See paras. 29, 37, 38, 39, 41, 42, 43, 47, 49, 50, 52

Case Name:

Royal Bank of Canada v. Boussoulas

Between
Royal Bank of Canada, Plaintiff/Appellant, and Theodore Boussoulas, Chris Boussoulas, Peter Boussoulas, 4191153 Canada Inc. o/a Royal) Edge, Edgebanding Solutions Inc., and Royal) Edge Incorporated, Defendants/Respondents

[2012] O.J. No. 2335

2012 ONSC 2070

Divisional Court File No.: 438/10

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

J.C. Kent, S.E. Pepall and P.M. Perell JJ.

Heard: March 28, 2012.
Judgment: April 26, 2012.

(58 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Circumstances when not granted -- Considerations affecting grant -- Clean hands doctrine -- Interlocutory or interim injunctions -- Stay or revocation of interim injunction -- Preservation of property -- Mareva injunctions -- Appeal by plaintiff from order dismissing application for interim Mareva injunction -- Plaintiff sued defendants with respect to $4,000,000 loan and alleged fraud -- 2009 interim interlocutory partial Mareva injunction imposed reporting requirements on defendants -- Plaintiff made tactical decision not to rely on fraud allegations in injunction application -- Motions judge correctly found plaintiff lacked clean hands as a result and was entitled to deny Mareva injunction on equitable grounds -- Plaintiff knew defendants were arguing unsupported allegations of fraud and discretionary factors were always in play -- 2009 injunction made pending application, so appropriately dissolved.

Appeal by the plaintiff bank from an order dismissing its application for an interim Mareva

injunction. The motions judge found all elements had been established but exercised his equitable discretion not to order the injunction. The plaintiff loaned $4,000,000 to one of the defendant corporations, guaranteed by a general security agreement and guarantees of two individual defendants. After the loan went into default, the plaintiff then discovered the corporation's equipment was being used by a company operated by the defendants' brother, which became insolvent, and the defendants had granted a $1,000,000 mortgage against the family home for no consideration. The plaintiff sued the defendants and sought an interlocutory Mareva injunction on the basis the defendants defrauded it of $3.8 million. An injunction granted in 2009 imposed reporting requirements on the defendants. The defendants vigorously denied any fraud. On the application in question, the plaintiff chose not to make any allegations of fraud. The defendants argued the injunction should be denied because of unsupported allegations of fraud. The plaintiff maintained it was not withdrawing its fraud allegations but they were not needed to obtain a Mareva injunction. The plaintiff argued the judge denied it procedural fairness, erred in finding it did not have clean hands, in refusing the injunction when all elements were met and in dissolving the previous Mareva injunction in place.

HELD: Appeal dismissed. The plaintiff made a tactical decision not to rely on the fraud allegations and there was nothing unfair about holding them to that decision, especially since the defendants made it clear they would be arguing unsupported allegations of fraud. Furthermore, discretionary factors were always in play, so the motions judge's decision should not have come as a surprise and there was no denial of natural justice. The motions judge appreciated that fraud was a live issue but found the plaintiff had overstated its case for the purpose of obtaining an injunction. The motions judge was correct in finding the plaintiff did not have clean hands in forcing the defendants to defend allegations of fraud all along and then suddenly dropping the allegations. The plaintiff's claim the motions judge did not have the jurisdiction to deny the injunction on equitable grounds when all elements were present was simply incorrect. The 2009 injunction was an interim interlocutory partial Mareva injunction granted pending the outcome of the within application so it was appropriately dissolved.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.45, s. 101(1)

Counsel:

J. Thomas Curry and Emily Graham, for the Plaintiff/Appellant.

Peter Greene and Michael Binetti, for the Defendants/Respondents.

The judgment of the Court was delivered by

S.E. PEPALL J.:--

INTRODUCTION

1 In this case, Justice Stinson determined that all of the constituent elements for granting a *Mareva* injunction had been established, but he exercised the Court's equitable discretion, and he dismissed the Royal Bank of Canada's ("RBC") motion seeking an injunction. He also dissolved an interim *Mareva* injunction that had been granted on consent.

2 On this appeal, the Appellant RBC makes four main arguments that the judgment below was in error and that a *Mareva* injunction should be granted and a receiver appointed by this appellate court. I will label the Bank's arguments: (1) the natural justice argument; (2) the substantive argument; (3) the strong substantive argument; and (4) the permanence of the consent injunction argument.

3 The Bank's natural justice argument is that the motions judge erred in holding that the Bank's conduct disentitled it to relief because the equitable doctrine (of unclean hands) had not been pleaded and the Bank was denied notice and the opportunity to respond.

4 The substantive argument, which is a case specific argument, is that in the case at bar, having found that the constituent elements for a *Mareva* injunction had been established, the motions judge erred in the exercise of his discretion by relying on the doctrine of unclean hands as the basis for refusing an injunction.

5 The strong substantive argument, which is a categorical argument, is that when the constituent elements for a *Mareva* injunction are established, the Court may never refuse the injunction and any concerns about the conduct of the plaintiff or counsel should be dealt with as a matter of costs.

6 The permanence of the consent injunction argument is that the motions judge erred in dissolving the *Mareva* injunction that Justice Cumming granted on consent on September 9, 2009.

7 The Respondents, the Defendants, Theodore Boussoulas, Chris Boussoulas, Peter Boussoulas, 4191153 Canada Inc. ("Royal Edge-1"), Edgebanding Solutions Inc. ("Edgebanding") and Royal Edge Incorporated deny the merits of any of these arguments, and they submit that the motions judge made no error in dismissing the motion to continue the injunction originally granted on consent.

8 Both the RBC and the Defendants submit that this is a very significant appeal. RBC submits that there will be a significant change in the law if the judgment below is affirmed. The Defendants submit that there will be a significant change in the law if the order below is reversed.

9 For the reasons that follow, it is my opinion that both the RBC and the Defendants are incorrect

about the significance of the order below. There will be no change in the law whatever arising from the outcome of this appeal. As I will explain, the motions judge did not develop or change the law but took the opportunity of the Bank's motion to emphasize existing law.

10 In any event, as I will explain, there was no breach of natural justice and the motions judge made no error in applying the substantive law and in dissolving the injunction granted by Justice Cumming. Accordingly, for the following reasons, the appeal should be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

11 Starting in 2005, RBC loaned $4 million to Royal Edge-1, which made parts for furniture. The loan was secured by a general security agreement and the guarantees of Peter (father) and Theodore (son) Boussoulas. The loan went into default, and the Bank appointed a receiver.

12 RBC alleges that it discovered that Royal Edge-1's equipment was being used by Edgebanding, which was being operated by Theodore's 21-year old brother, Chris Boussoulas, to produce furniture parts.

13 Edgebanding became insolvent, and RBC next discovered that Royal Edge-1's equipment was being used by Royal Edge Incorporated and 2200504 Ontario (collectively, "Royal Edge-2") to manufacture furniture parts. Royal Edge-2 was being operated by Joanne Bradbury, a former employee of Royal-Edge-1. The Bank later discovered that Theodore and Chris had granted a $1 million mortgage against the Boussoulas family home to their mother Theresa for no apparent consideration.

14 On August 31, 2009, the Bank sued Peter, Theodore, and Chris Boussoulas, Royal Edge-1, Edgebanding, and Royal Edge Incorporated, and sought an interim and interlocutory *Mareva* injunction. Included among the grounds for the motion was the allegation that there was a strong prima facie case that the Defendants defrauded RBC of $3.8 million and that the Defendants obtained half of the amount borrowed on the basis of a fraudulent equipment appraisal.

15 This injunction was granted by Justice Cumming on consent on September 9, 2009. The order was a partial *Mareva* injunction and imposed reporting requirements on the Defendants. It will be important to the discussion below to note that the sixth term of the order was an adjournment to allow cross-examinations. Paragraph 6 of the order stated:

> 6. THIS COURT ORDERS that this motion be adjourned to a date to be set at a 9:30 am. appointment following the delivery of all affidavits and such cross examinations as may be required.

16 Between September 9, 2009 and July 6, 2010, there were numerous 9:30 am. scheduling appointments and the date for the return of the motion kept changing. Meanwhile, the parties delivered affidavits, and there were examinations, cross-examinations, and interlocutory motions

and directions, all as the run up to a motion to continue Justice Cumming's order scheduled for July 6, 2009 on the Commercial List.

17 On July 6, 2010, with a 17-volume "Compendium of Evidence" and other documents filling three banker's boxes, it was readily apparent that one day was insufficient time for the motion.

18 For reasons that will become clearer later, it is very important to note the nature of the voluminous material delivered in the run up to the argument of the motion about the appointment of a receiver and for a *Mareva* injunction and how these court documents dealt with the matter of fraud.

19 In this regard, there was the Bank's original and amended Statements of Claim. These pleadings were gorged with allegations of fraud. There was the Bank's original and amended notice of motion that asserted that a *Mareva* injunction was warranted on the ground that, among other things, "there is a strong prima facie case that the defendants defrauded RBC of more than $3.8 million" and that "the Boussoulas obtained over half the total amount borrowed on the basis of a fraudulent equipment appraisal." There was the Bank's original factum, supplemental factum, and amended factum, of which, the first two factums, but not the last factum, made extensive reference to allegations of fraud.

20 For their part, the Defendants' materials included a factum and a supplementary factum delivered by different lawyers of record. These factums included a vigorous defence to the allegations of fraudulent conduct and the counterarguments that the RBC was making false allegations of fraud and the RBC and its counsel were improperly attacking the personal defendants' reputation and making unsubstantiated allegations of fraudulent behaviour.

21 Justice Stinson met counsel in chambers and explained to them that more time was needed. Counsel acknowledged that the time booked was insufficient and that the quantity of materials could be pared down. Justice Stinson rescheduled the motion, and it was argued for three days, on July, 21, 22, and 23, 2010.

22 On the return of the motion, RBC sought, among other things, the joinder of Joanne Bradbury, 2200504 Ontario Inc., and Theresa Boussoulas as party defendants, the amendment of its Statement of Claim, the appointment of a receiver, and a *Mareva* injunction. On consent, the joinder was allowed and leave was granted to deliver the amended Statement of Claim, which included numerous new allegations of fraud.

23 For reasons that will become clearer later, it is very important to note the nature of the parties' arguments at the hearing of the motion for a *Mareva* injunction.

24 For its argument on the return of the motion, RBC's amended factum did not mention fraud, and the Bank's argument-in-chief made no mention of any evidence of fraud. The position of the Bank during argument was that it was entitled to a *Mareva* injunction independent of its pleaded

allegations of fraud.

25 The Defendants did not file an amended factum. Their responding argument was to deny any fraud and to deny any basis for a *Mareva* injunction. In their documents filed for the motion, the Defendants also argued that the Court should refuse any injunction because the Bank had made unsupported allegations of fraud and also allegations of fraud that were shown to be unsupportable.

26 During the argument of the motion, in its reply submissions, the Bank's counsel stated that RBC was not withdrawing the fraud allegations and it still intended to rely on them, but, given the other evidence available, the Bank did not consider it needed to rely on fraud as a basis for obtaining the *Mareva* interlocutory. During the reply argument, the Bank indicated that it was prepared to substantiate its allegations of fraud, but this was not allowed because the Defendants objected that the Bank should not be allowed to split its argument-in-chief. The motions judge agreed with the Defendants in this regard.

THE JUDGMENT BELOW

27 Justice Stinson reserved judgment, and he released his reasons on August 25, 2010.

28 In his reasons for judgment, referring to *Aetna Financial Services Ltd v. Feigelman*, [1985] 1 S.C.R. 2, and with exceptions for Ms. Bradbury and 2200504 Ontario Inc Justice Stinson concluded that the Bank had satisfied the three constituent elements for a *Mareva* injunction. First, without relying on the Bank' s allegations of fraud, there was a strong prima facie case that the Defendants were liable to the Bank. Second, there was a real risk that the Defendants were dissipating assets outside of the ordinary course of business making the possibility of future tracing of the assets remote, if not impossible in fact or in law. Third, the balance of convenience favoured granting the injunction over refusing to grant the injunction.

29 Thus, by paragraph 20 of his 37 paragraph judgment, Justice Stinson had decided that the constituent elements for a *Mareva* injunction had been established. The balance of his reasons addressed the question of whether the Bank's actions disentitled it to an injunction. For present purposes, the most important paragraphs of this discussion are paragraphs 21-22 and 31-35, which stated:

> 21. The next question to address is whether the actions of the plaintiff have, as the defendants argue, disentitled it to the relief sought. A *Mareva* injunction is a discretionary, equitable remedy, as is an order appointing a receiver, which is granted only where it is "just and equitable". This means that, in deciding whether or not to grant the relief sought, the court is entitled to weigh in the balance the conduct of the party seeking it, and to decline the relief where that conduct is wanting. As noted by I.C.F. Spry in the Principles of Equitable Remedies, London: Sweet & Maxwell, 2010, at 414:

> an applicant who culpably misleads the court in making his application may be refused equitable relief on this ground.

22. In my view, the plaintiffs conduct in these proceedings has been such as to disentitle it to an equitable remedy such as a *Mareva* injunction or the appointment of a receiver. At its heart, the problem stems from the plaintiff overstating its case and making unsupportable allegations in its notices of motion, factums and affidavits. This is unacceptable in any court at any stage of a proceeding. It is especially problematic in a high volume court such as the Commercial List, where highly complex matters often come before the court for resolution on short notice, accompanied by thick affidavits, recounting complicated fact situations and supported by detailed and complex documentation.

31. In the present case, I find that RBC's materials fail to meet acceptable standards in numerous material respects.

32. RBC's original notice of motion and amended notice of motion both allege as grounds for the relief sought that there is a strong prima facie case that the defendants defrauded RBC of $3,829,025 and that "Boussoulases [and Bradbury] obtained over half the total amount borrowed on the basis of a fraudulent equipment appraisal." The initial, 3-volume affidavit filed before Cumming J. contained similar allegations. The word "fraud" (or variations of it) was used no less than 4 times in only the third paragraph of the affidavit: the affidavit concludes in its penultimate paragraph that "RBC has been the target of a fraudulent scheme to defraud it of the assets under its security." The RBC factum filed before Cumming J. recited the word "fraud" (or variations of it) no less than 4 times in only the second paragraph, including the assertion that the defendants "orchestrated a fraudulent scheme ... to fraudulently borrow over $4 million from RBC between 2005 and 2008 ..."

33. Despite these multiple, serious and repeated allegations of fraud in its initial salvos in this litigation (when it initially sought and obtained *Mareva* relief) in RBC's amended factum and its submissions in chief before me, the word "fraud" was not mentioned at all. In their submissions in response, the defendants argued (as they had submitted in their factums) that RBC had alleged, but failed to even argue, let alone prove fraud and should be denied equitable relief. In reply, RBC asserted that it stood by its allegations of fraud, and attempted to argue them despite having said nothing about them in its argument in chief. Understandably, the defendants objected that it was not open to RBC to advance in reply an argument that it could have, but refrained from advancing in chief. I agreed with the defendants' objection. RBC explained that it believed the remaining grounds relied upon were sufficient to warrant the relief sought.

34. While I agree (for the reasons articulated above) with the last proposition, it

> remains the case that RBC alleged yet failed to prove a case in fraud. Moreover, in several material respects, RBC misstated or overstated its case and the evidence. These include the following: ... .
>
> 35. As I have indicated previously, in my view, the conduct of RBC in these proceedings has been such as to disentitle it to equitable relief. Misstatements and overstatements of evidence such as those mentioned above impair and impede the court in the performance of its function, and are to be strongly discouraged. It is no answer for a party to say: "this motion was brought on notice - the defendant had every opportunity to respond with his side of the story." Whether a motion is or is not brought on notice does not affect a party's duty to be fair, accurate and candid with the court, in its notice of motion, affidavits and factum. At the same time as advocating his or her client's cause, counsel has a duty to assist the court in arriving at a just and proper result.

30 For present purposes, it is also important to note what Justice Stinson said in his costs endorsement, which he released on October 18, 2010, after receiving writing submissions. In paras. 4 and 5 of the costs endorsement, he stated:

> 4. In the ruling I made dismissing the RBC motion, however, I concluded that the activities of the Boussoulas Group would have entitled RBC to a *Mareva* injunction, but for the fashion in which the litigation was conducted by RBC. Among other things, I found a history of conduct by the Boussoulases and their companies that is inconsistent with "the ordinary course of business." The evidence revealed transfers of assets from company to company, repeated moves from premises to premises, assignment to and collection of accounts receivable by a sibling's company (despite a pledge of those receivables to the bank), and refusals to disclose assets or receipts. In the circumstances, it is understandable that RBC pursued the remedies that it did. Additionally, although RBC did not consider it necessary to advance fraud arguments before me, RBC was no doubt motivated by its belief that there was fraudulent conduct of some sort practiced by the Boussoulas Group. It may well yet emerge that RBC is on the right side of the dispute.
>
> 5. In view of this conduct by the Boussoulas Group, and the fact that such conduct caused RBC to pursue the motion as it did, I have reached the conclusion that, as between it and RBC, the costs of the motion should be reserved to the trial judge, and I so order.

DISCUSSION

31 The discussion of the Bank's four main arguments may be organized by first setting out the source of the Court's jurisdiction to grant a *Mareva* injunction and then addressing three regrettable circumstances associated with the motion and the judge's reasons.

32 The decisions of Justice Cumming and the decision of the motions judge were made pursuant to s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C.45, which is a statutory codification of the Court's equitable jurisdiction to appoint receivers and grant injunctions. Section 101 states:

> 101. (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just and convenient to do so.

33 The first regrettable circumstance is that RBC made its decision to deliver an amended factum and decided not to rely on fraud in support of its request for a *Mareva* injunction after, counsel had acknowledged that the quantity of materials could be pared and the motions judge ordered that amended facta and compendia be filed.

34 This circumstance is regrettable because it might leave the impression that with the Bank paring down its material, it would be unfair later for the motions judge to agree with the Defendants' argument that the *Mareva* injunction should be refused because of the Bank's conduct of advancing unsubstantiated allegations of fraud and some not provable allegations of fraud.

35 This impression would be false. After relying on allegations of fraud for the purposes of obtaining the interim interlocutory injunction and continuing to rely on allegations of fraud during the run up to the argument of the motion and until the delivery of the amended factum, the RBC made its own unfettered tactical decision not to rely on the allegations of fraud for the purposes of the *Mareva* injunction while at the same time not abandoning those allegations.

36 There is nothing unfair in holding RBC to the consequences of that decision, particularly when the Defendants made it clear in their material and in response to the motion that they were defending the allegations of fraud being made against them and that they would argue that the injunction should be refused if the Bank was found to have advanced unsupported or disproved allegations of fraud.

37 It is notable that the Defendants did not file an amended factum on the argument of the *Mareva* injunction and the motions judge's reasons in para. 33 reveal that in their submissions and in their factum, the Defendants argued that if RBC alleged but failed to prove fraud, it should be denied equitable relief. The Defendants never agreed that the Bank should be freed of the consequences of its tactical decisions.

38 If in the eleventh hour, the Bank made a tactical decision not to rely on its allegations of fraud, in order to curry the favour of the Court - which I do not think RBC did - then it was an unsolicited decision.

39 The RBC made its tactical decision because it apparently thought that there would be advantages and no adverse consequences. The Defendants, however, did not agree that there should

no adverse consequences, and as I will explain below, the motions judge made no error in visiting on the Bank the consequences of its tactical decision.

40 The second regrettable circumstance brings me to what I have labelled the natural justice argument. The second regrettable circumstance is that for the reply argument, as noted above, RBC sought to respond to the Defendants' argument by now substantiating the fraud and the Defendants rightly objected that RBC was splitting its argument-in-chief. The motions judge agreed, and he did not permit RBC to respond by now relying on its allegations of fraud.

41 This circumstance might give the impression that RBC was not given notice of an issue and not given the opportunity to defend itself. Once again, this impression would be false. In advance of the argument of the motion, RBC knew that the Defendants would take the position that even if the constituent elements for a *Mareva* injunction were established, equity's relief should be denied because of unsubstantiated allegations of fraud and because there were allegations of fraud that patently could not be substantiated.

42 As set out above, the motions judge noted in para. 34 of his reasons that RBC misstated or overstated its case and the evidence. I now set out the details of para. 34 that I excerpted from the quote above. In full, para. 34 states:

> 34. While I agree (for the reasons articulated above) with the last proposition, it remains the case that RBC alleged yet failed to prove a case in fraud. Moreover, in several material respects, RBC misstated or over-stated its case and the evidence. These include the following:
>
> (a) The assertion that the defendants fraudulently borrowed over $4 million from RBC between 2005 and 2008 is wrong. There is no evidence that the defendants embarked on a fraudulent scheme in 2005. The supposed fraudulent conduct (if it qualifies as such) did not commence until 2008, once most of the money had been advanced.
>
> (b) The allegation that the defendants obtained over half of the total amount borrowed (i.e. $1.9 million out of $3.8 million) on the basis of a fraudulent equipment appraisal, is untrue. The appraisal in question was obtained by RBC in January 2008. Thereafter, RBC advanced net new funds of only $489,000, nothing dose to the $1.9 million alleged. There is a material misstatement. There is no evidence of any participation by Chris, Theo or Joanne in the so-called "fraudulent appraisal scheme" yet RBC persists in that allegation, too.
>
> (c) There is no direct evidence of a fraudulent appraisal. In fact, contrary to the assertion in its initial factum and 3 volume affidavit that 419 submitted a fraudulently prepared equipment appraisal report, in truth RBC dealt

directly with the appraiser to request the report. The affiant who swore the principal affidavit purported to state the facts underlying this key allegation; in truth, he lacked personal knowledge of what transpired, but failed to qualify his "evidence" accordingly. A supplementary affidavit filed on the day the motion was argued, contained some correcting information but gave no further evidence to sustain the allegation of fraud. The sole basis for the allegation remains the difference between the two appraised values, with no evidence that the defendants bore any responsibility for the discrepancy. This is far from a prima facie case of fraud; it is no evidence of fraud on the part of the defendants. It is an allegation of fraud that should never have been made, without proper evidence to sustain it. The statement in the RBC factum before Cumming J. was unsupportable and misleading in relation to a highly material and damaging allegation.

(d) RBC's practice of overstating its case was not confined to the evidence (or lack of it) before Cumming J. For example, in an affidavit sworn May 27, 2010, RBC witness Tony Depascal swore that, as he and another RBC employee were asking questions of Joanne, it became obvious that she was determined not to provide the information they required. In truth, Depascal never met Joanne. Another RBC affiant, Colin Cochrane, swore that significant funds of 419 had been diverted to 220. On cross-examination, he admitted he had no evidence of this. He further swore that the receiver had been refused access to the books and records of 419. This was a misleading overstatement, given the access and assistance provided by Joanne to the receiver. On several other occasions under cross-examination Cochrane was forced to concede that he had no personal knowledge or evidence to support beliefs or conclusions in his affidavits that he stated as facts. His affidavit included numerous occasions in which he went beyond stating facts within his personal knowledge, without properly qualifying them as hearsay evidence or surmises on his part. This is not properly admissible evidence.

(e) In addition, RBC's affidavits included a number of irrelevant and inadmissible allegations as against the defendants, including reference to a pending criminal prosecution against Peter. That is evidence of no moment in this proceeding, and ought not to have been included in an RBC affidavit

43 In the context of what took place during reply argument, the three points to be emphasized are that: (1) the Defendants had given RBC notice that they were going to assert that the injunction should be denied because RBC had made unsubstantiated allegations of fraud; (2) there were allegations of fraud that patently could not be substantiated; and (3) RBC had the opportunity to be heard on whether the injunction should be denied on equitable grounds. With respect to the third

point, RBC had been given notice that the court's equitable discretion was in play, and apart from splitting its case, it remained open to RBC to justify its tactical decision not to rely on the fraud allegations and to explain that there should be no adverse consequences from that decision.

44 Further, and in any event, the discretionary factors associated with equitable relief are always in play and this issue does not have to be pleaded. In other words, it would not have come as a surprise and it should not have come as a surprise that a Court with an equitable discretion will exercise its discretion in accordance with the historic principles of equity, which the motions judge set out in his reasons. The discretionary elements of equity's jurisdiction are inherent in equity's jurisdiction. Indeed, equity's in personam jurisdiction is its legal persona.

45 Thus, it is not necessary to discuss the case law relied on by the Bank for this appeal that is authority for the proposition that a case should not be decided by the injection of a novel theory via the reasons for judgment. See: *Labatt Brewing Company of Canada v. HNL Enterprises Canada*, L.P., 2011 ONCA 511; *Garfin v. Mirkopoulos*, 2009 ONCA 421; *Grass Litigation Guardian) v. Women's College Hospital* (2005), 75 O.R. (3d) 85 (C.A.); and *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.).This case law is simply not applicable to the problem before the Court, which involves the exercise of an equitable discretion, the principles of which were applicable as an inherent aspect of the Bank's own request for equitable relief. Thus, I disagree with RBC's natural justice argument.

46 This brings me to the third regrettable circumstance, which I must deal with before addressing the Bank's two substantive arguments. The third regrettable circumstance is the possible impression that RBC or its counsel intentionally sought to deceive the Court by its allegations that the Defendants had committed fraud.

47 This impression, once again, would be false. As set out above, in his costs endorsement, the motions judge stated, this time with emphasis added: "although RBC did not consider it necessary to advance fraud arguments before me, RBC was no doubt motivated by its belief that there was fraudulent conduct of some sort practiced by the Boussoulas Group. It may well yet emerge that RBC is on the right side of the dispute." This comment indicates that the motions judge appreciated that fraud was a live issue and that although not proven on the motion, the Bank's overall belief that it had been the victim of fraud might ultimately be substantiated. However, as noted above, for the purposes of the *Mareva* injunction, the Bank had overstated its case.

48 I can understand why RBC and its counsel would be distressed by suggestions of misconduct, but it is clear that the motions judge in the educative and editorial portions of his judgment was speaking at large and referring to "spreading practices" that were of concern to the administration of justice. He spoke of counsel's ethical duty not to mislead the Court, especially in the context of a high volume court like the Commercial List in Toronto, but all the comments of the motions judge should not be taken as being specifically directed at RBC or its counsel.

49 The RBC made a late in the day tactical decision not to rely on the allegations of fraud for the

purposes of the *Mareva* injunction but at the same time did not abandon those allegations. In my opinion, in the circumstances of this case, without the concurrence of the Defendants, this tactical decision had consequences. Metaphorically speaking, if a litigant drops the gauntlet and insults another's integrity, then the litigant must complete the duel or genuinely withdraw the insult and apologize.

50 For about a year, the Defendants had been defending themselves from allegations of dishonesty and without abandoning those allegations, the Bank took the position that those allegations did not matter for the purposes of its request for equitable relief. This was simply not fair, and the unfairness has nothing to do with the administrative concerns of the Commercial List in Toronto. This tactical decision tainted the Bank's request for in personam relief. In my opinion, the motions judge was correct in concluding that RBC had unclean hands and should be denied an equitable remedy as a result of its conduct.

51 I discussed the doctrine of unclean hands in *Sherwood Dash Inc. v. Woodview Products Inc.*, [2005] O.J. No. 5298 (S.C.J.) at paras. 51-53, where I stated:

> An injunction is an equitable remedy and it is subject to the principles that govern the grant of equitable decrees and orders. One of those principles is the maxim that "one who comes to equity with clean hands."
>
> As commentators and judges have noted, the metaphor that a claimant for equitable relief must have clean hands must be put into context. Judges of the courts of equity do not deny relief because the claimant is a villain or wrongdoer; rather, the judges deny relief when the claimant's wrongdoing taints the appropriateness of the remedy being sought from the court. In *Argyll v. Argyll*, [1967] Ch. 302, Ungoed-Thomas, J. described the principle nicely at pp. 331-2 , when be said: "A person coming to Equity for relief ... must come with clean hands; but the cleanliness required is to be judged in relation to the relief sought."
>
> In *City of Toronto v. Polai*, (1969), 8 D.L.R. (3d) 689 (Ont. C.A.), in describing the clean hands principle Schroeder, J.A. stated at pp. 699-70:
>
>> The misconduct charged against the plaintiff as ground for invoking the maxim against him must relate directly to the very transaction concerning which the complaint is made, and not merely to the general morals or conduct of the person seeking relief; or as is indicated by the reporter's note in the old case of *Jones v. Lenthal* (1969), 1 Chan. Cas. 154, 22 E.R. 739: ".. that the iniquity must be done to the defendant himself."

52 In the case at bar, in my opinion, the motions judge was correct and made no error in principle in relying on the unclean hands doctrine associated with equitable relief. The Bank's tactical decision was an iniquity done to the Defendants. This opinion disposes of the Bank's substantive argument.

53 This opinion, also disposes of the Bank's strong substantive argument, which categorical argument, unsupported by any authority, is that when the constituent elements for a *Mareva* injunction are established, the Court may never refuse the injunction and any concerns about the conduct of the plaintiff or counsel should be dealt with as a matter of costs.

54 The motions judge might well have granted the *Mareva* injunction and exercised his discretion by denying costs or awarding costs against RBC, but the proposition that having decided that the constituent elements for a *Mareva* injunction had been established, the Court has no discretion to deny the injunction on equitable grounds, is just wrong.

55 An injunction is not a common law remedy like damages, which is a non-discretionary remedy; an injunction is an equitable remedy and it is discretionary and can be refused on equitable grounds, including the clean hands doctrine. Contrary to the Bank's strong substantive argument, the discretion of the motions judge was not circumscribed to making only a costs award.

56 Finally, this brings me to the Bank's permanence of the consent injunction argument, which is that the motions judge erred in dissolving the *Mareva* injunction that Justice Cumming granted on consent on September 9, 2009.

57 In my opinion, the motions judge made no error in dissolving the *Mareva* injunction granted by Justice Gumming. It is clear that the parties were consenting only to an interim interlocutory order pending the outcome of the motion that was being adjourned and that was repeatedly being rescheduled. The Bank's amended notice of motion sought a continuation of the September injunction, which would not have been necessary if the order was permanent. Although, it would have been clearer if the interim order had expressly indicated the duration of its operation, it is clear enough that it was an interim order and, therefore, it was quite appropriate for the motions judge to dissolve it when he refused to continue and expand it as requested by the Bank.

CONCLUSION

58 For the above reasons, I dismiss the Bank's appeal with costs of $6,000, all inclusive, for the motion for leave to appeal and $10,000, all inclusive, for the appeal. At the hearing of the appeal, counsel agreed on the quantum of costs.

J.C. KENT J.
S.E. PEPALL J.
P.M. PERELL J.