SUPREME COURT OF NOVA SCOTIA

Citation: *The Water Shed Water Conditioning Limited v. MacAskill*, 2019 NSSC 183

Date: 20190611
Docket: 476454
Registry: Halifax

Between:

The Water Shed Water Conditioning Limited

Plaintiff

v.

Meghan Leah MacAskill aka Meghan Leah Pitts and Daniel Marc MacAskill

Defendants

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	June 5, 2019, in Halifax, Nova Scotia
Counsel:	John O'Neill, for the Plaintiff Matthew Moir, for the Defendants

By the Court:

Introduction

[1] Stephen Burke is the directing mind of Watershed Water Conditioning Limited [”WW”]. WW provides a complete range of water treatment and testing, well drilling, hydro-fracking, geothermal cooling and heating and water pump services.

[2] Between July 2005 and June 2017 Meghan MacAskill [”Meghan”] worked for WW, and at all relevant times regarding this litigation was the office manager. Between 2012 and June 2017 Marc MacAskill [”Marc”] worked for WW as a service technician. They are married to each other.

[3] Initially WW started a proceeding by way of Notice of Application in Court, to which the Defendants responded with a Notice of Contest. That proceeding was discontinued by agreement, and on May 18, 2018 WW filed a Notice of Action alleging that Meghan and Marc had fraudulently converted monies (the evidence herein suggests in an amount between $100,000 and $200,000) from WW to their own personal use – by unauthorized means including: loans to themselves from WW; reimbursements for alleged disbursements paid by them for the benefit of WW; monies paid to them through WW as extra income and vacation payments. They filed a Notice of Defence on May 30, 2018, in which they denied that any of

such monies paid by WW were not authorized by Stephen Burke or would say that they were otherwise legitimate payments. They are also alleging that there was between Mr. Burke and them, an understanding that they would buy the business "conditional on the business becoming viable under Mr. Burke's ownership", and that this underlying reality informed how they treated the company's assets, and money in particular.

[4] This decision concerns a motion by WW for an interlocutory Preservation Order pursuant to CPR 42.02 (regarding "property claimed in the proceeding") and a Preservation Order pursuant to CPR 42.11 –"Mareva" injunction (regarding "assets that would be available to satisfy a judgment claimed in the proceeding"). While they share similarities, as I note below, they are nevertheless distinct remedies.

[5] In summary, I conclude a CPR 42.02 Order *should not* issue in relation to the motorboat- 4 Winns Celebrity Renko (registration number RE9785M), or the Dodge Ram truck and ATV ; but that a CPR 42.11 Order *should* issue in relation to the real property sought to be "preserved", being PIDs 40545055 and 41061680.

[6] I also order that the Defendants be restrained from disposing of, or encumbering in any manner, either of the two properties, without further order or leave of the court, and will require them each individually to cooperate in

preserving the value of those assets to the standard of their present condition or better.[1] I direct that the parties attempt to agree on wording of a draft order and provide same to the court within 15 days of this decision.

The pleaded cause of action: Conversion (and deceit)

[7] Regarding the tort of conversion, Justice Malachi Jones (as he then was) in *Federal Savings Credit Union Ltd. v. Centennial Trailer Sales Ltd.*, [1973] NSJ No. 163 stated:

> 19 The question arises as to whether the defendant was liable for conversion in repossessing the trailer. Our Court of Appeal dealt with the possession necessary to maintain an action for conversion in MacLellan v. Melanson (1967), 4 N.S.R. 1965-69 641, 62 D.L.R.(2d) 40. MacKinnon, J.A., (now C.J.N.S.), in delivering the judgment of the Court stated at p. 43:
>
> "It is my opinion that the above evidence does establish in the respondent a sufficient possessory right to maintain his action.
>
> Fleming, The Law of Torts, 2nd ed., pp. 67-8:
>
> 'In order to maintain an action for conversion, the plaintiff must have been either in actual possession or entitled to immediate possession of the goods, at the time when the conversion was committed. This emphasis on possession, rather than ownership, is a legacy from an earlier time when wealth was almost entirely associated with tangibles and the law was preoccupied with repressing physical violence, [*page269] combined with the persistent influence on legal thinking of the forms of action which developed out of these

[1] I recognize that the property bearing PID 41061680 is owned by the MacAskills (as joint tenants) and another couple (as joint tenants) yet collectively as tenants in common. While the other couple did not have an opportunity to speak to their interest being restricted, as proposed, by a Mareva injunction, the order does allow for the parties to return to court should circumstances change, which indirectly affords them an opportunity to address the court about their personal circumstances regarding the order. I direct that the Defendants within 15 days of their receipt of the Order, serve a certified copy of the Order on those persons, and provide proof thereof to the court in writing that they have done so.

conditions. This explains the seeming paradox that a possessor without title, such as a finder, a bailee, a sheriff who has seized goods, and perhaps even a thief, may recover their full value; whereas an owner who has neither possession nor a right to immediate possession, like a bailor during an unexpired term, cannot compel the wrongdoer to buy him out [Lord v. Price (1874) L.R. 9 Ex. 54]. So great is the emphasis on the protection of possession that even an owner may be liable in trover, as where a person entitled to temporary possession on a chattel returns it to him for a special purpose and he refuses to re-deliver after that purpose is satisfied [Roberts v. Wyatt (1810) 2 Taunt. 268; Howe v. Teefy (1927) 27 S.R. (N.S.W.) 301].

In Salmond on the Law of Torts, 9th ed., p.326, the following:

> 'Whenever goods have been converted, an action will lie at the suit of any person in actual possession or entitled at the time of the conversion to the immediate possession of them. The action of trover was based on possession and the right of immediate possession, and not always on the right of ownership.'

and at p. 327:

> 'Mere de facto possession is, as against a stranger, a sufficient title to support an action for a conversion... "The law is," says Lord Campbell in Jeffries v. Great Western Ry. [(1856), 5 E. & B. p.805], "that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person, for against a wrongdoer possession is a title.'

and at p. 328:

> 'Presumably it makes no difference in what mode the plaintiff obtained the possession on which he relies [Buckley v. Gross (1863), 3 B & S. p.574].'" [*page270]

The law regarding CPR 42.02 Preservation Orders as distinct from CPR 42.11 Mareva injunctions

[8] I cite with approval, Justice Patrick Murray's comments in *Reddick v MacInnis*, 2018 NSSC 201:

7 I have considered the affidavit evidence, the oral evidence and the submissions from counsel on behalf of the parties. *In my respectful view, there is some confusion in the case law, and therefore in the parties' submissions, between the test to be applied on a motion for injunctive relief in the form of a preservation order and that applied on a motion for a Mareva injunction.*

8 *Civil Procedure Rule 42.02* applies to preservation orders:

> 42.02 (1) A party who files an undertaking as required by Rule 42.07 may make a motion for an injunction to preserve evidence relevant to an issue in, or **to preserve property claimed in, a proceeding**.
>
> [*Emphasis added*]

9 *Mareva* injunctions, on the other hand, are addressed at *Rule 42.11*:

> (1) A party who files an undertaking required by Rule 41.06, of Rule 41 - Interlocutory Injunction and Receivership, may make a motion for an interim or interlocutory injunction that does any of the following:
>
> (a)restrains a party from disposing of assets available to satisfy a judgment claimed in the proceeding;
>
> (b)restrains a party from removing assets from Nova Scotia;
>
> (c)requires a party or other person to cooperate in preserving assets.
>
> (2) The party must satisfy the judge that the party has met requirements of the common law for an injunction preserving assets, such as the requirements on each of the following subjects:
>
> (a) a claim for damages;
>
> (b) the strength of the party's case;
>
> (c) the risk that assets will be made unavailable to satisfy a judgment for the damages;
>
> (d) the likelihood of recovery on a judgment for the damages if the assets are not preserved.

...

10 Preservation orders and *Mareva* injunctions are both forms of injunctive relief that preserve property. As *Rule 42.02(1)* indicates, however, a preservation order is the appropriate remedy where the property sought to be preserved *is the property actually claimed in the proceeding*. A *Mareva* injunction, on the other hand, is aimed at preserving assets to satisfy a judgment. The burden on the party seeking a *Mareva* injunction is much higher. In *Injunctions and Specific Performance* (Looseleaf edition, updated to November 2017), at para. 2.700, the Honourable Justice Robert J. Sharpe states:

> **Interlocutory injunctions are frequently granted to restrain disposition of an asset where the plaintiff asserts a specific or proprietary claim in respect of that asset.** Rules of Court, and in some jurisdictions legislation, typically provide for interim preservation of property. If the plaintiff sues for specific performance of an agreement of sale, an interlocutory injunction may be granted, restraining the defendant from defeating the plaintiff's claim by disposing of the property in question before trial. Similarly, even where the plaintiff asserts a money claim, an interlocutory injunction may be granted to protect the claim where the plaintiff has some proprietary right in the money or right to trace the particular fund. **The basis for injunctive relief here is to prevent dissipation or destruction of the property which is the subject matter of the suit. Such orders are made in accordance with the usual principles governing interlocutory injunctions and are to be distinguished from *Mareva* injunctions.**
>
> [*Emphasis added*]

11 The Plaintiff in this case is asserting a proprietary claim in respect of the lottery winnings in the Defendant's possession, and she seeks an order restraining him from disposing of those funds. A preservation order is the proper form of relief in these circumstances. In *Korem v. Crown Jewel Resort Ranch Inc.*, 2011 NSCA 102, [2011] N.S.J. No. 604, MacDonald C.J.N.S. confirmed that the test for a preservation order is the three-part test for an interlocutory injunction set out in *R.J.R. MacDonald*: para. 9. The Supreme Court of Canada recently summarized this test in *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] S.C.J. No. 34:

> 25 *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. **The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.**
>
> [*Emphasis added*]

12 Before applying the test, I wish to address the argument advanced by defence counsel that this case falls within "the third exception" recognized in *R.J.R. MacDonald* and, as such, the Plaintiff must satisfy the Court that she has a strong *prima facie* case, not just that there is a serious issue to be tried. In *R.J.R. MacDonald*, Cory and Sopinka J.J., for the Court, stated:

> 56 The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:
>
> > Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.
> >
> > To the extent that this exception exists at all, it should not be applied in *Charter* cases. ...
>
> …

14 In respect to this proposed third exception, I agree with the observation of Justice Wood in *North End Community Health Assn. v. Halifax (Regional Municipality)*, 2012 NSSC 92, [2012] N.S.J. No. 118, that the passage from *R.J.R. MacDonald* relied on by defence counsel, "suggests that the Supreme Court was not satisfied that such an exception exists...": para. 18. Even if this exception exists, however, I am not satisfied that the factual record is sufficiently settled for it to apply…

15 In the result I find that this is not a case where the proposed "third exception" in *R.J.R. MacDonald*, if it exists, would apply. The appropriate test is the lesser "serious issue to be tried" standard.

[Bolding in the original; my italicization added]

[9] In the case at Bar, even if such exception exists in law, the factual record is insufficiently settled for the purported third exception to the "serious question to be tried" standard to be applied.[2]

[10] Thus, as I see it, I am being asked to consider a preservation of specific property order pursuant to CPR 42.02 involving as it does any monies actually claimed directly or as traceable; and a preservation of assets order (Mareva injunction) pursuant to CPR 42.11.

Rule 42.02 order sought

[11] Regarding the order sought under CPR 42.02, I reiterate, the quotation from Sharpe on *Injunctions and Specific Performance* cited above:

> Similarly, even where the plaintiff asserts a money claim, an interlocutory injunction may be granted to protect the claim where the plaintiff has some proprietary right in the money *or right to trace the particular fund.*

[12] Arguably this may relate to a $70,000 RAM Dodge truck (which included an ATV in the package) and a 4 Winns Celebrity Renko motorboat, registration number RE9785M.

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[2] The general rule is that a judge on an interlocutory injunction motion should not "engage in an extensive review of the merits" of the main proceeding. There are three recognized exceptions: (1) when the result of the interlocutory injunction will have the practical effect of amounting to a final determination; (2) when a "question of constitutionality presents itself as a simple question of law alone"; and (3) (possibly) in private law cases a strong *prima facie* standard rather then a "serious question to be tried" should be recognized "in cases where the factual record is largely settled" so that the facts are not substantially disputed – *RJR MacDonald* at paras. 51-56.

[13] Let me indicate at this point that for present purposes there is insufficient evidence to suggest that the Defendants used monies allegedly converted to purchase the truck (ATV). On the other hand, the boat is linked to an alleged $17,000 payment showing on the financial records of WW in May 2015, and referenced in the pleadings of the Defendants' Notice of Contest (Exh. 32 of S. Burke affidavit at para 7)-thus there is an evidentiary basis to argue for a CPR 42.02 order regarding the boat. Moreover, the Defendants do not dispute that some money is owing to WW in relation to this purchase.

[14] In *Korem v Crown Jewel Resort Ranch Inc.*, 2011 NSCA 102, the court endorsed as applicable to CPR 42.02, the general injunctive relief three-part test from *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[15] Let me then turn to the application of that test regarding the boat.[3]

[16] Both parties agree that there is a serious question to be tried.

[17] Regarding whether there would be "irreparable harm" to the Plaintiff if the Preservation Order is not granted, generally speaking the threshold has been

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[3] I also keep in mind Justice Bryson's helpful elucidation of the law in *Maxwell Properties Ltd. v Mosaik Property Management Ltd*., 2017 NSCA 76 at paras. 17 – 23; although that case involved a different claim for injunctive relief.

characterized as follows (*Mosaik* at para. 55): if damages in the measure recoverable at common law would be (an) adequate remedy and the defendant would be [expected to be, without being subject to a preservation order] in a financial position to pay them, no interlocutory injunction [preservation order] should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

[18] In *Giffin v Soontiens*, 2011 NSCA 1, at para. 34, Justice Beveridge concluded in an appellate context that regarding an assessment of whether an appellant has demonstrated 'irreparable harm': "the role that risk of repayment can play in establishing irreparable harm is not a static or fixed one, but varies according to the context of the case being decided…".

[19] In relation to the boat, the evidence is clear that, as the Defendants concede, there is an amount owing of the original net $7000 of WW funds used by Marc to purchase the boat in May 2015.

[20] I cannot conclude that injunctive relief is necessary to avoid "irreparable harm", if the boat is not available to satisfy a judgment claimed in this proceeding, given the circumstances and the outstanding amount of debt owing. There is no irreparable harm.

[21] There is no evidence to confirm whether the boat is still owned by the Defendants. Mr. Burke deposed that: "I have seen the boat at Marc's home and I have pictures of Marc driving the boat.… I am unsure whether Marc and Meghan still have the boat at this time." He provided no date when he last saw the boat.

[22] I also conclude that the balance of convenience favours the Defendants.

[23] I decline to make a CPR 42.02 Preservation Order in relation to the boat.

Rule 42.11 order sought

[24] WW also seeks an order under CPR 42.11. That Rule contains its own specific written requirements for issuance of a *Mareva* injunction, including "that the party has met requirements of the common-law for an injunction preserving assets". This requires an examination of the applicable common-law.

[25] In *Aetna Financial Services Limited v Feigelman et al.*,[1985] SCJ No. 1 the Court stated:

> 7 The rule as to the availability of an interlocutory injunction generally has been variously stated but, in my view, it is convenient to refer to the succinct description of that order as found in Chesapeake and Ohio Railway Co. v. Ball, [1953] O.R. 843, where McRuer C.J.H.C. stated, at pp. 854-55:
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> > The granting of an interlocutory injunction is a matter of judicial discretion, but it is a discretion to be exercised on judicial principles. I have dealt with this matter at length because I wish to emphasize how important it is that parties should not be restrained by interlocutory injunctions unless some irreparable injury is likely to accrue to the plaintiff, and the Court should be particularly cautious where there is a

> serious question as to whether the plaintiff would ever succeed in the action. I may put it in a different way: If on one hand a fair prima facie case is made out and there will be irreparable damage if the injunction is not granted, it should be granted, but in deciding whether an interlocutory injunction should be granted the defendant's interests must receive the same consideration as the plaintiff's.
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> *Reconsideration of the requirement that the plaintiff must show a "strong prima facie case" has come in the wake of the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396. However, the other principles enunciated by McRuer C.J.H.C. remain unimpaired. As a general proposition, it can be fairly stated that in the scheme of litigation in this country, orders other than purely procedural ones are difficult to obtain from the Court prior to trial. Where the injunction maintains the status quo in a way which is fair to both sides, the order is attainable; but simply because the order would not injure the defendant is not sufficient reason to move the Court to grant what is generally regarded as an extraordinary intervention. *In Law Society of Upper Canada v. MacNaughton*, [1942] O.W.N. 551, Rose C.J.H.C. stated at p. 551:
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> > I have always understood the rule to be that the question is not whether the injunction will harm the defendant, but whether it is probable that unless the defendant is restrained, wrongful acts will be done which will do the plaintiff irreparable injury.

8 *A second and much higher hurdle facing the litigant seeking the exceptional order is the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial. Execution in this sense includes judicial orders impounding assets or otherwise restricting the rights of the defendant without a trial. This was enunciated by Cotton L.J. in Lister & Co. v. Stubbs, [1886-90] All E.R. 797, at p. 799, as follows:*

> *I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant, the defendant has been ordered to give a security till the debt has been established by the judgment or decree.*

…

9 *The general rule in Lister has had wide application in the law*. See Sharpe, Injunctions and Specific Performance (1983) at pp. 94-97. *However, the abhorrence which the common law has felt toward allowing execution before judgment has always been subject to some obvious exceptions*:

1. *for the preservation of assets, the very subject matter in dispute, where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute:*

> *To a large extent this exception to the Lister rule has been codified in the various provincial and federal procedural rules. Rule 330(1) of The Queen's Bench Rules (Man.) is typical and provides:*
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> > *330(1) The court may, on the application of any party and on such terms as may be just, make an order for the detention or preservation of property, being the subject of the action, ...*

See also: Ontario, Rules of Practice, R.R.O. 1980, Reg. 540, R. 372;

Federal Court Rules, Rule 470(1);
Nova Scotia, Civil Procedure Rules, R. 43.02;
Saskatchewan, The Queen's Bench Rules, R. 389;
Alberta, The Supreme Court Rules, R. 468.

That the courts had jurisdiction to make an order for the preservation of property pending litigation was, however, recognised even prior to passage of the Rules. In Great Western Railway Co. v. Birmingham & Oxford Junction Railway Co. (1848), 2 Ph. 597, 41 E.R. 1074, Cottenham L.C. observed, at p. 1076, as follows:

> It is certain that the Court will in many cases interfere and preserve property in statu quo during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser pendente lite would gain a title; but it would embarrass the original purchaser in his suit against the vendor, which the Court prevents by its injunction. Such are the cases Echliff v. Baldwin (16 Ves. 267), Curtes v. Lord Buckingham (3 V. & B. 168), Spiller v. Spiller (3 Swan. 556), per Lord Redesdale in Dow. 440. It is true that the Court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the Court to decide upon the merits in favour of the plaintiff.
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> Although the Great Western Railway case, supra, was decided before Lister v. Stubbs, supra, *it is nonetheless still accepted that an injunction to preserve the very subject-matter of the action is not to be equated with an injunction of the Mareva variety.* This distinction was recently restated by Craig J. in Rosen v. Pullen (1981), 126 D.L.R. (3d) 62 at pp. 74-75:
>
> It is unnecessary for the Court to consider the present case on the basis of a Mareva injunction because the very subject-matter of the action is the letter of credit in question.

It is not a case of an action against a defendant based on a debt where there is a likelihood that the defendant will remove available assets. See Williston & Rolls, The Law of Civil Procedure, vol. 2 (1970), p. 585, cited with approval by Lerner J. in OSF Industries Ltd. v. Marc-Jay Investments Inc. (1978), 20 O.R. (2d) 566 at p. 567, 88 D.L.R. (3d) 446 at p. 447, 7 C.P.C. 57, as follows:

> (a)An injunction will not be granted to restrain a defendant from parting with or encumbering his property before a creditor has established his right by judgment
>
> The result would be entirely different if the property likely to be disposed of is the very subject matter of the litigation.

2. where generally the processes of the court must be protected even by initiatives taken by the court itself;

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

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

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

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

4. quia timet injunctions were generally permitted under extreme circumstances which included a real or impending threat to remove contested assets from the jurisdiction.

10 Initially the Court of Appeal of the United Kingdom found its jurisdiction to issue this type of quia timet order in a section of the judicature legislation that ultimately became s. 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49, which authorizes the court to issue an injunction where it appears to the court "to be just or convenient" that the order should be made. In the rise of the Mareva injunction in the Court

of Appeal, the source of authority for the Supreme Court was found to reside in this provision which can be traced back through a succession of statutes reaching back to at least The Common Law Procedure Act, 1854, 17 & 18 Vic., c. 125. In later pronouncements concerning this type of injunction, the jurisdiction to do so has been traced even further back into the antiquity of the London Commercial Court. As we shall see, Canadian legislation has followed the same course as s. 45. *Lister*, supra and many other authorities, notably Aslatt v. the Southampton (Corporation of), (1880), 16 Ch.D. 193, have made it clear, however, that these words in the statute do not authorize a court to issue an injunction "because the Court thought it convenient". Nor in the words of the authors of Halsbury's Laws of England (4th ed.), Vol. 24, p. 518, paragraph 918, has this provision altered the general rules applying to the issuance of interlocutory injunctions.

11 *Section 19(1) of the Ontario Judicature Act is to the same effect as the United Kingdom provision, as are most of the comparable provisions in provincial statutes across the country:*

British Columbia, Law and Equity Act, R.S.B.C. 1979, c. 224, s. 36;

Alberta, Judicature Act, R.S.A. 1980, c. J-1, s. 13(2); Saskatchewan, The Queen's Bench Act, R.S.S. 1978, c. Q-1, s. 45(8);

Manitoba, The Queen's Bench Act, C.C.S.M., c. C280, s. 59;

Ontario, Judicature Act, R.S.O. 1980, c. 223, s. 19(1);

Nova Scotia, Judicature Act, 1972 (N.S.), c. 2, s. 39(9);[4]

New Brunswick, Judicature Act, R.S.N.B. 1973, c. J-2, s. 33, am. 1981 (N.B.), c. 6, s. 1;

Prince Edward Island, Judicature Act, R.S.P.E.I. 1974, c. J-3, s. 15(4);

Newfoundland, The Judicature Act, R.S.N. 1970, c. 187, s. 21(m).

…

[4] As a result of a reorganization the present section is 43(9).

> 26 The gist of the Mareva action is the right to freeze exigible assets when found within the jurisdiction, wherever the defendant may reside, providing, of course, there is a cause between the plaintiff and the defendant which is justiciable in the courts of England. *However, unless there is a genuine risk of disappearance of assets, either inside or outside the jurisdiction, the injunction will not issue. This generally summarizes the position in this country, including the Nova Scotia Trial Division in Parmar Fisheries Ltd. v. Parceria Maritima Esperanca L. DA.* (1982), 141 D.L.R. (3d) 498; [further citations omitted]
>
> …
>
> 43 *There is still, as in the days of Lister, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed of or moved out of the country or put beyond the reach of the courts of the country.* This sub-rule or exception can lead to serious abuse. *A plaintiff with an apparent claim, without ultimate substance, may, by the Mareva exception to the Lister rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial.* I would, with all respect to those who have held otherwise, conclude that the order should not have been issued under the principles of interlocutory quia timet orders in Canadian courts functioning as they do in a federal system.
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> *[My italicization added]*

[26] The parties agree on the common-law test for a section 43(9) *Judicature Act*, RSNS 1989, c. 240 and CPR 42.11 (Mareva) injunction, and that on each of these elements the Plaintiff in this case must satisfy the court:

> **1**-that there is a strong *prima facie* case that the plaintiff will be successful on the merits (and this has been held to be "a strong likelihood" on the law and the evidence that the plaintiff will succeed at trial – *R v Canadian Broadcasting Corporation*, 2018 SCC 5 at paras. 12-18 see below)

2-that there is a genuine or serious risk of disappearance of assets, (dissipation or concealment) by the Defendants which could otherwise satisfy a judgment.

3-that the balance of convenience favours the Plaintiff.

CPR 42.11(2) also requires the Plaintiff to satisfy the court such order should be granted considering:

a) a claim for damages;

b) the strength of the party's case;

c) the risk that assets will be made unavailable to satisfy a judgment for the damages; and

d) the likelihood of recovery upon a judgment for the damages if the assets are not preserved.

[27] The Defendants concede that there is a strong *prima facie* case on the evidence before the court, and I agree.

[28] In saying so, I remain mindful of the reasons of Justice Brown for the court in *R v Canadian Broadcasting Corporation,* 2018 SCC 5:

A. *What Is the Applicable Framework for Granting a Mandatory Interlocutory Injunction?*

12 In *Manitoba (Attorney General) v. Metropolitan Stores Ltd*.15 and then again in *RJR - MacDonald,* this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd*.16 At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious.17 The applicant must then, at the second

stage, convince the court that it will suffer irreparable harm if an injunction is refused.18 Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.19

13 This general framework is, however, just that - general. (Indeed, in *RJR - MacDonald*, the Court identified two exceptions which may call for "an extensive review of the merits" at the first stage of the analysis.20) *In this case, the parties have at every level of court agreed that, where a mandatory interlocutory injunction is sought, the appropriate inquiry at the first stage of the RJR - MacDonald test is into whether the applicants have shown a strong [page207] prima facie case*. I note that this heightened threshold was not applied by this Court in upholding such an injunction in *Google Inc. v. Equustek Solutions Inc*.21 In *Google*, however, the appellant did not argue that the first stage of the *RJR - MacDonald* test should be modified. Rather, the appellant agreed that only a "serious issue to be tried" needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply.22 By contrast, *in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.*

14 *Canadian courts have, since RJR - MacDonald, been divided on this question*. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case.23 Conversely, other courts have applied the less searching "serious issue to be tried" threshold.24

15 *In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the RJR - MacDonald test is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong prima facie [page208] case*. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel.25 Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial".26 The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR - MacDonald* as "extensive review of the merits" at the interlocutory stage.27

16 A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory

> injunctions.28 While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR - MacDonald* test, *I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions"*.29 For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that [page209] information from its website. *Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be".30 In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to refrain from doing something*.
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> 17 *This brings me to just what is entailed by showing a "strong prima facie case"*. Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success";31 a "strong and clear" or "unusually strong and clear" case;32 that he or she is "clearly right" or "clearly in the right";33 that he or she enjoys a "high probability" or "great likelihood of success";34 a "high degree of assurance" of success;35 a "significant prospect" of success;36 or "almost certain" success.37 *Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge [page210] must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.*
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> [My italicization added]

[29] I have already addressed the claim for damages and the strength the Plaintiff's case. How serious is the risk that assets owned and controlled by the Defendants will be made unavailable to satisfy a judgment for damages if the Plaintiff is ultimately successful, and the likelihood of recovery upon a judgment for damages if the assets are not preserved?

[30] The only evidence I have before me is that of the Plaintiff, in the form of Stephen Burke's affidavit. The Defendants filed no affidavits in response, from themselves or from any other persons.

[31] The Defendants are also charged criminally and before the Provincial Court as shown by Exhibits 25 and 26 of Mr. Burke's affidavit. Mrs. MacAskill is charged that on 24 May 2017 she stole a sum of money from the Plaintiff exceeding $5000 contrary to section 334(a) of the *Criminal Code*. Both Mr. and Mrs. MacAskill are charged that between November 23, 2013 and November 23, 2016 they did defraud and steal monies from the Plaintiff contrary to sections 332 (1), 355(a), 374(a), 380(1)(a) and that they did conspire together to commit theft over $5000 contrary to section 465(1)(c) of the *Criminal Code*.

[32] Arguably since they are also charged criminally with offences related to the same claims made by the Plaintiff herein, they may have felt reluctant to expose themselves to cross-examination upon their affidavits in this civil proceeding. It was suggested that the 'implied undertaking' rule would insulate them from the Crown making use of their affidavits and testimony in criminal proceedings-see *Juman v Doucette*, [2008] 1 SCR 157. Our Court of Appeal has suggested that "documents that have been filed with the court, not the parties' disclosure *inter se*" are not subject to the protections afforded in the *Juman* case- *Coltsfoot Publishing*

Ltd. v Foster-Jacques, 2012 NSCA 83 at para. 84 per Fichaud JA. In my opinion, it is clear in law that in this case where the civil and criminal proceedings are "totally intermingled" the MacAskills could swear affidavits and still have the protection of s. 13 *Charter* and s. 5 of *Canada Evidence Act*, R.S.C. 1985, c. c-5; *R. v. Noel*, 2002 SCC 67 at para 27. Ultimately the court is not aware of the reasons why neither they nor any other person on their behalf presented evidence in this matter. However, there clearly are persons beyond Mr. and Mrs. MacAskill who could have provided evidence about relevant issues raised by this motion.

[33] As the Plaintiff points out, in the Defendants' Notice of Contest (Exh.32 Burke affidavit) filed at a point in time when the matter was at an Application in Court (later on consent continued as an action) they signalled that beyond themselves they had at least eight other individuals available who could *also* speak to the each of the significant issues that form the core of their defence to this civil matter and the criminal charges: the planned business purchase and sale transaction/employee loans.

[34] To reiterate, the Defendants claim the they were authorized by Mr. Burke to convert any monies they did to their own benefit, provided the amounts were repaid if in the form of personal loans or advances.

[35] The court is left without any understanding of the financial circumstances of the Defendants. The Plaintiff has no comprehensive way to directly access such information and provide it to the court. The Defendants are aware of the Plaintiff's position (at least from the pleadings, the affidavit and the written arguments on this motion) regarding the risk that assets will be made unavailable and, in the event that the Plaintiff is successful, the likelihood of recovery is reduced if the assets are not preserved. The Plaintiff's affiant Mr. Burke was available in court for cross-examination, but the Defendants chose not to exercise their right to cross-examine him.

[36] The Defendants last worked for the Plaintiff in June 2017.

[37] Mr. Burke deposed that it was his belief, supported by the Plaintiff's accountant Lynda O'Laughlin's investigations, that the Defendants "unlawfully and fraudulently converted over $200,000 from the company". He notes that on March 9, 2016 Meghan incorporated a company called "Total Water Investigations Limited" with herself as President, Secretary, Director and recognized agent. This was one year before the Defendants were terminated by the Plaintiff in June 2017. The company's team presently is made up of Meghan, Marc and Tracy Horning, who is a former bookkeeper of the Plaintiff.

[38] Mr. Burke went on to state:

> Meghan's duties with the company evolved over time. Meghan's job description or duties are not set out in a written employment contract or job description. Meghan was the office manager and her duties included bookkeeping responsibilities, maintaining journals, ledgers and financial records, financial statement preparation, audit presentation, reconciliation of bank accounts, payroll, payment of company accounts, Canada Revenue Agency income tax and HST and federal and provincial payroll withholdings… I gave Meghan signing authority on the Water Shed's general operating bank account towards the end of 2013.… At no time was Meghan authorized to grant or approve employee or other form of loans from the Water Shed to herself or Marc, to prepare, write, issue checks drawn on the Water Shed's bank accounts for the issuance of disbursements of loans to herself or Marc, or for the payments of personal expenditures made by the Water Shed on behalf of herself or Marc… at no time did [I] authorize or approve any company checks for payments outside of regular payroll or loans in favour of Meghan or Marc nor have the loans have nor been [sic] repaid, that the income and vacation payments made outside of regular payroll were not earned payments made for personal expenditures were not authorized or approved and that reimbursement for personal expenditures claimed to be made by Marc or Meghan on behalf of the Company were not made on behalf of the Company… During the period of time relevant to this action the Water Shed operated one bank account with the Credit Union Atlantic… Exhibit 9 is schedule detailing checks written to Meghan that were cashed outside of payroll… Exhibit 10 is schedule detailing checks written to Marc that were cashed outside of payroll… Exhibit 11 are copies of checks (front and back) for checks written to Meghan and Marc outside of payroll… That at no time did I or the Water Shed authorize or approve any of the checks set out in exhibits 9 and 10 contained in Exhibit 11,… nor have any of the "loans" referenced in the Defendants' Notice of Defence have been repaid, that the income and vacation payments made outside of regular payroll were not earned, payments made for personal expenditures were not authorized or approved and that reimbursement for personal expenditures claimed to be made by Marc or Meghan on behalf of the Company were not made on behalf of the Company." (paras.14-22)

[39] He continued:

> I was in serious personal financial difficulty and had no disposable money, no personal savings or lines of credit and I had my home insurance and utilities etc. cut off or at risk of being cut off. As such I was personally unable to lend any money to Meghan or Marc during this time… During this period of time the Water Shed was in significant financial trouble. The company had no available [line] of credit, credit cards or ability to access debt. I was also in serious personal financial trouble. I was unable to borrow money. I was behind on my mortgage, my property insurance had been cancelled for nonpayment and my utilities were all in danger of being cut off. My own boat was off the water and in need of repairs that I was unable to afford. I would never have loaned Marc and Meghan money for them to purchase a boat when I could not afford to fix my own.… The Water Shed was approximately $60,000 in arrears with its HST remittances and $300,000 in source

> deduction remittances with the Canada Revenue Agency when Meghan and Marc quit in June 2017 (paras.24 33, and 49)

[40] In summary, the Plaintiff has provided uncontradicted evidence that the Defendants, who had ready, though unauthorized access to the accounts of the Plaintiff, have over years converted between $100,000 and $200,000 of the Plaintiff's money to their own use. The Defendants conceded that a strong *prima facie* case exists that they are liable to the Plaintiff for at least some portion of the claimed monies.

[41] The Defendants have been charged criminally in relation to at least some of these acts of conversion under the civil law. Those charges presume that the informant police officer who swore those informations honestly believed "on reasonable grounds" that the Defendants had committed the within offences- ss. 504 and 507 *Criminal Code*.

[42] In my opinion I can draw an adverse inference against the Defendants in this case. As Justice MacAdam stated in *Tingley v Wellington Insurance* [2009] NSJ No. 375 (SC):

> **Failure to Call Material Witnesses**
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> 457 The defendants observe that the failure to call a material witness, or relevant evidence, can result in the court drawing an adverse inference as to the content of such testimony or evidence had it been given. They refer to the decision of Justice Cromwell in *Davison v.*

> *Nova Scotia Government Employees Union*, 2005 NSCA 51, at para 73, citing Sopinka et al., *Law of Evidence in Canada*, 2d Cdn. (Toronto: Butterworths, 1999) at p. 297:
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> > In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.
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> 458 Justice Cromwell observed that the inference is permissive, not mandatory, and should only be drawn when it is warranted in all the surrounding circumstances. Counsel also acknowledges, referencing Justice Pugsley in *Can. Trustco v. Co-op General* (1997), 163 N.S.R. (2d) 241 (C.A.), at paras. 29-38, that an adverse inference will not be drawn where the proponent has not diligently used the broad powers available to discover the witness or evidence that they fault the other party for not bringing before the court.

[43] The Defendants were aware that the sole purpose of the Plaintiff's motion was to have the court freeze some or all of their assets, so that they would be available to pay any judgment the Plaintiff would receive if ultimately successful. The Plaintiff has been very specific as to its allegations, and particularly its concerns regarding the dissipation or concealment of the Defendants' assets. The Defendants had available to them to contest the Plaintiff's assertions, numerous other witnesses than themselves regarding their potential liability in the action, and their legal position in the motion.

[44] By not presenting any evidence of their own, the Defendants have kept private information relevant to the action, but more importantly to this motion, which the Plaintiff is effectively unable to present otherwise.

[45] I infer that this could be consistent with more than one specific motivation on their part, however I find it reasonable to conclude, and do conclude, that their omission to present any evidence whatsoever is as a result of them acting in what they believe is their own best interests, which includes protecting their assets from an eventual potential judgment against them in favour of the Plaintiff.

[46] The uncontradicted evidence in this motion by itself, satisfies me that they are not trustworthy. This gives rise to a concern that they will conduct themselves in a similar manner in relation to assets they have, to keep them beyond the reach of the Plaintiff should it be successful in the litigation.

[47] Based on all the evidence, I conclude that the Plaintiff has demonstrated that there is a genuine or serious risk that: the assets will be made unavailable to satisfy a judgment for the damages that the Plaintiff might ultimately receive, and that the likelihood of recovery upon such a judgment for damages is materially diminished without a limited Preservation Order, as sought, being made by the court.

[48] As to the balance of convenience, the evidence is clear that the Plaintiff continues to suffer serious financial difficulty, from which it might not recover if the monies it says were converted by the Defendants are not effectively recovered. The Defendants presented no evidence regarding any hardship which might befall them as a result of the Preservation Order being made.

[49] I find the balance of convenience favours the Plaintiff.

[50] I am satisfied the Plaintiff has met the required evidentiary and persuasive burden upon it, that a CPR 42.11 Preservation Order is just and appropriate in these circumstances.

Costs

[51] Both counsel advocated for $1000 in costs. The Plaintiff argued that they should be paid forthwith; the Defendants argued that they should be payable in the cause. Where the issue in the interlocutory proceeding is similar to that which will eventually be decided following a full trial, costs should be in the cause- *AMEC E&C Services Ltd. v Whitman Benn and Associates Ltd*., 2003 NSCA 126 per Bateman JA at para.5. In my view, justice will be done if costs are payable in the cause.

Rosinski, J.