KOSKIE MINSKY

JUSTICE MATTERS

# Civil Litigation

This newsletter is intended to provide insight for our clients on relevant litigation issues.

## Motion for Security for Costs

Motions for security for costs, brought under Rule 56 of the *Rules of Civil Procedure*, are a valuable tool available to defendants (and other responding parties) in civil proceedings. On such a motion, a defendant seeks an order requiring the plaintiff pay an amount into court that would cover the defendant's legal costs, should the defendant succeed in the action and be awarded costs. These orders are granted in cases where the court is persuaded there is a real risk that a defendant will not be able to collect on a costs award due to the location or financial status of a plaintiff.

While an order for security costs is itself a valuable result, the motion can serve many other useful purposes. One benefit is that a motion for security for costs allows a defendant to respond aggressively to a frivolous claim. By requiring a plaintiff "pay to play", and to make a substantial payment into court in order to maintain their claim, the plaintiff is forced to strongly consider their wherewithal to continue. Another benefit which arises when an order for security for costs is obtained, is that a plaintiff is precluded from taking any new steps in the proceeding until the security is paid. Failure to pay the security ordered will delay the proceeding and a defendant can subsequently move to have the proceeding dismissed for failing to comply with the security for costs order, or for delay.

Generally, a defendant who brings the motion has to establish the plaintiff fits into one of the categories set out in subsection (1) of rule 56.01. The most common two categories are that the plaintiff is ordinarily resident outside of Ontario, or the plaintiff is a corporation or "nominal plaintiff" (i.e. a shell corporation) and there is good reason to believe they have insufficient assets in Ontario to pay costs that might be awarded to the defendant. To respond, a plaintiff can simply show they in fact have sufficient assets in Ontario to satisfy a costs award (and therefore there is no need to make an order against them). Alternatively, a plaintiff can establish they are impecunious, and that it would be unjust to prevent them from having their claim proceed on the merits simply because they cannot afford to post security. In this second situation, a plaintiff has to provide thorough evidence establishing impecuniosity, including the inability to borrow the required money, and must also establish the claim has merits (though the burden

is low when a plaintiff proves they are impecunious). This evidence can provide a defendant with invaluable insights into the financial and legal position of the plaintiffs early in a proceeding.

Though they can be lengthy and complex motions, when done correctly, they can bring about a quick and favourable resolution.

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# Rule 31.10 Discovery of Non-Parties With Leave

In the course of an action, situations may arise where an adverse party lacks knowledge of a key issue that may be known by a non-party to the litigation. In such instances, relief may be available to conduct an examination for discovery of a non-party. Having said that, a party does not have the ability to examine a non-party by right and must therefore seek leave of the Court pursuant to Rule 31.10.

The preliminary consideration for the Court in hearing such a motion, as set out at Rule 31.10(1), is whether there is reason to believe the person sought to be discovered has information relevant to a material issue in the action. Once past this initial hurdle, the moving party must also satisfy the Court that it meets the three part test set out at Rule 31.10(2), namely that:

(a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;

(b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and

(c) the examination will not,

(i) unduly delay the commencement of the trial of the action,
(ii) entail unreasonable expense for other parties, or
(iii) result in unfairness to the person the moving party seeks to examine.

The requirements above are cumulative and therefore the moving party must satisfy all of the requirements set out in 31.10 to be successful on the motion.

Many motions for examination of a non-party fail at 31.10(2)(a), the requirement of the moving party to demonstrate that it cannot otherwise obtain the information. The moving party must establish it is unable to obtain the information from the other parties to the action, and also the non-party they wish to examine. [redacted]or constructive[redacted]refusal to provide the information sought must be demonstrated by the moving party.

The test for leave is intentionally difficult to satisfy so as to prevent abuse by litigants with ulterior motives. It is not meant to be a "fishing expedition" by the examining party. Litigation is a difficult

enough process that ought not to be complicated by the inclusion of non-parties on a mere whim of litigants. For this reason, the court does not take these requests lightly. Additionally, there are further impediments codified in the Rules to dissuade litigants from seeking non-party discovery. Generally, the examining party must bear the cost of producing and distributing transcripts of the non-party examination to all of the parties to the action and the examining party is not entitled to recover their costs for the non-party examination.

In litigation, knowledge is power. The court frowns upon "trial by ambush" and the parties have a right to know the case to be met. Accordingly, if a non-party has information relevant to a material issue in the action, R31.10 permits a party to acquire that evidence. However with such significant hurdles to overcome in seeking leave, it must be saved for those rare occasions where it is actually appropriate.

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# Certificate of Pending Litigation

If an "interest in land" is disputed between parties, the *Courts of Justice Act and the Rules of Civil Procedure* provide a potent remedy for a litigant to seek a Court Order to register a "Certificate of Pending Litigation" ("CPL") against title to the land(s) at issue.

The purpose of a CPL is to put the parties and the public on notice that the land(s) at issue are subject to a legal proceeding. Practically, a CPL restrains dealing (i.e. sale, refinancing, mortgaging) with the property while the action or application is pending. As such, a CPL is an effective pre-trial remedy to obtain a form of security to preserve the property until a judgment can be obtained.

There are numerous instances where it may be appropriate for a litigant to seek a court Order for a CPL claiming an "interest in the land," such as:

1. a property owner's name has been fraudulently removed from title;
2. a purchaser seeks to compel completion of the sale of land where the vendor refuses to close;
3. a party claims an interest in a mortgage. For example, a lender may have an equitable mortgage and seek an equitable charge in the property;
4. an interest in land arising from a claim for a constructive or resulting trust;
5. recovery of property that has been fraudulently conveyed;
6. a claim for breach of fiduciary duty giving rise to equitable interests in property or an order for restitution;
7. a claim for leasehold interest in land; or,
8. a vendor's claim for rescission.

A motion for a CPL can be brought with or without notice to the parties in the lawsuit. If the motion is brought without notice, it is essential that full disclosure of all material facts be disclosed to the court. Otherwise, a party seeking to set aside or "discharge" a CPL could succeed solely on the grounds of

incomplete disclosure, even if the non-disclosure is inconsequential to the court's determination on the merits of the CPL motion.

If a motion is brought to discharge a CPL, the court will consider whether the action has been prosecuted with due diligence, whether there is an adequate interest in land, and whether the sum of money would be an adequate alternative to an interest claim in land. Further, the court will also address the following non-exhaustive factors:

1. is the plaintiff a shell corporation;
2. is the land unique;
3. the intent of the parties acquiring the land;
4. whether there is an alternative claim for damages;
5. the difficulty or ease of calculating damages;
6. whether damages would be a satisfactory remedy; and
7. the prejudice or harm to the parties if the CPL is discharged, with or without security.

Legal advice should be obtained in order to evaluate a litigant's circumstances to determine whether a CPL is an appropriate pre-trial remedy. If so, a CPL can be utilized as a strategic and tactical tool in a lawsuit to preserve the property until trial or to precipitate an advantageous settlement.

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# Mareva Injunctions

In some cases it may be necessary for a plaintiff to seek an injunction from the court, in order to prevent another party from disposing of, encumbering or otherwise dealing with any of its assets during the course of litigation. This type of injunction is called a Mareva injunction.

The granting of any injunction by a court is an extraordinary remedy, and one that is not granted lightly. When seeking a Mareva injunction the plaintiff/moving party is required to do the following:

(a) make full and frank disclosure of all material facts within its knowledge;

(b) provide particulars of the claim, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;

(c) give some grounds for believing there are assets in the jurisdiction;

(d) give some grounds for believing there is a real risk the assets will be removed from the jurisdiction, disposed of within the jurisdiction or otherwise dissipated so the moving party will be unable to satisfy a judgment awarded to him/her; and

(e) provide an undertaking as to damages.

It is important to note that a motion for a Mareva injunction is made without notice to the defendant. Accordingly, it is vital the plaintiff make full and frank disclosure to the court of its claim, as well as any defences available to the defendant. Should a plaintiff be found later to have failed in its duty to provide full and frank disclosure, the court will likely set aside the previously granted Mareva injunction.

In order to succeed, the court will need to be persuaded the defendant has or is removing assets from the jurisdiction, that there is a real risk of the defendant removing assets from the jurisdiction, or that assets are being dissipated in a manner which would render the possibility of future tracing of the assets remote, if not impossible at law. The mere possibility of the removal of assets is not sufficient.

It is a real concern for plaintiffs that a defendant will dispose of assets in an attempt to make itself [redacted]proof[redacted]prior to trial. Accordingly, litigants should advise their lawyers if they receive any information that a defendant may be taking steps to dispose of assets, as discussed above, so appropriate steps can be taken to secure those assets in order to satisfy a potential judgment.



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