Divisional Court File No.: 533/77
Court File No. CV-17-11822-00CL

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KSV KOFMAN INC. IN ITS CAPACITY AS RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO INC., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC. AND TEXTBOOK (555 PRINCESS STREET) INC.

Plaintiff/Respondent

- and -

AEOLIAN INVESTMENTS LTD., JOHN DAVIES IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF BOTH THE DAVIES ARIZONA TRUST AND THE DAVIES FAMILY TRUST, JUDITH DAVIES IN HER PERSONAL CAPACITY AND IN HER CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, AND GREGORY HARRIS SOLELY IN HIS CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST

Defendants/Appellants

FACTUM OF THE RESPONDENT
(Appeal of Interlocutory Mareva Injunction)

April 30, 2018

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PART I – OVERVIEW

1. The defendants in this case played a central role in a Ponzi scheme, resulting in the misappropriation and loss of tens of millions of dollars from the investing public. Eight trustee corporations raised funds from public investors through syndicated mortgage investments for specific real estate development projects. These monies were then advanced to eleven development companies on a secured basis pursuant to loan agreements for purposes of acquiring and/or developing the specific projects. Seven of those development companies had to be put into receivership because, among other things, the defendants drained the companies of funds through improper transfers to themselves, related parties and others.[1] The plaintiff in this action, KSV Kofman Inc., was appointed Receiver over those seven development companies by the Ontario Superior Court (Commercial List).

2. In the underlying action, the Receiver seeks to recover the tens of millions of dollars, on behalf of creditors (primarily the investing public), that the defendants misappropriated. Following the commencement of the receivership proceeding, the defendants engaged in a course of conduct designed to liquidate assets and put them beyond the reach of creditors. Therefore, in connection with its action, the Receiver obtained a Mareva injunction against the defendants, John Davies, his spouse, Judith Davies, and their family holding company, Aeolian, after a strong *prima facie* case of fraud was found by Justice Myers.

3. The thrust of the defendants' complaint appears to be that Justice Myers (who has had ongoing carriage of this matter since its inception, including three prior court attendances and the

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[1] The other four development companies were initially too distressed to be put into receivership because the value of their assets appeared to be insufficient to repay first-ranking third party mortgages owing on the companies' respective properties (Supplement to the Sixth Report of the Receiver dated August 8, 2017 ("**Supplement to Sixth Report**"), section 3.0, para 1, Respondent's Compendium ("**Respondent's Compendium**"), Tab 1, p 5). However, all of these development companies are now, or have recently been, subject to enforcement proceedings (being power of sale proceedings and/or receivership proceedings).

review of over 1,500 pages of evidence from both sides) purportedly failed to apply the proper legal test and came to "speculative conclusions"[2]. The defendants' complaints are without merit.

4. His Honour expressly set out why he found the defendants' evidence to be unreliable and preferred the evidence of the Receiver, evidence which satisfied the well-established legal test for a Mareva injunction. These are issues of fact which can only be overturned if there was a "palpable and overriding error"[3]. Justice Myers made no error, let alone a palpable and overriding one.

5. The defendants' appeal is really premised upon a complaint that Justice Myers did not accept their evidence which attempted to explain away the Ponzi scheme they perpetrated on the investing public. Justice Myers rejected their evidence, going so far as to find that one of the defendant's explanations was "shocking in its clarity of a description of an illicit, fraudulent scheme".[4] Obviously unhappy with such conclusions, and unable to argue with the inherent logic of His Honour's findings, the defendants have instead resorted to the tactic of arguing that Justice Myers did not adequately explain why he found their incredible evidence to be incredible. In this appeal, they attack every aspect of Justice Myers' decision, asking this Court to hold him to the impossible burden of setting out all applicable law, legal tests, and every bit of supporting evidence he relied upon to come to his findings, accompanied by a detailed play-by-play of his decision making process, resulting in a decision that would be of a burdensome length and take an inordinate amount of time to prepare during a time-sensitive interlocutory motion. That is not the standard to which judges are held.

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[2] Factum of the Appellants dated February 28, 2018 ("**Appellants' Factum**") at para 5.
[3] *R. v Sheppard,* 2002 SCC 26 at para 10, (***Sheppard***), Appellants' Book of Authorities ("**Appellants' BOA**"), Tab 19.
[4] Unofficial Transcript of Justice Myers' Endorsement dated August 30, 2017 ("**Unofficial Transcript dated August 30**"), Respondent's Compendium, Tab 2A, pp 47-49 and, in particular, p. 48, para. 3; Justice Myers' Endorsement dated August 30, 2017 ("**Endorsement dated August 30**"), Respondent's Compendium, Tab 2, pp 37-46.

6. The defendants also allege that Justice Myers erred in not requiring an undertaking for damages. This is a highly discretionary determination that can only be interfered with if it is so clearly wrong that it constitutes an injustice. Justice Myers had before him numerous cases in which an undertaking has not been required, and followed those cases based on the facts before him, clearly explaining why such a determination was made. There is no clear error that could be said to constitute an injustice here.

7. When a court is asked to exercise its discretion to grant an injunction, "the fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case."[5] Justice Myers' reasons, properly read, clearly set out why the Mareva injunction was just and equitable in this case and why no undertaking was required. There was no error, let alone a palpable and overriding one, and this appeal should be dismissed.

PART II – FACTS

Background

8. The receivership companies were development companies, each associated with a specific real estate development project. In total, the receivership companies were advanced tens of millions of dollars from trustee corporations run by their principal, Raj Singh, which funds were ultimately sourced from public investors through syndicated mortgage offerings.[6] Under the applicable loan agreements between the development companies and the trustee corporations, the

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[5] *Google Inc. v Equustek Solutions Inc.,* 2017 SCC 34 at para 25 (***Google***), Respondent's Book of Authorities ("**BOA**"), Tab 1.

[6] Supplement to Sixth Report, section 3.0, Respondent's Compendium, Tab 1, pp 5-8; Fourth Report of the Receiver dated June 6, 2017 ("**Fourth Report**"), section 2.0, Respondent's Compendium, Tab 3, p. 57.

funds were required to be used to acquire and/or develop the specific real estate projects for which the funds were invested and advanced.[7]

9. KSV Kofman Inc. is the court-appointed Receiver of the seven receivership companies. It was appointed pursuant to orders of the Ontario Superior Court of Justice (Commercial List). Despite the receivership companies being advanced over $93 million of investor funds, at the time of the Receiver's appointment, the receivership companies collectively had a total cash balance of less than $18,000 and all but one of the receivership companies' projects remained in the pre-construction phase.[8] Construction had only recently commenced on that one project, and the company had no capital to further advance its project.[9]

10. The receivership companies are victims of a multi-million dollar fraud orchestrated by their director and officer, Mr. Davies, who drained the receivership companies of funds. Each of the receivership companies' real estate development projects faced a liquidity crisis from the outset and was doomed to fail. The syndicated mortgage scheme had the hallmarks of a Ponzi scheme as its continuance depended upon the raising of ever increasing sums of new money. The receivership companies relied almost exclusively on additional funds being raised from new investors (frequently in new projects) to pay for ongoing interest commitments to earlier investors (in other projects) and to fund development costs on other projects. Had there not been subsequent financings that raised additional monies from new investors, which were then loaned to other receivership companies to pay their pre-existing liabilities in contravention of the applicable loan

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[7] Fourth Report, section 2.0 and Appendix "A" - Loan Agreements, Respondent's Compendium, Tab 3, pp 57 and Tab 3A, pp 78 - 81 (see, in particular, p 78 for recitals and p 81 for s 7.02(g) of the excerpted loan agreement). For complete copies of all Loan Agreements, see the Appeal Book, Volume 3, Tab 19A, pp 665-1070.

[8] Supplement to Sixth Report, section 3.0, Respondent's Compendium, Tab 1, pp 5 - 8; Fourth Report, section 2.0, para 1, Respondent's Compendium, Tab 3, p 57.

[9] Supplement to Sixth Report, section 3.0, Respondent's Compendium, Tab 1, pp 5-8; Fourth Report, section 2.0, para 1 and footnote 5, Respondent's Compendium, Tab 3, p 57.

agreements, the receivership companies would have defaulted on their obligations.[10] As Mr. Davies noted in an email sent to Mr. Singh in 2014:

> "we're completely tapped out of cash and we were expecting $13.6 million to close on the 15th. There are around $300,000 of interest payments due on October 1st on a number of projects and the money to fund that was coming out of the $13.6 raise…We have no flexibility on this…We have no flexibility whatsoever. We need to close the full $13.6 million on the 15th or we're seriously f--ked"[11]
>
> (emphasis added and expletive suppressed)

11. In the underlying action, the Receiver seeks to recover tens of millions of dollars in damages from certain parties, including Mr. Davies in his personal capacity, Ms. Davies in her personal capacity and their family holding company, Aeolian, for their role in the syndicated mortgage investment scheme and their misappropriation of the receivership companies' funds.[12] The other parties to the action include Mr. Davies in his capacity as trustee of both the Davies Family Trust (the "**Family Trust**") and the Davies Arizona Trust (the "**Arizona Trust**"), Ms. Davies in her capacity as trustee of the Family Trust, and Gregory Harris solely in his capacity as trustee of the Family Trust.[13] The Family Trust and the Arizona Trust are trusts that were established by or at the direction of Mr. Davies in or around 2003 and 2013, respectively. The beneficiaries of the Family Trust are Mr. Davies, Ms. Davies and the Davies' children, as well as any future children and issue of Mr. Davies. The beneficiaries of the Arizona Trust are the Davies' children.[14]

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[10] Supplement to Sixth Report, section 3.0, Respondent's Compendium, Tab 1, pp 5-8.
[11] Supplement to Sixth Report, Excerpt of Appendix "K" – Relevant email correspondence between Messrs. Davies and Singh dated August 25, 2014, Respondent's Compendium, Tab 1D, pp 32-36 (and, in particular, pp 33-34). For a complete copy of Appendix "K" to the Supplement to the Sixth Report (i.e. complete copies of the relevant email correspondence between Mr. Davies, Mr. Singh and others), see Appeal Book, Volume 5, Tab 21K, pp 1576-1609.
[12] Fresh as Amended Statement of Claim, Respondent's Compendium, Tab 4, pp 82-111.
[13] Fresh as Amended Statement of Claim, Respondent's Compendium, Tab 4, pp 82-111.
[14] Sixth Report of the Receiver dated July 12, 2017 (the "**Sixth Report**"), sections 4.1 and 4.2, Respondent's Compendium, Tab 5, pp 121-122.

The Ex Parte Interim Mareva Injunction

12. On June 7, 2017, the Receiver moved ex parte for an interim Mareva injunction as against Mr. Davies and Aeolian (at that time, the only two defendants to the action). The evidentiary record before the motion judge, Justice Myers, was voluminous. It comprised a two-volume motion record totaling over 500 pages of evidence, including a Receiver's report with supporting documentation detailing the results of its investigations and particularizing the fraud. In granting the interim Mareva order, Justice Myers found "a strong *prima* [*facie*] case that Mr. Davies and his family's corporation misappropriated a significant amount of the investors' funds that were supposed to go to the development of properties"[15]. Justice Myers also found that Mr. Davies was "actively selling his assets – including his cottage and home" and that "proof of wrongdoing including likely defalcation by a fiduciary coupled with asset sales, readily leads to an inference that absent injunctive relief the defendants will dissipate their assets to avoid recovery by the receiver and the investors"[16]. Justice Myers exercised his discretion to dispense with the requirement for an undertaking as to damages and His Honour granted the sought Mareva order.[17]

13. Justice Myers has since had exclusive carriage of the matter.

The Frozen Account

14. On June 13, 2017, in compliance with the interim Mareva order, the Royal Bank of Canada froze Aeolian's sole bank account and produced Aeolian's banking records. The records revealed that although Aeolian had received millions of dollars from the receivership companies, Aeolian's

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[15] Unofficial Transcript of Justice Myers' Endorsement from Interim Mareva Motion dated June 7, 2017 ("**Unofficial Transcript dated June 7**"), Respondent's Compendium, Tab 6A, p 138; Justice Myers' Endorsement from Interim Mareva Motion dated June 7, 2017 ("**Endorsement dated June 7**"), Respondent's Compendium, Tab 6, p 137.
[16] Unofficial Transcript dated June 7, Respondent's Compendium, Tab 6A, p 138; and Endorsement dated June 7, Respondent's Compendium, Tab 6, p 137.
[17] Unofficial Transcript dated June 7, Respondent's Compendium, Tab 6A, p 138; and Endorsement dated June 7, Respondent's Compendium, Tab 6, p 137.

bank account had a closing balance of only $45.69 as at May 29, 2017.[18] The records revealed that millions of dollars of the receivership companies' funds were transferred to Aeolian and, from Aeolian, to Ms. Davies, the Family Trust and the Arizona Trust.[19] Some of these funds were used to purchase and renovate a property in Arizona, which is now owned by Mr. Davies in his capacity as trustee of the Arizona Trust.[20]

15. Notwithstanding Mr. Davies' claims that he is a sophisticated real estate developer, he had no known bank account to freeze. Furthermore, his asset and liability statements disclosed more liabilities than assets.[21]

The Initial Extension of the Interim Mareva Order on Consent

16. On June 16, 2017 (10 days after Justice Myers granted the interim order), he extended the interim order for 30 days on the consent of Mr. Davies and Aeolian.[22]

The Further Extension and the Expansion of the Interim Mareva Order

17. On July 17, 2017, on the consent of Mr. Davies and Aeolian, Justice Myers further extended the order to allow for a scheduled hearing process, and His Honour also expanded the order to capture Ms. Davies and the trustees of the Family Trust and the Arizona Trust. In Justice Myers' endorsement, he noted that "the court previously found a sufficiently strong *prima facie* case exists against the defendants to justify extraordinary pretrial injunctive relief issuing against

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[18] Sixth Report, Appendix "O" – Summary of Aeolian's Receipts and Disbursements, Respondent's Compendium, Tab 5E, p 134-136.
[19] Sixth Report, sections 4.1-4.4, 5.1-5.2, and Appendix "O" – Summary of Aeolian's Receipts and Disbursements Respondent's Compendium, Tab 5, pp 121-124, pp 127-129 and Tab 5E, pp 134-136.
[20] Sixth Report, section 4.3 and 5.2.2, Respondent's Compendium, Tab 5, pp 122-123 and 128.
[21] Fourth Report, Appendix "D" – Asset and Liability Statement of Davies and Appendix "F" – Revised Asset and Liability Statement of Davies, Respondent's Compendium, Tabs 5A and 5C, pp 130 and 132.
[22] Order of Justice Myers dated June 16, 2017, Respondent's Compendium, Tab 7, pp 139-147; Endorsement of Justice Myers dated June 16, 2017, Respondent's Compendium, Tab 8, p 148; Unofficial Transcript of Endorsement of Justice Myers dated June 16, 2017, Respondent's Compendium, Tab 8A, p 149.

them" as a "very substantial amount of money invested by public shareholders appears to have be [sic] misappropriated at first blush".[23]

18. Justice Myers also found that funds from the public investors subject to the Receiver's claims were given to Ms. Davies, the Family Trust and the Arizona Trust such that the Receiver "has a clear claim under Ontario law to ownership of an interest in property purchased with funds it proves at trial were misappropriated and used in non-arm's length transactions such as funding one's spouse or home."[24] Justice Myers further held that "the balance of convenience supports the order sought...There is a real risk of dissipation of assets by Ms. Davies...She's but a funnel through which investor funds are poured as part of the laundering cycles of corporate entities and trusts lined up to protect and hide potentially ill-gotten funds".[25]

19. The Receiver was appointed by the Court pursuant to various motions by Grant Thornton Limited, who itself was appointed by the Court on application by the Financial Services Commission of Ontario, and in that capacity represents the investing public. Justice Myers held this was not an appropriate case to require an undertaking as to damages as, among other things, the Receiver ultimately "acts for public investors whose funds are missing."[26]

The Extension of the Mareva Order on an Interlocutory Basis

20. On August 30, 2017, Justice Myers heard the Receiver's motion to extend the Mareva order on an interlocutory basis. The evidence before Justice Myers was extensive. In addition to the

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[23] Unofficial Transcript of Justice Myers' Endorsement dated July 17, 2017 from Motion Extending Injunction, ("**Unofficial Transcript dated July 17**"), Respondent's Compendium, Tab 9A, pp 157-158; Justice Myers' Endorsement dated July 17, 2017 ("**Endorsement dated July 17**"), Respondent's Compendium, Tab 9, pp 150-156.
[24] Unofficial Transcript dated July 17, Respondent's Compendium, Tab 9A, 157-158; Endorsement dated July 17, Respondent's Compendium, Tab 9, pp 150-156.
[25] Unofficial Transcript dated July 17, Respondent's Compendium, Tab 9A, 157-158; Endorsement dated July 17, Respondent's Compendium, Tab 9, pp 150-156.
[26] Unofficial Transcript dated July 17, Respondent's Compendium, Tab 9A, 157-158; Endorsement dated July 17, Respondent's Compendium, Tab 9, pp 150-156.

voluminous materials before His Honour on the ex parte motion and the subsequent extension and expansion motions, the Receiver also filed additional materials, including an additional report that provided further details of its investigations and further particularized the defendants' fraud. The defendants also filed detailed responding evidence, including several affidavits from Mr. and Ms. Davies. The various records before Justice Myers totaled five volumes comprising over 1,500 pages of evidence, including transcripts from the cross-examinations of Mr. Davies and Ms. Davies, and answers to written interrogatories posed of the Receiver.[27]

21. After about a half-day of oral submissions that canvassed the evidentiary record and the legal issues before the court (with which Justice Myers was already intimately familiar given his involvement in the prior motions), Justice Myers extended the Mareva order as against Mr. and Ms. Davies and Aeolian.[28] In his decision, Justice Myers concluded that the record established a strong *prima facie* case that the defendants had orchestrated a Ponzi Scheme.[29] Justice Myers came to that conclusion on the basis of all of the evidence before him, including a two-page explanation prepared by Mr. Davies himself that detailed how the receivership companies' financing model had worked.[30] That two page explanation from Davies provided, in part, that "*cash flow demands to keep the projects moving forward through pre-development stages (design costs, planning approvals, engineering, background studies and staff costs) had to be balanced with the obligation to keep investor interest payments current. To strike this balance, the Davies Developers made intercompany loans from projects that had recently received a cash infusion or had cash on hand, to projects in need of funding for development costs or interest payments*".[31]

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[27] Appellants' Appeal Book, Volumes 1-5.
[28] Order of Justice Myers dated August 30, 2017, Respondent's Compendium, Tab 10, pp159-165.
[29] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[30] Affidavit of John Davies sworn July 27, 2017, Exhibit "Q" – Overview of Intercompany Loans, Respondent's Compendium, Tab 11A, pp 191-193.
[31] Affidavit of John Davies sworn July 27, 2017, Exhibit "Q" – Overview of Intercompany Loans, Respondent's Compendium, Tab 11A, p 193, para 2.

Put another way, funds from one group of investors were used to pay another, distinct group of investors on completely separate projects. Justice Myers found that Mr. Davies' description of the financing model was "shocking in its clarity of a description of an illicit, fraudulent scheme without Mr. Davies seemingly having the least bit of compunction about it."[32]

22. Justice Myers rejected all of the defendants' counsel's "creative efforts" to offer an innocent explanation for the wrongdoing, finding that all of the defences were contradicted either by the evidentiary record, including Mr. Davies' own evidence and his admissions on cross-examination, or common sense.[33] As Justice Myers stated in his reasons:

> "With over $100 million raised and spent, there are no buildings! Mr. Singh and Mr. Davies have emails in which they plainly know the companies are insolvent and desperately look for cash to avoid an interest default that would trigger a [Financial Services Commission of Ontario] report and would dry up future investment needed to support the Ponzi Scheme. In addition, the Receiver fairly submits that the inter-company unsecured loans from one cash-strapped insolvent company to another were not real loans. There was no expectation of repayment. There were payments to keep the Ponzi alive a bit longer....Mr. Davies made no explanation at all beyond blaming [the Financial Services Commission of Ontario] for shutting his pipeline to yet further funding from the public at a time when the 7 [receivership companies] had an aggregate of $17,000 approximately in the bank.
> ...
> Davies offers no innocent explanation despite Mr. Kraft's creative efforts to find one. Mr. Davies does not say he did a poor job or that some identified circumstances in the market caused delays or increased costs. Instead, he says that only he understands how the development industry works. He says he was doing what people in the industry do to keep companies going during development. Not the honest ones."[34]

23. Justice Myers' finding of a strong *prima facie* case of fraud was clearly premised in part on the defendants' complete inability to provide a reasonable explanation for what happened to

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[32] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[33] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[34] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.

the tens of millions of dollars that had been raised from the investing public and advanced to the receivership companies.

24. In addition to finding a strong *prima facie* case of fraud, His Honour also found there was a serious risk of dissipation of assets given that Mr. and Ms. Davies had sold their family cottage and, after the interim and subsequent extension and expansion Mareva orders had been granted, they listed and marketed their personal residence for sale.[35] Specifically, His Honour held that he had "no hesitation finding a proven risk of dissipation given the listing of the house in the face of a Mareva."[36] Justice Myers also inferred "dissipation and likely flight to Arizona in light of the degree of dishonesty and the liquidation of the Davies' real estate."[37]

25. Justice Myers waived the requirement for an undertaking as to damages finding that, given all the circumstances, including the strength of the case in Mr. Davies' own voice, "access to justice concerns" lead him to the view this was "the rare and unusual case" where receiving an undertaking would not be necessary or appropriate.[38]

The Defendants' Purportedly "Unchallenged" and/or "Uncontradicted" Evidence

26. Throughout the defendants' factum, they mischaracterize the evidence and incorrectly assert that Justice Myers drew "speculative conclusions" that are "unsupported by the evidentiary record" or "in some cases, directly contradicted by evidence from the Defendants".[39] At paragraph 62 of their factum, they set out a list of the purported speculative conclusions.

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[35] Supplement to Sixth Report, section 8.0, Respondent's Compendium, Tab 1, p 14.
[36] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[37] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[38] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[39] Appellants' Factum, at para 62.

27. However, as set out below, all of the evidence the defendants describe in their factum as "unchallenged" or "uncontradicted" was, in fact, either challenged or contradicted and, in many cases, both. While the general thrust of the defendants' position is that their alleged misconduct was approved by the trustee corporations, even if the trustee corporations had consented to the payment of management fees, dividends or intercompany loans, it was not open to the trustee corporations to consent to a massive fraud being perpetrated on the receivership companies (and by extension, the investing public) all the while collecting millions of dollars in brokerage fees, referral fees and other compensation. Nor would it absolve Mr. Davies of liability for perpetrating such a fraud. In any event, that is not what the evidence supports. For instance:

(a) **Dividends**. Although the defendants assert that the uncontradicted evidence was that dividends were disclosed to and approved by the trustee corporations, there was considerable evidence contradicting this and supporting the impropriety of these payments. The Receiver's reports indicate that one of the receivership companies, Textbook (525 Princess Street) Inc., raised $6.387 million from investors in late 2015 and early 2016; however, by January 28, 2016, the company had a cash balance of only $111,000 and had spent no money on development activity. Although it could not advance its project, the company paid $1 million in dividends from the syndicated mortgage investment proceeds to entities related to Mr. Davies, Mr. Singh and others.[40] As Mr. Davies confirmed on cross-examination, these dividends were paid at a time when 525 Princess was facing cash constraints.[41] Further, as Mr. Davies noted in email correspondence sent to Mr. Singh and the other shareholders around the time of these

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[40] Supplement to Sixth Report, section 3.0, paras 11-12, Respondent's Compendium, Tab 1, pp 7-8; Fourth Report, section 3.2, paras 2 and 3(b), Respondent's Compendium, Tab 3, pp 66-67.

[41] Transcript of cross-examination of Mr. Davies conducted on August 9, 2017 ("**August 9 Transcript**"), Respondent's Compendium, Tab 12, Qs. 242-243, p 252 (Lines 22-25) and p 254 (Lines 1-6).

dividend payments (or "shareholder bonuses" to use Mr. Davies' parlance): "Gentlemen…I think we'd all agree that the payment of shareholder bonuses from the Tier 1 raises has been gratefully received. It certainly has been in my case….In the most recent advances for [525 Princess and 555 Princess] the amount of the raises after all fees, shareholder bonuses and other deductions netted a relatively small surplus…The size of the recent Tier 1 raises hasn't been large enough to leave us sufficient cash after payment of all deductions to operate the company... We need a couple of raises with $2 or $3 million surplus cash to catch up."[42]

(b) **Management fees.** Although the defendants assert that the "uncontradicted" evidence was that management fees were disclosed to and approved by the trustee corporations, there was also considerable evidence contradicting this and supporting the impropriety of these payments. For instance, the Receiver tendered evidence that the pro formas (through which the management fees were allegedly disclosed to the trustee corporations) were materially misleading in several different respects, including by failing to disclose a significant portion of the initial professional costs and other expenses for the various projects.[43] Further, the Supplement to the Receiver's Sixth report provides that the trustee corporations did not consent to management fees in writing, in accordance with the terms of the applicable loan agreements, and even if they provided written consent, which is not supported by the evidence, such consent would only increase the Receiver's serious concerns regarding the trustee corporations' conduct and participation in the scheme.[44] There was also evidence that the

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[42] Supplement to Sixth Report, Appendix "E" – Correspondence re Dividends, Respondent's Compendium, Tab 1B, pp 29-30.
[43] Supplement to Sixth Report, section 4.0, paras 1-3, Respondent's Compendium, Tab 1, pp 8-9.
[44] Supplement to Sixth Report, section 5.0, paras. 1-6, Respondent's Compendium, Tab 1, pp 9-11.

management fees paid in respect of the projects were not earned or reasonable as they were paid at an accelerated rate inconsistent with the stage of development of the projects.[45]

(c) **Intercompany loans**. Although the defendants assert that the uncontradicted evidence was that the intercompany loans were known to and authorized by the trustee corporations, recorded in the books and records of the receivership companies and expected to be repaid once construction financing was secured, considerable evidence contradicted this. For instance, on cross-examination, Mr. Davies admitted there was no formal written consent authorizing the intercompany loans.[46] Mr. Davies also admitted on cross-examination that there was tremendous pressure placed on the receivership companies to meet the interest payments from the beginning and the way he would alleviate that pressure was by raising more money through new financings, generally from other projects.[47] Further, email correspondence between Messrs. Davies and Singh reflect that the receivership companies were facing a liquidity crisis and were "completely tapped out of cash" on some projects, which necessitated the making of intercompany loans to perpetuate the scheme and avoid defaulting on the loans from the trustee corporations.[48] When pressed on cross-examination, Mr. Davies acknowledged that the intercompany loans created interdependencies between the projects such that the failure of one project could "theoretically" have a cascading effect

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[45] Supplement to Sixth Report, section 5.0, paras 1-6, and Appendix "G" – Summary of Estimated Unearned Management Fees, Respondent's Compendium, Tab 1, pp 9-11, and Tab 1C, p 31.

[46] August 9 Transcript, Respondent's Compendium, Tab 12, Qs. 204-205, p 238 (Lines 22-24) and p 239 (Lines 1-13).

[47] August 9 Transcript, Respondent's Compendium, Tab 12, Qs. 156-1164, p 227 (Lines 2-25), p 228 (Lines 1-25) and p 229 (Lines 1-17).

[48] Supplement to Sixth Report, Excerpt of Appendix "K" – Relevant email correspondence between Messrs. Davies and Singh dated August 25, 2014, Respondent's Compendium, Tab 1D, pp 32-36 (and, in particular, p 33). For a complete copy of Appendix "K" (i.e. complete copies of further relevant email correspondence between Mr. Davies, Mr. Singh and others), see Appeal Book, Volume 5, Tab 21K, pp 1576-1609.

and cause the other projects to fail too.[49] Although Mr. Davies insisted on cross-examination that construction financing would ultimately save the day,[50] this defied logic as construction financing for a project is generally extended to fund construction specifically for that project rather than pay old, unsecured debt unrelated to the project for which the construction financing is advanced.

(d) **Mr. Singh**. Although the defendants assert there was uncontradicted evidence that the only relationship between Mr. Singh and the receivership companies was that of an arm's length lender and borrower, considerable evidence contradicted this. For instance, the Receiver's Fourth Report specifically provides that Mr. Singh, through his holding company RS Consulting Group Inc., was a shareholder of at least two receivership companies as well as two non-receivership development companies in respect of which Mr. Davies was a director and officer.[51] As a shareholder of each of the applicable companies, RS Consulting Group Inc. also received $250,000 in dividends from each of the two receivership companies and from each of the two non-receivership development companies, for a total of $1 million in dividends from companies to which the trustee corporations advanced investor funds.[52] Clearly this is not an arm's length lender-borrower relationship.

28. All of the above evidence was before Justice Myers and formed part of the parties' oral submissions. His Honour heard both sides of the argument, reviewed the extensive record before him, and favored the evidence of the Receiver.

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[49] August 9 Transcript, Respondent's Compendium, Tab 12, Qs. 139-142, p 223 (Lines 8-25).
[50] August 9 Transcript, Respondent's Compendium, Tab 12, Qs. 168-172, p 230 (Lines 14-25) and p 231 (Lines 1-16).
[51] Fourth Report, section 2.1, paras 1-4, Respondent's Compendium, Tab 3, pp 58-59.
[52] Fourth Report, section 3.2, Respondent's Compendium, Tab 3, pp 65-68.

Leave to Appeal

29. On January 19, 2018, this Honourable Court granted leave to appeal. In this appeal, the defendants present no answer to the fact that His Honour considered their evidence and found it not to be credible in the face of overwhelming evidence of fraud and other misconduct, including evidence provided directly by Mr. Davies in his affidavit material, in contemporaneous email correspondence and on cross-examination. Instead, the defendants mischaracterize the evidence that was before Justice Myers and parrot the same explanations His Honour found not to be credible while ignoring the overwhelming evidence of fraud and other misconduct that grounded His Honour's decision.

PART III – LAW & ARGUMENT

The Standard of Review

30. The first issue raised by the defendants – whether the proper legal test for granting a Mareva injunction was considered – is a question of law to which a correctness standard applies.[53]

31. All of the subsequent issues raised by the defendants are questions of fact and discretionary decisions made by Justice Myers. For findings of fact, the standard of review "is that such findings are not to be reversed unless it can be established that the trial judge made a 'palpable and overriding error'."[54] There are numerous policy reasons, which have been articulated by the Supreme Court of Canada, for employing a high level of deference to findings of fact, such as the recognition of the expertise of the judge at first instance due to his or her extensive exposure to the evidence, the judge's familiarity with the case as a whole, the role of the judge to weigh and assess voluminous quantities of evidence, and the fact that the judgment reflects the total familiarity with

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[53] *Housen v Nikolaisen,* 2002 SCC 33 at para 8 (***Housen***), Appellants' Book of Authorities, Tab 3.
[54] *Ibid,* at para 10.

the evidence and the insight gained by the judge at first instance throughout the proceeding.[55] These policy concerns are particularly apt in this case where the record before Justice Myers was voluminous and extensive, and the parties are engaged in an ongoing proceeding supervised by Justice Myers.

32. Moreover, within those parameters, when a judge makes a discretionary decision, he or she is entitled to even more deference as "an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice" and the decision "cannot be replaced simply because the appellate court has a different assessment of the facts".[56]

Issues Raised by the Defendants

33. At paragraph 32 of their factum, the defendants set out four issues raised in this appeal. The second issue, the alleged deficiency in reasons, is not a free-standing ground of appeal[57] and is therefore instead considered as part of the defendants' first and third issues. As such, the defendants' issues for appeal are addressed as follows:

(a) Did Justice Myers consider the legal test for granting a Mareva injunction?

(b) Were Justice Myers' conclusions supported by the evidence?

(c) Was the decision to dispense with an undertaking for damages "so clearly wrong as to amount to an injustice"?

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[55] *Ibid,* at paras 10-18.

[56] *R. v Regan,* 2002 SCC 12 at para 117 (***Regan***), BOA, Tab 2; *Khan v Metroland Printing, Publishing & Distributing Ltd.* (2003), 178 OAC 201 (Div Ct) at paras 3-5, (aff'd (2005), 199 OAC 80 (CA)) (***Khan***), BOA, Tab 3; *Popack v Lipszyc,* 2016 ONCA 135 at para 25 (***Popack***), BOA, Tab 4.

[57] *Sheppard,* at para 42, Appellants' Book of Authorities, Tab 19; *R. v M. (R.E.),* 2008 SCC 51, at para 25 (***M. (R.E.)***), BOA, Tab 5.

A. Justice Myers Considered the Proper Legal Test

34. Judges at first instance "are presumed to know the law" and "[w]here a case turns on the application of well settled legal principles to facts as found after a consideration of conflicting evidence, the trial judge is not required to expound upon those legal principles to demonstrate to the parties, much less to the Court of Appeal, that he or she was aware of and applied those legal principles."[58] A judge is not required to explain or expand on law that is well-settled, uncontroversial or understood and accepted by the parties.[59]

35. The legal test for granting a Mareva injunction is well-settled and uncontroversial; there was no dispute between the parties about the proper test to be applied. As such, Justice Myers was not required to recite every word of the test that is well-established in prior cases. The defendants also acknowledge that "the motions judge properly recognized the test to be applied" but appear to suggest that he was required to set out the requisite elements for every cause of action plead[60] (which, in this case, included fraud, breach of fiduciary duty, conversion, unjust enrichment, negligence and unlawful means). The defendants have not pointed, and indeed cannot point, to any authority which states that in determining whether there is a *prima facie* case, the judge is required to list the elements of every cause of action in the plaintiff's statement of claim. That is not the well-established test for a Mareva injunction. Moreover, the legal elements of the relevant causes of action are well-settled and uncontroversial. Not only is Justice Myers presumed to know the law, but the requisite (well-settled and uncontroversial) elements were before him as set out in the Receiver's various facta (including the Receiver's factum on the interlocutory motion which was 50 pages long) and books of authorities (including the Receiver's book of authorities on the

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[58] *R. v Morrissey* (1995), 22 OR (3d) 514 (ONCA), at 27-28 (***Morrissey***), BOA, Tab 6; *M. (R.E.),* at para 54, BOA, Tab 5; *C. (R.) v McDougall,* 2008 SCC 53 at para 99 (***McDougall***), BOA, Tab 7.
[59] *M. (R.E.),* 2008 SCC 51 at para 19, BOA, Tab 5.
[60] Appellants' Factum at para 38; Fresh as Amended Statement of Claim, Respondent's Compendium, Tab 4, pp 82-111.

interlocutory motion which included over 25 authorities on the relevant points of law).[61] There is no legal error in not reproducing every element of a well-known legal test, and there was no error of law made by Justice Myers in his consideration of the legal test for the Mareva injunction.

36. In addressing this issue in their factum, the defendants also discuss Justice Myers' findings of fact on the legal test. Those are questions of fact, not a question of whether he applied the proper legal test, and are therefore addressed as part of the second issue below.

B. Justice Myers' Conclusions are Supported by the Evidence

37. The crux of the defendants' complaint appears to be that Justice Myers did not accept the evidence of the defendants, pointing to alleged deficiencies in His Honour's reasons as the basis for this complaint. The defendants appear to submit that, in addition to setting out all elements of well-established legal tests, Justice Myers ought to have reproduced all of the evidence on which he was basing his decision and was required to give a play-by-play explanation of his rejection of the defendants' evidence.

38. The Supreme Court of Canada and Ontario appellate courts have been consistently clear about what is required in terms of reasons. In reviewing reasons, an appellate court should "start from a stance of deference toward the trial judge's perceptions of the facts" and "based on the propositions that the trial judge is in the best position to determine matters of fact and is presumed to know the basic law."[62] The reasons must be read "as a whole, in the context of the evidence, the arguments and the trial, together with an appreciation of the purposes or functions for which

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[61] Factum of the Plaintiff dated June 6, 2017 at paras 52 onwards, Respondent's Compendium, Tab 13, pp 307-342; Factum of the Plaintiff dated July 12, 2017 at paras 80 onwards, Respondent's Compendium, Tab 14, pp 343-389; Factum of the Plaintiff dated August 18, 2017 at paras 108 onwards, Respondent's Compendium, Tab 15, pp 390-445; Index for Book of Authorities of the Plaintiff dated August 18, 2017, Respondent's Compendium, Tab 16, pp 446-449.

[62] *M.(R.E.),* at para 54, BOA, Tab 5.

reasons are delivered."[63] The motion judge's reasons must also be read in light of his familiarity with the case and with regard to the urgency of the matter.[64] An appellate court cannot "intervene simply because it thinks the trial court did a poor job of expressing itself".[65] Rather, "there must be a functional failing in the reasons."[66]

39. Therefore, the requisite standard is a "functional need to know" approach.[67] As found by the Supreme Court, "the object is not to show *how* the judge arrived at his or her conclusion, in a 'watch me think' fashion. It is rather to show *why* the judge made that decision."[68] "Where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable".[69] In addition, "where the result turns on fact-finding and not on the application of contested legal principles, it is appropriate that the reasons should focus on telling the parties what evidence was believed and why it was believed."[70] A judge's reasons are not intended to be "a verbalization of the entire process engaged in by the" judge. Rather, the critical question is:

> *do the trial judge's reasons, considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of the right to meaningful appellate review?*[71]

40. The case before this Court is not one of contested legal principles; it is one of fact-finding where an extensive evidentiary record was before the judge. In the context of: (i) the 1,500 pages of evidence; (ii) the oral and written submissions from both parties; (iii) the three prior court attendances before the same judge; (iv) the inherent knowledge of the judge in light of his ongoing

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[63] *R. v Brownlee,* 2018 ONCA 99 at para 39, BOA, Tab 8; *M.(R.E.),* at para 16 citing *Sheppard,* at paras 46 and 50, BOA, Tab 5; *Trade Capital Finance Corp. v Cook,* 2017 ONCA 281 at para 44, BOA, Tab 9.
[64] *PDM Entertainment Inc. v Three Pines Creations Inc.*, 2015 ONCA 488 at paras 31-33 (***PDM Entertainment Inc.***), BOA, Tab 10.
[65] *M. (R.E.),* at para 53 citing *Sheppard,* at para 26, BOA, Tab 5.
[66] *Ibid.*
[67] *Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board,* 2007 SCC 41 at paras 100-101 (***Hill***), BOA, Tab 11.
[68] *M. (R.E.)*, at para 17; BOA, Tab 5; *PDM Entertainment Inc.,* at paras 36-37, BOA, Tab 10.
[69] *Hill,* 41 at paras 100-101, BOA, Tab 11.
[70] *Morrissey,* at para 29, BOA, Tab 6.
[71] *M. (R.E.)* at para 57, BOA, Tab 5; see also *Sheppard,* Appellants' BOA, Tab 19.

carriage of the matter; (v) the nature of interlocutory and time-sensitive Mareva relief; (vi) the prior endorsements made on the same Mareva relief; and (vii) the application of uncontested legal principles to the facts, the functional requirement of Justice Myers' reasons could only have been to explain to the parties *why* he made the decision to continue the Mareva injunction in the face of the evidence put forth by the defendants. As further set out below, His Honour's reasons clearly serve this functional purpose and do not deprive the defendants "of the right to meaningful appellate review".

i. Prima Facie Case

41. At first instance, Justice Myers concluded that the Receiver established a strong *prima facie* case against the defendants, finding (in his June 7 endorsement): "...there is a strong *prima* [*facie*] case that Mr. Davies and his family's corporation misappropriated a significant amount of the investors' funds...".[72] He subsequently found (in his July 17 endorsement) that a "very substantial amount of money" invested by public investors appeared to have been misappropriated.[73] Justice Myers expressly indicated that "[w]hether that conclusion changes as the matter proceeds will be determined at a later date."[74]

42. At that later date, Justice Myers was presented with voluminous evidence from both sides, including evidence from the defendants, transcripts of cross-examinations, written and oral submissions from both sides, and the current findings of the Receiver based on its ongoing investigations. Justice Myers was clearly aware of the standard for a Mareva injunction, agreeing with the defendants that such an injunction "is a rare, extraordinary exception to the norm" that

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[72] Unofficial Transcript dated June 7, Respondent's Compendium, Tab 6A, p 138; and Endorsement dated June 7, Respondent's Compendium, Tab 6, p 137.
[73] Unofficial Transcript dated July 17, Respondent's Compendium, Tab 9A, 157-158; Endorsement dated July 17, Respondent's Compendium, Tab 9, pp 150-156.
[74] Unofficial Transcript dated July 17, Respondent's Compendium, Tab 9A, 157-158; Endorsement dated July 17, Respondent's Compendium, Tab 9, pp 150-156.

"should not be available when the Defendants have a plausible, acceptable defence" and "should only be available where the Plaintiff is clearly likely to succeed".[75] With that framework, Justice Myers considered and rejected the evidence of the defendants and the submissions of their counsel. His Honour's reasons, read in context, explain his basis for doing so.

43. Among other things, Justice Myers first explains his assessment of the factual evidence with respect to what happened to the money raised from public investors, specifically analyzing Mr. Davies' own explanation: "Mr. Davies prepared a 2 page explanation of how his financing model works. It is shocking in its clarity of a description of an illicit, fraudulent scheme without Mr. Davies seemingly having the least bit of compunction about it."[76]

44. Justice Myers goes on to address specific arguments raised by counsel for the defendants, finding that the arguments "cannot survive the clear admissions in Mr. Davies own hands and cross examination." His Honour continues to explain why this is the case based on the evidence before him; for example:

(a) "With over $100 million raised and spent, there are no buildings! Mr. Singh and Mr. Davies have emails in which they plainly know the companies are insolvent and desperately look for cash to avoid an interest default that would trigger a FSCO report and would dry up future investment needed to support the Ponzi Scheme."[77]

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[75] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[76] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[77] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.

(b) In response to inter-company loans, "[t]here was no expectation of repayment. There were payments to keep the Ponzi alive a bit longer."[78]

(c) In response to the argument that Davies was just a poor developer, "[a]n honest but lousy developer would not have gone along to 10 or 11 projects with each contributing its new investment to old debt."[79]

(d) "Mr. Davies said on cross examination that he expected construction financing to fill the ever-increasing debt. That makes no sense at all. Construction financing is used to build not to re-pay old debt…".[80]

(e) "Davies offers no innocent explanation…".[81]

45. In addition to the written reasons a judge provides, the Court must also have regard to the entire evidentiary record; as confirmed by the legal principles above, a judge is not required to expound on all of the evidence before him or her. The Supreme Court has stated the proper standard of review is that an appellate court is prohibited "from reviewing a trial judge's decision if there was *some* evidence upon which he or she could have relied to reach that conclusion."[82]

46. At paragraph 62 of the defendants' factum, they allege that certain of Justice Myers' conclusions were unsupported or directly contradicted by evidence; however, as previously set out at paragraph 27 above, all of the evidence the defendants point to was either challenged, contradicted or both. And all of Justice Myers' findings are supported by the evidentiary record.

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[78] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[79] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[80] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[81] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[82] *Housen,* at para 1, Appellants' BOA, Tab 3.

The defendants' suggestion that Justice Myers ignored salient, purportedly uncontradicted or unchallenged evidence and drew speculative conclusions is unfounded and belies the realities of the case.

47. A strong *prima facie* case of fraud was found in Justice Myers' June 7 and July 17 endorsements. His Honour subsequently made a factual determination that none of the defendants' evidence changed that finding. This was sufficient to establish a *prima facie* case for purposes of a Mareva injunction. There is no requirement, or need, to find a *prima facie* case on every cause of action alleged by a plaintiff. Indeed, courts have recognized that a finding of fraud is usually the strongest support for a Mareva injunction.[83] Once that is found, an analysis of every other cause of action is not necessary and, in any event, is unlikely to support Mareva relief. However, it should be noted that several other causes of action were alleged by the Receiver, including conversion, unjust enrichment and breach of fiduciary duty, and the Receiver put forward case law supporting the granting of a Mareva injunction where a strong *prima facie* case regarding such causes of action is made out, as was the case here.[84] All of these materials were part of the record before Justice Myers.

48. The defendants allege that the plaintiff's allegations of fraud have changed since the *ex parte* proceeding and this somehow impacts the continuous findings by Justice Myers of a *prima facie* case.[85] The defendants appear to submit that evidence showing the fee payments were disclosed to related parties means there is no fraud. What the defendants fail to recognize is that even if there was disclosure, that does not give the defendants the right to steal money. The nature of the Receiver's fraud claim has not changed; it has always been that the defendants have stolen

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[83] See e.g. *Lambrou v Voudouris,* 2015 ONSC 998 at para 5, BOA, Tab 12.
[84] See e.g Factum of the Plaintiffs dated August 18, 2017, Respondent's Compendium, Tab 15, p 390-445.
[85] Appellants' Factum at paras. 41-42.

money and committed a fraud. The evidence before Justice Myers has continuously supported this claim.

ii. Irreparable Harm

49. The defendants incorrectly assert in their factum that His Honour's reasons fail to address the issue of irreparable harm. Irreparable harm is harm "which cannot be cured, usually because one party cannot collect damages from the other."[86] This has consistently been interpreted to mean that "if there is evidence to support a finding that the responding parties may be unable to pay any award of damages then such a finding is sufficient to establish irreparable harm."[87]

50. In his endorsement made on the earlier interim motion, Justice Myers found that "absent injunctive relief the Defendants will dissipate their assets to avoid recovery by the Receiver and the Investors".[88] It should also be noted that the requirements for a Mareva injunction, including the element of irreparable harm, are not watertight compartments, but rather are interconnected and a framework to be followed.[89] Here, given the defendants' admitted lack of assets[90] and their dissipation of assets, coupled with all the other supporting evidence, harm would necessarily be irreparable and this element of the test was found to be satisfied by Justice Myers. Contrary to the defendants' assertions, a judge's reasons are not intended to be "a verbalization of the entire

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[86] *RJR MacDonald Inc. v Canada (Attorney General),* [1994] 1 SCR 311, 1994 CarswellQue 120 at para 64, Appellants' BOA, Tab 2.

[87] *Rexdale Mews Associates Partnership v Kaiser* (1999), 36 CPC (4th) 91, 1999 CarswellOnt 1625 at para 22 (Sup Ct), BOA, Tab 13.

[88] Unofficial Transcript dated June 7, Respondent's Compendium, Tab 6A, p 138; and Endorsement dated June 7, Respondent's Compendium, Tab 6, p 137.

[89] See *Potash Corp of Saskatchewan Inc. v Mosaic Potash Esterhazy Ltd. Partnership,* 2011 SKCA 120 at para 26 (***Potash***), BOA, Tab 14; *Google,* at para 25, BOA, Tab 1.

[90] The asset and liability statements of Mr. and Ms. Davies confirmed they had more liabilities than assets, and the bank statement of Aeolian showed it had an account balance of $45.69 as at May 29, 2017 (Fourth Report, Appendix "D" – Asset and Liability Statement of Mr. Davies and Appendix "F" – Revised Asset and Liability Statement of Mr. Davies, Respondent's Compendium, Tabs 5A and 5C, pp 130 and 132; Supplement to the Sixth Report, Appendix "B" – Asset and Liability Statements of Ms. Davies, Respondent's Compendium, Tab 1A, pp 15-26; Sixth Report, Appendix "O" – Summary of Aeolian's Receipts and Disbursements, Respondent's Compendium, Tab 5A, pp 134-136).

process engaged in by the" judge,[91] and Justice Myers' reasons, read in context, provide the "why" with respect to irreparable harm.

iii. Balance of Convenience

51. Justice Myers' reasons, read in context, also demonstrate that he properly considered and assessed the balance of convenience. First, in Justice Myers' July 17 endorsement he expressly found "that the balance of convenience supports the Order sought."[92] It should also be noted that "balance of convenience" overlaps with the other two elements of the test: irreparable harm and a strong *prima facie* case.[93] As stated above, each of these elements are not watertight compartments, but rather are interconnected and a framework to be followed, with the overall focus and fundamental question being on the justice and equities of the case.[94] Justice Myers clearly found a strong *prima facie* case and also addressed issues of irreparable harm, as set out above. He assessed all of the explanations Mr. Davies tried to put forward and looked at the respective positions of the defendants and the plaintiff. His Honour's reasons read as a whole, in the context of the evidence, the arguments and the proceedings (including Justice Myers' prior endorsements), demonstrate no palpable and overriding error with respect to the balance of convenience.

iv. Dissipation of Assets

52. The defendants baldy state that the motion judge's finding regarding dissipation of assets "was founded entirely on speculation rather than cogent evidence."[95] However, Justice Myers' conclusions answered the legal test and were grounded in the evidence.

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[91] *Morrissey,* at para 30, BOA, Tab 6.
[92] Unofficial Transcript dated July 17, Respondent's Compendium, Tab 9A, 157-158; Endorsement dated July 17, Respondent's Compendium, Tab 9, pp 150-156.
[93] *Atlas Copco Canada Inc. v Hillier,* 2011 ONSC 2277 at para 47, BOA, Tab 15; *Meridian Insurance Group Inc. v Regional Group of Cos.,* 2001 CarswellOnt 1305 (ONSC) at para 28, BOA, Tab 16.
[94] See *Potash,* at para 26, BOA, Tab 14; *Google,* at para 25, BOA, Tab 1.
[95] Appellants' Factum at para 58.

53. Justice Myers had to be satisfied that there was a real risk the defendants were about to remove their assets from the jurisdiction to avoid the possibility of a judgment, or that the defendants were otherwise dissipating assets in a manner distinct from their usual or ordinary course of business or living.[96] This requirement can be satisfied by looking to the evidence as a whole and inferring from the defendants' fraudulent conduct a sufficient risk of dissipation of assets to render the possibility of future tracing of assets remote, or significantly more difficult, and that the defendants will thereby frustrate the enforcement of any judgment the plaintiff may obtain.[97]

54. Justice Myers found a risk of dissipation in all of his endorsements. On June 7:

> Mr. Davies has not actively participated in the proceedings to date and he is actively selling his assets – including his cottage and home. I am satisfied that this is a case in which proof of wrongdoing including likely defalcation by a fiduciary, coupled with asset sales, readily leads to an inference that absent injunctive relief the Defendants will dissipate their assets to avoid recovery by the Receiver and the investors.[98]

55. In his subsequent reasons, Justice Myers stated the following additional grounds for finding a risk of dissipation, which are supported in the evidentiary record:

> [Mr. and Ms. Davies] have recently sold the cottage. They have listed their house for sale despite the existence of Mareva Injunction already. They are living well despite a Mareva with funds being advanced from the architect on the projects. There is a substantial house in Arizona owned by the two trusts that the trustees undertake not to sell. But they are not willing to put an order on title. The Receiver has shown a *prima facie* ability to trace corporate funds into both properties. The architect's largesse suggests that there may well be hidden pools of funds yet undiscovered. I have no hesitation finding a proven risk of dissipation given the listing of the house in the face of a Mareva. I infer dissipation and likely flight to Arizona in light of the degree of dishonesty and the liquidation of the Davies' real estate.[99]

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[96] *Aetna Financial Services Ltd. v Feigelman* (1985), 15 DLR (4th) 161 (SCC) at para 29, BOA, Tab 17.
[97] *Sibley & Associates LP v Ross et al,* 2011 ONSC 2951 at paras 62-67, BOA, Tab 18; *East Guardian SPC v Mazur,* 2014 ONSC 6403 at para 68, BOA, Tab 19; *Noreast Electronics Co Ltd v Danis,* 2018 ONSC 879 at paras 52-54, BOA, Tab 20; *Bank of Montreal v Misir,* 2004 CarswellOnt 5366 (Comm List) at paras 35-38, BOA, Tab 21; *Massa v Sualim,* 2013 ONSC 7520 at para 12 (injunction continued 2014 ONSC 2103), BOA, Tab 22.
[98] Unofficial Transcript dated June 7, Respondent's Compendium, Tab 6A, p 138; and Endorsement dated June 7, Respondent's Compendium, Tab 6, p 137.
[99] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46; Sixth Report, Respondent's

56. In addition to the above (selling their cottage, listing their house for sale in the face of a Mareva and refusing to put an order on title to the Arizona property), Mr. Davies has no known bank account and, subsequent to the granting of the Mareva, ran up debts on his American Express card to fund his lifestyle and borrowed $64,000 for an architect on certain of the Projects.[100] Justice Myers assessed all of this evidence before him and found a proven a risk of dissipation. There was no palpable and overriding error that would justify overturning that finding.

C. There Was No Error in Waiving the Requirement for an Undertaking

57. Whether or not to require an undertaking is a discretionary determination; such a determination can only be interfered with if it is found that the decision is so clearly wrong as to amount to an injustice.[101] Justice Myers had before him a number of cases in which courts exercised their discretion to waive the requirement for an undertaking, in accordance with Rule 40.03.[102] In addition, the Ontario Court of Appeal recently upheld a motion judge's decision to similarly waive an undertaking for a court-appointed receiver:

> As for the failure to require the Receiver to provide an undertaking as to damages, the motion judge rejected this argument, on the basis that the order was made in a court-appointed receivership. The purpose of such an undertaking is "to protect the defendant from the risk of granting a remedy before the substantive rights of the parties have been determined" [citation omitted]. The Receiver is not a self-interested party. A receiver is an officer of the court with a fiduciary duty to comply with the powers granted in the receivership order and to act honestly and in the best interests of all parties, including the debtor [citation omitted]. The Receiver has a duty to recover the property of the Debtors… The motion judge, under r. 40.03, was entitled to grant the Mareva Order without requiring an undertaking as to damages, and he did so for good reason in this case.[103]

Compendium, Tab 5, pp 113-129; Supplement to Sixth Report, Respondent's Compendium, Tab 1, pp1-14; August 9 Transcript, Respondent's Compendium, Tab 12, Qs 434-435, p 303 (Lines 14-24).

[100] August 9 Transcript, Respondent's Compendium, Tab 12, Qs. 13-30, p 200 (Line 22-25), pp 201-202 and p 203 (Lines 1-30).

[101] *Khan,* at paras 5, BOA, Tab 3, *Regan,* at para 117, BOA, Tab 2.

[102] *Sabourin & Sun Group of Companies v Laiken,* 2006 CarswellOnt 5787 (ONSC) at para 16 (***Sabourin***), BOA, Tab 23; *Taseko Mines Ltd v Phillips,* 2011 BCSC 1675 at paras 69-70, BOA, Tab 24; *Benjamin v Toronto Dominion Bank,* 2006 CarswellOnt 1887 (ONSC) at para 53, BOA, Tab 25; *Delta (Municipality) v Nationwide Auctions Inc.,* 1979 CarswellBC 96 at paras 26-27 (BCSC), BOA, Tab 26.

[103] *Business Development Canada v Aventura II Properties Inc.,* 2016 ONCA 300 at para 25 (***Business Development Canada***), BOA, Tab 27.

58. Based on the full record before him, and based on his knowledge of the facts, the parties and all the other circumstances, Justice Myers recognized that this was one of the "rare and unusual" cases where such a waiver would be appropriate.[104] Justice Myers explained the basis for this decision in both his July 17th and August 30th endorsements where he held that the Receiver acts for the benefit of public investors, has no skin in the game, and access to justice concerns make this an exceptional case where an undertaking would not be necessary or appropriate.[105] These reasons echo those of the Ontario Court of Appeal in the above case: "The Receiver is not a self-interested party. A receiver is an officer of the court with a fiduciary duty… to act honestly and in the best interests of all parties…The Receiver has a duty to recover the property of the Debtors".[106]

59. The defendants admit that the fact the Receiver is an officer of the court is a factor to be considered,[107] and it was clearly the deciding factor in the above Ontario Court of Appeal decision. However, they then arbitrarily allege that Justice Myers undertook no balancing.[108] His Honour explained the balancing he performed and why he exercised his discretion to determine an undertaking was not required in this case.

60. Justice Myers' decision was also informed by the numerous cases before him in which an undertaking was not required; for example, *Sabourin & Sun Group of Cos. v. Laiken*, where the Court dispensed with the requirement for an undertaking because the moving party in that case, like the receivership companies in this case, was insolvent and the Court held "it would be wrong to deny her a Mareva injunction to which she would otherwise be entitled on the grounds that her

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[104] Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49; Endorsement dated August 30, 2017, Respondent's Compendium, Tab 2, pp 37-46.
[105] Unofficial Transcript dated July 17, Respondent's Compendium, Tab 9A, 157-158; Unofficial Transcript of Justice Myers' Endorsement dated August 30, Respondent's Compendium, Tab 2A, pp 47-49.
[106] *Business Development Canada,* at para 25, BOA, Tab 27.
[107] Appellants' Factum at para. 68.
[108] Appellants' Factum at para. 69.

undertaking as to damages would be of little value".[109] In the context of a motion for an injunction to restrain a school board from demolishing a historic building, the Superior Court of Justice similarly waived the requirement for an undertaking as to damages because the plaintiff in that case, like the Receiver in this case, "did not stand to derive any personal gain from the preservation of the [property]".[110]

61. While discretionary decisions by judges of first instance are always to be accorded significant deference,[111] this decision in particular warrants a high degree of deference. Justice Myers has overseen this proceeding since its inception and His Honour was, and is, best positioned to determine if the facts faced by the receivership companies warrant the exercise of discretion reserved to the judge hearing the motion to dispense with the requirement for an undertaking for damages. There was no injustice here in waiving the requirement for an undertaking.

PART IV – ADDITIONAL ISSUES

62. The respondent does not raise any additional issues on appeal.

PART V – ORDER SOUGHT

63. For all of the foregoing reasons, the Receiver requests that this appeal be dismissed with costs payable to it on an appropriate scale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of April, 2018.

BENNETT JONES LLP

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[109] *Sabourin,* at para 16, BOA, Tab 23 (also included at Tab 24 of Receiver's Book of Authorities for the August 30th Mareva motion. See: Index for Book of Authorities of the Plaintiff dated August 18, 2017, Respondent's Compendium, Tab 16, pp 446-449).

[110] *House v Lincoln (Town),* 2015 ONSC 6286, at para 4, BOA, Tab 28.

[111] *Popack,* at para 25, BOA, Tab 4.

Divisional Court File No.: 533/77
Court File No. CV-17-11822-00CL

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KSV KOFMAN INC. IN ITS CAPACITY AS RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO INC., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC. AND TEXTBOOK (555 PRINCESS STREET) INC.

Plaintiff/Respondent

- and -

AEOLIAN INVESTMENTS LTD., JOHN DAVIES IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF BOTH THE DAVIES ARIZONA TRUST AND THE DAVIES FAMILY TRUST, JUDITH DAVIES IN HER PERSONAL CAPACITY AND IN HER CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, AND GREGORY HARRIS SOLELY IN HIS CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST

Defendants/Appellants

CERTIFICATE

Counsel for the Respondent certify that:

1. An order under subrule 61.09(2) (original record and exhibits) is not required; and
2. It is estimated that two hours will be required for the Respondent's oral argument.

SCHEDULE "A" – LIST OF AUTHORITIES

1. *R. v Sheppard,* 2002 SCC 26
2. *Housen v Nikolaisen,* 2002 SCC 33
3. *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34
4. *R. v Regan*, 2002 SCC 12
5. *Khan v Metroland Printing, Publishing & Distributing Ltd.* (2003), 178 OAC 201 (Div Ct) (aff'd (2005), 199 OAC 80 (CA))
6. *Popack v Lipszyc*, 2016 ONCA 135
7. *R. v M. (R.E.),* 2008 SCC 51
8. *R. v Morrissey* (1995), 22 OR (3d) 514 (ONCA)
9. *C. (R.) v McDougall*, 2008 SCC 53
10. *R. v Brownlee*, 2018 ONCA 99
11. *Trade Capital Finance Corp. v Cook*, 2017 ONCA 281
12. *PDM Entertainment Inc. v Three Pines Creations Inc.*, 2015 ONCA 488
13. *Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41
14. *Lambrou v Voudouris,* 2015 ONSC 998
15. *RJR MacDonald Inc. v Canada (Attorney General),* [1994] 1 SCR 311
16. *Rexdale Mews Associates Partnership v Kaiser* (1999), 36 CPC (4th) 91, 1999 CarswellOnt 1625 (Sup Ct)
17. *Potash Corp of Saskatchewan Inc. v Mosaic Potash Esterhazy Ltd. Partnership,* 2011 SKCA 120
18. *Atlas Copco Canada Inc. v Hillier,* 2011 ONSC 2277
19. *Meridian Insurance Group Inc. v Regional Group of Cos.,* 2001 CarswellOnt 1305 (ONSC)
20. *Aetna Financial Services Ltd. v Feigelman* (1985), 15 DLR (4th) 161 (SCC)
21. *Sibley & Associates LP v Ross et al*, 2011 ONSC 2951
22. *East Guardian SPC v Mazur*, 2014 ONSC 6403

23. *Noreast Electronics Co Ltd v Danis*, 2018 ONSC 879

24. *Bank of Montreal v Misir*, 2004 CarswellOnt 5366 (Comm List)

25. *Massa v Sualim,* 2013 ONSC 7520 (injunction continued 2014 ONSC 2103)

26. *Sabourin & Sun Group of Companies v Laiken,* 2006 CarswellOnt 5787 (ONSC)

27. *Taseko Mines Ltd v Phillips,* 2011 BCSC 1675

28. *Benjamin v Toronto Dominion Bank,* 2006 CarswellOnt 1887 (ONSC)

29. *Delta (Municipality) v Nationwide Auctions Inc.,* 1979 CarswellBC 96 (BCSC)

30. *Business Development Canada v Aventura II Properties Inc.,* 2016 ONCA 300

31. *House v Lincoln (Town),* 2015 ONSC 6286

SCHEDULE "B" – LEGISLATION

***Rules of Civil Procedure*, RRO 1990, Reg 194**

RULE 40 - INTERLOCUTORY INJUNCTION OR MANDATORY ORDER

UNDERTAKING

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

KSV KOFMAN INC. in its capacity as Receiver and Manager of Certain Property of Scollard Development Corporation, et al.
Plaintiff

v.

JOHN DAVIES et al.

Defendants
Divisional Court File No.: 533/77
Court File No: CV-17-11822-00CL

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RESPONDING PARTY
(Appeal of Interlocutory Mareva Injunction)

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