No. 18-592741-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

STRONACH CONSULTING CORP.

Applicant

- and -

BIONX CANADA INC.

Respondent

BRIEF OF AUTHORITIES
OF THE MOVING PARTY GENERAL MOTORS LLC AND
GENERAL MOTORS COMPANY OF CANADA

March 9, 2018

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SERVICE LIST

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Abolins v. Greendale Farm & Garden Ltd.

2005 CarswellOnt 1579, [2005] O.J. No. 1616, [2005] O.T.C. 285, 138 A.C.W.S. (3d) 1177

ALDIS ABOLINS (Plaintiff / Defendant by Counterclaim) and GREENDALE FARM & GARDEN LIMITED, KNUD SVENDSEN, ANNE MARIE SVENDSEN, ARNOLD H. KERRY, GAIL M. KERRY and JOHN DEERE CREDIT INC. (Defendants / Plaintiff by Counterclaim)

ALFONS ABOLINS (Plaintiff / Defendant by Counterclaim) - and GREENDALE FARM & GARDEN LIMITED, KNUD SVENDSEN, ANNE MARIE SVENDSEN, ARNOLD H. KERRY, GAIL M. KERRY and JOHN DEERE CREDIT INC. (Defendants / Plaintiff by Counterclaim)

ALDIS ABOLINS (Plaintiff) and GREENDALE FARM & GARDEN LIMITED, TOM MORAWETZ and KEN SVENDSEN (Defendants)

ALDIS ABOLINS (Plaintiff) and GREENDALE FARM & GARDEN LIMITED, KNUD SVENDSEN, ANNE MARIE SVENDSEN, ARNOLD H. KERRY, GAIL M. KERRY and JOHN DEERE CREDIT INC. (Defendants)

Sedgwick J.

Heard:
Judgment: April 21, 2005
Docket: CV-03001766-00, CV-03001899-00, 1270/03, 1900/03

Counsel: J. David M. Ross for Plaintiffs, Aldis Abolins, Alfons Abolins
K. Daniel Reason for Defendant, John Deere Credit Inc.

***Sedgwick J.*:**

Actions

1 The four actions set out in the above title of proceedings involve many of the same parties, have questions of law and fact in common and the relief claimed in them arises out of the same series of transactions and occurrences. For the purpose of these reasons, the court has identified them as Actions Nos. 1 to 4. The plaintiffs in these actions and defendants by counterclaim in Actions Nos. 1 and 2, are respectively, father (Alfons) and son (Aldis). They are both farmers. Alfons, who was 79 years old at the time of the transactions out of which his action arose, farms in the former Monteagle Township in northern Hastings County. Aldis farms on the Fish Lake Road near Demorestville in the former Sophiasburg Township in Prince Edward County. They have retained Mr. Ross as their common counsel. Aldis Abolins is the plaintiff in Actions Nos. 1,3 and 4; Alfons Abolins, in Action No. 2. John Deere Credit Inc. ("Deere") is a defendant and plaintiff by counterclaim in Actions Nos. 1 and 2 and a defendant in Action No. 4. Deere has retained Mr. Reason as its counsel. The remaining defendants in Actions 1,2 and 4 have retained Mr. John M. Ewart as their counsel. The defendant Greendale Farm & Garden Limited ("Greendale") is a farm equipment dealer carrying on business at Omemee, Ontario. The defendants Knud and Ann Marie Svendsen and Arnold and Gail Kerry are officers, directors and shareholders of Greendale. However, these defendants did not participate in the hearing of the motions which are the main subject of these reasons. These motions are between the Abolins and Deere.

Motions

2 There were four separate motion records before the court in the Belleville Motions Court on July 13, 2004. Two were brought by Aldis Abolins ("Abolins Motions"). The other two were brought by Deere ("Deere Motions"). The Deere Motions were brought as plaintiff by counterclaim for interim possession of specified farm equipment: (i) as against Aldis Abolins in Action No. 1; and (ii) as against Alfons Abolins in Action No. 2. They are brought under Section 104 of the *Courts of Justice Act* and Rule 44.01 of the *Rules of Civil Procedure.*

3 One of the Abolin Motions was brought to consolidate Actions Nos. 1-4, and to strike certain paragraphs from the Affidavit of Grant Conrad, sworn January 27, 2004, filed on behalf of the defendants other than Deere in Action No. 1. Counsel for the plaintiffs indicated to the court that all parties were consenting to the consolidation of all four actions. Accordingly an order will issue consolidating Actions No. 1,2,3 and 4, in accordance with Rule 6.01. That part of the motion for an order striking out certain paragraphs of the Conrad Affidavit was adjourned on consent to a date to be fixed by the trial coordinator.

4 The other Abolin Motion was brought in Action No. 1 for an interim injunction restraining the defendants or their employees, agents or bailiffs from entering the real property of Aldis Abolins at 1275 Fish Lake Road R.R. #2, Demorestville, Ontario, being part of lots 24 and 25, Concession 2, West of Green Point, Township of Sophiasburg, County of Prince Edward ("Aldis' Property"); from seizing and removing equipment, tools and chattels from Aldis' Property; and other relief relating to specified Case

farm equipment and tools belonging to Aldis Abolins ("Case Equipment").

Prior Orders

5 On October 29, 2003, Dunbar J. made an interim order in accordance with the relief requested in the notice of motion for an injunction brought by Aldis Abolins in Action No. 1 (see para. [4] above), "the equipment not to be encumbered or disposed of in the interim". The order of Dunbar, J. continues in effect.

Other Preliminary Matters

6 Counsel for the plaintiffs requested an adjournment of the Deere Motions. After hearing the submissions of both counsel, the requested adjournment was denied. Counsel for the plaintiffs also objected, under Rule 39.02(2), to admission of the Affidavit of Michael E. Cassone, sworn on July 9, 2004. Leave was given to Deere to tender the Cassone Affidavit in evidence at the hearing of the Deere Motions.

The Deere Motions

7 The Deere Motions were motions in Action No. 1 against Aldis Abolins; and in Action No. 2 against Alfons Abolins, for the same relief: an order for interim possession of a total of nine items of farm equipment, the purchase or lease of which, by either Aldis or Alfons, was financed by Deere. As previously indicated, these motions were brought by Deere as plaintiff by counterclaim in Actions No. 1 and No. 2 (see para. [2] above).

8 The items of farm equipment, which Deere seeks to recover from the possession of Aldis Abolins on an interim basis, are described as:

(1) Used 1984 Deere 210C backhoe-loader, S/N 148246, and other equipment;	($14,490.00)
(2) Used 1994 CIH (Case) model 5400, drill and cart, S/N JAG00440098;	($18,500.00)
(3) Used 1988 CIH (Case) model 4600 cultivator, S/N 359600;	($ 8000.00)
(4) 2001 Deere 840 front loader and grapple, S/N 00840X002056;	($11,500.00)
(5) New 2000 Ezeon model 1275, 12-foot offset disc, S/N 44654.	($10,000.00)

9 These items were purchased by Aldis Abolins from Greendale (as Seller), under three Fixed Rate Retail Instalment Contracts-Security Agreements, dated February 7, 2001, March 9, 2001 and May 14, 2001, respectively, (the "Contracts"). These Contracts were assigned by Greendale to Deere after they were signed by the Buyer. The dollar figures in the right-hand column represent Deere's estimate of the current resale value of the items purchased by Aldis Abolins (Cassone Affidavit paras. 5 and 6, Ex. D). The aggregate value of these items is estimated at $62,490. On a "quick sale value" basis, the aggregate value is estimated at $44,200.

10 The items of farm equipment, which Deere seeks to recover from the possession of Alfons Abolins on an interim basis, are described as:

(1) Kuhn 400 14' Mo-Co, S/N K6743A;	($15,000.00)
(2) Kuhn 1460 TMR Mixer, S/N K6743B;	($30,000.00)
(3) Used Deere 8310 Tractor, S/N 013041; and	($125,000.00)
(4) Used Deere 840 Loader	(-)

11 The items were leased by Alfons Abolins from Greendale (as Lessor), under two Commercial Lease Agreements (with Purchase Option), dated August 21, 2001 and May 30, 2002, respectively (the "Leases"). These Leases were assigned by Greendale to Deere after they were signed by the Lessee. The dollar figures in the right-hand column represent Deere's estimate of the current resale value of the items leased by Alfons Abolins (Cassone Affidavit paras. 5 and 6, Exhibit D). The aggregate value of these items is estimated at $170,000. On a "quick sale value" basis, the aggregate value is estimated at $126,500.

Location/Condition/Insurance of Disputed Equipment

12 The nine items of farm equipment which are the subject of the Deere Motions (the "Disputed Equipment") are all located on Aldis' Property in Prince Edward County and have been there for some time. Aldis' Property is located almost 200 km to the south of his father Alfons' property in Monteagle Township. There is little reliable evidence before the court as to their current condition. The Abolins have resisted or ignored repeated requests by the solicitors for Deere or Greendale to permit the entry of their clients' representatives on Aldis' Property to inspect the Disputed Equipment. During cross-examination on his affidavit prior to the hearing of the Deere Motions, Aldis Abolins acknowledged that some of the items of the Disputed Equipment were in use in farming operations on Aldis' Property; while others were "rusting" in the "weeds" (Transcript of Cross-Examination of Aldis Abolins, May 31, 2004, pp.22-23; Q. 107-111). The court's attention was not drawn to any evidence of steps taken by the Abolins to take care of the Disputed Equipment by way of mechanical maintenance or protection from the elements. Aldis Abolins also acknowledged that his barns were not insured (Transcript of

Cross-Examination of Aldis Abolins, May 31, 2004, p. 23 (Q.113). The current state of the Disputed Equipment is a major concern of the court. Under the Contracts and Leases they signed, the Abolins are obliged to keep the Disputed Property insured against loss, fire, theft, damage or destruction. However, Aldis Abolins acknowledged that they cancelled the insurance in 2003 because they could not afford the premiums. Then, on July 12, 2004, the very eve of the hearing of the Deere Motions, the insurance was reinstated (Ex. 2). That event does not give the court much confidence in the continuing stewardship of the Abolins with regard to the Disputed Property, in which Deere, and possibly other parties, clearly have an interest and a lawful right to possession.

Default: Contracts/Leases

13 Aldis Abolins is in default in making payments to Deere under the Contracts relating to the Disputed Equipment (see para. [9] above) as follows:

> (A) Contract No. 109408, dated February 7, 2001, relates to the purchase of the Used 1984 Deere 210C backhoe-loader and 4-Martin self-feeder wagons. The self-feeder wagons were traded-in by Aldis Abolins on March 1, 2001, in connection with another transaction, and are not presently an item of Disputed Equipment. The Financed Amount under this Contract was $44.517.20, repayable over a 60-month term. Payment default occurred. Deere demanded payment on November 11, 2003. No further payments were made after October 31, 2003. The principal balance owing is $10,174.06. The total amount repaid under this Contract is $1,000. The resale value of this Disputed Equipment is $14,900 ("quick sale value" $10,600).
>
> (B) Contract No. 169064, dated March 9, 2001, relates to the purchase of the Used 1994 CIH 5400 drill and cart; the Used 1988 CIH 4600 cultivator; and the New 2001 Deere 840 front-end loader and grapple. The Financed Amount under this Contract was $71,696.80, repayable over a 60-month term. Payment default occurred. Deere demanded payment on November 11, 2003. No further payments were made after October 31, 2003. The principal balance owing is $44,503.87. The total amount repaid under this Contract is $2,428.00. The aggregate resale value of this Disputed Equipment is $38,000 ("quick sale value", $26,600).
>
> (C) Contract No. 169092, dated May 14, 2001, relates to the purchase of the 2000 Ezeon 1275 offset disc. The Financed Amount under this Contract was $37,217.80, repayable over a 60-month term. Payment default occurred. Deere demanded payment on November 17, 2003. No further payments were made after September 26, 2003. The principal balance owing is $20,221.93. The total amount repaid under the Contract is $15,311.45. The resale value of this Disputed Equipment is $10,000 ("quick sale value", $7000).

14 Alfons Abolins is in default in making lease payments to Deere under the Leases relating to the Disputed Equipment (see para. [11] above), as follows:

> (A) Lease No. 155521, dated August 31, 2001, relating to the lease of a Kuhn 400 Mo-Co and a Kuhn 1460 TMR Mixer. Half-yearly rental payments of $7,355.20 (plus PST/GST) are required under this Lease. Payment default occurred. Deere demanded payment on August 8, 2003. No further payments were received after November 30, 2003. The total amount due under this Lease is $38,097.22. The total amount of payments received under this Lease is $23,162.35. The aggregate resale value of this Disputed Equipment is $45,000 ("quick sale value", $31,500).
>
> (B) Lease No. 667619, dated May 30, 2002, relating to the lease of a Used Deere 8310 Tractor with Used Deere 1840 Loader. Half-yearly rental payments of $15,955.48 (plus PST/ GST) are required under this Lease. Payment default occurred. Deere demanded payment on January 21, 2003. No further payments were received after May 30, 2002. The total amount due under the lease is $80,277.87. The total amount of payments received under this Lease is $15,955.49. The aggregate resale value of this Disputed Equipment is $125,000 ("quick sale value", $95,000.), attributable entirely to the Deere 8310 Tractor.

15 Aldis Abolins and Alfons Abolins are in default of their payment obligations under the various Contracts and Leases financed by and assigned to Deere. At the time the Deere Motions were heard by the court, their defaults in payment were longstanding and substantial. No payments were made after October 31, 2003, in the case of Aldis; and in the case of Alfons, May 30, 2002, under one lease; and November 30, 2003, under the other lease. Under the terms of each of the Contracts and Leases, payment of the total obligation is accelerated and is now due. Demands by Deere under each of the Contracts and Leases have not been met by Aldis or Alfons, respectively. At the date of its demands for payment, Deere also delivered the appropriate notices under s. 21 of the *Farm Debt Mediation Act* ("FDMA"), of intent to realize on security. Under the terms of each of the Contracts and Leases, Deere has an ownership interest in and a lawful

right to possession of the Disputed Equipment (see para. [12] above).

Defences

16 Counsel for the plaintiffs in Actions Nos. 1 and 2 concedes that they are in default under the Contracts and Leases, but asserts other defences.

17 The plaintiffs rely on s. 23(1) of the *Consumer Protection Act*, providing that a term of an "executory contract" (time-payment contract) with a "buyer" that authorizes repossession of the property is unenforceable without leave of the court, against the "buyer" if more than two-thirds of the total purchase price has been paid by the "buyer". A "buyer" does not include someone who buys under an "executory contract" in the course of carrying on business. The Disputed Equipment was purchased or leased in the course of carrying on the farming business. This statutory provision does not apply in this case.

18 On behalf of Aldis, reference was made to the attempted seizure by Greendale from Aldis' Property of a Case 8930 Tractor, while his father Alsons was engaged in debt mediation under the FDMA. There is evidence that this farm equipment was sold by Greendale and financed by Case. Deere claims no interest in this equipment. The relevance of this incident to these proceedings is not apparent.

19 His counsel also pointed out that a Deere 840 Loader appears twice as Disputed Equipment, once under Aldis (see para. [8] above); again under Alfons (see para. [10] above). This is cited as "double counting". Deere responded that if it is, the appropriate adjustment will be made. Obviously, Deere cannot recover twice for the same item of Disputed Equipment. That is an issue to be resolved in the actions. It is not an issue that needs to be resolved on the Deere Motions.

20 Finally, his counsel stressed the need for Aldis to continue to retain possession of the Disputed Equipment to use in his farming operations. His father is no longer farming on his own, but is assisting Aldis. There is little evidence as to which items are being used on Aldis' Property in his farming operation, and which are "rusting" in the "weeds". (see para. [12] above). Against the plaintiffs' convenience, the court must weigh concerns about maintenance (and continuing insurance) of the Disputed Equipment as affecting the value of the security represented by the Disputed Equipment.

21 On behalf of Alfons, it was acknowledged that he is no longer engaged in farming operations of his own. He contends that he did not sign either Lease No. 155521 (Kuhn Equipment) or Lease No. 667619 (Deere 8310 Tractor and 1840 Loader). (see para [14] above). However, he acknowledges receiving the Kuhn Equipment and his assertion that he made no payments is contrary to the evidence of Deere's account records relating to Lease No. 155521. During cross-examination on his affidavit, he acknowledged making some payments for those items of Disputed Equipment (Transcript of Cross-Examination of Alfons Abolins, May 31, 2004, p. 31 (Q.161).

22 As to the Deere 8310 Tractor, he contends that he never intended to buy that model, but rather a smaller tractor Model 6605. He signed Lease No. 667619 in blank and it was filled in by someone else, and anyway, Aldis is using the tractor. Various allegations were made that the plaintiffs were being "pillaged" by Greendale. These allegations against Greendale remain to be tested in the ongoing actions. Whatever allegations are made against Greendale do not affect the liability of Aldis or Alfons to Deere under the Contracts or the Leases. Deere received a copy of the Farm Financial Statement filed by Alfons Abolins in connection with his proposal to Creditors under the FDMA dated September 25, 2003, (Cassone Affidavit, para. 9, Ex. F). The Financial Statement shows the Kuhn Equipment and the Deere 8310 Tractor and 1840 Loader as among his assets; and the amounts owing to Deere under the Leases as among his liabilities. When the Abolins were maintaining insurance on the Disputed Equipment, their insurance certificate stated that Deere was the "lien holder" on the Deere 8310 Tractor (Affidavit of Aldis Abolins, sworn May 21, 2004, Ex. B).

Law

23 On interim motions for the recovery of possession of property under section 104 of the *Courts of Justice Act* and Rule 44 of the Rules of Civil Procedure, Deere, the plaintiff (by counterclaim) must provide the court with affidavit evidence setting out:

(a) a description of the property sufficient to make it readily identifiable;

(b) the value of the property;

(c) that the plaintiff is the owner or lawfully entitled to possession of the property;

(d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and

(e) the facts and circumstances giving rise to the unlawful taking or detention.

24 In *Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.*, [1996] O.J.

No. 238 (Ont. Gen. Div.), Molloy, J. of this court held that in order to succeed, the plaintiff (by counterclaim) must show "substantial grounds" for its claim that its property is being unlawfully detained by the defendant (by counterclaim). She concluded on this point that:

> Obviously since the order is only for interim recovery pending trial, the degree of proof is less than would be required on a motion for summary judgment. No final disposition of rights is being made. That is not to say, however, that the rights of the parties are not significantly affected even on an interim basis. In many cases, losing possession of goods for the time it takes to bring an action to trial may have serious, and perhaps irreversible consequences. Accordingly, I believe the plaintiff must show more than a probability of success at trial or simply that the plaintiff is more likely to succeed than the defendant. The test is "substantial" grounds, not reasonable grounds or probable grounds. (para. [18]).

25 If the plaintiff (by counterclaim) satisfies the "substantial grounds" test; the "balance of convenience" test must also be satisfied. After being satisfied that the plaintiff (by counterclaim) has substantial grounds for its claim to ownership of the property and that the defendant is wrongfully detaining them, the court must exercise its discretion whether or not to turn the property over to the plaintiff (by counterclaim). "The Rules specifically contemplate that the order can require that the defendant (by counterclaim) keep possession. The posting of security can be required of either party." *Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.*, *op.cit.* (para. [36]).

Decision / Orders

26 Applying the law as stated above to the facts of this case, the court is satisfied that the evidence adduced on the hearing of the Deere Motions adequately meets all the requirements set out in Rule 44 (see para. [23] above). Deere has provided descriptions of the items of Disputed Equipment sufficient to identify them and to establish their current resale value at $170,000, or $126,500, on a "quick sale" value basis (see para. [11] above). Deere has established to the satisfaction of the court that as a result of the substantial and continuing defaults of Aldis and Alfons Abolins under the Contracts and the Leases, respectively, and under the terms of the Contracts and Leases to which the court finds Aldis and Alfons Abolins are parties as Buyer and Lessee, respectively, Deere has an enforceable lawful right to possession of the Disputed Equipment (see para. [15] above); and Aldis and Alfons Abolins are unlawfully detaining the Disputed Equipment.

27 As to the "substantial grounds" test, the court is satisfied that Deere has shown on the evidence that there is a very high probability that its counterclaims in Actions Nos. 1 and 2 will succeed against Aldis Abolins and Alfons Abolins, respectively. The "substantial grounds" test is satisfied. As to the "balance of convenience test, the court is satisfied that this is a proper case to turn the Disputed Property over to Deere. The court is not unaware of the impact its decision will have on the current farm operations of the Abolins on Aldis' Property. However, the court has already expressed its concerns about the lack of care and maintenance the items of Disputed Equipment may have been receiving from the Abolins, the refusal by the Abolins to permit inspection of the Disputed Equipment as well as the spasmodic compliance by them with their contractual obligations to keep the Disputed Equipment insured (see para. [12] above). No payments have been made by the Abolins under any of the Contracts or Leases since October or November 2003 at the latest. Prior to those dates, the Abolins had paid less than a quarter of the amounts financed under the Contracts with Aldis Abolins and payments due under the Leases with Alfons Abolins. There is no likelihood of them being able to meet their respective payment obligations under the Contracts and the Leases in future.

28 Accordingly, an interim order will issue under s. 104 of the *Courts of Justice Act* that Deere may recover possession of the Disputed Property described in paragraphs [8] and [10] of these reasons from Aldis' Property, or wherever else an item of the Disputed Property may be located; and for that purpose employees, agents or other representatives of Deere may enter on Aldis' Property, or wherever else an item of the Disputed Property may be located, to take possession of the Disputed Property and remove the Disputed Property.

29 Although the court may order the posting of security in connection with an interim order issued under section 104 of the *Courts of Justice Act*, counsel made no submissions to the court on that subject. The court has considered whether Deere ought to be required to post a bond as security in this case. In view of the undertaking given by Deere to pay any damages and costs the plaintiffs in Actions Nos. 1 and 2 sustain by reason of this interim order (Cassone Affidavit, para. 6), a security bond will not be required.

30 An order will issue vacating paragraph 1 of the interim order of Dunbar, J., made on October 29, 2003 (see para. [5] above).

Other Orders

31 In the Abolin Motion to consolidate all four actions, an order will issue consolidating Actions No. 1-4 (see para. [1] above). As previously

indicated, this order is made on consent. (see para. [3] above).

Costs

32 If the Abolins and Deere are unable to agree as to the costs of the Deere Motions, counsel may address brief written submissions to the court within 30 days after those orders.

2017 ONSC 2935
Ontario Superior Court of Justice

Baca v. Tatarinov

2017 CarswellOnt 7247, 2017 ONSC 2935, 279 A.C.W.S. (3d) 501, 6 C.P.C. (8th) 104

Ginter Baca and Lease Administration Corporation (Plaintiffs) and Vasili Tatarinov, Vitalii Godonooga, Ontario Consumer Home Services Inc. and Viva Financial Inc. (Defendants)

Carole J. Brown J.

Heard: May 12, 2017
Judgment: May 15, 2017
Docket: CV-17-570057

Counsel: Michael Simaan, for Plaintiffs
Pradeep Chand, for Defendants

***Carole J. Brown J.*:**

1 The moving party plaintiffs, Ginter Baca and Lease Administration Corporation, bring this motion for an order pursuant to Rule 44 of the *Rules of Civil Procedure* and section 104 of the *Courts of Justice Act* for the interim recovery of possession of personal property.

2 The defendants bring a cross-motion for a stay of the action on the ground that the plaintiffs are in default of a requirement of the *Corporations Information Act*, RSO 1990, cC 39 ("*CIA*") and the *Ontario Business Corporations Act*, R.S.O. 1990, c B.16 ("*BCA*"). Both motion and cross-motion were argued before me on May 12.

3 I will first deal with the cross-motion and thereafter with the main motion.

The Defendants Cross-Motion For A Stay Of The Action

4 The defendants submit that the plaintiff is in breach of sections 18(1) of the *CIA* and 115(2)(a) of the *BCA*, in that, at the time of the bringing of this application and the motion, no director was named in the Corporation Profile Report. They further submit that, despite the fact that they brought this to the attention of the plaintiffs, nothing was done to correct this. As a result, the action should be stayed.

5 The CIA, section 18 states as follows:

> (1) A corporation that is in default of a requirement under this Act to file a return or notice or that has unpaid fees or penalties is not capable of maintaining a proceeding in a court in Ontario in respect of the business carried on by the Corporation except with leave of the court.
>
> (2) The court shall grant leave if the court is satisfied that
>
> > (a) the failure to file the return or notice or pay the fees or penalties was inadvertent;
> >
> > (b) there is no evidence that the public has been deceived or misled; and
> >
> > (c) at the time of the application to the court, the Corporation has filed all returns and notices required by this Act and has no unpaid fees or penalties.

6 Subsection 115(2) of the *BCA* states:

> (2) A corporation shall have a board of directors which shall consist of,
>
> > (a) in the case of a corporation that is not an offering corporation, at least one individual; and
> >
> > (b) in the case of a corporation that is an offering corporation, not fewer than three individuals.

7 It is the submission of the plaintiffs that the filing was corrected shortly after the omission to name a director was brought to their attention. They stated that the issue was brought to their attention in April 2016 and, once their counsel returned from out of country, it was attended to and corrected in May 2016. The plaintiff, Ginter Baca, stated in his affidavit and on cross-examination on the affidavit that he had been the Director since 2003 and that the omission was inadvertent and was corrected. Both in the motion record and at the return of the motion on May 12, evidence was adduced of the correction of the filings, which indicated that Mr. Baca was director of LAC and had held that position since 2003.

8 Pursuant to the *Courts of Justice Act (CJA)*, section 106, a court, on its own initiative or on motion by any person, whether or not a party, may stay

any proceeding in the court on such terms as are considered just. Pursuant to section 18(2) of the *CIA*, the court shall grant leave if the court is satisfied that the tests set forth therein have been satisfied.

9 I am satisfied based on the evidence before me that the failure to name a director was inadvertent and was corrected within a reasonable time after it was brought to the plaintiffs' attention. There is no evidence to indicate that the public was deceived or misled by the inadvertence. The error in the Corporate Profile Report was corrected following its being brought to the plaintiffs' attention. I am satisfied, based on the searches done on December 19, 2016 and May 12, 2017, and the Corporation Profile Reports produced at the times of those searches, contained in the evidence before this Court, that the inadvertent breach was rectified well prior to the hearing of this motion.

10 Accordingly, I grant leave to permit the plaintiff to proceed with its motion pursuant to Rule 44 of the *Rules of Civil Procedure*. While the defendant argued that the plaintiff had not sought leave from this court, on the basis of section 106 of the CJA, I am satisfied that, just as this Court may, on its own initiative or on a motion by any other party, stay any proceeding in the court it may, rather than staying the preceding, grant leave to continue the proceeding.

The Motion Pursuant to Rule 44 of the Rules of Civil Procedure

11 Lease Administration Corporation ("LAC") is the licensee under a License Agreement with Decision Systems Inc. This License Agreement entitles LAC to the non-exclusive use of an equipment, vehicle and personal property lease portfolio management software system known as "Infolease" together with its integral operating platform by Unidata. The License Agreement specifically prohibits LAC from transferring, assigning, sublicensing or permitting the use of the system by any other party. Any contravention of these restrictions could void the license. The license remains active to this date.

12 The Infolease software operated by LAC is, according to the plaintiff, a unique assembly of hardware and software products that cannot be purchased or replicated in its current form. LAC maintains that it has spent 25 years and hundreds of thousands of dollars building and developing programs that surround this application to customize it and allow it to produce product for the marketplace.

13 LAC generates its primary income through the provision of contract administration and management services to financial institutions, lenders, vendors and other companies involved in the leasing and finance industry.

In order to provide the services, LAC is entirely reliant on the Infolease system and other applications developed by it and at its expense that integrate with Infolease.

14 In November 2013, LAC began providing the services to Ontario Consumer Home Services Inc. ("OCHS") pursuant to an Administration Agreement concluded between the parties.

15 In January 2014, the individual defendants, Vasili Tatarinov and Vitalii Godonooga ("the individual defendants"), the controlling minds of OCHS, proposed to the individual plaintiff, Ginter Baca ("the individual plaintiff" or "Baca") that LAC combine its resources and operation with OCHS and the defendant, Viva Financial Inc. ("Viva"), which was not, at that time incorporated.

16 The proposal was accepted and LAC moved its offices and the LAC property into OCHS premises in March 2014.

17 Negotiations ensued regarding the structuring of the new agreement, but the parties were unable to reach a final agreement and the three entities, LAC, OCHS and Viva continued as separate legal entities.

18 LAC billed OCHS for administration services rendered by LAC regarding the Infolease system, pursuant to the Administration Agreement from October 2013 through April 2015.

19 In April 2015, there were discussions regarding sale of LAC stock to the individual defendants and, in contemplation of reaching a final agreement, Viva assumed responsibility for payment of the salaries, benefits and other amounts to become due to LAC employees, and also certain of LAC's operating expenses. Further, Baca was hired as Viva's president. In May 2015, with the benefit of the LAC property and related services supplied by LAC, Viva began billing OCHS monthly for the contract administration services previously billed by LAC for its own benefit. Viva continues to bill OCHS to this date.

20 However, in January 2016, due to a financing issue with Sun Life, Baca was terminated as president of Viva, without cause or notice and was prevented from accessing the premises from which OCHS, Viva and LAC operated and which is also where the LAC property (software and hardware) is located.

21 Attempts were made unsuccessfully to negotiate a satisfactory exit package for Baca, coupled with a purchase of the LAC property. In September, 2016, as no agreement was reached, LAC forwarded a revised

administration agreement to the defendants which set forth the cost of LAC continuing provision of services to OCHS. No response was received. Nevertheless, LAC began invoicing OCHS and Viva for services. To date, no invoices have been paid for administration services or the continued use of the LAC property, which remains with the defendants. As a result, the statement of claim in this matter was issued on February 21, 2017, which includes a request for an interim order under Rule 44.

22 In order to continue operating and generating profit, LAC has entered into negotiations to execute new administration agreements with clients. However, these administration agreements are contingent on LAC's continued ability to use Infolease and the other LAC property for the benefit of these new clients and to continue to provide contract administration and management services. Accordingly, it seeks, on an urgent basis, the return of the LAC property, given the time sensitive nature of the administrative agreements into which it is proposing to enter.

23 In response to this application, the defendants maintain that without the Infolease system, Viva would lose access to the data stored on the system for 37,000 customers, including billing and collection information for its customers, and, as a result, would lose those customers, suffer a significant financial loss and be exposed to claims from its financial partners, customers and third parties that rely on the Infolease system. However, the plaintiffs are amenable to having the defendants print or download the records contained in the Infolease system at any time prior to return of the LAC property to LAC.

24 Further, the defendants submit that, if the LAC property is returned to LAC, they will be unable to complete the administration services going forward. However, LAC has undertaken to continue to provide administration services to Viva through use of the LAC property on the same basis that it provided services to them prior to the attempts to merge, and on the condition that Viva enter into an administration agreement with LAC for said administrative services, in the same way the services were provided to OHCS prior to the attempted merger with LAC. This proposal would permit the defendants to continue using the LAC property, but provide LAC with control of its property and the ability to use it for the benefit of other clients as well. While the defendants maintain that the amounts sought for payment for services are well beyond market prices today, they have not provided any evidence to support this contention.

25 It is the position of the defendants that LAC has unfettered access to the Infolease system through VPN, which allows it to perform contract administration and management services for clients. It concedes, in its materials, that the VPN is not exclusive or private. The defendants further

submit that the plaintiffs are, as a result, able to fully carry on business with their clients. Indeed, the defendants maintain that the plaintiffs are currently using the Infolease system. There is no evidence before this Court to that effect. The plaintiffs maintain that the VPN does not provide them with exclusive access to their new clients' information, which could also be accessed by the defendants. As a result, they cannot guarantee their new clients confidentiality of information as regards their systems.

26 As regards the hardware sought to be returned, it remains in the OCHS premises. The plaintiff maintains that there is no issue as to the ownership by LAC of the hardware, that no issue was raised in the statement of defence and there was no evidence from the defendants before this Court that raised an issue regarding ownership. At this motion, the defendant took the position that in cross-examination, Ginter Baca was unable to produce receipts or invoices regarding purchase by LAC of the hardware in question, such that there is no evidence that it was, in fact, owned by the plaintiffs.

The Law

27 The test for an Order pursuant to section 104 of the *Courts of Justice Act* and Rule 44.01(1) of the *Rules* is as follows:

> 1. There are substantial grounds for the plaintiff's assertion that it is the legal owner or entitled to possession of the property;
>
> 2. There are substantial grounds for its claim that the property is being unlawfully detained by the defendants; and
>
> 3. The balance of convenience favours the plaintiff.

Clark Door of Canada Ltd. v. Inline Fiberglass Ltd. (1996), 45 C.P.C. (3d) 244 (Ont. Gen. Div.) at paras 11, 17 and 18; *Knew Order Co. v. 2291955 Ontario Inc.*, 2012 ONSC 3091 (Ont. S.C.J.)

28 In order to establish entitlement to an Order pursuant to Rule 44.01, the moving party must establish the following:

1. A description of the property sufficient to make it readily identifiable;
2. The value of the property;
3. That the plaintiff is the owner or lawfully entitled to possession of the property;
4. That the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the plaintiff; and

5. The facts and circumstances giving rise to the unlawful taking or detention.

Analysis

29 Based on all of the evidence before me, I am satisfied that the moving party plaintiffs have established the tests, as set forth at paragraph 28 above, and the requisite elements of their motion as set forth above at paragraph 29, above.

30 Pursuant to paragraph 29, above, the plaintiffs have provided a detailed description of the property such that it is readily identifiable, at Schedule A of the motion record and Schedule C of the factum. The plaintiffs maintain that the property is unique, such that it is difficult to determine a value for it. They have, nevertheless, accepted the defendants' value of $750,000 as the cost of replacement of the Infolease system. The plaintiffs maintain that, in any event, the value of property would only be relevant if a security payment pursuant to Rule 44 were found to be appropriate. I am satisfied that there are sufficient grounds to found its assertion that it is the legal owner of the property and that the property has been unlawfully retained, as set forth below.

31 I am satisfied that there are substantial grounds for the plaintiffs' assertion that LAC is the rightful owner of or entitled to the possession of the LAC property. The LAC property comprises the LAC Infolease license and surrounding systems. The defendants do not dispute that the LAC property belongs to LAC, nor have they claimed ownership over any part of that property. Indeed, the defendants attempted to purchase the LAC property, but negotiations proved unsuccessful. Had LAC not been the rightful owners/licensees of the property, there would have been no need for negotiations concerning a purchase from LAC by the defendants of the said property. I note that LAC's licensing agreement contains restrictions against assigning, sublicensing or permitting the use of Infolease by third parties, as set forth in paragraph 12, above. Thus, a majority of LAC's shares would have to be purchased by the defendants in order to exercise effective control over LAC's assets. No such purchase was ever effected between the parties.

32 While the defendant submitted that on cross-examination on the affidavit of Mr. Baca, he was unable to produce any bills, receipts or other documentation proving ownership of the hardware, there was equally no evidence to suggest that it was not the plaintiffs' property or that it was owned by the defendants. I do not accept the defendants' submissions in this regard.

33 I am further satisfied that there are substantial grounds for the claim that the property is being unlawfully detained by the defendants. The evidence before this Court indicates that the defendants have had possession and control of the LAC property to the exclusion of LAC since approximately January of 2016 and have failed to pay LAC for the use of the Infolease system since September 2016. There is no dispute before this Court that the defendants are in possession of the LAC property. While the plaintiffs have requested the return of the LAC property on numerous occasions, the defendants have refused to do so. Based on the evidence before me, I do not accept the defendants' submissions that no request was ever made to them to return the property.

34 I am satisfied that the balance of convenience in this case favours the return of the LAC property by the defendants to LAC. Without return of its property, LAC cannot operate its business nor generate income. It has contracts under negotiation with new clients but is unable to realize on them until it has possession and control of the LAC property. LAC has proposed options to respond to the concerns raised by the defendants as regards return of the property to LAC, as set forth at paragraphs 24-25, above. These include permitting the defendants to download all their client information or returning to the relationship of the parties prior to LAC moving into the OHCS premises, when the relationship was simply that of provision by LAC of the Infolease services to OHCS for payment of said services pursuant to the Administration Agreement. Based on the foregoing, I find that LAC will suffer serious harm if the property is not returned, such that the balance of convenience favours LAC in the return of the property to it.

35 It would seem most appropriate pending trial and until the defendants are able to find a replacement system if they so desire, which they stated in their materials may take six months or so, that the parties resume the relationship they had prior to LAC moving into the OHCS premises, with LAC providing its administrative services and the defendants paying for same. Any issue that the defendants may have regarding the amount of said payments to be made to LAC is an issue to be determined at trial and any adjustments in that regard would be made at trial.

36 As regards the posting of security, this was not vigorously argued by either side. The responding party defendants acknowledged that pursuant to Rule 44.03, the court may, but is not required to, order security, and simply submitted that it should be ordered in this case consistent with Rule 44 and CJA section 104. The moving party plaintiffs submitted that security is generally ordered where there is a dispute over ownership, which does not exist here where there is no real dispute over ownership.

37 I have considered the case law relied upon by the parties, including *Clark Door*, *supra* and *Knew Order Co.*, *supra.* I do not find in the circumstances of this case that security need to be posted. There is no serious argument as regards ownership of the property and no serious or irreversible consequences which need be protected or indemnified against, particularly given the proposals of LAC, as set forth at paragraphs 24 and 25, above. As a result, no security is required or posted by the plaintiff.

38 Order to go as sought by LAC granting an interim interlocutory order requiring the defendants to deliver up to the plaintiffs the LAC property, as defined in Schedule A of the supporting affidavit to the motion record, forthwith and, at latest, within 10 days of the date of this decision, and until further court order or determination of the issues raised in the action.

Costs

39 The plaintiffs, as the successful parties, are entitled to costs, which they seek on a partial indemnity basis in the total amount of $14,403.59. This is slightly less than the amount sought by the defendants in their Bill of Costs and is reasonable and proportionate in all of the circumstances. I grant the plaintiffs their costs in the amount of $14,403.59, all inclusive, payable forthwith.

Motion granted; cross-motion dismissed.

1992 CarswellOnt 408
Ontario Court of Justice (General Division)

Businex Business Centres (Can.) Inc. v. TR Services Ltd.

1992 CarswellOnt 408, [1993] O.J. No. 996, 17 C.P.C. (3d) 313, 40 A.C.W.S. (3d) 45, 4 W.D.C.P. (2d) 310

BUSINEX BUSINESS CENTRES (CANADA) INC. v. TR SERVICES LIMITED and CABLE & WIRELESS COMMUNICATIONS INC. carrying on business as CABLE AND WIRELESS COMMUNICATIONS

Dunn J.

Judgment: May 3, 1992
Docket: Doc. Brampton C11514/91

Counsel: *Robert A. Cobham, Q.C.*, for moving parties (defendants and plaintiffs-by-counterclaim).
R.S. Sleightholm, for responding party (plaintiff and defendant-by-counterclaim).

***Dunn J.*:**

Introduction

1 This is a motion by the defendants for an interlocutory injunction for interim recovery of personal property under r. 40.01 and s. 104(1) of the *Courts of Justice Act*. The property in question, telephone equipment, is clearly the property of the defendant. The issue to be decided is, therefore, whether in the circumstances of this case, an order should issue for the return of the property or, in the alternative, requiring the plaintiff to pay moneys or security into court or to the defendants.

The Facts

2 While the facts of this case are fairly complicated I need only set out a brief description for the purposes of disposing of this motion. Early in 1990 the defendant/plaintiff-by-counterclaim ("Cable and Wireless") contracted with the plaintiff/defendant-by-counterclaim ("Businex") to supply and install on a rental basis certain telephone switching systems. The agreements also provided for Cable and Wireless to provide servicing and support for these systems. Three separate contracts for three telephone systems were entered into; each requiring monthly payments of $2,006.86, $2,044.66 and $1,822.58 per month, respectively. Each contract was for a

different location at which Businex carried on business and embodied specific provisions as to the defendants "material representations". The preamble to the "material representations" provided as follows:

> T.R. Services Limited (hereinafter called the "Company") has agreed to the following conditions and has made the following Material Representations to Businex Business Centres (Canada) Inc. (hereinafter called the "Subscriber") upon which the Subscriber is relying in order to enter into this Telephone System Agreement. If the conditions are not reasonably met by the Company or if the material representations as noted below are not substantially true, then the Subscriber, in its sole discretion, in addition to any other legal remedy which it may have, shall have the option to terminate this Agreement and shall be entitled to a complete refund of any monies paid to the Company by the subscriber or to the financial company acting on its behalf.

3 There appear to have been a number of glitches with the systems from the outset, some of which have been worked out while others have not. The plaintiff had also complained about the quality and cost of the servicing provided by the defendants. It appears that the business relationship between Businex and Cable and Wireless began to deteriorate.

4 On April 2, 1991 Cable and Wireless gave notice to the plaintiff that it wished to remove the systems and that it would seek to do so on or about July 2, 1991. The defendants contend that this step was taken in light of the arrears of rental payments. Later that month, on April 24, 1991, the plaintiff provided Cable and Wireless with written notice of its intention to terminate the rental contracts and to make arrangements to replace the telephone systems within six to eight months. Cable and Wireless accepted this "termination" and attempted to arrange to retrieve the telephone systems on December 2, 1991.

5 Businex refused to allow the system to be removed and commenced this action on November 28, 1991 claiming $1,500,000 in damages for breach of contract. The plaintiff had been unable to find a replacement system at a cost it can afford and in light of its action asks to maintain possession of the systems as security for its claim.

6 The defendants rely, amongst other things, upon the rental contracts which contain the following provisions:

> 9. THE COMPANY shall at all reasonable times have access to the premises of the Subscriber to install inspect and repair the Installation during the continuance of the hiring and to remove the same after the termination of this Contract.

11. IF THE SUBSCRIBER SHALL REPUDIATE this Contract and the Company shall accept such repudiation so as to terminate this Contract the company may thereupon remove the installation and the Subscriber shall pay to the Company all payments then accrued due and also a sum equal to the present value on a five per cent basis of the remaining rentals that would have been payable under this Contract if not so terminated less an allowance of twenty-five per cent to cover the estimated costs of maintenance and value of recovered material. The said sum shall be payable as liquidated damages it being an agreed estimate of the loss the Company would suffer.

7 It is obviously to the plaintiff's advantage to delay the return of the property of the defendants as long as possible. While in possession of the equipment, it makes use of it on a daily basis yet has not paid anything under the rental contract for some time. In spite of Businex's expressed intention to replace the system as quickly as possible, something the plaintiff asserted would take six to eight months, it has failed to do so. Furthermore, there is little before me in the way of evidence to support the conclusion that it has made any real effort to do so.

The Law

8 Rule 44.01 states as follows:

> 44.01(1) An interim order under section 104 of the *Courts of Justice Act* for recovery of possession of personal property may be obtained on motion by the plaintiff, supported by an affidavit setting out,
>
> (*a*) a description of the property sufficient to make it readily identifiable;
>
> (*b*) the value of the property;
>
> (*c*) that the plaintiff is the owner or lawfully entitled to possession of the property;
>
> (*d*) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and
>
> (*e*) the facts and circumstances giving rise to the unlawful taking or detention.

9 The determination of the merits of this action is not within the scope of my inquiry on this motion. While the plaintiff's claim may indeed have merit it is not for me to decide. The law is clear on the scope of the inquiry

of R. 44, similar to that of R. 359 which is no longer in force. It is set out in *Ryder Truck Rental Ltd. v. Walker* (1959), [1960] O.W.N. 70 (H.C.) affirmed [1960] O.W.N. 114 (H.C.) at p. 71:

> The first matter for consideration is the scope of the enquiry under Rules 359-60. Having regard to the nature of the relief obtainable in a replevin action, which allows a preliminary taking of possession before trial, in my view it is not contemplated that the Court at this stage should embark upon a trial of the issues raised but only require the plaintiff to show the facts upon which it bases its claim, and if these facts afford substantial grounds for the plaintiff's claim, then the order should be granted. This is consistent with *Gilchrist v. Conger* (1854), 11 U.C.Q.B. 197, where it was held on an application to set aside a *praecipe* order that the question of whether the defendant did in fact either take or detain the goods must be left to be ascertained upon the trial as that involved the merits of the case. Therefore, in my opinion the enquiry is limited to determining whether there are substantial grounds for the plaintiff's allegations, which if proved, bring the case within the statute.

10 What is required to succeed in such a motion was stated in *Employers Liability Assurance Corp. v. Metropolitan Toronto (Municipality)*, [1966] 2 O.R. 485 (Co. Ct.) at p. 487:

> Therefore, in order to succeed in an action for replevin or for an interim order under Rule 359, a plaintiff needs only to provide that at the time of the commencement of the action he was the owner or was entitled to the possession of the chattel in question and that it was at that time being wrongfully detained from him: *MacDenzie et al. v. Somers*, [1954] 1 D.L.R. 421.

11 I should note at this point that although I have referred to Cable and Wireless as the defendants throughout these reasons they seek the relief under R. 44 as plaintiffs-by-counterclaim. Counsel for Cable and Wireless assert that their clients are the lawful owners of the telephone systems and support their claim with reference to both affidavit material and the written contracts between the parties. This assertion is not denied by counsel for the plaintiff who does not submit in his factum that the defendants are not the lawful owners of the telephone system but rather that the equipment is being used by the plaintiff at their business premises. The plaintiff alleges that the removal of the equipment will destroy the ability of Businex to provide the telephone answering services they offer, thereby increasing the damages already claimed. Furthermore, the plaintiff asserts that the value of the equipment is less than the liquidated claim outstanding and significantly less than the unliquidated claims for business loss. Counsel for Businex

therefore submits that it should be per mitted to maintain possession of the telephone equipment as security.

12 Both the decision of Mr. Justice O'Driscoll in *Abel/Noser Corp. v. Computerized Portfolio Services Inc.* (1987), 58 O.R. (2d) 633 (H.C.) and that of Master Peppiatt in *Gray Metal Industries Inc. v. 55319 Ontario Ltd.* (1984), 41 C.P.C. 314 (Ont. Master) refer to a consideration of the equities of the situation. The *Abel/Noser* decision is however distinguishable on the facts. In that case the party seeking the return of the property was unable to clearly identify the personal property which was the subject of the order sought. Furthermore, Mr. Justice O'Driscoll is clear in stating the factual circumstances which resulted in the pronounced equities upon which he laid his decision. The equities in favour of the respondent/plaintiff in the case at bar are less obvious.

13 Master Peppiatt in the *Gray Metal* case discusses the equities of the situation stating that he was tempted to withhold the issuance of the order on the equities, but then allowed the order to issue. He provided for the compensation of any possible harmful consequence of the order by requiring that security be posted. In this case, any harmful consequences of an order for interim recovery of the telephone systems may be compensated by way of damages upon the conclusion of the trial upon the merits. Furthermore, there is not, in my opinion, a strong argument for the necessity of having a large amount of security posted by Cable and Wireless in this case should an order for the return of the property issue.

Conclusion

14 This is clearly a case where a mandatory injunction for the recovery of the property should issue. I have considered the equities of the situation and while there is a substantial argument to be made in favour of allowing the plaintiff to maintain possession of the property given their ongoing need for it, it is not entirely compelling. The plaintiff has benefitted for some time by being in possession of the equipment yet not seeing fit to pay the monthly rental payments. The equities favour allowing the defendants to retrieve their equipment so that they may make use of it before its value due to depreciation declines even further.

15 The defendants will be entitled to enter into the premises occupied by the plaintiff, after providing seven days' written notice, to remove its equipment listed in schedule "A" to the defendants' factum which corresponds to the schedules of equipment to each of the three contracts in question. With respect to the issue of security, this is not, in my opinion, a case where there should be an order requiring it. The plaintiff will, as well, pay to the defendants the total of the monthly rental payments due for the

months of December, January and February of 1991 and thereafter the monthly payments from the date of this order until the recovery of the equipment by the applicant/defendants.

16 There will remain unpaid, many months of payments since the termination of the contract. This amount should properly await the final determination at trial in view of the claim of the plaintiff and the defendants' counterclaim.

17 In the event that the plaintiff wishes to use the system for a longer period of time, I leave it to the participants to agree as to the terms of any such arrangement, subject to any final determination at trial.

Costs

18 The defendants/moving party will have their costs on a party-and-party basis forthwith in the amount of $750.

Motion granted.

1996 CarswellOnt 193
Ontario Court of Justice (General Division)

Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.

1996 CarswellOnt 193, [1996] O.J. No. 238, 45 C.P.C. (3d) 244, 60 A.C.W.S. (3d) 712, 7 W.D.C.P. (2d) 100

CLARK DOOR OF CANADA LTD. (plaintiff/moving Party) v. INLINE FIBERGLASS LTD. (defendant/responding party)

Molloy J.

Judgment: January 29, 1996
Docket: Doc. 95-CU-94298

Counsel: *Thomas G. Andrews*, for moving party (plaintiff).
Gordon Capern, for responding party (defendant).

***Molloy J.*:**

1 This is a motion brought by the plaintiff Clark Door of Canada Ltd. ("Clark Door") for interim recovery of personal property currently in the possession of the defendant, Inline Fiberglass Ltd. ("Inline"). The subject matter of the application is certain pultrusion dies used in making fiberglass door frames.

Background Facts

2 Clark Door sells doors and related products. Inline is a manufacturer of fiberglass doors and windows using a method of fiberglass pultrusion. This is a process whereby fiberglass is injected with resins and pulled through a heated die into a form created by the shape of the die. Inline manufactures the dies used in the pultrusion process but this is as an adjunct to its pultrusion business. It is the pultrusion business itself (i.e. the manufacturing of doors, windows and frames) which Inline looks to as its main profit centre. Also, Inline sells doors and windows directly to builders.

3 In 1992 Clark Door entered into an agreement with Inline whereby Inline was to manufacture pultrusion dies and thereafter use those dies to manufacture fiberglass door frames for Clark Door. As agreed, Clark Door paid approximately $75,000 to Inline in respect of the agreement for the manufacture of the dies. Thereafter Clark Doors for a period of years purchased fiberglass products from Inline, including products manufactured using the dies. These transactions were separately invoiced and paid for.

The business relationship between Clark Doors and Inline began to deteriorate and ultimately Clark Doors decided to manufacture its own door frames. Clark Door asked Inline to return the dies so that Clark Doors could use them in its own manufacturing process. Inline refused taking the position that although Clark Door had "ownership" of the dies, it was a term of their agreement that only Inline would ever be entitled to possession of them. Inline maintains that it used a highly confidential secret technology to manufacture the dies and that this process is unique. Inline asserts that it has spent many years and $15 million of capital investment developing this technology. Further, Inline says that if others are able to look at and examine the dies they will be able to figure out the process and Inline will thereby have lost its competitive advantage arising from this proprietary technology.

4 Clark Doors commenced an action against Inline in November of 1995 and served along with the statement of claim a motion for interim relief. On the consent of Inline, an interim injunction was granted by Lissaman J. on November 29, 1995 restraining Inline from disposing of the dies until further order of the court. Inline is prepared to continue that injunction until the final resolution of the action or, alternatively, is prepared to place the dies in the hands of somebody else for safekeeping pending trial. Clark Doors, on the other hand, has brought this motion for interim recovery of the dies. Clark Doors says it has exhausted its supply of fiberglass door frames and wishes to begin immediately to manufacture its own frames using the dies. Clark Doors has already purchased the equipment it needs to do the manufacturing. It objects to being required to purchase new dies and the new dies manufactured and the lost profits resulting from the time that would take.

The Legal Test for Interim Replevin

5 The authority of a judge to make an order for interim recovery of personal property is set out in s. 104 of the *Courts of Justice Act* which provides:

> *104.*-(1) In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,
>
> (*a*) was unlawfully taken from the possession of the plaintiff; or
>
> (*b*) is unlawfully detained by the defendant,
>
> the court, on motion, may make an interim order for recovery of possession of the property.
>
> (2) A person who obtains possession of personal property by obtaining

or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property.

6 The essential evidence to be put before the Court on a motion for interim recovery is listed in Rule 44.01(1) as follows:

> 44.01(1) An interim order under section 104 of the *Courts of Justice Act* for recovery of possession of personal property may be obtained on motion by the plaintiff, supported by an affidavit setting out,
>
> (a) a description of the property sufficient to make it readily identifiable;
>
> (b) the value of the property;
>
> (c) that the plaintiff is the owner or lawfully entitled to possession of the property;
>
> (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and
>
> (e) the facts and circumstances giving rise to the unlawful taking or detention.

7 The powers of the judge on disposition of the interim recovery motion are set out in Rule 44.03(1) which provides:

> 44.03(1) On a motion for an interim order for recovery of possession of personal property made on notice to the defendant, the court may,
>
> (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant and give it to the plaintiff;
>
> (b) order the defendant to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the plaintiff security in such form and amount as the court approves, and direct that the property remain in the possession of the defendant; or
>
> (c) make such other order as is just.

8 It is to be noted that there is a broad residual discretion under Rule 44 to make whatever order is just. However, the Rule specifically contemplates that the party obtaining possession may be required to post security. Whether the security is in fact required and, if so, the amount of the security

to be ordered is within the discretion of the judge hearing the motion. However the amount of security suggested by the Rule is twice the value of the property. Further, it is significant that the Rule contemplates the possibility of requiring a defendant to pay security if the defendant is to retain the property pending trial. These provisions are consistent with s. 104(2) of the *Courts of Justice Act* as well as with the general principle that a person obtaining an injunction is generally required to give an undertaking as to damages caused by the injunction if it is subsequently found to have been unwarranted. (As will be referred to below, there are some overlaps in the law relating to interim injunctions and the law on interim replevin).

9 The classic and oft quoted statement of the test to be applied before making an interim recovery order is that propounded by the Senior Master in *Ryder Truck Rental Ltd. v. Walker* (1959), [1960] O.W.N. 70 (H.C.), a case involving the disputed ownership of 20 trucks under the *Replevin Act* R.S.O. 1950, c. 339, s. 2 and Rules 359 and 360 (the precursors of the current legislation and Rules set out above). The Senior Master ruled:

> The first matter for consideration is the scope of the enquiry under Rules 359-60. Having regard to the nature of the relief obtainable in a replevin action, which allows a preliminary taking of possession before trial, in my view it is not contemplated that the Court at this stage should embark upon a trial of the issues raised but only require the plaintiff to show the facts upon which it bases its claim, and if these facts afford substantial grounds for the plaintiff's claim, then the order should be granted. ...
>
> Therefore, in my opinion the enquiry is limited to determining whether there are substantial grounds for the plaintiff's allegations, which if proved, bring the case within the statute.

10 The Senior Master's Order was upheld on appeal by Ferguson J., [1960 O.W.N. 114 (H.C.) who held at p. 114:

> The plaintiff had shown *prima facie* that it had a right to possession that it had the legal title of the vehicles. The documents supported the plaintiff's case and they did not support the defendant's case.

11 The "substantial grounds" test has been consistently applied by the courts since 1960: See e.g. *Businex Business Centres (Can.) Inc. v. TR Services Ltd.* (1992), 17 C.P.C. (3d) 313 (Ont. Gen. Div.); *R.N. Holdings Ltd. (Receiver of) v. Wong* (1990), 45 C.P.C. (2d) 101 (Ont. Master); *Employers Liability Assurance Corp. v. Metropolitan Toronto (Municipality)*, [1966] 2 O.R. 485, [1966] 4 C.C.C. 334 (Co.Ct.); *Robert Cooper Productions Inc. v. J.S. Kastner Associates Ltd.* (1982), 24 C.P.C.

269 (Ont. Master); *Peco Tool & Die Ltd. v. 939991 Ontario Ltd.* (1993), 19 C.P.C. (3d) 123 (Ont. Gen. Div.).

12 The defendant Inline concedes that "substantial grounds" is the proper test but argues that when the question of ownership is contested and cannot be foretold and especially when findings as to credibility must be made, the substantial grounds test is not satisfied. Reliance is placed primarily on three cases: *Robert Cooper Productions Inc. v. J.S. Kastner Associates Ltd.; Peco Tool & Die Ltd. v. 939991 Ontario Ltd.*; and *Tuffy v. Schloendorf*, [1993] O.J. No. 1581 (Gen. Div.). Although in each of those cases the plaintiff's motion for interim recovery was denied, the reasoning applied does not in my view deviate from the substantial grounds test set down in *Ryder Trucks* and the cases that followed it.

13 In *Robert Cooper Productions* the plaintiff a movie producer, entered into a contract with the defendant writers to write a "treatment" for a screen play. The agreement provided that the plaintiff was granted all rights to the products of the writers' services. The finished product "treatment" was turned over to the plaintiff. The plaintiff also claimed entitlement to the defendant's tapes and notes of interviews and this was the subject of the replevin action. Master Donkin held at p. 271-272:

> In this case we are concerned not with goods which ever were in the possession of the plaintiff but rather goods that were created in the course of doing the work called for by the contract between the parties, and the whole case falls to be determined on the interpretation of the agreement which will be done either by an arbitration under the I.P.A. agreement or as a result of a trial, or other final disposition of this action. It is not a case involving goods in which the title is obviously or apparently or most likely vested in the plaintiff and where the defendant sets up a contrary claim by way of lien or charge, but rather a situation where the whole case will turn on the ownership of the chattels and that in turn will depend on the interpretation of the contract. In my view, the plaintiff has not shown to me that he has any more likelihood of success than the defendant. It is my view that it is not appropriate nor consistent with the whole idea of replevin to make an order at this stage which must be based on the finding that the plaintiff is the owner when that proposition is contested and where the outcome of the contest cannot be foretold.

The defendant relies on this case as supporting its argument that where the whole case turns on the ownership question and the interpretation of a contract, then an interim recovery order should not be made. I do not agree. A great many replevin actions turn on the ownership or right to possession of chattels and the interpretation of the agreement between the parties. That is, indeed, the very nature of replevin actions. I believe Master Donkin's

decision in this case really turned on his finding that he could not say that the plaintiff had shown more likelihood of success than the defendant and that therefore the plaintiff did not meet the substantial grounds test.

14 Likewise, in *Peco Tool & Die* the motions judge accepted the substantial grounds test but found that the test was not met by the plaintiff.

15 Again, to a similar effect is the decision in *Tuffy v. Schloendorf* in which Carter J. held:

> Because of the differing affidavits of the parties as to their intention when the original document was signed, and the several alterations and proposed alterations in terms discussed between the parties, I am satisfied that the question of ownership cannot be determined - or substantial grounds shown — without a full trial, where credibility will certainly play a part.

16 I agree that if it is not possible because of credibility issues and competing affidavit evidence to find that the plaintiff has shown "substantial grounds" then the plaintiff should not be successful on its motion. However, I do not see *Tuffy v. Schloendorf* as going beyond that. Accordingly, in my opinion the plaintiff is required to show substantial grounds supporting the claims advanced to meet the test required under the Act and Rule 44.01. This test is not altered by the three cases referred to by the defendant as discussed above.

17 I accept the submission of Mr. Capern that the plaintiff must satisfy all of the elements listed in Rule 44.01(1). In particular, it is not enough for the plaintiff to prove ownership or lawful entitlement to possession (as required by Rule 44.01(1)(c)). The plaintiff must also show that the property was "unlawfully taken" or is "unlawfully detained" (Rule 44.01(1)(d)). These are cumulative. Further, it is not enough for the plaintiff to assert that it is the owner and that the right to possession simply flows from that. Rather, there is a positive onus on the plaintiff to establish substantial grounds for its claim that its property is being unlawfully detained by the defendant.

18 It is not easy to articulate precisely the degree of proof which is required to meet the "substantial grounds" test. While the case law consistently identifies "substantial grounds" as the proper test, it is not immediately obvious where that test fits into the broad spectrum. Obviously since the order is only for interim recovery pending trial, the degree of proof is less than would be required on a motion for summary judgment. No final disposition of rights is being made. That is not to say, however, that the rights of the parties are not significantly affected even on an interim

basis. In many cases, losing possession of goods for the time it takes to bring an action to trial may have serious, and perhaps irreversible consequences. Accordingly, I believe the plaintiff must show more than a probability of success at trial or simply that the plaintiff is more likely to succeed than the defendant. The test is "substantial" grounds, not reasonable grounds or probable grounds.

19 The nature of a replevin order is in many ways similar to that of an injunction. Accordingly, I find the standard of proof applied in interlocutory injunctions to be useful for comparative purposes. Since *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 205, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725 (Div. Ct.) our courts have required that a party seeking an interlocutory injunction establish a "substantial issue to be tried". This is the threshold question and if it is answered in the affirmative a number of other issues must then be considered before relief should be granted (e.g. whether there would be irreparable harm unless an injunction is granted and the balance of convenience). *Yule v. Atlantic Pizza Delight* specifically rejected the "strong *prima facie* case" test which had formerly been applied in injunction cases and instead adopted the "substantial issue test" established by the English House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396. The reasoning in *American Cyanamid* was essentially adopted by the Supreme Court of Canada in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385. The "substantial issue" test for general interlocutory injunctions is not a difficult one to meet. In *RJR-Macdonald* the Supreme Court of Canada observed at p. 402:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claims is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: See *Metropolitan Stores, supra*, at p. 350. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of a leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

20 The "strong *prima facie* test continues to be applied, however, in Mareva injunction cases which, of course, are much more draconian than other forms of interlocutory injunctions. (*Chitel v. Rothbart* (1982), 39 O.R. (2d) 513, 141 D.L.R. (3d) 268, 69 C.P.R. (2d) 62 (C.A.).)

21 The impact of an interim replevin order seems to me to fall somewhere between the general interlocutory injunction and the Mareva injunction. It goes further than the interlocutory injunction in that it does not simply restrain the defendant from using the asset but requires delivery up of the asset to the plaintiff. On the other hand, it does not go as far as the Mareva injunction because it extends only to particular assets to which the plaintiff is asserting a proprietary claim. In terms of effect, a replevin order directing the delivery up of property is more like a mandatory injunction than other forms of injunctive relief.

22 Courts have traditionally required a higher standard of proof for mandatory injunctions than for prohibitive injunctions and have therefore not applied the *American Cyanamid* test in those situations (Sharpe, Robert, *Injunctions and Specific Performance*, 2nd ed. Canada Law Book Inc., 1995 at p. 2.19 and 2.38-2.39). The test for an interlocutory mandatory injunction has been described as requiring a "high degree of assurance that at trial it will appear that the injunction was rightly granted" (*Ticketnet Corp. v. Air Canada* (1987), 21 C.P.C. (2d) 38 at 43 (Ont. H.C.)

23 Clearly, the test for whether a replevin order should be made is not going to be exactly the same as the test for any type of injunction. However, the term "substantial grounds" is somewhat vague and it helps, in my opinion, to put it in a contextual framework. As I have said earlier, it is obvious that the substantial grounds test is a lesser standard than the test for summary judgment. Similarly, I consider the Mareva injunction "strong *prima facie* case" requirement to be too high a standard for replevin orders which are much less draconian and far reaching. On the other hand, the "substantial issue" test (not frivolous or vexatious) applied generally in prohibitive injunction cases is, in my view, too low a standard for a replevin order which requires one party to actually deliver up possession of property to the other. It must be remembered that before obtaining a prohibitive injunction, a party must satisfy other requirements not imposed on applicants for replevin (eg. the requirement of demonstrating irreparable harm which damages cannot remedy). As the replevin order is more in the nature of a mandatory injunction and is a greater interference with responding parties' rights than a prohibitive injunction, a stronger standard is required. Accordingly, I am of the view that the "substantial grounds" test for interim recovery of property requires a high degree of assurance that the plaintiff will be successful at trial.

24 Cases in which there is clear documentation supporting the plaintiff are more likely to meet the substantial grounds test. Cases in which straight issues of credibility will determine the action are less likely to meet the test. However, that is not to say that the presence of a credibility issue is fatal to the plaintiff's success or that a solid "paper trail" is unrebuttable by a defendant. Most cases will fall somewhere in the middle with some but not perfect, documentation and some issues of credibility. The case before me falls into that category.

Has the Plaintiff Clark Door Met the Substantial Grounds Test?

25 It is recognized by the parties that the plaintiff has met the requirements of Rule 44.01(1)(a)(b)(c) and (e). The main dispute between them is with respect to subparagraph (d) dealing with whether the defendant is unlawfully detaining the dies. The defendant Inline concedes that it was agreed between the parties that Clark Door would be the owner of the dies. However, Inline insists that ownership did not include a right to possession and that it was orally agreed between the principal of Inline (Mr. Rokicki) and the principal of Clark Door (Mr. Zafir) that possession of the dies would rest forever with Inline. Inline maintains that Clark Door's ownership rights in the dies extends only to prevent Inline from using the dies for any customers other than Clark Door. Mr. Rokicki's version of this oral agreement is flatly contradicted by Mr. Zafir. More significantly, Mr. Rokicki's characterization of the agreement is also contradicted by the documentary evidence.

26 The first document relating to the agreement between the parties is a price quotation given by Inline to Clark Door. Prices are quoted for dies, followed by the statement, "Delivery of the first die from the date of the orders is 6-8 weeks". Prices are then quoted on a per foot basis for the production of fiberglass products using the dies. The payment terms are stated to be 50% upon placing the order and 50% upon receiving goods. The plaintiff argues that the references to "delivery" and "receiving goods" are consistent with the plaintiff's claim to possession. I agree that these references are suggestive. However, since it was common ground that the dies were in fact manufactured at Inline's plant and were intended to be used there immediately in the manufacturing of door frames, rather than delivered to Clark Door, the reference to "delivery" and "receiving" could equally apply to delivery into the manufacturing process. Therefore, in my view this document is of little assistance in resolving the right to possession issue.

27 The dies which are the subject matter of this action were ordered by Clark Door under two purchase orders — one dated April 22, 1992 for die profile #130 and the other dated October 15, 1992 for die profile #125. The

April purchase order specified:

> Tooling will be the property of Clark Door Ltd. Maintenance of Tooling is the responsibility of Inline Fiberglass Ld.

The October purchase order contained virtually identical provisions as follows:

> Tooling is property of Clark Door Co. Die maintenance is the responsibility of Inline.

28 (It was accepted by both counsel before me that the words "tooling" and "dies" are used interchangeably).

29 A letter from Mr. Rokicki at Inline to Mr. Zafir at Clark Door dated July 27, 1992 (after the first purchase order but before the second) confirms Clark Door's property interest in the dies. He wrote:

> As per our discussion, Inline Fiberglass Ltd. confirms being paid in full $17,449.60 + G.S.T. Inline Fiberglass Ltd. verifies that we will hold the tool on our premises, and that the die is the property of Clark Door. Furthermore, Inline Fiberglass Ltd. would like to bring to your attention that this tooling is proprietory technology, which can't be transferred to anyone else. Inline Fiberglass Ltd. will be the custom pultruder for your profiles.

30 This letter is the closest Inline can come to any corroboration of its position that Clark Door would never be entitled to possession of the dies. However, in my view, the statement that the tooling is proprietary and cannot be transferred to anyone else is a far cry from saying that Clark Door cannot itself use the dies for its own purposes. Furthermore, the language of this sentence is to be contrasted to the beginning sentences which purport to confirm prior discussions. The term "would like to bring to your attention" suggests that this condition is being raised after the fact and is not consistent with this provision having been a term of the agreement between the parties from the outset.

31 The right to possess goods is a normal incident of ownership. Indeed, counsel were unable to give me any example of a situation where the owner of property (free and clear from any charge, pledge or lien interest) could be prohibited from *ever* being in possession of it. If, the defendant was requiring as a term of its agreement that the plaintiff, although owner of the dies, would never actually get them even upon termination of the manufacturing agreement, then it was incumbent upon the defendant to express that clearly. This is a condition so inconsistent with ownership that

it could not be presumed or imposed in the absence of clear language. Verification by Inline that it "will hold the tool on our premises" cannot be seen as a clear condition that all possessory rights of Clark Door to its own property were relinquished for all time.

32 Inline claims that it has $15 million tied up in research and development costs, the benefit of which will be lost if it is forced to give up possession of these dies and thereby give access to others to its proprietary technology. If this is an issue of such magnitude to Inline it is incomprehensible to me that it would not have protected its rights by strong language in its contracts. At the very least, it is difficult to accept that in this situation Inline would simply agree that the dies were the "property of Clark Door" without stipulating protection for its trade secrets.

33 Further, even if Inline gave Clark Door a substantial price reduction on the dies (as alleged by Mr. Rokicki) I am not persuaded that this could have any affect on rights of possession. There were good business reasons to cut the price on the dies because Inline's main source of profit was in the pultrusion manufacturing process and this was the business it wanted to attract from Clark Door. The documentation relating to pricing is consistent with price reductions having been given by Inline to Clark Door. However, it is clear that Clark Door was the purchaser. This was not a shared cost venture.

34 The only evidence supporting the defendant's position is the evidence of Mr. Rokicki who says that he made it clear to Mr. Zafir that Inline would always retain possession of the dies. It may be the case that Mr. Rokicki's evidence will be accepted at trial. I am obviously not in nearly as good a position to assess credibility as a trial judge would be. However, I cannot ignore the fact that Mr. Rokicki swore in his affidavit dated January 5, 1996 that he had never told Zafir that he would destroy the dies before he would give them to Clark Door. However, when confronted on cross examination with a transcript of a conversation he had with Mr. Zafir Mr. Rokicki admitted that he had made such a remark on two occasions. The plaintiff also pointed out other contradictions in his evidence. His credibility is therefore seriously in question.

35 Counsel for Inline argued that the failure of the documents to clearly set out the agreement with respect to possession rights can be attributed to the fact that English is not Mr. Rokicki's first language. I do not accept that this is a plausible explanation. Mr. Rokicki is obviously intelligent and well educated. He has a Master's degree in Mechanical Engineering from the Polytechnical Institute in Poznan, Poland and has lived in Canada since 1962. The letters which he has written in connection with this matter are well constructed and literate and show a fluent command of the English

language.

36 In my opinion the documentary evidence is consistent with the plaintiff's position and inconsistent with the defendant's position. Accordingly, since all of the documentation as well as logic and common sense favour the plaintiff, and since the only evidence substantially contradicting the plaintiff is that of Mr. Rokicki whose reliability is suspect, I find that the plaintiff has demonstrated a high degree of likelihood that it will be successful at trial or, to use the words of Master Donkin in *Robert Cooper*, title is apparently or most likely vested in the plaintiff'. Thus, the plaintiff has satisfied the substantial grounds test required for an interim recovery order.

Balance of Convenience

37 Having found that the plaintiff has substantial grounds for its claim to ownership of the dies and that the defendant is wrongfully detaining them, I must now consider whether or not to order that the dies be turned over to the plaintiff. It does not automatically follow that the plaintiff will be awarded possession. Indeed, the Rules specifically contemplate that the order can require that the defendant keep possession. The posting of security can be required of either party.

38 If possession is awarded to the plaintiff, the defendant argues that it will have lost control of its proprietary technology and its trade secrets will be lost for all time. Although I have found that the plaintiff has established substantial grounds for its claim, I would not have been prepared to award summary judgment to the plaintiff in this situation. I believe that the defendant has raised a genuine issue for trial. The difficulty for the defendant is that if the plaintiff obtains possession, any success which the defendant might have at trial would be illusory. The trade secrets would no longer be secret and the consequent damages would be extremely difficult, if not impossible, to calculate.

39 On the other hand, if the defendant retains possession, the plaintiff will also clearly incur costs in that it will have to pay for the manufacture of new dies, costs which essentially will have been thrown away if in fact the plaintiff is entitled to possession of the dies now held by the defendant. Further, there will be a delay of some months while the new dies are being manufactured during which time the plaintiff will have lost profits and potentially lost customers and/or business share. For the most part, these are damages which can be readily calculated and for which monetary compensation can be awarded. However, the plaintiff is concerned that any damages awarded in its favour in the future might not be recoverable from the defendant.

40 Regardless of which party is awarded possession, therefore, it is appropriate that security be posted. The defendant has vigorously challenged the plaintiff's motives and argues that the plaintiff is really trying to use the defendant's technology to set itself up in direct competition to the defendant. There is no evidence that this is indeed Clark Door's motivation. However Clark Doors has agreed readily that as a condition to obtaining possession of the dies, it will abide by an injunction restraining it from showing the dies or communicating information about the dies to anybody outside its own related companies and from using the dies for any purpose other than the manufacture of its own fiberglass products previously manufactured for it by Inline. Clark Doors also will undertake not to manufacture any dies similar in nature to those which are the subject of this action. The plaintiff is also prepared to post security of $150,000 or such other amount ordered by the Court. Although these terms are objected to by the defendant as not adequate to safeguard its interest, in my opinion they go a very long way to protecting the defendant's confidential information.

41 The defendant on the other hand offers to continue the existing interim injunction until trial or to place the dies in the hands of a neutral party for safekeeping. This does not solve the plaintiff's problem at all. When I asked counsel for Inline whether his client would be prepared to post security if given possession, I was told that Inline was prepared to post security of $100,000.00 but could not do so until the end of March because it was now in the process of refinancing. This is not acceptable security for the plaintiff.

42 In my view, a benefits vs harm analysis and the balance of convenience favour permitting the defendant to retain possession of the dies, all other things being equal. The potential harm which the defendant would sustain if it is successful at trial and if the plaintiff has had possession of the dies in the interim is greater and more difficult to compensate than if the situation is reversed. However, when the security offered by each party is entered into the equation, quite a different picture emerges. The plaintiff offers substantial and immediate security whereas the defendant vacillates. Accordingly, I am only prepared to permit the defendant to retain possession if adequate security is posted to protect the plaintiff's claim. If the defendant fails to post the security as required, possession shall be transferred to the plaintiff subject to the plaintiff posting security and subject to an injunction protecting the confidentiality claimed for the defendant's trade secrets.

Delay

43 I have considered the defendant's argument that the plaintiff should be disentitled to relief because of its delay in commencing this action. In the circumstances of this case, I do not consider the delay to have been inordinate. Further, the delay is largely explainable because of the plaintiff's need to reflect on its options and get its own manufacturing machinery and because of the defendant's threats to destroy the dies rather than give them to the plaintiff. Accordingly, I do not consider the complaint of delay to have any impact on the plaintiff's rights to relief.

Disposition

44 For the foregoing reasons, an order shall issue on the following terms:

1. Inline shall pay into court or post security in the amount of $150,000.00 within 14 days of the date of this Order, and upon doing so shall be entitled to retain possession of the subject property pending trial or further order of the Court;

2. If Inline does not post security as required under paragraph 1, the plaintiff Clark Door shall pay into court or post security in the amount of $150,000.00 and upon doing so, the subject property shall be taken from the defendant and given to the plaintiff to be held pending trial or further order of the Court;

3. Upon obtaining possession of the property, the plaintiff shall be bound by the following terms pending trial or further order of the court;

(i) the plaintiff is restrained from showing the property or communicating information about the property to anybody outside its own related companies

(ii) the plaintiff is restrained from using the dies for any purpose other than the manufacture of its own products

(iii) the plaintiff is restrained from reproducing or copying the dies or manufacturing or causing to be manufactured any dies of a similar nature.

4. The party with possession of the dies shall strictly comply with all time limits set out in the Rules and shall cooperate with the other party to expedite the trial of the action.

5. Costs of this motion are reserved to the trial judge.

45 The wording I have set out above is not meant to be definitive as to the wording of the final Order. If counsel are not able to agree on the appropriate wording of the Order, each counsel shall submit a draft Order to

me for approval.

Motion dismissed; defendant entitled to retain possession pending trial, upon posting security.

2009 CarswellOnt 1480
Ontario Superior Court of Justice

E-Zee Rent-To-Own Inc. v. Hopkins

2009 CarswellOnt 1480, [2009] O.J. No. 1139

E-ZEE RENT-TO-OWN (Plaintiff) and JOHN HOPKINS AND KAREN SCHOOLEY (Defendants)

D.M. Miller D.J.

Judgment: March 15, 2009
Docket: London 2322/08

Counsel: None given.

***D.M. Miller D.J.*:**

1 This is a motion brought without notice by the Plaintiff for an interim order for the return of appliances and furniture that it had rented to the Defendants and the issuance of a Writ of Delivery.

2 The Plaintiff's Claim was issued on December 3, 2008 and has not yet been served on the Defendants.

3 The facts are straightforward. In August, 2008, the Defendants rented a stove, refrigerator, dresser, night stand, television and television stand from the Plaintiff. The Defendants signed three rental agreements in connection with those purchases. Those agreements obligated the Defendants to make monthly payments to the Plaintiff over the subsequent twenty-four months, at the conclusion of which title to the items would vest in the Defendants. The Defendants have defaulted on their obligation to make the monthly payments. The Plaintiff has therefore brought this motion to have the items returned to it.

4 Rule 20.05 of the Rules provides that a party who has obtained an order for the delivery of personal property may enforce that order through a Writ of Delivery. Accordingly, a Writ of Delivery can only be issued after a party has obtained an order for the return of personal property.

5 Section 104(1) of The Courts of Justice Act provides as follows:

> In an action in which the recovery of personal property is claimed and it is alleged that the property,
>
> (a) was unlawfully taken form the possession of the Plaintiff; or
>
> (b) is unlawfully detained by the Defendant,
>
> the court, on motion, may make an interim order for recovery of possession of the property.

6 This section grants the power to make the order on "the court" which, since it is not specifically excluded, would include the Small Claims Court.

7 The Small Claims Court Rules do not provide for a procedure to be followed by a party who is attempting to obtain an order for the return of personal property. However, Rule 1.03(2) provides that:

> If these rules do not cover a matter adequately, the court may give directions and make any order that is just, and the practice shall be decided by analogy to these rules, by reference to the Courts of Justice Act and the Act governing the action and, if the Court considers it appropriate, by reference to the Rules of Civil Procedure.

8 Rule 44 of the Rules of Civil Procedure sets out a detailed procedure that is to be followed when a motion for an interim order for the recovery of personal property is brought in the Superior Court of Justice. Rule 44.01 requires that the motion be supported by an affidavit that sets out:

> (a) a description of the property sufficient to make it readily identifiable;
>
> (b) the value of the property;
>
> (c) that the plaintiff is the owner or lawfully entitled to possession of the property;
>
> (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and
>
> (e) the facts and circumstances giving rise to the unlawful taking or detention.

9 Rule 44.01(2) provides that the notice of motion must be served on the defendant unless the court is satisfied that there is reason to believe that the defendant may improperly attempt to prevent the plaintiff from recovering possession of the property or that, for any other sufficient reason, the order should be made without notice to the defendant.

10 In my view, the procedure provided for by Rule 44 of the Rules of Civil Procedure should be the procedure resorted to in motions for an order for the interim recovery of personal property that are returnable in the Small Claims Court.

11 In order to succeed in a motion for an interim order for the return of personal property, the courts have held that a plaintiff must demonstrate that it could meet the "substantial grounds" test. In order to meet that test, the plaintiff must satisfy the court that there is a high degree of assurance that the plaintiff will be successful at trial (see *Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.*, [1996] O.J. No. 238 (Ont. Gen. Div.).

12 I turn now the Plaintiff's application for an order for the interim recovery of the personal property that it rented to the Defendants.

13 Section 104(1) requires that the Plaintiff establish that the Defendants are unlawfully detaining the property in question.

14 The Rental Agreement provides that the agreement is deemed to be terminated if the Defendants fail to make a monthly payment when it is due. The agreement further provides that, on termination of the agreement, the Defendants are to allow the Plaintiff to have immediate possession of the property. The agreement provides that title to the property remains in the name of the Plaintiff unless and until the Defendants make all of the payments provided for pursuant to the Rental Agreement.

15 Turning to Rule 44.01 of the Rules of Civil Procedure, the affidavit sworn by Mike Cabana in support of the Plaintiff's motion establishes that the subject property is owned by the Plaintiff and is being unlawfully detained by the Defendants. Further, the affidavit provides a description of the property sufficient to make it readily identifiable, the circumstances of the detention of the property and the value of the property. I find that the evidence filed in support of the motion establishes that there is a high degree of assurance that the Plaintiff will be successful at trial. The Plaintiff has therefore satisfied the substantial grounds test noted above.

16 In his affidavit, Mr. Cabana states that the Plaintiff has attempted to contact the Defendants both by telephone and in person in order to secure the return of the subject property. The Defendants have apparently refused to allow the Plaintiff to enter their home in order to pick up the property. Given these circumstances, the Plaintiff is granted leave pursuant to Rule 44.01(2) to bring this motion without notice to the Defendants.

17 The Plaintiff's motion for the interim recovery of personal property is therefore allowed. The specific property that is covered by this order is that which is listed in the Affidavit sworn by Mike Cabana in support of this motion. Further, a Writ of Delivery will issue so as to enable the Plaintiff to enforce this order.

18 The Plaintiff is to serve the Defendants with a copy of the Plaintiff's Claim, this endorsement and the Writ of Delivery at the time that the property is seized pursuant to the Writ of Delivery. The Plaintiff is to hold the property in escrow for a period of twenty days following the date that the property is seized. In the event that the Defendants do not serve and file a Defence within that period of time, the Plaintiff is at liberty to dispose of the property. In the event that the Defendants do file a Defence within that twenty day period, the Plaintiff will continue to hold the property in escrow pending further order of this Court.

Motion granted.

2012 ONSC 3091
Ontario Superior Court of Justice

Knew Order Co. v. 2291955 Ontario Inc.

2012 CarswellOnt 6711, 2012 ONSC 3091, 215 A.C.W.S. (3d) 593

Knew Order Co., Ltd., Plaintiff and 2291955 Ontario Inc., carrying on business as Tai Groups Inc. and Chia Yang (also known as "James") Shen, Defendants

S. Chapnik J.

Heard: May 22, 2012
Judgment: May 25, 2012
Docket: CV-12-445865

Counsel: Matthew J. Latella, Ahmed H. Shafey, for Plaintiff
Rolf M. Piehler, for Defendants

***S. Chapnik J.*:**

1 The plaintiff seeks an order for recovery of an aircraft engine owned by the Government of Taiwan, specifically the National Airborne Service Corps ("NASC"), an arm of the Taiwanese Ministry of the Interior, without the need to post security.

2 The defendants request an order pursuant to rules 44.03 and 44.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for the plaintiff to obtain the bond of an insurer in the amount of twice the value of the engine and to file same with the Sheriff of the City of Toronto. In the alternative, the defendants request the dismissal of the motion and an order that the plaintiff proceed with the dispute resolution mechanism contained in s. 23 and 24 of the *Repair and Storage Liens Act*, R.S.O. 1990, c. R.25 ("the *RSLA*"). In the further alternative, the defendants seek an order for the payment into court by the plaintiff of the amount contemplated by s. 24(4) of the *RSLA*.

Background

3 On or about June 10, 2011, NASC issued a request for a proposal in respect of the purchase of an airplane engine with an estimated value of $2,500,000 in U.S. funds.

4 In July, 2011, the plaintiff tendered a bid and subsequently entered into a contract with NASC for approximately $475,000 in Canadian funds

for the overhaul, inspection and return of the engine to NASC.

5 It was arranged for the engine to be shipped directly from NASC to United Turbine Corp ("United Turbine"), a company based in Miami, Florida, which specializes in the repair and overhaul of aircraft engines.

6 On or about June 16, 2011, the defendants ("the Tai Groups") and the sole director of the corporate defendant, Mr. Shen, entered into a relationship with United Turbine in which United Turbine agreed to appoint Tai Groups as its representative for overhaul projects in Taiwan. Their relationship was formalized in a Representation Agreement by which a commission of seven (7) per cent of the actual overhaul price would be paid to the defendants.

7 On or about June 15, 2011, United Turbine gave the defendants a quotation of US$320,000 for parts and labour to complete the overhaul of the engine (with certain discounts after inspection). The defendants acted, in effect, as a middleman or sales agent between the plaintiff and United Turbine. Subsequently, the plaintiff issued a purchase order to United Turbine in the sum of US$325,000 (including an extra US$5,000 that Mr. Shen indicated would cover costs related to the inspection).

8 It is noted that the plaintiff carries on business in the repair and overhaul of aircraft engines and that the defendants had not before been involved in the overhaul of an engine, nor were they qualified as inspectors or certified to conduct the overhaul.

9 The engine was shipped directly from NASC to United Turbine on July 27, 2011 and arrived there on or about August 15, 2011. On August 16, 2011, the plaintiff paid the defendants, who were acting as agents for United Turbine the requisite advance payment of seventy (70) per cent of the agreed upon price in accordance with the purchase order, specifically the sum of US$227,500. In doing so, they were allegedly unaware of the fact that United Turbine had, due to the good shape of the engine, reduced its initial quotation from US$320,000 to US$263,654 which, they allege, was supposed to be passed on to the end customer, NASC.

10 The engine's overhaul was completed by United Turbine on November 9, 2011, and an inspection was to take place prior to shipping. The defendants have received the agreed upon commission of seven (7) per cent of the actual overhaul price pursuant to the Representation Agreement. The plaintiff alleges that the defendants interfered with the planned inspection and then unlawfully shipped the engine to Canada on or about November 18, 2011.

11 The engine is currently held on the defendants' behalf in Canada and it is alleged that despite numerous requests by the plaintiff and other parties, they have refused to return the engine to its owner or to the plaintiff. Moreover, the defendants purport to charge the plaintiffs on a daily basis for the storage and maintenance of the engine.

12 NASC has granted the plaintiff until June 3, 2012 to fulfill its obligations under their contract by completing the inspection and returning the engine to it. It is alleged that the return of the engine is urgently needed by NASC to perform search and rescue, disaster relief and other airborne services for the people and government of Taiwan.

The Law

13 The plaintiff brings this motion pursuant to the *Courts of Justice Act*, R.S.O. 1990, C.43, s. 104 and rule 44.01 of the *Rules of Civil Procedure*. Under that rule, the court may make an interim order for possession where personal property has been unlawfully taken or is being unlawfully detained by the defendant.

14 The test for a finding of unlawful detention was set out by the court in *Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.* (1996), 45 C.P.C. (3d) 244 (Ont. Gen. Div.)), at paras. 11, 17 and 18, as follows:

- there are substantial grounds for the plaintiff's assertion that it is the legal owner or entitled to possession of the item;
- there are substantial grounds for its claim that the property is being unlawfully detained by the defendants; and
- the balance of convenience favours the plaintiff.

15 As previously noted, the defendants raise the spectre of security under rules 44.03(1) and 44.04 and also claim a lien under the *RSLA*.

16 Pursuant to rule 44.03(1) of the *Rules*, on a motion for an interim order for recovery of possession of personal property, the court may order the plaintiff to pay security of twice the value of the property or another amount.

17 Rule 44.04 deals with the condition and form of security including the posting of a bond. A repair under the *RSLA* means an expenditure of money on or application of labour, skill or material to an article for the purpose of altering, improving or restoring its properties or maintaining its condition (see s. 1 of the *RSLA*).

18 Pursuant to the *RSLA*, s. 3(1), in the absence of a written agreement to the contrary, the repairer has a lien against an article that the repairer had repaired and the repairer may retain possession of the article until the amount is paid.

19 Pursuant to s. 3(4), a repairer who commences the repair of an article that is not in the repairer's actual possession shall be deemed to have gained possession of the article when the repair is commenced and to have given up possession when the repair is completed or abandoned.

Analysis

20 This case is distinguishable from most others seeking the recovery of personal property in that there is no dispute here as to who owns the engine. It is owned by NASC who entrusted the plaintiff with responsibility for the overhaul, inspection and ultimate return of the engine. The defendants do not assert ownership and the plaintiff by virtue of its agreement with the owner was, as noted, granted the responsibility for the overhaul, inspection and ultimate return of the engine. I am satisfied that there are substantial grounds for the plaintiff's assertion that it is entitled to possession of the item. In fact, as I understand it, NASC has now granted the plaintiff until June 3, 2012 to fulfill its obligation to it by completing the inspection and return of the engine.

21 Secondly, I am satisfied there are substantial grounds to support the plaintiff's claim that the property is being unlawfully detained by the defendants. The engine was shipped directly from NASC to United Turbine on July 27, 2011, arriving there on or about August 15, 2011. It was never in the possession of the defendants nor did it come into their possession until they had it shipped to Canada after the overhaul was completed and before the planned inspection would occur. In my view, there are substantial grounds to the plaintiff's claim that the engine was improperly taken and shipped to Canada contrary to the purchase order and that it is being unlawfully detained by the defendants.

22 I do not accept the defendants' assertion that they are entitled to possession of the engine or a lien with respect to it. The defendants acted only as a middleman or sales agent between the plaintiff and United Turbine. They did not expend monies or apply labour, skill or material for the engine's overhaul.

23 Moreover, the defendants do not satisfy the test of "giving out" for repair as in a subcontract, since the engine was not given out or left for repair with the defendants. It was shipped directly from NASC to United

Turbine.

24 Accordingly, the defendants are not entitled to a repairer's lien under the provisions of the *RSLA*. That Act has no application to the factual matrix in this case.

25 As to the defendants' claims under rule 44 for security and the balance of convenience test, it appears that the only reason the engine is being held by the defendants is as security for the defendants' claims for compensation, which are disputed by the plaintiff.

26 This is not a case such as in *Clark Door*, *supra*, in which losing possession of goods may have serious or irreversible consequences and where the possessor may require protection or indemnification in the interim pending trial.

27 The engine is housed in a sealed container and is of no use to the defendants. The plaintiff requires the engine to complete its inspection so it can be returned to its acknowledged legal owner. NASC purportedly needs the engine for its business and use, on an urgent basis.

28 The balance of convenience clearly favours an order requiring the delivery of the engine to United Turbine for final inspection and then return to its legal owner, the Taiwanese government.

29 Given that there are no serious, irreversible consequences to protect or indemnify against, and given the circumstances by which the defendants took possession of the engine, no security need be required or posted by the plaintiff.

Conclusion

30 An order shall issue requiring the defendants to forthwith deliver the subject engine to the plaintiff or its solicitor, or to whom it may direct, and to pay all costs related to the return of the engine through to its rightful owner, NASC.

31 The plaintiff seeks costs of the motion on a substantial indemnity scale given, in its words, "the outrageous and illegal conduct" of the defendants. I have refrained from making any findings on extraneous matters between the parties, and have attempted to focus only on the merits of the plaintiff's claim for possession of the engine.

32 Much of the plaintiff's argument, as set out orally and in its factum, deals with other issues not directly relevant to this inquiry. In my view, the

plaintiff's claim for substantial indemnity costs in the range of $40,000 to $50,000 for the motion is excessive. When asked, defendants' counsel requested about $11,000 in costs, if successful. Clearly, the vast majority of work was prepared by the plaintiff and the factual circumstances were somewhat convoluted, but this is not the trial of the action. Taking into account the factors set out in rule 57.01 of the *Rules of Civil Procedure*, and the reasonable contemplation of the parties, I grant costs to the plaintiff in the all-inclusive sum of $25,000, payable forthwith.

2015 ONSC 2236
Ontario Superior Court of Justice

Terrafix Geosynthetics Inc. v. Mansteel New Liskeard Inc.

2015 CarswellOnt 5026, 2015 ONSC 2236, 252 A.C.W.S. (3d) 816

Terrafix Geosynthetics Inc., Plaintiff and Mansteel New Liskeard Inc., Defendant

Thomas A. Bielby J.

Heard: April 2, 2015
Judgment: April 8, 2015
Docket: 5766/14SR

Counsel: Ray Thopar (Agent), for Plaintiff, Moving Party
Salma Sheikh, for Defendant

***Thomas A. Bielby J.*:**

Introduction

1 The defendant seeks to set aside the interim, *ex parte* order of Wilcox J., dated March 12, 2015, issued by the court in Haileybury.

2 The order directed the sheriff to seize the following personal property (the property), located at the defendant's place of business:

1. 23 rolls of geosynthetic clay liner;
2. 23 bags of Bentonite; and
3. 1 spreader bar.

3 The plaintiff alleges that items 1 and 2 were sold to the defendant and item 3 was on loan, a tool needed to install the liner.

4 The sheriff was directed to detain the property for a period of 10 days after which time the sheriff was to give the property to the plaintiff, unless otherwise ordered by the Court.

5 The property remains in the possession of the sheriff.

6 The plaintiff alleges that it sold the property to the defendant for $30,006.00 and has never been paid. As a result, the plaintiff submits that

title to the property remains with it.

7 On December 18, 2014, the plaintiff commenced an action and the relief sought was:

1. Compensation and Restitution for unjust enrichment in the amount of $30,006.00;
2. Payment of the sum of $30,006.00 by the defendant for goods and services that were supplied and invoiced to the defendant; and
3. Pre-judgment, special damages and costs.

8 Section 104 of the *Courts of Justice Act* R.S.O. 1990, Chap. 43, permits the court on motion, where the recovery of personal property is claimed, to make an interim order for recovery of the property.

9 Rule 44.01 of the *Civil Rules of Procedure* is the mechanism for seeking such an order and prescribes what information should be included in the affidavit in support of such a motion.

10 Rule 44.01(2) states that the motion should be served on the defendant unless the court is satisfied that there is reason to believe that the defendant may improperly attempt to prevent recovery of possession of the property, or that, for any other sufficient reason, the order should be made without notice.

11 The *ex parte* motion and the affidavit of David Fuerth, the Vice President of Sales for the plaintiff, sworn March 11, 2015, are set out at Tab I of the motion record. Contained as exhibits to the affidavit are the supporting documentation which describes the product in some detail and sets out the value of the product.

12 In regards to the motion being brought *ex parte*, the affidavit states, commencing at paragraph 18:

> 18. I recently became aware through business associates that the defendant was seeking to install our product in its business.
>
> 19. I have been advised and do verily believe that the defendant is seeking to have our product installed on March 16, 2015.
>
> 20. I have been advised and do verily believe that the company the defendant is contracting with to install our product is Canor Construction, located at 619 Stanley Street, North Bay, Ontario, P1A 4H9.

> 21. I am concerned that unless the defendant is restrained from disposing of or using the product, the plaintiff will have no means to recoup the account.

13 Presumably, Wilcox J. found this evidence persuasive enough to make the order without prior notice to the defendant.

14 While it would have been preferable to have brought the motion on notice, there was sufficient evidence before Wilcox J. to make the *ex parte* order. The issue now to be determined is the order to stand, be varied or revoked.

Facts and Argument

15 The sale of the property in issue is the subject of an invoice, number 158022, and dated November 11, 2014, issued by the plaintiff indicating the property was sold to the defendant.

16 The property had a value of $26,553.98 and the HST was $3,452.00 for a total of $30,006.00.

17 At the bottom of the invoice in larger print, the following is stated:

> Title to these goods remains with the sellers until this account is paid in full.

18 The plaintiff relies on this statement, a statement that is not disputed. Nor is it disputed that the account was never paid.

19 In argument, counsel for the defendant submitted that the property was, in fact, defective and that a setoff/counterclaim will exceed the value of the property. The defendant argues that the liner provided was too thin for the intended purpose.

20 The Sheriff attended at the defendant's place of business at 1107 Lakeshore Road South, New Liskeard, Ontario P0J 1P0, on March 24, 2015 and seized and removed the property. The plaintiff submits that the property removed was the property it sold to the defendant, whereas the defendant submits the plaintiff's property had already been used on a job in March 2014, and the property seized by the Sheriff belongs to World Development Corporation (WDC).

21 In this motion, counsel for the defendant was also advocating for WDC and alleging that, unless the property is returned, the defendant and

WDC will suffer excessive damages, which will result in further litigation.

22 The defendant submits that, the fact that the plaintiff's property has already been used on a job had been conveyed to the plaintiff before the order of Wilcox J. was sought, this fact was not set out in the affidavit in support of the motion for an *ex parte* order.

23 In the affidavit of Gurjit Deol, a law clerk for Ms. Sheikh, sworn March 25, 2015 and filed in support of the motion before me, an opinion is provided that, if Wilcox J. had been advised that the property had been used already, it was unlikely the order would have been made or, at the very least, the plaintiff would have been required to post security.

24 It is not the place of a law clerk to provide such an opinion. It is not the proper subject matter of affidavit. Further, the affidavit of Leanna Farr, a lawyer with the firm representing the plaintiff and sworn March 31, 2015, deposes that this information was conveyed to Wilcox J. during argument by plaintiff's counsel, Mr. Vibert.

25 Attached to Exhibit C of the motion record is an invoice from Enigma Land Ltd to WDC, dated August 8, 2014, which sets out the following description of the subject matter of the invoice:

- 32 rolls of Bentofix NWL 4.72 x 45 72m
- 28 50LBS Bags of Bentonite + 2 Spreading bars

26 The price of these goods with HST totals $43,709.30.

27 The invoice also states that the property remains that of the seller until payment is made.

28 It is submitted by the defendant that this invoice and that of the plaintiff are almost identical.

29 At Tab E to the affidavit of David Fuerth, sworn March 31, 2015, on behalf of the plaintiff, in the responding motion record is the plaintiff's "Record of Communications to Collect Outstanding Account with Mansteel New Liskeard Inc. It sets outs the history of the messages and emails between the parties, commencing February 20, 2014, regarding payment of the account. This evidence reveals that the plaintiff was told a couple of times that payment would be made.

30 An email from a representative of the defendant to the plaintiff, dated March 18, 2014, apologizes for the delay and writes that the matter would

be passed on to the accounts payable manager and would be dealt with forthwith.

31 On May 27, 2104, the plaintiff was told by a representative of the defendant that the contractor had been paid upfront and payment could be expected in two weeks.

32 However, the first reference to an alleged defect in the property is in an email sent by the defendant in March 2015. The defendant, in the same email, advises that the property had already been used.

33 Counsel for the defendant takes issue with the fact that, in the affidavit before Wilcox J., the identity of a business associate who told the plaintiff that the product was to be used by the defendant on March 16, 2015 was not identified. His identity is set out in the Fuerth affidavit, sworn March 31, 2015.

34 It regards to the issue of whether the property seized was that of the plaintiff or WDC, starting at paragraph 21 of the Fuerth affidavit, sworn March 31, 2015, the methods by which the plaintiff's property could be identified are set out.

35 It is also stated that there are only four companies in North America that can supply such a product and that the plaintiff is the only Canadian company. One of the American companies only began manufacturing in late 2014 and another did not ship to Canada.

36 Mr. Fuerth deposes that each of the 23 rolls has a roll number that can be matched against the plaintiff's quality control certificates. At Tab I of his affidavit are photographs of most of the roll numbers of the property seized.

37 The plaintiff's invoice references 23 rolls of liner and 23 bags of Bentonite and one spreader bar and 23 rolls, 23 bags, and one spreader bar were seized by the Sheriff.

38 A supplementary motion record was filed by the defendant. The affidavit is that of Grant Erlick, the sole officer and director of the defendant and was sworn on March 30, 2015.

39 Mr. Erlick deposes that the defendant is building a new recycling plant and that the material seized is needed as liner for the leachate containment ponds.

40 With respect to the property in issue, Mr. Erlick deposes that the

product supplied by the plaintiff had already been installed in May 2014, and was under eight feet of water. Further, he alleges that the property was defective in that it was thinner than required and additional costs were incurred because of the negligence of the plaintiff.

41 The defendant submits that there is an urgency to have the seized property returned. It is alleged that, if the pond liner is not installed at its recycling plant, significant environmental damage will result, which could result in significant fines levied by the Ministry of the Environment. A new liner cannot be re-ordered in time.

42 Also included in the supplementary motion record is the affidavit of Troy Wilson, the sole director and officer of Mammoth Consulting, which was contracted to oversee the installation of the pond system.

43 He deposes that the pond system was to be completed by May 30, 2014, and, because of extreme winter weather, the job could not be completed. The MOE provided an extension until the spring of 2015.

44 Also included in the supplementary record is the affidavit of Mary Shaer Valei, the administrator of WDC, who deposes she has contracted with the defendant to complete the recycling plant.

45 Ms. Valei also deposes to the strict timetable for the liner installation because of the environmental issues.

Analysis

46 Counsel for the defendant provided the Court with the decision of Deputy Judge Miller in *E-Zee Rent-To-Own Inc. v. Hopkins*, [2009] O.J. No. 1139 (Ont. S.C.J.) where at paragraph 11 the deputy judge states the following:

> In order to succeed in a motion for an interim order for the return of personal property, the courts have held that a plaintiff must demonstrate that it could meet the "substantial grounds" test. In order to meet the test, the plaintiff must satisfy the court that there is a high degree of assurance that the plaintiff will be successful at trial.

47 Also provided by the defendant is the decision of Howden J. in *Sherman v. P.D. Merrell Bailiff Inc.*, [2001] O.J. No. 3414 (Ont. S.C.J.) in which, at paragraph 7, the learned judge discusses the appropriate test. The test for interim injunctions is set out in the paragraph and the following is stated:

> My reading of the law on the issue of recovery of chattels is that claimants for interim recovery under Rule 44 must meet a higher standard than that required for interim injunctions. The claimant for interim recovery of a chattel must show substantial grounds to support the relief asked.

48 Howden J. references the decision of *Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.* (1996), 45 C.P.C. (3d) 244 (Ont. Gen. Div.) for confirmation of the test applied by Deputy Judge Miller in *E-Zee Rent* case above.

49 In my opinion on the material before me, I believe the plaintiff has met the test for the following reasons.

50 The property was supplied by the plaintiff to the defendant in November 2013.

51 At all material time, title to the property remained with the plaintiff.

52 In March 2014, employees of the defendant acknowledged the debt and stated payment would be made.

53 The issues of defects and deficiencies in the plaintiff's product was not raised until last month, after the action had been commenced and at a time when the plaintiff was asserting a possessory claim to the property.

54 The plaintiff has deposed to identifiers on the property seized indicating that it was the product it supplied. Copies of photographs of these identifiers located on the seized property have been provided. No such identifiers have been provided by the defendant, nor are any referenced by the alleged owner of the product, WDC.

55 The evidence before me establishes that the plaintiff has substantial grounds supporting the relief sought and provides a high degree of assurance of the plaintiff's success.

56 With competing affidavits, it is difficult to make findings of credibility. However, I have a great deal of difficulty with the facts as relied upon by the defendant. It alleges the plaintiff provided a defective product but, as noted, never raised the issue of defects until over one and one-half years after it was supplied and a year after it was allegedly installed.

57 The installation of the property which is now, by the defendant's own evidence, under eight feet of water would make it difficult to identify the product or any defects.

58 It seems too contrived to now state payment was not made because of defects in a product installed and under water.

59 The urgency argument of the defendant relating to the environmental risk is not persuasive. The retaining pond was to be completed last spring. It is alleged the harsh winter prevented completion, however, the winter we have just finished was just as harsh. Further, my order will provide a method by which the defendant may recover the property.

60 Rule 44.03(1)(b) of the *Civil Rules of Procedure* allows me to order the defendant to pay into court, as security, any amount I so direct, in exchange for the property in issue.

61 Accordingly, on the merits of the motion, and on the evidence before me, I order:

1. The motion of the defendant to vacate the order of Wilcox J., dated March 12, 2015, is dismissed.
2. The order of Wilcox J. is amended to include the following:

    a. The Sheriff is to maintain possession of the property in issue for a further 60 days.

    b. During the 60 day period the defendant can pay into court, as security for the property, the sum of $30,006.00 and pay to the Sheriff the storage cost incurred to the date of payment, in exchange for which the property is to be released to the defendant.

    c. If the said monies are not paid within the 60 days, the Sheriff shall release the property to the plaintiff upon payment of any fees incurred by the Sheriff.

Costs

62 The parties provided to me their bill of costs. The plaintiff is entitled to its cost as it has been successful. The plaintiff's bill is less than the cost of the defendant. The plaintiff seeks on a partial indemnity basis a figure of $7,141.37 and I order the defendant to pay costs forthwith to the plaintiff, in the amount of $7.141.37, all inclusive.

Motion dismissed.

STRONACH CONSULTING CORP.
Applicant

-and-

BIONX CANADA INC.
Respondent

No. CV-18-592741-00CL

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDINGS COMMENCED IN
TORONTO

BRIEF OF AUTHORITIES
OF THE MOVING PARTIES GENERAL MOTORS LLC AND
GENERAL MOTORS OF CANADA COMPANY

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RCP-E 4C (May 1, 2016)

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