Court File No. C60799/M45378

ONTARIO
COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Appellant (Responding Party)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Respondents (Moving Party)

FACTUM AND AUTHORITIES OF THE APPELLANT/RESPONDING PARTY, THE CATALYST CAPITAL GROUP INC.
(MOTION TO QUASH RETURNABLE NOVEMBER 5, 2015)

October 23, 2015

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PART I - OVERVIEW

1. This motion concerns the characterization of an appeal from the dismissal of a contempt motion by a judge of the Superior Court of Justice in circumstances where the issues argued and determined at the contempt motion will not be argued again or open to determination by the trial judge.

PART II - THE FACTS

A. Background to the Action

2. This action concerns the resignation of Brandon Moyse ("Moyse"), the moving party, from the appellant The Catalyst Capital Group Inc. ("Catalyst") in June 2014 and Moyses's immediate employment with the defendant West Face Capital Inc. ("West Face"), a competitor to Catalyst. In so doing, Moyse and West Face intentionally acted in breach of a non-competition covenant in Moyse's employment contract with Catalyst.

3. Catalyst and West Face manage investment funds that control billions of dollars of assets. At the time of his resignation, Moyse was a member of a team at Catalyst working on a top-secret opportunity to acquire Wind Mobile, a Canadian wireless telecommunications company.

4. West Face was also seeking to acquire Wind Mobile. Catalyst was concerned that Moyse's and West Face's refusal to honour Moyse's non-competition covenant would, among other things, lead to unfair competition by West Face in the contest to acquire Wind Mobile. Catalyst was also concerned that Moyse would communicate its confidential and proprietary information to West Face, thereby causing irreparable harm to Catalyst.

5. Through a forensic review of Moyse's work computer conducted after he resigned, Catalyst learned that prior to his resignation, Moyse engaged in conduct consistent with the

removal of its confidential and proprietary information for improper purposes. Catalyst immediately commenced an action against West Face and Moyse.

6. In its Statement of Claim, Catalyst seeks, among other things, a permanent injunction against Moyse to prohibit him from using or disclosing Catalyst's confidential and proprietary information in any way. Catalyst also seeks an order prohibiting Moyse from in any way deleting, modifying, or in any way interfering with any of his electronic equipment.[1]

B. The Preservation and Interlocutory Orders

7. On July 16, 2014, Moyse consented to an order (the "Preservation Order") that required him, among other things, to preserve documents relevant to his activities since March 27, 2014 and to turn over his personal computer to a forensic IT expert for the purpose of creating an "image" of the computer for potential review by an Independent Supervising Solicitor ("ISS").[2]

8. On November 7, 2014, Justice Lederer granted an interlocutory order which, among other things, required Moyse and West Face to honour the non-competition covenant and authorized an ISS to review the forensic image of Moyse's personal computer.

9. What follows is a summary of Justice Lederer's relevant findings of fact:

(a) Beginning in March 2014, Moyse and Thomas Dea ("Dea"), a partner at West Face, communicated in writing and in person to discuss the possible employment by Moyse at West Face.

(b) By email dated March 27, 2014, Moyse sent Dea four confidential investment memos belonging to Catalyst. Shortly after doing so, Moyse deleted the email message.

(c) West Face did not inform Catalyst that Moyse had sent it Catalyst's confidential information; instead, even though he understood that the memos contained

[1] Catalyst's Amended Amended Statement of Claim can be found at Tab 1 of its Responding Motion Record.
[2] The Preservation Order can be found at Tab 2 of Catalyst's Responding Motion Record.

confidential information, Dea circulated the memos to his partners and to Yu-Jia Zhu ("Zhu"), a vice-president at West Face.

(d) By email dated May 24, 2014, while on vacation, Moyse gave notice of his resignation to Catalyst, effective June 22, 2014. Moyse's email made no reference to his having accepted employment with West Face.

(e) Shortly after Catalyst learned that Moyse had resigned to go work for West Face, Catalyst's outside counsel wrote to West Face and to Moyse's counsel to express concerns about Moyse's employment at West Face, and in particular that Moyse was in breach of his non-competition covenant and/or would communicate Catalyst's confidential information to West Face.

(f) In response, West Face's and Moyse's outside counsel took the position that the restrictive covenants were unenforceable and offered assurances that Moyse would comply with his confidentiality obligations to Catalyst. Neither counsel alerted Catalyst's counsel to the fact that Moyse had already communicated confidential information to West Face.

(g) Catalyst's counsel's reply stated that the defendants' replies and assurances did not go far enough in light of the fact that Catalyst and West Face are competitors and Moyse possessed Catalyst's highly sensitive and proprietary information.

(h) Moyse and West Face insisted on proceeding with Moyse's employment at West Face commencing June 23, 2014. Days later, Catalyst commenced this action and brought its motion for urgent interim and interlocutory relief.

(i) Catalyst retained an IT expert to analyze an image of the computer Moyse used while employed at Catalyst. That analysis revealed that:

  (i) on March 28, 2014, over an 11-minute period, Moyse accessed a series of files from an "Investors Letters" directory;

  (ii) on April 25, 2014, over a 70-minute period, Moyse accessed dozens of files related to the "Stelco" matter out of "personal curiosity";

  (iii) on May 13, 2014, over a 20-minute period, Moyse accessed 29 files relating to the Wind Mobile situation;

(j) In his initial affidavit sworn in response to Catalyst's motion, Moyse described Catalyst's concerns about his misuse of confidential information as speculation and innuendo when he knew or should have known it was wrong to do so.

(k) After litigation commenced, West Face disclosed the existence of the March 27 email from Moyse. In cross-examinations, Moyse professed not to understand what makes a memo "confidential".

(l) The Preservation Order required Moyse to deliver a sworn affidavit of documents disclosing documents in his power, possession or control relating to Catalyst. Moyse's affidavit disclosed over 800 documents, at least 245 of which Catalyst identified as confidential.

(m) Moyse admitted at his cross-examination that he could not say with absolute certainty that his search of his Devices had been exhaustive, and he admitted that between March and May 2014, he deleted documents.[3]

C. The ISS Discovers That Moyse Downloaded and Ran "Scrubber" Software

10. Following the granting of the interlocutory order, the parties retained Stockwoods LLP to act as the ISS. In its report, the ISS revealed that Moyse had downloaded and installed military-grade deletion software (known colloquially as "scrubbing software" and referred to herein as the "Scrubber") on his personal computer the morning that he consented to the Preservation Order. On July 20, 2014, the night before the forensic image of his computer was created, Moyse opened the Scrubber program.

11. Upon learning of Moyse's conduct, Catalyst brought a motion to hold Moyse in contempt of court (the "Contempt Motion").

12. Moyse admits that he downloaded the Scrubber, but claims that he did not use the Scrubber to delete "relevant" data. Significantly, Moyse also admits that he deleted his web browsing history between the date he consented to the Preservation Order and the creation of the forensic image of his computer.

D. The Motion Judge Dismissed Catalyst's Contempt Motion

13. The Motion Judge dismissed the Contempt Motion. In particular, he held that:

(a) If the words "activities since March 27, 2014" were intended to encompass non-litigation-related activities, then the Interim Order was ambiguous;

(b) Any activities referred to in the Interim Order would have to be relevant to Moyse's conduct at Catalyst and/or with respect to issues raised in the litigation;

(c) Catalyst did not prove beyond a reasonable doubt that Moyse deleted files relevant to his conduct at Catalyst and/or with respect to issues raised in the litigation;

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[3] Judgment of Justice Lederer dated November 10, 2014; Responding Motion Record, Tab 3.

(d) Even if Catalyst had proved beyond a reasonable doubt that Moyse had deleted relevant files from his personal computer, the Motion Judge would have exercised his discretion to decline to make a finding of contempt as such conduct occurred as a result to make "good faith" efforts to comply with the Interim Order while deleting embarrassing personal files that were not relevant to the litigation; and

(e) Catalyst did not prove beyond a reasonable doubt that Moyse ran the Scrubber.[4]

14. Catalyst has appealed the Order dismissing the Contempt Motion to this Court.[5]

E. Moyse Acknowledges that the Contempt Issue will not be Argued at Trial

15. After Catalyst commenced this appeal, Moyse delivered reply costs submissions to the Motion Judge as part of the parties' exchange of submissions on the issue of costs. In his submissions, Moyse argued, with respect to the contempt motion:

> The only issue before the court on [the motion before Justice Glustein] with respect to Mr. Moyse was whether or not he was in contempt of the order of Justice Firestone. Your Honour held that [Catalyst] had not met its burden of proving that Mr. Moyse had breached the order. **That issue will not be before the court again.**[6]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

16. The only issue to be determined on this motion is whether the dismissal of Catalyst's contempt motion is final or interlocutory in nature. Catalyst respectfully submits that the dismissal finally determined a substantive matter in the litigation that will not be open to determination at trial and is therefore final in nature.

17. The jurisprudence of this Court is not consistent on the issue of whether dismissal of a contempt motion is in the nature of a final or interlocutory order. However, there is logic to this inconsistency: where the alleged contempt concerns a matter that the moving party will be able to argue again before the trial judge, the dismissal is interlocutory in nature. If the alleged contempt

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[4] Endorsement of Justice Glustein dated July 7, 2015, ¶58-87; Responding Motion Record, Tab 4.
[5] The Order of Justice Glustein is attached at Tab 5 of the Responding Motion Record. The Notice of Appeal is attached at Tab 6 of the Responding Motion Record.
[6] Letter from R. Centa to Justice Glustein dated August 14, 2015, Exhibit "A" to the Affidavit of Jessica Zhi, sworn October 15, 2015; Responding Motion Record, Tab 7-A.

will not be argued before the Court again, the dismissal is final in nature and an appeal from the dismissal order properly lies to this Court.

18. The two cases which illustrate this distinction are *Simmonds v. Simmonds*, the case relied upon by Moyse in his written submissions, and *Sabourin and Sun Group of Companies v. Laiken*.[7]

A. *Simmonds*: Dismissal of Contempt not Binding on the Trial Judge is Interlocutory

19. *Simmonds* concerned a family law proceeding in which the appellant brought a motion for a finding that the respondent had failed to comply with a court order requiring the respondent to provide specific disclosure in respect of her income loss claim arising from a motor vehicle accident. The motion judge found that the respondent had provided all relevant disclosure and dismissed the contempt motion.

20. The appellant appealed and the respondent brought a motion to quash the appeal on the basis that the dismissal order was interlocutory in nature. The Court's brief endorsement granting the motion to quash explains how the context of the alleged contempt affected its decision:

> The appellant relies on *Pimiskern v. Brophey*, [2013] O.J. No. 505 (Ont. S.C.J.) to argue that an order dismissing a motion for contempt is a final order.
>
> The respondent concedes that an order finding contempt is a final order but argues that because the motion judge dismissed the motion for contempt, **the motion judge's order is interlocutory and not binding on the trial judge**, and that an appeal accordingly does not lie to this court.
>
> We agree with the respondent and reject the conclusion reached in *Pimiskern*.[8]

21. The bolded portion of this Court's decision in *Simmonds* demonstrates that the Court's characterization of the dismissal of the contempt motion was informed by the fact that the motion judge's decision was not binding on the trial judge, who would have an opportunity to decide on a

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[7] *Simmonds* is enclosed at Tab "A-1 of this factum. *Sabourin* is enclosed at Tab "A-2" of this factum.
[8] *Simmonds*, 2013 ONCA 479, at ¶3-5 [emphasis added].

final basis whether the respondent had complied with the disclosure order since this remained an issue for trial.

22. The same cannot be said of the current case, where Moyse's counsel acknowledges that the trial judge will not determine on a final basis whether Moyse acted in contempt of the Preservation Order. The final determination of the contempt motion is found in the order of Justice Glustein.

B. *Sabourin*: Dismissal of Contempt that will not be Argued at Trial is Final

23. If the contempt motion is the final determination of the matter, then dismissal of the motion is a final order and an appeal lies to this Court. This was the context of the contempt order sought in *Sabourin*, in which the appellant had brought a motion to hold the respondent in contempt for breaching a *Mareva* injunction.

24. The purpose of the *Mareva* injunction was to preserve the assets of Sabourin, a party to the action. After the injunction was granted, Carey, counsel to Sabourin, returned funds held in his trust account to Sabourin. The appellant, Laiken, brought a motion for contempt against Carey on the basis that the return of the funds held in trust violated the *Mareva* injunction.[9]

25. The motion judge hearing the contempt motion initially held Carey in contempt but later set aside that order before it could be appealed to this Court. As a result, the contempt motion was dismissed.

26. This Court heard and allowed the appeal. It did not quash the appeal, nor did it raise or address any concerns about its jurisdiction to hear the appeal. Even though the matter would continue to trial on the issue of whether Laiken suffered any damages as a result of Carey's return

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[9] *Sabourin*, 2013 ONCA 530 at ¶1-2.

of the funds to his client, this Court heard and ultimately granted Laiken's appeal of the dismissal of her contempt motion.[10]

27. In contrast to *Simmonds*, the motion judge's decision in *Sabourin* amounted to a final decision as to whether Carey had acted in contempt when he returned the funds to Sabourin.[11]

28. Catalyst submits that its appeal is on point with *Sabourin* for four reasons: (1) the orders that were the subject of the contempt proceedings were intended to preserve the claimant's rights; (2) the contempt motions concerned allegations that these preservation orders were breached; (3) the contempt motions were dismissed; and (4) determination that the respondent did not act in contempt would not be subject to further determination or examination at trial.

29. *Sabourin* and the present appeal can be distinguished from *Simmonds*, which does not apply to the facts before the Court on this motion.

30. Catalyst respectfully submits that in order to determine whether dismissal of a contempt motion is a final or interlocutory order, this Court should consider form over substance – if the alleged contempt will not be a matter open to the trial judge to determine, as in *Sabourin* and the present case, the dismissal of the motion amounts to a final order and an appeal therefore properly lies to this Court.

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[10] See *Sabourin* at ¶15-16 for a summary of the issue that would continue to trial.
[11] See *Sabourin* at ¶28: the motion judge held that Carey might be found to have been inadvertent or negligent, but that did not amount to contempt.

PART IV - ORDER REQUESTED

31. For the reasons stated above, Catalyst asks that Moyse's motion be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of October 2015.

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Lawyers for the Appellant

Schedule "A" Not Required

2013 ONCA 479
Ontario Court of Appeal

Simmonds v. Simmonds

2013 CarswellOnt 10221, 2013 ONCA 479, 117 O.R. (3d) 479, 231 A.C.W.S. (3d) 31

Garfield Simmonds, Applicant (Appellant) and Michelle Simmonds, Respondent (Respondent in Appeal)

Alexandra Hoy A.C.J.O., K. Feldman J.A., Janet Simmons J.A.

Heard: July 05, 2013
Judgment: July 5, 2013
Docket: CA C56555

Counsel: Peter M. Callahan, for Appellant
Orlando da Silva Santos, for Respondent

Subject: Civil Practice and Procedure; Public; Torts

Table of Authorities

Cases considered:

Pimiskern v. Brophey (2013), 2013 ONSC 572, 2013 CarswellOnt 1161 (Ont. S.C.J.) — considered

APPEAL by plaintiff from judmgent dismissing plaintiff's motion for order for contempt.

***Per curiam*:**

1 The appellant appeals the January 22, 2013 order of the motion judge dismissing his motion for a finding that the respondent was in contempt of court because she had failed to comply with the August 3, 2012 order of Mossip J. requiring her to provide specified disclosure in respect of her income loss claim arising from the motor vehicle accident that occurred in 2004.

2 The motion judge reviewed the materials that had been provided and found that the respondent had complied with the order of Mossip J. and provided all relevant disclosure.

3 The appellant relies on *Pimiskern v. Brophey*, [2013] O.J. No. 505 (Ont. S.C.J.) to argue that an order dismissing a motion for contempt is a final order.

4 The respondent concedes that an order finding contempt is a final order but argues that because the motion judge dismissed the motion for contempt, the motion judge's order is interlocutory and not binding on the trial judge, and that an appeal accordingly does not lie to this court.

5 We agree with the respondent and reject the conclusion reached in *Pimiskern*.

6 This appeal is accordingly dismissed for lack of jurisdiction. Costs are fixed in the amount of $3,500 all inclusive.

Appeal dismissed.

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See pages 2-3, 6-7 and 12-13

COURT OF APPEAL FOR ONTARIO

CITATION: Sabourin and Sun Group of Companies v. Laiken, 2013 ONCA 530
DATE: 20130827
DOCKET: C56104

Rosenberg, Sharpe and Gillese JJ.A.

BETWEEN

Sabourin and Sun Group of Companies

Plaintiff/Defendant by Counterclaim

and

Judith Laiken

Defendant/Plaintiff by Counterclaim

AND BETWEEN

Judith Laiken

Appellant

and

Sabourin and Sun Group of Companies, Peter Sabourin, Sabourin and Sun Canada Inc., Sabourin and Sun Inc., a Bahamas Corporation, Sabourin and Sun BVI Trust, and Intervest Direct Inc., 1077472 Ontario Limited, Greg Irwin, Sabourin and Sun Inc. and 1061971 Ontario Limited

and

Peter W.G. Carey

Respondent

Kevin D. Toyne, for the appellant Judith Laiken

Patrick F. Schindler, for the respondent Peter W.G. Carey

Heard: June 17, 2013

On appeal from the order of Justice Lois B. Roberts of the Superior Court of Justice, dated September 10, 2012, with reasons reported at 2012 ONSC 7252, setting aside her earlier order of October 12, 2011 (2011 ONSC 5892).

Sharpe J.A.:

[1] This appeal raises procedural and substantive issues in relation to contempt and the duties of a solicitor representing a party who is subject to a *Mareva* injunction. The respondent, Peter Carey, a solicitor, was acting for Peter Sabourin, a financial advisor who was subject to a *Mareva* injunction obtained by the appellant, Judith Laiken. Sabourin sent Carey a cheque for $500,000 without instructions. Carey deposited the cheque in his trust account. Sabourin later instructed Carey to use the funds to settle with an unrelated group of creditors represented by Bill Brown. Carey refused to follow those instructions as to do so would violate the *Mareva* injunction. Sabourin then instructed Carey to attempt to settle with Laiken. Carey was unable to reach an agreement with Laiken's solicitor. When Carey advised him that settlement of the Laiken claim was not possible, Sabourin instructed Carey to return the funds to him. Carey deducted $60,000 for his legal fees and returned the remaining funds to his client.

[2] Laiken brought this contempt motion against Carey alleging that by returning the money to his client, Carey had violated the *Mareva* injunction which,

by its terms, applied to monies held in trust. After considering the affidavit evidence, the motion judge found Carey in contempt and adjourned the matter pursuant to rule 60.11 (5) and (8) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. When the matter resumed before the motion judge, Carey testified that he honestly believed that he was acting properly in returning the money to Sabourin and that he did not intend to breach the *Mareva* order. He submitted that the contempt finding should be set aside. The motion judge found, on the basis of Carey's oral evidence, that she was not satisfied beyond a reasonable doubt that Carey had deliberately violated the *Mareva* order or that his interpretation of it was wilfully blind. It followed, in her view, that her previous finding of contempt should be set aside.

[3] Laiken appeals on the grounds that the motion judge erred in the procedure she followed and in the legal test she applied to the allegations of contempt. Laiken submits that the motion judge should not have permitted Carey to offer fresh evidence and to re-open the initial contempt finding and that, in any event, on the evidence, Carey's conduct did constitute contempt of the *Mareva* order.

[4] For the following reasons, I would allow the appeal and restore the finding of contempt. However, as Carey's actions were prompted by an error of judgment and did not amount to a deliberate violation of the *Mareva* order, I would limit the sanction to the payment of costs

FACTS

[5] Sabourin and his companies were involved in off-shore securities. Laiken was Sabourin's client and had invested substantial sums in off-shore securities on his advice. In 2000, Sabourin and Laiken became involved in protracted litigation. Sabourin sued Laiken for $364,000 alleging a deficit in her margin account, and Laiken counterclaimed in 2001 for over $800,000 alleging fraud. The matter proceeded to discovery. In the course of the litigation, Laiken made several *ex parte* requests for orders freezing Sabourin's assets but these orders were either refused or set aside for non-disclosure.

[6] The *ex parte Mareva* order at issue on this appeal was obtained by Laiken on May 4, 2006. The order was very broad in its terms. It enjoined Sabourin and the other named defendants "from disposing of, or otherwise dealing with, any of their assets" and it contained no exceptions to deal with payment of legal fees or living expenses. The order also enjoined "any person … with knowledge of this Order" to "prevent the sale, disposition, withdrawal, dissipation, sale, assignment, dealing with, transfer, conveyance, conversion, encumbrance or diminishment" of the assets and specifically included money held in "trust accounts". The order did not contain the usual term requiring the named parties to disclose their assets.

[7] The *ex parte* order was continued a week later. It was agreed by the parties and accepted by the judge hearing the motion that the order required variation to allow for payment of legal fees, living and other routine expenses.

The judge left it to the parties to work out appropriate terms but no steps were taken to amend the formal order. The parties agreed to certain terms but failed to agree on the payment of ordinary third party creditors. That issue was the subject of a further continuation motion argued on September 14, 2006, when a decision was reserved.

[8] On September 21, 2006, Sabourin delivered to Carey a cheque for $500,000 with no instructions. Carey later testified that the cheque was a "surprise". He attempted to reach Sabourin but was unable to do so. Following Law Society regulations, Carey deposited the cheque in his trust account. On September 25, 2006, the decision to continue the *Mareva* order and refuse a provision allowing Sabourin to pay third party creditors was released. Sabourin subsequently called Carey and instructed him to use the funds to settle with the Bill Brown group of creditors. Carey informed Sabourin that he could not do so as that would violate the terms of the *Mareva* order. Sabourin then instructed Carey to attempt to settle with Laiken in the range of $175,000 to $250,000. Within a few days of that conversation, there was a conference call involving Sabourin, Brown and Carey. Sabourin informed Brown that Carey held $500,000 in trust. Sabourin said that the money was intended for Brown, but that the *Mareva* order prevented Carey from releasing the funds.

[9] Carey attempted to settle with Laiken's solicitors but was unable to do so. He did not reveal that he had $500,000 in his trust account. In late October,

2006, Carey reported to Sabourin that he was unable to reach a settlement with Laiken. Sabourin instructed Carey to return the funds and Carey did so after deducting $60,000 for past and future legal fees.

[10] In early 2007, Sabourin called Carey to inform him that because of proceedings before the Ontario Securities Commission, he wished to terminate Carey's retainer and to retain new counsel. However, Sabourin did not follow through and Carey remained the counsel of record on the Laiken matter.

[11] Sabourin then went out of business and disappeared.

[12] In October 2007, Brown obtained judgment against Sabourin and his companies and obtained a receiving order by way of equitable execution. The receiver demanded payment from Carey of the $500,000 trust money. Carey responded that he had paid that money back to Sabourin.

[13] On October 27, 2009, Laiken commenced an action against Carey alleging, *inter alia*, negligence in relation to his return of the $440,000 to Sabourin in breach of the *Mareva* order.

[14] In November 2007, the Sabourin - Laiken action came on for trial. Carey appeared and indicated he had no instructions and was permitted to withdraw. The matter proceeded as an uncontested trial. Sabourin's claim against Laiken was dismissed and Laiken was awarded judgment against Sabourin for $820,000 plus interest and costs of almost $300,000. The trial judge accepted Laiken's

evidence that she had lost her entire net worth as a result of Sabourin's fraudulent conduct.

CONTEMPT PROCEEDINGS

[15] Laiken launched her motion for contempt against Carey on December 15, 2010. She was initially joined by counsel for Brown but he appears not to have participated in the proceedings. Carey responded with a motion for summary judgment to dismiss Laiken's 2009 civil action. The primary evidence filed in support of the contempt motion was the affidavit of Paul McGrath, an officer of the receiver in the Brown action. Carey filed a responding affidavit setting out in some detail his defence to the contempt motion. McGrath failed to attend to be cross-examined and his affidavit was struck. Laiken did not cross-examine Carey on his affidavit. The parties agreed that the exhibits to the McGrath affidavit be admitted.

[16] The matter was heard in mid-September 2011 on the basis of the exhibits to the McGrath affidavit and Carey's affidavit evidence. Carey did not attend but was represented by counsel. The motion judge released her reasons on October 12, 2011, finding Carey in contempt. She dismissed Carey's summary judgment motion on the basis that there was a genuine issue for trial as to whether Laiken had suffered any damages as a result of Carey returning the $440,000 to Sabourin.

[17] The motion judge rejected Carey's claim that the *Mareva* order was unclear, stating, at para. 27:

> With respect, the *Mareva* Order could not be clearer: it plainly prohibited any and all dealings whatsoever with any monies belonging to the Sabourin defendants, expressly including any held in trust for them.

[18] The motion judge pointed out that Carey's evidence made it clear that he realized that the money in his trust account was subject to the *Mareva* order. He knew that it had to be varied to allow for payment of routine expenses and that he could not pay third party creditors as requested by Sabourin. She found that it was also clear that he transferred funds from his trust account, an act prohibited by the terms of the *Mareva* order.

[19] Carey also asserted that to retain the funds would be to shelter them improperly from creditors, because he was bound by solicitor-client privilege not to reveal the trust funds.. The motion judge considered and rejected this defence. In her view, this did "not explain why he could not have simply left the trust funds where they were secure" (para. 38).

[20] The motion judge concluded, at para. 42:

> I am satisfied beyond a reasonable doubt that Mr. Carey knowingly and deliberately breached and is therefore in contempt of the *Mareva* Order.

The motion judge then directed the parties to appear before her pursuant to rule 60.11, the relevant portions of which provide as follows:

Motion for Contempt Order

60.11 (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

…

Content of Order

(5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

(a) be imprisoned for such period and on such terms as are just;

(b) be imprisoned if the person fails to comply with a term of the order;

(c) pay a fine;

(d) do or refrain from doing an act;

(e) pay such costs as are just; and

(f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property.

…

Discharging or Setting Aside Contempt Order

(8) On motion, a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5) or (6) and may grant such other relief and make such other order as is just.

[21] The motion judge explained what would happen in the following terms, at para. 43:

> Mr. Carey's attendance is required at the hearing although he is not obliged to call any evidence or testify. At that hearing, if he wishes, Mr. Carey shall have the opportunity to present any further evidence, including *viva voce* evidence, and make any submissions that he wishes to make. The plaintiff shall also have the opportunity to file any further material, call evidence, cross-examine at the hearing, and make submissions. I shall take all of this into account in making any order under Rule 60.11 (5) and (8) of the *Rules of Civil Procedure*.

[22] Carey filed a notice of appeal from the contempt finding and moved for a stay of that order and any further proceedings pending the determination of his appeal. I dismissed the stay motion on the ground that the appeal should not be used to interrupt and fragment the Superior Court proceedings: 2011 ONCA 757. I pointed out, at para. 7, that if the appeal from the contempt finding succeeded that would end the matter but if it failed, there would still be an appeal from the sanction imposed and that it was preferable to await the completion of proceedings and determine all issues on a complete record. This follows the practice used in criminal appeals where the court cannot entertain an application for judicial interim release until the sentence has been imposed. As the motion judge relied on para. 9 of my reasons, I quote it here:

> To stay the contempt proceedings at this stage would also interfere with the design of the commonly followed procedure that is permitted, if not prescribed, by rule 60.11 (5) and (8), of dividing a contempt proceeding into two phases, the first dealing with the issue of whether the party is in contempt and the second dealing with the issue of sanction. Until the order has been made under

> 60.11 (5), the contempt proceedings have not come to their final conclusion. Until the sanction has been imposed, the judge has not expressed his or her final view of the case. It is clear from the passage quoted above from the motion judge's reasons that she has not yet completed her adjudication of the contempt proceedings. Indeed, her specific reference to rule 60.11 (8) indicates that she remains open to a wide range of possible outcomes. Until she completes her work, this court will not know if the motion judge considered the contempt to be serious or trivial or how the judge intended to use the sanction of contempt to bring about compliance or to punish the contemnor. These are elements integral to the nature and character of the contempt proceeding and essential to an appellate court's full appreciation of the disposition under appeal.

[23] When the matter resumed before the motion judge, Carey led further evidence. He filed an affidavit sworn by Alan Lenczner Q.C., a highly respected member of the litigation bar, and Carey testified to amplify his defence to the contempt allegation. The matter proceeded over two days in December 2011 and July 2012. Laiken also filed affidavit evidence and testified.

[24] Lenczner's affidavit stated that by returning the money in excess of that required to cover legal fees, Carey had acted in a manner that was consistent with the practice of counsel generally. Lenczner maintained that position when cross-examined.

[25] In his oral evidence, Carey provided a full account of the proceedings between Laiken and Sabourin and reiterated and elaborated on the position he had advanced earlier. Carey testified that he believed that to retain the money in

his trust account under the veil of solicitor-client privilege would only serve to shelter the money from creditors. He testified that he thought Laiken had essentially admitted liability for Sabourin's claim on discovery, that her claim against Sabourin was weak, that he felt that the May 2006 *Mareva* order was an improper tactical maneuver, and that the variations effectively gutted the order:

> Returning these monies did not constitute a violation of the order because the order as varied, the order was changed completely in terms of what could or could not have been done. It simply doesn't exist anymore.

Carey further testified:

> I honestly believed at the time that I was doing this that I was acting completely properly. I was abiding by my obligations as a solicitor, both in terms of my obligations to the client and my obligations as an officer of the court and quite frankly, I still do.

[26] At the conclusion of the evidence and argument, the motion judge announced that, for reasons to follow, her previous finding of contempt was set aside. In her written reasons released on December 24, 2012, she noted that rule 60.11(8) permits a judge to "discharge, set aside, vary or give directions" with respect an order. She cited para. 9 of my reasons on the stay application as authority to allow Carey to reopen the contempt finding. She added that in any event, she would have granted leave to reopen pursuant to rule 59.06(2) as to allow Carey to respond more fully to the serious allegation of contempt was necessary to avoid a miscarriage of justice.

[27] The motion judge concluded, at para. 36, that she had a reasonable doubt as to whether the terms of the *Mareva* order "were completely clear to Mr. Carey, and I am not satisfied beyond a reasonable doubt that Mr. Carey's interpretation of the [*Mareva*] order was deliberately and willfully blind". As "it must be clear to a party exactly what must be done to be in compliance with the terms of an order" and as "[a]ny doubt must be resolved in favour of Mr. Carey," contempt had not been shown beyond a reasonable doubt.

[28] She added, however, at paras. 38 and 39, that she made no finding as to the correctness or reasonableness of Carey's interpretation of the *Mareva* order. She left open the possibility that Carey might be found, on the civil balance of probability standard, to have been inadvertent or negligent, but added that did not amount to contempt: "Unprofessional or sloppy practice, if that is ultimately found to be the case here, is not contempt of court."

ISSUES

[29] Laiken raises four issues on appeal:

1. Did the motion judge err in setting aside her initial finding of contempt?
2. Was the Lenczner affidavit properly admissible?
3. Did the motion judge err in finding that Carey's conduct did not amount to contempt?
4. If Carey was in contempt, what is the appropriate sanction?

ANALYSIS

1. Did the motion judge err in setting aside her initial finding of contempt?

[30] In my view, the contempt proceedings in this case took an uneven course and the procedure that was followed in this case should not be emulated in the future. The problem started when Laiken's main deponent, Paul McGrath, the officer of the receiver in the Brown action, failed to attend to be cross-examined. Carey made an understandable but, as it turned out, unwise tactical decision not to attend, testify or to offer other evidence on the contempt hearing. As Carey had provided an affidavit that offered a point-by-point response to the McGrath affidavit, there was a clear factual foundation for a contempt finding which the motion judge made. Carey then used the second stage of the proceedings to attack the motion judge's findings and reasons for finding him in contempt.

[31] As both the motion judge and Carey relied on my reasons in the stay motion, it is appropriate for me to offer the following clarification. I do not read my reasons to say - and I certainly did not intend them to say – that rule 60.11 contemplates a judge revisiting and reversing an initial finding of contempt. What I intended to say was that until a judge has decided *both* the issue of contempt *and* the issue of sanction, an appellate court does not have a complete record of the case. Appeals should only come to this court on a complete record and in contempt, as in other areas, we should avoid a fragmented or piece-meal

approach to hearing appeals before the first instance court has completed its adjudication of all issues.

[32] In my view, neither rule 60.11 nor the case law contemplates the procedure that was followed in this case. A party faced with a contempt motion is not entitled to present a partial defence and then, if the initial gambit fails, have a second “bite at the cherry”. In contempt matters, as in all other areas of litigation, the interests of justice are best served if the principle of finality is respected. Parties have one chance to present their case and, absent exceptional circumstances, they must live with the consequences of the tactical decisions they have made in deciding what evidence and what arguments to present to the court.

[33] The finality principle must, however, be applied in a way that takes into account the fact that contempt motions typically involve two phases. The first phase deals with whether the party is in contempt. When that decision is made, the finding is final. If the party is found to be in contempt, the issue of sanction is usually dealt with at the second phase. It is not until both phases are complete that it is appropriate to proceed with an appeal of the contempt finding. These two phases correspond with the practice in criminal proceedings of dividing the issues of conviction and sentence.

[34] I would add two qualifications. First, as the ultimate aim of the law of civil contempt is to secure respect for and compliance with court orders, there must be a certain element of flexibility in the way it is applied. A finding of contempt may prompt the contemnor to comply with the order and that may prompt the judge to set aside the initial finding of contempt. That is contemplated by rule 60.11. See *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3, 93 O.R. (3d) 483, at para. 118: "These rules give to the court an ongoing supervisory role over a civil contemnor together with the discretion to vary or even discharge a contempt order if the contemnor purges the contempt." However, in such a case, the contempt finding is not set aside because the judge has second thoughts about the contempt finding or because the contemnor offers a different or more ample defence. Rather, it is set aside because the contempt proceedings have had their intended effect of securing compliance with a court order. Obviously, that did not occur in the present case.

[35] The second qualification is that contempt proceedings are subject to the standard principles that allow parties to re-open findings in exceptional circumstances where there is a sound explanation for why the fresh evidence or new facts were not presented to the court before the contempt order was made.

[36] In my view, *Belanger v. McGrade Estate* (2003), 65 O.R. (3d) 829 (Sup. Ct.) was such a case. A solicitor had been found in contempt and sentenced to jail for failing to comply with court orders in an estate matter. He did not appear to

defend himself on the contempt motion. After being found in contempt he deposed that he had been misled throughout the proceedings by the other lawyer, that he had been told that it was unnecessary for him to attend the contempt motion, and that the orders he failed to obey were obtained without his knowledge or consent. The other lawyer did not deny those facts and the contempt order was set aside under rule 60.11(8). I would distinguish *Belanger* from the present case on the basis that it dealt with facts that only came to light after the contempt finding had been made through no fault of the alleged contemnor.

[37] In the case before us, the motion judge relied on rule 59.06(2):

> **Setting Aside or Varying**
>
> 59.06(2) A party who seeks to,
>
> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
>
> (b) suspend the operation of an order;
>
> (c) carry an order into operation; or
>
> (d) obtain other relief than that originally awarded,
>
> may make a motion in the proceeding for the relief claimed.

[38] While I agree that this rule applies to contempt proceedings, I respectfully disagree with the motion judge that the facts of the case before her brought it within its reach. In particular, Carey was not seeking to set aside or vary the contempt finding "on the ground of fraud or of facts discovered after it was made"

but rather on the basis of evidence that was clearly available for the initial hearing.

[39] I conclude, accordingly, that the procedure followed in this case was flawed and that Carey should not have been permitted to re-open the finding of contempt.

2. Was the Lenczner affidavit properly admissible?

[40] It follows from what I have already said that, to the extent Carey relied on the Lenczner affidavit for the issue of contempt, it should have been tendered on the initial phase as it was not evidence of a fact discovered after the initial order.

[41] It is also my view that, in any event, the Lenczner affidavit was not admissible on the issue of contempt. As I will explain in the next part of these reasons, the question of whether or not Carey's conduct amounted to contempt essentially turns on the interpretation of the *Mareva* order and the legal test for contempt. Those, in my view, are legal issues for the court to decide on the basis of legal argument, and while Carey is entitled to advance all the legal arguments he can muster, he cannot advance what are essentially legal arguments under the guise of expert evidence.

[42] However, those aspects of the Lenczner affidavit addressing the standards and common understandings of the litigation bar could be properly admitted as evidence favouring leniency on the issue of sanction.

3. Did the motion judge err in finding that Carey's conduct did not amount to contempt?

[43] Although I have concluded that the motion judge erred procedurally in setting aside her initial finding of contempt, we have her findings on the complete record and the matter has been fully argued before this court. Therefore, I propose for the sake of completeness to consider whether Carey's conduct, as found by the motion judge, did or did not amount to contempt.

[44] Carey offered a number of explanations that he claims justified returning the trust money to his client. Carey testified that:

- in his opinion, Laiken had little chance of success in the action and the *Mareva* order was an improper tactical move on her part to gain a tactical advantage;
- the form of the *Mareva* order was deficient in that it failed to provide for payment of legal costs, living expenses and disclosure of assets;
- the variations agreed to by counsel had gutted the order: "It simply doesn't exist anymore"; and
- because the money remained Sabourin's property, the transfer from the trust account was not prohibited.

[45] The motion judge appears to have accepted the thrust of these submissions in her December 24, 2012 reasons in concluding, at para. 36, that

she was not satisfied beyond a reasonable doubt "that the terms of the May 4, 2006 *Mareva* order were completely clear to Mr. Carey".

[46] In my respectful view, that conclusion reflects legal error.

[47] It is well-established that court orders must be respected, even if they were improperly or improvidently granted. See *Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council (*2006), 82 O.R. (3d) 721 (C.A.) at para. 90: "The law is clear that an order of the court, however wrong, must be obeyed until it is reversed or varied" (citation omitted). Whatever opinion Carey had as to the likely outcome of the Laiken-Sabourin litigation or as to the propriety or form of the *Mareva* order, he was bound to comply with it. He could and did, as Sabourin's counsel, move to set aside or vary the order but unless the order was set aside, he was bound to comply with it.

[48] I fail to see how the alleged deficiencies in the order could render unclear the term of the injunction prohibiting the transfer of trust funds held on Sabourin's behalf. The failure to allow payment of living expenses or legal costs or to provide for disclosure of assets had no impact on this term. The order may well have been unduly restrictive, but that does not amount to a lack of clarity. The order exhibited none of the characteristics typically found in orders lacking clarity: see *Culligan Ltd. v. Fettes* 2010 SKCA 151, 326 D.L.R. (4th) 463, at para. 21. It was missing no essential details about its application; it did not use overly

general or unclear language; and nothing had occurred that could obscure its meaning. I would add on this point that as Sabourin had instructed Carey to use the $500,000 to deal with creditors, it is very difficult to see how he or Carey could, at the same time, maintain that he needed it for his day-to-day living expenses.

[49] I see no merit in the assertion that because of the variations to the order, it no longer existed or that it lacked sufficient clarity. As the motion judge found in her initial reasons, the order "could not be clearer" and "it plainly prohibited any and all dealings" in money belonging to Sabourin, including money held in trust. She pointed out that Carey's own actions indicate that he knew the order still had binding effect. Carey's unsuccessful effort to secure a variation to permit payments to third party creditors and subsequent refusal to use the trust money as instructed by his client to settle the Brown claims demonstrates that he knew the *Mareva* order, as varied to permit payment of legal and ordinary living expenses, remained in force and had binding effect.

[50] Carey's fourth point, that the money remained Sabourin's property and therefore by returning it he was not caught by the order, is without merit. The *Mareva* order enjoined the "withdrawal, dissipation … dealing with, transfer … or diminishment" of the assets and specifically included money held in "trust accounts". The whole purpose of this and other *Mareva* orders is to prevent the defendant and others having knowledge of the order from dealing with the

defendant's property so as to defeat the court's process. I fail to see how the fact that Sabourin retained beneficial ownership could possibly defeat the application of these terms to the money Carey held in his trust account.

[51] I now turn to the significance of the fact that Carey testified that he honestly believed that he was acting in a manner consistent with his duty to his client and his duty to the court when he returned the trust money to Sabourin.

[52] I begin by pointing out what appear to me to be fundamental flaws in Carey's analysis of the interpretation and application of the *Mareva* order.

[53] The basic premise of a *Mareva* order is that the defendant is a rogue bent on flouting the process of the court. That is said to justify the exceptional and drastic measure of freezing the defendant's assets before trial and before judgment. A finding that Sabourin was a rogue bent on flouting the court's process was implicit in the grant of the *Mareva* order and Carey was bound to act accordingly. If that is the starting point, it is difficult to see how Carey could reasonably have thought that returning the money to Sabourin would render it subject to execution while retaining it in the trust account would shelter it from execution. It was much more likely that the money would have been available for execution had Carey held the money in his trust account rather than returning it to his client who then behaved in precisely the manner the *Mareva* order predicted: he disappeared without a trace taking all of his assets with him.

[54] Carey asserts that it would have been wrong for him to have left the money in his trust account because that would shelter it from creditors under the protection of solicitor-client privilege. This ignores the fact that Carey knew that Sabourin had revealed to Bill Brown who represented several third party creditors the fact that there was $500,000 sitting in his lawyer's trust account. Not surprisingly, the receiver Brown had appointed used that information in an attempt to recover the funds, only to find that they had been returned to Sabourin. As Sabourin had already disclosed to third party creditors that Carey held $500,000 in trust to be used to pay or settle creditors' claims, it was virtually inevitable that at some point, his creditors, likely including Laiken, would come after the money had it remained in Carey's trust account. I have difficulty accepting Carey's assertion that there was no way that Laiken or her counsel could learn that he had his client's money in his trust account in the face of his evidence that his client had already disclosed that fact, albeit to another creditor. I note here that whether Laiken would have gained from an execution brought by other creditors is a contentious issue upon which I express no view. The point remains, however, that as was predicable from Sabourin's conduct and, as events proved, had Carey retained the money in his trust account, he would not have sheltered it from execution.

[55] In my view, Carey committed an act that violated both the letter and the spirit of the *Mareva* order.

[56] The motion judge was not satisfied beyond a reasonable doubt that Carey's belief that he was entitled to return the money to his client amounted to a deliberate or willfully blind breach of the *Mareva* order. I accept that finding and now turn to consider the legal issue that arises: was the motion judge correct in finding that it follows from her finding that Carey was not in contempt?

[57] It is well-established that while the act that contravenes a court order must be intentional to constitute civil contempt, it is not necessary to show that the act was deliberately contumacious. This is not a case of criminal contempt where public defiance of the court's authority is an essential element and, as held in *United Nurses of Alberta v. Alberta (Attorney General),* [1992] 1 S.C.R. 901, at p. 933, it must be proved beyond a reasonable doubt that "the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*)." This is a case of civil contempt where "[a] person who simply breaches a court order ... is viewed as having committed civil contempt": *United Nurses*, at p. 931.

[58] In *TG Industries Ltd. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35, bolstered by a thorough review of what he described, at para. 19, as the "long line of authority for the view that intention to disobey is not an element of civil contempt", Cromwell J.A. (then a member of the Nova Scotia Court of Appeal), explained the governing principle in the following way, at para. 17:

> [I]n civil contempt, it is important to distinguish between an intentional act and knowledge that the act is prohibited. The core elements of civil contempt are knowledge of the order and the intentional commission of an act which is in fact prohibited by it. The required intention relates to the act itself, not to the disobedience; in other words, the intention to disobey, in the sense of desiring or knowingly choosing to disobey the order, is not an essential element of civil contempt.

[59] As Cromwell J.A. pointed out, at para. 11, to hold that a party could only be found in contempt "if it intentionally and wilfully acted contrary to the requirements of the order" would put the test for civil contempt "too high" as "[i]f accepted, this view would mean that mistakes of law would be a defence to an allegation of civil contempt but not to a murder charge."

[60] This court applied the same principle in *Sheppard v. Sheppard* (1975), 12 O.R. (2d) 4, at p. 8:

> [I]n order to constitute a contempt it is not necessary to prove that the defendant intended to disobey or flout the order of the Court. The offence consists of the intentional doing of an act which is in fact prohibited by the order. The absence of contumacious intent is a mitigating but not an exculpatory circumstance.

[61] Similarly, it has been held that even a party who acts on legal advice may be found in contempt if the conduct violates terms of a court order: see *Re Tyre Manufacturers' Agreement*, [1966] 2 All E.R. 849, at p. 862; *Canada Metal Co. Ltd. v. C.B.C. (No. 2)* (1974), 48 D.L.R. (3d) 641, at p. 661, aff'd 65 D.L.R. (3d) 231 (Ont. C.A.). Sabourin could not have avoided a finding of contempt by relying

on Carey's erroneous legal advice and neither should Carey because of his erroneous interpretation of the order.

[62] Carey knew of the order and he violated it. He did not desire or knowingly choose to disobey the order, but the lack of contumacious intent is a mitigating factor and not an essential element of civil contempt.

[63] In his capable submission on behalf of Carey, Mr. Schindler cites English authority dealing with contempt allegations against third parties who have acted contrary to an order made against a different party. It has been held that an intention on the part of the third party "to interfere with or impede the administration of justice" is "an essential ingredient…to be established to the criminal standard of proof": *Attorney General v. Punch Ltd.,* [2003] 1 A.C. 1046, at para. 87. This principle has been applied to banks alleged to have violated *Mareva* injunctions as third parties with knowledge of the order: see *Z. Ltd. v. A-Z and AA-LL,* [1982] 2 W.L.R. 288 (C.A.), at p. 305: "Carelessness or even recklessness on the part of the banks ought not in my opinion to make them liable for contempt unless it can be shown that there was indifference to such a degree that was contumacious."

[64] I am not persuaded that as the solicitor acting for Sabourin in relation to the *Mareva* order, Carey falls into the same category as the third parties discussed in those cases who were strangers to the litigation bound to respect

the court order simply because they had knowledge of it. As the solicitor of record and as an officer of the court, Carey must be held to a higher standard. The solicitor-client bond creates a community of interest between Carey and Sabourin that is plainly distinguishable from the situation of a stranger to the litigation who is apprised of the court order. As an officer of the court, a solicitor of record is duty-bound to take scrupulous care to ensure respect for court orders. In my view, as the solicitor of record in the case, Carey should be held to the same standard of compliance as his client who was a party.

[65] I conclude, accordingly, that the motion judge erred in law in finding that because Carey did not deliberately breach the *Mareva* order, he could not be found in contempt.

4. If Carey was in contempt, what is the appropriate sanction?

[66] While it is my view that Carey's conduct did breach the May 4, 2006 *Mareva* order, I accept that Carey actions were prompted by an error in judgment and not by any deliberate disrespect for the court or its process. On this issue, the Lenczner affidavit is relevant and admissible.

[67] Laiken does not ask that Carey be imprisoned or fined but submits that the court should order Carey to pay her $440,000 by way of compensation. I do not intend to review the authorities as to whether or when a compensation order is an appropriate sanction for contempt as it is my view that, even if this court does have the authority to require compensation as the sanction for contempt, no such

order should be made in the circumstances of this appeal for the following procedural reason.

[68] It is clear from the motion judge's reasons refusing to grant summary judgment to dismiss the action that Laiken's claim for damages raises contentious issues of fact and law, including issues as to causation. It would be difficult to come to grips with those issues in the context of a contempt motion which is designed to be an expeditious and focused proceeding. To the extent that violation of the *Mareva* order is an element of Laiken's claim against Carey, she will have the benefit of our finding in this contempt proceeding, but she must pursue her claim in a proceeding that affords a proper procedural framework for its adjudication.

[69] In my view, the appropriate sanction is to require Carey to pay Laiken the costs of the contempt proceedings. As I accept the finding that Carey's breach of the *Mareva* order was not deliberately contumacious, I would order costs on a partial indemnity basis.

DISPOSITION

[70] I conclude that the motion judge's decision of September 10, 2012 to set aside her initial October 17, 2011 finding of contempt should itself be set aside and her order of October 17, 2011 should be restored for two reasons. First, the motion judge erred in permitting Carey to attack her initial finding of contempt,

and second, and in any event, she erred in the legal test she applied to Carey's conduct.

[71] Laiken is entitled to her costs on a partial indemnity scale. Both parties asked for approximately $20,000 for costs of the appeal and I fix the costs in that amount. If the parties are unable to agree as to the costs of the proceeding in the Superior Court, they may file brief written submissions to this panel.

"Robert J. Sharpe J.A."
"I agree M. Rosenberg J.A."
"I agree E.E. Gillese J.A."

Released: August 27, 2013

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43.

6. (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court.

THE CATALYST CAPITAL GROUP INC.
Plaintiff/Appellant/Responding Party

-and-

BRANDON MOYSE et al.
Defendants/Respondents/Moving Party

Court File No. C60799/M45378

ONTARIO
COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM AND AUTHORITIES OF THE APPELLANT/RESPONDING PARTY, THE CATALYST CAPITAL GROUP INC. (MOTION TO QUASH RETURNABLE NOVEMBER 5, 2015)

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