

CANADA / JUDGMENT

Equustek Solutions Inc. v. Jack

2016 BCSC 1103

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 1103 Equustek Solutions Inc. v. Jack

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Equustek Solutions Inc. v. Jack,

2016 BCSC 1103

Date: 20160415

Docket: S112421

Registry: Vancouver

Between:

Equustek Solutions Inc.,

Robert Angus and Clarma Enterprises Ltd.

Plaintiffs

And

Morgan Jack aka Matt Garcia aka Matt Garci aka Ian Taylor

Andrew Crawford aka Derek Smythe,

Datalink Technology Gateways Inc., Datalink 5, Datalink 6

John Doe, Datalink Technologies Gateways LLC,

Lee Ingraham aka Darren Langdon, Mike Bunker

Igor Cheifot aka Jolio Fernandez,

Alexander Cheifot aka Randy Schtolz,

Frank Geiger aka Felix Fernandez and

Alfonso Doe

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Corrected Judgment: The text of the judgment was corrected on June 14, 2016

at paragraphs 16, 20, 23, 37, 39, 43, 61 & 73.

Oral Reasons for Judgment

Counsel for Plaintiffs:

Robert Fleming

Place and Date of Hearing:

Vancouver, B.C.

April 13-15, 2016

Place and Date of Judgment:

Vancouver, B.C.

April 15, 2016

- [1] THE COURT: This action was commenced by the plaintiffs, Equustek Solutions Inc., Robert Angus and Clarma Enterprises Inc. (collectively, "Equustek") in April 2011. In the present application, which has been heard over the last few days, Equustek seeks a worldwide Mareva injunction against Colin Marsh and Kathleen Marsh. The form of order sought is attached as Schedule "A" to the notice of application filed April 12, 2016.
- [2] This application was brought in addition to an application for relief from the implied undertaking rule in relation to certain documents seized by Equustek pursuant an Anton Piller order (the "APO"), granted by Justice Dillon on March 9, 2015. Yesterday, April 14, 2016, I granted that relief in respect of certain seized documents and information gleaned from the APO documents.
- [3] As I understand it, these documents and that information is intended to be used by Equustek in certain proceedings to be commenced against the Marshes in France. The Marshes are residents of France. I am advised that Equustek will be asking the French court to grant certain relief, by which real property and bank accounts held by the Marshes in France are sought to be provisionally secured.

- [4] Ideally, I would have reserved these reasons to provide more comprehensive and detailed reasons. However, I have formed the view that the result of this application should be available for consideration by the French jurist as he or she may deem appropriate. I am, obviously, not asking the French court to do anything in that respect.

Background

- [5] There have been significant proceedings within this action. At present, Equustek advances various claims against the defendants who, I might add, do not presently include the Marshes. The major claim is in conspiracy and those allegations have been the focus of this application.
- [6] Equustek alleges that the defendants have conspired to steal Equustek's trade secrets, that the defendants have passed off their products as those of Equustek and, also, that the defendants have infringed Equustek's copyright.
- [7] One of the major allegations is that certain defendants, being Morgan Jack and the Datalink companies (who Equustek collectively calls the "Datalink Defendants", as I will), designed a competing product, namely, the Datalink GW1000, using Equustek's trade secrets. This is, obviously, a very brief summary of these allegations, but it will suffice for the purposes of these reasons.
- [8] For the sake of brevity, I will point out that I am aware of the background and facts set out by Justice Leask and his decision in September 2011, at which time he refused an earlier application by Equustek for a Mareva injunction. Much of his reasons were reproduced by Justice Punnett in his reasons found at *Equustek Solutions Inc. v. Jack*, 2012 BCSC 1490 at paras. 3-5.
- [9] Since September 2011, there has been considerable activity in this litigation.
- [10] I am advised by Equustek's counsel that in April 2012, the original Datalink companies and Mr. Jack abandoned the proceedings. Their responses were struck in June 2012, and a worldwide Mareva injunction was granted against them by Punnett J. in July 2012 (cite for reasons in para. 8 above). At that time, Punnett J. was reconsidering the earlier refusal of Leask J. to grant such an order. Ultimately, Punnett J. found that the balance of convenience had shifted to Equustek. In addition, the Court found that there was a real risk of dissipation of assets after inferring that matter from the circumstances at that time: see para. 42 of Punnett J.'s reasons.
- [11] In addition, an arrest warrant was issued for Mr. Jack by Justice Groves on September 26, 2012.
- [12] Finally, there have been extensive proceedings with respect to Google Inc. relating to certain websites that Equustek maintains were created by the Datalink Defendants in breach of certain court orders. In June 2014, Justice Fenlon (as she then was) granted a mandatory injunction with respect to Google's indexing or referencing of such sites: *Equustek Solutions*

Inc. v. Jack, 2014 BCSC 1063, which was affirmed at Equustek Solutions Inc. v. Google Inc., 2015 BCCA 265. It is my understanding that leave to the Supreme Court of Canada has been sought and obtained and a hearing is scheduled for December 2016.

- [13] Equustek's counsel advises that more websites, presumably those created by the Datalink Defendants, are continually popping up, and continually being removed by Google, through a protocol that was settled between Google and Equustek.
- [14] Equustek's principal, the plaintiff, Robert Angus, in his recent affidavit #10 sworn April 14, 2016, filed during the course of this application, suggests that the Datalink Defendants continue in their business operations. This affidavit was filed in response to the Court's enquiry as to evidence in support of Equustek's contention that there are ongoing breaches by the Datalink Defendants at this time.
- [15] At present, there are four defendants who are actively defending the litigation. They are Andrew Crawford, against whom a Mareva injunction was granted by Chief Justice Bauman (as he then was) on January 15, 2013. I not aware that the reasons of Bauman C.J. were transcribed, so it is unclear to me as to the facts upon which that order was granted. In addition, responses have been filed by the defendants, Mike Bunker, Frank Geiger and Lee Ingraham.

The APO Proceedings

- [16] The present application arises from the consequences of the APO execution and seizure. The APO was granted on March 9, 2015 by Justice Dillon, which allowed seizure of the certain evidence from the residence of Igor Cheifot and Alexander Cheifot (who were not then named defendants). The reasons of the Court indicate that this relief was granted to preserve evidence and/or property which was the subject matter of the litigation.
- [17] The evidence upon which Dillon J. determined that there was a strong prima facie case included that the Cheifots had obtained materials from the Datalink Defendants in April 2012, that the Datalink Defendants' responses had been struck (by which the allegations against them were deemed to be admitted) and that:
- [11] [the Chiefots] were invested heavily in an ongoing business with the Datalink principal, Morgan Jack, and have been trying to manufacture and sell a closely linked product, coincident in timing with obtaining materials from Datalink and subsequently.
- [18] Execution under the APO occurred, and in accordance with the usual procedures, the evidence or materials seized was subsequently held by independent supervising solicitors.
- [19] At some point, the Cheifots were added as defendants to this action. In any event, later still, on September 9, 2015, Justice Wedge granted an order striking the response of Igor Cheifot. She also found that Alex Cheifot was in default in filing a response and was prohibited from doing so without further order of the court.

- [20] The final order, of which I am aware, was granted on September 21, 2015 by Justice Duncan, who is the case management judge. She ordered that Equustek be allowed access to the evidence seized under the APO. Her order, in part, provided that Equustek was to list any relevant documents discovered. In addition, the order provided that, if Equustek discovered any potentially privileged documents, a protocol would be followed by which such documents would be placed aside and listed as potentially privileged, presumably, with the idea that they would be reviewed at some later time.
- [21] Mr. Fleming indicates that none of the seized documents reviewed by Equustek to date have been listed, whether as relevant or as privileged or potentially privileged. To my mind, it is also important to note that Mr. Fleming confirms that only a limited number of the APO documents have been reviewed by Equustek to date.
- [22] However, that limited review of the APO documents has revealed some emails which Equustek contends provides a "significant revelation" regarding the involvement of the Marshes.
- [23] Colin Marsh is not unknown to Equustek. His company, Sage Automation Corp. ("Sage"), was a previous distributor of Equustek's predecessor company's products. In addition, Mr. Marsh was considered to have attempted, some time ago, in 2000, to develop a competing product with Mr. Jack and Mr. Crawford.
- [24] Equustek's predecessor company was also involved in litigation with Mr. Marsh and Sage. The action against him personally involved an allegation that he had personally guaranteed the debt of Sage. That allegation was ultimately rejected by Justice Cullen (as he then was) in February 2003: *Equus Technologies Inc. v. Sage Automation Corp.*, 2003 BCSC 315.
- [25] To date, the parties who have been discovered in this action have steadfastly denied any involvement of Mr. Marsh in the activities of the remaining defendants or the activities that are impugned by Equustek generally within this litigation (including relating to the Datalink Defendants).
- [26] The most relevant evidence on this application is a series of emails, which are contained in the affidavit #67 of Sarah Perkonig sworn April 6, 2016. These emails, I am advised, come from the APO documents. These emails are dated from December 2011 to July 2014.
- [27] The first issue that was tackled head-on by Equustek's counsel was the identity of the people behind these various APO emails. It is apparent, from a review of these emails, that the email addresses do not reveal names, as one would typically see in email addresses. Equustek's style of cause in its pleadings include allegations that certain aliases have been used by the various defendants, including Mr. Jack and the Cheifots. As Mr. Fleming points out, with those responses having been struck, those matters are taken to have been admitted by those defendants.

- [28] Equustek alleges that the primary participants in these various emails are Mr. Jack, the Cheifots and Mr. Marsh. In many cases, this is more than evident where there is reference to "Morgan" (i.e. Mr. Jack), "Alex" (i.e. Alex Cheifot), "Igor" (i.e. Igor Cheifot) or "Colin" (i.e. Mr. Marsh), in the body of these affidavits, which departs from the aliases as they are using them. There is no direct evidence that the emails attributed to Mr. Marsh, namely, those with the "K.C." or "K.C Firth" designations, are that of Mr. Marsh. Nevertheless, I am satisfied, on a balance of probabilities, that the references with respect to "K.C." or "K.C Firth" do, in fact, refer to Mr. Marsh.
- [29] Equustek's counsel strongly suggests that the use of aliases by this group of men evidences a consciousness of guilt regarding their activities.
- [30] In any event, I do accept Equustek's contention as to the use of these various aliases and the true identity behind the senders and recipients of these emails, as being Mr. Jack, the Cheifots and Mr. Marsh.
- [31] I will not recount all the details of these emails.
- [32] I agree with Equustek's counsel's contention that, generally speaking, these emails show that Mr. Marsh was involved in advising Mr. Jack on business strategy and how to carry on his business. These emails refer to various court orders granted in this jurisdiction, and can be construed as containing advice as to how to carry on business in the face of these court orders. There is also reference in the emails as to creating shell companies or nominee companies, with nominee shareholders or directors. The emails refer to corporations being established in multiple jurisdictions, principally, Panama and Mexico.
- [33] I agree that, in substance, the emails show that Mr. Marsh was involved in other matters, such as branding and sales of the GW1000 product, the operations of the companies, sales materials and some technical matters (although I think it is well-taken that Mr. Marsh is not a technical person).
- [34] It is also quite apparent to me that these parties to these emails were quite concerned about maintaining secrecy of communications. That is evident enough from the use of the aliases. There is also concern expressed in the emails about the emails being hacked in terms of disclosing the substance of the discussions to other parties.
- [35] Some items of note from the emails include:
- a) the email of August 3, 2012 at p. 20 of Ms. Perkonig's affidavit. This email refers to the setting up of a Mexican shell company. This email also refers to "Colin" in a number of places as having a percentage interest, although it is referred to as a part-time interest. "Colin" is also referred to as a strategic advisor in the European sales channel and this European reference, of course, is consistent with Mr. Marsh's residency in France. It is worth noting that this email was some eight days after the Mareva injunction was granted against the Datalink Defendants;

- b) the email of September 19, 2012 at p. 41 of Ms. Perkonig's affidavit. I accept that the capitalized and bolded responses to the previous emails are those of "K.C." (i.e. an alias of Mr. Marsh), and these refer to a "bait-and-switch" method which is, in fact, something that was referenced later in the litigation as a tactic employed by the Datalink Defendants in acting contrary to Equustek's rights;
 - c) the email dated February 15, 2013 at p. 67 of Ms. Perkonig's affidavit. This, again, refers to capitalized responses from "K.C.", which I take to be Mr. Marsh. This email refers to protection against lawsuits. There is also specific reference to Mr. Angus, the principal of Equustek, and there is reference to being dragged into a conspiracy lawsuit advanced by Mr. Angus. The intent of the email seems to be directed at how to avoid being sued; and
 - d) finally, the email dated March 27, 2013 at p. 84 of Ms. Perkonig's affidavit. There is a reference, again, in capitals, from "K.C." at "kc@adelab.org" referring to the fact that both "you", who I take to be Mr. Jack, "have been found guilty by default in the Cdn courts AND THE JUDGE ALSO ORDERED THAT ALL GW1000 SALES MUST STOP". If nothing else, this indicates a knowledge of the Canadian court orders.
- [36] I refer to the above emails simply as examples. As Mr. Fleming noted in his review of all of the emails that are in Ms. Perkonig's affidavit #67, they all have to be considered as a whole and in the context of each other.
- [37] Finally, there is also a reference in these emails to Mr. Marsh's wife. The reference in these emails is at times only "K". For the purposes this application, I accept this as being a reference to Kathy Marsh. I will address the substance of the emails in relation to Ms. Marsh later in my reasons below.

Jurisdiction

- [38] The first issue to be considered is that of jurisdiction. As I said, Mr. and Mrs. Marsh live in the south of France. Mr. Fleming refers to them having extensive connections with British Columbia, which is questionable at this time. It appears that they were residents of West Vancouver at some point, and had a bank account in West Vancouver at some point. Mr. Marsh was also a litigant in these courts in the past. These British Columbia connections appear to be dated, at best. In addition, Mr. Marsh apparently holds a Canadian passport which I do not consider as being particularly relevant on this point.
- [39] As Mr. Fleming argues, the test to establish jurisdiction is low. Equustek need only establish a good, arguable case that the Marshes are within the jurisdiction of the Court: see *Purple Echo Productions v. KCTS*, 2008 BCCA 85. That authority was followed by Fenlon J. in granting the injunction against Google.

- [40] The relevant test is found in the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 (the "Act"). The relevant section is s. 3(e), which provides that this Court has territorial competence if there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.
- [41] Equustek's counsel advances a number of bases upon which I might assert jurisdiction, as found in s. 10 of the Act.
- [42] I do not intend to deal with all of Equustek's arguments; rather, I will focus on two.
- [43] The first basis is s. 10(a), where the proceeding:
- (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property ...

The propriety rights are said to arise from Equustek's intellectual property rights which are sought to be enforced by Equustek in this province. That source of jurisdiction was accepted by Fenlon J. in June 2014 at paras. 26-27. I adopt that as the basis for jurisdiction for the same reasons set out in Fenlon J.'s reasons.

- [44] The second basis on which I conclude that this court has jurisdiction is s. 10(g), namely, where the action concerns a tort committed in British Columbia. Mr. Fleming relies on two decisions concerning this Court's jurisdiction in the context of a conspiracy: *British Columbia v. Imperial Tobacco*, 2006 BCCA 398 at para. 43 and *Fairhurst v. De Beers*, 2012 BCCA 257 at paras. 35-45. Those decisions support that where there is harm suffered in this province, this Court can assert jurisdiction over defendants in accordance with s. 10(g) of the Act.
- [45] Other jurisdictional bases are asserted under s. 10(e),(h) and (i)(i)(ii) which pose a more difficult analysis. I do not intend to do so, since I have already found jurisdiction under the other two matters.
- [46] In summary, I accept that this Court has jurisdiction in respect of the Marshes for the purpose of this application.

The Mareva Authorities

- [47] Mr. Fleming has, of course, provided me with the leading authorities in this jurisdiction on Mareva injunctions. Those include this Court's decision in *Mooney v. Orr*, [1994] B.C.J. No. 2652 and the Court of Appeal's in *Silver Standard Resources Inc. v. Joint Stock Co.*, [1998] B.C.J. No. 2887 and *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, [2007] B.C.J. No. 2182, 2007 BCCA 481.
- [48] I was previously aware of these authorities, having discussed them at some length in my decision in *Hans v. Volvo Trucks North America Inc.*, 2014 BCSC 1123. In that case, I discussed the balance of convenience issue at para. 70 and following.

- [49] Finally, I am assisted in the review of the law relating to Mareva injunctions by Punnett J.'s discussion in his October 2012 reasons confirming the basis upon which he granted the Mareva injunction against the Datalink Defendants.
- [50] For the purpose of these reasons, I am going to review the principles only briefly. The authorities establish, of course, that this is extraordinary relief. The starting point, in terms of any analysis, is that a defendant against whom a claim has not been proven is entitled to maintain control of his or her assets pending the plaintiff succeeding in respect of the relief sought.
- [51] The applicant must establish, firstly, a strong prima facie case or a good arguable case; and, secondly, that the balance of convenience favours the applicant. As the many case authorities show, the overriding test to be applied in this case is whether it is just and equitable in the particular circumstances to grant this extraordinary relief.

Strong prima facie Case

- [52] Many previous court orders granted in this action establish that Equustek has made out a strong prima facie case against the Datalink Defendants, Mr. Crawford and the Cheifots.
- [53] Equustek now contends that the Marshes are co-conspirators with Mr. Jack and the other defendants or have aided or abetted them in their unlawful activities. In addition, Equustek alleges that the Marshes knowingly assisted the Datalink Defendants, and presumably the Cheifots too, in their unlawful activities, and that the Marshes knowingly received proceeds from those activities.
- [54] Equustek submits that the APO emails attached to Ms. Perkonig's affidavit #67 show that Mr. Marsh was in a joint enterprise with Mr. Jack and the Cheifots from 2011 to 2014. Further, Equustek submits that these emails show that he has been caught counselling these other people to flout the orders of this Court.
- [55] Having reviewed these emails and considered Mr. Fleming's submissions, I agree that a strong prima facie case has been made out against Mr. Marsh. The emails are capable of supporting the argument that, during that period of time, namely, from 2011 to 2014, Mr. Marsh was a co-conspirator with Mr. Jack and the Cheifots for the purpose of exploiting Equustek's products or trade secrets.
- [56] Further, the emails in the March 2014 timeframe also suggest that Mr. Marsh was obtaining some monetary compensation from the Datalink Defendant's operations. Mr. Fleming has, just recently, on the continuation of today's hearing, pointed out that some of the APO documents refer to two companies and the shareholdings in those companies. These documents do not refer to Mr. Marsh but, in any event, that still leaves open the possibility that Mr. Marsh has an interest perhaps with a nominee. In addition, it remains the case that at least one email (August 3, 2012) refers to another company that the Datalink defendants and the Cheifots were talking about incorporating, which was to include Mr. Marsh.

- [57] The situation regarding Ms. Marsh, however, stands on a different footing. There are no emails from her; nor is there any suggestion that she was using any aliases in any communications that she might have had with the other defendants.
- [58] The earliest email referring to Ms. Marsh is, again, found in Ms. Perkonig's affidavit # 67 and is dated March 28, 2013. That is Mr. Marsh's email with the subject matter "Communications Security." Most references to Ms. Marsh, as I noted above, are either to "my wife" or to "K".
- [59] I do not intend reading the relevant portions of these emails into the record. They can be found at pp. 85, 86, 88, 90, 104, 106 and 117 of the affidavit. Briefly, these emails include references (mostly by Mr. Marsh) to the effect of: "in summary, my partner"; "I am asking you to delete all your past, present emails"; "However, for my wife's peace of mind"; "I am sure you understand my pressure. K was very upset"; "I am asking you to delete all your past, present and future communications" "At least K keeps reminding us"; "I had a chat with K about Matt G"; "K thinks ABB are being unreasonable" and "I talked things over with K."
- [60] Equustek alleges that this proves that Ms. Marsh was "involved" and was aware of Mr. Marsh's unlawful activities. In addition, Equustek alleges that through these emails from her husband, Ms. Marsh was indirectly advising Mr. Jack regarding the ABB transactions and how Mr. Jack should protect himself from his co-conspirators.
- [61] Notwithstanding Equustek's counsel's submissions, I have great difficulty interpreting these emails as does Equustek. These emails are not from Ms. Marsh. They are penned by her husband, and there is no way to determine if he accurately describes what statements are attributed to her. There is also no way to accurately discern from these emails what her state of mind was, or what she was aware of, in terms of any activities, perhaps unlawful activities, of Mr. Jack or her husband.
- [62] Ms. Marsh was, of course, aware of the previous relationship between Mr. Marsh/Sage and Equustek and the litigation that ensued between them some years ago. It is possible that any concerns that she had about the communications in that timeframe (namely, 2013 to 2014 per the emails) arose from the obvious acrimony that arose from that litigation and the apparent distress of the Marshes in relation to Equustek and Mr. Angus' litigation strategies.
- [63] In summary, I am unable to conclude, on the basis of the APO emails produced by Mr. Marsh that refer to Ms. Marsh, that Equustek has established a prima facie case against her.

Balance of Convenience

- [64] That leaves the issue as to whether the balance of convenience favours Equustek or Mr. Marsh in terms of granting an injunction against him.
- [65] I return to my analysis in Hans regarding the balance of convenience. I discuss extensively in those reasons some of the background of Mareva injunctions particularly arising from the Aetna Financial decision, which was discussed in Tracy. There are four exceptions outlined in Aetna Financial setting out when such an injunction may be granted. Mr. Fleming, quite

rightly, points out that those are not airtight compartments into which Equustek must fit itself for the purpose asserting a basis upon which this Court may grant a Mareva injunction. However, they are a useful guide in terms of typical situations where these types of injunctions may be considered.

- [66] The usual type of situation is, of course, where there is a real or impending threat to remove contested assets from the jurisdiction. This is the *quia timet* type of injunction. This provides a clear basis upon which to grant such an injunction, namely, where there is dissipation, whether real or potential, of assets which would have the effect of thwarting any successful claim at the end of the day.
- [67] However, in this case, there is no evidence that Mr. Marsh has or is in the process of dissipating his assets. By all accounts, it appears that the Marshes sold their property in West Vancouver over a decade ago, in 2004. The date when they moved to France is not known, so nothing can be inferred from that event in terms of them dissipating assets. It is known that the Marshes own real property in the south of France. Also, Mr. Fleming refers to other assets of the Marshes (not in evidence), namely, that the Marshes have substantial balances in bank accounts in France at this time.
- [68] In addition, there is no evidence that the Marshes have organized their affairs in France in order to remove them from this jurisdiction in respect of any present or anticipated litigation where they might be exposing those assets to execution if they were sued. Again, all I understand is that they sold their property in West Vancouver many years ago and moved to France. By all accounts, they have been living in France for some time now and conducting their lives in the ordinary course.
- [69] That is a very different situation, for example, from the circumstances found in *Mooney* where Justice Huddart (as she then was) commented that it was accepted that Mr. Mooney had, in fact, put his assets offshore for that very purpose, i.e. to shield his assets and protect his wealth or "preserve assets out of sight and out of attack" (para. 58). There is no evidence that Mr. Marsh has acted in the same fashion as Mr. Mooney.
- [70] Mr. Fleming, of course, points out that it is not necessary that there be any evidence of active or potential dissipation of assets, pointing to the well-known decisions of this Court that a Mareva injunction may be ordered without such circumstances. I would refer on this point to *Punnett J.*'s reasons:
- [31] What is essential is awareness of the root issue of the particular situation before the court, so that a proper balancing of interests can take place, and a just result arrived at (Tracy at paras. 44-46). In most circumstances, a real risk of dissipation of assets must be established before a party will be granted a Mareva injunction in British Columbia; however, this is not a strict requirement (*ICBC v. Patko*, 2008 BCCA 65 at para. 26. In some circumstances, such as where there is evidence of fraud, a risk of dissipation of assets can be inferred (*Netolitzky*). Where the risk of dissipation of assets is not imminent, the court's fundamental concern should be to protect its process from abuse. As a result, given a Mareva injunction can be

granted as a form of security, it is not essential that there be evidence of active removal or dissipation of assets. (Netolitzky; Silver Standard Resources Inc. v. Joint Stock Co. Geolog (1998), 168 D.L.R. (4th) 309 (B.C.C.A.)).

- [71] Of course, protecting the process of the court from abuse was something that was commented on in Aetna Financial. That is the second exception, which is discussed in Tracy:
- [44] I do not consider that the general approach to Mareva injunctions in British Columbia requires modification. It may, however, require clarification and a reminder that it is a species of interlocutory injunction with special requirements. Those requirements relate to the general rule against pre-judgment execution and may vary depending on the nature of the exception into which the injunction fits (with reference to the four categories of exception given as examples in Aetna Financial). While the term "Mareva injunction" is used to denote any order impounding assets or freezing assets before judgment (outside of statutory remedies such as builders liens or garnishing orders), they are not all alike. Awareness of the root issue is helpful in sorting out the exercise of discretion.
- [45] Unlike a quia timet injunction, in which the issue is removal of assets from the jurisdiction, an injunction to protect the processes of the court may not involve extra-territorial considerations but may engage issues of dissipation. But at its root, the issue is the risk of harm through either dissipation of assets or removal of them to a place beyond the court's reach.
- [46] In all cases, great caution is to be shown to avoid the mischief of litigious blackmail or bullying, and due regard must be paid to the basic premise that a claim is not established until the matter is tried. Great unfairness may be occasioned, and the administration of justice brought into disrepute, by an order which impounds assets before the merits of the claim are decided. It is useful to recall the words of Huddart J.A. in Grenzsarve Spedition Ges.m.b.H. et al. v. Jans et al. (1995), 129 D.L.R. (4th) 733, 15 B.C.L.R. (3d) 370 (S.C.) at 755-756 at p. 23:
- [Mareva and Anton Pillar orders] represent an extraordinary assumption of power by the judiciary. Judges must be prudent and cautious in their issue.
- [72] In this case, of course, the assets identified by Equustek are already beyond the Court's reach, namely, in France, and I can only presume that they have been there for some time now.
- [73] The comment from the Court of Appeal that bears repeating in this circumstance is that found in Silver Standard, which was also quoted by Leask J. when he rejected the earlier Mareva injunction. The Court said at that time:

- [21] ... it is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted.
- [74] So the question here - just as it was in *Hans* at para. 91 - is this an exceptional case?
- [75] As regards Mr. Marsh, he has no status in this litigation at this time. He is not yet a defendant. However, I do not see that as a major hurdle in this case because, as Mr. Fleming pointed out, Equustek could have easily just commenced a stand-alone action against him and brought the Mareva injunction in that action (and then, perhaps later, applied to consolidate the proceedings or have them heard together).
- [76] It remains the case that there are various hurdles to be climbed by Equustek, including having Mr. Marsh added as a defendant. It is also a possibility that there may be jurisdictional issues to be determined in terms of whether this Court does have jurisdiction in relation to him and, if so, whether Mr. Marsh might apply to have the Court decline jurisdiction. Of course, as the cases point out, it is not necessarily a certainty at this time that Equustek will succeed against Mr. Marsh in respect of its allegations against him at the end of the day.
- [77] One of the other concerns that I have in this case, as raised with Mr. Fleming through the course of his submissions, is that there has only been partial review of the APO documents. It is, of course, well-taken that on this *ex parte* application, Equustek is required to come before the Court with all relevant information, both inculpatory and exculpatory. Mr. Fleming has, quite properly, referred me to some potentially exculpatory documents. Nevertheless, I am concerned that the review of the APO documents has only been partially completed, and that the Court may have an incomplete picture in terms of Mr. Marsh's involvement or non-involvement, as the case may be, in terms of his activities with the Datalink Defendants and the Cheifots.
- [78] That said, the tenor of the communications in the emails is fairly strong in terms of Mr. Marsh, and has led to my finding that there is a strong *prima facie* case against him. He does appear to have been actively involved with the Datalink Defendants, although what his version of these activities entailed, whether legal or not, remains to be seen. I do accept that the clandestine nature of the communications, including references to aliases and references to potential hacking of communications, do raise concerns about the legitimacy of those activities.

- [79] Another issue relevant to the balance of convenience is the fact that the emails that I have seen are rather dated, to 2014, some two years from today's date. That is in contrast to the evidence, as I understand it, before the Court on the earlier Mareva applications, where there was strong evidence of ongoing activity in terms of the breaching of Equustek's intellectual property rights at the time that those applications were brought.
- [80] There is no evidence here that Mr. Marsh is continuing with his activities with the Datalink Defendants, whatever that may have been. Therefore, these emails are rather dated. I accept that that is not a complete answer to Equustek's conspiracy allegations. It may be that Mr. Marsh was only in this conspiracy, if it is proven, for a short period of time. While this may not be particularly relevant for the purposes of liability, I consider that it is a factor in terms of whether it is appropriate at this time to tie up Mr. Marsh's worldwide assets pending him being added to this proceeding and defending it.
- [81] Mr. Fleming has, quite properly, given me extensive submissions on why I should not grant this Mareva injunction as part of the full and frank disclosure that this Court expects on this ex parte application. I have considered the points that he has made in that respect.
- [82] However, having considered all of the circumstances, I am not convinced that the balance of convenience at present favours Equustek versus Mr. Marsh. Needless to say, there may be further developments, just as there were in relation to the Datalink Defendants, that might give rise to a different conclusion. I can only go on the basis of the evidence that is before me today. Having reviewed this evidence, and heard the extensive submissions of Mr. Fleming, I am not convinced that it is appropriate at this time.
- [83] Mr. Fleming has indicated Equustek intends to commence legal proceedings in France by next week. In that event, I am directing that my oral reasons, as no doubt recorded by Mr. Fleming to some extent, be communicated to the French judge in some manner, presumably by an affidavit. Obviously, I will not have my written reasons available by that time, if they are ordered. Accordingly, I am directing that they be communicated to the French judge in some fashion and the French judge can do with that information as he or she deems appropriate.
- [84] At the very least, the communication to the French judge should be that I have found a strong prima facie case against Mr. Marsh only, but that I have determined that the balance of convenience does not weigh in favour of an injunction being granted against him at this time. Needless to say, if I had found a strong prima facie case against Ms. Marsh, I would similarly have concluded that the balance of convenience weighed in her favour also.
- [85] In conclusion, the application set out in paragraph 1 of the notice of application is dismissed. As previously noted in these reasons, I have already granted relief in relation to relief from the implied undertaking (paragraph 2 of the notice of application).
- [86] Anything arising, Mr. Fleming?

- [87] MR. FLEMING: No, My Lady. Maybe just to clarify. So I'm to advise the court in France of the core conclusions, which are a strong prima facie case as against Colin Marsh, but no balance of convenience and, alternatively, had there been a strong prima facie case against Kathy Marsh, also no balance of convenience and, therefore, the application against both is dismissed. Am I also to advise the French judge of the conclusions about the aliases and implications of the evidence, My Lady? That will be difficult for me to do. I'm not sure if that was your intention or not, or just those core points.
- [88] THE COURT: Well, I think just the core points. Those are really conclusions. I expect that the French court is going to be in a position to make their own findings of fact, whatever process they happen to go through. I think just the core conclusions need to be communicated, to the extent the French court wants to consider those.
- [89] MR. FLEMING: So I'll do that. That's straightforward. I take it, then, that you do not intend that I obtain a transcript of your reasons to do this. I'm just going to write them a letter giving them those core conclusions.
- [90] THE COURT: Well, no. I mean, you are at liberty to order the transcript. All I am saying is that I do not think you are going to have the transcript in time.
- [91] MR. FLEMING: No, I won't.
- [92] THE COURT: That was my point. If you were going to wait until you had the transcript, then fine, but I did not get the feeling that that was what you were going to do.
- [93] MR. FLEMING: No, My Lady.
- [94] THE COURT: Yes, that was where I was going with the whole thing.
- [95] MR. FLEMING: Thank you, My Lady.
- [96] THE CLERK: My Lady, can I just confirm? So the order sought as per the notice of application, para. 1, is not granted?
- [97] THE COURT: Dismissed.
- [98] THE COURT: Yes.
- [99] MR. FLEMING: My Lady, there's just one last point that has to be addressed, then, and we sort of already addressed it, but just so I'm clear. You've now given - you've made an order and you've also given reasons. Neither of them are covered in the sealing order. So to capture the purpose of the sealing order, I think the sealing order needs to be amended to reflect those two things.
- [100] THE COURT: This is an ongoing process, is it not?

- [101] MR. FLEMING: I'm afraid it is. So I wonder if - I'm not sure if you would like - should I write that into the sealing order? Or perhaps I would prefer, if you don't mind, if you would write it in, and then I'm not sure if it needs to be an issue.
- [102] THE COURT: Yes. All right. Why do you not hand that up. So we want to add in the order of today.
- [103] MR. FLEMING: Yeah, so under the last item where it says "the orders," it should be plus this order and --
- [104] THE COURT: Order of April 15.
- [105] MR. FLEMING: Dismissing the plaintiffs' application, item number 1.
- [106] THE COURT: Well, I am just going to put the order. I do not have to say what it says.
- [107] MR. FLEMING: Yeah, that's fine.
- [108] THE COURT: Anything else?
- [109] MR. FLEMING: The reasons for judgment of today.
- [110] THE COURT: Well, that is the audio recording, is it not?
- [111] MR. FLEMING: I think it is the same, My Lady, but just to be clear. I am not sure they're usually considered the same even though they have the same source.
- [112] THE COURT: I think I have fixed that. Why do you not have a look at that, Mr. Fleming, and make sure that works for you.
- [113] MR. FLEMING: Yes, My Lady, I think that will be sufficient. I do not know if the registry will be very happy, but I think it's clear enough.
- [114] THE COURT: Well, it is the best we can do at five o'clock on a Friday.
- "Fitzpatrick J."

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