CACV No. 3667

IN THE COURT OF APPEAL FOR SASKATCHEWAN

ON APPEAL FROM THE COURT OF QUEEN'S BENCH

JUDICIAL CENTRE OF SASKATOON
Q.B. No. 1401 of 2019

BETWEEN:

HARMON INTERNATIONAL INDUSTRIES INC.

PROPOSED APPELLANT
(RESPONDENT)

- and -

HARDIE & KELLY INC., Receiver of Harmon International Industries Inc.

PROPOSED RESPONDENT
(APPLICANT)

- and -

PILLAR CAPITAL CORP.

INTERESTED PARTY
(INITIAL APPLICANT)

MEMORANDUM OF LAW ON BEHALF OF PROPOSED APPELLANT, HARMON INTERNATIONAL INDUSTRIES INC.

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TABLE OF CONTENTS

I. INTRODUCTION AND RELIEF SOUGHT

1. This Memorandum of Law is filed in support of an application by the Proposed Appellant, Harmon International Industries Inc. ("**Harmon**"), by Notice of Motion dated June 11, 2020 (the "**Leave Application**"), for an order granting leave to appeal the Sales Process Order of the Honourable Mr. Justice R.W. Elson (the "**Chambers Judge**") issued June 5, 2020 (the "**Sales Process Order**" or the "**Order**"). Harmon's proposed appeal has sufficient merit and importance to ground an order for leave to appeal, as the Sales Process Order has authorized the Proposed Respondent in this matter, Hardie & Kelly Inc. (the "**Receiver**") to have Harmon's Property listed and sold at a price far below market value, when the evidence ought to have weighed heavily against granting the Sales Process Order.

II. FACTS

2. Harmon relies on the facts stated in the Affidavit of Calvin Moneo sworn October 8, 2019 (the "**October 2019 Moneo Affidavit**"), the Affidavit of Calvin Moneo sworn January 10, 2020 (the "**January 2020 Moneo Affidavit**"), and the Affidavit of Calvin Moneo sworn June 5, 2020 (the "**June 2020 Moneo Affidavit**"), as well as certain facts alleged in the Affidavit of Kevin Hoy sworn January 8, 2020 (the "**Hoy Affidavit**"), the Affidavit of Ken Kreutzwieser sworn January 8, 2020 (the "**Kreutzwieser Affidavit**"), and the First Report of the Receiver dated May 27, 2020 (the "**First Report**"). Reference will also be made to the Confidential Supplement to the First Report of the Receiver dated May 27, 2020 (the "**Confidential Supplement**"). Unless stated otherwise, this Memorandum of Law adopts the abbreviations used in the October 2019 Moneo Affidavit.

III. ISSUE

3. This Memorandum of Law is concerned with the following issue: should this Court grant Harmon leave to appeal the Order?

IV. RIGHT OF APPEAL

4. Harmon's right of appeal arises from section 193(e) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "***BIA***"), which provides that:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> . . .
>
> (e) in any other case by leave of a judge of the Court of Appeal.

V. CRITERIA FOR GRANTING LEAVE TO APPEAL

5. In *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119 at para 6, 227 Sask R 121 [*Rothmans*], this Court set the established test to be met on an application for leave to appeal:

> The power to grant leave has been taken to be a discretionary power exercisable upon a set of criteria which, on balance, must be shown by the applicant to weigh decisively in favour of leave being granted: *Steier v. University Hospital*, [1988] 4 W.W.R. 303 (Sask. C.A., per Tallis J.A. in chambers). The governing criteria may be reduced to two—each of which features a subset of considerations—provided it be understood that they constitute conventional considerations rather than fixed rules, that they are case sensitive, and that their point by point reduction is not exhaustive. Generally, leave is granted or withheld on considerations of merit and importance, as follows:
>
> > First: Is the proposed appeal of sufficient merit to warrant the attention of the Court of Appeal?
> >
> > - Is it prima facie frivolous or vexatious?
> > - Is it prima facie destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?

- Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?
- Is it apt to add unduly or disproportionately to the cost of the proceedings?

Second: Is the proposed appeal of sufficient importance to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?

- does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
- does it raise a new or controversial or unusual issue of practice?
- does it raise a new or uncertain or unsettled point of law?
- does it transcend the particular in its implications?

VI. PROPOSED GROUNDS OF APPEAL

6. The Proposed Appellant proposes to abandon grounds of appeal (a) and (c) in the Draft Notice of Appeal, but seeks leave to appeal on ground of appeal (b) in the Draft Notice of Appeal, which states:

> That the Learned Chambers Judge erred in fact and/or in law in failing to conclude that ICR Commercial Real Estate was intending to list the Harmon Lands, as described in the Sales Process Order, at a value significantly less than fair market value.

VII. APPLICATION OF CRITERIA FOR GRANTING LEAVE TO APPEAL

7. It is respectfully submitted that Harmon's proposed ground of appeal meets the two-part test for leave as established in *Rothmans*.

Merit

8. It is submitted that the proposed appeal is of sufficient merit to warrant the attention of the Court of Appeal.

9. Harmon's proposed appeal is neither frivolous nor vexatious. Instead, this proposed appeal is well-founded on the evidence that was before the Chambers Judge, as well as the principles of law that ought to have been applied to exclude certain evidence relied upon by the Chambers Judge.

10. The crux of Harmon's proposed appeal is that the Sales Process Order authorizes ICR to list the Millar Property for sale with a list price of $3,800,000, when there was considerable evidence to show that the market value of Harmon's property at 2401 Millar Avenue in Saskatoon (the "**Millar Property**") is significantly higher. Such evidence includes the following:

a. Collier's listing of the Millar Property (not including one of the lots) in 2018 for $5,250,000 (Exhibit "J" to the October 2019 Moneo Affidavit);
b. The initial valuation of the Millar Property (not including one of the lots) at $5,125,000 provided by Ken Kreutzwieser ("**Kreutzwieser**") of ICR in September 2018 (Kreutzwieser Affidavit at para 4);
c. ICR's own listing of the Millar Property (likewise not including one of the lots) for $5,295,000 in 2019 (October 2019 Moneo Affidavit at para 14);
d. Coldwell Banker's offer to list the Millar Property for $4,950,000 in 2020 (June 2020 Moneo Affidavit at para 6); and
e. The Brunsdon Report appraising the Millar Property at $5,500,000 in 2017 (Exhibit "C" to the October 2019 Moneo Affidavit).

11. Why then did the Chambers Judge authorize ICR to list the Millar Property for $3,800,000? It is submitted that the Chambers Judge relied on three pieces of evidence:

1) Kreutzwieser's later opinion that the Millar Property is worth less than $5,125,000 (Kreutzwieser Affidavit at para 6);
2) the content of the Confidential Supplement, and

3) the appraisal by Suncorp Valuations dated January 7, 2020 (the "**Suncorp Appraisal**"), which provides that the market value of the Millar Property is $3,430,000 to 3,650,000.

12. These three pieces of evidence, when properly considered, are far from capable of supporting the conclusion that the market value of the Millar Property is in the range of $3,800,000. First, Kreutzwieser's revised opinion merely states that the market value of the Millar Property is less than $5,125,000: such opinion does not provide any particular value to the Millar Property.

13. Second, the Confidential Supplement does not contain an appraisal of the Millar Property, and instead only contains proposals from ICR and Colliers for the listing of this property (First Report at para 59). To the extent that they are making these proposals in order to enter into a listing agreement, ICR and Colliers cannot be viewed as independent third parties providing reliable opinions of value.

14. Third and most importantly, it is submitted that in admitting as evidence and considering the Suncorp Appraisal, the Chambers Judge erred in law by failing to apply the appropriate principles. Specifically, as the Suncorp Appraisal was exhibited to the Hoy Affidavit and as Kevin Hoy is counsel for Harmon's principal secured creditor, Pillar Capital Corp., the Chambers Judge ought to have applied the authorities prohibiting the filing of evidence on substantive or contentious matters by way of a lawyer's affidavit. Such authorities include *Crouser v 493485 Alberta Ltd.*, [1996] AJ No 967 (WL) (ABQB) and *Pavao v Ferreira*, 2018 ONSC 1573, [2018] OJ No 1247. In *Owen v White Bear Lake Development Corp.*, [1997] 7 WWR 296 (WL) (SKQB) 1997 at para 7, the Court of Queen's Bench of this province declined to admit evidence filed in the form of an exhibit to a lawyer's affidavit but granted leave to file the evidence as an exhibit to an affidavit sworn by one of the defendants.

15. It follows that the only appraisal that should have been considered by the Chambers Judge in determining whether or on what terms to grant the Sales Process Order was

the Brunsdon Report providing an appraised value of $5,500,000. While the Brunsdon Report was admittedly dated, there was more recent evidence to support the conclusion that the market value of the Millar Property is approximately $5,000,000. Such evidence clearly outweighs the evidence contained in the Confidential Supplement.

16. For the above reasons, it is also submitted that the proposed appeal is not *prima facie* destined to fail, having regard to the nature of the issue, the scope of the right of appeal, or the nature of this Court's adjudicative framework. Harmon recognizes that the standard of review on appeal will require that this Court treat the Sales Process Order with deference, however the facts presented here at least indicate that it is open to argument as to whether the Chambers Judge erred in principle or disregarded material matters of fact, as contemplated in *Rimmer v Adshead*, 2002 SKCA 12 at para 58, 217 Sask R 94.

Importance

17. It is submitted that the proposed appeal is of sufficient importance to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal.

18. Most obviously, the proposed appeal is of great importance to the receivership proceedings, as the Sales Process Order bears heavily and prejudicially upon the outcome for Harmon. Simply put, by permitting the Receiver to sell the Millar Property for approximately $3,800,000, the Sale Process Order risks costing Harmon more than $1,000,000, a very large share of its total assets.

19. More broadly, the proposed appeal raises issues of importance to the practice of receivership law and insolvency law more generally. Not only does the proposed appeal raise the issue of whether appraisal evidence should be considered by judges of first instance when exhibited to a lawyer's affidavit, but it also asks this Court to consider what principles

might be applied in weighing different forms of evidence of value in commercial insolvency proceedings.

VIII. SUMMARY OF THE PROPOSED APPELLANT'S APPLICATION

20. Harmon respectfully request that leave to appeal be granted for the reasons contained herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 29th day of July, 2020.

Leland Kimpinski LLP

Per:_____
Solicitor for the Proposed Appellant,
Harmon International Industries Inc.

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IX. LIST OF AUTHORITIES

1. *Crouser v 493485 Alberta Ltd.*, [1996] AJ No 967 (WL) (ABQB).
2. *Owen v White Bear Lake Development Corp.*, [1997] 7 WWR 296 (WL) (SKQB).
3. *Pavao v Ferreira*, 2018 ONSC 1573, [2018] OJ No 1247.
4. *Rimmer v Adshead*, 2002 SKCA 12, 217 Sask R 94.
5. *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121.

TAB 1

1996 CarswellAlta 1611
Alberta Court of Queen's Bench

Crouser v. 493485 Alberta Ltd.

1996 CarswellAlta 1611, [1996] A.J. No. 967, 66 A.C.W.S. (3d) 1160

BETWEEN. TAD CROUSER Applicant and - 493485 ALBERTA LTD. Respondent

Veit J

Judgment: November 5, 1996
Docket: 9603 12867

Counsel: J.R. McClelland for the applicant
R S. Woods for the respondent

Subject: Public

***THE HONOURABLE MADAM JUSTICE JOANNE B. VEIT*:**

1. Background

10 Tad Crouser issued an originating notice of motion in which he asks for an injunction restraining the respondent from dealing with Crouser's shares in 493485 Alberta Ltd., and for related relief including a direction that the respondent deliver up to Crouser the minute book and other corporate documents and statements.

11 The originating notice was supported by two affidavits, one sworn by Mr. Crouser, and one sworn by his lawyer.

12 The affidavit from Mr. Crouser states, among other things, that, in 1993, he became an 8% shareholder in the respondent company as a result of doing "delimbing" work on logs. Mr. Crouser stopped working with the company in November, 1994 He swears that he never signed a document in which he disposed of his shares in 493485 Alberta Ltd.

13 The affidavit filed by Mr Crouser's lawyer contains much of the same material contained in Mr. Crouser's affidavit: Exs. E. F, G, H. 1 of the lawyer's affidavit are also exhibited to the Crouser affidavit.

14 The affidavit filed by Mr. Crouser's lawyer exhibits letters that he sent to the respondent:

1 - he sent a letter to the respondent's lawyer asking for confirmation that the company still existed and that Mr. Crouser still owned shares in the company, and for the company's minute book;

2 - he received a reply from the respondent's lawyer stating that Mr. Crouser had ceased to be a shareholder and director of the company in November, 1994;

3 - he wrote to the respondent's solicitor, referring to the response received and asking: "How could this happen?". The solicitor's letter goes on to say:

> My client informs me that he never signed or agreed to sign any documents selling or transferring his shares in the above company. He never has received Notices of any Shareholders' Meeting of the above Company. In fact, he informs that he has never received any Notice or other documentation that informed him that his Shares were being dealt with in any way.
>
> I am advised by my client that he paid valuable consideration for the Shares in the above company.

> This is notice to you and your client that unless my clients Share Certificates and the Minute book of the above Company are produced to our offices by November 27, 1995, I am instructed to proceed immediately under Part 18 of the *Alberta Business Corporations Act* against the above Company and your client.

4 he was told by the lawyer for the respondent company that the latter would not be delivering any minute book to him;

5 - he personally delivered a letter to the lawyer for the respondent asking for the minute book and undertaking to return the minute book to him by June 6, 1996;

6 - he was told by the lawyer for the respondent company that the latter would not be delivering any minute book to him;

7 - he received the results of a corporate registry search done on June 4, 1996, showing that Mr. Crouser was not a shareholder in the respondent company.

15 The respondent company has filed an affidavit from one of its directors stating that, on November 7, 1994, Mr. Crouser executed an assignment of his 100 Class A Common Voting shares of the company to the company, which document is exhibited to the affidavit, and that the company has offered to redeem Mr. Crouser's preferred shares for the issue price of $1.00 per share, but that Mr. Crouser has refused this offer.

2. Legal ethics of giving evidence for one's own client

16 Part 10 of the Alberta Professional Code of Conduct for lawyers - a part entitled "Lawyer as Advocate" - includes Rule #10:

> A lawyer must not act in any proceeding in which it is likely that the lawyer will give evidence that will be contested.

17 Mark Orkin states in his textbook on legal ethics:

> So far as Canada is concerned, the burden of the older cases was that while the practice [of a lawyer giving evidence for his own client] is not one which should be encouraged, yet there is no law barring counsel for either party to an action from giving evidence either in support of his client's case or gainst the other party to the suit and it is said to have been permitted time and again in both Canadian and English Courts. Arsenault, V.C., while expressing this opinion in ... felt, however, that it was more ethical for counsel not to do so.
>
> /The more modern Canadian view is that it is improper for counsel to give evidence at trial ....
>
> It is likewise improper for a solicitor to give evidence by way of affidavit to establish the facts of his clients case; if he does so it should only be as to matters of procedure and where no other course is possible.
>
> Nevertheless, although the appearance of counsel as a witness on behalf of his client is "irregular and contrary to practice" and has been considered to be grounds for granting a new trial and is universally condemned. yet the fact remains that there is no rule "but only an urgent judicial reprobation" forbidding the practice... Accordingly. in *Stanley v Douglas*, [1951] 4 D.L.R. 689, Cartwright J, after reviewing the authorities, came to the conclusion that the evidence is legally admissible.

18 In *Meier*, Funduk M. cited the following comments of Addy J. in *Lex Tax Canada*:

> The present case illustrates clearly and dramatically the impropriety of having the solicitor of any party to a legal proceeding take an affidavit or testify orally on behalf of his client regarding any cause or issue as to which he has been consulted. The rule has long been recognized by common law Courts but of late, seems to have fallen into disuse to some extent, in interlocutory matters in any event, largely because it is so much more convenient for the solicitor to take such affidavits.
>
> Whatever might be the motive for doing so, it is completely improper and unacceptable for a solicitor to take an affidavit even in an interlocutory matter where he attests to matters of substance and might therefore expose himself to being cross-examined on matters covered by solicitor-and-client privilege. In the case at bar, counsel for the defendant quite

candidly stated that it was precisely in order to avoid answering questions on certain aspects of the case as to which any other representative of the defendant might be cross-examined, that a decision was made to have the affidavit taken by the solicitor. This of course, brings into focus all the more clearly the fundamental injustice which might result from the practice.

Where, as in the present case, there is a refusal on the part of the solicitor to answer on the grounds of solicitor-and-client privilege resulting in a denial of the other party's right to full and complete cross- examination on all matters raised in the affidavit, the Court has no alternative but to reject all of the evidence of that witness. In the case at bar this involves the solicitor's affidavit and its exhibits. Since this is the only evidence tendered, the motion must necessarily fail.

19 Funduk M. also noted:

It is correct that generally a counsel should not also be a witness. In Chambers Practice and Advocacy, v. 1 (LESA 1983) Stevenson J.A. suggests:

Where affidavit evidence is employed the most serious breach of general principles relating to affidavits is the use of counsel's own affidavit. This is a practice which should be discouraged. If we applied the strictures of the Supreme Court of Canada a good many counsel would be disqualified from arguing motions.

20 Funduk M. continues:

Of course there may be situations where it would be proper for counsel to be a witness, although he should definitely not appear as counsel on the application.

If there is an issue between counsel about what happened between them who better to testify on that than counsel? Should we still force the litigants to give evidence based on information and belief, being information they receive from counsel?

If a counsel wants to put in evidence letters that he has received should we force the litigant to give evidence putting the letters in evidence?

21 Funduk M. goes on to hold that the impugned evidence must be analyzed to determine whether a lawyer's affidavit is improper.

22 Funduk M. also issued the decision in *Duffy* in which he records concerns relative to the filing of affidavits by the party's own solicitor.

23 The Alberta Appeal Court stated, in *Kennett*:

The affidavit 'in support of the application was of the appellant's solicitor. While this was not objected to, it is our duty to point out that such an affidavit was improper. While affidavits on information and belief are permitted in chamber matters it does not follow that they may be used in all circumstances. They should not be used when the evidence is the evidence of the person making the application and no other evidence is tendered. In such cases, the party making the application should himself take the affidavit. Among other reasons why this type of affidavit should not be used is because it would deprive the opposite party of effective cross- examination on the affidavit, if such were desired

24 In summary, then, the authority of case law and of academic commentary is that lawyers should not give evidence except on merely formal matters. Rule 10 of Part 10 of the Alberta Professional Code of Conduct is not framed in the same way as the older commentaries; however. its intent is, clearly, the same. In this context, "contest" includes cross-examination.

25 Funduk M.'s opinion in *Meier* that lawyers who give evidence on formal matters should not appear as counsel on any application relating to those matters was probably restricted to those few situations where a matter, expected to be uncontested, becomes contested. Otherwise, it appears to me that neither the Professional Code of Conduct nor the other authorities prevent a lawyer who has filed a merely formal affidavit from appearing on a motion in the proceedings.

3. What happens when lawyers give evidence for their own clients

26 While the case law holds that it is improper for lawyers to give evidence for their clients, it does not state what may be done to an offending lawyer when this occurs. One supposes that the party opposite may complain to the Law Society and that the Law Society will then take whatever action it deems fit.

27 The courts also have a role in this matter. As in other aspects of the conduct of litigation, the court may use its costs power to sanction inappropriate behaviour. In the worst case, where a lawyer gives evidence for the client on more than merely formal matters, while admitting the evidence, the court could prevent the lawyer who has become a witness from continuing to act as a lawyer.

4. Application of the law to this case

a) Is Mr. Crouser's lawyer's affidavit limited to formal matters?

28 No, the lawyer's affidavit is not limited to formal matters. Much of the information sworn to by the lawyer relates to letters sent and received by him on purely formal matters. I agree with Funduk M.'s comments that it would be pointlessly formalistic to have some other person - the lawyer's student or secretary - swear to such matters. It is appropriate for the lawyer himself to swear to the state of the correspondence between the lawyers.

29 Even in this context, however, I must note that part of the lawyer's affidavit deals with telephone conversations rather than letters. This is giving evidence, albeit not on the merits of the proceedings. If the content of the conversations were contested, the lawyer would be forced to ceased to act because he would be required to give evidence. In the circumstances here, it may not be contested that the conversations' were limited to a refusal by the respondent to provide the minute book and other corporate documents Therefore, I do not take this portion of the affidavit into account in determining whether the motion should be successful.

30 The main problem with Mr. Crouser's lawyer's affidavit is that, in part, it incorporates by reference correspondence that deals with the merits of the proceeding. This is precisely what a lawyer should not be giving evidence about.

b) Can Mr. Crouser's lawyer be cross-examined on his affidavit?

31 Certainly, Mr. Crouser's lawyer can be cross-examined on his affidavit. One of the problems that will arise is how effective the cross-examination can be when the lawyer's affidavit is, in part, based on information received from his client A more difficult issue may arise in that context about whether the swearing by the lawyer of the affidavit in question has an impact on solicitor-client privilege. It is premature to determine those issues on this motion.

c) Should Mr. Crouser's lawyer be forbidden to act?

32 It is premature to prevent Mr. Crouser's lawyer to act in this proceeding. The court has the power to make such an order, but it should not do so until the full ramifications of the lawyer's affidavit are known. These ramifications will only become known once the responent has decided whether it will cross-examine the solicitor on his affidavit and the cross-examination has taken place.

5. Procedure on the motion

33 Mr. Crouser says that the respondent should file an affidavit pointing out which aspects of his lawyer's affidavit are contested. I do not agree that an affidavit on this issue is usually necessary. Whether a lawyer's affidavit will be contested will usually be made plain from the affidavit itself. The issues about which a lawyer can swear are identified by Funduk M. in *Meier*. Other issues, any issues going to the merits, are potentially contestable. It is not necessary for the party opposite to identify

these in an affidavit; a review of the pleadings and of the other material filed will normally identity the issues that are likely to be contested.

6. Costs

34 Although the respondent has not been successful on this motion, it should have costs of the application since it was the decision by Mr Crouser's lawyer to file his own affidavit, and to include in it matters of information and belief, that required this motion to be brought forward.

End of Document

TAB 2

1997 CarswellSask 208
Saskatchewan Court of Queen's Bench

Owen v. White Bear Lake Development Corp.

1997 CarswellSask 208, [1997] 7 W.W.R. 296, 157 Sask. R. 1, 71 A.C.W.S. (3d) 975

James Michael Owen, Plaintiff and White Bear Lake Development Corp. and Norman Shepherd, Elmer Lonethunder, Maria Shepherd, Bruce Standingready, George Sparvier, Edward Harvey Littlechief, Paul Twietmeyer, Fay Sioux-John and Bernard Shepherd, Defendants

Geatros J.

Judgment: May 30, 1997
Docket: Regina Q.B.G. 3582/95

Counsel: *Mervin C. Phillips*, for plaintiff.
Shelley J. Pillipow, for defendants.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Professions and occupations
IX Barristers and solicitors
IX.4 Relationship with client
IX.4.f Counsel as witness
Headnote
Barristers and Solicitors --- Relationship with client — Counsel as witness
Defendants brought motion for order setting aside default judgment and to strike plaintiff's claim — Only evidence in support of motion presented by way of affidavit from defendants' lawyer — Code of Professional Conduct and case law prohibited solicitor from acting as witness for own client — Fact that solicitor best person to depose to relevant facts of no avail — Situation could not be remedied by having another lawyer argue motion — Motion adjourned to allow defendant to file and serve affidavit from one of defendants.
All the defendants in an action brought a motion for an order setting aside the noting for default against them, with the individual defendants also seeking to have the claim against them struck. The only evidence presented on their behalf was an affidavit by their solicitor.
Held: The motion was adjourned to allow the defendants to file new affidavits in support of the motion.
The Law Society's *Code of Professional Conduct* and case law prohibit a lawyer from acting as a witness for a client except in purely formal or uncontroverted matters. In this case, the solicitor deposed to facts and circumstances of a substantive nature. It was irrelevant that she was the best person to depose of the facts relevant to the issues involved in the motion. Nor could the situation be remedied by having another lawyer argue the motion. What was required was that another affidavit be taken by one of the defendants. The matter was adjourned to allow this step to be taken.
Table of Authorities
Cases considered by *Geatros J.*:
Bilson v. University of Saskatchewan, [1984] 4 W.W.R. 238, 33 Sask. R. 1 (Sask. C.A.) — applied
C & M Farms Ltd. v. Rottacker Farms Ltd. (1975), [1976] 2 W.W.R. 634, 65 D.L.R. (3d) 286 (Alta. T.D.) — considered
Prince Albert Rural School Division No. 56 v. Fisher (1981), 16 Sask. R. 245 (Sask. Q.B.) — applied
R. v. Ironchild (1984), 30 Sask. R. 269 (Sask. C.A.) — considered

MOTION by defendants to set aside default against them and to strike plaintiff's claim.

***Geatros J.*:**

1 Upon this motion, all of the defendants seek an order that the noting for default against them be set aside. As well, the individual defendants ask that the plaintiff's claim against them be struck. In support of the motion was read the affidavit of Shelley Pillipow, counsel for the defendants, who appeared on their behalf to present the motion. *No other evidence* by way of affidavit or otherwise was relied upon by the defendants.

2 During argument, the question was raised concerning the propriety of Ms. Pillipow's appearance as counsel for the defendants since it is she who gave the only evidence, by way of her affidavit, in support of the motion.

3 The *Code of Professional Conduct* (adopted by The Benchers of The Law Society of Saskatchewan in Convocation on September 26, 1991, effective October 1, 1991), provides:

> The lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a tribunal save as permitted by local rule or practice, or as to purely formal or uncontroverted matters. This also applies to the lawyer's partners and associates; generally speaking, they should not testify in such proceedings except as to merely formal matters. The lawyer should not express personal opinions or beliefs, or assert as fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer must not in effect become an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to someone else. ...

4 It is apparent that what Ms. Pillipow deposed to went beyond "formal or uncontroverted matters". She dealt with facts and circumstances of a substantive nature.

5 In *Bilson v. University of Saskatchewan*, [1984] 4 W.W.R. 238 (Sask. C.A.), Cameron J.A., in alluding to a like provision in the Canadian Bar Association Code of Professional Conduct, said at p. 241: "... so long as it remains part of the profession's code of conduct it should be adhered to." Ms. Pillipow, after having an opportunity to reflect upon it, may well acknowledge that the rule is clear.

6 In *Prince Albert Rural School Division No. 56 v. Fisher* (1981), 16 Sask. R. 245 (Sask. Q.B.), McIntyre J. said, at p. 247, "... I am of the view that a person who presents evidence in any cause or matter should not be the solicitor for a party when that cause or matter is being heard." See also *R. v. Ironchild* (1984), 30 Sask. R. 269 (Sask. C.A.), referred to by Cameron J.A. in *Bilson, supra*. To the same effect is the judgment of the Alberta Supreme Court, D.C. McDonald J. in *C & M Farms Ltd. v. Rottacker Farms Ltd.* (1975), 65 D.L.R. (3d) 286 (Alta. T.D.).

7 It cannot avail Ms. Pillipow by asserting that she is the best person to depose to the facts relevant to the issues involved in the motion. She is the solicitor of record for the defendants in the action. In such a context she cannot, I suggest, remedy the situation by having another lawyer argue the motion. What is needed is another affidavit taken by one of the defendants, either on the basis of having personal knowledge, or upon information and belief, or both, of the facts and circumstances relied upon in seeking the kind of relief sought. I do not agree, as I understood Ms. Pillipow to say, that an affidavit from *every* defendant would be required.

8 I do not criticize Ms. Pillipow. Her professional qualifications and ethics are beyond reproach. I am satisfied that in preparing the present motion she was not conscious of the ramifications of presenting her own evidence in support of it. In such circumstances the motion should not be dismissed, but it stands adjourned until June 26 next. In the meantime the defendants have leave to file and serve an affidavit of the kind I have alluded to, or such other material as they may be advised, in support of their motion. I leave the matter of costs for the chambers judge on the adjourned date.

Motion adjourned to allow defendants to file new affidavits in support of motion.

TAB 3

Most Negative Treatment: Check subsequent history and related treatments.

2018 ONSC 1573
Ontario Superior Court of Justice

Pavao v. Ferreira

2018 CarswellOnt 3578, 2018 ONSC 1573, [2018] O.J. No. 1247, 291 A.C.W.S. (3d) 553, 36 E.T.R. (4th) 307

MARIA P. PAVAO (Plaintiff) and ZENAIDE FERREIRA, ALSO KNOWN AS ZENAIDA FERREIRA, JOSE FERREIRA, THE ESTATE OF LUIS C. PAVAO, DECEASED, VICTOR PAVAO, IN HIS CAPACITY AS BENEFICIARY OF THE ESTATE OF LUIS PAVAO, AND MICHAEL PAVAO, IN HIS CAPACITY AS BENEFICIARY OF THE ESTATE OF LUIS PAVAO (Defendants)

Favreau J.

Heard: November 16, 2017
Judgment: March 7, 2018
Docket: CV-17-568933

Counsel: Gisel Bettencourt, for Plaintiff
Michael Katzman, for Defendant, Zenaide Ferreira
Daniel Naymark, for Defendant, Jose Ferreira
Andreas Seibert, for Defendants, Victor Pavao and Michael Pavao

Subject: Civil Practice and Procedure; Estates and Trusts; Evidence; Family; Property

Related Abridgment Classifications

Estates and trusts
I Estates
I.16 Miscellaneous
Evidence
XVII Affidavits
XVII.4 As evidence at trial
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.c Miscellaneous

Headnote

Civil practice and procedure
Estates and trusts
Evidence
Family law
Remedies

Table of Authorities

Cases considered by *Favreau J.*:

Abco Box & Carton Co. v. Dafoe & Dafoe Inc. (1987), 20 C.P.C. (2d) 128, 65 C.B.R. (N.S.) 292, 1987 CarswellOnt 196 (Ont. Dist. Ct.) — referred to

Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business & Technology (2003), 2003 CarswellOnt 35, [2003] O.T.C. 7 (Ont. S.C.J.) — followed

Cardenas (Litigation guardian of) v. Sallese (2017), 2017 ONCA 237, 2017 CarswellOnt 4067, 66 C.C.L.I. (5th) 179 (Ont. C.A.) — referred to
Carevest Capital Inc. v. North Tech Electronics Ltd. (2010), 2010 ONSC 1290, 2010 CarswellOnt 2927, 267 O.A.C. 96, 103 O.R. (3d) 231, 97 C.P.C. (6th) 98 (Ont. Div. Ct.) — referred to
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Pavao v. Pavao Estate (2017), 2017 ONSC 542, 2017 CarswellOnt 789 (Ont. S.C.J.) — referred to
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Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to
Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to
Succession Law Reform Act, R.S.O. 1990, c. S.26
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 30.10 — considered

R. 30.10(1) — considered

R. 30.10(2) — considered

R. 39.01(4) — considered

R. 40.03 — considered

R. 42.01(2) — considered

R. 77.05 — considered

***Favreau J.*:**

Introduction

1 This matter has a complex history and came before me as a motion for extensive extraordinary injunctive relief, including the continuation and expansion of a *Mareva* injunction, and additional *Norwich* orders.

2 For the reasons set out below, the motion to continue the injunctive relief already ordered is granted, but the balance of the motion is dismissed.

Background facts

The parties and background relevant to the motion

3 The plaintiff, Maria Pavao ("Ms. Pavao") is 81 years old. She immigrated to Canada from Portugal in 1952. She was married to Luis Pavao ("Mr. Pavao") for over 60 years.

4 Ms. Pavao and Mr. Pavao have four adult sons. The defendants Victor Pavao ("Victor") and Michael Pavao ("Michael") are the two youngest sons. The older sons, John and Oswald, are not parties to this action.

5 Mr. Pavao was admitted to hospital with lung cancer in August of 2015, where he remained until his death on December 13, 2015.

6 Ms. Pavao and Mr. Pavao separated on September 1, 2015, while Mr. Pavao was in the hospital. In November 2015, Ms. Pavao initiated an application under the *Family Law Act*, R.S.O. 1990, c. F.3, for the purpose of obtaining spousal support and equalization of the net family property (the "FLA proceedings").

7 Following Mr. Pavao's death, Ms. Pavao continued the FLA application by way of a Notice of Application dated March 4, 2016 under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26.

8 Throughout his life, Mr. Pavao ran a dry goods store in Toronto's Kensington Market (the "Kensington Store"). The Kensington Store was jointly owned by the Pavaos. In addition, at different times, he and Ms. Pavao owned a number of other properties, including the following which are at issue in this action:

a. A restaurant property located in Dundalk, Ontario (the "Dundalk Restaurant Property");

b. A farm property located in Dundalk, Ontario (the "Dundalk Working Farm"); and

c. A second farm property located in Dundalk, Ontario (the "Third Dundalk Property").

9 Since the late 1970s, the defendant Zenaide Ferreira provided bookkeeping assistance and financial advice to Mr. Pavao. The defendant, Jose Ferreira ("Mr. Ferreira") is Ms. Ferreira's husband. (Collectively Mr. and Ms. Ferreira are referred to as the "Ferreiras" or the "Ferreira defendants".)

10 In addition, it is evident that some of the properties owned by Mr. Pavao and, in some cases, Ms. Pavao were also owned in part by Ms. Ferreira and, in one case, Mr. Ferreira. For example, the Pavaos and Ferreiras owned the Dundalk Working Farm together until 2008 when Ms. Pavao sold her interest to the Ferreiras and 2010 when Mr. Pavao sold his interest to the Ferreiras. In addition, Mr. Pavao and Ms. Ferreira owned the Third Dundalk Property together until 2015, when Mr. Pavao transferred his interest in the property to Ms. Ferreira.

11 It is also evident that the two families had a social relationship and that, amongst other interactions, they spent recreational time together at the Dundalk Working Farm.

Estate proceedings

12 Mr. Pavao's will did not leave anything to Ms. Pavao. His will provided that his estate was to be divided equally between his four sons, and included a few small gifts to other relatives.

13 Soon after Mr. Pavao's death, the Pavaos' oldest sons, John and Oswald, claimed that their father had transferred his interest in the Kensington Store to them a few days before his death. They brought an application to the Court on February 29, 2016, seeking to have the Court approve the transfer (the "Estate proceedings"). Ms. Pavao, all four Pavao sons and the Ferreiras were parties to the application. The application was ultimately settled by consent judgment dated August 15, 2018, although it does not appear that the Ferreiras participated in the settlement. The settlement included approval of the transfer of Mr. Pavao's interest in the Kensington Store to John and Oswald, John and Oswald renouncing any interest in the balance of Mr. Pavao's estate and a requirement that John and Oswald swear affidavits in support of the proceedings against the Ferreiras.

14 Ms. Pavao has also brought a dependent's support application in the context of the Estate proceedings. The settlement of John and Oswald's application provides that Ms. Pavao can continue with her application.

Motion before Justice Charney

15 In the context of the Estate proceedings and the FLA proceedings, Ms. Pavao obtained disclosure of some of Mr. Pavao's financial records. Through this disclosure, she became aware of the extent of Ms. Ferreira's role in Mr. Pavao's financial interests. It became evident that Ms. Ferreira had signing authority over many aspects of Mr. Pavao's bank accounts, that she was in possession of many of his financial records and that her home address was the mailing address for many of Mr. Pavao's records such as his income tax returns.

16 It also became evident that the Dundalk Restaurant Property had been sold in August 2015, that Mr. Pavao had deposited $311,892.79 from the proceeds of sale in a bank account that was jointly held by the Pavaos at a branch of the Canadian Imperial Bank of Commerce (the "CIBC"), and that Ms. Ferreira had transferred $235,567.90 out of that account in the form of money orders and to other accounts at the CIBC in her own name. Notably, some of these transfers had been made after John and Oswald had been appointed as powers of attorney for property for Mr. Pavao and, in at least one case, after Mr. Pavao's death.

17 On the basis of this information, Ms. Pavao's lawyer brought an urgent motion against Ms. Ferreira in the context of the FLA proceedings seeking a *Mareva* injunction for the purpose of freezing $235,567.09 in Ms. Ferreira's CIBC accounts and/or the return of the money orders Ms. Ferreira had drawn on the Pavaos' joint account. Ms. Pavao also sought a *Norwich* order for disclosure of information from the Ferreiras' CIBC accounts. The motion was brought before Justice Charney on January 19, 2017, on five days' notice.

18 At the time of the motion, Ms. Ferreira had retained counsel, but the lawyer she retained was unavailable for the motion, and another lawyer appeared on his behalf to request an adjournment.

19 On the day of the motion, Justice Charney granted the adjournment to April 18, 2017, on a number of terms including the following:

a. A schedule was set for the exchange of materials and cross-examinations leading up to the hearing of the motion;

b. The plaintiff was required to commence a separate action or application against Ms. Ferreira within 14 days;

c. The CIBC was required to disclose to Ms. Pavao's counsel the amounts in any accounts held by Ms. Ferreira and/or Mr. Ferreira in which either of them had an interest, including three specifically identified accounts;

d. The CIBC was required to freeze until further order of the court the sum of $235,567.90 in the accounts held by Ms. Ferreira and/or Mr. Ferreira;

e. Mr. Ferreira was to surrender to Ms. Pavao's lawyer any uncashed bank drafts, international money orders or other negotiable instruments in her possession that were obtained through withdrawals from Mr. Pavao's bank accounts, and the amount of frozen funds was to be reduced to reflect the amount of bank drafts delivered to Ms. Pavao's lawyer; and

f. The Ferreiras were to deliver to the plaintiff's lawyer within 20 days, all papers and property in their possession belonging to Mr. Pavao, including all banking, investment, estate planning, business, tax, insurance, legal files, powers of attorney and wills.

20 A few days later, Justice Charney released his decision explaining the basis for his order. His decision, which is reported as 2017 ONSC 542 (Ont. S.C.J.), included the following findings:

8 Shortly before the date of separation Luis sold the restaurant property that was owned solely by him. He deposited the proceeds of the sale - $311,892 - of the property into his bank account on August 7, 2015. While that bank account was held jointly with the applicant she did not know that it existed. She only discovered its existence after the Court issued an order on April 28, 2016 compelling the bank to disclose all accounts belonging to Luis (the disclosure order).

. . .

11 Since obtaining the disclosure order the applicant has discovered other accounts in which Luis deposited funds from his business operations. The applicant discovered that Ms. Ferreira was also named as an account holder and received all of the bank statements at her home. Her signature appears on all cheques written on the account and her name and that of Luis Pavao are printed on the cheques.

12 The applicant alleges that Ms. Ferreira has transferred to herself or to accounts held jointly with her husband Jose Ferreira (via money orders, bank drafts, cheques and transfers) virtually all of the proceeds from the sale of the restaurant. They allege that, unbeknownst to the applicant, Ms. Ferreira transferred a total of $235,567.90 from the Pavao's joint bank account into her accounts. The applicant has produced the bank documents (cheques, bank drafts and international money orders) to support this allegation.

13 This amount includes a $100,000 bank draft that was cashed by Ms. Ferreira as recently as December 9, 2016.

21 Based on these findings, Justice Charney found that it was appropriate to make an order freezing the amounts Ms. Ferreira had transferred out of the Pavaos' joint account:

20 I am satisfied that the applicant has met the test for a *Mareva* injunction in this case. The evidence presented by the applicant on this motion presents a strong prima facie case that Ms. Ferreira has converted funds from the applicant's joint account or the proceeds of the sale of a property to which the applicant has a valid claim, to Ms. Ferreira's own use. Ms. Ferreira's past conduct establishes a circumstance of urgency such that there is a serious risk of removal, dissipation or hiding of such assets if the injunction is not made until this motion can be heard in three months. Now that Ms. Ferreira's activities regarding these funds have been detected the funds are at risk.

21 I am satisfied that the applicant, who is 81 years of age and in poor health, will suffer irreparable harm if the assets are dissipated before this motion can be heard with a full record. This is a circumstance where if the assets are dissipated they may not be recovered in the applicant's lifetime. The sum in question can be traced directly to the Pavao's joint bank account and/or the sale proceeds of the restaurant property. The freezing order does not interfere with Ms. Ferreira's ability to conduct banking with respect to funds linked to her own income. Finally, while the freezing of Ms. Ferreira's bank accounts for three months may be an inconvenience, no evidence was presented to suggest that Ms. Ferreira had any immediate need for these funds over the next few months. Indeed, her counsel advised that she was a woman of means who owned many properties in Toronto.

22 He also found that this was an appropriate case for a Norwich order compelling disclosure from the CIBC:

34 I have already determined that the applicant has presented a strong *bona fide* claim or potential claim against Ms. Ferreira. In the present case the bank is an innocently involved third party in receipt of allegedly fraudulent funds from the Pavao's accounts or properties. This satisfies the second part of the *Norwich* test. The bank, as is often the case, is likely

the only practical source of information that would enable the applicant to locate fraudulently transferred assets or funds. (*Autopoietic Telemetric Solutions Limited v. John Loughlin*, 2012 ONSC 2305at para. 15).

Motion before Justice Croll

23 Following Justice Charney's decision, on February 2, 2017, the plaintiff issued a statement of claim that commenced this civil action. The claim makes extensive allegations of fraud, deceit, breach of fiduciary duty, breach of contract and negligence against Ms. Ferreira. The allegations are not limited to the issue of the proceeds of sale from the Dundalk Restaurant property, but span many years and relate to extensive alleged financial dealings between Ms. Ferreira and the Pavaos.

24 On April 18, 2017, the plaintiff sought to proceed with the motion for injunctive relief that had been adjourned by Justice Charney. The motion was brought in Family Court.

25 Justice Croll made the following endorsement, finding that the motion should not have been brought in Family Court, and varying the interim relief ordered by Justice Charney:

> This dispute does not properly belong in the family court (See endorsement of Charney J dated Jan 19, 2017, paras. 28 and 29.) The issues raised against the Ferreiras and the relief sought must be resolved in the context of the civil action that has been initiated.
>
> This motion is adjourned *sine die*, pending relief in the civil action, on the following terms:
>
> The interim order of Charney J dated January 19, 2017 shall continue in place subject to the following:
>
> i. The Respondents Zenaide Ferreira and Jose Ferreira shall pay into court the sum of $185,000 pending the disposition of the civil claim, another order of this court, or agreement of the parties. Upon this payment being made, paras 6 and 7 of the Charney Order are no longer required and shall be removed;
>
> ii. Accordingly, CIBC is ordered to "unfreeze" the accounts referred to para 5;
>
> iii. The Respondent Zenaide Ferreira shall not sell, mortgage or otherwise deal with the property known as 19 Dundalk, described as Part of Lot 236 and Part of Lot 237, Concession 1, Southwest of the Toronto and Sydenham Road, being Part 2 on Plan 17 R-1178, Township of Southgate, County of Grey (known as the 3rd Dundalk property) without first providing at least 60 days written notice to the Applicant Maria Pavao and the Respondents Victor Pavao and Michael Pavao, and without their consent or the consent of the Court;
>
> iv. The Applicant and Pavao Respondents shall arrange for this motion to be heard at the earliest possible time, and in any event no later than May 31, 2017;
>
> v. Given the serious costs issues, all parties may refile the material filed for this motion today in the civil action, and rely on same.

Issues and position of the parties on the motion

26 Following Justice Croll's endorsement, the motion was scheduled for June 12, 2017. The motion was subsequently rescheduled on consent to November 16, 2017, to allow time for a refusals motion.

27 The relief sought on the motion before me expanded significantly from the motion that was originally heard by Justice Charney, in part due to information the plaintiff received as a result of the disclosure from the CIBC and other sources. The plaintiff now seeks to continue the orders made by Justices Charney and Croll, and she also seeks expanded *Mareva* injunctive relief and very broad *Norwich* orders. The specific relief she seeks is as follows:

a. Continuation of the orders made by Justice Charney and Justice Croll;

b. Freezing of an additional $525,000 (or half of that amount), which represents the proceeds of sale from the Dundalk Working Farm;

c. Broad third party production from financial institutions and government agencies, including the Canada Revenue Agency (the "CRA");

d. An order permitting the continuation of the action against the estate of Mr. Pavao without an estate trustee;

e. Consolidation of this action with the FLA proceedings and the Estate proceedings;

f. A certificate of pending litigation; and

g. Costs of the motion before Justice Charney on a substantial indemnity basis.

28 In support of the motion, the plaintiff relies on three affidavits sworn by a law clerk in her lawyer's office. The first affidavit formed the basis for the motion before justice Charney. The other two affidavits are based in part on the information obtained from the CIBC as a result of the Justice Charney's *Norwich* order. The plaintiff's record also includes affidavits sworn by John and Oswald that are attached to the law clerk's affidavit.

29 Relying on these affidavits and cross-examinations on the Ferreiras' affidavits, the plaintiff argues the sales of the Dundalk Working Farm and the Third Dundalk Property were improper. With respect to the Dundalk Working Farm, she argues that Ms. Ferreira tricked Ms. Pavao into selling her share of the property and that Mr. Pavao did not get any consideration for his share of the property. With respect to the Third Dundalk Property, Ms. Pavao claims that the transfer of the property from Mr. Pavao to Ms. Ferreira for $2.00 was improper.

30 She also argues that that the Kensington Store generated a significant amount of cash business, and that the Ferreiras' wealth is disproportionate to the salaries they earned during their working lives, suggesting that the Ferreiras' wealth comes from misappropriation of the Pavaos' wealth.

31 On this basis, Ms. Pavao seeks a continuation and expansion of the *Mareva* order, and seeks extensive further third party disclosure of the Ferreiras' financial affairs.

32 Not surprisingly, Victor and Michael support the plaintiff's motion. Ultimately, as beneficiaries of Mr. Pavao's estate, they have an interest in any amounts Ms. Ferreira may owe Mr. Pavao's estate. However, they have not sworn any affidavits in support of the motion.

33 In response to the motion, Ms. Ferreira has sworn two affidavits on which she was cross-examined. She maintains that she provided appropriate accounting and financial assistance to Mr. Pavao, and that there is an explanation for each of the apparent financial irregularities. She also takes the position that Victor and Michael do not have standing to advance the interests of Mr. Pavao's estate, and that the appointment of an estate trustee is required to advance such interests. Finally, she takes issue with the propriety of the plaintiff's evidence, arguing that the law clerk's affidavits contain unattributed hearsay and that it is improper for an employee in a lawyer's office to file an affidavit in support of the motion.

34 Mr. Ferreira is separately represented by counsel. He also swore an affidavit and was cross-examined. He supports the positions taken by Ms. Ferreira on the motion.

Issues and analysis

35 Based on the relief sought, I have distilled the issues to be decided as follows:

a. Is the affidavit of the law clerk admissible?

b. Is the plaintiff entitled to *Mareva* injunctive relief?

i. What is the test for a *Mareva* injunction?

ii. Should the *Mareva* injunction in respect of the proceeds of sale from the Dundalk Restaurant Property continue?

iii. Should a further *Mareva* injunction be granted in relation to the proceeds of sale from the Dundalk Working Farm?

c. Should a further *Norwich* order be granted?

d. Is injunctive relief available if the plaintiff has not sought injunctive relief in the statement of claim?

e. Is the plaintiff's undertaking as to damages sufficient?

f. Should a certificate of pending litigation be granted in relation to the Third Dundalk Property?

g. Is the appointment of an estate trustee necessary?

h. Should the FLA proceedings, Estate proceedings and civil claim be consolidated?

Law clerk's affidavit

36 As mentioned above, the evidence in support of the plaintiff's motion is based on affidavits sworn by Eva Medeiros, who is a law clerk working in the office of counsel for the plaintiff. The Ferreira defendants take issue with Ms. Medeiros' affidavits on the basis that they contain unattributed hearsay and that it is improper for a lawyer to provide substantive evidence on a motion. While not argued explicitly, Ms. Pavao's lawyer appears to defend the use of Ms. Medeiros' affidavit on the basis that Ms. Pavao is elderly and frail, and that her English is poor and she is illiterate.

37 Rule 39.01(4) of the Rules of Civil Procedure sets out the requirements for affidavit evidence on a motion:

> An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

38 The case law recognizes that a failure to attribute hearsay evidence is not fatal in circumstances in which it is possible to glean the source of the information from the attached exhibits and circumstances where the matters at issue are not contentious: see *Carevest Capital Inc. v. North Tech Electronics Ltd.*, 2010 ONSC 1290 (Ont. Div. Ct.) at para. 16; and *Abco Box & Carton Co. v. Dafoe & Dafoe Inc.*, [1987] O.J. No. 2395 (Ont. Dist. Ct.) at paras. 12 to 19. However, there is no doubt that second or third hand hearsay or unattributed hearsay on contentious matters in inadmissible or at the very least should be given little to no weight: *Cardenas (Litigation guardian of) v. Sallese*, 2017 ONCA 237 (Ont. C.A.), at paras. 10 and 11.

39 I also agree with the Ferreira defendants that it is generally improper to rely on an affidavit sworn by a lawyer or staff within a law firm for the purpose of advancing evidence dealing with the substance of a claim. In *Ferreira v. Cardenas*, 2014 ONSC 7119 (Ont. S.C.J.), paras. 14 to 17, Myers J. explained why affidavits from lawyers and law firm staff are generally inappropriate in support of a motion for summary judgment:

> 14 Lawyers' affidavits can be quite helpful in cases where the lawyers, or their staff, have particular knowledge relevant to the facts in issue before the court. In *Mapletoft v. Christopher J. Service*, 2008 CanLII 6935 (ON SC) at para. 15, Master MacLeod provided the following guidelines for the use of lawyers' affidavits:
>
> > For the guidance of counsel in future, I propose the following guidelines:
> >
> > > a) A partner or associate lawyer or a member of the clerical staff may swear an affidavit identifying productions, answers to undertakings or answers given on discovery. These are simple matters of record, part of the discovery and admissible on a motion pursuant to Rule 39.04. Strictly speaking an affidavit may not be necessary but it

may be convenient for the purpose of organizing and identifying the key portions of the evidence. Used in this way, the affidavit would be non-contentious.

b) If it is necessary to rely on the information or belief of counsel with carriage of the file, it is preferable for counsel to swear the affidavit and have other counsel argue the motion. This approach will not be appropriate for highly contentious issues that may form part of the evidence at trial. If the evidence of counsel becomes necessary for trial on a contentious issue, it may be necessary for the client to retain another law firm.

c) Unless the evidence of a lawyer is being tendered as expert testimony on the motion, it is not appropriate for an affidavit to contain legal opinions or argument. Those should be reserved for the factum.

15 Some procedural motions turn on evidence that counsel is uniquely situated to provide. For example, a motion for dismissal for delay under rule 24.01 or a motion to amend a timetable under rule 3.04 will turn on facts concerning how the litigation has progressed or the reasons why it may not have progressed for a period of time. Counsel, rather than clients, are often best suited to have personal knowledge of these types of facts. Similarly, if the conduct of counsel is the subject matter of a proceeding, such as a motion for costs under rule 57.07 or more a motion brought to compel undertakings under rule 34.15, then, once again, counsel will likely be best suited to provide firsthand evidence of relevant facts.

16 It is rarer for law firm clerical staff to be helpful witnesses. In some cases, a clerk or assistant may conveniently adduce evidence simply exhibiting correspondence between lawyers that is non-contentious. By contrast, evidence from a lawyer adduced by way of information and belief through a staff member simply limits the weight of the evidence and should be discouraged: *Essa (Township) v. Guergis; Membery v. Hill*, [1993] O.J. No. 2581 (Ont. Div. Ct.). Moreover, this is not an appropriate vehicle if the lawyer who provides the information wishes to be counsel at the hearing: *Manraj v. Bour*, 1995 CarswellOnt 1335 (SCJ). One may also question the advisability and propriety of exposing administrative staff to cross-examination.

17 Unlike these procedural motions, motions for summary judgment go to the heart of the merits of the dispute between the clients. The lawyers for the parties generally have no firsthand knowledge of the facts. They have no "specific facts showing that there is a genuine issue requiring a trial". For this reason, information and belief evidence tendered through a lawyer's affidavit will rarely satisfy rule 20.02. Moreover, as the Court of Appeal explained in *Armstrong v. McCall*, 2006 CanLII 17248at para. 33, there is a concern that information and belief evidence will be used to shield persons from cross-examination.

40 Given that the test on a motion for a *Mareva* injunction requires the plaintiff to demonstrate that she has a strong *prima facie* case, in my view similar concerns arise with allowing the plaintiff to put her case forward through the evidence of a law clerk. Having said that, the courts have recognized that evidence through a lawyer's affidavit is appropriate if it deals with procedural or non-contentious matters: see *Garrick v. Dalzine*, 2015 ONSC 2175 (Ont. S.C.J.), at para. 7.

41 In his case, Ms. Medeiros' affidavits contain a mix of admissible evidence, inadmissible evidence and evidence to which I would give little weight. Parts of her affidavits consist of a narrative attaching documents from third party sources, such as the CIBC, and, in my view, these are business records and are admissible. Other parts of her affidavit provide background information about the parties and the history of the proceedings, and again, in my view, these are non-contentious matters and therefore admissible.

42 However, there are many instances in which Ms. Medeiros' affidavit is hearsay evidence touching on matters of controversy, and in some cases is unattributed or second or third hand. Set out below are a few examples of many such instances:

a. "Ms. Pavao advises that the store generated significant cash over the decades and that Mr. Pavao took this cash to Ms. Ferreira's home every week. Ms. Pavao does not know the whereabouts of the cash generated by the store. Ms. Pavao believes that cash revenues from the family's Casa Acoreana business were used to fund the purchase of various pieces of real estate, the proceeds of which are missing or have been transferred to Ms. Ferreira". (Paras. 42 and 43 of Ms. Medeiros' affidavit sworn January 10, 2017.)

b. "Ms. Pavao, Victor and Michael Pavao have also advised that they did not receive any Christmas gift on behalf of Mr. Pavao and were completely unaware of this cheque until it was disclosed by CIBC." (Para. 55 of Ms. Medeiros' affidavit sworn January 10, 2017.)

c. "Ms. Pavao advises that contrary to the assertions in Ms. Ferreira's Answer, it was actually Ms. Ferreira who approached and suggested to Ms. Pavao that Ms. Pavao should purchase a car for her son Michael, but this was not at all tied to selling a share in the Dundalk Working Farm. Ms. Pavao advises that Ms. Ferreira arranged to take her to a lawyer's office to sign papers and that Ms. Ferreira must have paid the legal fees. Ms. Pavao advises that she had no idea what she was signing". (Para. 97 of Ms. Medeiros' affidavit sworn January 10, 2017.)

d. "Ms. Ferreira indicated in her Answer ... that she had not held onto any property belonging to Mr. Pavao. However, I am advised by Ms. Pavao that Mr. Pavao owned a truck, and that a truck matching this description has been seen parked in Mr. and Ms. Ferreira's driveway at 86 Riverwood Parkway on or about October, 2016." (Para. 125 of Ms. Medeiros' affidavit sworn January 10, 2017.)

e. "Subsequent to the January 19, 2017 hearing, Mr. Seibert advises that he spoke to the Pavao's neighbours across the road from the Dundalk Working Farm who put him in contact with the mother of (and joint account holder with) Mr. Curtis Shaw, who confirmed regular payments to Mr. Shaw's bank accounts to cut the grass and clear the snow at Dundalk Working Farm. Mrs. Shaw also advised Mr. Seibert that she accompanied her son to the said farm to carry out maintenance. Using this information, Mr. Seibert advised that CIBC, who were able to match these regular deposits into Mr. Shaw's account to cheques prepared by Ms. Ferreira drawn from the Pavao's joint CIBC Account 72-95235, between 2014 and June, 2015, *years after* the Pavaos allegedly 'sold' their share in the family farm to Ms. Ferreira." (Para. 95 of Ms. Medeiros' affidavit sworn March 30, 2017.) (Emphasis added in original.)

f. "Ms. Pavao advises that she and her husband did not purchase any properties and did not have any large expenses after November, 2006." (Para. 112 of Ms. Medeiros' affidavit sworn March 30, 2017.)

43 In addition, as some of the examples above make clear, Ms. Medeiros' affidavits are replete with argument, advocacy and opinion. Set out below are a few additional notable examples:

a. On a number of occasions, Ms. Medeiros states that it is her belief that Ms. Ferreira was holding certain amounts in trust for Mr. Pavao's estate. For example, she states "Based on my review of the banking records provided by CIBC it is my belief that Ms. Ferreira was holding these funds on behalf of Mr. Pavao's estate in trust in March 2016..." (Para. 67 of Ms. Medeiros' affidavit sworn January 10, 2017.)

b. On a number of occasions Ms. Medeiros suggests that signatures are forged. For example, she states "Mr. Pavao's signature on the cheque to Portugal Auto Garage appears to be forged as it does not resemble his signature on other documents signed in front of counsel during that time period." (Para. 126 of Ms. Medeiros' affidavit sworn January 10, 2017.)

c. She compares the Pavaos' assets to the Ferreiras' assets, and provides the following opinion: "Accordingly, in comparing the net worth of the Ferreiras and the Pavaos today, to when Ms. Ferreira first began bookkeeping work for the Pavaos, having regard to the income potential for each family, it appears that the Pavao family had substantially more resources." (Para. 25 of Ms. Medeiros' affidavit sworn March 30, 2017.)

d. Ms. Medeiros speculates that Ms. Ferreira wrote a letter signed by Mr. Pavao: "I believe that Zenaide Ferreira wrote this said letter to Epstein Cole because (i) Mr. Pavao spoke little English, was functionally illiterate in Portuguese and English and because he was at "death's door" (he died on December 14, 2015); (ii) It appears that it is the same author (poor English-language skills) and that the same typewriter is used as in many other documents..." (Para. 28 of Ms. Medeiros' affidavit sworn March 30, 2017.)

44 Even if Ms. Pavao's lawyer had explicitly argued that Ms. Pavao could not swear an affidavit on her own behalf, in my view the types of defects referred to above could not be saved on the basis that Ms. Meideros' evidence is reliable and necessary. As indicated above, some of it is reliable because it is based on attached business records, but much of the evidence is unattributed hearsay or hearsay evidence from Ms. Pavao on very contentious matters. In terms of necessity, Ms. Medeiros has not put forward any independent evidence, beyond her own opinion, that Ms. Pavao is illiterate and in poor health. Notably, as referred to below, Ms. Pavao did swear an affidavit giving an undertaking as to damages.

45 Accordingly, in my view, there are significant portions of Ms. Medeiros' affidavit that are inadmissible or to which I would give very little weight. However, rather than going through the exercise of parsing her affidavits to determine which portions are inadmissible, my analysis of the issues below takes account of the concerns I have identified with Ms. Medeiros' affidavits. I have tried to make clear the evidence relied on, and the basis on which I have accepted or not accepted the evidence relevant to the issues as I go through them.

Request for Mareva injunctions

Test for obtaining a Mareva injunction

46 A *Mareva* injunction is available to freeze the defendants' assets where there is a risk that the assets will be moved or dissipated to avoid judgment. It has been described as a "drastic and extraordinary". It is recognized as extraordinary relief because the courts do not generally grant judgment before a determination of the merits of a claim: see *Pugliese v. Arcuri*, 2011 ONSC 3157 (Ont. Div. Ct.), at para. 18; and *Furrow Systems International Ltd. v. Island Pools & Landscaping Ltd.*, 2014 ONSC 1428 (Ont. S.C.J.), at para. 9.

47 In his decision, Justice Charney set out the test for obtaining a *Mareva* injunction as follows:

> 19 In *O2 Electronics Inc. v. Sualim*, 2014 ONSC 5050 (CanLII) at para. 67, Perell J. summarized the law relating to *Mareva* injunctions as follows:
>
> > For a *Mareva* injunction, the moving party must establish: (1) a strong *prima facie* case; (2) that the defendant has assets in the jurisdiction; and (3) that there is a serious risk that the defendant will remove property or dissipate assets before the judgment. A *Mareva* injunction should be issued only if it is shown that the defendant's purpose is to remove his or her assets from the jurisdiction to avoid judgment. The moving party must also establish that he or she would suffer irreparable harm if the injunction were not granted and that the balance of convenience favours granting the injunction. Absent unusual circumstances, the plaintiff must provide the undertaking as to damages normally required for any interlocutory injunction.

48 In this case, there are two aspects to the plaintiff's request for *Mareva* injunctive relief. First, the plaintiff requests that the moneys held in court attributable to the sale of the Dundalk Restaurant Property remain in court and, second, the plaintiff now requests that a further amount be frozen in respect of the sale of the Dundalk Working Farm.

Continuation of the Mareva injunction in respect of proceeds of sale from Dundalk Restaurant

49 As indicated above, Justice Charney made an order freezing the sum of $235,567.90 in the Ferreira's accounts until further court order. Ultimately, Ms. Ferreira did return some of the money orders drawn on the Pavao's joint account, and Justice Croll reduced the amount to be frozen to $185,000, and ordered that that amount be paid into Court.

50 As part of the relief sought on this motion, the plaintiff asks that this amount continue to be held in Court.

51 In argument and in their factum, the Ferreira defendants did not vigorously argue that this order should be lifted, except on the basis of the more general arguments addressed and dismissed below that the statement of claim does not seek permanent injunctive relief and that the undertaking as to damages is insufficient.

52 Neither side addressed the test that I am to apply in deciding this issue. Normally, an *ex parte Mareva* injunction is to be considered *de novo* when it comes back before a judge on notice: *NAC Air LP v. Wasaya Airways Ltd.*, [2007] O.J. No. 4618 (Ont. S.C.J.), at paras. 16 and 17. In contrast, where parties seek to vary a *Mareva* injunction, they must meet the test in *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business & Technology*, [2003] O.J. No. 40 (Ont. S.C.J.), at para. 16. In this case, the original interim relief was not obtained *ex parte*, but the Ferreira defendants did not have an opportunity to present responding evidence on the motion before Justice Charney. In addition, he adjourned the motion on terms, making clear that the motion was to be argued on the merits when it was returned before the Court. On this basis, I am satisfied that the matter is to be decided *de novo*.

53 Based on my view of the evidence, I do not see any basis to lift or vary this aspect of the previous orders. The plaintiff's evidence in support of freezing the amount at issue consists primarily of bank records showing that amounts from the Pavaos' joint bank account were paid out by Ms. Ferreira to her other accounts, including the payment of $100,000 made after Mr. Pavao's death.

54 While Ms. Ferreira's affidavit evidence does provide some explanations for such payments, I find that these explanations are generally self-serving, have changed over time, and lack an air of reality. In many instances, she states that she was repaying herself loans she had made to Mr. Pavao, but she provides no independent evidence of the loans.

55 Accordingly, I agree with Justice Charney, that the plaintiff has made out a strong *prima facie* case in relation to the proceeds from the sale of the Dundalk Restaurant Property. I also agree with the balance of his analysis on the test for a *Mareva* injunction, and, in my view, the evidence put forward by the Ferreira defendants on the motion does not affect the conclusions he reached on his application of the other part of the test. For example, while Ms. Ferreira's lawyer argued that there is no risk that the Ferreira defendants will dissipate their assets given their many properties and strong ties to Ontario, as found by Justice Charney at paragraph 20 of his reasons, the conduct at issue itself speaks to risk of dissipation.

Request for Mareva injunction with respect to proceeds from the sale of the Dundalk Working Farm

56 In contrast, in my view, the evidence in support of an order freezing the proceeds of sale from the Dundalk Working Farm does not support a strong *prima facie* case. This Court has explained that a strong *prima facie* case is one where the plaintiff demonstrates that she is clearly right and almost certain to succeed at trial: see *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, [2009] O.J. No. 1743 (Ont. S.C.J.), at para. 39.

57 The Dundalk Working Farm was purchased by the Pavaos and Ferreiras in May 1992. At that time, the Parcel register shows that the property was a 50% joint ownership interest by the Pavaos and a 50% joint ownership interest by the Ferreiras. Ms. Pavao's interest in the property was transferred to the Ferreiras in 2008 for $32,000, and Mr. Pavao's interest was transferred to the Ferreiras in 2010 again for $32,000.

58 Ms. Pavao takes the position that she was tricked into transferring her interest to Ms. Ferreira and that Mr. Pavao's transfer was improper because it was done for no consideration. Ms. Pavao asserts that the Ferreiras sold the Dundalk Working Farm for $525,000 on September 1, 2015, and that that amount or, alternatively, half of that amount should be frozen.

59 Ms. Ferreira's position is that these were legitimate transactions that occurred because both Ms. Pavao and Mr. Pavao needed money at the time the transfers occurred.

60 The difficulty with the position advanced by Ms. Pavao is that she has put forward no direct evidence on this very contentious issue. In contrast to the evidence put forward in support of the freezing order in relation to proceeds from the sale of the Dundalk Restaurant which consists of bank records, the evidence on this issue is primarily hearsay evidence about Ms. Pavao's recollection of how she came to transfer her interest in the Dundalk Working Farm and speculation about the lack of foundation for Mr. Pavao's transfer.

61 With respect to Ms. Pavao's interest, Ms. Medeiros' evidence includes the following statements:

> Ms. Pavao advises that contrary to the assertions in Ms. Ferreira's Answer, it was actually Ms. Ferreira who approached and suggested to Ms. Pavao that Ms. Pavao should purchase a car for her son Michael, but this was not at all tied to selling a share in the Dundalk Working Farm. Ms. Pavao advises that Ms. Ferreira arranged to take her to a lawyer's office to sign papers and that Ms. Ferreira must have paid the legal fees. Ms. Pavao advises that she had no idea what she was signing.
>
> Ms. Pavao believes that the transaction was orchestrated by Ms. Ferreira to trick her.
>
> . . .
>
> Ms. Pavao says that she learned that she had transferred her share of the Dundalk Working Farm when her husband came home and began physically assaulting her for having sold part of the farm to Ms. Ferreira. (Para. 97, 98 and 100 of Ms. Medeiros' affidavit sworn January 10, 2017.)

62 With respect to Mr. Pavao's interest in the property, in her affidavit, Ms. Medeiros states that Mr. Pavao's sons believed that Mr. Pavao continued to own the property at the time their parents separated. She also states that, from her review of the Pavaos' financial information, she has not come across any evidence that Mr. Pavao was paid for the transfer of the property.

63 In contrast, Ms. Ferreira has provided direct evidence on this issue.

64 With respect to the transfer to Ms. Pavao, the evidence is her affidavit is as follows:

> In or about the spring of 2008, I was cutting Mrs. Pavao's hair and she was telling me that she wished to purchase a car for her son Michael. Over the course of the discussion, Mrs. Pavao asked me if I would purchase her share of the property so that she could use the funds to buy her son a car.
>
> Mrs. Pavao suggested the figure of $32,500.00 as a fair price for her share. We agreed on that figure as the purchase price. She was pleased with the arrangement and the transaction was completed by Mrs. Skultety.
>
> Mrs. Pavao received the sale proceeds. She used $16,753.54 to purchase a car for her son, and kept the rest for herself.

65 She goes on to explain that sometime later Mr. Pavao approached her about selling his interest in the Dundalk farm for the same amount, and that they agreed to the transaction which was paid for in cash. After that, Mr. Pavao continued to use the farm as a hobby farm. He harvested and sold hay from the farm, in exchange for which he paid for some of the expenses.

66 The difficulty with the plaintiff's request that I freeze the proceeds from the sale of the Dundalk Working Farm is that I am faced with two competing versions of how the transfers occurred, and that the evidence put forward by Ms. Pavao is hearsay evidence to which I cannot give much weight.

67 It may turn out at trial that the plaintiff is able to support her claim for fraudulent conveyance in relation to the Dundalk Working Farm, but based on the record before me I cannot find that she has made out a strong prima *facie case* for the purpose of obtaining a *Mareva* injunction. Given that the plaintiff has not made out a strong *prima facie* case, it is not necessary for me to consider the balance of the test for a *Mareva* injunction.

Further Norwich order

68 The plaintiff seeks extensive production from third parties relating to the Ferreiras including further banking documents and documents from the CRA. The requests go far back in time and, in some cases, the specific source of documents is not identified and the scope of the request is without parameters. For example, requests include obtaining copies of the Ferreiras' income tax returns from the CRA from 1980 to the present and requiring "financial institutions, including the Sotto Mayor Bank ... to disclose requested information and documentation relating to any accounts held or formerly held" by the Ferreiras.

69 The plaintiff's justification for requesting these broad orders in part is that she believes that Ms. Ferreira has defrauded her and Mr. Pavao over many years. Her primary support for this position is her view that the Ferreira's wealth is not justified

by their employment history or the amount of money they had when they immigrated to Canada in the 1970s. Therefore, she seeks third party production that would allow her to review the Ferreiras' financial affairs over a very lengthy period of time for the purpose of identifying any potential fraud perpetrated by Ms. Ferreira.

70 In *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619 (Ont. C.A.) at paras. 85 and 104, the Court of Appeal emphasized that a *Norwich Pharmacal Co. v. Customs & Excise Commissioners* [[1973] UKHL 6 (U.K. H.L.)] is "extraordinary discretionary relief", and that it is only available where the applicant can demonstrate that the disclosure is necessary "to permit a prospective action to proceed".

71 In his decision, Justice Charney described the test for a *Norwich* order as follows:

> 33 In *Bergmanis v. Diamond & Diamond*, 2012 ONSC 5762Perell J. summarized the requirements for a *Norwich* order as:
>
> > (1) the plaintiff must have a *bona fide* claim or potential claim against a wrongdoer; (2) the defendant to the *Norwich* proceeding must have a connection to the wrong beyond being a witness to it; (3) the defendant to the *Norwich* proceeding must be the only practical source of the needed information; (4) the interests of the party seeking the disclosure must be balanced against the interests of the defendant to the proceeding, including his or her interest in privacy and confidentiality, and any public interest that would justify non-disclosure; and (5) the interests of justice must favour obtaining the information

72 The Ferreira defendants object to the issuance of further *Norwich* orders in this case in part on the basis that the litigation is no longer at the "pre-action" stage. I agree with this objection.

73 Once the litigation has commenced, the plaintiff should follow the procedures in the Rules of Civil Procedure for obtaining documentary disclosure, including for disclosure from non parties. As held in *GEA Group AG v. Ventra Group Co.*, *supra*, at para. 104, a *Norwich* order "is not intended as a device to circumvent the normal discovery process mandated by the *Rules of Civil Procedure*".

74 The plaintiff argues in the alternative that she should be entitled to the third party productions requested pursuant to Rule 30.10 of the Rules of Civil Procedure. The difficulty with this position is that Rule 30.10(2) requires that notice be given to third parties. In addition, Rule 30.10(1) requires leave of the Court, and part of the test developed by the courts for obtaining leave requires the party seeking production to establish *inter alia* the importance of the documents to the litigation and that the documents are not otherwise available through the discovery process between the parties in the litigation: *Ontario (Attorney General) v. Ballard Estate* (1995), 26 O.R. (3d) 39 (Ont. C.A.), at para. 15.

75 In this case, given that there has not yet been any documentary production or examination for discovery, it is not possible to determine whether leave is appropriate.

76 Accordingly, the request for a further *Norwich* order is dismissed because it does not meet the stringent test for pre-litigation extraordinary relief. The request for production of documents from non-parties pursuant to Rule 30.10 is also dismissed because the plaintiff has not served the proposed non-parties and because she has not met the test for disclosure.

77 However, my ruling on this point is without prejudice to the plaintiff's ability to renew her request for production from third parties at a later date. I note that such a motion is to be brought before a Master.

78 As a final point on this issue, when I indicated during argument that I was skeptical that the relief sought could be ordered at this stage of the proceedings, Ms. Pavao's lawyer expressed concern about the preservation of further bank records from the CIBC given the age of some of the records her client is seeking. Counsel for the Ferreiras indicated that they did not have concerns with a direction to the CIBC to preserve all of the Ferreira defendants' bank records until the completion of the litigation to ensure that they are available if an order for production is made at a later date. Accordingly, I make such an order which is more fully particularized in the conclusion.

Effect of not pleading injunctive relief

79 The Ferreira defendants argue that Ms. Pavao is not entitled to any injunctive relief because she has failed to seek such relief in her statement of claim. In support of this argument, they rely on the decisions in *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 1535 (Ont. Div. Ct.) and *Laplante v. Hennessy-Craibe*, 2011 ONSC 5601 (Ont. S.C.J.) to argue that interlocutory injunctive relief is not available unless a permanent injunction is sought in the statement of claim.

80 In my view, these cases do not stand for the broad proposition put forward by the Ferreira defendants and, in any event, this situation is distinguishable. Both cases relied on by the Ferreira defendants involved requests for mandatory injunctive relief related to the conduct of the defendants in those cases.

81 In *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, *supra*, the plaintiff obtained an interlocutory mandatory injunction requiring the defendant to deal with the plaintiff as a preferred agent pending the disposition of a Competition Bureau investigation. On appeal to the Divisional Court, the Court set aside the injunction in part on the basis that the claim did not seek a permanent injunction restraining the defendant from violating the *Competition Act*.

82 In *Laplante v. Hennessy-Craibe*, *supra*, the plaintiff, who ran a dance studio, sought an injunction precluding the defendant from soliciting current and former students to its own studio. In denying the injunction, the motion judge relied in part on the fact that the claim did not seek a permanent injunction. In the course of his decision, the motion judge provided the following description of the principle to be gleaned from the Divisional Court's decision in *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, *supra*:

> 20 A claim by the plaintiff for a permanent injunction in the statement of claim is a prerequisite for the granting of an interlocutory injunction. In the case of *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* (1995), 23 O.R. (3d) 766, 123 D.L.R. (4th) 742 (Div.Ct.), an interlocutory injunction was set aside where there was no claim for permanent injunction in statement of claim.

83 In my view, that paragraph has to be read in context. In both cases, it made sense to consider whether the plaintiffs were seeking permanent injunctions in deciding whether to grant interlocutory injunctions. The purpose of an injunction is to preserve the status quo in situations where there will be irreparable harm if the status quo is not preserved. It only makes sense to allow relief precluding competition or solicitation if those are in fact also permanent remedies sought in the claim.

84 In contrast, different considerations will apply where the injunctive relief is a *Mareva* injunction. *Mareva* injunctions are available to preserve assets. Ultimately, if the plaintiff is successful, she will be entitled to payment of the moneys at issue. Therefore, in my view, as long as the other aspects of the stringent test for obtaining a *Mareva* injunction are met, it would be nonsensical to require plaintiffs to seek a permanent freezing order in the claim in order to obtain a *Mareva* injunction. A claim for payment or recovery of the amounts the plaintiff seeks to freeze is sufficient.

85 In this case, the prayer for relief in the statement of claim, which includes the following claims, makes clear that the relief sought is the payment of moneys Ms. Pavao claims belong to her and/or Mr. Pavao:

> 1. The Plaintiff Maria P. Pavao (Ms. Pavao") claims as against Zenaide Ferreira, also known as "Zenaide Ferreira" ("Ms. Ferreira") and Jose Ferreira ("Mr. Ferreira"):
>
> > 1. Damages for breach of fiduciary and/or equitable duties; breach of the duty of good faith, misrepresentation, dishonest assistance and knowing receipt, deceit, negligence, breach of contract, breach of trust, conversion, unjust enrichment and conspiracy in the amount of $10,000,000;
> >
> > . . .
> >
> > c) an accounting and tracing of all sums misappropriated by Mr. and/or Ms. Ferreira and an accounting of all profits from the Ferreira's wrongful activities;

> d) an accounting and tracing of all sums received by Mr. and/or Ms. Ferreira which were payments received in deceit of Ms. Pavao and/or Mr. Pavao, as described below, and an order for the payment to Ms. Pavao and the Estate of Mr. Pavao of all sums found due on the taking of the account;
>
> . . .
>
> f) a declaration that Mr. and Ms. Ferreira and each of them hold all sums received by them in deceit of Ms. Pavao and/or Mr. Pavao as resulting or constructive trustees for Ms. Pavao and/or Mr. Pavao, as described below, and an order that they pay those sums to Ms. Pavao and/or Mr. Pavao's Estate;
>
> g) an order that Mr. and Ms. Ferreira and each of them reconstitute the assets which they hold in trust for Ms. Pavao and/or Mr. Pavao's estate and deliver up those assets to Ms. Pavao and to Mr. Pavao's estate...

86 Under the circumstances, there is a clear nexus between the injunctive relief sought on the motion and the relief Ms. Pavao seeks at the end of the action. Accordingly, there is no basis for dismissing the plaintiff's motion on the basis that she has not sought a permanent injunction in her statement of claim.

87 Given that I am not granting the *Norwich* orders sought, I do not need to consider whether similar considerations apply to *Norwich* orders.

Sufficiency of undertaking as to damages

88 The Ferreira defendants argue that the plaintiff has failed to provide a meaningful undertaking as to damages.

89 Rule 40.03 of the Rules of Civil Procedure requires a party who seeks injunctive relief to give an undertaking as to damages unless the Court orders otherwise:

> On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

90 In this case, likely in response to the argument advanced in the Fereira defendants' factum, the plaintiff filed an affidavit sworn by Ms. Pavao at the beginning of the motion providing an undertaking as to damages.

91 In my view, this is sufficient. The evidence suggests that the plaintiff has some assets and income streams. In addition, at this point, the only injunctive relief that has been ordered is the payment into court of $180,000. While the defendants are entitled to an undertaking as to damages, it is hard to see how this order would cause significant, if any, damages to the Ferreira defendants, especially since by Ms. Ferreira's own admission she has significant resources.

Certificate of pending litigation

92 The notice of motion does not seek a certificate of pending litigation. It is only in the factum served on November 7, 2017, less than ten days before the motion was heard, that the plaintiff seeks a certificate of pending litigation. While it is not clear from the factum for which property the plaintiff seeks a certificate of pending litigation, it appears that it is in respect of the Third Dundalk Property, which is the only property Ms. Ferreira currently owns that she previously owned with Mr. Pavao.

93 Justice Croll's order requires Ms. Ferreira to provide notice if she decides to sell the Third Dundalk Property.

94 The defendant objects to the request for a certificate of pending litigation in part on the basis that the prayer for relief in the statement of claim does not request a certificate of pending litigation nor does it provide a legal description of the property at issue.

95 Rule 42.01(2) explicitly requires that a plaintiff's claim include a request for a certificate of pending litigation and a legal description of the property at issue as a precondition to the issuance of the certificate:

> A party who seeks a certificate of pending litigation shall include a claim for it in the originating process or pleading that commences the proceeding, together with a description of the land in question sufficient for registration.

96 In this case, the statement of claim does not include a claim for a certificate of pending litigation nor does it include a description of the land at issue. Accordingly, a certificate of pending litigation cannot be issued at this time in this case: *Sutton Group Professional Realty Inc. v. Stone*, [2008] O.J. No. 5811 (Ont. S.C.J.), at para. 1.

97 I note that a motion for a certificate of pending litigation is to be made to a Master. If the plaintiff were to amend her claim at a later date to address the requirement of Rule 42.01(2), such a motion should be brought to a Master and not to a judge.

98 I also note that the Ferreira defendants did not vigorously object to the continuation of Justice Croll's order requiring notice of any intention to sell the Third Dundalk Property, and I am therefore ordering the continuation of that aspect of her order.

Standing of estate

99 As part of the relief sought, the plaintiff has asked to continue the action against the estate without the appointment of an estate trustee. The Ferreira defendants oppose this request.

100 John Pavao was originally acting as estate trustee in the Estate proceedings, but he ceased doing so as part of the settlement in that matter. I note that the settlement provides that Victor, Michael or Ms. Pavao can each apply to become litigation administrator for the estate, but it appears that no such appointment has been made.

101 It is evident that the estate has an interest in this litigation and that the issues raised by Ms. Pavao on her own behalf are intertwined with the interests of the estate. Ms. Pavao has her own interest in any moneys that Ms. Ferreira may have improperly taken. However, part of her interest is also dependent on the estate's interests. Therefore, it is evident that in order to fully determine the issues between all parties, Mr. Pavao's estate is a necessary party to the proceedings.

102 Unfortunately, neither counsel for Ms. Pavao nor counsel for Victor and Michael has provided me with any authority that would allow me to grant the relief requested. Similarly, counsel for the Ferreira defendants opposed this relief but did not provide any authorities on point. It is clear from the relief sought in the action, that some of the relief is sought on behalf of the estate. I am not aware of any authority that gives Victor and Michael standing to represent the estate as beneficiaries, nor am I aware of any basis on which the estate can be a party without the appointment of an estate trustee.

103 Accordingly, I am requiring that, as provided in the settlement of the Estate proceeding, one of Ms. Pavao, Michael or Victor bring an application to be appointed as estate trustee within 60 days of this decision. If this timeline is not practical or if the parties wish to have me reconsider this part of my decision, and only this part, a request may be directed to my attention within 30 days of this decision after which I will set a procedure and schedule for addressing this issue.

Consolidation of proceedings

104 The plaintiff asks that this action be consolidated with the FLA proceedings. The Ferreira defendants object to this request on the basis that they are not parties to the FLA proceedings, and that the issues in both proceedings are distinct.

105 I agree that consolidating the proceedings does not make sense. However, the resolution of the FLA proceedings (and the Estate proceedings for that matter) are dependent on the outcome of Ms. Pavao's claim against the Ferreira defendants. Accordingly, there is some benefit in having the cases proceed sequentially and in an orderly fashion.

106 At the end of the motion, I asked the parties' counsel what could be done to assist in moving these matters forward. My question was prompted by my observation that the action was commenced in early 2017, and that the motion before me

was not heard until November 2017. In the interim, the parties were tied up on this motion rather than advancing the action through the exchange of affidavits of documents, examinations for discovery and motions for third party productions under Rule 30.10. All counsel agreed that this matter would benefit from active case management. I agree. However, pursuant to Rule 77.05, a request for Case Management must be made to the Regional Senior Judge, and I therefore do not have the authority to order these cases into case management. Nevertheless, I encourage the parties to make such a request and to make reference to my decision in the request.

Conclusion

107 For the reasons set out above, I make the following order:

a. The order of Justice Charney dated January 19, 2017 and the order of Justice Croll dated April 18, 2017 are continued until further order of this Court;

b. The CIBC is directed to preserve all existing records from all current and former accounts of the defendants Zenaide Ferreira and Jose Ferreira until further order of this Court or until this litigation is concluded;

c. Ms. Pavao, Michael and/or Victor are to make an application to be appointed as estate trustee of Mr. Pavao's estate within 60 days of this decision, or, alternatively, the parties may request a reconsideration of this aspect of my decision by no later than 30 days from the date of the release of this decision; and

d. The balance of the motion is dismissed.

108 Given the divided success on the motion, I direct the plaintiff to provide me with written submissions no longer than five pages on the issue of costs within 10 days of the release of this decision, and I direct the defendants to provide me with their written submissions no longer than five pages 10 days following the receipt of the plaintiff's submission.

End of Document

TAB 4

Most Negative Treatment: Check subsequent history and related treatments.

2002 SKCA 12
Saskatchewan Court of Appeal

Rimmer v. Adshead

2002 CarswellSask 19, 2002 SKCA 12, [2002] 4 W.W.R. 119, [2002] W.D.F.L. 100, [2002] S.J. No. 22, 111 A.C.W.S. (3d) 533, 217 Sask. R. 94, 24 R.F.L. (5th) 159, 265 W.A.C. 94

JOHN COLIN RIMMER (APPELLANT) and DONNA MARIE ADSHEAD (RESPONDENT)

DONNA MARIE ADSHEAD (APPELLANT) and JOHN COLIN RIMMER (RESPONDENT)

Cameron, Vancise, Lane JJ.A.

Heard: December 10, 2001
Judgment: January 18, 2002
Docket: 225, 250

Counsel: *Mr. R. Bradley Hunter*, for Appellant, Mr. Rimmer
Mr. W.Timothy Stodalka, for Respondent, Ms. Adshead

Subject: Family; Property; Civil Practice and Procedure

Related Abridgment Classifications

Family law
V Divorce
V.4 Setting aside decree or judgment
Family law
XVII Practice and procedure
XVII.1 Jurisdiction
XVII.1.c Support
XVII.1.c.ii Spousal support
Family law
XVII Practice and procedure
XVII.6 Discovery
XVII.6.e Miscellaneous

Headnote

Family law --- Divorce — Practice and procedure — Setting aside decree or judgment

Parties were married in 1988 and separated in 1996 — Husband presented wife with interspousal contract prepared by his lawyer, which wife retained after signing — Husband obtained divorce by default judgment, referring in his affidavit to interspousal contract provisions as resolving all matters outstanding — Wife's application to set aside default judgment was granted and divorce judgment was severed from wife's corollary relief claims — Husband appealed order setting aside default judgment — Appeal dismissed — Jurisdiction to set aside default judgment existed, without setting aside divorce — No prejudice or irreparable harm resulted by granting order — Application judge committed no error in opening up proceedings rather than giving effect to interspousal contract, whose existence, validity and content was sufficiently doubtful to warrant full inquiry.

Family law --- Family property on marriage breakdown — Practice and procedure — Discovery — Discovery of documents

Parties were married in 1988 and separated in 1996 — Husband presented wife with interspousal contract prepared by his lawyer, which wife retained after signing — Husband obtained divorce by default judgment, referring in his affidavit to interspousal contract provisions as resolving all matters outstanding — Wife's application to set aside default judgment was granted and

Wicks (1990), 87 Sask. R. 139 (Sask. C.A.). In each of these cases default judgments of divorce were set aside to accommodate proceedings for corollary relief. In neither case, however, had the divorce become final and the certificate of divorce been issued. The point is that we wish to leave open the question of whether such a judgment can be set aside after the certificate of divorce issues, barring fraud or some such vitiating circumstance.

56 Second, Rule 346 empowers the court not only to set aside a default judgment but to vary it (much as Rule 40 empowers the court to vary a judgment after leave to defend be given). Hence, if it is not open to the court to set aside a default judgment of divorce by reason of the circumstances, still it remains open to the court, if leave be given to pursue corollary or other relief, to vary such judgment, not as it pertains to the divorce but as it pertains to such corollary or other relief as might ultimately be granted.

57 It follows that the judgment in the present case, while not open to variation in relation to the divorce because the divorce was not set aside, remains open to variation in relation to corollary or other relief, which is to say it remains open to variation if, in making the order under appeal, the judge properly exercised the powers at his disposal.

(iii) the judge's exercise of power

58 In turning to this issue, it is necessary to bear in mind that the powers in issue are discretionary and therefore fall to be exercised as the judge vested with them thinks fit, having regard for such criteria as bear upon their proper exercise. The discretion is that of the judge of first instance, not ours. Hence, our function, at least at the outset, is one of review only: review to determine if, in light of such criteria, the judge abused his or her discretion. Did the judge err in principle, disregard a material matter of fact, or fail to act judicially? Only if some such failing is present are we free to override the decision of the judge and do as we think fit. Either that, or the result must be so plainly wrong as to amount to an injustice and invite intervention on that basis. (See, for example, *Walker v. McKinnon Industries Ltd.*, [1951] 3 D.L.R. 577 (Ontario P.C.), at 579 and *Saskatchewan Power Corp. v. John Doe*, [1988] 6 W.W.R. 634 (Sask. C.A.)).

59 With this in mind, counsel for the appellant submitted in effect that the judge abused his discretion by exercising the powers of Rules 40 and 143 without sufficient regard for the pre-requisites to invoking them, namely timely application and demonstrated merit.

60 The key to the exercise of the powers conferred by Rule 40 lies in leave to defend having first been granted, as under Rule 114(3) for example. The pre-requisites for the exercise of the power to grant leave under Rule 114(3) are the same as those for setting aside a default judgment under Rule 346: *Bank of Montreal v. Pauls* (1984), 35 Sask. R. 204 (Sask. C.A.). Aside from non compliance with a rule, the pre-requites are essentially two-fold: that delay be accounted for and that a sufficient case on the merits be satisfactorily demonstrated: *Klein v. Schile*, [1921] 2 W.W.R. 78 (Sask. C.A.); *First City Capital Ltd. v. Abramson Enterprises Ltd.* (1988), 68 Sask. R. 281 (Sask. C.A.); *Wicks v. Wicks*, cited earlier. As these cases illustrate, the merit of the matter is the dominant consideration, provided the delay not be accompanied by irreparable harm.

61 Vancise J.A. summed up these requirements in *Wicks v. Wicks* in which an application had been brought to set aside a default divorce judgment and obtain leave to advance a claim for corollary relief. He summed them up as follows at p. 141:

> (1) The application should be made as soon as possible after the judgment came to the knowledge of the defendant. Mere delay will not bar the application unless the result will be irreparable harm to the plaintiff.
>
> (2) The application must be supported by an affidavit setting out the circumstances under which the default arose.
>
> (3) The proposed defendant must depose to a defence on the merits. It is not sufficient to state that the defendant has a defence. The defendant's affidavit must set out the nature of the defence and set forth facts to enable the judge or court to determine whether there is a defence on the merits.

62 With this in mind, it may be noted that Ms. Adshead's application, brought within four months of the judgment becoming final, entailed a potentially prejudicial result, namely the setting aside of the divorce. But the judge effectively overcame this

TAB 5

Dated: 20021024

2002 SKCA 119 **Docket: 624**

THE COURT OF APPEAL FOR SASKATCHEWAN

BEFORE: CAMERON J.A.

ROTHMANS, BENSON & HEDGES INC.

(Plaintiff) PROSPECTIVE APPELLANTS

- and -

GOVERNMENT OF SASKATCHEWAN

(Defendant) PROSPECTIVE RESPONDENT

COUNSEL:

Neil G. Gabrielson, Q.C. and M. Ouellette for the Applicants
Thomson Irvine and R. Hischebett for the Respondents

DISPOSITION:

On Appeal From:	QB 945 of 2002, J.C. of Saskatoon
Application Heard:	October 23, 2002
Application Allowed:	October 23, 2002
Written Reasons:	October 24, 2002
Reasons By:	The Honourable Mr. Justice Cameron

CAMERON J.A.

[1] Rothmans, Benson & Hedges Inc. seek leave to appeal a decision made by Mr. Justice Barclay in the course of an action brought by the company against the Government of Saskatchewan claiming the following declarations:

> 1. That section 6 of *The Tobacco Control Act,* S.S. 2001, c. T-14.1, governing the display of tobacco products in Saskatchewan, is inoperative in light of the provisions of the *Tobacco Act*, S.C. 1997, c. 13, concerning the marketing of tobacco products in Canada, and of the constitutional doctrine of federal paramountcy.
> 2. That sections 6 and 7 of *The Tobacco Control Act* are inconsistent with section 2 of the *Charter of Rights and Freedoms,* guaranteeing freedom of expression, and therefore of no force or effect.

[2] Mr. Justice Barclay took up the first of these claims on an application by the company under Rule 188 of *The Queen's Rules,* leaving the second to be tried in the usual way. He decided that section 6 of *The Tobacco Control Act* of Saskatchewan is not in conflict with the *Tobacco Act* of Canada and, hence, not inoperative.

[3] The application for leave to appeal is made pursuant of section 8 of *The Court of Appeal Act, 2000,* S.S. 2000, c.C-42.1, which reads thus:

> **8**(1) Subject to subsection (2), no appeal lies to the court from an interlocutory decision of the Court of Queen's Bench unless leave to appeal is granted by a judge or the court.
>
> (2) Leave to appeal an interlocutory decision is not required in the following cases:
>
> (a) cases involving:
> (i) the liberty of the individual;
> (ii) the custody of a minor;
> (iii) the granting or refusal of an injunction; or
> (iv) the appointment of a receiver;
>
> (b) other cases, prescribed by the rules of court, that are in the nature of final decisions.

[4] The parties are of the common view the decision of Mr. Justice Barclay is an interlocutory decision requiring leave to appeal pursuant to section 8 of *The Court of Appeal Act, 2000*.

[5] This is a new *Act*—it came into force on November 1st, 2000—but many of its provisions constitute the re-enactment of former provisions or, in the case of section 8, the enactment in substance of former law derived from other sources, as in *Thompson Lands* v. *Henry Kelly Tractor et al.* (1984), 34 Sask. R. 247 (Sask. C.A., chambers). That being so, the jurisprudence pertaining to leave to appeal, as it existed before the *Act* came into force, continues to be relevant.

[6] The power to grant leave has been taken to be a discretionary power exercisable upon a set of criteria which, on balance, must be shown by the applicant to weigh decisively in favour of leave being granted: *Steier* v. *University Hospital*, [1988] 4 W.W.R. 303 (Sask. C.A., *per* Tallis J.A. in chambers). The governing criteria may be reduced to two—each of which features a subset of considerations—provided it be understood that they constitute conventional considerations rather than fixed rules, that they are case sensitive, and that their point by point reduction is not exhaustive. Generally, leave is granted or withheld on considerations of **merit** and **importance,** as follows:

> First: Is the proposed appeal of **sufficient merit** to warrant the attention of the Court of Appeal?
>
> - Is it *prima facie* frivolous or vexations?
> - Is it *prima facie* destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?
> - Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?
> - Is it apt to add unduly or disproportionately to the cost of the proceedings?
>
> Second: Is the proposed appeal of **sufficient importance** to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?
>
> - does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?

- does it raise a new or controversial or unusual issue of practice?
- does it raise a new or uncertain or unsettled point of law?
- does it transcend the particular in its implications?

[7] With this in mind, I turn first to merit. Having regard for the decision in question, the nature of the issue, and the grounds of appeal set out in the proposed notice of appeal, I cannot say the proposed appeal is *prima facie* frivolous or pre-destined to fail. Nor, is it apt to delay the proceedings, for the trial of the remaining issue pertaining to the *Charter* will not proceed, if it proceeds at all, for quite some time; indeed the trial is a long way off. And relatively speaking, appeal at this stage of the proceedings in relation to the issue in question does not give rise to concerns about cost.

[8] Turning to considerations of importance, Mr. Gabrielson made the following point on behalf of the applicant, a point that struck me as rather compelling: *The Tobacco Control Act* is new legislation affecting countless vendors of tobacco products in the Province, who are potentially subject to prosecution under the *Act*, and that the decision of Mr. Justice Barclay serves to set the legal standard for compliance, a standard that would remain in effect until the trial of the action and the appeal which would then follow. This is apt, he said, to be a very long time in light of several considerations, including the fact the *Charter* issue is being litigated elsewhere.

[9] Needless to say, perhaps, the proposed appeal bears heavily on the proceedings. Indeed, it is potentially decisive of them, in the sense that if the appeal were allowed the action would be at an end, barring further appeal. And, of course, the subject- matter is of considerable general importance.

[10] For these reasons, orally expressed in general on the hearing of the application, I was persuaded to allow the application and grant leave to appeal. The proposed notice of appeal sets out eight grounds, one of which, namely 4(a)(v), was objected to by Mr. Irvine on behalf of the Government, an objection I found to be well taken. Hence I struck this ground of appeal from the proposed order granting leave. Otherwise I directed that the proposed order issue.

[11] As for costs, the costs of the application shall be costs in the cause, not

the cause of action as whole, but the cause of action as it relates to the issue to go before the Court of Appeal.