

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Equustek Solutions Inc. v. Jack*,
2012 BCSC 1490

Date: 20121010
Docket: S112421
Registry: Vancouver

Between:

**Equustek Solutions Inc., Robert Angus, and
Clarma Enterprises Inc.**

Plaintiffs

And:

**Morgan Jack, Andrew Crawford,
Datalink Technology Gateways Inc., Datalink 5, Datalink 6,
John Doe and Datalink Technologies Gateways LLC**

Defendants

Before: The Honourable Mr. Justice R. Punnett

Reasons for Judgment

(In Chambers -- *Ex Parte*)

Counsel for the Plaintiffs:

R.S. Fleming

Defendants:

No appearances

Place and Date of Decision:

Vancouver, B.C.
July 26, 2012

Place and Date of Reasons:

Vancouver, B.C.
October 10, 2012

Introduction

[1] In August 2011 the plaintiffs brought an application to the court for relief that included a *Mareva* injunction. The matter was heard by Mr. Justice Leask over two days and the *Mareva* injunction was refused.

[2] The plaintiffs renewed their application in the summer of 2012 on the basis of events that transpired since the earlier application. I heard the matter *ex parte* on July 26, 2012 and issued a *Mareva* injunction with reasons to follow. These are those reasons. They rely to some extent on

the written submissions of the plaintiffs without specific attribution being noted.

Background

[3] For the purpose of this application the plaintiffs accept the findings of fact of Leask J. in his oral unreported decision of September 8, 2011. Leask J.'s introduction and findings of fact were as follows:

INTRODUCTION

[2] The plaintiffs are seeking a Mareva injunction against the defendants. Both companies are manufacturers of industrial network interface products which allow different pieces of complex machinery made by different manufacturers and using different interface and software to communicate with each other. For many years the two companies worked together with the plaintiffs designing and manufacturing products and the defendants acting as distributors and sales agents. In recent years their relationship broke down and they have become competitors. In this chambers application, the affidavit material demonstrates seriously different versions of the facts.

FACTS

[3] There is some common ground between the parties. The original technology for the Equus/Equustek product line was invented by the plaintiff Robert Angus.

[4] Datalink was formerly a distributor of products manufactured by Equustek and its predecessor company, Equus Technologies. There was no formal distribution agreement in place, but for years the practice was that Datalink would take orders from its customers for Equustek products and then in turn order the product from Equustek. Datalink would then deliver the product to its customers.

[5] In earlier years, Equus had no marketing or sales division of its own. The Equus products were marketed as "Datalink" products. Datalink actively marketed the Equus products and the products themselves had "Datalink" logos.

[6] The products were heavily marketed by Datalink's web presence and numerous websites. The idea was that the customer would be more inclined to buy a Datalink product from Datalink if there was an association of names.

[7] The business arrangement described above was originally devised between Equus and Colin Marsh, who operated two companies, Sage Automation Corporation and Datalink Technologies, sometimes hereafter referred to as old Datalink, which sold the Equus products in the United States and Canada. The arrangement essentially contemplated a division of labour: Sage and old Datalink were responsible for interactions with the marketplace, and Equus was responsible for hardware and software.

[8] Over time difficulties developed between Robert Angus and Colin Marsh. This eventually led to a lawsuit in which Angus alleged that Marsh had personally guaranteed the debts of Sage. Ultimately Equus failed at trial to prove the personal guarantee.

[9] After the relationship between Marsh and Angus collapsed, the defendant Morgan Jack, who had worked for Sage, founded the new Datalink, to carry on the business of Sage and old Datalink. Since Jack's Datalink began dealing with Angus and Equustek, the relationship has suffered from similar problems as Marsh had run into previously.

[10] In or around 2003 or 2004, when Datalink refused to merge with Equustek, Jack says that Angus told him that Equustek would market its products directly and put Datalink out of business.

[11] Shortly after this exchange, Equustek hired Bob Huth to take charge of its marketing functions and put Equustek labelling on the product, in addition to the DL labelling that was already there. Huth ceased putting a Datalink logo on the products. Datalink maintained its longstanding marketing practices and did not change its websites or photos at this time, so they continued to display the Datalink logo and DL on the product as before. When the new products that were developed by Equustek did become available after this point, Datalink photoshopped over the photo of the Equustek logo.

[12] This brings us to the involvement of the defendant Andrew Crawford.

[13] Crawford, a professional engineer, is a former employee of Equustek. He was employed by Equustek and its predecessor company, Equus Technologies, from October 1993 until January 2005. While at Equus/Equustek, Crawford was engaged in designing network interface products based on a competitor's product, an Allen Bradley network product called the 1770-KF2 which operated on its own closed proprietary network called a DH+ network, meaning that only Allen Bradley products could communicate on that network.

[14] After Crawford left Equustek in January of 2005, he joined Tantalus Systems Corp., in February 2005, doing work that was unrelated to his work at Equus/Equustek. When he left Equustek, according to him, he did not take with him any intellectual property, nor did he have any intention of being involved with anything that competed with Equustek.

[15] In 2006, the defendant Morgan Jack hired Crawford as an independent contractor to work on a project called QPAB with General Electric. This particular project was a DH+ interface card for a touch-screen computer.

[16] The QPAB work required an interface that would work on Allen Bradley DH+ networks. According to Crawford, his role was limited to certain hardware and firmware developments for the QPAB, none of which involved the plaintiffs' intellectual property. Crawford says that his work on the QPAB was limited to the study and use of the Allen Bradley product and the use of open industry technical standards, expired Allen Bradley patents and common engineering techniques, such as reverse engineering, applied to the Allen Bradley product and other products made by Allen Bradley and Equustek.

[17] Crawford says he was told by Jack to design the QPAB product independently so that there would be no complaints that it was not independently developed, as they were aware that Angus might well commence litigation if it were discovered that a DH+ product was being worked on.

[18] According to Crawford, he worked on three things for QPAB: the selection of the central processing unit, the selection of the operating system and the initial design of the physical interface for the DH+. Crawford used a Digi Evaluation Kit for these purposes, which had pre-existing hardware and firmware elements, such as the right processor and operating system.

[19] Crawford also wrote the firmware necessary for the DH+ connectivity that was not already pre-programmed. The firmware was written by Crawford from scratch, and the code is different from the firmware on Equustek's products.

[20] Crawford says it took him two years to reverse engineer the Allen Bradley project for the QPAB. To aid him, he had the benefit of the Digi Kit, his personal knowledge of how the Allen Bradley project worked and expired patents.

[21] Beginning in about 2006, while continuing to rely exclusively on Equustek's trademarks, products, images and manuals, the defendants began selling the GW1000 product in substitution for the Equustek products.

[22] The plaintiffs' sales and the defendants' purchases of the Equustek products

declined dramatically after 2007.

	Total Sales '000s	Sales to Data- Link	%
2004	296	278	94%
2005	672	367	55%
2006	643	410	64%
2007	701	448	64%
2008	484	150	31%
2009	361	104	29%
2010	259	27	10%

[23] In December 2010, Equustek discovered that Datalink were not filling Equustek product orders with Equustek products. Instead, while advertising and accepting orders for Equustek products, Datalink was filling those orders with their own GW1000 line of products.

[24] When Equustek discovered this they wrote to the defendants on January 18, 2011, and terminated the distribution agreement and demanded that the defendants delete all reference to Equustek's products and trademarks on their websites.

[25] The plaintiffs believe that the defendants now hold approximately two-thirds of the market share formerly held by them, and since the change in the websites and the demand, sales of the Equustek products have recovered somewhat, up 19%, and they have not returned to the level they were before the defendants began selling the GW1000.

[26] In January 2011, Equustek terminated its relationship with Datalink. Datalink sought to remove all references to Equustek products from its websites. As a result of the extensive marketing network that Datalink had established, the process was difficult and took a long time. In some cases Datalink simply shut a website down because it was too difficult to delete every single reference. As far as Datalink is aware, every reference to Equustek products on its websites has now been eliminated. The plaintiffs vehemently disagree.

[27] The plaintiffs' view is that the GW1000 line of produc[t]s was developed by Crawford using the plaintiffs' confidential information.

[28] Datalink's view of the similarities between the products is that the products are designed in some ways to accomplish essentially the same function and are based on pre-existing technology which is the same. The similarities result from functional necessity or their common technological roots, rather than theft or copying.

[29] According to Crawford, the similarities between the GW1000 and the Equustek products should be expected, as both are derived from the Allen Bradley product. The GW1000 does not purport to be similar to the Equustek products, but instead it attempts to be similar to the Allen Bradley product.

[30] The parties also have a dispute about the product manuals. Robert Angus says he wrote them and the defendants have improperly copied them in preparing GW1000 manuals. The defendants say Colin Marsh wrote the original manuals and Jack and Datalink have his permission to copy them.

...

[4] Leask J. refused the application saying:

[44] The principal argument of the plaintiffs is that injunctive relief is necessary to provide a meaningful monetary remedy in the event of their being successful at trial[.] In my opinion, looking at all the difficult issues and admitted facts in this case, the plaintiffs do not have a convincing balance of convenience case. Going back to the roots of Mareva jurisprudence, the plaintiffs have failed to show a good reason why the court should deprive the defendants of control of their assets before the plaintiffs have succeeded at trial. To quote the Court of Appeal in *Silver Standard*:

[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.

[45] I explicitly adopt the *Tracy* formulation that "the overarching consideration in each case is the balance of justice and convenience between the parties". As between Equustek and Angus on the one hand and Datalink and Jack on the other, I find that the balance of justice and convenience favours Datalink and Jack.

[5] Leask J. continued with the balance of the plaintiffs' application and on September 23, 2011 ordered:

...

1. If any of the Defendants have any such documents in their possession or control, the Defendants must immediately return to the Plaintiffs all copies of the Plaintiffs' source code, board schematics and any other documentation taken from the Plaintiffs;
2. Except as noted in paragraph 5 below, the Defendants Datalink 4 and Morgan Jack are prohibited from
 - a. referring to any of the Plaintiffs, or
 - b. referencing or using the Plaintiffs' product images, users manuals, and product names in any way on any website that they own, direct, or control in any way, and without limiting the generality of the foregoing, on the following websites:
 - c. www.protocolconverter.com;
 - d. www.datalinkgateways.com;
 - e. www.abgateways.com;
 - f. www.datalink-gateways.com;
 - g. www.datahighwayplus.com;
 - h. www.datalink-networks.com;
 - i. www.datalinktek.com
 - j. www.datanetprotocols.com
 - k. www.1770-kf3.com;
 - l. www.1770-kf2.com;

- m. www.1784-pktx.com;
- n. www.1784-ktx.com;
- o. www.1784-pcmk.com;
- p. www.ethernetgateways.com;
- q. www.control-logix.com;
- r. www.ethernetipsolutions.com;
- s. www.datatechgateways.com;
- t. www.datalinkcontrollers.com; and
- u. www.datalink-networking.com.

The Plaintiffs' products, which Defendants Datalink 4 and Morgan Jack are prohibited from referencing or using in any way (the "Equustek Products") are:

- v. EQ7000/DL7000;
- w. EQ-DCM;
- x. DL6000;
- y. DL4500;
- z. DL4000;
- aa. DL3500;
- bb. DL2000;
- cc. DLPCle;
- dd. DLPCI;
- ee. DL-PC;
- ff. DL-STD; and
- gg. DL-PC/104;

3. [T]he Defendants Datalink 4 and Morgan Jack are prohibited from distributing the users manuals for the Equustek Products above, but this paragraph 3 does not restrict the Defendants from continuing to distribute users manuals for the GW1000.

4. [T]he Defendants Datalink 4 and Morgan Jack are prohibited from making any of the following statements to customers:

- a. the Equustek Products are no longer available in the market place;
- b. the Equustek Products are obsolete;
- c. the Equustek Products belong or ever belonged to the Defendants in any way;
- d. GW1000 line of products is an upgrade or consolidation of the Equustek Products in any way; or
- e. any similarly inaccurate statements,

but the Defendants shall be entitled to make comparisons (other than on their websites), based in fact, between the GW1000 and the Equustek Products in the course of fair competition between the Plaintiffs and the Defendants;

5. The Defendants Datalink 4 and Morgan Jack shall, within 14 days of this order,

prominently post on each of their websites (as described in paragraph 2 above) in which the GW1000 is sold or advertised in any way, the following statement:

"Equustek Solutions Inc. (www.equustek.com ... products are no longer distributed by Datalink, including:

DL4500	DL3500	DLPCI
DL6000	DL2000	DL-PC
DL7000 / EQ7000	DL4000	DL-STD
EQ-DCM	DLPCIe	DL-PC/104

Customers of these products should contact Equustek directly at the website above, or toll free at 1.888.387.3787 [and the Equustek logo must be displayed]."

The statement must be placed on the main or home page of each such website, above the fold of that page.

6. The Defendants Datalink 4 and Morgan Jack shall, within 30 days of this order, disclose to the Plaintiffs the names and contact details of all customers who have ordered an Equustek Product from the Defendants since January 1, 2007.

7. Except as noted in paragraph 1 above, the Plaintiffs' application is dismissed as against the Defendant Andrew Crawford, with costs payable on Scale B forthwith and in any event of the cause.

8. The Plaintiffs' application for a limited *Mareva* injunction, as set out in paragraph 2 of the Notice of Application, is dismissed as against Defendants Datalink 4 and Morgan Jack.

9. Except as noted in paragraph 7 above, costs will be in the cause.

Present Application

[6] The present application is for a *Mareva* injunction against Morgan Jack, Datalink Technology Gateways Inc. ("Datalink 4"), and Datalink Technologies Gateways LLC ("Datalink 7"), collectively referred to as the "Datalink Defendants."

[7] Counsel acknowledges that this Court cannot reconsider or come to a different decision than Leask J. did on the facts at that time. They note that the application in August of 2011 was of a limited nature in that they were not trying to close the defendant business down but rather sought payment of the business' profits into court. The present application seeks an unrestricted *Mareva* injunction, that is, the plaintiffs now seek an order to freeze all of the defendants' assets. They base this renewed application on events occurring after the fall of 2011. I now turn to those events.

[8] On October 19, 2011 Master McDiarmid ordered that Datalink Technologies Gateways LLC be added as a defendant to this action.

[9] On March 21, 2012, Madam Justice Fenlon, the case management judge, concluded that Morgan Jack and Datalink 4 had not adequately complied with the September 23, 2011 order of Mr.

Justice Leask and made the following additional orders:

1. The Plaintiff's application that the Responses to Civil Claim of the defendants Morgan Jack and Datalink 4 be struck and judgment entered against them is dismissed;
2. Morgan Jack and Datalink 4 must comply in full with the Order of Mr. Justice Leask made September 23, 2011 (the "Leask Order"), by April 30, 2012;
3. Morgan Jack and Datalink 4 must also:
 - a. Produce a new customer list as required in paragraph 6 of the Leask Order;
 - b. Deliver an affidavit confirming that this new customer list is accurate and complete; and
 - c. By consent, deliver copies of the purchase order or credit card invoice associated with each request to purchase the Plaintiffs' products from each of the customers on the list (except that Morgan Jack and Datalink 4 may redact the first 9 digits of the 12 digits in each credit card number referenced);

by April 30, 2012;

4. Morgan Jack and Datalink 4 must also amend the notice posted on their websites, as required by paragraph 5 of the Leask Order, to:
 - a. delete the opening phrase;
 - b. delete the Datalink phone number above the notice;
 - c. display the Equustek phone number in the same font and size, and in bold, as the Datalink phone number formerly in the banner at the top of the box which contained the notice, as displayed at page 64 of the Affidavit #2 of R. Huth (sworn January 31, 2012), which is attached here as Schedule "A", and
 - d. use an image to post the notice so that it is not searchable by internet search engines;

by April 30, 2012.

and

5. The Plaintiffs are awarded special costs of this application, as against the defendants Morgan Jack and Datalink4, in any event of the cause and payable forthwith.

[10] Counsel met on March 30, 2012 to attempt to resolve the noncompliance referred to in Fenlon J.'s order. The defendants had apparently been asserting since September 2011 that they intended to apply to sever liability and quantum and on March 30, 2012 agreed that such application would be filed by April 30, 2012. That did not occur.

[11] On April 24, 2012 plaintiffs' counsel wrote to the Datalink defendants' counsel and counsel for Andrew Crawford, seeking document production and their agreement to some form of confidentiality order to protect their intellectual property pending trial. They also put the defendants on notice that they would apply for default judgment if the deadline in Fenlon J.'s order was not

met. No response was received to that letter. Instead the Datalink Defendants filed a notice of intention to act in person on April 25, 2012.

[12] On June 20, 2012 Madam Justice Dickson ordered that the response to civil claim of the defendants Morgan Jack and Datalink Technology Gateways Inc. be struck, and awarded special costs of the application in any event of the cause.

[13] On June 25, 2012 the special costs of the plaintiffs' March 20 and 21, 2012 application before Fenlon J. were allowed in the total sum of \$30,224.

[14] On July 25, 2012 Andrew Crawford filed a notice of intention to act in person.

[15] Plaintiffs' counsel advises that all of the motions and orders have been promptly delivered to the Datalink Defendants since they filed their notice of intention to act in person and that there has been no response from any of the Datalink Defendants since April 27, 2012.

[16] No new customer list, affidavit, or supporting documents have been produced and most of the websites continue to be in violation of the orders of Leask J. and Fenlon J. The Datalink Defendants have not paid the certificate of special costs.

[17] The evidence indicates that Morgan Jack is now in Argentina. He has sold his British Columbia property. The defendants' websites state they carry on business in Vancouver, B.C., Ferndale, Washington, Tucson, Arizona and Mexico. The Ferndale and Tucson addresses are simply the addresses of a mail box company.

[18] After these proceedings were commenced Morgan Jack incorporated Datalink 7 in Arizona; however, Datalink 7 was not added as a party until the order of Master McDiarmid on October 19, 2011. Datalink 7 has filed a statement of defence and attorned to the jurisdiction. The most recent iterations of the defendant's websites now refer to another company "DataTech Inc."

Plaintiffs' Submissions

[19] The plaintiffs submit that as a result of the above events and other factors that I will refer to, there has been a significant change in circumstances since September 2011.

[20] They note firstly that the striking of the Datalink Defendants' defence results in those defendants being deemed to have admitted the claims against them. In addition, they now have an order for costs against the Datalink Defendants and are seeking in part post-judgment relief, that being the sum owing for costs.

[21] Secondly, they submit there has been a complete failure by the defendants to comply with

the orders for production of documents. They advise that no document lists whatsoever have been produced and that the defendants have maintained the position that confidentiality issues must first be resolved. Plaintiffs' counsel notes that does not explain their failure to disclose all documents that are not claimed to be confidential nor to move to deal with the confidentiality issues.

[22] While not a new issue, given it was considered by Leask J., the Datalink Defendants have continued to fail to provide any information respecting how they operate or where they manufacture the GW1000. They have also recently dropped their prices by 33%.

[23] The concerns of the plaintiff with the present situation are addressed in affidavit #4 of Robert Angus, a plaintiff and a principal of the two corporate plaintiffs. In his affidavit filed July 6, 2012 he deposes as follows:

...

3. About six months ago, Datalink started advertising "custom solutions" on its website as follows:

"If one of GW1000's existing products does not meet your needs, we will work with you to design, develop, test, and support a new custom solution. Our engineers have become experts at developing interface solutions for many companies including Siemens and Toshiba. Call us to discuss your application at no obligation."

4. I attach as Exhibit "A" an example of this from February 15 of this year, and as Exhibit "B", an example from today. The Siemens and Toshiba projects referred to were Equustek (actually Equus) projects that Andrew Crawford worked on while he was employed at Equus, so Datalink appears to be advertising our core technology for sale, just as they appear to have sold our technology with the General Electric QPAB project.

5. This is a serious concern to us because our business model depends on the fact that our products are in a highly technical niche market that are difficult to replicate, particularly by someone outside the field. If our trade secrets are further distributed by Datalink (or anyone else) during the course of selling our technology further, there will come a point when our trade secrets are no longer secret. If that happens our products will become commoditized and prices will collapse.

6. This may already be happening. In the past few weeks, Datalink has dropped its prices approximately 30%, renamed its product to the "DT1000" and now says it is carrying on business through another company, "DataTech Inc." which we do not know the location of – this is demonstrated by the website printout from last week which is attached as Exhibit "C". However this is only the most recent company they have used, as can be seen from the Exhibit "D", a website print out from January 30, 2012.

7. I described the plaintiffs products and the plaintiffs trade secrets in some detail in my Affidavit #1, and I would also like to comment here on parts lists, parts specifications, and design notes.

8. I referred to the effort required to create a parts list in paragraph 87 of my Affidavit #1. Determining the specifications required for each part is the step before creating the parts list, and is an integral part of the design process.

9. Most engineering work begins with design notes, and it is from these rough ideas that board schematics and source code are ultimately developed. This means that the core

idea that is finally reflected in the source code or board schematics can often be found in the design notes. Engineers commonly keep these notes in a log book of their daily activity, and Andrew Crawford had many of these log books when he worked for us. Some of these, in particular from the suspect AAI period, have never been returned to us.

...

[24] As a result the plaintiffs assert the evidence now shows that their trade secrets are in jeopardy and should they be disseminated the value of their technology will collapse.

The Law Respecting a *Mareva* Injunction

[25] An applicant for a *Mareva* injunction must establish a strong *prima facie*, or a good arguable case, and must show that the balance of convenience as between the parties favours the granting of the injunction. In balancing those interests the court should have regard to all the relevant factors in each case. Included in such factors will be evidence showing the existence of assets and “a real risk of their disposal or dissipation so as to render nugatory any judgment.” (*Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 at para. 44 (S.C. Chambers) [*Mooney No. 2*]; *Tracy v. Instalcons Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 at para. 17).

[26] In *Tracy* the court commented on the first branch of the test, noting references in the authorities to both a “strong *prima facie* case” and “good arguable case.” The court stated that “[i]n either case, it is more than an arguable case, and may be met by an assessment that does not reach the ‘bound to succeed’ threshold” (para. 54).

[27] Once a strong *prima facie* case is shown, “the interests of both parties should be balanced taking into account the particular relevant circumstances of the case, including: the nature of the transaction giving rise to the cause of action, enforcement measures available in B.C., the amount of the claim, the history of the defendant’s conduct, the relative strengths of the parties’ cases, and evidence of irreparable harm either way.” (*Netolitzky et al v. Barclay et al*, 2002 BCSC 1098 at para. 22).

[28] In *Tracy*, at paras. 46 and 47, in considering the relevant factors the court must keep in mind that:

[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 ***Grenzservice Speditions 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.

[47] At the same time, assets are easily moved from jurisdiction to jurisdiction, and if, as in **Mooney**, a party seeks the intervention of the court and also seeks to put his assets beyond reach, the court has the ability to respond. As said by Newbury J. in **Mooney No. 1**:

[11] ... The reasons for extending Mareva injunctions to apply to foreign assets are valid in British Columbia no less than in England and Australia – the notion that a court should not permit a defendant to take action designed to frustrate existing or subsequent orders of the court, and the practical consideration that in this day of instant communication and paperless cross-border transfers, the courts must, in order to preserve the effectiveness of their judgments, adapt to new circumstances. Such adaptability has always been, and continues to be, the genius of the common law.

[29] The approach to granting a *Mareva* injunction is a flexible one bearing in mind “[t]he fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case.” (Huddart J. in *Mooney No.2* at para. 43 quoting *B.C. (A.G.) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.) at 346).

[30] The flexible approach articulated in *Mooney No.2* rejects any hard and fast rules as to when a *Mareva* injunction can be issued. A careful balancing of relevant factors will lead to a just result. In that case an injunction was found to be available even where the defendant was not actively dissipating or removing assets from the jurisdiction. It was available as a form of security given the particular circumstances before the court. Huddart J. explained the flexible approach as follows:

...

In other words, it prevents the judge from becoming a prisoner of a fixed formula and places the emphasis where it belongs, on the justice and fairness of the order *inter partes*. It is fair to both sides, because, while maintaining the burden on the plaintiff to establish grounds for the application, it justifies calling upon the defendant to meet the case brought by the plaintiff, by putting forth evidence to support his position.

By this approach, the ultimate question becomes, is it fair and just that the applicant should have the right to monitor the movement or expenditure of capital assets by the respondent during the course of the proceedings between them?

Along the route to an answer, the court must consider whether and to what extent the justification put forth in a particular case permits that right. This question directs attention to the value underlying the court's examination of whether there is real risk of dissipation of domestic assets and/or foreign assets, whether that analysis is performed as part of the three-pronged test that predominates at the *ex parte* stage or of the underlying "fit and just" test likely to be given flesh only at the *inter partes* continuation hearing.

Implicit in the framing of this question is the view that *Mareva* injunctions are available not only to restrain the active dissipation of assets, but also as a form of security. In my view it is only fair to state directly what courts are doing in fact.

...

The real question on this application becomes whether this court will restrain a litigant like Mr. Mooney from dealing freely with capital assets already abroad before the proceeding was commenced, and probably before the cause of action arose. This is a different issue

from that of active and imminent dissipation of assets for which the Supreme Court of Canada approved the use of the *Mareva* injunction in *Aetna*, supra, as an exception to the long-standing practice of not requiring security before judgment.

It follows from my view of the law and practice in this province with regard to domestic *Mareva* injunctions that it is open to me to do just that. The English Court of Appeal devised the *Mareva* injunction for marauding charterers. It is equally well-suited to marauding deal-makers, to ensure that those B.C. residents who structure their business and personal lives to preserve assets out of sight and attack, may be enjoined from dealing with those assets except under the court's supervision during litigation. I am encouraged in reaching this conclusion by the decision of the Supreme Court of South Australia in *Coombs & Barei v. Dynasty Pty. Ltd.* (1986), 42 S.A.S.R. 413 (Millhouse J).

Fundamental to the exercise of the jurisdiction where no dissipation or secretion is imminent, will be the court's concern to protect its process from abuse. A litigant cannot be permitted to use the court to his advantage, while effectively disavowing in advance any judgment against him.

...

[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.))

[32] I turn now to the application of these principles to the facts of this case.

Discussion

[33] Renewal of an application for injunctive relief where such relief has been denied can be made where new evidence becomes available provided such evidence was not available to the plaintiffs at the original hearing but which would have affected the decision to refuse the earlier application if before the court at that time (*Cercast Inc. v. Shellcast Foundries Inc.* (No. 2) (1972), 8 C.P.R. (2d) 280 at 282 (F.C.T.D.); *DSL Capital Corp. v. Credifinance Securities Ltd. et al*, 2011 ONSC 4044 at para. 3).

[34] In refusing the plaintiffs' earlier application, Leask J. said that he could not say who was more likely to win at trial but that he accepted that the plaintiff had met the threshold test. However, he concluded that irreparable harm was not established and that the plaintiffs did not have a convincing balance of convenience case. Specifically, Leask J. found that they had not shown "a

good reason why the court should deprive the defendants of control of their assets before the plaintiffs have succeeded at trial.”

[35] In my view the subsequent events have addressed those concerns and have shifted the balance of justice and convenience in favour the plaintiffs. With respect to the subsequent events I will address each event in turn and its relevance to the current application.

Striking of Statement of Defence

[36] The effect of the striking of the statement of defence of the Datalink Defendants is that it is deemed to be an admission of the allegations contained in the plaintiffs’ notice of civil claim. In *Mclsaac v. Healthy Body Services Inc.*, 2009 BCSC 1716, Mr. Justice Pearlman reviewed the law on deemed admissions arising from a judgment taken in default of defence. He concluded that the authorities established certain principles to be applied as to the effect of such deemed admissions. At para. 44 he stated:

[44] I take the following principles from these cases:

a) Generally, if a statement of defence is struck, the defendant is deemed to have admitted the allegations of fact contained in the statement of claim. Where the defence is struck with damages to be assessed, all that remains in issue is the assessment of damages.

b) The rule that the defendant is deemed to have admitted all of the allegations of fact in the statement of claim is not immutable. The plaintiff must prove his or her claim for damages. The court retains the discretion, which it must exercise judicially, to permit the defendant to adduce evidence and cross-examine on issues essential to a fair and just determination of the loss actually sustained by the plaintiff.

...

[37] The order striking their defence did not find the Datalink Defendants “liable with damages to be assessed.” Therefore, while the facts respecting liability are deemed to be admitted, the court can still exercise its discretion. The facts in the statement of claim are not “immutable.”

[38] Given the deemed admission of the facts, and the failure of the Datalink Defendants to comply with court orders resulting in the striking of their defence, the “who will win” factor has in my opinion shifted and is no longer neutral and now weighs in favour of the plaintiffs.

Order for Costs

[39] The fact that the defendants are, at least to the extent of the costs award, judgment debtors is a factor (although a limited one) given the amount involved for costs apparently pales in comparison to the potential damages claimed.

Effectiveness of Court Orders

[40] As noted in *Tracy* at paras. 21 and 22, one of the factors to consider is the effectiveness of court orders. Citing *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318 (S.C. Chambers) [*Mooney No. 1*], where Newbury J. quoted from *Derby & Co. Ltd. v. Weldon* (No. 2), [1989] 1 All E.R. 1002 (C.A.) at 325:

[21] ...

The fundamental principle underlying this jurisdiction [to issue a worldwide order pre-judgment] is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case. ...

[22] The chambers judge referred to passages of *Mooney No. 1* confirming the adaptability of the courts to new circumstances, the need to ensure a defendant does not take action designed to frustrate existing or subsequent orders of the court, and the caution to be applied in ensuring that there is a real risk of removal or dissipation of assets to avoid judgment. ...

...

[41] In this case I am satisfied that there has not been full compliance with the orders of Leask J. and Fenlon J. The evidence indicates as well that the Datalink Defendants have abandoned the litigation and show no intention of compliance with either the orders of the court or the rules of court. The defendants have established multiple corporate entities, including some outside Canada, and the defendant Morgan Jack appears to have taken up permanent residence outside the jurisdiction.

[42] On the material filed it can be reasonably inferred that the Datalink Defendants have chosen to deal with the plaintiffs' claims by moving out of the jurisdiction, filing a notice of intention to act in person, incorporating a myriad of shell corporations in different jurisdictions and ignoring the court process. In my view it can be reasonably inferred that there is a "real risk of dissipation of assets."

Conclusion

[43] In my opinion the factors discussed above weigh in favour of granting the injunction sought, especially given the ephemeral nature of intellectual property which once disseminated likely cannot be retrieved and whose value diminishes as a result. The plaintiffs will suffer irreparable harm if the injunction is not granted.

[44] As mentioned earlier Datalink 7 was not added as a defendant until after the application before Leask J. As a result it is not in default of any court orders because they do not apply to it. However, I am satisfied on the evidence filed that it is simply one more corporate shell used by the defendants to conduct the same business with the same products. Taking into account the necessity for a finding of a strong *prima facie* case, the balance of convenience and the interests of justice, I am satisfied that it is appropriate to include Datalink 7 in the order.

[45] In granting the injunction I have considered the significant impact it may have on the defendants' ability to carry on business. In practical terms it will prohibit them from doing so. Notwithstanding that result the balance of convenience lies with the granting of the injunction requested. The injunction will prohibit the Datalink Defendants from dealing with any of their assets worldwide with the exception that they may meet ordinary living expenses and retain counsel to provide advice on the setting aside of the injunction.

[46] As a result the *Mareva* injunction shall issue.

“Punnett J.”