IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***ICBC v. Patko et al,***
2007 BCSC 743

Date: 20070215
Docket: M103232
Registry: New Westminster

Between:

Insurance Corporation of British Columbia

Plaintiff

And:

Jonathen James Patko and Frank Patko

Defendants

Before: The Honourable Madam Justice Fisher

Oral Reasons for Judgment

In Chambers
February 15, 2007

Counsel for the Plaintiff	F.G. Potts R.N. Hamilton
Counsel for the Defendants	J. Battista
Place of Trial/Hearing:	New Westminster, B.C.

[1] **THE COURT:** ICBC applies for a Mareva injunction in the form of prejudgment execution. Mr. Potts, counsel for ICBC, relies primarily on Rule 45 of the ***Rules of Court***, section 39 of the ***Law and Equity Act*** and the inherent jurisdiction of this court.

[2] ICBC seeks an order enjoining itself from paying $200,000 in settlement funds to the defendant Jonathen Patko in accordance with a settlement agreement reached on January 15th, 2007. The settlement was in respect of an action that was commenced on July 30th, 2003, arising from a motor vehicle accident that occurred in August 1986 when Jonathen Patko was an infant.

[3] On January 10th, 2007, five days before the settlement was reached, ICBC commenced this proceeding, alleging fraud against Jonathen Patko and his uncle Frank Patko. These fraud allegations arise from a motor vehicle accident that occurred on January 27th, 2005.

[4] On February 1st, 2007, Madam Justice D. Smith made an *ex parte* order enjoining ICBC's counsel in the settled action, Lyle Harris, from paying out the settlement funds. Mr. Harris found himself in a difficult situation, as a day or so before he had received a cheque in the amount of $200,000 from Mark Olsen, an ICBC claims adjuster in the head office, and under the terms of the settlement he was required to deliver the funds to Mr. Murphy, counsel for Jonathen Patko. He was about to do so when he received a copy of the February 1st, 2007 order. Mr. Potts advised me that ICBC subsequently stopped payment on the cheque.

[5] The order of Madam Justice Smith expired on February 9th, 2007, when this matter was heard before me. I extended the order to today. I also granted ICBC's motion to reduce the period of time in which Jonathen Patko is required to file an appearance.

[6] ICBC has taken default judgment against Frank Patko. It had difficulty serving Jonathen Patko with the writ and statement of claim in this matter. On January 24th, 2007, it obtained an order for substitutional service. Jonathen Patko has not yet filed an appearance, and he was not served with the notice of motion and supporting materials for this application. However, he swore an affidavit on February 7th, 2007, which was unfiled but included in the chambers record. Mr. Battista appeared to oppose the application on behalf of Jonathen Patko and made submissions on his behalf.

The Fraud Action

[7] In 2005, Jonathen Patko leased a 2004 Ford F150 truck. He was a named insured under a policy of insurance on the truck that was in effect from January 5th, 2005 to January 4th, 2006. At about 2:15 a.m. on January 27th, 2005, Jonathen Patko's truck collided with a hydro pole. The truck was seriously damaged. There were three occupants in the truck at the time, and they all left the scene of the accident before police arrived.

[8] Later that day, at about 5:45 p.m., Jonathen Patko telephoned ICBC to report the accident. He told the claims adjuster that he was at home that night and that his uncle, Frank Patko, was driving the truck at the time of the accident. ICBC says that this was not true and that Jonathen Patko and his uncle both made false statements to ICBC. ICBC says that Jonathen Patko was driving the truck and that he lied to ICBC because he was subject to a recognizance of bail that imposed a curfew on him and he did not want to be charged with a breach.

[9] In a written statement to ICBC, Frank Patko said that he had borrowed the truck and was giving two girls - one who was a friend of Jonathen Patko's - a ride. One of the girls, Amanda Hunt, also gave a statement confirming that Frank Patko was driving. Frank Patko and the two girls filed bodily injury claims. Jonathen Patko filed a claim for the total loss of the truck. ICBC did not pay Frank Patko's claim, but it paid Jonathen Patko's claim for the damage to the truck, the bodily injury claims of the two girls and property damage to B.C. Hydro and the City of Port Coquitlam. In June 2006, it paid out a total amount of $55, 818.40.

[10] The police charged Jonathen Patko with breach of his recognizance in March 2005. Mr. Patko eventually pleaded guilty to that charge in July 2006. In their investigation, the police obtained evidence showing that Jonathen Patko had been at a cabaret on the night of January 27th, 2005. They also obtained a statement from Ms. Hunt admitting that Jonathen Patko was driving the truck that night, and explaining that she lied to ICBC because she did not want to get Mr. Patko into trouble due to his curfew.

[11] ICBC claims that Jonathen Patko and Frank Patko "wrongfully and maliciously conspired together in a joint enterprise to deceitfully cheat, hoodwink, defraud and injure" ICBC, and to that end, caused, required or conspired with each other to falsely report that Frank Patko was driving the truck at the time of the accident. It says that the false statements rendered Jonathen Patko's insurance void and, as a result, it is entitled to be indemnified by Mr. Patko for the amount paid out under the insurance. It also claimed substantial punitive damages of up to $100,000. Mr. Potts advised me that ICBC intends to take the case before a jury.

[12] Jonathen Patko filed no material that disputed any of the facts alleged by ICBC in respect of this action. Mr. Potts submitted, and I agree, that ICBC has a very strong *prima facie* case. Mr. Battista did not dispute this.

Issue

[13] The issue is whether a Mareva injunction should be issued to prevent Jonathen Patko from receiving all or part of the settlement funds. The primary question is whether the nature of the alleged fraud in this case is of sufficient seriousness to place it within the fraud exception to the general rule prohibiting prejudgment execution, and to support an inference that Mr. Patko will dissipate the funds.

[14] Mr. Potts submitted that Jonathen Patko's fraud is serious. Mr. Patko lied to avoid criminal prosecution, and a reasonable inference can be drawn that he was seeking insurance on the basis of a fraudulent statement.

Providing misleading information to ICBC is an offence under section 42.1 of the ***Insurance Motor Vehicle Act***, R.S.B.C. 1996, c. 231. Mr. Potts advised me today that Mr. Patko has been charged with an offence under that section.

[15] Mr. Battista submitted that the fraud in this case is not the kind of egregious fraud that has been demonstrated in the case law. He says that Mr. Patko did not intend to defraud ICBC, as he clearly had insurance. His intention was to avoid being breached under his bail conditions. He did not receive anything he was not entitled to had he told the truth.

Law

[16] As I said before, Mr. Potts seeks a Mareva injunction. He calls it a "freezing order", which amounts to an interlocutory injunction preserving a defendant's assets so as to ensure that a victim of fraud will be able to enforce recovery on a judgment when and if it is obtained.

[17] There is a longstanding rule enunciated in ***Lister & Co. v. Stubbs***, [1886-90] All E.R. Rep. 797 (C.A.), that execution cannot be obtained before judgment. There have been some exceptions to this rule. The Mareva injunction, as it is now known, became a "legal generic" for exceptions to the ***Lister*** rule after a series of maritime cases beginning in about 1975. Mareva injunctions were first granted in circumstances where there was a real risk that a defendant was about to remove assets from the jurisdiction; they were then extended to include assets within the jurisdiction where there was a real risk that a defendant would dissipate them so as to render nugatory any judgment that a plaintiff may eventually obtain. In 1985, the Supreme Court of Canada reviewed the development of this law in ***Aetna Financial Services v. Feigelman***, [1985] 1 S.C.R. 2.

[18] The most common exception to the ***Lister*** rule, which has been codified in Rule 46 of the ***Rules of Court***, is to preserve the subject matter of the dispute. Another is "to prevent fraud both on the court and on the adversary" (***Aetna*** at para. 9). This is the exception that Mr. Potts submits applies in this case.

[19] In ***Aetna***, Estey J. relied on the ***Campbell v. Campbell*** (1881), 29 Gr. 252, as a succinct statement of the general rule and the fraud exception:

> Where no fraud has been committed the court will not restrain a defendant from dealing with his property at the instance of a creditor or person who has not established his right to proceed against that property. But where a fraudulent disposal has actually been made of the defendant's property, ... then the court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance, until the plaintiff can obtain a declaration of its validity, and a recovery of judgment for the amount claimed.

[20] He also referred to ***Toronto (City of) v. McIntosh*** (1977), 16 O.R. (2d) 257 (Ont. H.C.J.) and ***Mills v. Petrovic*** (1980), 30 O.R. (2d) 238 (Ont. H.C.J.) as examples of recent cases in which the fraud exception had been applied. ***Campbell v. Campbell*** and ***Toronto v. McIntosh*** involved fraudulent conveyances of property, but ***Mills v. Petrovic*** involved a strong case of theft over $100,000 by an accountant. It is the ***Mills*** case on which Mr. Potts primarily relies, and other cases that have applied this principle in what he says are analogous situations.

[21] In ***Aetna***, Estey J discussed the Mareva injunction in some detail. As mentioned above, the essential basis for granting an injunction is where there is a real risk that a defendant will remove his assets from the jurisdiction or dissipate his assets in order to avoid the possibility of judgment. In ***Mills***, however, there was no discussion about dissipating assets. The court enjoined the accountant and her husband from selling their house, even though the husband was not involved in the fraud and there was no indication that the house would be disposed of for an improper purpose. Rather, it was the only available asset. In a rather short decision, Galligan J. said this:

> There is no doubt that the law is clear that an interim or interlocutory injunction will not be granted to restrain a defendant from parting with or encumbering his property before a creditor has established his right by judgment. Basically, the courts will not grant execution before judgment.... It is my opinion that equity demands that there be an exception to that principle where there is substantial evidence supporting an allegation that the defendant has defrauded or stolen from the plaintiff.... It does not appear to me to be an unreasonable extension of the principle ... to permit equity to give a

> person who has been defrauded or stolen from by a defendant, some measure of relief that would not be available to a plaintiff in an ordinary action where fraud or theft are not issues.

[22] ***Mills*** goes against the traditional requirement that there must be evidence of a real risk of an intention to dissipate assets. It has been criticized in Ontario. In ***Chitel v Rothbart*** (1982), 36 O.R. (2d) 124 (Ont. H.C.J.), Anderson J. thought that ***Mills*** was wrongfully decided, and he referred the case to the Court of Appeal. The Ontario Court of Appeal (1983), 39 O.R. (2d) 513 did not go so far, but MacKinnon A.C.J.O. noted that ***Mills*** may have been a case similar to ***Campbell v. Campbell*** and the facts may have justified the order.

[23] In ***66309 Ontario Inc. v. Bauman*** (2000), 190 D.L.R. (4th) 491 (Ont. Sup. C.J.) aff'd [2001] O.J. No. 1213 (Ont. Sup. C.J.) (QL), Cullity J. gave a comprehensive review of these cases (***Aetna***, ***Mills*** and ***Chitel***), and held at para. 29 that:

> ... ***Mills*** did not widen the fraud exception beyond its historical foundations in the ***Fraudulent Conveyances Act*** to the extent that it would cover any proceedings where fraud is alleged and nothing more than a strong *prima facie* case is shown. This means that where no allegedly fraudulent disposition has occurred and it is sought to restrain the defendant from disposing of assets, the requirements for a Mareva order must be satisfied even where the plaintiff's cause of action is based on fraud.

[24] A similar approach was taken in B.C. in ***Swamy v. Tham Demolition***, 2000 B.C.SC 1253, where the court concluded that it would grant or continue a Mareva injunction "where there has been a fraudulent disposal of assets ... in order to prevent the further fraudulent disposition of assets."

[25] ***Mills*** was applied in Alberta in ***J.R. Paine and Associates Ltd. v. Cairns*** [1987] A.J. No. 901 (Q.B.) (QL), a case involving serious allegations of theft and fraud, and in B.C. in ***Sutton Resources Ltd. v. Sinclair*** (1997), 37 B.C.L.R. (3d) 381 (S.C.), ***ICBC v. Leland***, [1999] B.C.J. No. 2073 (S.C.) (QL) and ***Netolitzky v. Barclay***, 2002 BCSC 1098.

[26] In ***Sutton Resources***, the plaintiff claimed fraudulent misrepresentation in a private placement of shares, and sought rescission. Some of the shares had already been sold. Dillon J. granted a Mareva injunction securing the shares that remained under the first exception in ***Aetna*** (to preserve the subject matter of the dispute), and extended the injunction to include the equivalent of the shares sold on the basis of the fraud exception, relying on ***Mills***.

[27] In ***ICBC v. Leland*** and ***Netolitzky v. Barclay*** the issue of the real risk of dissipating assets was addressed. In ***Leland***, the risk of removal or alienation of assets was inferred from evidence that strongly suggested that the defendant was involved in a criminally fraudulent scheme which caused significant losses to ICBC. In ***Netolitzky***, Dillon J held that if a strong *prima facie* case of fraud against the defendant is established, an inference can be made that there is a real risk that assets will be removed from the jurisdiction or dissipated.

[28] The fraud in those cases was significant. ***Leland*** involved claims of theft, conversion and conspiracy where the defendants were alleged to be involved in a scheme to strip parts from stolen vehicles. In ***Netolitzky***, the defendant Barclay had provided accounting services to the plaintiffs for over 25 years, and the plaintiffs had uncovered evidence of losses of over $500,000. The defendants were shown to have benefited from the fraud, which had been going on for a long time and which involved substantial concealment and dishonesty. They did not provide any substantial defence or explanation and provided no information about their financial status. Dillon J. found that the balance of convenience favoured the plaintiffs, and she continued a Mareva injunction that restrained the defendant's assets and provided a monthly allowance for living expenses.

[29] Mr. Potts says that there is no doubt that if the settlement funds are given to Jonathen Patko, they will be long gone by the time ICBC gets to trial in this action. This is demonstrated, he says, by Mr. Patko's actions throughout this litigation. Mr. Patko has shown no remorse, he evaded service of the writ and statement of claim, and he filed an affidavit that is notable for what is not in it. In particular, it provides no evidence about what assets Mr. Patko has and what he intends to do with the settlement funds.

[30] Mr. Battista submitted that an inference that Mr. Patko's assets will be dissipated cannot be drawn on the basis of the kind of fraud shown here. He relies on the approach taken in ***Mooney v. Orr*** (1994), 100 B.C.L.R. (2d)

335, as referred to in ***Netolitzky*** at para. 22:

> The approach described by Huddart J in ***Mooney v. Orr*** ... reconciles the traditional test for injunctive relief with the Mareva test in ***Aetna*** so that once a strong *prima facie* case is established, the interests of both parties should be balanced taking into account the particular relevant circumstances of the case, including: the nature of the transaction giving rise to the cause of action, enforcement measures available in B.C., the amount of the claim, the history of the defendant's conduct, the relative strengths of the parties' cases, and evidence of irreparable harm either way. This provides a flexible approach that allows a judge to tailor a remedy to fit the circumstances. The ultimate question is whether it is fair and just that the plaintiff has the right to monitor the movement or expenditure of assets pending final disposition of this matter.

[31] Mr. Battista submitted that granting an injunction here would extend the fraud exception too far. He says that the nature of the transaction in this case does not involve egregious fraudulent activity of the kind in the other cases, that Mr. Patko did not receive anything he was not entitled to, and that ICBC paid out insurance monies it would have paid had there been no misleading statements.

Analysis

[32] The court's general jurisdiction to grant an injunction is set out in section 39(1) of the ***Law and Equity Act***, R.S.B.C. 1996, c. 253, which provides that an injunction may be granted by an interlocutory order where it appears to the court to be "just or convenient" that the order should be made. As Huddart J. (as she then was) stated in ***Mooney v. Orr***, "the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances."

[33] There are some basic criteria that a plaintiff must satisfy before a Mareva injunction will be granted. The plaintiff must demonstrate that it has a strong *prima facie* case (***Aetna***). As I noted above, it is not in dispute that ICBC has shown a strong *prima facie* case here.

[34] The plaintiff must also show that there is a real risk of assets being dissipated before a judgment is obtained. In ***Aetna***, Estey J. referred to the risk of dissipating assets "to avoid the possibility of a judgment," indicating that the dissipation must have a wrongful character to it. This has been the subject of some controversy. In Ontario, as I understand it, the weight of authority is that an improper purpose must be shown. In that regard, I refer to ***Chitel v. Rothbart*** and ***R. v. Consolidated Fastfrate Transport Inc.*** (1995), 24 O.R. (3d) 564 (Ont. C.A.); I note that Weiler J.A. wrote a strong dissent in the latter case, concluding that no improper purpose need be shown.

[35] In B.C., an improper purpose is not required. In ***Silver Standard Resources Inc. v. Joint Stock Co. Goelog*** (1998), 59 B.C.L.R. (3d) 196 (C.A.), the Court of Appeal agreed with the flexible approach taken in ***Mooney v. Orr*** and stated as follows at para. 20 of that decision:

> I agree with this approach, which in my view is true to the historical roots of injunctions generally and Mareva injunctions in particular. Thus I would be reluctant to adopt a hard and fast rule, as counsel for the defendants urged upon us, that a Mareva injunction may never be made or considered unless there is a fraudulent intent on the part of the debtor; or where the payment in question is one proposed to be made in the ordinary course of business ... The overarching consideration in each case is the balance of justice and convenience between the parties, and those concepts can embrace many factors that do not fit easily into the "rules" or "conditions" advanced by the defendants.

[36] While fraudulent or wrongful intent may not be required, I interpret the authorities as requiring a dissipation of assets, which will have the effect of hampering or defeating the plaintiff's attempts to realize on any judgment that may be obtained.

[37] Applying the flexible approach in ***Mooney v. Orr***, the court may consider the interests of both parties, taking into account a number of factors, including the strength of the plaintiff's case, the nature of the transaction giving rise to the action, the risks inherent in that transaction, the amount of the claim, the defendant's assets and the

history of the defendant's conduct.

[38] I agree with Dillon J. in ***Netolitzky***, that in cases alleging serious fraud, the risk of dissipating assets may be inferred from the evidence related to the plaintiff's strong *prima facie* case. I also agree with the approach of Dupont J. in ***Caisse Populaire Laurier D'Ottawa Ltée. v. Guertin et al.***, [1983] O.J. No. 2221 (Ont. H.C.J.) (QL), that to determine whether there is a real risk, it is necessary to look at all the circumstances, including the nature of the conduct alleged, the type of assets involved and the general circumstances. The court must assess whether in all of those circumstances the defendant will deal with the assets in a manner that will interfere with or defeat the plaintiff's attempts to realize on any judgment it might obtain.

[39] Two significant factors in this case are the nature of the conduct giving rise to ICBC's action and the type of asset involved.

Nature of the Conduct

[40] I agree with Mr. Potts that the alleged fraud showed by Mr. Patko's conduct is serious and cannot be countenanced. However, this case is quite different from the fraud cases on which he relies. The original cases involved fraudulent conveyances. The cases that followed involved substantial taking of assets from the plaintiffs in a manner where the fraud was concealed and from which a clear inference could be drawn that the defendant would continue to act in the same way (***Mills***, ***J.R. Paine***, ***Leland*** and ***Netolitzky***), or they involved assets that were connected to the litigation (***Sutton Resources***).

[41] Here, Jonathen Patko made a claim on his insurance with ICBC after making a false and misleading statement. If ICBC proves this claim, Mr. Patko's insurance will be rendered void and ICBC will be entitled to be indemnified by him. He has not cooperated in this litigation, and he filed an affidavit that provided no explanation for his actions and no evidence that is pertinent to the issues raised in this application.

[42] However, his fraud did not involve any complex taking of property. It involved lies and misleading statements for the apparent purpose of avoiding criminal prosecution and obtaining insurance for the damage to his vehicle. From this conduct I can draw an inference that Mr. Patko is a dishonest person who cannot be trusted. This goes only to propensity. In my view, it is not sufficient to support an inference of a real risk that the asset will be dissipated such that ICBC's attempts to realize on any judgment it may obtain will be frustrated.

Type of Asset

[43] There is another aspect in this case that sets it apart from the other cases. Here, the asset ICBC seeks to enjoin is an asset that ICBC agreed to pay to Mr. Patko. It is an asset that ICBC agreed to pay after it had started this action. (In this regard, I note that the primary affidavits in support of this application were sworn on January 9th, 2007, and that Ms. Freeborn, the claims adjuster, deposed that ICBC had already settled the earlier action. However, evidence from Mr. Murphy's firm shows that the settlement was reached between counsel on January 15th, 2007.) There is no evidence before me about how this came about, other than Mr. Harris's letter indicating that he learned of the situation after the February 1st, 2007 injunction was granted, and Ms. Freeborn's evidence that ICBC paid out material damage and injury claims, not including Frank Patko's claim, in June 2006. There is no evidence as to when ICBC became aware of the results of the police investigation, but it is clear that the police were investigating this matter between January and April 2005. The police laid charges against Mr. Patko for breach on March 18th, 2005, and they interviewed Ms. Hunt in April 2005. Jonathen Patko pleaded guilty to the breach charge on July 18th, 2006. All of these events were long before ICBC commenced this action.

[44] An inference can be drawn that ICBC realized what happened after it was too late. It now seeks to have this court enjoin it from paying out settlement funds, to which Jonathen Patko is entitled, from an action commenced in July 2003, arising from injuries sustained in 1986. It essentially wants to be able to set off its payment to Mr. Patko in one action with the amount of a judgment it has not yet obtained in another.

[45] In this sense the case is somewhat analogous to ***Hosseini-Nejad v. ICBC***, 2003 B.C.CA 700. There, ICBC sought a stay of execution in respect of an order granting Mr. Hosseini-Nejad the right to enforce an arbitration award of $1 million, which was awarded to him for injuries he suffered in a motor vehicle accident in 1993. In a

separate action, started five days after Mr. Hosseini-Nejad had obtained his arbitration award, ICBC sued him for a portion of a settlement of $1.26 million it paid to another party in respect of a different accident in 1992. ICBC wanted to be able to set off what it was required to pay to Mr. Hosseini-Nejad with any sum it may in due course be adjudged to recover from him.

[46] There were a number of complications, and the proceedings were case managed. ICBC endeavoured to have its claim against Mr. Hosseini-Nejad heard by way of summary trial, but through a misunderstanding, that application was not heard for some time. The case management judge had granted ICBC a partial stay in November 2001, but eventually lifted the stay in October 2002. A majority of the Court of Appeal dismissed ICBC's appeal, primarily because there was no basis to interfere with the discretion exercised by the case management judge. At para. 11, Lowry J.A. for the majority said this:

> In my view, there is, on the face of it, no sound basis upon which a stay could be granted to preclude Mr. Hosseini-Nejad from recovering the full amount of his arbitration award from ICBC. Mr. Hosseini-Nejad's petition is wholly unrelated to ICBC's action. ... I can see no reason why ICBC should be in any better position in respect of the award against it than it would have been if the 1992 accident had never occurred. To impose a stay in order to permit ICBC sufficient time to pursue, to a final disposition, an action that may result in a judgment in its favour against Mr. Hosseini-Nejad for some portion of the settlement it paid would be to grant relief before judgment. It would ... be tantamount to the kind of injunctive relief associated with a Mareva injunction where there is no factual basis for an order of that kind being made.

[47] I realize that case did not involve fraud; however, in this case, ICBC has not sought a stay, presumably because the first action was settled, but rather seeks injunctive relief on the basis of the fraud exception.

General Circumstances

[48] Considering all of these circumstances, I am not satisfied that there is a factual basis for this court to grant a Mareva injunction in the nature of prejudgment execution. Such a remedy is an extraordinary one. To extend the fraud exception to these particular circumstances would not, in my opinion, be just and equitable.

Order

[49] Accordingly, ICBC's application is dismissed.

[50] Counsel, are there any submissions on costs?

[51] MR. POTTS: Yes, My Lady, but there is another matter I would like to address as well. I have considered this possibility and have discussed it with my client. I expect I will receive instructions to appeal. I am going to ask that your order be stayed for one week to give us time to attend to that. As to costs, given the nature of the order, I think they follow the event.

[52] THE COURT: All right.

[53] MR. BATTISTA: My Lady, the only difficulty I have with that is that Mr. Patko has until tomorrow to enter an appearance. I can tell you that he's looking to retain us, but he's looking to some funds to retain us, and if the order is extended it's going to effectively preclude him from retaining us on this matter. If Your Ladyship is disposed to granting some type of continuation, I would ask that half the money at least be released from any freezing order so that Mr. Patko has funds to retain us and address previous issues, financial issues he has with our firm. I know there is no evidence before the court as to our retainer agreement, but I'm taken by surprise by my friend's request and –

[54] THE COURT: Well, I am not sure that – if you want a stay, do you not have to get that from the court of appeal?

[55] MR. POTTS: Well, My Lady, it's open to you to grant a stay for a limited period of time so the matter can get to the court of appeal. That's what happened in the case of ***ICBC v. Dragon*** where the court dismissed a claim

as against one of the defendants, stayed the dismissal for one week to allow ICBC to get into the court of appeal, and at that point it's up to the court of appeal as to whether or not a stay is to be granted by them. But the reason for it, My Lady, is that if the funds are paid over, our concern is that the appeal becomes moot.

[56] THE COURT: I understand. Well, I would be prepared to grant the stay for half of the settlement funds.

[57] MR. BATTISTA: I'm sorry, for …

[58] THE COURT: For half. For 100,000, not the 200,000. It seems to me a reasonable amount. Frankly, it is probably a good idea that the Court of Appeal hear this, because there are not very many appellate decisions on these issues for obvious reasons, and it is quite an area of law, I have discovered.

[59] MR. POTTS: Yes. The point is not free from doubt, as I am sure Your Ladyship appreciates, but it's a practice point of considerable significance to my client, and I expect that when I report in I'm going to be told to get myself up to the court of appeal and have that point resolved. It will impact on how they deal with not just this matter but a number of them. But as I understand it, My Lady, you're prepared to grant the stay for the amount of $100,000 for one week with the other 100,000 to be paid over forthwith.

[60] MR. BATTISTA: My Lady, that's on the understanding that that 100,000 is an arbitrary figure, it's not anything that was arrived at on its merits, and if for some reason the court of appeal overturns you, I would like to be able to make submissions as to the amount. I am not conceding that the 100,000 is the right amount. That's an arbitrary amount.

[61] MR. POTTS: There is no dispute about that.

[62] THE COURT: That is fine. I did not deal with the amount. If I had, it is unlikely I would have given you the injunction for the entire amount in any event. So it is basically an arbitrary amount for that purpose.

[63] MR. POTTS: And, My Lady, I would also ask as well that upon payment of that $100,000 to my friend's firm that Mr. Harris be released from his undertakings. He is still sort of stuck –

[64] THE COURT: Yes.

[65] MR. POTTS: -- in the middle here.

[66] THE COURT: Yes. Mr. Harris will be released from his undertakings. Do I need to give any direction about payment, though?

[67] MR. POTTS: No. I think, My Lady, it's sufficient to say that he's at liberty – upon payment of the $100,000, he's at liberty to deal with the release and the settlement documentation that he's been provided with.

[68] THE COURT: As I understand it, the cheque was stopped payment.

[69] MR. POTTS: That's correct, yes.

[70] THE COURT: So he does not have any funds?

[71] MR. POTTS: He doesn't have any funds. What he has is the executed settlement documentation.

[72] THE COURT: Right.

[73] MR. POTTS: And what I have in mind, My Lady, is the 100,000 to be paid over forthwith, Mr. Harris released from his undertakings, and we're still left with that remaining 100. In that fashion, we'll be able to go ahead and deal with the question of costs. There's some other issues there as well.

[74] THE COURT: Well, should not the $200,000 be paid over to Mr. Harris and the full amount put in his trust account with interest for the benefit of Mr. Patko and then Mr. Harris be relieved from his undertaking and be directed to pay out $100,000 of that? Would that work?

[75] MR. BATTISTA: My Lady, Madam Justice Smith ordered that it be in an interest-bearing account. It's already in an interest-bearing account someplace.

[76] MR. POTTS: No, but what Madam Justice Smith said was for the space of a week she wasn't concerned about that, but she wanted to be sure that the judge who heard the matter was aware that her view was it should be in an interest-bearing account.

[77] THE COURT: Well, there were two orders, and I believe the second one superseded the first one because it dealt with --

[78] MR. BATTISTA: My Lady, I trust my friend Mr. Potts. The money can go to his trust account. I don't think we need to have – once things are tied up with Mr. Harris, I don't know that he needs to continue to be involved.

[79] THE COURT: Okay. Well, whatever works the best.

[80] MR. BATTISTA: Does that make more sense?

[81] MR. POTTS: Yes.

[82] THE COURT: It seems to me that the $200,000 should go in somebody's trust account so it is there. Do you not think?

[83] MR. POTTS: Well, but your order, as I understand it, My Lady, is that you will grant a stay limited to the sum of $100,000.

[84] THE COURT: Right.

[85] MR. POTTS: It follows from that that 100 has to go to Mr. Murphy. The issue is, what about the remaining 100, 000.

[86] THE COURT: Right.

[87] MR. POTTS: As to that, I am content to have it in my trust account, although I don't think there is any real issue that ICBC isn't going to pay that.

[88] THE COURT: No, there is not. It is just that there is time now getting involved. It seems to me the interest should go to the benefit of Mr. Patko.

[89] MR. POTTS: All right. Well, then I suggest the order be this, that the stay is granted for one week for the sum of $100,000. It follows from that that 100,000 has to be paid to my friend's firm. Mr. Harris is released from his undertakings and, at the end of the week, either we get a stay from the court of appeal or we don't. We'll hold the 100,000 in an interest-bearing account.

[90] THE COURT: All right.

[91] MR. BATTISTA: So, My Lady, it goes without saying we need your reasons transcribed.

[92] THE COURT: That is fine. I will order the transcript, and I will edit it to include all of the proper case citations for the purposes of your appeal.

[93] MR. BATTISTA: So 100,000 forthwith to us in trust. 100,000 will be owed to us.

[94] THE COURT: So I am giving you the stay for one week, so that is until –

[95] MR. POTTS: It would be the 23rd, I guess -- oh, a week today would be the –

[96] THE COURT: February 22nd.

[97] MR. POTTS: The 22nd.

[98] THE COURT: Till February 22nd. It would be till the close of. I guess 4:00 p.m. on the 22nd. Do I need to put a time on it?

[99] MR. POTTS: No, My Lady, but may it be till the 24th, till the Friday?

[100] THE COURT: Friday is the 23rd.

[101] MR. POTTS: Or the 23rd rather.

[102] THE COURT: All right. I will give you until the 23rd.

[103] MR. BATTISTA: That's fine, thanks.

[104] THE COURT: All right. Well, it certainly is quite an area of law, and I look forward to seeing what comes of it.

"Fisher J."