Court File No. C60799/M45378

# 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
(Respondent/Moving Party)

## SUPPLEMENTARY BRIEF OF AUTHORITIES OF THE MOVING PARTY, BRANDON MOYSE

November 5, 2015

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**Tab**

# Tab 1

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Frederick v. Aviation & General Insurance Co. | 1966 CarswellOnt 497, [1966] 2 O.R. 356 | (Ont. C.A., Mar 28, 1966)

1932 CarswellOnt 148
Ontario Court of Appeal

Hendrickson v. Kallio

1932 CarswellOnt 148, [1932] 4 D.L.R. 580, [1932] O.R. 675, [1932] O.J. No. 380

# Hendrickson v. Kallio

Mulock, C.J.O., Magee and Middleton, JJ.A.

Judgment: November 1, 1932
Docket: None given.

Counsel: *H. Cassels*, for plaintiff, respondent on appeal
*A. C. Heighington*, K.C., for defendant, appellant on appeal

Subject: Civil Practice and Procedure

***Middleton, J.A.*:**

Motion by the plaintiff to quash an appeal by the defendant from the judgment of Grant, J.A., dated June 18, 1932, dismissing the appeal of the defendant from the report of McKay, Co.Ct.J., of the District Court of Thunder Bay, acting as special Referee, upon the ground that no appeal will lie to this Court from the judgment in question without leave, and that leave has been applied for and refused.

This action is brought for an accounting with respect to transactions between the parties for the cutting and hauling of a quantity of pulp wood.

It appears to have been commenced in the District Court of the District of Thunder Bay, but was apparently transferred in some way to this Court for, on March 15, 1932, the Honourable, the Chief Justice of the High Court Division made an order referring the action for trial to His Honour Judge McKay, Junior Judge of the District Court, as special Keferee, and on April 13, 1932, the special Referee made a report finding that there is due from the defendant to the plaintiff $1,044.56 and that there is nothing due from the plaintiff to the defendant upon the counterclaim, and that the plaintiff is entitled to payment of the sum mentioned, together with his costs of action,

 

From this report an appeal was had, upon many grounds, which was heard and determined by Grant, J.A., who, by order of June 18, 1932, dismissed the appeal.

Upon the assumption that leave to appeal was necessary, an application for leave to appeal was made and hoard by Logie, J., on June 24, 1932, who dismissed the application,

The defendant then being convinced that the judgment was not as he had thought an interlocutory judgment, but a final judgment, served notice of appeal to this Court, assuming he had a right to appeal without leave. This notice was given on June 30, 1932, within the time limited for that purpose,

The present application is made to quash the appeal for the reasons already indicated,

The question is of importance, and arises by reason of the amendment to the Judicature Act in 1927, and now found in s. 24 of the Act, R.S.O. 1927, c. 88. This provides that "There shall be no appeal to a Divisional Court from any interlocutory order whether made in court or chambers, save by leave as provided in the Rules."

The following section, 25, of the Act, conferring the right of appeal to the Divisional Court, is expressly made subject to this provision of s. 24.

Before this amendment, the statutory provision was that there was no appeal to a Divisional Court from an interlocutory order whether made in Court or Chambers, where before the Ontario Judicature Act, 1881 (Ont.), c. 5, there would have been no relief from a like order by an application to a Superior Court, There was, in addition, the provision found in the Rules of 1913, R. 507, which permitted an appeal from a decision by a Judge in Chambers which finally disposes of the whole or part of the action or matter but prohibits an appeal without leave, from any judgment or order made in Chambers, which does not finally dispose of the whole or part of the action or matter, and which delimits the cases in which leave to appeal may be granted.

The amendment of 1927 was manifestly intended to get rid of the difficulty which arose by reason of the reference to the practice before 1881 which was in a state of great confusion and extraordinary difficulty, and also to bring the practice in relation to appeals from all interlocutory orders into harmony. This statutory provision was supplemented by the provisions of the present R. 493, which only defines the cases in which leave should be given and does not contain the former description of an appealable order as one which finally disposes of the question involved in the action.

The argument here is that the report of the referee does not finally determine the rights of the parties in such a sense as to make it final. It is a mere step in the cause and there must be a motion for judgment based upon the report which will finally determine the rights.

  

It is true that upon this motion for judgment, the report will be regarded as conclusive, and the merits of the case cannot be discussed, but this it is said, makes no difference.

It is necessary to draw attention to the statutory provisions under which the order of reference was made. These are found in ss. 66-71 of the Judicature Act, R.S.O. 1927, c. 88. A Judge is authorized to refer to an official Referee or to a special Referee agreed upon by the parties, any question arising in an action for inquiry and report. Section 66.

If all parties interested consent, or where the Judge is of opinion that a prolonged examination of documents or legal investigation is required which cannot, in the opinion of the Court, be conveniently made before a jury or conducted by the Court directly, or where the matters in dispute consist wholly or partly of matters of account, he may refer the whole action or any question or issue of fact arising therein to an official referee or special referee for determination. Section 67.

"The referee shall make his findings and embody his conclusions in the form of a report, and his report shall be subject to all the incidents of a report of a master on a reference as regards filing, confirmation, appealing therefrom, motions thereupon and otherwise, including appeals to a Divisional Court." Section 70.

I do not regard this section as sufficient to give a right of appeal to a Divisional Court. It appears to me to simply place the report of the Referee in precisely the same position with reference to appeals as the report of the Master.

The provisions of the Rules with reference to appeal from the Master, are found in R. 506, *et seq.*, authorizing an appeal in all cases to the Court. Any further right of appeal from the decision of the Judge in Court must depend upon the general provision with reference to appeals, that is, if the decision is interlocutory, there is no appeal by reason of the provisions of s. 24.

I am clearly of opinion that the order in question is not an interlocutory order within the meaning of this statutory provision. The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties — the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.

Two distinct lines of cases are relied upon as leading to the contrary conclusion. First, a series of cases relating to appeals to the Supreme Court of Canada. It is enough to say that these cases all depend upon a statute widely different from that herein question. There, the appeal is given from the final judgment in the action and from nothing else. Manifestly a report or an order made upon an appeal from the report is not the final judgment in the action. The merits may have been determined by the judgment directing the reference or the final adjudica tion may be the judgment on further

  

directions. These may be final judgments, but the report itself, although really determining the rights of the parties, is not subject to appeal.

I refer particularly to the case of *Clarke v. Goodall* (1911), 44 S.C.R. 284, where the present Chief Justice of Canada regrets that for the reasons I have indicated, there is no right of appeal from the real determination of the rights of the parties because of the limited terms of the statute giving the right of appeal

This was followed in *Dunn & Eastern Trust Go. v. Eaton* (1912), 9 D.L.R. 303, where the rights of the parties were de termined by a judgment which directed a reference and reserved further directions. This judgment was not final, and therefore no right of appeal.

The contemporaneous decision in *Hesseltine v. Nelles* (1912), 10 D.L.R. 832, is also instructive. There, there was an original judgment directing a reference, a report, then a judgment upon further directions, and it was held that the inability of the Judge hearing the motion for judgment on further directions to go behind the judgment or report, precluded the Supreme Court from going into the merits upon the appeal from the final order.

The other line of cases are a series of English decisions. There ape different provisions and time limits for appeals from final decisions, and from interlocutory decisions under the English practice. There are a series of decisions by no means consistent dealing with this classification of appeals.

In a comparatively early decision, *Standard Discount Co. v. LaGrange* (1877), 3 C.P.D. 67, the principle was laid down that to determine whether an order is final or merely interlocutory, the Court must not merely look at the order actually made, but also upon the order that would have resulted if the decision had gone in favour of the other party. The motion is not to be regarded as a motion for a final order unless the motion would end the dispute no matter in whose favour the question is determined.

If the decision "given in one way will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then it is not final but interlocutory," so said Lord Esher in *Salaman v. Warner*, [1891] 1 Q.B. 734, at p. 735, in which this principle was adopted without qualification.

An entirely inconsistent view is taken in another series of cases. There it is said that the order actually made is alone to be looked at, and if it finally disposes of the rights of the parties, then it is final and not interlocutory, and it is quite immaterial that the refusal of the order would have been interlocutory, because if the order sought had been refused, the action would have had to proceed further.

This is laid down in the case of *Shubrook v. Tufnell* (1882), 9 Q.B.D. 621. This case was preferred to the earlier decision in *Bozson v. Altrincham Urban Dist. Council*, [1903] 1 K.B. 547, a decision

 

of Lord Halsbury, L.C., Lord Alverstone, C.J., and Sir F. H. Jeune. Lord Alverstone puts the point shortly (pp. 548-9): —

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not it is then, in my opinion, an interlocutory order."

In the more recent case of *Isaacs v. Salbstein*, [1916] 2 K.B. 139, this decision is followed, although there had been in the meantime dicta preferring the opposite view.

*Bk. of Minnesota v. Page* (1887), 14 A.R. (Ont) 347, a decision of our own Court of Appeal strongly supports this view, and definitely declines to follow the earlier English cases which it is pointed out are not applicable here as relating merely to procedure with reference to appeals and not dealing with the question of a right of appeal.

For these reasons I am of opinion that there is an appeal as of right for the judgment in question determines the merits of the action and the real rights of the parties, nor do I think that the mistake of the appellant in unnecessarily and improperly applying for leave to appeal amounts to a waiver of the right to appeal without leave which he possessed.

This motion therefore fails and must be dismissed with costs which may be set off *pro tanto* against the costs of the motion improperly made for leave to appeal, which the appellant has been ordered to pay.

Tab 2

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Burtch v. Barnes Estate | 2006 CarswellOnt 2423, 20 M.P.L.R. (4th) 160, [2006] O.J. No. 1621, 27 C.P.C. (6th) 199, 209 O.A.C. 219, 80 O.R. (3d) 365 | (Ont. C.A., Apr 25, 2006)

1993 CarswellOnt 23
Ontario Court of Appeal

Ball v. Donais

1993 CarswellOnt 23, [1993] O.J. No. 972, 13 O.R. (3d) 322, 40 A.C.W.S. (3d) 1031, 45 M.V.R. (2d) 319, 4 W.D.C.P. (2d) 276, 64 O.A.C. 85

# RONALD SCOTT BALL v. PERRY MICHAEL DONAIS

McKinlay, Catzman and Austin JJ.A.

Oral reasons: April 22, 1993
Written reasons: May 4, 1993
Docket: Doc. C.A. C10164

Counsel: *Lawrence R. McRae*, for appellant.
*Janet McGuigan Kelly*, for respondent.
*David Lepofsky*, for Attorney General for Ontario.

Subject: Public; Civil Practice and Procedure; Estates and Trusts

**Table of Authorities**

**Cases considered:**

*Bell v. Smith* (May 5, 1969) Daudlin J. (Ont. C.A.) [unreported] — *referred to*

*Frederick v. Aviation & General Insurance Co.*, [1966] 2 O.R. 356 (C.A.) — *referred to*

*Wigle v. Allstate Insurance Co. of Canada* (1984), 30 M.V.R. 167, 49 O.R. (2d) 101, 10 C.C.L.I. 1, 14 D.L.R. (4th) 404, [1985] I.L.R. 1-1863 (C.A.) [leave to appeal to S.C.C. refused (1985), 14 D.L.R. (4th) 404n, 8 O.A.C. 320 (S.C.C.)] — *referred to*

**Statutes considered:**

 

Highway Traffic Act, R.S.O. 1980, c. 198 [R.S.O. 1990, c. H.8] —

Pt. XI

s. 180(1) [R.S.O. 1990, c. H.8, s. 206(1)]

Motorized Snow Vehicles Act, R.S.O. 1980, c. 301 [R.S.O. 1990, c. M.44] —

s. 10 [R.S.O. 1990, c. M.44, s. 11]

**Rules considered:**

Ontario, Rules of Civil Procedure —

R. 21

Appeal from order declaring action not statute-barred.

***Per curiam*:**

1 The defendant moved under R. 21 before Daudlin J. for the determination before trial of a question of law raised by the pleadings. The question of law was whether this action was barred by the two-year limitation period prescribed by s. 180(1) of the *Highway Traffic Act*, R.S.O. 1980, c. 198, as amended. Daudlin J. determined that the action was not barred by that Act and made an order accordingly.

2 Counsel for the plaintiff submitted that this court lacked jurisdiction to entertain the defendant's appeal from the order of Daudlin J. because the order was interlocutory in that it did not finally dispose of the issue between the parties.

3 The effect of the order of Daudlin J. was to preclude the defendant's entitlement to raise thereafter, as a defence to this action, the plaintiff's failure to sue within the limitation period prescribed by the *Highway Traffic Act*. While that order did not finally dispose of the rights of the parties to the litigation, it did, subject to appeal therefrom, finally dispose of the issue raised by that defence, and thereby deprived the defendant of a substantive right which could be determinative of the entire action. Viewed from that perspective, the order of Daudlin J. was a final order within the contemplation of the decisions of this court in *Bell v. Smith* (May 5, 1969) Daudlin J. (Ont. C.A.) (unreported); *Frederick v. Aviation & General Insurance Co.*, [1966] 2 O.R. 356; and *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101.

  

4 Accordingly we are of the view that the defendant's appeal from the order of Daudlin J. is properly before this court.

5 On the question of whether or not the limitation period in the *Highway Traffic Act* applies to this case, Daudlin J. held that it did not, because of s. 10 of the *Motorized Snow Vehicles Act*, R.S.O. 1980, c. 301 which reads:

> The provisions of the *Highway Traffic Act*, except Part XI, and of the *Motor Vehicle Accident Claims Act* do not apply to a motorized snow vehicle or to the driving thereof.

(Section 180 is not contained in Pt. XI of the *Highway Traffic Act*.)

6 We do not agree with the decision of the Motions Court judge on this issue. The short answer is that this litigation does not, other than in a peripheral way, deal with a "motorized snow vehicle" or "the driving thereof". It involves a claim by an individual, who happened to be driving a snowmobile at the time, against the driver of a motor vehicle. It is the driving of the motor vehicle, not the snowmobile, which is the real issue in the case.

7 An additional and novel constitutional argument was raised by the respondent, that is, that because the accident took place on the frozen waters of the Thames River, the provisions of the provincial *Highway Traffic Act* cannot apply to the case because constitutional authority over navigation and shipping rests in Parliament. That argument, though amusing, we find to be otherwise without merit.

8 In result, the appeal is allowed and the plaintiff's action is dismissed with costs here and below to the appellant.

*Appeal allowed.*

Tab 3

1946 CarswellOnt 74
Ontario Supreme Court [Court of Appeal]

Guaranty Trust Co. of Canada v. Fleming & Talbot

1946 CarswellOnt 74, [1946] O.R. 817, [1947] 1 D.L.R. 184

# Guaranty Trust Company of Canada v. Fleming & Talbot

Robertson C.J.O. and Fisher and Laidlaw JJ.A.

Heard: October 7, 1946
Judgment: October 30, 1946

Counsel: *G. A. Gale, K. C.* (*J. T. Weir* with him), for the defendants, respondents, on the motion to quash
*R. M. Willes Chitty, K. C.*, on the appeal

Subject: Corporate and Commercial; Civil Practice and Procedure

An appeal by Eric Duff Scott from an order of Wilson J., dismissing an appeal from an order of the Master, who had refused to set aside an appointment and *subpoena* for the examination for discovery of the appellant. Leave to appeal from the order of Wilson J. had been refused by Urquhart J. The proceedings below are fully reported in [1946] O.W.N. 564, and the reasons of Urquhart J. are also reported in [1946] 3 D.L.R. 385. The respondents served notice that at the opening of the appeal they would move to quash the appeal on the ground that the order of Wilson J. was an interlocutory one, and that no leave to appeal had been obtained.

The appeal and the motion to quash were heard by Robertson C.J.O. and Fisher and Laidlaw JJ.A.

*G. A. Gale, K.C.* (*J. T. Weir* with him), for the defendants, respondents, on the motion to quash: There is no right of appeal without leave, under s. 24 of The Judicature Act, R.S.O. 1937, c. 100, since the order in appeal is interlocutory only, in that it does not determine the real matters in dispute between the parties: *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580. [Robertson C.J.O.: But the appellant is not a party to the action. Does not the order finally determine his rights so far as this litigation is concerned?] Middleton J.A., when he spoke of "parties" in the *Hendrickson* case, at p. 678, intended to limit himself to the actual litigants alone. That is made clear by him in *Roblin v. Drake*, [1938] O.R. 711 at 712, [1938] 4 D.L.R. 758.

 

[Robertson C.J.O.: Here the appellant moved to set aside the appointment. If he had failed to attend and you had moved to commit him, and an order had been made accordingly, could you then say that the committal order was merely interlocutory?] Perhaps not, but in that case the liberty of the subject would be involved, and the *Hendrickson* case lays down the rule that in determining whether or not an order is interlocutory, the Court will look only at the order which has in fact been made. In any event, the matter is one of procedure, and an order which determines only a question of procedure is, generally speaking, considered an interlocutory one: *Roblin v. Drake, supra.*

*R. M. Willes Chitty, K.C.*, for the appellant, on the motion to quash: The order, though it may be interlocutory as to the parties to the action, is clearly final so far as the appellant is concerned, since it finally determines that he is liable to be examined: Compare *Osolsky v. Schwartz* (1929), 37 O.W.N. 121.

[The Court reserved judgment on the motion to quash, and directed counsel to proceed with the argument on the substantive appeal.]

*R. M. Willes Chitty, K.C.*, on the appeal: This action, although it is in name brought by the trustee in bankruptcy of Canadian Depositors Limited, is in fact brought by a large creditor of the bankrupt company in the trustee's name. There is no question here of an assignment, and Rule 335 has no application, except in so far as some of the cases decided under that Rule may have a bearing on the construction which should be put upon Rule 334. The proposed examination is to be justified, therefore, only under Rule 334, on the ground that the action is brought for the immediate benefit of the bankrupt company. An action brought by a trustee in bankruptcy may be for the ultimate benefit of the debtor, but the immediate benefit clearly goes to the creditors; the trustee in bankruptcy is a trustee, not for the debtor, but for the creditors, and the only benefit to a debtor from such an action would arise in rare cases where the estate shows a surplus after creditors' claims have been satisfied. That is a "mediate" rather than an "immediate" benefit: *Trusts and Guarantee Co. v. Smith* (1915), 33 O.L.R. 155, 21 D.L.R. 711.

Even if it could be said that the action is brought for the immediate benefit of the bankrupt company, Rule 334 still does not permit the proposed examination of an officer of that company. The learned Master applied s. 32(*ze*) of The Interpretation Act to make the word "person" in Rule 334 include a corporation, but he overlooked the opening words of s. 32, *viz.*, "In every Act unless the context otherwise requires". The context here clearly does otherwise require. The only provision for the examination of an officer of a corporation is to be found in Rule 327(2), and Rule 327 clearly applies to parties to the action, so that clause 2 authorizes the examination of an officer of a corporation only where the corporation is a party to the action: *Bank of Toronto v. Quebec Fire Ins. Co.* (1897-8), 18 P.R. 41. *May v. Roberts*, 48 B.C.R. 411, [1934] 1 W.W.R. 798, 15 C.B.R. 464, is not properly distinguishable on the grounds suggested by the learned Master, because the provision in our Rules against the reading at the trial of the examination for discovery of an officer of a company is in Rule 327(2), applying, as has been said, only to corporations which

  

are parties to the action. This attempted distinction, however, serves to emphasize the fact that Rule 334 cannot have been intended to apply to an officer of a corporation for whose benefit an action is brought, because if it had been intended so to apply it would obviously have provided for the exclusion of the examination at the trial.

The other cases cited, both by the Master and by Urquhart J., are clearly distinguishable. In none of them was a trustee in bankruptcy, or a corporation, involved, and clearly different considerations arose. *Gough v. Toronto and York Radial R.W. Co.* (1918), 42 O.L.R. 415, dealt with an entirely different point, and the statement of Middleton J. in that case, quoted here by Urquhart J., was obiter.

It is submitted that the only questions to be decided on this appeal are: (1) whether the appellant is a person for whose immediate benefit the action is brought; (2) whether Rule 334 was ever intended to apply to a corporation; and (3) if so, whether the Court is justified in legislating by incorporating the provisions of Rule 327(2) into Rule 334.

*G. A. Gale, K.C.*: The appellant is examinable under both Rule 334 and Rule 335.

He is liable to be examined, first, as a person for whose benefit the action is brought, under the provisions of Rule 334. Certainly, in an action by the trustee of an insolvent person, the debtor is a person for whose immediate benefit the action is prosecuted: *Macdonald v. Norwich Union Ins. Co. et al.* (1884), 10 P.R. 462; *Garland v. Clarkson* (1905), 9 O.L.R. 281; *Tollemache v. Hobson* (1897), 5 B.C.R. 214; *Johnston v. McIntosh* (1883), 3 C.L.T. (Occ. N.) 313. [Laidlaw J.A.: How can it be said that the debtor company in this case can benefit immediately by the action, in view of the fact that it is brought by a creditor and not by the trustee?] There may be a surplus as a result of the action, in which case the debtor company will receive that surplus, and in any event, if the action succeeds a debt will be liquidated which would otherwise be outstanding. In addition, it is put in a more favourable position in the event of its applying for a discharge.

Assuming that the action is for the benefit of the debtor company, it comes within Rule 334 by virtue of s. 32(*ze*) of The Interpretation Act, R.S.O. 1937, c. 1, which provides that the word "person" in a statute shall include a corporation, and the effect of which is extended to the Rules by s. 6 of the same Act and s. 106 of The Judicature Act. [Laidlaw J.A.: But that meaning is to be given to the word only unless the context otherwise requires, by the opening words of s. 32.] The wording of Rule 334 does not exclude this interpretation of "person". In Rule 333 the context obviously excludes such an interpretation of the word.

Since discovery may be had against the debtor company under Rule 334 (and, for the same reasons, under Rule 335), that right can be made effective by resort to the provisions of Rule 327(2). [Robertson C.J.O.: But Rule 327 deals only with parties to the litigation, either individuals or corporations.] We submit that while clause 1 of Rule 327 is limited to parties to the action, clause 2 is not so limited, but extends to the examination of officers or servants of corporations generally.

 

Otherwise the draftsman of the Rules would have indicated that clause 2 was to be restricted to cases where the corporation in question was a party to the litigation: *Gough v. Toronto and York Radial R.W. Co. supra* at p. 417. [Robertson C.J.O.: How do you distinguish *Bank of Toronto v. Quebec Fire Ins. Co. supra*, and *May v. Roberts, supra*?] In the *Bank of Toronto* case the Court did not consider whether the officer in question could have been examined under the provisions of what is now Rule 334, so it cannot be said to be an effective or binding authority on that Rule. It is not clear from *May v. Roberts* what Rule was being applied, but in any event the learned judge there was moved by the fact that an examination, if permitted, could be used on the trial against the trustee, and as a matter of discretion, if nothing else, he declined to make the order. In Ontario the examination cannot be used against the plaintiff at the trial; it is being sought only as a medium of discovery. We refer also to *Argles v. Pollock* (1917), 12 O.W.N. 158; *Patterson v. Toronto General Trusts Corporation* (1918), 15 O.W.N. 42.

*R. M. Willes Chitty, K.C.*, in reply.

***Robertson C.J.O.*:**

1 This appeal is from an order of Mr. Justice Wilson, dated 1st May 1946, dismissing an appeal of Eric Duff Scott from an order of the Master, dated 13th April 1946, which dismissed the appellant's application for an order setting aside an appointment and *subpoena* requiring the appellant to attend for examination for discovery at the instance of the defendants in the action.

2 Appellant is not a party to the action, nor is he an officer or servant of any party to the action. The plaintiff, Guaranty Trust Company of Canada, in whose name the action is brought, is the trustee in bankruptcy of Canadian Depositors Limited, an undischarged bankrupt. Appellant is alleged to be examinable as an officer of Canadian Depositors Limited.

3 The action is upon a contract alleged to have been made between the bankrupt company and the defendants, and damages are claimed for breach of that contract. The defendants allege material misrepresentation on the part of Canadian Depositors Limited in the making of the contract.

4 The defendants, in support of the right they claim to examine the appellant for discovery, rely upon Rules 334 and 335, which are as follows:

> 334. A person for whose immediate benefit an action is prosecuted or defended may without order be examined for discovery.
>
> 335. Where an action is brought by an assignee the assignor may without order be examined for discovery.

5 The Master held that the appellant was examinable.

  

6 Before dealing with the substantive appeal it is necessary to dispose of a preliminary motion by the respondents to quash the appeal on the ground that it is an appeal from an interlocutory order, and that leave to appeal from the order of Wilson J. was not obtained, but was in fact refused by Urquhart J. Section 24 of The Judicature Act, R.S.O. 1937, c. 100, is referred to.

7 As between the appellant and the respondents I do not think that the order is interlocutory. It finally disposes of the only question in issue between them, that is, the question of the right of the respondents to compel the appellant to attend and submit to examination for discovery in an action to which he is not a party, nor is he the officer or servant of any corporation that is a party. To say that as between the plaintiff and the defendants the proceedings in relation to the examination of the appellant for discovery are interlocutory, is no doubt right, for none of the issues in the action between the parties to the action is determined thereby. The appellant is, in no sense, a party to those issues. The issue he has raised is one entirely personal to himself. He says that the defendant in the action has no right to bring him, a stranger to the action, before an examiner and make him answer questions for purposes of discovery. He disputes the right that the defendants allege they are given in respect of examining him, under the Rules of Practice.

8 In my opinion this is an issue that the appellant has a right to raise, and it is quite distinct from the issues to be tried in the action between the parties to it. The order of Wilson J. finally determined that issue, subject to any right of appeal there may be. To hold that the order of Wilson J. disposing of appellant's application is not an interlocutory order within s. 24 of The Judicature Act, but is a final order, does not in the least conflict with anything said in such cases as *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580, and *Roblin v. Drake*, [1938] O.R. 711, [1938] 4 D.L.R. 758. There was no question involved in the appeals in the cases referred to, as there is here, between one of the parties to the action and a stranger to the action. If the order in appeal stands, the appellant must attend before the examiner and submit to examination for discovery by the respondent in an action to which he is no party, or become liable to punishment for contempt. I would dismiss the motion to quash the appeal.

9 An illustration of an appeal being entertained from a somewhat similar order by one who was a stranger to the action is to be found in *Goodeve v. White* (1893), 15 P.R. 433. There the Court of Appeal entertained an appeal from an order, made in a County Court case, for the examination of the appellant as a person to whom a judgment debtor had made a transfer of his property, the jurisdiction of the Court of Appeal being restricted to the hearing of appeals from orders in their nature final, and not merely interlocutory. (The County Courts Act, R.S.O. 1887, c. 47, s. 42).

10 Dealing then with the substantive appeal, it is to be observed that neither Rule 334 nor Rule 335 makes any provision for the examination for discovery of an officer or servant of a corporation. It does not carry the argument any farther to interpret the word "person" in Rule 334, or the word "assignor" in Rule 335, as extending to a corporation. That alone does not cover the

 

examination of an officer or servant of a corporation. When it is intended by the Rules of Practice to give the right to examine for discovery an officer or servant of a corporation, express provision to that effect is made. That is what is done by Rule 327, which, by clause 1, provides that a party to an action, whether plaintiff or defendant, may be examined for discovery by any party adverse in interest. The Rule then, in clause 2, makes provision for the case of a corporation by providing that any officer or servant of such corporation may, without order, be orally examined by any party adverse in interest. Rule 327, however, deals only with the right to examine for discovery as between parties to the action. Without the special provision contained in clause 2 for the case of a corporation, there would be no right to examine for discovery an officer or servant of a corporate plaintiff or corporate defendant. The right to do so depends entirely upon the Rule itself, and the right it gives has been varied from time to time by amendments of the Rule.

11 I am not aware of any principle of construction by which clause 2 of Rule 327 can be read into Rules 334 and 335, or either of them. The fact that express provision is made by Rule 327 for the examination of an officer or servant of a corporation which is a party to the action, while no provision is made for such an examination by Rule 334 where a corporation is the person to be benefited by the action, or by Rule 335 where a corporation is an assignor, would seem, upon ordinary principles of construction, to be the plainest indication that no such right was intended to be given by either of the latter two Rules.

12 In a case where the intention is so plainly indicated it is not important to search for grounds upon which it may be said to be reasonable that the right to examine for discovery should be so limited. It is enough that the Rules do not grant the right. It is sometimes suggested that the right to examine for discovery is abused, and that some limitations upon it, or some change in the manner of obtaining discovery, as, for example, by interrogatories submitted in writing, would be advisable. In any event, the right to examine this appellant for discovery in this action depends upon the Rules of Practice, and, where they are silent, no right to examine for discovery a stranger to the action can be recognized.

13 The appeal should be allowed, and the *subpoena* and appointment for examination should be set aside. The appellant should have costs of the appeal and of the motions before Wilson J. and the Master.

***Fisher J.A.:***

14 I agree with the reasons and conclusions of my Lord the Chief Justice, and have nothing to add.

***Laidlaw J.A.:***

15 This is an appeal from an order of the Honourable Mr. Justice Wilson in chambers, dated the 1st May 1946, dismissing an application by way of appeal from an order of the Master dated the

  

13th April 1946. When the appeal to this Court came on for hearing, counsel for the respondents made application for an order quashing the appeal on the ground that the order in appeal, dated the 1st May 1946, is an interlocutory order and that no appeal therefrom lies to this Court because leave to appeal had not been obtained as provided in the Rules of Practice. The Court heard argument on the application and reserved judgment, and thereafter heard argument on the merits of the appeal. I proceed at once to consider and discuss the preliminary objection and application made on behalf of the respondents.

16 The facts and course of proceedings leading to the order in appeal may be briefly stated. Canadian Depositors Limited, a corporation incorporated under the Dominion Companies Act, was adjudged bankrupt by an order of the Registrar of the Supreme Court of Ontario in Bankruptcy dated the 14th December 1942. Subsequently, namely, on the 4th January 1943, the plaintiff was appointed trustee of the estate of the debtor. The trustee neglected or refused to take proceedings against the defendants, and General Petroleums Limited, a creditor of the debtor, was authorized to commence proceedings in the name of the trustee by an order of the Registrar of the Supreme Court of Ontario in Bankruptcy dated the 20th September 1943. By that order it was provided, *inter alia*, that "all benefits to be derived from the proceedings authorized by this Order together with full costs of same, do belong exclusively to the applicant and to such other creditors of the said Debtor who may within seven days of the service upon them of the notice of the granting of this Order . . . agree to contribute pro rata according to the amount of their respective claims to the expense and risk of such proceedings . . . ." The action was commenced by writ of summons issued on the 13th October 1944. The statement of claim was delivered on 13th October 1944, and the statement of defence on the 29th November 1944. The defendants obtained an appointment, dated the 19th March 1946, from a Special Examiner for the examination for discovery of "Eric Scott, President of Canadian Depositors Limited". Notice of the appointment and *subpoena* directed to "Eric Scott" was served upon him. He was required thereby to attend at the time and place of the appointment and to bring with him and produce "all Books, Contracts, Agreements . . . and all other writings and documents in [his] possession or under [his] control in any way relating to the matters which are within the scope of this proceeding or have any reference thereto". Mr. Scott thereupon made application to the Master for an order setting aside the appointment, notice and *subpoena*. That application was dismissed, as stated, by order of the Master, and an appeal therefrom was dismissed by the Honourable Mr. Justice Wilson in chambers by an order dated the 1st May 1946, *supra*. The appellant applied to the Honourable Mr. Justice Urquhart in chambers for leave to appeal from the order of the Honourable Mr. Justice Wilson, and that application was dismissed by order dated the 15th May 1946. On the same day, and within the time permitted by the Rules, the appellant gave notice of appeal to this Court from the order pronounced by the Honourable Mr. Justice Wilson. The respondents thereafter, on the 30th May 1946, gave notice to the appellant that at the opening of the appeal an application would be made for an order quashing the appeal on the grounds mentioned above.

  

17 The respondents rely on the provisions of s. 24 of The Judicature Act, R.S.O. 1937, c. 100, as follows:

> There shall be no appeal to the Court of Appeal from any interlocutory order whether made in court or chambers, save by leave as provided in the rules.

18 There is no definition of "interlocutory order" in the statute or in the Rules of Practice. Moreover, no precise or exhaustive definition can be found in reported cases. On the contrary, learned jurists have expressly refrained from formulating any such definition. It is extremely difficult and perhaps impossible to lay down any general rule applicable in all cases to test the nature of a judgment or order for purposes of deciding whether an appeal from it lies without leave as provided by the Rules. Any test proposed must be applied with great care to the particular case under consideration. The question is not a simple one, and the opinions expressed from time to time are not consistent.

19 In England there are at least two series of cases. In *Bozson v. Altrincham Urban District Council*, [1903] 1 K.B. 547, the Earl of Halsbury L.C., at p. 548, referred to the fact that the authorities were not in harmony. He considered the cases of *Shubrook v. Tufnell* (1882), 9 Q.B.D. 621, and *Salaman v. Warner et al.*, [1891] 1 Q.B. 734, and preferred to follow the earlier decision of *Shubrook v. Tufnell*. Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council, supra*, said that the real test for determining the question ought to be:

> Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

20 In *Isaacs & Sons v. Salbstein et al.*, [1916] 2 K.B. 139 at 147, Swinfen Eady L.J. concludes that the decision in *Bozson v. Altrincham Urban District Council, supra*, puts the matter on the true foundation "that what must be looked at is the order under appeal". Pickford L.J., in the same case, places his judgment on that foundation. Many of the cases in point are considered and discussed in *Spelman v. Spelman*, 59 B.C.R. 120, [1943] 3 W.W.R. 181, [1943] 4 D.L.R. 248.

21 In *Re City of Toronto and Toronto R.W. Co.* (1918), 42 O.L.R. 413 at 414, Middleton J. says:

> When an action has been brought, then all applications in that action are interlocutory, within the meaning of the Rules, unless the application determines the merits of the action, e.g., a motion for judgment, or an appeal from a determination upon a motion for judgment or a hearing.

22 In *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580, the same learned jurist discusses the question at length and, at p. 678, says:

 

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties — the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.

23 This test was applied in *Roblin v. Drake*, [1938] O.R. 711, [1938] 4 D.L.R. 758. *Hendrickson v. Kallio, supra*, is referred to in *Baker v. Dumaresq*, [1934] S.C.R. 665 at 675, [1935] 1 D.L.R. 148, and *Halbert et al. v. Netherlands Investment Company of Canada Limited*, [1945] S.C.R. 329 at 337, [1945] 2 D.L.R. 418.

24 A very plain and important distinction between the cases to which I have referred and the one presently under consideration must be made. The question in controversy in those cases was one between parties to the action. The governing consideration in determining whether the order in question was interlocutory or not was the effect of such order on the matter in dispute in the action. In the present case the appellant is not a party to the action. He is a member of the public whom the respondents seek to examine for discovery in the course of an action to which he is a stranger, and the fact that he was or is president of Canadian Depositors Limited does not alter his position in considering the question which now arises. A proceeding was initiated against him by the respondents which, in my opinion, does not place the respondents in any better position than if they had instituted separate judicial proceedings seeking a right to compel the appellant to submit to an examination. In any such proceedings, and in the one taken by the respondents, the appellant could properly maintain that under the Rules of Practice the respondents do not possess the right to examine him as claimed by them. Upon application made on behalf of the appellant to the Master, the real matter in dispute between the respondents and the appellant was this: Have the respondents a right to compel the appellant to attend on an examination for discovery in an action to which he is not a party? Or, in other words, is the appellant entitled in law to refuse to attend upon such examination? If this question had been determined adversely to the appellant in separate judicial proceedings between him and the respondents, it cannot be doubted that a judgment or order would be appealable by him to this Court as of right. His rights are not less by reason of the fact that the respondents are defendants in a pending action.

25 If one seeks with care to apply the test proposed in cases to which I have made reference, the result will be as follows: The order in question does finally dispose of the rights of the parties as I have described them. Therefore, by applying the test proposed by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council, supra*, the order in appeal must be treated as a final order and not as an interlocutory order. Likewise, applying the rule quoted from *Hendrickson v. Kallio, supra*, the order in appeal determines the real matter in dispute between the respondents and the appellant. The merits of the case as between those parties have been finally disposed of. I find support for my opinion in *Bassel's Lunch Ltd. v. Kick et al.*, [1936] O.R. 445, [1936] 4 D.L.R. 105. In that case the plaintiff in the action appealed to the Court of Appeal from an order of Kingstone

  

J. dismissing a motion by the plaintiff for writs of attachment for contempt of court against the respondents, who were not parties to the action. It was held that the order of Kingstone J. dismissing the plaintiff's motion was a final order, and not merely interlocutory. At p. 455, Riddell J.A. says:

> The respondents are not parties to the action; no proceedings are taken against them except one to stop their interfering with the plaintiff's business; the order appealed from denies the plaintiff this relief, finally and absolutely . . . .

26 I have concluded that the order in appeal is a final determination of the real subject matter in dispute between the appellant and the respondents. It finally and absolutely disposes of the right of the appellant to refuse to attend and be examined for discovery by counsel for the respondents. Hence, my opinion is that an appeal from the order of Wilson J., dated the 1st May 1946, lies to this Court without leave. The application made on behalf of the respondents for an order to quash the appeal must accordingly be dismissed, with costs.

27 I shall proceed to consider the merits of the appeal.

28 Counsel for the respondents claims the right to examine the appellant for discovery by virtue of Rules 334, 335 and 327 (2). Rule 334 is as follows:

> A person for whose immediate benefit an action is prosecuted or defended may without order be examined for discovery.

29 It is first argued that Canadian Depositors Limited is a "person" within the meaning of that word as used in the Rule, because by the statutory definition contained in s. 32(*ze*) of The Interpretation Act, R.S.O. 1937, c. 1, the word "person" shall include a body corporate.

30 But that section of the statute also expressly provides that the statutory definitions therein set forth are applicable "unless the context otherwise requires". Suppose for the moment that the words "body corporate" be read into Rule 334. The result is meaningless and of no effect whatever. A body corporate cannot as such be examined for discovery, and the Rule omits entirely any provision for examination of an officer or servant of a corporate body who might, on the interpretation suggested, fall within its provision. The only reasonable conclusion is that a corporate body does not come within the meaning of the word "person" as used in the Rule, and the context requires that the word be given its ordinary meaning. It is urged that Rule 327 (2) should be read with Rule 334, and that when they are so read there is no omission and no difficulty in procedure. In my opinion, those Rules cannot be read together. They relate to examinations of two entirely different classes of persons. Rule 334 provides for the examination of a person who is obviously not a party to an action. Rule 327 provides for the examination of parties to an action. Again, clause 2 of Rule 327 is not severable from clause 1 of the same Rule, but is an integral part thereof. It cannot properly be made to apply to an examination of a person who is not a party to an action and is not applicable to an examination under the provisions of Rule 334.

  

31 The argument that this action is prosecuted for the "immediate" benefit of Canadian Depositors Limited, within the meaning of Rule 334, cannot be given effect in any event. It is suggested by counsel that a judgment in favour of the plaintiff might improve the position of the company financially, or, upon subsequent proceedings by it, on an application for discharge from bankruptcy. There is no evidence before this Court as to the assets or liabilities of Canadian Depositors Limited, or of the amount of the claim by the creditor General Petroleums Limited or other creditors who caused the action to be brought. One pertinent fact appears, however, and that is that the trustee of the estate of the bankrupt company did not see fit to institute the proceedings and refused or neglected to do so. It may be reasonably concluded that, in his opinion, there would be no benefit to the estate from the action. But whatever benefit Canadian Depositors Limited might obtain from the successful prosecution of the action, it would, in my opinion, be "mediate" and not "immediate". Moreover, it does not follow that a benefit to Canadian Depositors Limited, of whatever kind it might be, would be a benefit to the appellant. The appellant is the "person" sought to be examined under Rule 334, and the facts and the argument before this Court do not disclose to me that the prosecution of the action would be of any benefit whatever to him.

32 My judgment may be put on another ground. The commencement of this action was authorized by an order of the Registrar of the Supreme Court of Ontario in Bankruptcy dated the 20th September 1943, and by the provisions of that order all benefits to be derived from the proceedings belong exclusively to General Petroleums Limited, a creditor of Canadian Depositors Limited, and certain other creditors. That provision of the order appears to be inconsistent with s. 69(2) of The Bankruptcy Act, R.S.C. 1927, c. 11, by which provision is made that "Any benefit derived from the proceedings shall to the extent of his claim and full costs, belong exclusively to the creditor instituting the same." I need not consider or discuss any such inconsistency because, in either case, the provision shows that the action is not prosecuted for the immediate benefit of the appellant. So far as appears, the order of the Registrar, *supra*, has not been the subject of appeal or of modification in any way, and a decision of this Court that the action is prosecuted for the immediate benefit of the appellant would clearly be inconsistent with that order and with the express provision in s. 69 of The Bankruptcy Act. We should not create such an inconsistency.

33 Counsel for the respondents refers to and relies on the following cases: *Macdonald v. Norwich Union Ins. Co. et al.* (1884), 10 P.R. 462; *Minkler v. McMillan* (1884), 10 P.R. 506; *Garland v. Clarkson* (1905), 9 O.L.R. 281. Those cases are distinguishable. In *Macdonald v. Norwich Union Ins. Co. et al.*, it was made plain that the plaintiff was acting as an agent for the person to be examined. The action was to collect a debt, and the plaintiff was to pay the proceeds of the action as the person to be examined directed. *Garland v. Clarkson* follows *Macdonald v. Norwich Union Ins. Co. et al.* In *Minkler v. McMillan*, the person to be examined was interested in the subject matter of the litigation "just as much as the plaintiff". The plaintiff was under an obligation to account to that person for the proceeds of the action. The cases mentioned are also clearly distinguishable upon the facts and the circumstances under which the present action was commenced.

 

34 Rule 335 does not give to the respondents the right to examine the appellant. He is not an assignor and the plaintiff is not an assignee from him. The Rule is clearly inapplicable to the facts of this case.

35 My conclusion is that the respondents have no right to examine the appellant for discovery and that the notice of appointment for examination for discovery and *subpoena* served on him cannot stand. I would, accordingly, allow this appeal and set aside the order of the Honourable Mr. Justice Wilson dated the 1st May 1946. In place thereof the appeal from the order of the Master dated the 13th April 1946 should be allowed. I would also allow the appellant the costs of this appeal and of the appeal to the Honourable Mr. Justice Wilson in chambers and of the application to the Master.

*Appeal allowed with costs throughout.*

Solicitors of record:
Solicitor for the applicant, appellant: *H. G. Donley*, Toronto.
Solicitor for the defendants, respondents: *R. D. Humphreys*, Oshawa.

# Tab 4

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Ibrahim v. College of Pharmacists (Ontario) | 2010 ONSC 5293, 2010 CarswellOnt 7461, 193 A.C.W.S. (3d) 349, [2010] O.J. No. 4200 | (Ont. Div. Ct., Sep 24, 2010)

1980 CarswellOnt 410
Ontario Supreme Court [Court of Appeal]

Smerchanski v. Lewis

1980 CarswellOnt 410, [1980] O.J. No. 3769, 117 D.L.R. (3d) 716, 18 C.P.C. 29, 30 O.R. (2d) 370, 5 A.C.W.S. (2d) 343

# Smerchanski v. Lewis et al.

Arnup, Wilson and Weatherston JJ.A.

Heard: September 15, 1980
Judgment: October 27, 1980

Counsel: *Julian Polika*, Q.C., for Attorney General for Ontario.
*J.M. Banfill*, for plaintiff — respondent.

Subject: Civil Practice and Procedure

## Annotation

As to the distinction between final and interlocutory orders, see Holmested & Gale, R. 499. For other cases dealing with applications to set aside subpoenas, see Holmested & Gale, R. 272.

## Table of Authorities

### Cases considered:

*A.G. Can. v. Reader's Digest Assn. (Can.) Ltd.*, [1961] S.C.R. 775, [1961] C.T.C. 530, 61 D.T.C. 1273, 30 D.L.R. (2d) 296 — *referred to*

*Bassell's Lunch Ltd. v. Kick*, [1936] O.R. 445, 67 C.C.C. 131, [1936] 4 D.L.R. 106 (C.A.) — *referred to*

 

*Bozson v. Altrincham Urban Dist. Council*, [1903] 1 K.B. 547 — *referred to*

*Chase Nat. Bank v. Bank of Brockville Centre Trust Co.* (1932), 53 B.R. 457 (C.A.) — *referred to*

*Conway v. Rimmer*, [1968] A.C. 910, [1968] 1 All E.R. 874, reversing [1967] 1 W.L.R. 1031, [1967] 2 All E.R. 1260 (C.A.) — *referred to*

*Dion v. Orr*, [1961] B.R. 320 — *referred to*

*Frederick v. Aviation & Gen. Ins. Co.*, [1966] 2 O.R. 356 (C.A.) — *referred to*

*Guar. Trust Co. v. Fleming*, [1946] O.R. 817, [1946] 1 D.L.R. 184 (C.A.) — *referred to*

*Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580 (C.A.) — *referred to*

*R. v. Homestake Mining Co.*, [1977] 3 W.W.R. 629, 3 C.P.C. 110, 38 C.R.N.S. 214, affirming (sub nom. *Homestake Mining Co. v. Texasgulf Potash Co.)* [1977] 3 W.W.R. 198, 76 D.L.R. (3d) 521 (Sask. C.A.) — *referred to*

Motion to quash an appeal.

**The judgment of the Court was delivered by *Arnup J.*:**

1 This is a motion by the Attorney General for Ontario to quash an appeal by the plaintiff in two actions from the decision of the Honourable Mr. Justice Cromarty given on May 28, 1980 in the course of the trial of the two actions. I have used the word "decision" deliberately because the proper characterization of what the learned Judge did will furnish the answers to the first of two questions arising in this motion. The motion is brought on the basis that the decision is an interlocutory order from which an appeal lies not to this Court, but (with leave) to the Divisional Court. We were told by counsel that there are no Ontario authorities directly dealing with the matters raised by the motion.

2 A brief recital of the facts will be sufficient to set the background. In 1971 and 1972 Asta Securities Corporation Limited ("Asta") was a registered broker and broker dealer in Toronto, controlled by Lewis, the defendant in the first action. The plaintiff, who lives in Winnipeg, had dealings with Lewis, who with his company Asta is in the Toronto area. The plaintiff and Lewis were interested in the shares of two companies. In the course of their dealings, the plaintiff

 

delivered certain shares to Asta, and Lewis executed and delivered his promissory note for $100,000 to the plaintiff, to whom it was payable. The plaintiff alleges he advanced $100,000 to Lewis, and is suing to recover it back. Lewis says the money, by agreement, went to Asta, as part of an agreement involving the shares in the two companies. Lewis now says he and the plaintiff were involved in a conspiracy to "rig the market". He also asserts that it was agreed Asta was to repay the money.

3 At some stage the Ontario Securities Commission conducted an investigation into the affair. More recently there has been an investigation by the R.C.M.P., in the course of which Lewis made several statements implicating the plaintiff, as well as disclosing his own substantial part in what he alleges was a fraud on the public. Charges have been laid against the plaintiff, and undoubtedly Lewis will be a key Crown witness. Mr. J. Brian Johnston of the Ministry of the Attorney General has been appointed to prosecute the plaintiff. Mr. Johnston is in possession of the several statements of Lewis to Corporal Agnew of the R.C.M.P. Corporal Agnew has copies of those statements.

4 The two actions came on for trial together before Cromarty J., and proceeded for several days. The plaintiff had completed his case and the defence had begun. At that stage the plaintiff served two subpoenas duces tecum as follows:

5 (a) upon Mr. Johnston, requiring him to produce in court the statements furnished to him for the purpose of the criminal proceedings against the plaintiff, including all of the statements of Lewis (In those proceedings, the preliminary hearing has been partly held and is adjourned to a date in November, 1980.)

6 (b) upon Mr. H.S. Bray, Q.C., the Vice Chairman of the Ontario Securities Commission, requiring him to produce the transcript of all evidence given by Lewis in 1972 during the Commission's investigation.

7 As I understand it, the defendants called Corporal Agnew as a defence witness. He was asked by counsel for the plaintiff in cross-examination to produce all of the statements of Lewis and another person.

8 Mr. Johnston attended in Court in answer to the subpoena, and stated his desire to get instructions from the senior officers of the Ministry as to the production of the documents sought by the plaintiff. In due course counsel for the Attorney General and counsel for the Ontario Securities Commission appeared at the trial. They had not served notices of motion, and no transcript of the submissions made to the trial Judge is available, but it is clear that both of them asked that the subpoenas be quashed, and that the persons upon whom they had been served should not be required to produce the documents requested.

 

9 After dealing with a motion to amend the statement of defence (with which we are not concerned here), the trial Judge in his oral reasons referred to the motion by counsel for the Attorney General as one for an order that the statements need not be produced and that the subpoena served upon Mr. Johnston be quashed "upon the grounds that the statement should be excluded from production on the basis of public policy or that they are privileged by virtue of the fact that they arose out of a confidential relationship between an informant and a police investigator". After consideration of a number of English and Canadian cases, Cromarty J., said:

> The subpoena against Mr. Johnston will therefore be quashed. There will be an order that the statements sought must not be disclosed to the plaintiff, and the same ruling will apply to the copies held by Corporal Agnew.

10 Different considerations were argued by counsel and considered by Cromarty J., in connection with the subpoena requiring production from the Ontario Securities Commission. That matter was complicated by the fact that two out of three transcripts of the evidence taken by the Commission have disappeared. In the end, Cromarty J., quashed the subpoena directed to Mr. Bray and said:

> ... There will be an order that the transcript or transcripts need not be produced.

After these decisions were given, the trial was adjourned and has not yet resumed.

11 The plaintiff has appealed the order made with respect to Mr. Johnston and Corporal Agnew; there has been no appeal from the decision respecting the Ontario Securities Commission.

12 No formal order has been issued embodying this decision. An order was drawn up and approved by counsel for all parties, but has never been issued. I suspect this was because the administrative officers of the Court were not sure just how this decision was to be categorized; in homey language, "What kind of animal *was* this?" It had some of the characteristics of an order and some of the characteristics of a ruling on evidence.

13 Having regard to the way the learned Judge in fact dealt with the matter, his decision in my view was an "order" of the Court. He perhaps could have ignored the subpoenas and given a ruling that the evidence sought to be introduced was inadmissible and the documents being sought were not subject to production. In that event it could be strongly argued that his decision was of the same nature as any other ruling on evidence or the conduct of the trial, not subject to appeal itself. We do not have to decide that hypothetical question.

14 The decisive factor in my mind is that the Judge quashed the two subpoenas. If they had been served before the trial, and there had been time enough to do so, a motion to quash them

  

could have been brought in Motions Court and whatever decision had been reached there would in my view have undoubtedly been properly characterized as an "order".

15 I have dealt with this subject at this length because there has been an increasing trend in Ontario, particularly in criminal cases, to try to appeal from, or to quash on certiorari, rulings made by trial Judges or by Judges conducting preliminary hearings. In practically all of these cases this Court has said that trials are not to be interrupted by attempts to challenge allegedly erroneous rulings by the trial Judge. The trial process would soon grind to a halt if all such rulings were subject to immediate appeal or to a motion to quash.

16 The present case has two distinguishing features that set it apart from the ordinary situation. The first is, as I have found, that the true intrinsic nature of the decision made is that it is an "order". The second is that the issue dealt with, and now sought to be brought to this Court, is between a stranger to the action and one of the parties. I will return to this distinction later.

17 The decision on the motion to quash the appeal rests upon determining whether the order sought to be appealed is final or interlocutory. If it is interlocutory, the applicant is right in saying that the appeal does not lie to this Court but lies to the Divisional Court (if leave to appeal to that Court can be obtained from another Judge of the High Court). It is well established law that on an application made in an action, the order made may be interlocutory if a certain result is reached but may be final if a different result is reached. Thus an order dismissing an action because the statement of claim discloses no cause of action known to the law as a final order, whereas an order dismissing an application brought for that purpose is interlocutory. Similarly, an order setting aside a default judgment, with or without terms, is interlocutory, whereas an order dismissing an application to set aside a default judgment is final.

18 This Court has held that an order made in a contest between a party to an action and someone who is not a party is a final order, appealable without leave, if the order finally disposes of the rights of the parties *in the issue raised between them.* In *Guar. Trust Co. of Can. v. Fleming*, [1946] O.R. 817, [1947] 1 D.L.R. 184, reversing [1946] O.W.N. 564 (C.A.) an order was made by the Master refusing to set aside an appointment and subpoena for the examination for discovery of a former officer of a bankrupt company in whose name its trustee in bankruptcy had brought an action. Wilson J., dismissed an appeal from that order, and Urquhart J., dismissed a motion for leave to appeal which had obviously been brought on the theory that the order of Wilson J., was interlocutory [reported at [1946] O.W.N. 564, [1946] 3 D.L.R. 385]. Notwithstanding these steps, the former officer appealed the order of Wilson J., and the Court of Appeal on a motion to quash held that the orders of the Master and of Wilson J., were *not* interlocutory. Those orders, it was held, finally disposed of the only matter in dispute between the plaintiff and the party sought to be examined. I refer to the judgments of Robertson C.J.O. at pp. 822-3 and Laidlaw J.A., at pp. 828-9.

19 At p. 828 Laidlaw J.A., said:

  

> Upon application made on behalf of the appellant to the Master, the real matter in dispute between the respondents and the appellant was this: Have the respondents a right to compel the appellant to attend on an examination for discovery in an action to which he is not a party? Or, in other words, is the appellant entitled in law to refuse to attend upon such examination? If this question had been determined adversely to the appellant in separate judicial proceedings between him and the respondents, it cannot be doubted that a judgment or order would be appealable by him to this Court as of right. His rights are not less by reason of the fact that the respondents are defendants in a pending action.

20 After referring to *Bozson v. Altrincham Urban Dist. Council*, [1903] 1 K.B. 547 (C.A.), *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580 (C.A.) and *Bassel's Lunch Ltd. v. Kick*, [1936] O.R. 445, 67 C.C.C. 131, [1936] 4 D.L.R. 105 (C.A.) Laidlaw J.A. continued at pp. 828-9:

> I have concluded that the order in appeal is a final determination of the real subject matter in dispute between the appellant and the respondents. It finally and absolutely disposes of the right of the appellant to refuse to attend and be examined for discovery by counsel for the respondents. Hence, my opinion is that an appeal from the order of Wilson, J.... lies to this Court without leave.

21 In *Frederick v. Aviation & Gen. Ins. Co.*, [1966] 2 O.R. 356 the defendant sought to appeal from an order of Wilson J., setting aside the order of the Master adding as a party defendant the insured under a policy issued by the defendant. The plaintiffs moved to quash the appeal on the ground that the order of Wilson J., was interlocutory. This Court dismissed the motion, holding (at p. 361) that while it was no doubt correct in one sense to say that as between the plaintiff and the appellant the order refusing to add the proposed defendant was interlocutory, because none of the issues in the action between those parties was thereby determined, the central issue raised on the motion was between the appellant and its insured, the party sought to be added. The Court held that the order of Wilson J., deprived the appellant of a substantive right and finally determined that issue subject to any right of appeal which the appellant might have. At p. 362 Schroeder J.A., for the Court said:

> I have not overlooked the principles enunciated in *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580, and *Roblin v. Drake*, [1938] O.R. 711, [1938] 4 D.L.R. 758. Those cases involve no question between one of the parties and a stranger to the action as in the present case. If the order in appeal stands, the appellant will have lost a substantial right, namely, the right to make full answer and defence within the established procedural rules against a claim asserted by persons occupying a position analogous to that of persons deriving their rights under an assignment from the assured and the right to have all questions in issue determined

 

in one action in accordance with the provisions of s. 15, para. 8, of *The Judicature Act*. The order is, therefore, final rather than interlocutory and is appealable without leave.

22 The converse of the situation with which we are confronted was dealt with by the Saskatchewan Court of Appeal in *R. v. Homestake Mining Co.*, [1977] 3 W.W.R. 629, 3 C.P.C. 110. In that case the trial of an action had been proceeding for several weeks. The plaintiff served a subpoena upon an engineer who had held a position in the public service of Saskatchewan, with duties referrable to the potash industry, which was the industry involved in the action. Counsel for the government of Saskatchewan appeared at the trial and objected to the admissibility of his evidence on the ground that by statute he was prohibited from testifying. That ground was found insufficient by the trial Judge but he gave leave to raise the question of Crown privilege as a ground for excluding the evidence. An affidavit of a minister of the Crown was then filed swearing that a disclosure of the evidence would be contrary to the statute earlier mentioned and that the disclosure involved in such evidence would be injurious to the public interest.

23 The trial Judge ([1977] 3 W.W.R. 198, 76 D.L.R. (3d) 521) held that the statute relied on did not prohibit the witness from giving the evidence sought by the plaintiff and that under the principle established in the House of Lords in *Conway v. Rimmet*, [1968] A.C. 910, [1968] 1 All E.R. 874 the evidence ought not to be excluded on the ground that its disclosure would be injurious to the public interest. From that decision the government of Saskatchewan appealed. (Culliton C.J.S., at p. 631 describes the decision of the trial Judge as a "judgment" but in the same paragraph refers to what had been decided as having been expressed "in a written fiat".)

24 At p. 633 Culliton C.J.S., for the Court said:

> It is true that the practice in this jurisdiction is that no appeal lies, per se, from an order or decree incidental to the trial made by a trial judge during the course of a trial. On the other hand, the Crown, when it has an interest in the subject matter of the information sought to be adduced, whether in a criminal or civil case, and though not a party to the action in the civil case, has a right to raise the question of Crown privilege. That being so, I think it follows, as a matter of pure reason, that, if the Crown has a right to raise the question of Crown privilege on the ground that disclosure of the evidence sought would be injurious to the public interest, it has a right to have that question finally settled before disclosure is made. This would necessitate the right of appeal.
>
> That such is the practice in Canada is evident from the procedure followed in *A.G. Can. v. Reader's Digest Assn. (Can.) Ltd.*, [1961] S.C.R. 775, [1961] C.T.C. 530, 61 D.T.C. 1273, 30 D.L.R. (2d) 296. It was suggested that this case could be distinguished on the ground that the Crown was a party to the action. In my view, there is no validity to this suggested distinction. The ruling made was made in the course of the trial on a question of Crown privilege and it was that ruling which was appealed. The same practice is followed in England when the

  

Crown is not a party: see *Conway v. Rimmer*, supra. In all of the circumstances, I am satisfied the Crown has a right to appeal in this instance.

25 I agree with the conclusions reached by the learned Chief Justice but with the greatest respect I find difficulty in supporting his conclusion by either of the cases to which he refers. The *Reader's Digest* case arose in Quebec. Under the Code of Civil Procedure in force at the time of the trial, the trial Court could give an "interlocutory judgment", sustaining an objection to the admissibility of evidence, which was appealable at once: the Code of Civil Procedure, art. 46, *Chase National Bank v. Bank of Brockville Centre Trust Co.* (1932), 53 B.R. 457 (C.A.) and *Dion v. Orr*, [1961] B.R. 320 at 321-2. Hence the right of appeal from the trial Judge's ruling was never in issue.

26 In *Conway v. Rimmer*, supra, the matter did not arise at trial but in interlocutory proceedings concerning production between the parties. The Attorney General on behalf of the Home Secretary appeared by counsel on the appeal from the district registrar to a Judge in Chambers, and again in the Court of Appeal ([1967] 2 All E.R. 1260) and the House of Lords, [1968] A.C. 910. His right to do so does not appear to have been challenged.

27 Nevertheless I respectfully agree with the learned Chief Justice that where the objection is taken by a stranger to the action, especially where it is the Crown, "as a matter of pure reason" there should be a right of appeal from the order made. If the trial Judge rules that the evidence may be given, the damage is done before an appeal from his ultimate judgment can be heard, and if the trial Judge refuses to admit the evidence, the parties seeking to adduce it, if unable to appeal at that time, would not be able to take any proceedings to correct the error until after the trial had been completed and judgment given.

28 Furthermore, it is my view that the appealability of an order is determined by the nature of the order made and not by the identity of the successful party. If a stranger to the action who has been unsuccessful in an application made to the trial Judge has an immediate right of appeal, it seems to me clear that where the stranger *succeeds* before the trial Judge, the party to the action who failed in the issue with the stranger should have an immediate right of appeal. In short, an order made in an issue between a party and a stranger is either appealable or it is not, and if it is appealable, the party who lost in the issue has a right of appeal.

29 I therefore conclude that the decision in question was an order within the meaning of The Judicature Act, R.S.O. 1970, c. 228 and the Rules, that it was final and not interlocutory, and that an appeal accordingly lies to this Court. I would therefore dismiss the motion to quash the appeal, with costs to the plaintiff in any event of the appeal.

30 This action was instituted in 1973. The trial began in February, 1980. It has been held up since Cromarty J., made his order on May 28, 1980. The appeal book and the appellant's factum are already filed. The factum of the Attorney General should be filed within ten days from the issue

  

of this order, and the hearing of the appeal should be expedited to the earliest date the registrar can arrange subsequent to the filing of the respondent's factum.

*Motion dismissed.*

Tab 5

**CITATION:** Laiken v. Carey; Sabourin v. Laiken, 2011 ONSC 5892
**COURT FILE NOS.:** CV-09-389964 and
00-CV-187887CM4
**DATE:** 20111012



**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Judith Laiken, Plaintiff

**AND:**

Peter W.G. Carey, Stephen P. Ponesse and Brian Greenspan, Defendants

- AND –

Sabourin and Sun Group of Companies, Plaintiff

**AND:**

Judith Laiken, Defendant

**BEFORE:** Madam Justice L.B. Roberts

**COUNSEL:** Kevin Toyne, for the Plaintiff, Judith Laiken

Patrick Schindler, for the Defendant, Peter W.G. Carey

Nicholas Kluge, for the Defendant, Stephen P. Ponesse

**HEARD:** September 15 and 19, 2011

## REASONS FOR DECISION

**Overview:**

**Nature of the Motions:**

[1] Judith Laiken and Peter W.G. Carey respectively bring motions before me. Ms. Laiken's motion is for a declaration that Mr. Carey be found in contempt for having allegedly breached an order for a Mareva injunction (the "Mareva Order"). Mr. Carey's motion is for summary judgment to dismiss Ms. Laiken's action against him.

[2] Mr. Ponesse appeared through counsel on these motions but took no position and is not bound by the outcome of these motions. The action has been discontinued as against Mr. Greenspan.

[3] These motions arise out of proceedings commenced by Mr. Carey's former clients, Peter Sabourin and his Sun Group of Companies, against Ms. Laiken.

**Background Facts:**

[4] Mr. Sabourin and his companies had been retained by Ms. Laiken to carry out off-shore security trades. They brought an action against her to recover the deficit in her margin trading account in the amount of $363,919.12 US. In that action, Ms. Laiken counterclaimed against Mr. Sabourin and his companies, alleging fraud and breach of fiduciary and contractual duties.

[5] Ms. Laiken was examined for discovery over 8 days in 2005.

[6] On May 4, 2006, Ms. Laiken obtained the Mareva Order on an *ex parte* motion before Mr. Justice C. Campbell. The Mareva Order was served on Mr. Carey for the Sabourin defendants on May 5, 2006.

[7] Ms. Laiken's motion returned before Mr. Justice Campbell on May 10, 2006. The Mareva Order was continued subject to variations to be agreed upon by counsel for the parties. The parties through their counsel agreed that the Mareva Order did not bar the payment by Mr. Sabourin or his companies of legal costs with respect to their action against Ms. Laiken.

[8] Ms. Laiken's motion was adjourned repeatedly until it was transferred to the Commercial List and heard by Mr. Justice Lederman on September 14, 2006. Mr. Justice Lederman continued without variation the Mareva Order pending the release of his decision. Mr. Justice Lederman released his decision on September 25, 2006 and continued the Mareva Order until trial or other disposition of the action.

[9] In the interim, on September 21, 2006, Mr. Sabourin sent by courier to Mr. Carey a cheque in the amount of $500,000, payable to Mr. Carey in trust. No instructions accompanied the trust cheque and Mr. Carey was unable to reach Mr. Sabourin at that time to obtain instructions concerning it. Mr. Carey deposited the trust cheque into his trust account.

[10] Pursuant to the agreed upon variation of the Mareva Order, Mr. Carey paid his outstanding accounts, amounting to a little more than $11,000.00, from the proceeds of the trust cheque.

[11] Mr. Sabourin called Mr. Carey and instructed him to use the balance of the trust funds to make payments to other creditors unrelated to Ms. Laiken. Mr. Carey refused to do so, advising Mr. Sabourin that such payments would be a breach of the Mareva Order. Mr. Sabourin instructed Mr. Carey to keep the funds in his trust account and to attempt to negotiate an overall settlement with Ms. Laiken and his other creditors.

[12] Mr. Carey was unable to reach a settlement at that time. On October 25, 2006 he returned $400,000 in the form of bank drafts to Mr. Sabourin; and on November 30,

2006, he returned $40,000 in a bank draft to Mr. Sabourin. Mr. Carey retained the balance of the trust funds in his trust account to cover future services.

[13] Early in 2007, Mr. Sabourin terminated Mr. Carey's retainer and instructed him to take no further steps until his new solicitors were retained. No notice of change of lawyers was ever subsequently served on Mr. Carey.

[14] On October 5, 2007, a receiver was appointed by the Court in an unrelated action to, among other things, take possession and control of the property of the Sabourin entities subject to the receivership order. The receivership entities included Mr. Sabourin and the other Sabourin defendants in these proceedings[1].

[15] Discovering from outside sources unrelated to Mr. Carey that Mr. Sabourin's funds had been deposited to Mr. Carey's trust account, the receiver demanded disclosure from Mr. Carey of his dealings with Mr. Sabourin's funds.

[16] In his letter of November 1, 2007, Mr. Carey disclosed to the receiver a summary of his dealings with the Sabourin trust funds and claimed solicitor and client privilege prevented him from making full disclosure.

[17] On November 26 and 27, 2007, Ms. Laiken brought a motion for summary judgment. Mr. Carey attended and advised the Court that he had no instructions from the Sabourin defendants.

[18] In the Endorsement dated November 27, 2007, Mr. Justice Cumming found that Ms. Laiken had lost her entire net worth as a result of the fraudulent conduct of the Sabourin defendants. Judgment was given in favour of Ms. Laiken based on her uncontested allegations of fraud in the amount of $1,150,057.80, including interest and costs in the amount of $295,638.98.

[19] By its decision dated March 20, 2009, the Ontario Securities Commission also determined that the investment program offered by the Sabourin defendants was in fact a sham.

[20] The receiver obtained a court order on April 2, 2009, requiring Mr. Carey and others to make the demanded disclosure.

[21] Mr. Carey paid over to the receiver the balance in his trust account of approximately $4,094.02. By letter dated April 8, 2009, Mr. Carey provided full disclosure of his trust account to the receiver.

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[1] According to paragraph 24 of Ms. Laiken's counterclaim, Sabourin and Sun Inc. changed its name to 1061971 Ontario Limited on January 21, 1999 and 1077472 Ontario Limited appears to be a related company.

[22] On October 27, 2009, Ms. Laiken commenced her action against Mr. Carey (among others) for damages for negligence arising out of Mr. Carey's return of the amount of $440,000 to Mr. Sabourin in breach of the Mareva Order.

**Analysis:**

**Contempt Motion:**

[23] A finding of contempt is a serious matter that is quasi-criminal in nature. There are potential penal sanctions facing the alleged contemnor. The Court's contempt powers are to be used sparingly and with great restraint. For these reasons, all proper procedures must be strictly complied with on a contempt motion.[2]

[24] The following three-pronged test[3] must be satisfied for a finding of civil contempt:

i. The order that was breached must state clearly and unequivocally what should and should not be done. It must be clear to a party exactly what must be done to be in compliance with the terms of an order.

ii. The party who disobeys the order must do so deliberately and wilfully. This means that the alleged contemnor's conduct must objectively breach the order. Further, there is a mental or subjective element requiring the breach to be deliberate and wilful, wilfully blind, indifferent or reckless. The moving party does not have to prove that the alleged contemnor intended specifically to disobey the order or to exhibit any particular disdain of the judicial system; the offence of civil contempt consists of the intentional doing of an act which is in fact prohibited by the order.[4]

iii. The evidence must show contempt beyond **a** reasonable doubt. Any doubt must be resolved in favour of the person alleged to have breached the order.

**i. Clarity of the Mareva Order:**

[25] The following provisions of the Mareva Order are in issue on this motion:

i. Mr. Sabourin, his companies, or any person with knowledge of the Mareva Order were enjoined from disposing of, or otherwise dealing with, any of their assets, until the final disposition of the action or further order of this Court.

ii. Any person, partnership, corporation or depository with knowledge of the Mareva Order had to take immediate steps to prevent the sale, disposition, withdrawal, dissipation sale, assignment, dealing with, transfer, conveyance, conversion, encumbrance or diminishment of any of the enjoined property, including, without limitation, any monies or accounts, including trust accounts, in the power, possession or control of such person, partnership, corporation or depository.

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[2] *Bell ExpressVu Limited Partnership v. Torroni*, 94 O.R. (3d) 614 (C.A.), at para. 20
[3] *Ibid.*, at paras. 21-22
[4] *Sweda Farms Ltd. (c.o.b. Best Choice Eggs) v. Ontario Egg Producers* [2011] O.J. No. 3482 (Ont.S.C.J.), at para. 23

[26] It was argued for Mr. Carey that the Mareva Order was unclear because it did not expressly deal with the exchange of monies as between solicitor and client. Further, Mr. Schindler contended and Mr. Carey deposed that the Mareva Order did not prohibit the return of monies by a solicitor to a client because the ownership of the funds did not change.

[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.

[28] Conspicuous by its absence in Mr. Carey's affidavit evidence is any suggestion that he was confused by the scope or meaning of the Mareva Order. He attended the court appearances before Justice Campbell on May 10th and Justice Lederman on September 14th and exchanged correspondence with counsel for Ms. Laiken including drafts of the Mareva Order. There is no evidence that he indicated to the Court or to counsel at any time that the terms of the Mareva Order were unclear. Mr. Schindler conceded for his client that there is no evidence that Mr. Carey questioned the clarity of the Mareva Order.

[29] The well established purpose of a Mareva Order is to preserve a defendant's assets by restraining a defendant or anyone else from taking steps to put a defendant's assets beyond the reach of a plaintiff.[5]

[30] Given the well known nature and purpose of a Mareva Order, it would have been surprising if an experienced civil litigator like Mr. Carey (called to the Ontario Bar in 1989) had been confused. Mr. Carey did not depose that he was unfamiliar with Mareva orders. On the contrary, Mr. Carey was critical of the Mareva Order, deposing that it was flawed in that it did not contain an obligation to report on the part of the Sabourin defendants or a right of discovery of assets on the part of Ms. Laiken; and he made reference to and appended as an exhibit to his affidavit a precedent Mareva order that he obtained from the Commercial List web page.

[31] Mr. Carey's affidavit evidence demonstrates that he understood that the Mareva Order covered the Sabourin monies in his trust account. In particular, Mr. Carey knew that he had to obtain the other parties' agreement to vary the Mareva Order to permit payment of his accounts. If he had believed that the Mareva Order did not cover exchanges as between solicitor and client, he would not have sought consent to that disbursement as, according to that reasoning, none would have been necessary.

[32] Mr. Carey deposes in his affidavit evidence that he thought it was improper to keep Mr. Sabourin's monies in his trust account and that he wanted to return the funds to Mr. Sabourin so that they were covered by the Mareva Order.

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[5] *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business Technology*, [2003] O.J. No. 40 (Ont.S.C.J.), at para. 17

[33] By that, Mr. Carey could not have meant that the monies in his trust account were not covered by the Mareva Order. First, he does not say that he believed that the monies in his trust account were not covered by the Mareva Order. Moreover, if that were his belief, Mr. Carey would not have sought from counsel an agreement to vary the Mareva Order permitting certain disbursements to be made from his trust account, nor would he have refused to disburse monies from his trust account to third parties as requested by Mr. Sabourin. Again, the Mareva Order clearly and expressly covered monies held in trust accounts, with which provision Mr. Carey has never indicated any confusion or uncertainty.

[34] As a result, the evidence demonstrates beyond a reasonable doubt that the terms of the Mareva Order were not only objectively clear but also that Mr. Carey should have clearly understood them.

**ii. Deliberate and Wilful Breach:**

[35] There is no question that Mr. Carey had knowledge of the Mareva Order. As I have already found, he also understood or should have understood, unless he was being wilfully blind, what was required of him under the Mareva Order. The evidence also establishes beyond a reasonable doubt that Mr. Carey intentionally transferred funds from his trust account to Mr. Sabourin, which was an act prohibited by the Mareva Order.

[36] It appears to me from the evidence that Mr. Carey felt that he was on the horns of a dilemma: there were to be no dealings with the trust funds that were frozen by the Mareva Order; however, Mr. Carey did not want to be seen as improperly sheltering in his trust account the frozen funds of his client, which he felt he could not disclose. Mr. Carey took the only course that he says he thought was open to him: he returned the funds to his client, deducting an amount for "future services".

[37] Mr. Carey believed that the trust account was subject to solicitor and client privilege and confidential, and that he could not disclose its contents to anyone without his client's consent or court order. As noted above, the Mareva Order did not contain a reporting obligation or allow for discovery rights by Ms. Laiken. As a result, Mr. Carey would not have voluntarily disclosed the existence of the trust funds. Indeed, he did not do so until the receiver demanded this information pursuant to court order.

[38] That Mr. Carey felt that he could not voluntarily disclose to third parties the presence of the trust funds in his trust accounts does not explain why he could not have simply left the trust funds where they were secure. Mr. Carey's course of action would have made more sense if it had occurred at the termination of his retainer; however, there is no reason why Mr. Carey had to return the funds a little more than a month after their receipt while he was still under retainer.

[39] Mr. Sabourin's instructions were to keep the funds in Mr. Carey's trust account. While it is true that trust funds cannot be held indefinitely, at the time that Mr. Carey returned the funds, he was still retained and acted as counsel for Mr. Sabourin and his companies in

the ongoing action. Although Mr. Carey deposes that settlement was not possible at that time, the action was continuing and settlement could very well have been possible at some later time.

[40] Further, Mr. Carey's assertion that he felt it would be improper to hold on to the trust funds is contradicted by his own action of doing just that by retaining some of those funds for "future services", retaining them even after his retainer had been terminated when they could not at that point have been for "future services".

[41] Mr. Carey may have thought that it was better to return most of the funds than to retain them; however, he knew or should have known that the transfer of funds to his client was a clear breach of the Mareva Order. Mr. Carey's assertion that, "What I did was no different than if Peter Sabourin had handed me a cheque and I had simply handed it back to him" ignores the clear provisions of the Mareva Order and the fact that Mr. Carey had cashed the trust cheque, paid his accounts, and returned the funds.

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

[43] As a result, the parties shall appear before me for a hearing during the week of December 19, 2011 at 361 University Avenue. 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*.

[44] Counsel should communicate with Michelle Chen of the motions court office to schedule the particular date of the hearing for half a day or longer if required during the week of December 19, 2011. The plaintiff should deliver and file any further material by November 3, 2011. Although Mr. Carey is not required to file any further material or testify, if he wishes to submit any further material including an affidavit, he shall deliver and file those materials by December 1, 2011. Any reply material by the plaintiff shall be delivered and filed by December 8, 2011. Any *viva voce* evidence may also be called and any cross-examinations on affidavit material filed shall take place at the hearing.

[45] If there are any difficulties with this timetable, counsel for the parties should obtain a date from my assistant, Sharon Junor, for a brief attendance before me for scheduling purposes.

**Motion for Summary Judgment:**

[46] The test on a motion for summary judgment is whether there is a genuine issue requiring a trial. Once the moving party satisfies the initial onus of demonstrating that there is no genuine issue requiring a trial, the burden shifts to the responding party to show that there are genuine issues requiring a trial. The bar on a motion for summary judgment is high.

The parties cannot simply rely on their pleadings but must put their best foot forward to discharge their respective evidentiary burdens with respect to the existence or non-existence of material issues to be tried.[6]

[47] The recent rule amendments give the Court the enhanced powers under Rule 20.04 (2.1) of the *Rules of Civil Procedure* to weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence, unless it is in the interest of justice for such powers to be exercised only at trial.

[48] The fundamental purpose of a motion for summary judgment has not changed and was succinctly articulated by the Supreme Court of Canada in the following excerpt from its decision in *Canada v. Lameman*[7]:

> "...The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial."

[49] In the present case, the principal issues in dispute are whether Mr. Carey owed any duty of care to Ms. Laiken and whether a breach of a court order is actionable in the circumstances of this case.

[50] Ms. Laiken's action is based on an allegation that Mr. Carey was negligent in having returned the trust funds to Mr. Sabourin when Mr. Carey knew or ought to have known that this act would constitute a breach of the Mareva Order. Ms. Laiken pleads that Mr. Carey owed a duty of care to her to comply with the terms of the Mareva Order and that Mr. Carey fell below the applicable standard of a "reasonable person" by returning the funds to Mr. Sabourin.

[51] With respect to the damages claimed, it is alleged that Mr. Carey knew or ought to have known that his failure to comply with the terms of the Mareva Order would likely result in the Sabourin assets being placed beyond Ms. Laiken's reach, contrary to the spirit and intent of the Mareva Order. But for Mr. Carey's negligence, argues Ms. Laiken, the amount of $440,000 would still be in his trust account and be available to satisfy Ms. Laiken's judgment.

[52] In his statement of defence, Mr. Carey asserts that at all material times he was retained by the Sabourin defendants, and not Ms. Laiken, and that he owed her no duty of care. Mr. Carey denies breaching the Mareva Order; in the alternative, he pleads that a breach of a

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[6] Rule 20.04 of the *Rules of Civil Procedure*; *Canada v. Lameman,* (2008) 1 S.C.R. 372, at para. 11; and *New Solutions Extrusion Corp. v. Gauthier*, [2010] O.J. No. 661 (Ont. S.C.J.), at paras. 10 to 12.
[7] *Ibid.*, at para. 10

court order cannot give rise to a negligence claim but must be dealt with by way of a contempt motion. Further, Mr. Carey states that Ms. Laiken has suffered no damages because the $440,000 would not have been available to satisfy her judgment as the trust monies would have been in the possession and control of the receiver and dispersed to creditors with claims having priority over Ms. Laiken's judgment.

[53] Generally a lawyer holds no duty to the opposite party. In *Shuman v. Ontario New Home Warranty Program*[8], Madam Justice K. Swinton held that such claims cannot succeed:

"Moreover, as to the claims against [the opposing party's solicitors] in negligence, or breach of fiduciary duty, there is no legal authority to support the proposition that a solicitor for a party owes a duty of care to an opposing party. Therefore, there is no basis for a claim in negligence or fiduciary duty against these defendants (*Geo. Cluthe Manufacturing Co. v. ZTW Properties Inc.* ...). ...."

[54] This issue was also before the Court in *Brignolio v. Desmarais, Keenan & Robert*[9]. In his decision, Mr. Justice D. Lane held, at paragraph 17, that an action does not lie against an adverse party or his counsel based on a lawyer's breaches of ethical duties since such duties are owed to the Court and to the Law Society of Upper Canada, but not to the opposite party in litigation, and referenced the public policy rationale that protects a lawyer from such actions:

"If the policy of the court were otherwise, the same difficulties would arise as would arise in the case of negligence. There would be a temptation, which many would find irresistible, to re-litigate in actions against their opponent's counsel the issues which they have lost in the main litigation, or to attempt to handicap the other side by eliminating experienced and knowledgeable counsel from the case. The public policy in such instances is referred to by Lord Donaldson of Lymington M.R. in *Al-Kandari v. J.R. Brown & Co.* [1988] 1 All E.R. 833 at p. 835 (C.A.) cited in the *Cluthe* case ... as follows:

> I would go rather further and say that, in the context of "hostile" litigation, public policy will usually require that a solicitor be protected from a claim in negligence by his client's opponent, since such claims could be used as a basis for endless re-litigation of disputes.

In my view, the same principles apply to allegations of breaches of ethical conduct."

[55] There are a few well established exceptions to the general rule that a lawyer owes no duty to opposing or third parties, including:

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[8] [2001] O.J. No. 4102, [2001] CarswellOnt 3666, at para. 25 (S.C.J.)
[9] [1995] CarswellOnt 4761 (Gen. Div.), appeal dismissed [1996] O.J. No. 4812 (C.A.), appeal dismissed [1996] S.C.C.A. No. 326

i. Where a lawyer gives an undertaking to the Court or the opposing or third parties and fails to perform it, the lawyer may be ordered to do that act or make good the loss flowing from the failure to perform the undertaking[10].

ii. Where a lawyer is implicated in intentional torts, including fraud, slander of title, false imprisonment, malicious prosecution, abuse of process and civil conspiracy, those intentional torts are not defeated by the rule that a lawyer owes no duty of care to the opposing party in litigation.[11]

[56] Further, there is no absolute bar to an action against a lawyer by an opposing or third party whom the lawyer has injured while the lawyer was acting outside the scope of his or her duty as a solicitor. A lawyer can be liable to an opposing or a third party where the lawyer commits an independent tortious act that causes foreseeable injury.[12]

[57] In the present case, Ms. Laiken squarely frames her action against Mr. Carey in negligence. She does not allege that he committed any intentional tort, voluntarily gave an undertaking that he did not fulfill, made any representations to her upon which she relied, or was retained by her in any capacity. In fact, Ms. Laiken does not say that Mr. Carey was negligent while acting as a lawyer; she alleges that he fell below the standard of care expected of a "reasonable person" by his breach of the Mareva Order.

[58] There is no tort for breach of a court order[13]; a breach of a court order by itself cannot found a claim for damages.[14]

[59] Mr. Toyne argues for Ms. Laiken that a breach of a court order can, however, inform a duty of care, in that it can establish proximity, foreseeability and support for the claim that the care fell below the standard required in the circumstances. He contends that Ms. Laiken's claim should be recognized as a novel cause of action for pure economic loss under the *Anns v. Merton London Borough Council* analysis.

[60] The *Anns* test involves a two-stage analysis to determine, first, if there is sufficient proximity between the parties to give rise to a duty of care and, then, whether there are any policy considerations that ought to negate or limit the scope of the duty.[15]

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[10] *Wallace International Silversmiths Inc. v. Heritage Silversmiths Inc.*, 2001 CarswellOnt 3714 (Ont.S.C.J.), at para. 5; *Udall v. Capri Lighting Ltd.*, 1987 WL 492649 (Eng.C.A.), at p. 11; *Al-Kandari v. J.R. Brown & Co.*, [1988] EWCA Civ 13 (26 February 1988) (Eng. C.A.), at p. 6

[11] *Lawrence v. Peel (Regional Municipality) Police Force*, [2005] O.J. No. 604 (C.A.), at para. 6; *Geo. Clothe Manufacturing Co. v. ZTW Properties Inc.*, [1995] O.J. No. 4897 (Div.Ct), at p. 7; *New Solutions Extrusion Corp. v. Gauthier*, *supra*, at paras. 23 to 27

[12] *Dufort Testing Services v. Berube*, [2004] O.J. 6225 (H.C.J.), at para. 21, affirmed, [2005] O.J. No. 5208 (C.A.)

[13] *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83, at para. 58

[14] *Gordon H. Freund Professional Corp. v. Haljan* (1996), 8 C.P.C. (4th) 201; *353903 Ontario Ltd. v. Nova Scotia*, 1998 CarswellNS 252 (N.S.S.C.), at para. 25

[15] *Design Services Ltd. v. Canada* [2008] 1 S.C.R. 737, at paras. 46 to 47

[61] The proximity test is largely held to relate to foreseeability and whether the plaintiff is so closely and directly affected by the act of the defendant that the defendant ought to reasonably have had her in his contemplation as being so affected.[16]

[62] In the present case, it is clear that Mr. Carey knew or should have known about Ms. Laiken's interest in the Sabourin trust funds and knew or should have known that she would be directly affected if those funds did not remain secure under the terms of the Mareva Order. I hold that the foreseeability test is met.

[63] The more difficult question is the policy considerations to be taken into account in the second part of the *Anns* analysis. Mr. Schindler refers to the above noted policy consideration against lawyers being sued by an opposing party. The distinction that I have already noted is that the claim is not pleaded against Mr. Carey *qua* lawyer, but as a "reasonable person", so that the policy consideration referenced by Mr. Schindler does not appear to be relevant.

[64] Mr. Schindler also argues that the decision of the House of Lords in *Customs and Excise Commissioner v. Barclays Bank*[17] should be applied to the present case.

[65] In *Barclays Bank*, the House of Lords upheld the trial judge's dismissal of the plaintiff's action against the Bank for having disbursed funds from its customer's bank account in breach of a court order. While the House of Lords agreed that the foreseeability element was satisfied, it held that there was no duty owed by the Bank to a third party such as the plaintiff and that the breach of the court order did not give rise to such a duty.

[66] While followed in other Canadian jurisdictions, the *Barclays Bank* decision has never been followed in Ontario. On the contrary, in *Kovacs v. TD Financial Group* (a similar case where the TD Financial Group had disbursed funds contrary to a court order), Madam Justice A.M. Molloy for the Ontario Divisional Court distinguished *Barclays Bank* on the following basis:

> "...Further, and more importantly, since the *Anns* case was decided, the law in England has developed quite differently than has been the case here in Canada. English courts have retreated from the *Anns* test, whereas Canadian courts, including the Supreme Court of Canada, have continued to apply it. ..."[18]

[67] In addition to the distinction articulated by Madam Justice Molloy, I would further distinguish *Barclays Bank* from the present case on the ground that, unlike Barclays Bank, Mr. Carey was closely involved with the drafting of variations to the Mareva Order and could have carved out exceptions to the Mareva Order. As such, he was not in the same position as a bank upon which a Mareva Order can be unexpectedly imposed and which it has no opportunity to resist. The policy consideration noted by the House of

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[16] *Ibid.*, at paras. 48 to 50
[17] [2006] UKHL 28
[18] 2010 ONSC 6111 (CanLII), (Div.Ct.), at para. 35

Lords against imposing a duty on a bank and exposing it to indeterminate risk to an opposing or a third party does not apply in the present case.[19]

[68] In my view, whether or not Mr. Carey owes Ms. Laiken a duty of care in the particular circumstances of this case gives rise to a potentially novel cause of action. Novel causes of action, particularly ones involving public policy concerns, are best determined on a fully developed record at trial, rather than on a summary judgment motion.[20]

[69] With respect to the issue of damages, there is no dispute that Ms. Laiken has only been able to recover about $38,000.00 of her judgment against Mr. Sabourin and his companies. Mr. Sabourin's whereabouts are unknown and the funds available from the disposition of the Sabourin defendants' assets are insufficient to satisfy Ms. Laiken's judgment.

[70] Based on the materials filed on this motion, there is no conclusive evidence that the claims of those creditors with priority over Ms. Laiken's judgment would have eaten up all the available assets of the receivership entities, leaving nothing to satisfy Ms. Laiken's judgment in whole or in part.

[71] As a result, I find that there is a genuine issue requiring a trial as to whether Ms. Laiken suffered any damages as a result of Mr. Carey's returning the $440,000 to Mr. Sabourin.

**Costs:**

[72] The disposition of the costs of the contempt motion is an issue to be heard and determined at the sentencing hearing.

[73] With respect to the costs of the motion for summary judgment, if the parties cannot otherwise agree, they may make brief written costs submissions to me of no more than 2 pages through Judges' Administration at 361 University Avenue, as follows: Ms. Laiken shall deliver her submissions by October 26, 2011; and Mr. Carey shall deliver his submissions by November 9, 2011.

[74] I am indebted to counsel for the parties for their great assistance and excellent advocacy on these motions.

L.B. Roberts, J.

[19] *Commissioner v. Barclays Bank, supra*, at para. 23

[20] *Kovacs v. TD Financial Group, supra*, at para. 33; *Romano v. D'Onofrio*, [2005] O.J. No. 4969 (Ont. C.A.), at para. 7

**Date:** October 12, 2011

Tab 6

**Most Negative Treatment:** Reversed
**Most Recent Reversed:** Laiken v. Carey | 2013 ONCA 530, 2013 CarswellOnt 11824, 52 C.P.C. (7th) 144, 310 O.A.C. 209, 367 D.L.R. (4th) 415, 109 W.C.B. (2d) 42, 116 O.R. (3d) 641, 230 A.C.W.S. (3d) 708 | (Ont. C.A., Aug 27, 2013)

2012 ONSC 7252
Ontario Superior Court of Justice

Laiken v. Carey

2012 CarswellOnt 17537, 2012 ONSC 7252, [2012] O.J. No. 6596

# Judith Laiken, Plaintiff and Peter W.G. Carey, Stephen P. Ponesse and Brian Greenspan, Defendants and Sabourin and Sun Group of Companies, Plaintiff and Judith Laiken, Defendant

L.B. Roberts J.

Judgment: December 24, 2012
Docket: CV-09-389964, 00-CV-187887CM4

Proceedings: reversed *Laiken v. Carey* (2013), 116 O.R. (3d) 641, 52 C.P.C. (7th) 144, 367 D.L.R. (4th) 415, 310 O.A.C. 209, 2013 CarswellOnt 11824, 2013 ONCA 530, E.E. Gillese J.A., M. Rosenberg J.A., Robert J. Sharpe J.A. (Ont. C.A.); leave to appeal allowed *Laiken v. Carey* (2014), 2014 CarswellOnt 3396, 2014 CarswellOnt 3395, Abella J., Moldaver J., Rothstein J. (S.C.C.)

Counsel: Kevin Toyne, for Plaintiff, Judith Laiken
Patrick Schindler, for Defendant, Peter W.G. Carey
Nicholas Kluge, for Defendants, Stephen P. Ponesse

Subject: Civil Practice and Procedure; Evidence

**Table of Authorities**

**Cases considered by *L.B. Roberts J.*:**

*Bell ExpressVu Ltd. Partnership v. Torroni* (2009), 94 O.R. (3d) 614, (sub nom. *Bell Express Vu Ltd. Partnership v. Torroni)* 304 D.L.R. (4th) 431, 69 C.P.C. (6th) 14, 2009 ONCA 85, 2009 CarswellOnt 416, 246 O.A.C. 212 (Ont. C.A.) — referred to

 

*Jutte v. Jutte* (2007), 41 C.P.C. (6th) 271, 77 Alta. L.R. (4th) 126, 415 A.R. 329, 2007 CarswellAlta 501, 2007 ABQB 191, [2007] 10 W.W.R. 353 (Alta. Q.B.) — referred to

*Laiken v. Carey* (2011), 2011 CarswellOnt 13706, 2011 ONSC 5892 (Ont. S.C.J.) — referred to

*R. v. W. (D.)* (1991), 1991 CarswellOnt 1015, 3 C.R. (4th) 302, 63 C.C.C. (3d) 397, 122 N.R. 277, 46 O.A.C. 352, [1991] 1 S.C.R. 742, 1991 CarswellOnt 80 (S.C.C.) — followed

*Sabourin & Sun Group of Cos. v. Laiken* (2011), 2011 CarswellOnt 13240, 2011 ONCA 757, 286 O.A.C. 273 (Ont. C.A. [In Chambers]) — referred to

*Sweda Farms Ltd. v. Ontario Egg Producers* (2011), 2011 CarswellOnt 7348, 2011 ONSC 3650 (Ont. S.C.J.) — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194
R. 59.06(2) — considered

R. 60.11(5) — considered

R. 60.11(8) — considered

MOTION by solicitor to re-open contempt hearing and set aside order finding him in contempt.

***L.B. Roberts J.*:**

**Overview:**

1 By my Reasons for Decision dated October 12, 2011 [2011 CarswellOnt 13706 (Ont. S.C.J.)], I allowed the plaintiff's motion for contempt against the defendant, Mr. Peter W.G. Carey, and dismissed Mr. Carey's motion for summary judgment.

2 In accordance with paragraph 43 of my Reasons for Decision, I held a further hearing for the purpose of making an order under subrules 60.11 (5) and (8) of the *Rules of Civil Procedure*. At the same time, Mr. Carey brought a motion to re-open the hearing of the plaintiffs contempt motion to vary my contempt finding against him, Mr. Carey elected to testify at the hearing.

  

3 On September 10, 2012, 1 released a short written Endorsement setting aside my previous finding of contempt against Mr. Carey, with additional reasons to follow. These are those reasons.

**Analysis:**

**Preliminary issues:**

***i. Re-opening the contempt motion:***

4 Mr. Carey brought a motion to reopen the contempt hearing, submit new evidence, and to vary my contempt finding against him, which was permitted by the provisions of paragraph 43 of my October 12, 2011 Reasons for Decision.

5 In paragraph 43 of my October 12, 2011 Reasons for Decision, I ordered that the parties appear before me for a hearing and provided that, while he was not obliged to call any evidence or testify, Mr. Carey would have the opportunity to present any further evidence, including viva *voce* evidence, and make any submissions that he wished to make and that the plaintiff would also have the opportunity to file any further material, call evidence, cross-examine at the hearing, and make submissions, all of which I would take into account in making any order under subrules 60.11 (5) and (8).

6 Subrule 60.11 (5) sets out the possible orders that can be, made by a judge where a finding of contempt is made against a person. Subrule 60.11 (8) stipulates, among other things, that, on motion, a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5) and may grant such other relief and make such other order as is just.

7, As noted by the Ontario Court of Appeal on November 30, 2011 [1] , in dismissing Mr. Carey's motion for a stay of my October 12, 2011 contempt order, the hearing of the plaintiff's contempt motion is not yet completed:

> 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.

8 In consequence, there is no need, in my view, for an order to allow the "reopening" the plaintiff's motion, as it is not yet completed.

9 If I am wrong in that conclusion, I would have allowed Mr. Carey to re-open the plaintiff's contempt motion. The court has discretion under subrule 59.06 (2) to re-open a hearing to allow new evidence and to set aside or vary a decision. A court should only exercise that discretion in the clearest of cases and to prevent a miscarriage of justice. To allow Mr. Carey the opportunity that he desired to respond more fully to the very serious allegations of contempt by way of oral evidence is necessary to avoid a miscarriage of justice.

***ii. Affidavit of Alan Lenczner, Q.C.***

10 Mr. Carey sought to introduce the expert evidence of Alan Lenczner, Q.C. Mr. Lenczner is an experienced commercial litigator who was called to the Ontario Bar in 1969,

11 According to Mr. Lenczner's unchallenged evidence, the granting of Mareva orders is not a common occurrence and there is only a small subset of litigation lawyers in Toronto of about 50 or so who have done "a few of them". Although he has dealt with about a dozen Mareva orders over the span of his more than 40 years of experience, based on the relative rarity of Mareva orders, Mr. Lenczner has had sufficient experience to qualify as an expert in this area.

12 I find that Mr. Lenczner has the requisite expertise as an experienced commercial litigator to opine generally as to the form, nature and effect of standard Mareva orders and that his evidence in that respect is necessary, relevant and of assistance to me in relation to the general and background context in which I should consider the question of the clarity of the May 4, 2006 Mareva Order of Mr. Justice C. Campbell in issue in these proceedings and whether Mr. Carey was willfully blind in his interpretation of that Order.

**Civil contempt finding:**

13 In reaching my finding of civil contempt against Mr. Carey for breaching the May 4, 2006 Mareva Order, based on the evidence that was before me on the earlier hearing of the contempt motion on September 15 and 19, 2011, I had found that the well-established three-pronged test[2] was satisfied beyond a reasonable doubt, as follows:

> i. The May 4, 2006 Mareva Order clearly and unequivocally plainly prohibited any and all dealings whatsoever with any monies belonging to the Sabourin defendants, expressly including any monies held in trust for them.

  

ii. Mr. Carey had disobeyed the order by returning the trust funds to his client and that he should have understood, unless he was being wilfully blind, what was required of him under the May 4, 2006 Mareva Order.

iii. The evidence showed contempt beyond a reasonable doubt.

14 During the most recent hearing before me, over two days of oral testimony on December 19, 2011 and July 25, 2012, Mr. Carey explained and amplified the affidavit evidence that had been previously filed in response to the plaintiffs contempt motion.

15 Mr. Carey testified about the context in which the May 4, 2006 Mareva Order was obtained by plaintiff's counsel, Mr. Carey testified that there was a history of Ms. Laiken's unsuccessful earlier attempts to obtain an order freezing Mr. Sabourin's assets. From 2001 to late 2003 or early 2004 there was very little activity on the file. Lerners came on the file in 2004 and asked that discoveries be scheduled. It was in the context of the renewed activity on the file that the May 4, 2006 Mareva Order was obtained *ex parte* by Ms. Laiken's counsel.

16 Mr. Carey saw Ms. Laiken's claim as a very weak case and he believed that she owed money to his clients. He testified that, if Mr. Sabourin had appeared for the trial, Ms. Laiken would have lost completely. It was clear from his evidence that Mr. Carey viewed the May 4, 2006 Mareva Order as an improper tactical maneuver by the plaintiff for the purpose of driving Mr. Sabourin to settle the plaintiff's claim, which the parties almost immediately agreed to vary:

> "And the effect of the variation, the effect of the variations they agreed to was that all this stuff about not dealing with assets and not taking the — that had all gone by bye because that's just the nature of what was agreed to. In other words, they had agreed that the original order they had taken was far too, was in my view improper and onerous and they were now backtracking and allowing various things to go forward." [3]

17 Mr. Carey also made it clear during his oral testimony that he did not regard the original written form of the May 4, 2006 Mareva Order, which was in the parties' motion materials, as the existing Order that had to be followed because, according to his evidence, the May 4, 2006 Mareva Order had been varied on the recommendation of Justice Campbell and by subsequent agreement of counsel during attendances before Justice Campbell, and in the course of telephone conversations and correspondence between counsel. Mr. Carey testified that:

> "It was varied in that he [Mr. Justice Campbell] expressly noted that it was subject to variations by counsel because we attended on May 10th before Justice Colin Campbell and the submissions that I made were that the order as it stood was simply untenable, It basically didn't allow Mr., it, literally Mr. Sabourin had to go and sit in the corner and hide, and I think even Ms. Laiken commented in one of her cross-examinations, he couldn't even brush his

  

> teeth. So Justice Campbell said, "Of course it has to be varied," and he said, "I'm going to leave the variations between counsel," and he ushered us out of his chambers. Now, subsequently, in correspondence, counsel did agree to vary the order so that living expenses could be paid, the legal expenses could be paid, child support could be paid, taxes could be paid, all of this kind of stuff. So, this order, as recited here, is not the Mareva Order. It was the initial order that was almost immediately varied." [4]

18 On both days of his oral testimony, Mr. Carey repeated that the effect of the variations agreed to by counsel was to remove all of the prohibitions contained in paragraphs 2 and 3 of the May 4, 2006 Mareva Order. The following excerpts are representative of Mr. Carey's testimony on the effect of the variations on the May 4, 2006 Mareva Order:

> "So, because we had agreed to these variations that allowed payments of things such as taxes, child support, legal fees, personal expenses, that kind of thing, the parts of the order in paragraphs two and three that essentially prevent the Defendants or other persons from ... doing things, these effectively were disposed of. Everything that it prohibited was now allowed under the terms of the variation. And, of course, the variation was, the terms were also confirmed in writing by ... Lerners." [5] ; and,

> "But, of course, my main view was that this didn't, this order, didn't have much sense anymore in light of the variations, this paragraph of the order, didn't have much sense in light of the variations, because once you accept that Peter Sabourin has got to pay legal fees, he's got to pay taxes, he has to pay child support, he has to pay living expenses, well obviously he's got to do all of those things. He's got to transfer, convey, potentially encumber and certainly, I mean, if he goes on to buy his groceries he's diminishing the property because that's going into groceries, which he's eating and that's not available anymore. So, to the extent that this was varied, in my mind, this was, the variations, simply made this, just blew this all out, it made this a non-starter." [6]

19 While the variations were not incorporated into a formally amended order, Mr. Carey testified that he believed that the parties could conduct themselves as if all of the amendments had been formally made and took that position in his correspondence with plaintiff's counsel and during attendances before Mr. Justices Campbell and Lederman.

20 For example, in his May 15, 2006 letter to plaintiff's counsel at Lerners, Mr. Carey set out that Justice Campbell clearly indicated at their attendance before him on May 10, 2006 that the *ex parte* order that they have obtained would be subject to variation, for example, to allow for certain living and personal expenses such as child support, and that he specifically mentioned these items to Justice Campbell.

  

21 Similarly, in his letter of June 28, 2006 to Christine Snow of Lerners, he referenced their telephone conversation and the continuation of Mr. Justice Campbell's order, "subject as always, to the agreements between Mr. Jervis and myself with respect to variation, until our appearance before Justice Campbell on Friday, June 30, 2006." Mr. Carey's June 28, 2006 letter was shown to Mr. Justice Campbell who wrote his June 28, 2012 fiat extending his Order to June 30, 2006 on consent.

22 In response to Ms. Snow's August 18, 2006 letter, Mr. Carey returned Ms. Snow's draft form of the June 30, 2006 order continuing the May 4, 2006 Mareva Order, on which he had endorsed that his approval was subject to the variations agreed to by counsel.

23 According to Mr. Carey, the May 4, 2006 Mareva Order was continued on September 25, 2006 by Mr. Justice Lederman, subject to the variations agreed upon by counsel; and that after Justice Lederman had released his decision, counsel had ongoing discussions about the continuing variations, both verbally on the telephone and by correspondence,

24 Counsel attended again before Mr. Justice Lederman on October 10, 2006. Mr. Justice Lederman's October 10, 2006 Endorsement provided as follows:

> Counsel are to discuss what living expenses can be appropriately released on a monthly basis pending trial. If no agreement, Mr. Carey is at liberty to bring a motion for this purpose.
>
> My order of September 25, 2006 includes Mr. Irwin, Again, Mr. Carey is at liberty to seek a variance of that order on proper affidavit material.

25 In his October 13, 2006 letter to plaintiff's counsel, Mr. Carey wrote that, based on Mr. Jervis' submissions to Justice Lederman, he expected that they had agreed that the following items represented allowable expenses of Mr. Sabourin, namely, child support, legal fees, mortgage payments, utilities for the cottage, property tax, personal tax liability, transportation costs, and health care.

26 Mr. Carey confirmed during cross-examination that his letter of October 13, 2006 would have been referring to the attendance before Justice Lederman on October 10, 2006; and that the October 13, 2006 letter from Mr. Carey to Lerners was based on his discussions with Mr. Jervis and what Mr. Carey told Justice Lederman when they were discussing the variations, such as, for child support, legal fees, mortgage payments, utilities, property, and personal taxes, because counsel had gone back to Justice Lederman to discuss the variations.

27 Mr. Carey would not agree during cross-examination that, on October 10, 2006, the variation of what living expenses could be released was up in the air; Mr. Carey stated that only the quantum of those expenses was up in the air, because, according to Mr. Carey, Lerners had already agreed

  

as of July 2006 that living expenses were allowed. According to Mr. Carey, his letter of October 13, 2006 did not set out proposed variations, but was the recitation of what Mr. Jervis had told Mr. Justice Lederman that he would agree to at the attendance before him on October 10, 2006: the issue was how much money Mr. Sabourin was going to receive, not whether he was allowed to receive any money.

28 Mr. Carey testified that his purpose in sending the October 13, 2006 was to reduce to writing in one document the variations that had been agreed to by counsel to that point in time during court attendances, correspondence and telephone discussions:

> Well, yes, and I think I mentioned it in passing already, was that we were trying to get, we'd agreed in correspondence with counsel already, and verbally about certain variations to the order as given by Justice Colin Campbell. I was trying at that point to formalize the exact order, so that it wouldn't be as vague as it was, because it was very vague indeed and composing little bits of correspondence here and there and what counsel had said to judges in hearings and that kind of thing and we were also trying to get an agreement from Lerners on the quantum of the living expenses that Sabourin was going to get under the terms of the order. Now, having said that, throughout this piece he'd already been obviously living, buying food, and if I may be cruel, a 775-pound man was obviously buying a lot of food. So, to that extent, he's already been, he's doing whatever he's doing, right. So, I was just trying to get a formal version of it in place, which I thought was a prudent thing to do.

29 In her October 17, 2006 letter Ms. Snow of Lerners wrote that, while counsel did not dispute Mr. Sabourin's ability to pay any normal, modest living expenses (including such items as child support) or reasonable legal fees, as such expenses fall due, it continued to be their position that any expenses that are apart from modest should be reviewed and subject to further scrutiny. Ms. Snow also requested specific information about the amounts of the expenses claimed by Mr. Sabourin: "Before we can agree to any formal variation of the terms of the Order authorizing the payment of certain expenses, we will require both Mr. Sabourin and Mr. Irwin to provide us with complete and detailed affidavit evidence setting out a comprehensive list of all of these expenses, including the specified amounts of the expenses and the frequency with which they fall due."

30 During cross-examination, Mr. Carey testified that Mr. Sabourin's November 1, 2006 affidavit was sworn to deal with the issue of how much money Mr. Sabourin was going to receive a month as living expenses and that Mr. Sabourin wanted more money to live on than Lerners was prepared to allow. Mr. Carey confirmed in re examination that Mr. Sabourin's November 1, 2006 affidavit was prepared in response to the October 17, 2006 letter of Ms, Snow.

31 When asked on cross-examination whether the correspondence produced on the contempt motion incorporated all of the variations agreed to by counsel, Mr. Carey testified that there was other correspondence not produced on the contempt motion, as well as verbal discussions,

  

concerning variations to the May 4, 2006 Mareva Order, and that there were other variations agreed to that were not set out in the correspondence produced on the contempt motion:

> "Well, I don't know how we can be in disagreement, Mr. Toyne, because I knew it and you weren't there. So, you only know what you read from the limited number of documents that you're putting forth before the court, but certainly my evidence is that there was an ongoing, supported by the correspondence, is that there was an ongoing agreement to vary the order with respect to a number of things, including legal fees and living expenses. We had a dispute with respect to the quantum of the living expense and I was trying to get, I think very sensibly, an entire sort of package nailed down so we wouldn't have all this vagueness surrounding what was permitted and what wasn't, but certainly there were certain things that had been agreed to." [7]

32 While Mr. Carey claimed that he was not confused about the scope of the May 4, 2006 Mareva Order, he also stated, as already noted, that the Mareva Order was unclear because the variations agreed to by counsel were not set out in one place:

> "I was not confused by the scope of the Mareva Order. I understand what Mareva Orders are. And, this Mareva Order was particularly unclear because the variations in the order were contained in correspondence and understandings between counsel after the order of Justice Colin Campbell. [8]

33 Mr. Carey's possible lack of clarity concerning the terms of the May 4, 2006 Mareva Order may also have arisen out of the relative rarity of Mareva orders and the unusual form of the May 4, 2006 Mareva Order, The evidence of Mr. Lenczner, an experienced commercial litigator with over 40 years of relevant experience, is that he has only dealt with Mareva orders about a dozen times. Mr. Lenczner testified that the May 4, 2006 Mareva Order was unusual and narrower than the standard Mareva order and that it gave him some difficulty because it was so narrow, for example, it did not provide an exemption for the payment of legal fees and ordinary living expenses.

34 Before he returned the money to Mr. Sabourin, Mr. Carey testified that he had turned his mind to the. existence of the May 4, 2006 Mareva Order. As already noted, lie believed that paragraphs 2 and 3 of the Mareva Order had gone because of the variations agreed upon by counsel and that the Mareva Order did not cover the return of a client's trust funds:

> "...I would say this is not the order that was extant when I returned the money. The order that was extant when I returned the money was the order that had been varied and because the variations included all the things we discussed, it had nothing to do with whether it was in a trust account. It was just that one could now sell, dispose, withdraw, do whatever to various monies because that's what was allowed, including paying the legal fees and buying

  

groceries, and paying rent and paying child support and paying taxes. There's no magic to being in a trust account." [9] ; and that

"Returning these monies did not constitute a violation of the order because the order was varied, the order was changed completely in terms of what could or could not have been done. It simply doesn't exist anymore." [10]

In addition, Mr. Carey testified that Mr. Sabourin had instructed him to return the balance of the monies held in Mr. Carey's trust account.

35 Because Mr. Carey testified, in considering his evidence, I must apply the principles enunciated by the Supreme Court of Canada in *R. v. W. (D.)*. [11] Specifically, I must work through three steps, adapting the criminal jury instruction: first, if I believe Mr. Carey's exculpatory evidence, then I must dismiss the plaintiffs motion; second, if I do not believe his exculpatory evidence but I am nonetheless left in reasonable doubt by it or otherwise have a reasonable doubt about where the truth of the matter lies, then I must dismiss the motion; and, third, even if I am not left in doubt by Mr. Carey's evidence, I must ask myself whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence that Mr. Carey is in contempt of court. This approach applies to credibility findings in respect of disputed evidence on the elements of contempt of court and on the elements of defences raised to it. [12]

36 Based on Mr. Carey's oral evidence, because of the protracted history between Mr. Carey's clients and the plaintiff and the way that Mr. Carey viewed the merits of the plaintiffs claim, the unusual form of the May 4, 2006 Mareva Order, and the variations discussed and agreed upon between counsel, which were not set out in one document by formal amendment, I have a reasonable doubt as to whether the terms of the May 4, 2006 Mareva Order were completely clear to Mr. Carey, and I am not satisfied beyond a reasonable doubt that Mr. Carey's interpretation of the May 4, 2006 Mareva Order was deliberately and willfully blind, It must be clear to a party exactly what must be done to be in compliance with the terms of an order. [13] Any doubt must be resolved in favour of Mr. Carey. [14] As a result, I conclude that contempt has not been shown beyond a reasonable doubt.

37 While I have a reasonable doubt as to whether Mr. Carey's conduct with respect to the May 4, 2006 Mareva Order constitutes contempt, I make no determination on a balance of probabilities as to the correctness or reasonableness of his conduct or whether his interpretation of the May 4, 2006 Mareva Order is correct or reasonable.

38 The correctness or reasonableness on a civil standard of a balance of probabilities of Mr. Carey's interpretation of the May 4, 2006 Mareva Order (including the status of any variations or amendments) and/or of his subsequent actions is not an issue that I have to determine on the

  

plaintiffs motion for contempt where the standard of proof of the alleged contempt is in accordance with the criminal standard of proof beyond a reasonable doubt. [15]

39 If Mr. Carey's conduct is ultimately found to show inadvertence, even due to some component of negligence, which, again, is not something that I have to decide on the plaintiffs contempt motion, this is not a sufficient mental element for a finding of contempt. Unprofessional or sloppy practice, if that is ultimately found to be the case here, is not contempt of court. [16]

40 For all of the above reasons, I set aside the previous finding of contempt that I had made against Mr. Carey by my October 12, 2011 Order.

**Costs:**

41 With respect to the disposition of the costs of the plaintiff's contempt motion, if they cannot otherwise agree, the parties to this motion may make brief written submissions of no more than two pages plus their respective bills of costs and deliver them to me via Judges' Reception at Room 170, 361 University Avenue, Toronto, as follows: the plaintiff shall deliver her submissions by January 7, 2013; and Mr. Carey shall deliver his submissions by January 17, 2013.

*Motion granted.*

Footnotes

1 *Sabourin & Sun Group of Cos. v. Laiken*, 2011 ONCA 757 (Ont. C.A. [In Chambers]), at para. 9

2 *Bell ExpressVu Ltd. Partnership v. Torroni* (2009), 94 O.R. (3d) 614 (Ont. C.A.), at paras, 21-22

3 Transcript, July 25, 2012, pages 36 to 37

4 Transcript, July 25, 2012, pages 11 to 12

5 Transcript, December 19, 2011, page 55

6 Transcript, July 25, 2012, pages 122 to 123

7 Transcript, July 25, 2012, page 52

8 Transcript, July 25, 2012, pages 16 to 17

9 Transcript, July 25, 2012, pages 125 to 126

10 Transcript, July 25, 2012, page 127

11 [1991] 1 S.C.R. 742 (S.C.C.)

 

12 *Sweda Farms Ltd. v. Ontario Egg Producers*, [2011] O.J. No. 3482 (Ont. S.C.J.), at para.

13 *Bell ExpressVu Ltd. Partnership v. Torroni*, *supra*, at paras. 21-22

14 *Ibid.*

15 *Ibid.*

16 *Jutte v. Jutte*, [2007] A.J. No. 426 (Alta. Q.B.), at para. 44

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|---|---|---|
| THE CATALYST CAPITAL GROUP INC.<br>Plaintiff<br>(Appellant/Responding Party) | -and- | BRANDON MOYSE et al.<br>Defendants<br>(Respondents/Moving Party) |

**COURT OF APPEAL FOR ONTARIO**

# SUPPLEMENTARY BRIEF OF AUTHORITIES OF THE MOVING PARTY


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