

The cost of a wrongful injunction

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Introduction

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Introduction

The Ontario Court of Appeal decision in *United States of America v Yemec*(1) ended a decade-old case in which the plaintiffs were ultimately saddled with having to pay a damages award of C\$954,576 to the defendants in accordance with the plaintiffs' undertaking(2) provided to the court on the return of the *ex parte* motion for a Mareva injunction and an Anton Piller order. The award followed a 15-day damages hearing ordered by the court after the *ex parte* Mareva injunction was dissolved and set aside on the basis that the court determined that the plaintiffs misled the court in their initial *ex parte* motion.

Issuance of *ex parte* Mareva injunction and Anton Piller order

Justice Nordheimer of the Ontario Superior Court of Justice granted the plaintiffs a Mareva injunction and an Anton Piller order on an *ex parte* basis on the strength of a lengthy affidavit filed on behalf of the plaintiffs to which were appended voluminous exhibits.

Subsequently, the defendants moved before Justice Gans of the Ontario Superior Court of Justice to set aside and dissolve the Mareva injunction on the basis that the plaintiffs misled Nordheimer on their *ex parte* motion seeking the Mareva injunction and the Anton Piller order. In the introduction to his reasons for judgment setting aside and dissolving the Mareva injunction, Gans stated:

"Ex parte injunctions in general and Mareva injunctions in the particular are often the bane of the judicial process. They present judges with the most vexing of issues on an immediate and urgent basis while simultaneously obliging the moving party to make full and frank disclosure of the relevant facts, if known, including facts which may explain the position or inure to the benefit of the defendant. Furthermore, where a Mareva injunction is ordered, a 'profound unfairness' occurs since a defendant's assets are tied up indefinitely, in more severe circumstances than even with an execution after judgment, which may force the defendant to settle rather than await 'vindication after trial.'"

Gans then set out the well-known principle obliging a plaintiff on an *ex parte* application to make full and frank disclosure as follows:

"It is now well settled law that the failure of the moving party to make full and frank disclosure may result in the dissolution of an ex parte injunction. This failure can take multiple forms, including, but not limited to: non-disclosure of material facts in support of the defendant's position; misstatement of the then current state of affairs and law; overstatement of the position in support of the moving party; selective exclusion of relevant information; extensive use of exhibits without detailed reference to relevant material in the body of an affidavit."

As previously indicated, the material in this matter, even limited to the evidence before Nordheimer J., is voluminous. No judge entertaining an ex parte motion could be expected

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to read, assimilate, and understand all or even a majority of the material thrust before him or her, even if the task were limited to the affidavits. The factum becomes all the more critical in the circumstances and if matters are overstated, let alone misstated, a problem is likely to occur.

From my reading of his endorsement, it would appear that the representations made to Nordheimer J. in the form of conclusory statements, which were repeated often before me, were more hyperbolic than they were fair, let alone factual...

I digress to observe that some of the matters that the defendants complained were not disclosed to Justice Nordheimer may very well be found in the material filed before him – in obiter comments in some of the cases cited, footnotes, or exhibits to the affidavits. However, the fact remains that even if disclosure was made of some or all of these matters, as above, they were not highlighted and clearly brought to the attention of the court and such conduct should not be encouraged." (Emphasis added).

Gans then referred to a leading scholarly treatise supporting the proposition that a failure to make full and frank disclosure is not necessarily fatal to an injunction as follows:

"A. Exercise of discretion

Justice Sharpe, in his text *Injunctions and Specific Performance*, seems to move away from the position he took in *Friedland* which was that the failure to make full and frank disclosure mandated the dissolution of the *Mareva* injunction. He now suggests, and I agree, that the failure to disclose is 'not invariably fatal' to the injunction; there is a residual discretion in the judge hearing the motion *inter partes*. He further observes that if dissolution would result in an injustice then the punitive rationale for dissolution may be outweighed."⁽³⁾

However, in the result, Gans determined that an injustice would be done if the *Mareva* injunction were continued. As a consequence, the *Mareva* injunction was set aside and dissolved.

Subsequently, on the motion to determine the costs that the defendants were entitled to from the plaintiffs, having succeeded in setting aside and dissolving the *ex parte* *Mareva* injunction obtained by the plaintiffs, Gans stated:

"in my view an award of costs at this stage of the proceedings, in circumstances where I found an injunction was obtained without full and frank disclosure, warrants, if not mandates, not only redress for the costs incurred by the defendants so affected, but a sanction meted out by the court against those who have trifled with, if not torn asunder, the very essence of the integrity of the *ex parte* process."⁽⁴⁾ (Emphasis added).

Subsequently, the court ordered that a hearing be held to ascertain the damages that the plaintiffs may be obliged to pay to the defendants in accordance with the undertaking that the plaintiffs gave to the court on their initial *ex parte* application before Nordheimer. After unsuccessfully challenging the order directing that a damages hearing be held, the court held a damages hearing that lasted 15 days and ordered the plaintiffs to pay the defendants C\$954,576. The plaintiffs' subsequent appeal of the damages award was dismissed by the Ontario Court of Appeal.⁽⁵⁾

Comment

Aside from how misleading the court can impugn, undermine, if not irreparably damage the reputation of the various participants in the litigation process, it can also be extremely costly to the unsuccessful parties. This case should encourage counsel and their parties to carefully ensure that any evidence put before the court has been tendered fairly and squarely.

For further information on this topic please contact [Norm Emblem](#) or [Ara Basmadjian](#) at Dentons Canada LLP by telephone (+1 416 863 4511) or email (norm.emblem@dentons.com or ara.basmadjian@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) 2014 ONCA 274.

(2) The undertaking was as follows:

"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 Defendants for which the Plaintiff out to compensate the Defendants."

(3) *United States of America v Yemec* 67 OR (3d) 394.

(4) *United States of America v Yemec* 2005 CarswellOnt 5064.

(5) 2014 ONCA 274.

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