plaintiff had no legal right to engage in this self help, that was a conclusion plaintiff did not challenge, and that as a result of plaintiff's actions, defendant was deprived of the use and enjoyment of the exhibit booth and was forced to sign a contract with another exhibit house for a replacement trade show booth at an additional cost of approximately $160,000...
>
> In response, plaintiff maintains that defendant's entire argument is predicated on the claim that plaintiff's possession of defendant's trade show exhibit was improper or unauthorized and that defendant's non-payment was justified. As indicated by plaintiff, the jury clearly rejected this premise, finding that nearly all of plaintiff's charges were proper and that defendant's refusal to pay was unjustified. Moreover, the jury evidently chose to believe testimony indicating that as soon as plaintiff received payment from defendant for the amounts due, it would return the exhibit to defendant...

19 OZ has initiated an appeal of the judgment in New Jersey by way of notice of appeal filed on or about March 23, 2004.

20 OZ has not petitioned for a stay of the New Jersey judgment nor has it posted a superseded bond as is required under New Jersey law for an application to stay a judgment.

21 The current amount owing under the judgment, inclusive of pre — and post — judgment interest up to June 22 nd, 2004, is $575,061.16 US. Although DCI is in a position to enforce the judgement by way of execution under the New Jersey law, it is unable to do so given OZ's lack of assets in that jurisdiction.

22 OZ has commenced a statement of claim in Ontario dated November 21 st, 2003, claiming the following relief:

(a) An order requiring the defendant to deliver the plaintiff's trade show booth and equipment to the plaintiff;

(b) In addition, damages for physical damage and/or loss to the plaintiff's trade show booth and equipment as a consequence of the defendant's wrongful and unlawful conversion and/or detention of the plaintiff's trade show booth and equipment in an amount which the plaintiff is unable to ascertain at this time;

(c) In the alternative, damages for the defendant's wrongful and unlawful conversion of the plaintiff's trade show booth and equipment in the sum of USD $522,000.00;

(d) In the alternative, damages for the defendant's wrongful and unlawful detention of the plaintiff's trade show booth and equipment in the sum of USD $522,000.00;

(e) In addition, damages for loss of business opportunity, loss of customers and loss of profit in the amount of USD $1,000,000.00;

(f) Pre — and post-judgment interest on the above sums, pursuant to the *Courts of Justice Act*, R.S.O. 1990, chapter C.43, as amended;

(g) Its costs on a substantial indemnity scale, inclusive of GST; and,

(h) Such further and other relief as this Honourable Court deems just.

23 The issues that must be determined in this court are as follows:

1. Does DCI have the right to enforce its New Jersey judgment in Ontario?

2. Does the fact of OZ filing a notice of appeal in New Jersey preclude DCI from enforcement of the New Jersey judgment pending the hearing of the appeal?

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3. Is DCI entitled to a dismissal or stay of the Ontario action commenced by OZ?

24 For the reasons that follow, I find that:

1. DCI does have the right to enforce its New Jersey judgment in Ontario.

2. The notice of appeal filed by OZ does not preclude DCI from the enforcement of its judgment; and

3. DCI is entitled to a dismissal of the Ontario action commenced by OZ.

Law

25 A final judgment *in personam* for a fixed sum of money given by a foreign court of competent jurisdiction is capable of recognition and enforcement in Ontario.

26 The court has adopted a two-fold test for the enforcement of foreign judgments in Ontario:

(a) The foreign judgment must be final and *res judicata* in the foreign jurisdiction.

(b) The foreign judgment must pass the test of conclusiveness in that it may not be impeached at common law in an action to enforce it in Ontario.

27 The finality contemplated in the test for enforcement of foreign judgments simply requires that the court that pronounced the judgment no longer has jurisdiction to abrogate or vary it.

28 The Ontario law defining the conditions upon which a foreign judgment for payment of money may be enforced was canvassed by the Ontario Supreme Court in *Four Embarcadero Center Venture v. Mr. Greenjeans Corp.* (1988), 26 C.P.C. (2d) 248 (Ont. H.C.), found at Tab 4 in DCI's Brief of Authorities. The decision of Henry, J. dated March 4 th, 1988, enunciated the proper principles applicable to the enforcement of a foreign judgment:

> First - the proper criteria for determining whether an action will lie on a foreign money judgment are whether or not the judgment may be abrogated or varied, or the issues re-heard, by the court that pronounced it; whether the judgment represents an adjudication on the rights of the parties; and whether it is conclusive as to the amounts payable. It is not necessary for the plaintiff to show that the judgment cannot be varied or re-tried by any other means — including on appeal.
>
> Second - a foreign judgment that has gone by default is no less final or enforceable than a judgment rendered after a full trial on the merits; indeed, according to the law introduced into Ontario in *Bank of Bermuda v. Stutz*, *supra*, even though the judgment can be varied, it is enforceable by action until it is set aside.
>
> Third - an action may be commenced in Ontario to enforce a foreign money judgment that is final in the above sense, notwithstanding that it is under appeal where there is no stay of enforcement so that under the foreign law it may be enforced notwithstanding pendency of an appeal. The preservation of enforceability of the judgment in the foreign jurisdiction, notwithstanding a pending appeal, is an additional important and relevant, but not essential, factor. If the judgment may be enforced in the foreign jurisdiction there is no sound reason of justice why it should not be enforced in Ontario; to do so in this jurisdiction requires the judgment creditor to proceed by action, whatever may be his procedural recourse in the foreign country.
>
> Fourth - the safeguard of the rights of a judgment debtor in such circumstances is to stay execution of the judgment obtained in the Ontario action until the outcome of the appellate proceedings is finally determined.

29 This issue was also reviewed in another Ontario Court decision, *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Ont. Gen. Div.), a November 18, 1993 decision of MacPherson, J. of the Ontario Court General Division.

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In *Arrowmaster*, *supra*, the court held that the plaintiff was entitled to a summary judgment under Rule 20, but stayed the enforcement of the judgment pending the decision of the United States Appellate Court.

30 The leading case dealing with the enforcement of foreign judgments is the decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.). *Morguard Investments Ltd.* , *supra*, dealt with the enforcement of a court order across provincial boundaries, however, it is clear that the analysis in LaForest J.'s judgment applies equally to a situation where the judgment has been rendered by a court in a foreign jurisdiction. LaForest J. stated, at page 272,

> ...a regime of mutual recognition of judgments across the country is inherent in a federation.

and at page 268:

> Modern states... cannot live in... isolation and do give effect to judgments given in other countries in certain circumstances ... our courts will enforce personal judgments given in other states. Thus... our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action ... in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected.

Justice LaForest goes on to say,

> ...I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S. 113(1895) at pp. 163-4, in a passage cited by Estey J. in *R. V. Spencer* (1985), 21 D.L.R. (4 th) 756 at p. 759, 21 C.C.C. (3d) 385, [1985] 2 S.C.R. 278, as follows:
>
> > 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws...

Position of DCI

31 DCI takes the position that the judgment in New Jersey is a final judgment dealing with all of the issues outstanding between the parties. DCI also asserts that although the counter-claim by OZ was denied for procedural reasons the jury actually heard evidence on all of the issues that would have formed the basis of a counter-claim.

32 DCI also takes the position that OZ has simply filed a notice of appeal and it has failed to to enunciate any grounds for the appeal and has not sought a stay of the New Jersey judgment pending the appeal nor filed a bond in accordance with New Jersey law.

33 DCI claims that the issues raised by OZ in its Ontario action is *res judicata* in that all of the issues were determined by the New Jersey action.

Position of OZ

34 The position of OZ is that a stay of enforcement should be granted for the following reasons:

> 1. That the same issues are not in dispute in the Ontario action that were before the New Jersey court which is evidenced by the fact that the counter-claim was denied by the New Jersey court.

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2. That the enforcement of the New Jersey judgment cannot be commenced by an application under Rule 14.051 of the *Rules of Civil Procedure*, but must be done by a statement of claim.

Analysis

35 The case law recognizes the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided. This has been referred to as issue-estoppel. In the Supreme Court of Canada case of *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.), Dickson J. defines the requirements of issue-estoppel as:

> ...(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

36 I find that OZ is precluded from advancing the Ontario claim because the issues outstanding between the parties have been determined by the New Jersey court. It is also clear from the evidence that the New Jersey court order is a final order disposing all of the issues between the parties.

37 The nature of the basis of OZ's claim for set-off and counter-claim is the same whether asserted by set-off or counter-claim. It is the basis of the claim that is determinative, not the means of asserting the claim. I am satisfied that the New Jersey court had jurisdiction to deal with the issues that were before it and that OZ submitted to the jurisdiction of that court by filing a statement of defence and advancing its claim for a set-off.

38 The Ontario Court of Appeal dealt with an application under Rule 14 in a 1977 case, *Services Techniques Bic Inc. v. Goldenberg*, [1997] O.J. No. 2595 (Ont. C.A.), Docket No. C21667. Although this case was decided on other grounds, the defendant's appeal of the plaintiff's judgment commenced under Rule 14 was dismissed.

39 I find as a fact that DCI is entitled to commence these enforcement proceedings under Rule 14 of the *Rules of Civil Procedure* in that there are no material facts in dispute between these parties.

40 I also find as a fact that OZ's claim in the Ontario action is simply an attempt to relitigate matters that have been previously tried and finally determined in a New Jersey court, subject to appeal.

41 Therefore, for the above mentioned reasons, this court orders the following:

1. A judgment in favour of DCI against OZ in the amount of $575,061.16 US, as of June 22nd, 2004, plus post judgment interest calculated at the rate of 1.28% per annum.

2. A further order granting DCI's request for the dismissal of OZ's November 21, 2003 claim against it (see Ottawa Court file #03CV025912).

3. The motion by OZ for a stay of the enforcement of this judgment is allowed pending the final determination of the New Jersey action.

42 If the parties cannot agree on costs, written submissions not to exceed three typewritten pages, may be sent to my Brockville chambers at 41 Court House Square, Brockville, Ontario, K7A 7N3, on or before December 15th, 2004.

Application granted; Motion granted.

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End of Document

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TAB 13

1988 CarswellOnt 378
Ontario Supreme Court, High Court of Justice

Four Embarcadero Center Venture v. Mr. Greenjeans Corp.

1988 CarswellOnt 378, [1988] O.J. No. 210, 26 C.P.C. (2d) 248, 64 O.R. (2d) 746, 9 A.C.W.S. (3d) 348

FOUR EMBARCADERO CENTER VENTURE et al. v. MR. GREENJEANS CORPORATION et al.; MR. GREENJEANS CORPORATION et al. v. FOUR EMBARCADERO CENTER VENTURE et al. *

Henry J.

Heard: January 28 and 29, 1988
Judgment: March 4, 1988
Docket: Doc. 6046/85

Counsel: *M. Teplitsky*, Q.C., and *Wailan Low*, for moving parties (defendants)
B.H. Kellock, Q.C., and *J. Richler*, for responding parties (plaintiffs)

Subject: Civil Practice and Procedure; International

MOTION by defendants to strike out statement of claim; for summary judgment dismissing action and for determination of question of law raised by pleadings.

***Henry J.*:**

1 This motion raises the broad issue whether an action is maintainable in Ontario upon a money judgment obtained in the Courts of California, which is under appeal and is regarded by the Code of Civil Procedure of that state as still pending and not final.

2 This action, together with four other actions commenced in Ontario, seeking similar relief, arises out of a series of judgments obtained in the Courts of the State of California against (variously) Mr. Greenjeans Corporation, Mr. Greenjeans Galleria Corporation, Mr. Greenjeans Embarcadero Corporation, Resemp Corporation, Maury Kalen and Mark Bromberg; these parties are collectively referred to as the Greenjeans parties.

3 The plaintiffs were parties (variously) in six actions in the Superior Court for the State of California for the City and County of San Francisco; they obtained judgment against one or more of the Greenjeans parties in each of those actions. Those judgments have been appealed by the Greenjeans parties.

4 The background of these proceedings is fully set out in two reported decisions of Reid J. — *Four Embarcadero Center Venture v. Mr. Greenjeans Corp.* (1987), 59 O.R. (2d) 229, 16 C.P.C. (2d) 205 (Ont. H.C.) (application to give effect to letters rogatory) and *Four Embarcadero Center Venture v. Kalen* (1987), 59 O.R. (2d) 236 (Ont. H.C.) (motion to stay), in which motions to dismiss or stay the Ontario actions pending disposition of the California appeals were in the result adjourned on consent, so far as the corporate defendants are concerned.

5 The plaintiffs Four Embarcadero Center Venture (Venture) and Embarcadero Center Ltd. are partnerships incorporated under the laws of California and Prudential is incorporated under the laws of New Jersey. The corporate defendants Mr. Greenjeans Corporation, Mr. Greenjeans Galleria Corporation and Resemp are incorporated under the laws of Ontario, with head offices in Toronto; Resemp is the parent of the other two.

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6 Having obtained judgment for a money payment in the California Court the plaintiffs commenced five actions in Ontario which are briefly identified as follows:

Ontario Action No.	California Action	Plaintiffs	Defendants
6045/85	alter-ego	Venture,Center and Prudential	Kalen and Bromberg
6046/85	alter-ego	Center,Venture and Prudential	Mr.Greenjeans Corp., Galleria and Resemp
6047/85	fraud	Venture	Kalen and Bromberg
6048/85	fraud	Venture and Galleria	Mr.Greenjeans Corp.
6049/85	guarantee	Venture	Galleria

7 The motions before me are brought in the three actions 6046/85 (the alter-ego action), 6048/85 (the fraud action), and 6049/85 (the guarantee action). The motion in action 6046/85 was fully argued before me, it being agreed by counsel that my decision on this motion will govern the outcome of the other two.

8 Objection is made by counsel for the plaintiffs that the substance of these motions as now asserted is an abuse of process because it ought to have been raised at an earlier stage, when the parties were before Reid J., and the defendants are now estopped from doing so. The defendants in the Ontario actions brought motions before Reid J. on September 10 and 11, and November 19, 1986, inter alia to strike out or stay actions 6046/85, 6048/85 and 6049/85. On September 11, the corporate Greenjeans parties by their counsel consented to an order adjourning those parties' motions sine die on terms that should the Embarcadero parties succeed in obtaining judgment, executions would not issue until such motions were disposed of by Reid J.; they also consented to an order giving effect to letters rogatory which required representatives of those parties to attend on examinations in aid of execution of the judgments in the fraud, guarantee and alter-ego actions. The actions against the individual defendants Kalen and Bromberg do not concern us here, the motions of those defendants being dismissed. See 59 O.R. (2d) 229 and 236, supra.

9 In the three actions before me, the motions to strike out or stay therefore stand adjourned sine die. Thereafter the defendants delivered statements of defence and counterclaim in the actions; the counterclaims advanced by the corporate Greenjeans parties seek essentially the same relief and rely on essentially the same facts as in the California actions. On October 15, 1987 the defendants appeared before me and consented to an order providing that no steps be taken in their counterclaim pending resolution of the appeals in California.

10 It is Mr. Kellock's position that the substance of the motions now before me ought to have been asserted before Reid J. and that it is now too late to do so. I have however decided that I ought to dispose of the matter on its merits.

11 The motions now made before me by the Corporate Greenjeans parties in the three actions (of which 6046/85 is the governing case as agreed) are for an order striking out the statement of claim; for summary judgment dismissing the action; and for the determination of a point of law raised on the pleadings pursuant to rr. 20.01 and 21.01 of the Rules of Civil Procedure. The notice of motion sets out the grounds of the motion as follows:

> The Statement of Claim discloses no reasonable cause of action existing at the date of the issuance of the claim and as of the date of this motion. The judgment upon which the Plaintiffs bring action in Ontario is not final and conclusive and *res judicata* as between the Plaintiffs and Defendants.

12 The question of law submitted under r. 21.01(1)(*a*) is:

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> Must all the facts necessary to constitute the plaintiff's claim be in existence at the date of issuance of the statement of claim?

13 In this action, S.C.O. 6046/85, the plaintiffs plead in the statement of claim, issued September 19, 1985, that in the California action No. 816561 in the Superior Court for the State of California for the City and County of San Francisco, in which the plaintiffs and defendants were all parties by claim or cross-claim, the Greenjeans parties who were defendants and cross-claimants failed to appear at trial which took place on June 3, 1985, although they had defended and cross-claimed, thereby attorning to the jurisdiction of the Court. Judgment was rendered on the same date in the California action (alter ego action) as follows:

> 1. Plaintiff Four Embarcadero Center Venture have judgment on its complaint against defendants Mr. Greenjeans Embarcadero Corporation, Mr. Greenjeans Corporation, Mr. Greenjeans Galleria and Resemp Corporation.
>
> . . . . .
>
> 3. Cross-complainants Four Embarcadero Center Venture, Embarcadero Center, Ltd. and Prudential Insurance Company of America have judgment on their cross-complaint against Mr. Greenjeans Corporation, Mr. Greenjeans Galleria Corporation, Resemp Corporation, Maury Kalen and Mark Bromberg.
>
> 4. Four Embarcadero Center Venture, Embarcadero Center, Ltd. and Prudential Insurance Company of America recover from Mr. Greenjeans Embarcadero Corporation, Mr. Greenjeans Corporation, Mr. Greenjeans Galleria Corporation, Resemp Corporation, Maury Kalen and Mark Bromberg, jointly and severally, the sum of $4,007,586.77 in compensatory damages, attorneys' fees and expenses in the amount of $692,978.61. To prevent a double recovery, attorneys' fees and expenses pursuant to this judgment will not be recoverable to the extent that such fees are recovered and collected under the judgments in Action Nos. 798933, 802729 and 804082.
>
> 5. Furthermore, Four Embarcadero Center Venture, Embarcadero Center, Ltd. and Prudential Insurance Company of America recover exemplary damages from Mr. Greenjeans Embarcadero Corporation, Mr. Greenjeans Corporation, Mr. Greenjeans Galleria Corporation, Resemp Corporation and Maury Kalen, jointly and severally, in the sum of $2,000,000.00, and from Mark Bromberg in the sum of $400,000.00.

14 It is further pleaded in the statement of claim in this action (S.C.O. 6046/85) that the defendants have appealed this judgment but that pursuant to the laws of California the appeal does not stay execution of the judgment unless the judgment debtors give an undertaking or file an appeal bond; it is pleaded that none of the defendants has complied with these conditions and accordingly the judgment appealed from is in full force and effect. It is further pleaded that none of the defendants has made any payment on the California judgment. The total claimed is $6,700,565.38 together with prejudgment interest and costs.

15 The statement of defence pleads, inter alia, that:

16 (a) The plaintiffs have no cause of action on the California judgment 816151 which is unenforceable.

17 (b) The judgment has been appealed to the Court of Appeals in the State of California and the judgment is not final while under appeal nor is it res judicata between the parties according to the laws of the State of California.

18 (c) A judgment which is neither final nor res judicata by the law of the jurisdiction in which it was issued is not enforceable, according to conflict of laws principles.

19 (d) The judgment was not a judgment on the merits but issued as a result of an order of a reference striking out defendants' claims and defences; the striking of the defendants' pleadings and entry of judgment was contrary to natural justice and is unenforceable.

20 (e) The judgment ought not to be enforced as it is founded on a cause of action and a punitive award which it is contrary to the public interest in this jurisdiction to enforce.

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21 The defendants ask that the action be dismissed. The two Greenjeans corporations (not Resemp) have made a counterclaim against the plaintiffs and others, which the plaintiffs say raises issues already raised in the California proceedings.

22 The plaintiffs' statement of claim does not expressly plead that the California judgment which founds the Ontario action is final and res judicata; that issue is raised by the statement of defence; in their reply however, the plaintiffs put that matter in issue, pleading in para. 24 that the judgments in the California actions are final.

23 I interject to say that the moving parties' (defendants) submissions before me focused on the proposition that this Ontario action is premature in that no action lies upon the California judgment which they submit is neither final nor res judicata. No argument was addressed to the other grounds of defence raised in the defendants' pleadings. The question of law submitted is significant because if I should find that the action is premature on the ground that the California judgment is not "final" and therefore cannot at this stage give rise to a cause of action in Ontario the judgment would later become final if the appeal is decided by the California Court in favour of the Embarcadero plaintiffs; in that event the question is whether the Ontario action can stand and the fact of finality established by the outcome of the appeal be added as a necessary element in the statement of claim at that time to perfect the action.

The finality of the California judgment

24 The moving parties assert the position that the California judgment, according to the law of California is not final, and is not res judicata, while it is under appeal and therefore no cause of action has as yet accrued upon which to recover the judgment debt in Ontario.

25 The plaintiffs' position is that the judgment became final so as to found this action at the time when the California Superior Court disposed of the issues and no jurisdiction remained *in that Court* to rescind or vary it; in their submission the pending appeal has no bearing on the question of finality for purposes of enforcing it in the Ontario action.

26 The general rule in Anglo-Canadian law is that in order to found an action on a foreign money judgment the foreign judgment must be final and conclusive as to the existence of the debt in the Court in which it was pronounced. This principle derives from the leading English decision in *Nouvion v. Freeman* (1889), 15 App. Cas. 1 (H.L.) , in which Lord Herschell used the following language at pp. 8-9:

> ... But it was conceded, and necessarily conceded, by the learned counsel for the appellant, that a judgment, to come within the terms of the law as properly laid down, must be a judgment which results from an adjudication of a Court of competent jurisdiction, such judgment being final and conclusive. I shall of course have something to say upon the meaning which must be given to those words, but the general proposition in that form is not disputed by the learned counsel for the appellant.

And further at the same page:

> My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties.

27 Where counsel for the plaintiffs and the defendants on this motion differ is upon the meaning of that concept. Simply put, counsel for the defendants, moving parties, submit that according to the laws and procedures of California, the judgment pronounced by the Superior Court of California is neither final nor res judicata while it is under appeal. Conversely, counsel for the plaintiffs submit that the judgment of that Court, which awards the payment of money, is, according to the law and procedure of California, final and conclusive and is res judicata between the parties because, notwithstanding the appeal, it cannot be rescinded or varied as, by reason of the municipal rules, it has now passed beyond the reach of the Court that pronounced it.

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28 The onus of establishing the proposition for which the plaintiffs contend is, in the first instance at least, upon the plaintiffs who assert it. The law and practice of California is applicable in this respect, and that law and practice must be proved as a fact by evidence in the Ontario action.

29 Affidavit evidence as to the laws of California was introduced for both plaintiffs and defendants. In conformity with r. 21.01(2) I admit it. There has been no cross-examination on the two affidavits proffered but I do not find them to be in conflict — rather they proceed on parallel lines.

30 The affidavit of Otto Michael Kaus, a member of the California Bar who has also formerly been a Judge of the Superior Court, the Court of Appeal and the Supreme Court of California, among other notable qualifications, I accept as expert evidence. Mr. Kaus addresses three questions of California law:

(a) Is a California judgment under appeal final?

(b) Is a California judgment under appeal res judicata?

(c) Are the answers different if the judgments are obtained by default or by way of pleadings having been struck out?

31 As to the first question, he deposes that the word "final" is used in two senses which must be distinguished, appealability and res judicata; California law, apart from certain exceptions, permits an appeal only from a final judgment; here the word "final" merely imports that the judgment must not be interlocutory, but this sense says nothing about the finality of the judgment as res judicata.

32 As to the second question, he is emphatic in deposing that a California judgment under appeal is *not* res judicata. In this he says that California law differs from the federal rule which also applies in a majority of states. He canvasses the line of judicial decisions which establish this principle, commencing with the earliest Supreme Court case *Woodbury v. Bowman*, 13 Cal. 634 (1859), and concluding with the latest statement of the rule in *Agarwal v. Johnson*, 25 Cal. 3d 932 (1979).

33 The effect of the judicial decisions is that an appeal suspended the operation of the judgment for all purposes, that in the California Courts it is not admissible in evidence in other proceedings and that an action that invokes it pending the resolution of the appeal is premature, not res judicata and cannot be pleaded by way of estoppel.

34 He further deposes that by 1893 the Legislature enacted the Code of Civil Procedure; s. 1049 confirmed the case law as follows:

> An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

He further deposes and concludes:

> That section which confirmed the law as expressed in earlier cases, is now the statutory basis for the California rule that a judgment is not *res judicata* until it is decided on appeal or until the time for appeal has expired.
>
> . . . . .
>
> In sum, exhaustive research of California law on the subject gives one no reason to doubt the continued validity of the rule first stated in *Woodbury v. Bowman* 128 years ago: a California judgment is not *res judicata* while an appeal is pending.

35 As to the third question, on the basis of authorities cited, he deposes that from the very earliest days of California jurisprudence default judgments are as appealable as any other judgment, "A judgment arising from default and under appeal is therefore no more final for *res judicata* purposes than a judgment after a contested trial."

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36 For completeness Mr. Kaus adds that if the res judicata effect of a judgment rendered by a federal Court or a Court of a sister state is called in question before a California Court, the California Court will apply the federal rule or that of the sister state even if it differs from the California rule. Conversely, in like circumstances a federal Court will apply the California rule.

37 The plaintiffs' expert, Roderick A McLeod, is an attorney admitted to practice before the Bars of the Supreme Court of the State of California and various lower trial and intermediate appellate Courts. He was called to the Bar in 1982 and is at present associated with the firm of Brobeck, Phleger & Harrison, attorneys for the plaintiffs in the Greenjeans actions. No objection was taken to his qualifications or status. I admit his expert evidence.

38 Mr. McLeod in his affidavit addresses the second question in Judge Kaus' affidavit respecting the res judicata effect of the California judgment herein and the provisions of California law that are material to issues raised in the motions before me.

39 He deposes that the summaries of the authorities set out in Mr. Kaus' affidavit are essentially correct; he says however that Mr. Kaus' affidavit does not address the right to enforce money judgments pending appeal or the rights that the Greenjeans parties once had to have the trial Court re-hear the issues in the actions or to have the trial Court amend the judgment now under appeal.

40 First he deposes that by reason of s. 917.1 of the California Code of Civil Procedure at all material times and at present, the judgment is fully enforceable. Section 917.1 provides in part:

> (a) The perfecting of an appeal shall not stay the enforcement of the judgment or order in the trial court if the judgment or order is for money or directs the payment of money ...

41 Second he deposes that, notwithstanding the authorities cited by Mr. Kaus, the California judgments are final in the sense that:

> (a) the trial court no longer has any jurisdiction to re-hear or otherwise deal with the merits of the issues raised in the California actions; and
>
> (b) the Greenjeans parties failed to invoke the jurisdiction of the trial court to re-hear or otherwise deal with those issues during the limited period of time that such jurisdiction existed.

42 He then summarizes the remedies that the Greenjeans parties could have attempted to invoke. I need not elaborate except to say that provision is made for the granting of a new trial, or to vary or correct the judgment, or to relieve a party from a judgment obtained through his mistake, inadvertence or excusable neglect, or to modify, amend or revoke the judgment on the grounds of alleged differences in the state of facts. These remedies are subject to limitation periods or other conditions which now place the Greenjeans parties beyond their availability, no attempt having been made to invoke them, but instead they have elected to file their appeals.

43 Moreover, by s. 916 of the Code the perfecting of the appeal stays proceedings in the trial Court upon the judgment appealed from upon the matters embraced therein or affected by it including enforcement. An exception is found in s. 917.1 which provides that the perfecting of the appeal *does not stay enforcement* of the judgment in the trial Court if it is a judgment for money or for the payment of money, unless an undertaking is given by the defendant to pay double the amount of the judgment or provide a bond by a surety insurer for 1-1/2 times the amount of the judgment. (It is a common ground that the Greenjeans parties have given neither an undertaking nor an appeal bond and that under California law the judgment is at present enforceable although otherwise stayed. It is also common ground as is asserted in the affidavits of Franklin Brockway Gowdy that the Greenjeans parties applied to the Court of Appeal for a writ of supersedeas and a stay of enforcement which was denied on October 17, 1986.)

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44 In summary, under the law of California the trial Court no longer has jurisdiction to re-open the judgment; enforcement of the judgment may however proceed because no undertaking or appeal bond has been provided by the defendants and the Court of Appeal has refused a writ of supersedeas and a stay.

45 Accepting the evidence of Mr. Kaus, (although I am invited by Mr. Kellock to explore certain chinks in his armour) I find the law of California to be as Mr. Kaus states it, with which Mr. McLeod does not disagree in principle; that the judgments in the three actions here concerned are not final, conclusive or res judicata while the appeals are pending; they are however at present enforceable.

46 That however does not end the matter because in the final analysis resort must be had to the state of the law of Ontario which in my opinion reflects a somewhat different principle.

47 The starting point is the leading case in England to which I have already referred in the decision of the House of Lords in *Nouvion v. Freeman* , supra, which ever since it was decided in 1889 has been applied both in England and in Canada. The principle there applied is as I have said that a foreign money judgment, to be enforced by action, must be a judgment of a Court of competent jurisdiction that is final and conclusive and is res judicata between the parties. No submission is made that the California Court is not a Court of competent jurisdiction or that the parties are not the same. The defendants' position in attacking the Ontario action is simply that it is not final and res judicata according to the law of California.

48 In *Nouvion* the plaintiffs obtained a judgment in the Spanish Courts for recovery of the balance of the purchase price of certain mining property. They sought to enforce the judgment by action in England. The statement of defence pleaded, inter alia, that the Spanish judgment was not final so as to sustain the action to enforce it, and a trial of an issue was directed on this point, which was heard by North J. The evidence was that the Spanish judgment was a "remate" or executive judgment of a summary nature and was in law final unless reversed on appeal; it was such however that the unsuccessful party might take further proceedings in the same Court, directed to the adjudication of the same issues (called plenary proceedings) and resulting in a further judgment which rendered the "remate" proceedings inoperative. The remate judgment could however under Spanish law be enforced so long as an appeal or plenary proceedings were only pending.

49 North J. found that the plaintiffs could sustain their claim as a judgment creditor upon the remate judgment. The Court of Appeal reversed this decision and held the remate judgment to be not final and conclusive; the House of Lords affirmed the decision of the Court of Appeal, holding that as the remate judgment did not finally and conclusively establish the existence of a debt no action could be brought upon it in England.

50 Lord Herschell, in the passage I have already cited in part, said at pp. 9-10:

> My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt.
>
> The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court

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be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the Courts of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation.

51 Lord Watson wrote to a similar effect at p. 13:

... In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal.

52 The decision of the House of Lords, in determining the finality of the foreign money judgment for the purpose of sustaining an action by the judgment creditor in England to recover the judgment debt, focuses on the finality of the judgment in the sense that the Court pronouncing it has no further jurisdiction to re-hear the issues or to vary or rescind the judgment. Where the Court that pronounced it has ceased to have such jurisdiction, the judgment is final for this purpose in the concept of English law. The existence of a pending appeal does not destroy the finality of the judgment so long as it stands unreversed in the Court of Appeal. The plaintiff need only show that the action has moved beyond the reach of the foreign Court that pronounced it.

53 The irrelevancy of the pending appeal in determining finality was also emphasized in the earlier decision in *Scott v. Pilkington* (1862), 2 B. & S. 11, 121 E.R. 978 . The protection of the Court and the judgment debtor against abuse of process lies in a stay of execution pending the final outcome of the appeal. And see *Colt Industries Inc. v. Sarlie (No. 2)*, [1966] 3 All E.R. 85 (C.A.) .

54 The principle in *Nouvion v. Freeman* as to what constitutes a final judgment for the purposes of founding an action for its enforcement by the judgment creditor has been applied in Ontario.

55 In *Eastern Trust Co. v. MacKenzie Mann & Co.* (1916), 10 O.W.N. 445 (Ont. H.C.) , Kelly J. in respect of the enforcement of a money judgment recovered in the Supreme Court of Nova Scotia applied the test that the Nova Scotia Court had no power to set aside or vary it; it was thus final and the proper subject of an action in Ontario notwithstanding that an appeal had been taken.

56 In *Maguire v. Maguire* (1921), 50 O.L.R. 100, 64 D.L.R. 180 (Ont. C.A.) , the Court entertained an action to enforce a judgment for alimony pronounced in a Minnesota Court. Mulock C.J. Ex., the trial Judge, found that under the law of Minnesota the Court that made the order for alimony retained jurisdiction to vary it. Relying on *Nouvion v. Freeman* he invoked the test in that decision (p. 101):

Thus it appears that the District Court is still seised of the case to the extent that it may revise its order or decree,

. . . . .

When it is sought to enforce in this Court a foreign judgment ordering payment of a sum of money, it must appear that the foreign Court has finally established the existence of the debt in question so as to make it res judicata. ...

The action was therefore dismissed although all that was sought in the Ontario action was *arrears* of alimony.

57 The appeal to the Appellate Division was dismissed on this point (Meredith C.J.C.P. dissenting). Middleton J.A. stated the law as follows, at p. 103:

The fundamental principle is most clearly stated in *Williams v. Jones* (1845), 13 M. & W. 628 , 633: —

Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained.

This is explained by what is said in *Nouvion v. Freeman*, 15 App. Cas 1 , at p. 9: —

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> In order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it ... then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt.

> It is there pointed out that the existence of a right of appeal has never been deemed to prevent a judgment from being regarded as final and conclusive for the purpose under discussion. The question is whether the judgment is final and conclusive so far as the tribunal which pronounced it is concerned. Can it thereafter ordain that there is no obligation and no debt? If it can, the element of finality is lacking.

> It will also be observed that there is no distinction between an action upon a foreign and upon a domestic judgment. A lack of finality is fatal in either case.

He also comments upon the "full faith and credit" clause in the United States Constitution, and the varying laws of the several states, with respect to *alimony judgments* . For example, in New York the settled doctrine is that no power existed to modify the judgment so as to affect *past due* instalments. In some states the matter is governed by statute. A judgment may also in fact not purport to be final by its terms, because there is power to vary it according to ongoing change in circumstances. He also referred to the situation in Ireland and in England. In the result the Court upheld the trial decision with respect to the alimony payments in view of the Minnesota statute law which expressly provided that the Court that made the order or decree for alimony retained power to revise and alter the order or decree respecting the amount and payment thereof. The matter of costs was different and the judgment to this extent was enforced in the Ontario action.

58 I add that the Court considered two earlier Ontario decisions since *Nouvion* in *Aldrich v. Aldrich* (1893), 24 O.R. 124 (Ont. C.A.) , and *Lee v. Lee* (1895), 27 O.R. 193 (Ont. H.C.) , to the same effect. Meredith C.J.C.P. in a strong dissent distinguished *Nouvion* and as a matter of justice would have enforced the Minnesota judgment for both arrears and costs.

59 In *Davis v. Williams*, [1938] O.W.N. 504 (Ont. Master) , Master Barlow dismissed a motion to strike out the special endorsement on the writ of summons in an action on a money judgment obtained in the Superior Court of California. It was argued that an appeal was pending and not yet heard, and that there had been no final adjudication. On the material it appeared that no stay of execution had been obtained and that the plaintiff could levy execution notwithstanding the pending appeal. The Master, applying *Nouvion v. Freeman* , sustained the plaintiffs' action in Ontario as on a final judgment of the California Court. He cited the judgment of Middleton J.A. in *Maguire v. Maguire* , supra, at p. 103, to the effect that, in *Nouvion v. Freeman* , "It is there pointed out that the existence of a right of appeal has never been deemed to prevent a judgment from being regarded as final and conclusive for the purpose under discussion."

60 *McIntosh v. McIntosh*, [1942] O.R. 574, [1942] 4 D.L.R. 70 (Ont. C.A.) , commenced the enforcement of a Québec judgment by action in Ontario. The judgment was for alimony and was expressed to be provisional and reserved the right of the plaintiff to apply for a reduction of the monthly allowance. The action in Ontario was to recover the arrears, under the provisional (i.e., interim) order, the Québec action not having as yet been tried. Hogg J. gave judgment for the plaintiff. The Court of Appeal ordered a new trial.

61 The judgment of the Court of Appeal was delivered by Robertson C.J.O. who stated the principle at p. 579:

> It is disputed that an action upon a foreign judgment to recover money that it orders to be paid, will not lie in this Province if the foreign Court whose judgment is sued upon retains power to vary its judgment in respect of the sums sued for. Such a judgment is not strictly a final judgment. To establish that the foreign judgment is final, 'it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties.' *Nouvion v. Freeman et al.* (1889), 15 App. Cas. 1 at p. 9, per Lord Herschell.

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He said that the question whether the provisional nature of the Québec order constituted a debt which could be recovered by the creditor was a matter to be determined by Québec law. In this respect the evidence as to that law was unsatisfactory, partly because the expert witness cited no authorities to support his opinion.

62 The principle again came before the Ontario Court of Appeal in *Ashley v. Gladdon*, [1954] O.W.N. 558, [1954] 4 D.L.R. 848 (Ont. C.A.) . The headnote reads in part:

> ... To be enforceable, however, a foreign judgment (or the part thereof sought to be enforced) must, amongst other requirements, be final and conclusive of the matter in issue so as to make it *res judicata* between the parties, and if it does not comply with this condition it is unnecessary to consider whether it is otherwise enforceable.

This again concerned a foreign judgment for child maintenance pronounced in a divorce action by a Court in Vermont, and the action in Ontario was to recover arrears under that judgment. Danis J. tried the action. The plaintiff, in reliance on the Vermont judgment, argued that the defendant husband having attorned to the jurisdiction of the Vermont Court, was estopped from denying its jurisdiction, which was disputed because the mother and child were domiciled and resided in Vermont. Danis J. dismissed the action, relying on the passage in Lord Herschell's judgment in *Nouvion* above. He found that under the law of Vermont, the Court that rendered the judgment, "could change, vary or modify the order of maintenance", that is it could vary the amount past due and therefore it was not res judicata between the parties. The Court of Appeal affirmed the decision on the ground that the Vermont judgment was not "final".

63 In *Bank of Bermuda Ltd. v. Stutz*, [1965] 2 O.R. 121 (Ont. H.C.) , Wilson J. refused leave to appeal from an order of Jessup J. who dismissed an application to dismiss an action on a foreign money judgment. The judgment arose out of proceedings in the Supreme Court of Bermuda. The defendant failed to comply with an order of the Court to produce documents as a result of which his defence was struck out and judgment was pronounced against him for the payment of money on a contract of guarantee.

64 The motion before Jessup J. was to strike out the special endorsement as disclosing no reasonable cause of action under R. 126. He refused to do so for the reason given by Hunter C.J.B.C. in *Boyle v. Victoria Yukon Trading Co.* (1902), 9 B.C.R. 213 (B.C. C.A.) , as well as *Nouvion v. Freeman* . In the *Boyle* case the plaintiff's action was on a judgment of the Yukon Territorial Court which went by default. The trial Judge gave judgment for the plaintiff who appealed. One of the grounds for the appeal advanced by Mr. Duff was that a judgment obtained by default is not enforceable as a foreign judgment. The Court of Appeal disagreed. Hunter C.J. considered the decision in *Nouvion v. Freeman* not to support Mr. Duff's proposition and cited the language of Lord Herschell as to the test to which I have alluded. While the default judgment *might have been set aside* by the Court that made it, Hunter C.J. extracted the principle that it remains final and conclusive until it is set aside, and is sufficient to found an action for default in British Columbia. This decision was the basis of the decision of Jessup J. referred to. On a motion for leave to appeal his order, Wilson J. on this point adopted the test of Lord Herschell and applied it to the default judgment, refusing leave to appeal.

65 In *Lear v. Lear*, [1973] 3 O.R. 935, 13 R.F.L. 27, 38 D.L.R. (3d) 655 (Ont. H.C.) , Lacourciére J. tried an action in Ontario to enforce arrears of alimony under a New Jersey decree of divorce. He dismissed the action. In so doing he stated the principle thus at p. 937, in characteristically learned and thorough reasons:

> To be enforceable in Ontario, the judgment *nisi* of the Supreme Court of New Jersey must be final and conclusive. The leading case is *Nouvion v. Freeman* (1889), 15 App. Cas. 1 , wherein the House of Lords decided that a judgment obtained in Spain, in summary or 'executive' proceedings was not enforceable in the English Courts despite the fact that such judgment was final in those proceedings unless reversed or varied on appeal, because the unsuccessful party could then take 'plenary' proceedings in respect of the same matter, in which proceedings the whole merits of the matter were investigated and the earlier judgment could not be set up as *res judicata* . The law concerning the enforceability of foreign judgments is stated in *Nouvion v. Freeman* by Lord Herschell at pp. 8-9 as follows:

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> ... a judgment, to come within the terms of the law as properly laid down, must be a judgment which results from an adjudication of a Court of competent jurisdiction, such judgment being final and conclusive ....
>
> My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contests being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt.

> Lord Watson, at p. 13, stated: '... no decision has been cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it'.
>
> These statements are regarded as establishing that, to be final, the judgment must be treated by the foreign Court as *res judicata* between the parties, and that the possibility of variation or abrogation of the judgment by the Court which issued it, is fatal to its enforceability.

66 He added that *Nouvion v. Freeman* has been consistently followed in Ontario and other Canadian provinces, notwithstanding the strong dissent of Meredith C.J.C.P. in *Maguire v. Maguire* , and he referred to a number of subsequent decisions of Ontario Courts. He then summarized as follows, at p. 941:

> It seems to me therefore that the cases support the following propositions:
>
> (1) Ontario Courts will enforce collection of arrears of alimony under a foreign judgment in respect of which the foreign tribunal has no powers of variation;
>
> (2) arrears under a foreign alimony judgment in respect of which foreign tribunal has jurisdiction to vary arrears will not be enforced in Ontario, and
>
> (3) the onus is on the plaintiff to establish as a matter of fact — by a preponderance of acceptable expert evidence — the effect of the foreign law, in the present case as to the finality and conclusiveness of the alimony award: *McIntosh v. McIntosh*, [1924] N.Z.L.R. Supp. 132 ; *Beatty v. Beatty*, [1924] 1 K.B. 807 .

67 He found the expert evidence of the New Jersey attorney to be unsatisfactory because he cited opinion only with no authorities in support. On consent he referred directly to case law in New Jersey and concluded at p. 943:

> Thus it would seem that a judgment for alimony granted by the Courts of New Jersey is not a final decree, but may be modified at any time by the Court with retroactive effect, and that execution does not issue for arrears as of right, but only with the leave of Chancery.
>
> In *Madden v. Madden* (1945), 136 N.J.Eq. 132 at p. 136, Herr, A.M., of the Court of Errors and Appeals, stated: 'In this state arrearages of alimony do not become vested in the former wife or take on the attributes of a judgment for the payment of a fixed sum until this court so orders. No such order was made in this case.'
>
> . . . . .
>
> Having been referred to this case law by consent, and in view of the wording of the attorney's affidavit, I am clearly of opinion that the plaintiff has failed to satisfy the onus upon her of establishing the finality or conclusiveness of the New Jersey decree: the foreign expert's evidence does not meet the minimum requirements set out by the Court of Appeal in the *McIntosh* case, *supra* , and will not be accepted for the purpose of laying a foundation for this Court's jurisdiction under *Nouvion v. Freeman* (1889), 15 App. Cas. 1 . In the absence of acceptable expert evidence,

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> the law of New Jersey must be presumed to be similar to the law of Ontario, wherein judgments for alimony and maintenance, although final in the sense that leave to appeal would not be required (*McCart v. McCart and Adams*, [1946] O.R. 729, [1946] 4 D.L.R. 568) are nevertheless not final for the purpose of affording a cause of action outside the jurisdiction, ...

68 Finally, in *Pan American World Airways Inc. v. Varghese* (1984), 45 O.R. (2d) 645, 7 D.L.R. (4th) 499 (Ont. H.C.) , a recent judgment of this Court, Gray J. followed the *Nouvion* principle, citing at length the judgments of Lord Herschell and Lord Watson as to the test for finality of the judgment. The headnote sets out the point as follows:

> A judgment obtained in a foreign court is final although there is a right of appeal from such judgment. Similarly, where the plaintiff has obtained a final judgment and there are parallel proceedings in which the plaintiff is a defendant and a possibility of a retrial of such proceedings, there is no basis upon which to refuse to enforce the plaintiff's judgment as a final judgment.

69 At this point I conclude that the law of Ontario defining the conditions upon which a foreign judgment for the payment of money to the plaintiffs may found an action to recover the judgment debt, has adopted the rule in *Nouvion v. Freeman* , and has applied it to both judgments adjudicated upon the merits and to judgments by default. Under the law of Ontario the question to be asked is: What are the characteristics of the foreign judgment that enable the judgment debt to be recovered by action in Ontario? The answer is a judgment that, under the laws of the jurisdiction where it was made, is final between the parties in the sense that under the foreign law the Court that made it has no jurisdiction or residual power to abrogate or vary it or to retry the issue that it has decided. The fact that an appeal is pending which may result in its being rescinded or varied does not deprive the judgment of its finality in the sense mentioned.

70 It is also said that as part of the required test or characteristic of the judgment it must also be res judicata between the parties. That doctrine is also an aspect of finality — indeed Ms. Low, of counsel for the defendants, submits that both aspects must be present to found the action in Ontario. The point is troublesome because to embellish "finality" (in the sense of the judgment having ceased to be within the reach of the Court that pronounced it) by adding the aspect of res judicata imports a second principle — that of estoppel. In a different context this was discussed at some length in *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853, [1966] 2 All E.R. 536 (H.L.) .

71 The law of California as I find, unlike most other states, regards the judgment in this and other actions as not final or res judicata. The perfection of the appeal deprives the trial Court of further jurisdiction which in any event it lacks, because further remedies in that Court originally available are now beyond the reach of the defendants by lapse of time and other conditions. In any event, also under the Code of Civil Procedure, the proceedings in the trial Court are stayed by the appeal.

72 The matter has therefore gone beyond the reach of the trial Court except for enforcement. By reason of ss. 916 and 917.1 of the Code of Civil Procedure which applies to a money judgment, enforcement of the judgment is not stayed by the appeal unless the defendants give an undertaking or post an appeal bond as described; or the Court of Appeal has issued a writ of supersedeas and a stay. None of these conditions has occurred.

73 There is here a certain anomaly — the action by California statute law is still "pending" and in that sense is neither final nor res judicata; yet it is a final judgment for purposes of appeal because it is not interlocutory, there being no further judicial action required by the trial Court to determine the rights of the parties. It is also final in the sense that it is at present enforceable in California, by statute.

74 In my opinion, notwithstanding the statutory rule that while the appeal is pending the action is also deemed to be pending, in the eyes of Ontario law it is final because it meets the test that the Court that made it no longer has jurisdiction to abrogate or vary it, and moreover it is enforceable in California as a judgment debt.

75 The question remaining therefore is whether the aspect that it is not regarded as res judicata under California law bars the Ontario action. In my opinion it does not. A close reading of the language of Lord Herschell in *Nouvion v.*

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Freeman , suggests that he used the expression res judicata with respect to further proceedings in the same Court, and the reasons of the other Law Lords are to the same effect.

76 It must be appreciated that the House of Lords in *Nouvion* was dealing with a unique jurisdictional situation in which the same Court that gave judgment in the remate (executive) action was empowered in future again to try and give judgment on the same issues in later (plenary) proceedings. It was in that context that the idea of res judicata was coupled with finality. The concept of estoppel in collateral proceedings was not addressed except with respect to the same Court. Indeed the proceedings, so far as Ontario enforcement is concerned, cannot conceptually be res judicata until all grounds of appeal from the judgment have been concluded and adjudicated. The ordering of a new trial by the appellate Courts for example would reopen the issues in the original Court. But the Anglo-Canadian case law consistently holds that the pendency of an appeal does not alter the finality of the judgment pronounced. The possibility that on appeal the judgment may be vacated or varied is recognized by the power of the Ontario Court to stay execution pending the outcome of the appeal. This latter rule is part of Ontario law and is of importance in the whole concept of enforcement of foreign money judgments by action in Ontario to recover the judgment debt. It is self-evident that, from a practical standpoint, any judgment for the payment of money is not "final" in the sense that if an appeal is pending, it may be varied or set aside by the appellate Courts. Anglo-Canadian law nevertheless treats it as final, for purposes of enforcement by action, of the debt or money judgment. Recognition of the defendants' potential success on appeal which may vacate or vary the judgment, is a factor that the Ontario Court will take into account in the final disposition of the Ontario action at the conclusion of the trial, if the appeal in the foreign Courts has not been determined, to protect the rights of the defendant-appellant by staying execution of the judgment until the outcome of the appeal is known; or alternatively if the appeal succeeds, to conform to the final disposition in the foreign appellate Court. Prejudice to a judgment debtor who is ultimately successful in his appeal is a matter to be compensated in costs.

77 In my opinion, that is the concept in Anglo-Canadian law of the doctrine of res judicata as contemplated by the decision in *Nouvion* , i.e., that the issues decided by the trial Court may not, in accordance with the law of the foreign Court, be reviewed or reopened, and the judgment abrogated or varied by *that* Court, unless by order of the Court of Appeal. The judicial decisions canvassed by Mr. Kaus in his evidence, together with provisions of the Code of Civil Procedure, reflect the law of California to the effect that the action continues to be pending and is not res judicata until the appeal is determined. That philosophy as reflected in his evidence appears to me to refer to the principle that the judgment under appeal cannot be invoked in collateral proceedings in another Court by way of estoppel or bar to the proceedings in the other Court. But that is not the situation in the case at Bar, which is simply an action to enforce the judgment debt, which according to the expert evidence can also be enforced at present in California. The combination of the judgment now being beyond the reach of the Court that made it, together with the preservation of its enforceability under California law, in my opinion gives it characteristics sufficient to make it eligible to found the action in Ontario. I find nothing in this conclusion that does violence to the principle of deference to the law of California.

78 I recapitulate what I believe to be the proper principles applicable in this jurisdiction:

79 First — the proper criteria for determining whether an action will lie on a foreign money judgment are whether or not the judgment may be abrogated or varied, or the issues re-heard, by the Court that pronounced it; whether the judgment represents an adjudication on the rights of the parties; and whether it is conclusive as to the amounts payable. It is not necessary for the plaintiff to show that the judgment cannot be varied or re-tried by any other means — including on appeal.

80 Second — a foreign judgment that has gone by default is no less final or enforceable than a judgment rendered after a full trial on the merits; indeed according to the law introduced into Ontario in *Bank of Bermuda v. Stutz* , supra, even though the judgment can be varied, it is enforceable by action until it is set aside.

81 Third — an action may be commenced in Ontario to enforce a foreign money judgment that is final in the above sense, notwithstanding that it is under appeal where there is no stay of enforcement so that under the foreign law it may be enforced notwithstanding pendency of an appeal. The preservation of enforceability of the judgment in the foreign

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jurisdiction, notwithstanding a pending appeal, is an additional important and relevant, but not essential, factor. If the judgment may be enforced in the foreign jurisdiction there is no sound reason of justice why it should not be enforced in Ontario; to do so in this jurisdiction requires the judgment creditor to proceed by action, whatever may be his procedural recourse in the foreign country.

82 Fourth — the safeguard of the rights of a judgment debtor in such circumstances is to stay execution of the judgment obtained in the Ontario action until the outcome of the appellate proceedings is finally determined.

83 This is sufficient to dispose of the motion before me. This action 6046/85 is proper and ought to proceed to trial in the ordinary course with due regard to the outcome of the appeal. The order of Reid J. at present safeguards the rights of the defendants by staying execution, if judgment is obtained for the debt, until the defendants' adjourned motion is dealt with by the Court. The foundation for the action came into existence when the California Superior Court ceased to have jurisdiction to rescind, vary or re-open the judgment.

84 In view of my decision on the substantive issue, it is unnecessary for me to deal with the procedural objections made by the plaintiffs' counsel. As to the question of law, the answer is no, by reason of new r. 14.01(4), which provides:

> 14.01(4) A party may rely on a fact that occurs after the commencement of a proceeding, even though the fact gives rise to a new claim or defence, and, if necessary, may move to amend an originating process or pleading to allege the fact.

85 The motion in this action and in actions 6048/85 and 6049/85 are therefore dismissed. Costs may now be spoken to as agreed, in writing if counsel prefer.

Motion dismissed.

Footnotes

* The defendants appealed to the Court of Appeal. The plaintiffs successfully moved to quash the appeal on April 11, 1988, before Brooke, Blair and McKinlay JJ.A.

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TAB 14

1993 CarswellOnt 505
Ontario Court of Justice (General Division)

Arrowmaster Inc. v. Unique Forming Ltd.

1993 CarswellOnt 505, [1993] O.J. No. 2737, 17 O.R. (3d) 407,
29 C.P.C. (3d) 65, 43 A.C.W.S. (3d) 1082, 4 W.D.C.P. (2d) 607

ARROWMASTER INCORPORATED v. UNIQUE FORMING LIMITED and ANTONIO SABATO

MacPherson J.

Heard: October 14, 1993
Judgment: November 18, 1993
Docket: Doc. 92-CU-63679

Counsel: *Lesli Bisgould*, for moving party (plaintiff).
E.L. Nakonechny, for responding parties (defendants).

Subject: Insolvency; Civil Practice and Procedure; International

Motion by plaintiffs for summary judgment in action to enforce foreign judgment.

***MacPherson J.*:**

1 Two important issues are raised by this motion: first, whether the principles enunciated by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, for the interprovincial enforcement of court orders apply in an international enforcement context; and secondly, whether a stay of execution should be granted with respect to a foreign order because the judgment of the foreign court has been appealed from in a timely fashion and the results of that appeal are imminent.

2 The facts giving rise to these two issues are quite straightforward. The moving party plaintiff, Arrowmaster Inc., is a corporation duly incorporated under the laws of the State of Illinois. At the material time, it was engaged in the manufacture and sale of industrial concrete vibrators, machines used in the construction industry. The defendant, Unique Forming Ltd., is a corporation duly incorporated under the laws of the Province of Ontario. It is engaged in the manufacture and sale of concrete products used in construction and manufacturing. The defendant Antonio Sabato is the owner and operator of Unique Forming Ltd.

3 Arrowmaster and Unique entered into a contract for the purchase of Arrowmaster's business and certain concrete vibrator products. A dispute arose and Arrowmaster initiated a claim for breach of contract in the United States District Court, Central Division of Illinois. The defendants attorned to the jurisdiction of that court and defended the action. The trial lasted three days and included two days of evidence and one day of legal argument. The District Court's judgment, dated September 21, 1992, was in favour of Arrowmaster "in the amount of $93,210.20, plus interest at the rate of $25.53 per day from November 20, 1989, plus costs and attorneys fee". On December 18, 1992, the District Court amended its judgment by assigning specific amounts to the attorneys fee and costs items in its earlier judgment.

4 Unique decided to appeal the District Court's decision and filed a notice of appeal on October 20, 1992. The appeal was argued in the United States Appellate Court in Chicago on September 15, 1993. The court reserved its decision. There is some evidence (discussed below) that the decision of the court would "normally" be made "four to six months following oral argument".

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5 Although there was, after October 20, 1992, an appeal pending in Illinois, Arrowmaster decided to take steps to enforce the Illinois judgment in Ontario where the defendants have their assets. On December 31, 1992 Arrowmaster filed a statement of claim seeking to recover the amounts it had been awarded by the United States District Court in Illinois. On March 17, 1993 the defendants filed their statement of defence. Arrowmaster decided to proceed by way of a motion or summary judgment under R.20 of the *Rules of Civil Procedure*. The motion was filed on August 23, 1993 and both parties prepared the appropriate motion records and facta. The motion was heard on October 14, 1993, with the defendants taking two lines of defence against the motion — first, that the motion for summary judgment be stayed; secondly, and alternatively, that if the motion were granted then its enforcement be stayed. The ground for both of these lines of defence is the same — the completed argument before, and pending decision of, the United States Appellate Court.

6 Against the background of this chronology, two issues must be addressed:

(1) Is Arrowmaster entitled to summary judgment now?

(2) If it is, should the enforcement of the judgment be stayed until the United States Appellate Court has rendered its decision?

A. Summary Judgment

7 A plaintiff is entitled to summary judgment under R.20 if there is no genuine issue for trial.

8 The role of R.20 and the meaning of 'genuine issue' were considered by the Ontario Court of Appeal in *Irving Ungerman Ltd. v. Galanis* (1991), 83 D.L.R. (4th) 734. Morden J.A., speaking for the court, stated, at pp. 739 and 740:

> The summary judgment rule, properly applied, is one of several rules which enables the policy expressed in rule 1.04(1) to be given effect. It reads:
>
> > 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> A litigant's "day in court", in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense. Rule 20 exists as a mechanism for avoiding these failures of procedural justice.
>
> . . . . .
>
> It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to *satisfy* the court that the requirements of the rule have been met. (emphasis in original)

9 Applying these principles to the present motion, the question becomes: is a trial required to determine whether the judgment of the United States District Court should be enforced in Ontario?

10 The leading case dealing with the enforcement of 'foreign' judgments is the decision of the Supreme Court of Canada in *Morguard Investments*, supra. The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the

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necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:

> Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected*. (emphasis added)

11 *Morguard Investments* was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule — there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process.

12 In my view, there is some useful Ontario case law on the question of the enforcement in Ontario of judgments obtained in the courts in foreign countries, especially the United States. Although the relevant decisions predate *Morguard Investments*, their doctrinal underpinnings are entirely consistent with that decision and they provide a valuable elaboration of some of the specific factors that should animate the consideration of an enforcement question.

13 A particularly important case, in my view, is *Four Embarcadero Center Venture v. Kalen* (1988), 65 O.R. (2d) 551 (H.C.), a case dealing with the enforceability of a California court order in Ontario even though the California decision was being appealed. Henry J. enunciated a two-fold test for the enforcement of such orders in Ontario. The first component of the test related to the finality of the judgment in the foreign jurisdiction. He said, at p. 563:

> The foreign money judgment must be final and *res judicata* in the foreign jurisdiction. This occurs when the judgment of the foreign court is final in the sense that the court that made it no longer has the power to rescind or vary it; *this test is not altered by reason that the judgment is under appeal*. (emphasis added)

See, also, J.G. Castel, *Canadian Conflict of Laws* (2nd ed., 1986), at pp. 162-3.

14 In the present case, the judgment and order of the United States District Court are final. In its original and amended orders (September 21 and December 18, 1992) that court has dealt with all the matters before it. Its decision has been appealed and, indeed, the appeal has been heard. Put simply, the litigation has completely and irrevocably passed out of the hands of the District Court.

15 The second component of Henry J.'s test in *Four Embarcadero v. Kalen* is what he calls 'conclusiveness'. He states, at p. 563:

> The foreign money judgment must also pass the test of conclusiveness in the sense it is one that may not at common law be impeached in an action to enforce it in Ontario.

After a full discussion, Henry J. suggests five factors that assist in determining the conclusiveness question. He summarizes them in this passage, at p. 571:

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> My understanding of the common law position is that the general rule as I have stated it is subject to the exceptions that a foreign judgment made by a court having jurisdiction in the international sense may be impeached or defended in Ontario on the grounds:
>
> > (a) the court actually had no jurisdiction over the subject-matter and the parties in which case its judgment is a nullity ...;
> >
> > (b) lack of identity of the defendant, that is the defendant was not a party to the foreign suit;
> >
> > (c) the judgment was procured by a fraud on the court;
> >
> > (d) a failure of natural justice which relates to procedural matters — the mode by which the judgment was reached; and
> >
> > (e) to enforce the judgment would be contrary to public policy in Ontario.

16 None of these grounds is present in this case. The United States District Court had jurisdiction over both the subject matter of the litigation (the contract) and the parties. The defendants on this motion are the same defendants who attorned to the jurisdiction of the Illinois court, defended the action on the merits, and lost. There is no hint of a fraudulently obtained judgment nor of a hearing in Illinois marred by procedural irregularities. Finally, it is certainly not contrary to the public policy of Ontario to have relatively simple commercial contracts enforced by the courts when they are breached.

17 In conclusion, the plaintiff Arrowmaster has a stronger case here for summary judgment than the plaintiffs in both *Morguard Investments* and *Four Embarcadero v. Kalen*. In those cases the plaintiffs sought the enforcement of default judgments obtained in 'foreign' (Alberta and California) jurisdictions. Here the defendants attorned to the jurisdiction of the Illinois court by making a full defence on the merits (including a counterclaim) and by participating in a three-day trial. Moreover, the judgment of the Illinois court is a full judgment dealing with all of the relevant issues. In those circumstances, the Illinois judgment is worthy of enforcement in Ontario. In *Morguard Investments* La Forest J. said, at p. 1096:

> In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.

The state line in *Morguard Investments* was the Alberta-British Columbia. Here the nexus would be Illinois and Ontario. In my view, nothing turns on this difference. The underlying philosophy of *Morguard Investments* and the safeguards enunciated by Henry J. in *Embarcadero v. Kalen*, taken together, provide the appropriate framework for considering whether true 'foreign' (i.e. non-Canadian) court orders should be enforced in Ontario. The Illinois court order at issue in this case should be enforced. Moreover, in my view, there is no triable issue with respect to its enforcement in Ontario. Hence Arrowmaster is entitled to an order for summary judgment under R. 20.

B. Stay of Execution

18 The defendants advance an alternative argument, namely that if an order for summary judgment is made, then execution on the order should be stayed. The defendants advance a two-pronged factual basis for this alternative relief.

19 The first prong relates to the progress of the litigation in Illinois. The defendants cite the following chronology: September 21, 1992 — judgment of the United States District Court; October 20, 1992 — defendants file notice of appeal; September 15, 1993 — appeal actually heard by the United Stated Appellate Court and judgment reserved. To this chronology the defendants would add an assertion that the final decision from this appellate court is imminent, probably 4-6 months after the hearing. The basis for this assertion is a letter dated October 1, 1993 from Unique's Illinois attorney to its Ontario lawyer which states in part: "Per your recent request, I checked with the United States Court of

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Appeal this date and was advised that decisions are normally made 4-6 months following oral argument. In this case, oral arguments were held on September 15, 1993". The defendants contend that this chronology establishes that they have prosecuted their appeal vigorously and that the results of the appeal will be known soon. In these circumstances, assert the defendants, it is unnecessary and would be unfair to permit execution on the Illinois judgment now.

20 This assertion of unfairness flows into the second prong of the defendants' argument for a stay of execution. They say that execution on the Illinois judgment, in the face of a bona fides appeal of that decision to an Illinois Appellate Court, would create a substantial hardship for the defendants. The evidence in support of this claim is a single paragraph in the affidavit of the defendant Antonio Sabato, the owner of Unique Forming Ltd:

> 11. If a summary judgment is granted in this matter at this stage and Arrowmaster is allowed to execute upon it, it will seriously prejudice the defendants in the event that the appeal is allowed and either the decision overturned and damages awarded to Unique, or alternatively a new trial is ordered. In that event, the damage occasioned to Unique as a result of any steps taken by Arrowmaster to enforce a judgment would be irreparable.

21 The general principles governing the granting of a stay of execution pending an appeal were set out by Middleton J. in *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1923), 55 O.L.R. 127 (C.A.), approved by *Talsky v. Talsky (No. 2)* (1973), 1 O.R. (2d) 148 (C.A.), at 153-4; *International Corona Resources Ltd. v. Lac Minerals Ltd.* (1987), 21 C.P.C. (2d) 260 (Ont. C.A.), at 261-2, and *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 49 C.P.C. (2d) 239 (Ont. Div. Ct.), at 243-4.

22 Middleton J. distinguished between the extreme case in which the refusal of a stay would render the appeal nugatory and the case in which one or both of the parties would suffer some loss if the stay was either granted or refused. There is no evidence in the present case that a refusal of a stay would render nugatory the defendants' appeal in Illinois. Hence we are in Middleton J.'s second category of case. In this category the test is, in his word, "the balance of convenience" (p. 132).

23 In the seventy years since *Battle Creek* various judges and courts in Ontario have suggested factors that will assist in applying the balance of convenience test. Two of the suggested factors are the bona fides of the appeal and the substance of the appeal, including some assessment of its merits. I am not persuaded that these are helpful factors, particularly in the context in which the stay of execution issue will usually arise, namely a motion for summary judgment. For a motions judge to look inside a commercial contract and try to interpret its terms, and then analyze it, even in a cursory fashion, under the law of a foreign jurisdiction is simply not realistic or, in my view, desirable.

24 A third factor suggested by the case law is, in the words of Goodman J.A. in *International Corona Resources* [*International Corona Resources Ltd. v. Lac Minerals Ltd.* (1986), 21 C.P.C. (2d) 252 (Ont. C.A.)], at p. 255, "the hardship to or the prejudice to be suffered by the respective parties if a stay be granted or refused". In my view, this factor is crucial in determining whether a stay should be granted. I would add to it one other particularly important factor, namely the chronology and conduct of the litigation in the foreign jurisdiction, especially with respect to the appeal component of the litigation.

25 Turning to the consideration and application of these two factors in the present case, there is little evidence of hardship or prejudice on either side. The defendants assert that they would suffer 'irreparable' harm if a stay is refused. Yet, there is nothing (e.g. financial records) beyond the bald assertion to support the assertion. And on the plaintiff's side there is no evidence at all about the importance of enforcing the Illinois judgment in Ontario *now*. The plaintiff simply relies on its rights arising out of the trial judgment in Illinois and says that it is entitled to receive the principal amount awarded in the judgment now, not just the principal amount and accumulated interest at some point in the future, even if that point is in the near future.

26 Both parties in argument attempted to paint a picture with the following ingredients — large judgment, small business, hard recessionary times. Based on these factors Arrowmaster said that it would suffer irreparable harm if it did not obtain the principal amount of the judgment now; relying on the same factors, the defendants said that they would

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suffer greatly if they had to pay on the judgment before the appeal decision was rendered. There was not, however, any evidence from either party to support its large judgment/small business/recession argument. Accordingly, in my view, the hardship or prejudice factor is about even in this case.

27 That leaves the chronology and process of litigation point. The plaintiff argues that the defendants are not serious about their appeal as evidenced by their failure to comply with the Illinois State *Rules of Civil Procedure* dealing with stays of judgment in Illinois. The basis for this argument is set out in paragraphs 9 and 10 of the affidavit of Terence Collier, a lawyer in the Ontario law firm representing the plaintiffs:

> 9. The defendants are now appealing this judgment. However, under Illinois State law, in order to stay collection proceedings on a judgment under appeal, the defendant must post a supersedeas bond in the amount of the judgment within 30 days of filing the appeal ...
>
> 10. I have been informed by Mr. Blackwood, solicitor for the plaintiff in Illinois, and verily believe, that to date the defendants have not posted the bond required to stay collection proceedings on the judgment. I have been further advised that without this bond the defendants cannot stop enforcement of the judgment. Given, that the defendants have not taken the appropriate steps to stay the enforcement of the action, I verily believe that it would be appropriate to seek the enforcement of the judgment in Ontario.

28 The legal basis for this argument is R. 62(*d*) of the Illinois State *Rules of Civil Procedure* which provides:

> 62(d) *Stay Upon Appeal*. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (*a*) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

29 The short answer to the plaintiff's argument on this point is that R. 62 deals with stays of execution *in Illinois*. Since, presumably, the defendants have no assets in Illinois it was unnecessary for them to give a supersedeas bond. A conclusion that, by inference or extension, R. 62 should be interpreted as laying down a procedural requirement for staying an execution on an Illinois court order in Illinois *and in foreign jurisdictions* would be, in my view, both outside the wording of R. 62 and contrary to the fundamental principle that laws are intended to operate within their territorial limits.

30 On the chronology point, the defendants' argument for a stay is based on the following factors — the defendants attorned to the jurisdiction of the Illinois trial court, they defended fully and fairly (e.g. without any delay) in that court, they appealed the decision promptly, the appeal has been heard, and a judgment from the appellate court is imminent. In these circumstances, say the defendants, it is appropriate to permit the Illinois litigation to come to a full and final conclusion before permitting execution on the defendants' assets in Ontario.

31 I find this argument persuasive. The case law makes it clear that a stay of execution pending a decision in an appeal is a matter of judicial discretion. In *Four Embarcadero Center Venture v. Mr. Greenjeans Corp.* (1988), 64 O.R. (2d) 746 (Ont. H.C.) Henry J. said, at pp. 765-6:

> The possibility that on appeal the judgment may be vacated or varied is recognized by the power of the Ontario Court to stay execution pending the outcome of the appeal.

And again, at p. 767:

> The safeguard of the rights of a judgment debtor in such circumstances is to stay execution of the judgment obtained in the Ontario action until the outcome of the appellate proceedings is finally determined.

And in *Four Embarcadero Center Venture v. Kalen* (1987), 59 O.R. (2d) 236 (H.C.) Reid J. said, at p. 238:

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> At that point [after judgment in Ontario is obtained], in the event the plaintiffs are successful and there is still some basis, such as the fact that the California appeals are still pending, respondents could apply to the trial judge for a stay of execution.

32 It is true that these statements in the two *Four Embarcadero* cases are obiter; the cases dealt with striking out statements of claim and staying proceedings, not staying executions. Nevertheless, it is, in my view, instructive that both judges could contemplate the possibility of a stay of execution even in a case where the behaviour of the respondents in California had been poor. In Reid J.'s words in *Kalen*, supra, at p. 237:

> The circumstances of this case are highly unusual. The Ontario proceedings follow protracted proceedings in California ... in which the respondents were castigated throughout for delay and obstruction by judges and judicial officers. This included the use of proceedings in this court calculated to obstruct the California proceedings. They now seek to use the California proceedings to stay the Ontario actions.

33 There is, of course, none of this 'dirty hands' context in the present case. The behaviour of the defendants in the Illinois courts, both trial and appeal, has been entirely appropriate.

34 In the present case, I believe that a stay of execution is warranted. In *International Corona Resources*, supra, Goodman J.A. said, at p. 255:

> I am of the view that as a general rule it is in the interest of justice that the "status quo" be maintained pending an appeal where such can be done without prejudicing the interest of the successful party.

35 The fact situation in *International Corona Resources* (a huge mining operation) is very different from the simple contract action in this case. Nevertheless, in all the circumstances of this case I believe it appropriate to maintain the status quo until the Illinois appellate court has rendered its decision. The case involves a monetary amount and there is no evidence before me that the plaintiff will be prejudiced if it receives the principal amount and accumulated interest a few months from now if the defendants' appeal is unsuccessful. Moreover, the appeal has been argued and the information, admittedly more informal that one would like, about a decision in 4-6 months from September 15, 1993 strikes me as reasonable. As well, both parties have, up to this time, conducted the litigation, fully and fairly, in the Illinois courts. In all of these circumstances, my conclusion is that the hardship factor cuts about equally for both parties but the chronology and process of litigation factor tells in favour of the defendants. They are entitled to an order staying execution of the summary judgment obtained by the plaintiff until after the United States Appellate Court has rendered its decision.

Conclusion

36 The plaintiff is entitled to an order for summary judgment to enforce the orders made by the United States District Court on September 21 and December 20, 1992. The defendants are entitled to an order staying execution on this judgment until after the United States Appellate Court has rendered its decision.

37 Since success is divided, no costs are awarded.

Motion granted but with stay of execution.

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TAB 15

2012 ONSC 4312
Ontario Superior Court of Justice

Blizzard Entertainment Inc. v. Simpson

2012 CarswellOnt 9944, 2012 ONSC 4312, 221 A.C.W.S. (3d) 81, 41 C.P.C. (7th) 168

Blizzard Entertainment, Inc., Applicant and Michael Simpson, Respondent

Carole J. Brown J.

Heard: July 20, 2012
Judgment: July 23, 2012
Docket: CV-12-453889

Counsel: Andy Radhakant, for Applicant
Michael Simpson, for himself

Subject: International; Civil Practice and Procedure; Intellectual Property

APPLICATION by plaintiff to have judgment of California court enforced in Ontario.

***Carole J. Brown J.*:**

1 The applicant, Blizzard Entertainment, Inc. ("Blizzard") seeks to have recognized and enforced in Ontario a judgment of the United States District Court for the Central District of California (the "California Court") granted by United States District Judge Cormac J. Carney dated July 20, 2011, which granted an injunction and damages against the respondent, Michael Simpson ("Mr. Simpson"). The defendant/respondent did not defend the California action, nor appeal the judgment, and has not provided any responding materials or evidence to this application, although duly and properly served in both the California action and in this application. The respondent did, however, appear before this Court and make oral submissions.

2 The California judgment concerns Simpson's infringement of Blizzard's copyrights and other rights in the computer game StarCraft® II — Wings of Liberty ("StarCraft II"). Blizzard, in its action in California, had specifically alleged that Simpson's online sale of unauthorized "map hacks" designed to alter and impair the online, multiplayer functionality of StarCraft II violated Blizzard's copyright and contractual rights. Specifically, as set forth in the affidavit of the California attorney involved in this matter, Marc E. Mayer, the map hack software, CraniX Map Hack allowed users to alter the gameplay of StarCraft II in order to gain an unfair competitive advantage in StarCraft II, thereby disrupting and impairing the competitive multiplayer aspect of the game. In the California action, and the judgment which the applicant seeks to have recognized and enforced in Ontario, Simpson was enjoined from infringing Blizzard's StarCraft II copyright and from violating the applicable Terms of Use and End User License Agreement ("EULA"). The California Court also awarded damages plus interest, fees and costs payable by Mr. Simpson to Blizzard.

3 As set forth in the affidavit of Marc E. Mayer, referred to above, the District Court of California granted leave on December 15, 2010 to obtain discovery in order to learn of the identities of the defendants and to serve subpoenas on PayPal, Inc., Google, Inc. and CrowdGather, Inc. under the United States Federal Rules of Civil Procedure in order to obtain such identities. Following investigation, it was determined that the StarCraft II Map Hack Software and the website affiliated with it were linked to Mr. Simpson.

4 Blizzard thereafter served Mr. Simpson, who resides in Carlton Place, Ontario, by making requests with Canada's designated Central Authority under the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil*

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or Commercial Matters (the "*Hague Convention*"). Mr. Simpson was properly served pursuant to the *Hague Convention* on March 1, 2011. The applicant submits that Mr. Simpson acknowledged receipt of the Summons and Complaint by posting the full text of the Summons and Complaint along with his comments on his website www.SC2hackdev.org on March 1, 2011. Mr. Simpson admitted during his appearance in this Court that he, in fact, received service of the Summons and Complaint.

5 However, Mr. Simpson did not serve or file a defence or otherwise respond to the California action or appear at the California proceeding. He was noted in default in the California action on April 11, 2011 and default judgment was obtained following proper service of the motion for default judgment on Simpson, who again did not respond.

6 On July 11, 2011, the Hon. Judge Cormac J. Carney of the United States District Court (California) heard argument on Blizzard's motion for entry of the default judgment and issued the judgment now sought to be recognized and enforced in Ontario. The judgment granted is as follows:

> Mr. Simpson is ordered to pay Blizzard statutory damages in the amount of $150,000 plus postjudgment interest pursuant to 28 U.S.C. § 1961 at the rate of 0.16%, attorneys fees of $41,792.75 and costs of $3645.21. Furthermore, Mr. Simpson and his officers, agents, servants, employees, attorneys, successors, licensees, partners, and assigns, and all those acting directly or indirectly in concert or participation with any of them, are permanently enjoined from: (1) infringing Blizzard's StarCraft II copyrights by engaging in activities including without limitation the development, sale, and/or distribution of software products designed to modify or hack Blizzard's online videogame StarCraft II including without limitation the "CraniX Map Hack," (2) including or contributing to third party infringements of Blizzard's StarCraft II copyrights, (3) intentionally interfering with Blizzard's contract with StarCraft II players, and (4) violating the StarCraft II End User License Agreement ("EULA") and Battle.net terms of use ("TOU").

7 The California judgment was properly served on Mr. Simpson on August 1, 2011. Mr. Simpson took no steps to satisfy, appeal, vary or set aside the California judgment, which remains valid and unsatisfied.

Law and Analysis

8 In order to determine whether the California judgment should be recognized and enforced in Ontario, the Ontario Court must be satisfied that the California Court properly assumed jurisdiction according to Canadian conflict of laws rules, that there are no applicable defences of fraud, breach of natural justice, or public policy, established upon which this Court could refuse to enforce the California judgment and that the injunctive relief granted in the foreign judgment is enforceable in Canada.

9 The Supreme Court of Canada in *Beals v. Saldanha*, [2003] 3 S.C.R. 416 (S.C.C.) sets forth a two-stage approach for the recognition and enforcement of foreign judgments. Firstly, the moving party must establish that the foreign court took jurisdiction according to Canadian conflict of laws rules, *i.e.* there must be "real and substantial connection" to the jurisdiction. This test requires a significant connection between the cause of action and the foreign court and is "the overriding factor in the determination of jurisdiction". As stated in *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.), the most recent pronouncement of the Supreme Court of Canada on the "real and substantial connection" test, jurisdiction may be based on traditional grounds, such as the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if established (paragraph 79). In this case, based on the documentation produced by the applicant, including the StarCraft II End User License Agreement and the respondent's acceptance of the terms therein, including the governing law (stipulated to be the Laws of the United States of America) and the location of the court of competent jurisdiction to determine disputes (stipulated to be the County of Los Angeles, State of California), the applicant submits that the real and substantial connection test has been satisfied, as the defendant consented to the jurisdiction.

10 Where the real and substantial connection test has been satisfied, the responding party has the onus of establishing any applicable defences, including fraud, public policy and lack of natural justice in resisting the foreign judgment. In

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this case, the respondent, Mr. Simpson, did not defend the California action nor appear at the California proceeding. Mr. Simpson has not raised any defences which would satisfy his onus in resisting the foreign judgment.

11 I am satisfied, based on all of the evidence before me and the caselaw cited and considered, including *Beals v. Saldanha*, *supra.*, *United States of America v. Yemec*, 2012 ONSA 414and *Facebook inc. c. Guerbuez*, 2010 QCCS 4649 (C.S. Que.) aff'd 2011 QCCA 268 (C.A. Que.), that the defences of fraud, denial of natural justice and breach of public policy are not applicable.

12 Mr. Simpson did appear at the application hearing before this Court and argued, for the first time, that Blizzard had committed a breach of Mr. Simpson's hacker software website. He submitted that Blizzard had accessed his hacker website to determine his identity, and in so doing breached the user terms and conditions set forth in his website. He argued that the applicant had produced as evidence in this Court the screenshot of his forum posted on his www.SC2hackdev.org website, which contained his comments regarding receipt of the Summons and Complaint in the California action, and that such access was in breach of the contractual terms of his website and software. While he did not provide any responding material, he did refer to the applicant's materials which included the snapshot of Mr. Simpson's hacker software website with his comments, and also a copy of his posted registration, with "terms of use".

13 The terms of use on Mr. Simpson's StarCraft II hacker software website included the following:

> By using our website, you agree to the terms described below...
>
> 1. You are not an employee or know an employee of any companies listed:
>
>   • Activision Blizzard,
>
>   • Vivendi,
>
>   • Blizzard Entertainment, Inc.,
>
>   • Activision.

14 Mr. Simpson submitted that the Blizzard lawyers must have gained access to his website and, in so doing, given the terms and conditions, would have breached those conditions, being affiliated with Blizzard. I note that the snapshot was taken in the context of the investigation pursuant to the California Court order. He further admitted that he did accept service of and received all material served on him pursuant to the *Hague Convention*. He further submitted that he had developed the map hack software and marketed it, making $5000 on the map hack software.

15 With respect to the Blizzard lawyers accessing Mr. Simpson's map hack website and breaching the terms of his user agreement, Mr. Radhakant submitted that if infringers could protect themselves from infringement actions by posting terms and conditions on their websites, this would be an untenable position in IP law. I agree with the Applicant's submissions, Mr. Simpson has not satisfied the onus of establishing any applicable defences to enforcement of the California judgment.

16 I find, on all the evidence before me, and on the submissions of the parties, that the California Court did properly assume jurisdiction and that there are no defences to enforcement of the judgment which are applicable.

17 Based on the evidence before me, the submissions of Mr. Radhakant and Mr. Simpson, and the case law upon which the plaintiff relies, I am satisfied that the plaintiff has met the test for recognition and enforcement of foreign judgments, as set forth by the Supreme Court of Canada in *Beals v. Saldanha*, *supra*. and that none of the defences to enforcement are applicable, including fraud, denial of natural justice or breaches of public policy. I am satisfied that the injunctive relief sought is enforceable in this Court, that the terms of the Order of the California Court are clear and specific and that the considerations set forth in *Pro Swing Inc. v. ELTA Golf Inc.*, [2006] 2 S.C.R. 612 (S.C.C.) have been satisfied.

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Accordingly, I order that the judgment of the United States District Court of the Central District of California, Southern Division CV — 01495 — CJC (MLG) dated July 20, 2011 be recognized and enforced as a judgment of this Court.

Costs

18 I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within thirty days of the release of this Endorsement.

Application granted.

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TAB 16

2006 CarswellOnt 2045
Ontario Superior Court of Justice

Disney Enterprises Inc. v. Click Enterprises Inc.

2006 CarswellOnt 2045, [2006] O.J. No. 1308, 267 D.L.R. (4th) 291, 49 C.P.R. (4th) 87

Disney Enterprises Inc., Columbia Pictures Industries, Inc., Universal City Studios Productions LLLP, Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Warner Bros. Entertainment Inc. and Metro-Goldwyn-Mayer Studios Inc. (Applicants) and Click Enterprises Inc. and Philip G. Evans (Respondents)

Lax J.

Heard: March 15, 2006
Judgment: April 5, 2006
Docket: 05-CV-296252PD3

Counsel: Brian W. Gray for Applicants
Philip G. Evans for Respondents

Subject: International; Property; Intellectual Property

APPLICATION by plaintiffs for recognition and enforcement of New York judgment.

***Lax J.*:**

1 "The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions, and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, the Internet is also potentially a medium of virtually limitless international defamation." [1]

2 So begins a judgment of the majority of the Ontario Court of Appeal addressing the issue of defamation on the Internet. The application before me is the issue of wrongful commercial activity on the Internet. I am asked to recognize and enforce a judgment granted by the United States District Court for the Southern District of New York awarding damages of $US 468,442.17 against the respondents, Ontario residents, for copyright infringement and unfair competition. The issue turns on whether the New York court properly exercised jurisdiction for activities that originate in Ontario and take place on the Internet. Is there a "real and substantial connection" to New York in a borderless Internet world?

Factual Basis for the Action

3 The subject matter of the action was the infringement of the plaintiffs' copyright and/or exclusive reproduction and distribution rights in certain films. The websites, *FlicksUnlimited.com*, *FlicksIncorporated.com*, *DownloadFreeFilms.com*, *HQMovies.net* and *GetMoviesOnline.com* were registered to the respondents with a registrant address on Sorauren Avenue in Toronto, Ontario. Philip Evans is the President and sole officer of Click Enterprises Inc., an Ontario Corporation.

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4 These websites advertised for sale a variety of memberships that provided consumers with tools or technology to simplify and streamline the process of downloading copyrighted films as well as on-line support to those subscribers who sought assistance in downloading specific films they were having trouble locating. The websites prominently feature testimonials from "happy members" in Canada, the United Kingdom and the United States, for example, from John, USA:

> I'm a movie fan! Before *HQMovies*, I could only afford to buy about 2-3 new movies each month. But now when I have been a member with you for a month I have already downloaded 40 movies! Its amazing. I never thought of these ways to get movies before. I thank you a lot!

5 The websites appeared as "sponsored links" on well-known search engines such as Google, leading users who searched queries for popular motion pictures to their sites. The websites employed "pull-down" menus that identified hundreds of the applicants' films by name creating the impression that the respondents were authorized to facilitate the distribution of the applicants' films on the Internet. They represented that the use of their services was "100% legal", but offered their customers the opportunity to purchase "Evidence Shredder" software to eliminate traces of web browsing and file usage history and destroy evidence of downloading infringing content from a personal computer.

6 In effect, the respondents conducted an Internet retail business for profit that facilitated the illegal copying and downloading of copyrighted motion pictures.

Procedural History of the Action

7 An Ontario process server personally served the respondents with the Summons and Complaint in accordance with the United States Federal Rules of Civil Procedure. Sufficiency of service is not disputed. The respondents did not appear to dispute either the merits of the complaint or the United States' District Court's jurisdiction to deal with the matter.

8 After the respondents were noted in default, Mr. Evans wrote to Magistrate Judge Katz denying liability personally or corporately, but indicating that for financial reasons, the respondents were unable to defend the action. In his letter, he acknowledged that he was "the person behind" Click and that a New York resident had purchased a membership from his website. However, he stated that a Delaware corporation, Click Enterprises Inc. (Delaware), who was not a party to the lawsuit, was the corporation that received payments for the involved websites.

9 The applicants brought an Application for entry of Default Judgment and served the respondents. The Application presented evidence from two U.S.-based Internet Payment Service Providers, Paycom Billing Services Inc. ("Paycom") and Internet Billing Company ("iBill"). The evidence of Paycom showed that Click Enterprises Inc., a Canadian corporation, was a sponsored merchant maintaining an account with it for sales made through a number of websites, including those described above. Paycom made payments of $465,250.75 to an account of Click Enterprises Inc. at the Bank of Nova Scotia in Toronto, Ontario. iBill made payments to Click Enterprises Inc. of $3,191.42. These amounts together represent the judgment granted by United States District Judge Barbara S. Jones on March 25, 2005.

Jurisdiction of the US Court

10 A foreign judgment will be recognized in Ontario if it is a final *in personam* judgment for a definite sum of money given by a court that had jurisdiction to issue the judgment. This judgment meets the requirements for enforcement in Ontario if the court issuing judgment properly exercised jurisdiction in the action.

11 In *Morguard Investments Ltd. v. De Savoye*, [2] it was established that the courts of one province or territory should recognize and enforce the judgments of another province and territory, if that court had properly exercised jurisdiction in the action. In *Beals v. Saldanha*, [3] the Supreme Court of Canada endorsed the *Morguard* principles, holding that they equally apply to judgments that issue from courts that are outside Canada. The determination of the proper exercise

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of jurisdiction by a court depends on two principles: the need for "order and fairness" and the existence of a "real and substantial connection" to either the cause of action or the defendant. [4]

"Order and Fairness"

12 The need for order and fairness is met if the originating court had reasonable grounds for assuming jurisdiction where the participants to the litigation are connected to multiple jurisdictions. [5]

13 The subject matter of the action was damages for copyright infringement and unfair competition pursuant to the *United States Copyright Act*, 17 U.S.C. §101 *et seq*. and the *Lanham Act*, 15 U.S.C. §§ 1125. The plaintiffs are Delaware corporations with their principal place of business in California, whose films are distributed throughout the United States and elsewhere. The defendants are resident in Ontario, but owned or controlled the interactive websites through which subscription agreements were sold to residents of the United States, including residents of New York, that facilitated the illegal downloading of the films. Our courts recognize a sufficient connection for taking jurisdiction where Canada is either the country of transmission or the country of reception: *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*. [6] There were reasonable grounds for the United States District Court for the Southern District of New York to assume jurisdiction.

"Real and substantial connection"

14 A court will have properly exercised jurisdiction in an action if it had a real and substantial connection with either the subject matter of the action or the defendant. No distinction is drawn between a judgment after trial and a default judgment absent "unfairness or other compelling reason." [7] The respondents have alleged neither and neither exists in this case.

15 What then is a "real and substantial connection"? In *Morguard*, the court variously described a real and substantial connection as a connection "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the forum province", "with the transaction or the parties" and "with the action". [8]

16 According to *Beals*, the "real and substantial connection" test requires a "significant connection" between the cause of action and the foreign court:

> [32] ... a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. (at p.17)

17 Under the approach adopted by the majority in *Beals*, any unfairness to a defendant will be dealt with on the basis of *forum non conveniens* in the foreign forum or invoking defences to the enforcement of the foreign judgment.

18 Lebel J. in dissent, proposed a test that balances the connection between the forum and the action, on the one hand, and the hardship that litigation in the foreign forum would impose on the defendant, on the other hand. He thought that the justification for requiring a defendant to go to the foreign forum is generally strongest when there is a link to the defendant. However, he qualified this in the following paragraphs of his judgment:

> [178] ... If the defendant has become involved in activities in the jurisdiction, or in activities with foreseeable effects in the jurisdiction, it is hardly reasonable for her to claim that she should be shielded from the process of that jurisdiction's courts. This reasoning is reflected in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239,, a case relied on in *Morguard*. In *Moran* it was held that, in a products liability tort case, the place where the victim suffered damages could assume jurisdiction over a foreign defendant manufacturer who knew or ought to have known that the defective product "would be used or consumed where the plaintiff used or consumed

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> it" — i.e., if there was an indirect but substantial connection between the defendant and the forum (*Moran*, *supra*, at p. 409, cited in *Morguard*, at p. 1106).
>
> . . . . .
>
> [182] The test should ensure that, considering the totality of the connections between the forum and all aspects of the action, it is not unfair to expect the defendant to litigate in that forum. It does not follow that there necessarily has to be a connection between the defendant and the forum. There are situations where, given the other connections between the forum and the proceeding, it is a reasonable place for the action to be heard and the defendant can fairly be expected to go there even though he personally has no link at all to that jurisdiction.

19 It is evident that on either approach, the application of the "real and substantial connection" test will vary with the circumstances. As Sharpe J.A. said in *Muscutt v. Courcelles*,[9] the test is "deliberately general to allow for flexibility in its application" and "it cannot be reduced to a fixed formula". Faced with a deliberately general test, it is appropriate to review the considerations that led to it.

20 *Morguard* altered the old common rules for the recognition and enforcement of interprovincial judgments. LaForest J. recognized that "modern states cannot live in splendid isolation" (p.1095) and " ... the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner" (p. 1096).

21 Although Canada's constitution does not include a "full faith and credit" clause as in the United States or Australia, it was his view that the application of the traditional approach to enforcement of the judgments of sister provinces was inconsistent with common citizenship, mobility rights, economic integration and a common market for goods, services and capital. Moreover, any unfairness to a defendant was minimized by Canada's integrated system of justice under which the federal government appoints superior court judges and their judgments are ultimately subject to review by a unitary and unifying Supreme Court.

22 Central to the decision in *Morguard* to modernize the common law rules was the doctrine of comity. This is developed further in *Beals* where Major J., writing for the majority, recognizes the particular importance of this doctrine when viewed internationally. He says:[10]

> [26] ... the flow of wealth, skills and people across state lines" is as much an imperative internationally as it is interprovincially.
>
> [27] ... the reality of international commerce and the movement of people continue to be "directly relevant to determining the appropriate response of private international law to particular issues such as the enforcement of monetary judgments" (J. Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth Into the World" (1997), 28 C.B.L.J. 373 at p. 375).
>
> [28] International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in *Morguard*, *supra*, and further discussed in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16, can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally. (para 28)

23 In *Socan*, the court had to decide where copyright infringement occurs and applied the "real and substantial connection" test as developed in *Morguard* and *Beals*. The court also relied on the language of LaForest J. in *Tolofson v. Jensen*[11] and said, "[t]he test reflects the underlying reality of 'the territorial limits of law under the international legal order' and respect for the legitimate actions of other states inherent in the principle of international comity."[12] In *Socan*, the court concluded that copyright infringement occurs in Canada where there is a real and substantial connection

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between this country and the communication in issue. It recognized that either the country of transmission or the country of reception may take jurisdiction over a transmission linked to its territory:

> In terms of the Internet, relevant connecting factors would include the *situs* of the content provider, the host server, the intermediaries and the end user. The weight to be given to any particular factor will vary with the circumstances and the nature of the dispute. [13]

24 *Morguard*, *Beals* and *Socan* signal a new direction for our courts, but as Binnie J. observed in *Socan*, it can be problematic to apply a jurisdictional legal concept to activities that take place through a medium that has no jurisdiction:

> The issue of the proper balance in matters of copyright plays out against the much larger conundrum of trying to apply national laws to a fast-evolving technology that in essence respects no national boundaries ...The issue of global forum shopping for actions for Internet torts has scarcely been addressed. ... E-commerce is growing. Internet liability is thus a vast field where the legal harvest is only beginning to ripen. [14]

25 The metaphor of the unripened harvest is particularly apt as I was referred to only one decision that directly addresses the issue before me. In *Braintech Inc. v. Kostiuk*, [15] the British Columbia Court of Appeal refused to enforce a Texas judgment for Internet defamation against a B.C. resident where the plaintiff, a Nevada corporation domiciled in British Columbia, but doing business in the United States, brought an action in Texas. The B.C. resident's only connection with Texas was "passive posting" on an Internet bulletin board. There was no proof that anyone in Texas had actually looked at it. There was no allegation that the defendant had a commercial purpose.

26 In this case, Click Enterprises had a commercial purpose that utilized the Internet to enter the United States to carry out its activities. It contracted with payment service providers in the United States to process Internet payments on its websites. Initially, Click contracted through a Canadian corporation and after VISA changed its regulations, it incorporated Click Enterprises Inc. (Delaware) so that payments were made through it. The manner in which these payments were processed is of less interest than where they originated and where they were received.

27 The respondents submit that the payment service providers were collecting payments worldwide and not only in the United States. While this may be true, it is inescapable that Click was making its services available to residents of the United States who wished to illegally download American films. The majority of the testimonials on the respondents' websites are from subscribers in the United States and demonstrate that this occurred. It would not surprise anyone that the consumers of American films are Americans, not exclusively, but certainly in large numbers. There is little doubt that the payments made their way from subscribing customers in the United States to Click's bank account in Toronto. Further, by offering their subscribers the opportunity to purchase "Evidence Shredder" software, the respondents were clearly aware of the illegal nature of their business and the infringing conduct of their customers.

28 The respondents further submit that there is only a tenuous connection to New York, that it is a "random" jurisdiction and that the "real and substantial connection" test is not met. I do not agree. If the action had been brought in a jurisdiction with little or no connection to the genre of American films or to the language or culture of the residents of New York, this argument would be more convincing. *Moran v. Pyle National (Canada) Ltd.*. [16] is a products liability case, but the reasoning at p. 409 applies:

> By tendering his products in the marketplace directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm *as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.* (emphasis added)

29 When activities are conducted on the Internet, they have the potential to cause harm anywhere and everywhere. The respondents' websites were available 'through normal distributive channels' to the residents of New York and their products caused harm there. There was no juridical advantage to commencing the action in New York. In my view, this

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was not only an appropriate jurisdiction in which to bring the action, but one that was arguably fairer to the respondents than if it had been brought as it might have been, in a more geographically remote jurisdiction such as California.

30 Jurisdiction in the United States District Court was established on the basis of the subject matter of the action. Jurisdiction over the defendants was established on the basis that they had continuous and ongoing business contacts with residents of New York through their interactive websites, which were targeted at residents of this state. The plaintiffs chose the United States District Court for the Southern District of New York as the venue for the action on the basis that a substantial part of the events and omissions giving rise to the claims occurred within its Judicial District and that venue lay in that District under federal rules in the United States. Once jurisdiction is established, there is no reason for this court to look behind the choice of venue so long as it is not fanciful.

31 I am satisfied that the respondents had a "real and substantial connection" to New York and that the applicants have satisfied the test they must meet.

32 Having concluded that the United States District Court for the Southern District of New York properly exercised jurisdiction in the action, I must consider whether any defences to recognition and enforcement of the judgment have been established.

Defences

33 There are three defences: (1) fraud; (2) failure of natural justice; and (3) public policy.

Fraud

34 The defence of fraud is narrow and places the burden on the defendant to demonstrate either that there was fraud that misled the New York court into assuming jurisdiction or that there are new and material facts suggesting fraud that were previously undetectable through the exercise of reasonable diligence. [17] No defence of fraud is raised.

Natural Justice

35 The enforcing court must ensure that the defendant is granted a fair process that guarantees basic procedural safeguards. Where the foreign legal system is similar to our own, as it is here, the assessment is not a difficult one.

36 In this case, the Summons and Complaint was personally served on both respondents. Service was in accordance with the United States Federal Rules of Civil Procedure respecting service *ex juris* and included service of the Summons and Complaint, Individual Practices of Magistrate Judge Theodore H. Katz, Individual Practices of Judge Barbara S. Jones, Procedures for Electronic Case Filing, the Guideline for Electronic Filing and 3rd Amended Instructions for Filing an Electronic Case or Appeal. Electronic filing procedures can enhance access to the court system and particularly in the case of a foreign defendant. Three months after the claim was served, the respondents were noted in default. The respondents admit they had knowledge of the action. They were also served with the Application for Default Judgment and had knowledge that the applicants were seeking a judgment in the amount of $US 468,442.17.

37 There is no defence on the ground of procedural unfairness.

Public Policy

38 This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. This turns on whether the foreign law is contrary to our view of basic morality. [18]

39 Like fraud, the public policy defence is a narrow one. In *Beals*, the majority rejected this defence in circumstances where an award of damages by a Florida jury (including punitive damages) was considerably greater than would have been awarded in Canada for similar acts and enforcement would lead to the defendants' bankruptcy. The court held

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that the public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in the foreign jurisdiction would not yield comparable damages in Canada.

40 Further, as section 7 of the *Canadian Charter of Rights and Freedoms* does not shield a Canadian resident from the financial effects of the enforcement of a judgment rendered by a Canadian court, the Supreme Court of Canada did not accept that s. 7 should shield a Canadian resident from the enforcement of a foreign judgment: "The obligation of a domestic court to recognize and enforce a foreign judgment cannot depend on the financial ability of the defendant to pay that judgment." [19]

41 In short, severe hardship is not a basis for the defence. To the extent that financial hardship is raised as a defence, I must reject it.

Disposition

42 The application is granted without pre-judgment interest and with costs fixed at $5,000, inclusive of fees, disbursements and GST.

Application granted.

Footnotes

1 *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (Ont. C.A.) at p. 416, *per* Blair J.A.

2 [1990] 3 S.C.R. 1077 (S.C.C.)

3 [2003] 3 S.C.R. 416, 234 D.L.R. (4th) 1 (S.C.C.)

4 *Beals* at para. 21.

5 *Beals* at para. 22.

6 [2004] 2 S.C.R. 427 (S.C.C.) at 457 [*Socan*]

7 *Beals* at para. 31

8 *Morguard* at pp. 1104-1109

9 (2002), 213 D.L.R. (4th) 577 (Ont. C.A.) at paras. 36 and 75

10 *Beals* at pp.15-16

11 [1994] 3 S.C.R. 1022 (S.C.C.)

12 *Tolofson* at p. 1047

13 *Socan* at p. 456

14 *Socan* at pp.449-450

15 (1999), 171 D.L.R. (4th) 46 (B.C. C.A.)

16 (1973), [1975] 1 S.C.R. 393 (S.C.C.) (cited in *Morguard* at p. 1106 and in *Beals* at paras. 25 and 178)

17 *Beals* at pp. 19-24

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18 *Beals* at p. 27, para. 71

19 *Beals* at p. 20, para. 78

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TAB 17

2014 ONSC 2600
Ontario Superior Court of Justice

Johnson & Johnson Finance Corp. v. Kavoussi Estate

2014 CarswellOnt 6042, 2014 ONSC 2600, 19 C.B.R. (6th) 127, 240 A.C.W.S. (3d) 355

Johnson & Johnson Finance Corporation, Applicant and The Estate of Key Kavoussi, Deceased, by His Executor, Howard Kavoussi, Iran Kavoussi, Howard Kavoussi, Harold P. Kavoussi, M. D. Inc., Second California Independent Physicians Association, Inc. and Pomona Equity Fund, Inc., Respondents

Carole J. Brown J.

Heard: March 28, 2014
Judgment: April 29, 2014
Docket: CV-14-496624

Counsel: Kristina Desimini for Applicant
No one for Respondents

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency; International

APPLICATION by applicant for order recognizing and enforcing judgment entered by United States Bankruptcy Court.

***Carole J. Brown J.*:**

1 The Applicant, Johnson & Johnson Finance Corporation ("the Applicant" or "J & J") brings this application for an order recognizing and enforcing the Amended Judgment entered April 7, 2006, by the United States Bankruptcy Court, Central District of California in the matter of *Chapter 7 Trustee v The Estate of Key Kavoussi, Deceased, by His Executor, Howard Kavoussi, Iran Kavoussi, Howard Kavoussi, Harold P. Kavoussi, M.D., Southern California Independent Physicians Association, Inc. and Pomona Equity Fund, Inc.*, Case Number LA 00-10729-ES, Adversary No. AD 01-01606-ES (the Fraudulent Transfer Action).

2 The Amended Judgment was assigned to J & J Finance Corporation pursuant to a Notice of Assignment of Amended Judgment and Assignment of Amended Judgment dated July 20, 2010.

3 The Amended Judgment is a final monetary judgment and all relevant appeal periods have expired.

4 The Bankruptcy Court properly exercised its jurisdiction over the respondents in the Fraudulent Transfer Action and, as such, the plaintiff seeks to have the Amended Judgment recognized in Ontario.

5 In the Fraudulent Transfer Action, J & J alleged, among other things, that the debtors made a series of fraudulent transfers of real property to the Kavoussis which were designed to render the debtors insolvent and unable to pay the J & J loans.

6 On January 10, 2000, the debtors filed a voluntary Chapter 7 petition under the United States Bankruptcy Code in Bankruptcy Court with case number SA 00-19717-ES and a Trustee was appointed. The proceeding stayed the Fraudulent Transfer Action against the debtors under the US Bankruptcy Code. As a result of the commencement of the Chapter 7 proceedings, the Fraudulent Transfer Action became the property of the debtors' estate and, accordingly, the Trustee took over the action against the defendants.

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7 As regards jurisdiction of the California court, the Kavoussis resided or carried on business in the State of California at all material times. The loans were entered into in California. The defendants were duly served with notice of the action, retained counsel, and fully defended the action, delivering a defence, appearing in court and making submissions.

8 The Amended Judgment includes reconveyance of certain properties located in California to the estate of Dr. Kavoussi and monetary judgment in the amount of $4,148,000.00 US to be paid by the defendants, less the value of Dr. Kavoussi's interest in the reconveyed properties, plus interest commencing October 20, 2004. The Amended Judgment remains outstanding.

9 Certain of the defendants obtained judgment against Mr. Moos in an action for fraud commenced in the Superior Court of Orange County, California, with Superior Court number 30-2009-00126207. A Notice of Lien in respect of the California action was filed by the plaintiff on July 1, 2013, which attaches to all recoveries received by the Estate of Key Kavoussi and Howard Kavoussi individually and as agents of service for process for Pomona Equity Fund, Ltd. and Pomona Equity Fund, Inc. until the amount owing to J & J under the Amended Judgment is satisfied in full.

10 J & J seeks recognition of the Amended Judgment to further protect and preserve its rights in Ontario pursuant to the Amended Judgment and Notice of Lien, and to ensure that any amounts owing to or received by the Kavoussi plaintiffs in respect of the recognition proceedings brought in Ontario (Court File No. CV-12-458484) are remitted to J & J until the outstanding indebtedness under the Amended Judgment is satisfied in full.

11 I am satisfied that the tests for recognition and enforcement of foreign judgments have been met in this case.

Recognition of Foreign Judgments

12 The law on the enforcement of foreign judgments in Ontario is well-established. The courts will generally enforce a foreign judgment when the foreign court properly took jurisdiction, the judgment is final and conclusive and the order is of a nature that the principle of international comity requires the Ontario court to enforce the order.

13 As stated in *Beals v. Saldanha*, [2003] 3 S.C.R. 416 (S.C.C.), in enforcing a foreign judgment, the enforcing court must first determine whether the foreign court properly took jurisdiction, and the overriding factor in this determination is whether the foreign court had a real and substantial connection to the action or the parties. This connection must be of some significance, and must not be "fleeting or relatively unimportant".

14 In the present case, the Bankruptcy Court properly took jurisdiction over all respondents. I find the real and substantial connection test is met. There is no question that the respondents attorned to the jurisdiction by defending the actions with retained counsel, attending the multiple hearings, serving written materials, making oral submissions and opposing the transfer of the Fraudulent Transfer Action to Bankruptcy Court. Based on the evidence before me, the Amended Judgment was properly obtained pursuant to California law.

15 While a responding party may raise the limited defences available, including fraud, natural justice or enforcement of the foreign judgment being contrary to Canadian public policy, in the present case, the responding parties, although duly served, have not responded to this application.

16 There is no evidence to suggest that the foreign judgment was obtained by fraud undetectable by the foreign court, that there was a failure of natural justice or that enforcing the California Amended Judgment would be contrary to public policy.

17 Accordingly, I find that the Amended Judgment of the Superior Court of California is to be recognized and enforced in Ontario. In the coordinate action, Court file No CV-12-458484, above-mentioned at paragraph 10, I have held that the judgment of the Superior Court of California is to be recognized and enforced in Ontario.

Application allowed.

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GARY STEVENS, LINDA STEVENS and 1174365 ALBERTA LTD.
Applicants

v.

SANDY HUTCHENS et al
Respondents

Court File No. CV-18-608271-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

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