Federal Court Cour fédérale

Date: 20181107

Docket: T-1929-18

Citation: 2018 FC 1119

Ottawa, Ontario, November 7, 2018

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MERCEDES-BENZ FINANCIAL SERVICES CANADA CORPORATION

Applicant

and

MAERSK LINE A/S

Respondent

and

TIANJIN ZHONGYISHENGSHI TECHNOLOGY DEVELOPMENT CO. LTD AND WORLDLINK LOGISTICS INC.

Interveners

ORDER AND REASONS

By way of motion filed on Friday, November 2, 2018, the Applicant, Mercedes-Benz Financial Canada Corporation ("Mercedes"), sought:

1. An Order restraining Maersk Line A/S ("Maersk"), the Defendant, from taking any steps whatsoever to dispose of or release six Mercedes-Benz vehicles as are described in the motion; and

2. An Order requiring Maersk to return the vehicles to Canada, and more precisely to the destination of Vancouver, within fourteen (14) days from the date of the motion, and thereafter to release the vehicles to the Canadian Border Services Agency ("CBSA") or otherwise as directed by the Court or by agreement of the parties.

[1] Shortly before the matter was to be heard, the Court received a letter from Mr. Walter Stasyshn indicating that the vehicles at issue in this matter were "ultimately acquired" by his client, Tianjin Zhongyish Technology Development Co. Ltd ("Tianjin"). Mr. Stasyshn sought to make representations at the hearing in support of his client being involved in the motion;

[2] Having considered the submissions of the parties and those of Mr. Stasyshn, I granted an interim injunction on the following terms:

1. Maersk was restrained from taking any steps of any nature to dispose of or release the vehicles, as described in Mercedes injunction motion, until further Order of this Court;

2. Tianjin, on or before 12 noon on Monday, November 5, 2018 was to file and serve its request to be added as a party to this matter and its motion record made in support of its claim that it has an interest in the matter, including all proof of purchase and payment documentation, and communications that it, its counsel or other parties have had with CBSA concerning the vehicles, and its position as to why the vehicles should not be returned to Canada while the ownership issue is resolved.

3. Mercedes would, on or before 2 pm on Monday, November 5, 2018 serve and file a written memorandum as to the facts and law;

4. This matter would be recalled on Tuesday, November 6, 2018 at 10 a.m.

[3] Tianjin duly filed a motion record on its behalf and on behalf of Worldlink Logistics Inc. ("Worldlink"), which is described as Tianjin's authorized representative in Canada, seeking to be enjoined in the proceeding and addressing whether Mercedes has met the test for a mandatory injunction.

[4] Mercedes filed what it termed additional submissions and also a further affidavit of Ms. Tasha Neu, national collections and loss recovery manager for Mercedes.

[5] Mercedes submits that by contract of sales by instalment, or conditional sales contracts, six individual buyers each bought new Mercedes-Benz vehicles from vendor car dealers. Each contract included an assignment of that contract by the vendor to Mercedes, and Mercedes duly registered its interest in each vehicle. More specifically:

i) Contract of Sale by Instalment
Dated: July 24, 2018,
Vendor: Silver Star Montreal Inc.
Purchaser: Mr. Charles Dray
Vehicle: 2018 Mercedes-Benz GLS 450 4MATIC SUV vehicle, identification number 4JGDF6EE1JB167282
Registered Interest: the *Civil Code of Québec*, RLRQ c CCQ-1991 (the "CCQ") on the *Registre des droits personnels et réels mobiliers* (the "RDPRM"), July 31, 2018, registration number 18-0836107-0007
("vehicle 7282")

ii) Contract of Sale by Instalment
Dated: June 27, 2018
Vendor: Auto Classique de Laval Inc.
Purchaser: Mr. Georgios Zevgolis
Vehicle: 2018 Mercedes-Benz GLE 400 4MATIC SUV, vehicle identification number 4JGDA5GB3JB131136
Registered interest: pursuant to the provisions of the CCQ, on the RDPRM, July 6, 2018 registration number 18-0734830-0020
("vehicle 1136")

iii) Conditional Sale Contract
Dated: July 31, 2018
Vendor: Mercedes-Benz Canada Inc. ("Mercedes Dealer")
Purchaser: Mr. You Lin Jiang and Mrs. Wenyan Yang
Vehicle: 2018 Mercedes-Benz GLS 450 4MATIC SUV, vehicle identification number 4JGDF6EE5JB157662
Registered interest: pursuant to the provisions of the *Ontario Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "**PPSA**"), August 3, 2018, registration number 20180803 1047 1532 3524
("vehicle 7662")

iv) Conditional Sale Contract
Dated: June 21, 2018
Vendor: Mercedes Dealer
Purchaser Mr. Min Kang Xie
Vehicle: 2018 Mercedes-Benz GLS450 4MATIC SUV, vehicle identification number 4JGDA5GBXJB146345
Registered interest: pursuant to the provisions of the PPSA, June 29, 2018, registration number 20180629 0851 1532 2079
("vehicle 6345")

v) Conditional Sale Contract
Dated: August 30, 2018
Vendor: Mercedes Dealer
Purchaser: Mrs. Ming-Lai Li and Mr. Ka Ho Li
Vehicle: 2018 Mercedes-Benz GLS450 4MATIC SUV, vehicle identification number 4JGDF6EEXJB174781
Registered interest: pursuant to the provisions of the PPSA, September 11, 2018, registration number 20180911 1104 1532 5784
("vehicle 4781")

vi) Conditional Sales Contract
Dated: August 3, 2018
Vendor: Quantum Automotive Group Inc.
Purchaser: Mr. Mahdi Darbani
Vehicle: 2018 Mercedes-Benz GLS 450 4MATIC SUV, vehicle identification number 4JGDF6EE4JB178678
Registered interest: pursuant to the provisions of the PPSA, August 13, 2018, registration number 20180813 1258 1532 4731
("vehicle 8678")

(collectively, the "vehicles")

[6] Copies of the sales contracts and registration extracts were attached as exhibits to the affidavit of Ms. Tasha Nue, declared on November 2, 2018 ("Nue Affidavit #1"). Nue Affidavit #1 says little else, other than attesting to the veracity of the facts presented in the application (motion), and that Ms. Nue has seen a series of emails with Mr. Walter Stasyshyn who, at the time of the declaring of her affidavit, had failed to provide any details or evidence with respect to the alleged purchase of the vehicles by 9379-5540 Québec Inc ("Québec Inc") or an alleged ownership interest in the vehicles by the consignee, Tianjin.

[7] In its original written submissions, Mercedes asserts that there remain outstanding amounts owing to Mercedes with respect to the vehicles and that all right, title, ownership and interest in them remains with Mercedes. Further, that Mercedes did not consent to any transfer of title to, or any interest in, any of the vehicles or to the removal of the vehicles from Canada, which consent was required by the sales contracts.

[8] However, despite this, the vehicles were received by Maersk in Toronto and Montreal, loaded onto two of Maersk's vessels in Vancouver and delivered to China and South Korea. The shipper identified on the bills of lading is Québec Inc or, in one instance, Apex Global Logistics. The consignee is Tianjin Showdilongyang International Logistics Co. Ltd or Tianjin Zhongyshengshi Technology Development Co. The bookings were allegedly made with Maersk for the consignees by Worldlink, although that entity does not appear on the bills of lading. Copies of the bills of lading are attached as exhibits to Neu Affidavit #1.

[9] Mercedes asserts that the consignees have at no time held valid title to the vehicles and neither the consignees nor any other party had the right to remove them from Canada. Further, that when Mercedes discovered there had been a breach of the sales contracts as the vehicles were being shipped out of Canada, it notified the police and Canada Border Services Agency ("CBSA") of the removal who, in turn, alerted Maersk. However, by the time Maersk reacted, the vessels were no longer in Canadian waters. The vehicles were discharged at the ports of Shanghai and Busan where they remain under the care and control of the Maersk.

[10] As to the grounds of its motion seeking injunctive relief, in its initial representations, Mercedes asserts that these are that it retains all right, title and interest in the vehicles, that the risk that it will not be able to recover possession of the vehicles is extremely high if Maersk is not ordered to return them to Canada, and that it is a matter of great urgency that the vehicles be returned to Canada and to the protection of the Canadian police or CBSA. Mercedes further states that the main purpose of its motion is to ensure that the vehicles are returned to Canada for the police to hold them while they conduct their investigations and in order for the vehicles to be out of the potential jurisdiction of foreign courts and tribunals.

[11] Maersk makes no written submissions. During the initial appearance before me, its counsel advised that Maersk is prepared to return the vehicles if ordered to do so by this Court and if Mercedes covers the costs of doing so, which Mercedes states it has agreed to do. Maersk pointed out that its contract of carriage with the consignees obliges it to ship and then release the vehicles to the consignees. Thus, it is not open to Maersk to simply return the vehicles at the request of Mercedes.

[12] At the initial hearing of this matter, Mr. Stasyshyn stated his view that Tianjin has an interest in the vehicles and, accordingly, should be able to participate in the injunction hearing.

[13] As noted above, I granted the Interim Order to allow Tianjin to file and make submissions in that regard.

[14] Tianjin filed the affidavit of Jingbo Gao, director of Worldlink, affirmed on November 5, 2018 ("Gao Affidavit"). Therein Mr. Gao states that that Worldlink is a logistics company and that he is the authorized representative of Tianjin in Canada. According to Mr. Gao, Tianjin sought to acquire seven Mercedes vehicles in Canada and contracted with Québec Inc for this purpose and to arrange for their transport to China. Tianjin paid the full amount for the vehicles to Québec Inc. Attached as exhibits to the Gao Affidavit are documents Mr. Gao states are wire transfers (these are not translated) and contractual documents between Tianjin and Québec Inc, these are documents entitled sales contract and commercial invoice. Mr. Gao also attaches what he describes as vehicle sales, registration and payment documentation. These are:

i) Vehicle 7282

> Silver Star Montreal (o/b Silver Start Montreal), offer to purchase prepared for Ian Nathan Widman, undated and unsigned, (VIN 4JGDF6EE1JB167282), a Québec certificate of registration for 9379-5540 Québec Inc, and a non-negotiable client copy of a TD Bank money payment to Silver Star Montreal in the amount of $115, 960.62, payor unidentified

ii) Vehicle 1136

> Mercedes-Benz Laval (Auto Classique de Laval INC), purchase agreement, purchaser Georgios Zevgolis (VIN 4JGDA5GB3JB131136), Québec certificate of registration to 939-5540 INC, non-negotiable TD Bank money payment to Mercedes Benz Laval in the amount of $84,344.38, payor unidentified;

iii) Vehicle 7662

Mercedes Benz Markham (o/b) Mercedes –Benz Canada Inc., offer to finance prepared for You Lin Jiang (not signed by dealer) (VIN 4JGDF6EE5JB157662), Ontario vehicle registration for You Lin Jiang, non-negotiable TD Bank money payment to Mercedes Benz Markham in the amount of $113, 037.29, payor unidentified;

iv) Vehicle 6345

Mercedes Benz Markham (o/b Mercedes –Benz Canada Inc.), purchase agreement, purchaser Min Kang Xie (VIN 4JGDA5GBXJB146345), Ontario vehicle permit for Min Kang Xie, non-negotiable TD Bank money payment to Mercedes Benz Markham in the amount of $84,047.92 , payor unidentified

v) Vehicle 4781 – not addressed

vi) Vehicle 8678

Quantum Automotive Group Incorporated, purchase agreement, purchaser Mahdi Darbani (VIN 4JGDF6EE4JB178678), Ontario vehicle permit for Darbani Mahdi, non-negotiable TD Bank money payment to Quantum Automotive Group Incorporated in the amount of $106,274.68, payor unidentified

Other - Mercedes Benz Markham (o/b Mercedes –Benz Canada Inc.), purchaser Ping Yan Cai, (VIN 4JGDF6EE9JB182144), Ontario vehicle permit for Pingyan Cai, non-negotiable TD Bank money payment to Mercedes Benz Markham in the amount of $112, 454.99, payor unidentified

- Mercedes Benz Thornhill (o/b Mercedes –Benz Canada Inc.), purchaser Yangyu Chan (VIN 4JGDF6EE6JB181839), Ontario vehicle permit for Yangyu Chan, vehicle permit, TD Bank money payment to Mercedes Benz Thornhill in the amount of $111, 953.27, payor unidentified

[15] Mr. Gao states that while the Mercedes documentation indicates that the vehicles were financed, this was a surprise to him. Further, that he was advised by Mr. Yang of Tianjin, whose position with that entity and role in this matter is not addressed, that representatives of Québec Inc travelled to China to solicit business from companies seeking to purchase vehicles in Canada,

where they can be acquired much less expensively than in China. Tianjin placed the orders for the seven vehicles described by Mr. Gao and Québec Inc completed the acquisition of the vehicles. Mr. Yang advised Mr. Gao that Québec Inc was used as an intermediary. Québec Inc arranged for the vehicles to be sent to Worldlink's warehouse in British Columbia to provide for storage, booking of shipping and insuring the vehicles prior to shipping. However, Worldlink did not prepare export documentation or other documents provided to CBSA. Mr. Gao does not state who did so.

[16] He further deposes that neither Worldlink or Tianjin had anything to do with any alleged theft of the vehicles and that the police have not contacted him or Mr. Yang, although Mr. Stasyshyn had communicated with CBSA. Attached as an exhibit to the Goa Affidavit is a letter dated October 24, 2019 from Mr. Stasyshyn to CBSA and Maersk. This states that sales documents as between Québec Inc and Tianjin had been provided and that, apparently, Québec Inc had not paid out liens on the vehicles. And while the "Registered Title Holder", by which Mr. Stasyshyn advised when appearing before me meant the original purchasers of the vehicles as identified by Mercedes, had requested that the vehicles be returned, Tianjin had requested that the vehicles not be returned to allow for an investigation into what happened. The letter states that if the vehicles were shipped back to Canada all damages and losses consequent thereon suffered by his clients would be the responsibility of CBSA and Maersk and action would be taken accordingly. The letter goes on to state that the Registered Title Holder entered into an agreement with Québec Inc transferring the vehicles to it for the purpose of selling the vehicles to Tianjin and, therefore, any issue of payment is between the Registered Title Holder and

Québec Inc. the former having no right to require the return of the vehicles. Mr. Stasyshyn's letter does not state how he has knowledge of these alleged agreements.

[17] Various email communications between Mr. Stasyshyn and Andrew Donaldson of CBSA are also attached, the upshot of which is that CBSA advised that it had no luck in tracking down "Jason" the owner of Québec Inc; at least some of the vehicles were reported stolen in Canada; CBSA was checking to see how far along the police, Interpol and China Border authorities investigations had proceeded; all of the vehicles have liens on them; the fraudulent documentation presented to CBSA by Worldlink looked like it was received from "Jason"; the incorrect export permit listed on the Export Declaration needed to be corrected; as to a PONU container, the purchasers of both vehicles in Canada wanted their vehicles back as they had not received payment and that CBSA would be follow up with the other owners; and Worldlink had been asked to contact "Jason", as CBSA suspected that he had not paid for any of the vehicles in Canada. The remainder of the email correspondence are attempts by Mr. Stasyshyn to contact CBSA and his request for assurances that the vehicles will not be shipped back to Canada until everyone's rights are determined so as not to prejudice his client, noting that it appeared that the purchasers had facilitated a fraudulent transaction.

[18] The Goa Affidavit also states that Mr. Yang advised Mr. Goa that on November 1, 2018 Tianjin initiated a filing in Tianjin Maritime Court, but to the best of Mr. Goa's knowledge no order has been issued in the proceedings. He states that Tianjin takes the position that it has paid for the vehicles and, therefore, has an ownership interest in them. It disputes Mercedes clam that it has some interest in the vehicles.

[19] In its new submissions Mercedes asserts, as additional grounds for its motion seeking injunctive relief, that it has a duly registered security interest which would have been revealed by any due diligence search of title to the vehicles. And, although an order as to the ownership of the vehicles is not sought in the motion, Mercedes asserts that its registered security interest and reservation of ownership has not been altered, nor did it cease to exist as a result of the vehicles being removed from Canada. Further, Tianjin had provided no evidence of a good faith purchase or how Québec Inc purchased the vehicles from the original purchasers or dealers. There was no proof of an unbroken chain of ownership to Tianjin. The submissions also assert that the documents submitted by Mr. Goa are incomplete, inconsistent, have been altered and are suspect. In that regard, I noted that Nue Affidavit #2 describes various problems with the documents and affirms that Mercedes has confirmed with representatives of Auto Classique, Silver Start, Mercedes Dealers and Quantum that none of them ever received the TB Bank draft receipts, copies of which were provided by the Goa Affidavit. Further, the TD Bank draft receipts contain no indication as to whom they were issued, which she knows to be customary, or to what they relate.

Should Tianjin and Worldlink be added as parties to this motion?

[20] Tianjin submits that the Court may join a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectively and completely determined (*Federal Courts Rules 104(1)(b); Constellation Brands Québec Inc. v Smart and Biggar*, 2016 FC 605 at para 44). As Tianjin has a beneficial interest in the vehicles it should be bound by any decision made by this Court that would affect its interests. Further, if Tianjin is not added as a party its interests will not be heard.

Tianjin also suggests that, by way of the removal of the vehicles from Canada, Mercedes' registered security interests may have been lost and, by returning the vehicles, the liens may be reactivated or replaced, which would place a cloud on Tianjin's beneficial interest in them which, it claims, arises as a result of trust law (*Nishi v Rascal Trucking Ltd.*, [2013] 2 SCR 438 at para 1). This is why the issue of ownership is not discrete from whether Mercedes should be entitled to a mandatory order requiring the vehicles to be returned to Canada. At the very least, Tiajin should be added as an intervenor.

[21] For its part, Mercedes contests that its registered security interests have been defeated by the unlawful removal of the vehicles. It submits that ownership need not be determined for purposes of the injunctive relief sought but is relevant only to the status of Tianjin's intervention request. In that regard, as the documents provided by Tianjin are incomplete and suspect, they do not establish that Tianjin has a *prima facia* case with respect to ownership. Mercedes references no law in support of its position on enjoinder.

[22] As discussed further below, as the basis of Mercedes claim against Maersk concerns only Maersk's actions, being an alleged delay in responding to a request to return the vehicles, Tianjin is not a necessary party to that action. And if an injunction were to issue requiring the return of the vehicles, it would bind only Maersk and not Tianjin. Thus, Tianjin is not a necessary party to the intended action. However, in my view, given that Tianjin asserts an ownership interest in the vehicles, even if it is disputed, it should be granted intervenor status in this matter so that its position will be known to the Court.

[23] Rule 109 governs leave to intervene. The criteria for granting intervenor status have been described as follows:

> (1) Is the proposed intervenor directly affected by the outcome?
>
> (2) Does there exist a justiciable issue and a veritable public interest?
>
> (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
>
> (4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
>
> (5) Are the interests of justice better served by the intervention of the proposed third party?
>
> (6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

(*Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] FC 90 (C.A.) re aff'd in *Sport Maska Inc. v Bauer Hockey Corp*, 2016 FCA 44 ("*Sport Maska*")).

[24] Further, the Federal Court of Appeal in *Sport Maska* stated that the criteria for allowing or not allowing an intervention must remain flexible because each intervention application is different. Ultimately, the question in each case is whether the interests of justice require that a motion to intervene be granted or refused. The concept of the interests of justice is broad, allowing the Court to consider both the interests of the Court and those of the parties to the litigation.

[25] I am satisfied that in these circumstances Tianjin and Worldlink should be granted intervenor status as Tianjin's alleged interest would not otherwise be known to the Court which would not be in the interest of justice.

[26] I need make no finding as to the validity of Tianjin's position that, although it bought and paid for the vehicles in Canada, the pre-existing registered security interest of Mercedes were defeated by their removal, in breach of the contracts of sales as between the original purchasers and dealers, and if so, that the security interests could be revived or renewed on return of the vehicles to Canada thereby prejudicing Tianjin. I reject, however, Tianjin's assertion of a beneficial interest based on trust law. There is no evidence to support that claim.

[27] Accordingly, Tianjin and Worldlink are added as intervenors to this motion.

Should the injunctive relief sought by Mercedes be granted?

[28] Recently, in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (*"Canadian Broadcasting"*), the Supreme Court of Canada considered the applicable framework for granting a mandatory interlocutory injunction. It noted its prior decisions in *Manitoba (Attorney General) v. Metropolitan Stores Ltd*. [1987] 1 SCR 110 and in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 (*"RJR—MacDonald"),* where it held that applications for an interlocutory injunction must satisfy each element of a three part test which stems from *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer

greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.

[29] However, in *Canadian Broadcasting*, the courts below had applied a heightened threshold which raised, for the first time before the Supreme Court, the question of what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction. The Court held that:

> [15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the RJR—MacDonald test is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong prima facie case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in RJR—Macdonald as "extensive review of the merits" at the interlocutory stage.
>
> [16] A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions. While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified RJR—MacDonald test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions". For example, in this case,

> ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the …injunction are likely to be". In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to refrain from doing something.

[30] As to what is entailed by showing a "strong *prima facie* case", this means that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice. The Court concluded that:

> [18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR—MacDonald* test, which proceeds as follows:
>
> (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
>
> (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
>
> (3) The applicant must show that the balance of convenience favours granting the injunction.

[31] In this matter, Mercedes has not yet filed an underlying action. In that regard, Rule 372 states as follows:

> 372(1) A motion under this Part may not be brought before the commencement of a proceeding except in a case of urgency.

> (2) A party bringing a motion before the commencement of a proceeding shall undertake to commence the proceeding within the time fixed by the Court.

[32] In its original written submissions Mercedes stated that the matter was urgent and that it undertook to commence proceedings before this Court within the time and pursuant to the conditions fixed by the Court. At the first hearing of this matter the primary issue was what involvement, if any, that Tianjin would have in the motion. My Interim Order acted as a placeholder until the next hearing date when Tianjin's submissions would be before me, it did not speak to the filing of a statement of claim by Mercedes.

[33] When the motion was again before me yesterday I asked Mercedes about its intended action. Counsel advised that it had understood, absent an order from me, that a statement of claim need not have been filed between the issuance of the Interim Order and the recalling of the matter.

[34] Regardless of the fact that a statement of claim has not yet been filed, I noted that I could not determine from Mercedes' submissions what the basis for its claim against Maersk was – being the intended underlying action supporting its motion for an injunction. This was relevant to assessing the first branch of the tripartite test, being that Mercedes must demonstrate a strong *prima facie* case that it will succeed at trial against Maersk.

[35] When pressed, Mr. Prager stated that the basis of the underlying claim against Maersk is that it delayed in responding to notification that the vehicles should not be removed from Canada. I note that no evidence was submitted by Mercedes in support of that assertion.

[36] To my mind, this in turn raised a jurisdictional question. This is because there was no contractual relationship between Maersk and Mercedes concerning the vehicles. Mercedes is not a party to the bills of lading. In order for this Court to have jurisdiction under s 22 of the *Federal Courts Act*, navigation and shipping, the claim must fall within one of the enumerated headings. However, Mercedes submissions do not in any way address the basis of its claim nor, when appearing before me, did it explain on what basis the Court would have jurisdiction in the underlying claim. Mr. Prager stated that Mercedes does not assert that Maersk was a party to the fraudulent scheme by which the vehicles were removed from Canada, indeed I observe that such a claim would very likely be outside this Court's jurisdiction.

[37] For his part, counsel for Maersk advised that this was the first time that he had heard of Mercedes proposed action. While there was no evidence before the Court on the point, he indicated that the vehicles had actually been loaded in September and that Maersk had first heard from CBSA on October 4, 2018 and first heard from counsel for Mercedes on October 31, 2018. It was only after the vessels carrying the cars had sailed that CBSA asked Maersk to return the vehicles. However, CBSA had no jurisdiction to demand the return as the vehicles as they were no longer in Canada or its waters. Counsel for Maersk again pointed out that Maersk cannot simply breach its contract of carriage upon request by a third party. It was willing, however, to return the vehicles if ordered to do so by a Court and if Mercedes was prepared to pay all costs (outbound, return and related) in doing so. I would expect that Mr. Stasyshn's letter threatening Maersk and CBSA with legal action if the vehicles are returned to Canada was also a consideration for Maersk. In essence, Maersk is stuck in the middle. Its counsel stated that if a

statement of claim is issued, Maersk will defend and it reserved its right to challenge jurisdiction in that event.

[38] In my view, these circumstances suggest that, in fact, Maersk is really only a party of convenience in this matter. The vehicles are in its warehouse and it has ships that enable it to return them. Mercedes submissions and evidence filed in this motion have demonstrated no real concern with Maersk's actions as to the timeliness of response to the request to return the vehicles, but are directed at the alleged fraud.

[39] This view is supported by the fact that, in its initial submissions, Mercedes states that the main purpose of its motion is to ensure that the vehicles are returned to Canada for the police to hold them while they conduct their investigations and in order for the vehicles to be out of the potential jurisdiction of foreign courts and tribunals.

[40] It is true that injunctive relief can in some circumstances, be ordered against someone who is not a party to the underlying action. For example, when non-parties are so involved in the wrongful acts of others that they facilitate the harm, even if they themselves are not guilty of wrongdoings, they can be subject to interlocutory injunctions (*Google Inc. v Equustek Solutions Inc.* 2017 SCC 34). However, Mercedes does not suggest that this is such a situation.

[41] I raised my concern about the lack of attention to the test for an injunction at the initial hearing of this matter, in particular, whether Mercedes had established irreparable harm. My assumption was that by permitting Mercedes to file a new memorandum as to the facts and the

law it would take the opportunity to address this. However, Mercedes says that it understood from its reading of my Interim Order that I was satisfied that it met the test and, therefore, assumed that it need only address the issues of Tianjin being added to the motion and Tianjin's asserted interest in the vehicles.

[42] I have difficulty with this position but, in any event, even in its original submissions Mercedes failed to identify or in any way address the test. It cited no law in support of its request that a mandatory injunction issue compelling Maersk to return the vehicles. Nor did it provide any evidence to support that it has a *prima facia* case against Maersk.

[43] Further, I agree with Tianjin that Mercedes has failed to establish with clear and non-speculative evidence that it will suffer irreparable harm if the vehicles are not returned to Canada. I note that neither of Ms. Neu's affidavits directly address this issue. Moreover, the contracts of sale contain provisions whereby the vehicle purchaser is responsible to pay to Mercedes all amounts due on the contract if the vehicle is damaged destroyed or missing. Thus, Mercedes has the ability to pursue the purchasers under the assigned contracts of sale. Further, under those contracts, the buyer was obliged to insure the vehicles against risk of theft, and other risks, so long as any amount remained unpaid on the contract with the loss payable to Mercedes.

[44] In the result, it is possible that if the vehicles were stolen from the original purchasers, then Mercedes has an insured risk. If the original purchasers were complicit in the fraud and the removal of the vehicles from Canada, then Mercedes has a right of action against them for breach of contract and damages and can also pursue the matter in the criminal courts. That said,

I acknowledge there is no certainty of recovery against those parties even if the civil action were successful.

[45] In its most recent submission Mercedes states that if the vehicles are not returned to Canada there is a "clear risk that justice cannot be done, that MBFS [Mercedes] never recover possession of said vehicles, that the CBSA and the Canadian Police are deprived of important elements in their investigations, and that those involved in this illegal export, whoever they are, will be encouraged to continue this lucrative business". All of that may be true and these are valid concerns. However, there is no evidence before me concerning the necessity of the return of the vehicles for purposes of the criminal investigation. Moreover, the remedy that Mercedes seeks before this Court is injunctive relief premised on an intended underlying action against Maersk. Mandatory injunctive relief is not a stand alone remedy. Accordingly, in this case, there are no grounds for issuing an injunction for the recovery of property alleged to have been fraudulently removed from Canada for the purpose of supporting a criminal investigation, as deterrence or avoiding the potential jurisdiction of a foreign court.

[46] As to the balance of convenience, this assuredly is in Mercedes' favour. As Mercedes is prepared to pay Maersk its costs in returning the vehicles, there is no burden on Maersk should the injunction issue. Further, it is quite clear and undisputed that there is an element of fraud involved in the removal of the vehicles from Canada, although its parameters are not established. While Mercedes tendered no evidence on the point, when appearing before me its counsel advised that in fact there are approximately 40 cars involved and that actions are being pursued in other courts. Nor, in these circumstances, do I place much weight on Tianjin's submission that

it will be prejudiced if the vehicles are returned to Canada and Mercedes' registered security interests remain valid or are revived by the return. In whole, equity favours Mercedes, who as they stated, are trying to strike at the heart of a wide spread problem of fraud. However, the test for injunctive relief is conjunctive, the burden lies with Mercedes and the first two branches of the test have not been met. Accordingly, the motion must be dismissed.

ORDER IN T-1929-18

THIS COURT ORDERS that

1. Tianjin Zhongyishengshi Technology Development Co. Ltd and Worldlink Logistics Inc. are granted intervenor status in this matter and the style of cause is amended accordingly;

2. Mercedes' motion for an interlocutory injunction is dismissed;

3. My Interim Order is extinguished; and

4. Given the circumstances, there shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1929-18
STYLE OF CAUSE:	MERCEDES-BENZ FINANCIAL SERVICES CANADA CORPORATION v MAERSK LINE A/S AND TIANJIN ZHONGYISHENGSHI TECHNOLOGY DEVELOPMENT CO. LTD AND WORLDLINK LOGISTICS INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 6, 2018
REASONS FOR ORDER AND ORDER:	STRICKLAND J.
DATED:	NOVEMBER 7, 2018

APPEARANCES:

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Walter Stasyshyn	FOR THE INTERVENERS

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Walter Stasyhyn Toronto, Ontario	FOR THE INTERVENERS