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INJUNCTIONS and SPECIFIC PERFORMANCE

The Honourable Mr. Justice Robert J. Sharpe

Release No. 27, November 2018

What's New in this Update:

Injunctions: Jurisdiction

Following *Google Inc. v. Equustek Solutions Inc.*, [2017] 1 S.C.R. 824, 410 D.L.R. (4th) 625 (S.C.C.), Google argued before the U.S. District Court for the Northern District of California that the Canadian injunction was unenforceable in the United States on the basis that it violated the First Amendment to the United States Constitution, the Communications Decency Act, and principles of international comity. The U.S. District Court granted an interlocutory stay of the Canadian injunction within the United States: *Google LLC v. Equustek Solutions Inc., et al.*, U.S.D.C., N.D. Cal., San Jose Division, Nov. 2, 2017, and then a

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permanent stay shortly thereafter: *Google LLC v. Equustek Solutions Inc., et al.*, U.S.D.C., N.D. Cal., San Jose Division, Dec. 14, 2017. Google's subsequent application to the Supreme Court of British Columbia to set aside the injunction was dismissed: *Equustek Solutions Inc. v. Jack* (2018), 13 B.C.L.R. (6th) 208, 291 A.C.W.S. (3d) 150 (B.C. S.C.). Smith J. observed that while the U.S. District Court accepted that the legal tests for preliminary and permanent injunctive relief were satisfied relating to Google's claim under the Communications Decency Act, the U.S. District Court expressly avoided dealing with the issues of international comity and First Amendment rights. Smith J. also observed that the Supreme Court of Canada had determined that Google could apply to vary the injunction only if the injunction would require it to violate the laws of another jurisdiction, whereas the U.S. District Court did not find that the Canadian injunction required Google to violate American law. Smith J. said that restricting Google's ability to exercise certain rights (including freedom of expression) would not be the same thing as requiring Google to violate American law. Google's application to set aside the Canadian injunction was dismissed because American law does not prohibit Google from de-indexing websites. The Canadian injunction was found to be enforceable because the court had personal jurisdiction over Google, which was found to carry on business in British Columbia through its advertising and search operations.
[para. 1.1190]

Permanent and Interlocutory Injunctions

Liu v. Hamptons Golf Course Ltd. (2017), 14 C.P.C. (8th) 246, 283 A.C.W.S. (3d) 658 (Alta. C.A.), at para. 17:

> Since an interlocutory injunction is, by definition, only in place until trial, it involves a consideration of the prospect of irreparable harm occurring before trial, and the balance of convenience. On the other hand, before a permanent injunction can be granted, whether summarily or after trial, the plaintiff must fully prove its rights; demonstrating a "serious issue to be tried" is not sufficient. Once it has conclusively established its rights, the plaintiff must also demonstrate that it is entitled to the equitable remedy of a permanent injunction.

[para. 2.15]

Interlocutory Mandatory Injunctions

R. v. Canadian Broadcasting Corp. (2018), 417 D.L.R. (4th) 587, [2018] 2 W.W.R. 431 (S.C.C.), at para. 15: "on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR-*

MacDonald test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case".
[para. 2.250]

At para. 17: "the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice".
[para. 2.90]

Irreparable Harm and Restrictive Covenants

In *May v. 1986855 Alberta Ltd* (2018), 292 A.C.W.S. (3d) 150, 2018 ABCA 94 (Alta. C.A.), at para. 16, a case where the plaintiff sought an interim injunction to restrain building alleged to violate a restrictive covenant, the Alberta Court of Appeal held that as "the presumptive remedy for a breach of a restrictive covenant is a permanent injunction" and as a court will be less likely to award injunctive relief after construction has been completed, "[d]enying the interim injunction . . . potentially restricts the appellant to a remedy in damages" and "compared to the utility and advantages of a permanent injunction, that is irreparable harm".
[para. 2.416]

Undertaking in Damages: Security

The court may order security by way of bond or payment into court, security by way of payment into the trust account of the plaintiff's solicitor, or a third-party guarantee of the plaintiff's undertaking in damages: *Brainbox Digital Ltd. v. Backboard Media GmbH & Anor*, [2017] EWHC 2465.
[para. 2.504]

Undertaking in Damages: Enforcement

Delay by the defendant in requesting an inquiry into damages is however a very important consideration that militates against granting the request: *Société Générale v. Goldas Kuyumculuk Sanayi Ithalat Ihracat A.S., Goldart Holding A.S.*, [2018] EWCA Civ 1093, at para. 45. [para. 2.510]

The English Court of Appeal held in *SCF Tankers Ltd. & Ors v. Privalov & Ors*, [2017] EWCA Civ 1877, at para. 42 that the defendant "must show that the loss would not have been suffered 'but for' the order; that is [that the injunction was] an effective cause of the . . . loss."
[para. 2.513]

Mandatory Injunctions

The Supreme Court of Canada explained in *R. v. Canadian Broadcasting Corp*. (2018), 417 D.L.R. (4th) 587, [2018] 2 W.W.R. 431 (S.C.C.), at para. 15:

> A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR-Macdonald* as "extensive review of the merits" at the interlocutory stage.

[para. 2.640]

Mareva Injunctions

In a case involving a well-known individual who received a significant settlement from the federal government, Belobaba J. refused a *Mareva* injunction on the ground that "it is insufficient for an applicant to raise a mere possibility that the defendant will hide or dissipate assets, because such possibilities exist in every case" and "[w]e do not have one law for Omar Khadr and another for all other Canadians": *Morris and Speer v. Khadr* (2017), 415 D.L.R. (4th) 534, 281 A.C.W.S. (3d) 156 (Ont. S.C.J.), at paras. 4 and 7.
[para. 2.880]

The plaintiff is not required to adduce direct evidence of active dissipation: "[a] serious risk of dissipation is sufficient and the risk may be inferred in appropriate cases by the surrounding circumstances of the fraud": *2092280 Ontario Inc. v. Voralto Group Inc*. (2018), 291 A.C.W.S. (3d) 152, 2018 ONSC 2305 (Ont. Div. Ct.), at para. 23.
[para. 2.830]

A secured creditor of a debtor who is subject to a freezing order generally is not required to apply to a court to amend the order in order to enforce its security interest. However, it may be prudent for a secured creditor to seek judicial confirmation of its right to enforce its security given the serious implications of breaching a freezing order: *Taylor v. Van Dutch*

Marine Holding Ltd. & Ors, [2017] EWHC 636 (Ch).
[para. 2.980]

The legal principle that a *Mareva* injunction does not confer a security interest or priority in favour of the plaintiff applies even if the frozen assets may be shown at some time in the future to have been stolen from the plaintiff and thus never belonged to the defendant in the first place: *Trade Capital Finance Corp. v. Cook* (2018), 56 C.B.R. (6th) 1, 287 A.C.W.S. (3d) 342 (Ont. C.A.).
[para. 2.1000]

Statutory Injunctions

Gavin Downing v. Agri-Cultural Renewal Co-operative Inc. O/A Glencolton Farms ("ARC") et al (2018), 289 A.C.W.S. (3d) 388, 2018 ONSC 128 (Ont. S.C.J.), at paras. 108-113:

> The granting of a statutory injunction is a different analysis than the granting of an equitable injunction under the common law. The test as described in *RJR-MacDonald Inc. v. Canada* . . . is not applicable.
>
> . . . . .
>
> The residual discretion that the court maintains is limited. The court will only refuse an application for a statutory injunction from a municipality in "exceptional circumstances".
>
> The applicant need only to establish that there is a breach of the applicable statute. There is no obligation on the municipality to provide "compelling evidence."
>
> Once a breach of the statute has been established by the evidence provided, the court can only exercise its discretion to not grant the injunction in "exceptional circumstances" which could include: the offending party has ceased the activity; the injunction is moot and would serve no purpose; the offending party has provided clear and unequivocal evidence that the unlawful conduct will cease; where there is a right that pre-existed the enactment that was breached; there is uncertainty that the offending party is flouting the law or where the conduct is not what the enactment was intended to prevent.

[para. 3.265]

Injunctions: Enforceability

Liu v. Hamptons Golf Course Ltd. (2017), 14 C.P.C. (8th) 246, 283 A.C.W.S. (3d) 658 (Alta. C.A.), set aside an injunction enjoining a golf club "from permitting its members and guests to hit golf balls into the Plaintiff's property in numbers exceeding the number of balls that enter the properties of the neighbours and from permitting hard driven balls

onto the Plaintiff's property that are capable of causing injuries to persons or significant damage to property" on the ground that it was too uncertain and incapable of enforcement.
[para. 4.230]

Defamation Injunctions: Interlocutory

In *Khuja (formerly known as PNM) v. Times Newspapers & Ors*, [2017] UKSC 49, at para. 19, the UK Supreme Court described the modern rationale for the rule that interlocutory injunctions are rarely granted in defamations actions:

> [In] its modern form, its function is to balance the freedom of the press and the right of the claimant to protect his reputation, by confining the plaintiff to the post-publication remedies to which he may prove himself entitled at a trial. The media are at liberty to publish if they are willing to take the risk of liability in damages.

[para. 5.50]

Romana v. The Canadian Broadcasting Corporation et al. (2017), 418 D.L.R. (4th) 570, 14 C.P.C. (8th) 117 (Man. Q.B.), holds, at para. 23, that the principle excluding interlocutory injunctions for defamation actions applies to related causes of action for invasion of privacy, intentional infliction of emotional distress, breach of copyright, and discrimination.
[para. 5.150]

Defamation Injunctions: Post-trial

Nazerali v. Mitchell (2018), 421 D.L.R. (4th) 399, [2018] 7 W.W.R. 48 (B.C. C.A.), at para. 109:

> The injunction should have been limited to the words that were found by the judge to be defamatory because it should not expose the appellants to potential contempt proceedings in respect of words that have not yet been published.

[para. 5.40]

Injunctions and Third Parties

In *Cartier International AG v. British Telecommunications Plc*, [2018] 1 W.L.R. 3259, [2018] WLR(D) 354 (U.K. S.C.), the UK Supreme Court decision upheld an injunction requiring internet service providers to block access to websites that were advertising and selling counterfeit merchandise purporting to be the claimants' goods. The court held that where injunctions are granted requiring a legally innocent third party to assist the claimant in the assertion of its rights against a wrongdoer, the

claimant must indemnify the third party against reasonable compliance costs.
[para. 6.260]

Injunctions to Restrain Breach of Contract

The UK Supreme Court explained in *Morris-Garner v. One Step (Support) Ltd.*, [2018] I.R.L.R. 661, [2018] 1 Lloyd's Rep. 495 (U.K. S.C.), at para. 35:

> The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have as a consequence of his failure in performance.

[para. 7.130]

Stipulated Remedies Clauses

Rock Developments (Price Albert) Inc. v. Carlton Spur Development Corp. (2017), 7 C.P.C. (8th) 292, 283 A.C.W.S. (3d) 165 (Sask. Q.B.), at para. 73: While not determinative, ". . . such a clause provides strong and cogent evidence – not only of such harm, but also of the reasonable expectations of the parties when they entered into their agreement and subsequently conducted their business dealings".
[para. 7.730]

Specific Performance and the Sale of Land

1954294 Ontario Ltd. v. Gracegreen Real Estate Development Ltd. (2017), 80 C.L.R. (4th) 297, 285 A.C.W.S. (3d) 884 (Ont. S.C.J.), at para. 151, and *Sivasubramaniam v. Mohammad* (2018), 292 A.C.W.S. (3d) 887, 2018 ONSC 3073 (Ont. S.C.J.), at para. 80, suggest that in major urban areas where "land is in increasingly limited supply and home sales are often characterized by bidding wars among prospective purchasers" specific performance should be the usual remedy.
[para. 8.50]

Specific Performance: Discretion

In an Ontario case involving two commercial parties, the fact that the vendor had acted in bad faith by trying to terminate a valid purchase and sale agreement in order to take advantage of the escalating value of the vended property after the agreement was signed was held to be a factor favouring specific performance: *1954294 Ontario Ltd. v. Gracegreen*

Real Estate Development Ltd. (2017), 80 C.L.R. (4th) 297, 285 A.C.W.S. (3d) 884 (Ont. S.C.J.), at para. 171.
[para. 8.90]