Federal Court  Cour fédérale

Date: 20181207

Docket: T-2021-18

Citation: 2018 FC 1235

Ottawa, Ontario, December 7, 2018

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

TIANJIN ZHONGYISHENGSHI TECHNOLOGY DEVELOPMENT CO. LTD. AND WORLD LINK LOGISTICS INC.

Plaintiffs

and

YANG MING SHIPPING (CANADA) LTD., YANG MING MARINE TRANSPORT CORPORATION AND CANADA BORDER SERVICES AGENCY

Defendants

and

MERCEDES-BENZ FINANCIAL SERVICES CANADA CORPORATION

Intervener

ORDER AND REASONS

[1] By way of motion initially filed on November 23, 2018, the Plaintiffs sought, on an *ex parte* basis, an injunction:

> As against the Defendants, Yang Ming Shipping (Canada) Ltd. and Yang Ming Marine Transport Corporation (collectively "Yang Ming"):
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> (a) An interlocutory injunction against the discharge of a container bearing identification number SEGU2748855 from the vessel "Ulsan Express" in which container was stowed a 2018 Mercedes-Benz GLS450 bearing VIN 4JGDF6EE7JB160966 ("Vehicle") and from taking any steps whatsoever to dispose of or release the Vehicle to any party other than the Plaintiffs, or
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> (b) In the alternative, an order directing that the Vehicle be discharged to the custody and control of the Plaintiffs or,
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> (c) In the further alternative, an order requiring the Defendant Yang Ming Shipping (Canada) Ltd. ("Yang Ming Canada") to return the Vehicle to Pusan, South Korea for delivery to Tianjin, China or,
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> (d) In the further alternative, an order that Yang Ming Canada perform its contract with the Plaintiffs, so as to transport the Vehicle to Pusan, South Korea for delivery to Tianjin, China.
>
> As against the Defendant Canada Border Services Agency ("CBSA"):

(a) An interlocutory injunction restraining, and from interfering with the movement, transit, custody, and control of the Vehicle by the Plaintiffs or if so ordered, by Yang Ming.

[2] The Plaintiffs stated that the grounds of the motion were that Tianjin Zhongyishengshi Technology Development Co. Ltd ("Tianjin") is the beneficial owner of the Vehicle. Tianjin contracted with Yang Ming for shipment of the Vehicle to Pusan, South Korea, for delivery to Tianjin, China. However, while the Vehicle was in transit on board the "Ulsan Express" and outside Canadian territory and jurisdiction, CBSA delivered a directive to Yang Ming to return the Vehicle to Canada. The Plaintiffs claim that CBSA had no legal authority to issue such a directive, that this unlawful direction was facilitated by Yang Ming, and that it interfered with Tianjin Co's property rights in the Vehicle.

[3] A Statement of Claim filed on November 23, 2018 commenced the underlying action. This claims that 9379-5540 Québec Inc ("Québec Inc") had represented itself to Tianjin as a business that could source Mercedes-Benz vehicles in Canada. Tianjin was interested in this as the same vehicles are less expensively acquired in Canada than in China. Subsequently, on or about September 7, 2018, it contracted with Québec Inc for the purchase of a 2018 Mercedes-Benz GLS450 vehicle. Tianjin claims that it caused Québec Inc to be paid approximately CDN $93,100 for the vehicle. And, on or about July 2018, Québec Inc acquired the Vehicle that Tianjin had paid for. The Vehicle was registered in Québec Inc's name and, as Tianjin had advanced money in payment, it claims that in law it was and is the beneficial owner of the Vehicle.

[4] Québec Inc then contracted with World Link Logistics Inc., described as Tainjin's authorized representative in Canada ("World Link"), to arrange for transport of the Vehicle to Vancouver. World Link then stored the Vehicle in its warehouse until it was loaded for shipment on or about October 11, 2018. A Bill of Lading number WL100501 and document number YVR171894, identifies the shipper as Québec Inc, the consignee as Tianjin, the forwarding agent as World Link, and the port of delivery as Tianjin, China.

[5] On November 8, 2018, a representative of Tianjin attended at the port in Tianjin, China, to take delivery of the Vehicle but was informed that the container holding the Vehicle was going to be returned to Canada at the request of CBSA. Various communications were exchanged between the parties concerning the Vehicle. The Statement of Claim also identifies other communications between counsel for Tianjin and CBSA concerning six other Mercedes-Benz vehicles alleged to have been purchased in Canada by Tianjin and being shipped to China. These included communication between counsel for the Plaintiffs advising that Tianjin did not consent to those other Mercedes-Benz vehicles being returned to Canada and, on October 24, 2018, communication from CBSA advising counsel for Tianjin that those vehicles were reported as stolen in Canada and that fraudulent documentation had been submitted to CBSA as to their purchase.

[6] In the Statement of Claim, Tianjin claims that Ming Ying breached its contract of carriage including by failing to deliver the Vehicle and acting on a directive issued by CBSA when it knew or ought to have known that CBSA had no authority to require the Vehicle be returned from a vessel situated in international waters. Further, that in issuing the unlawful

directive, CBSA intended to procure a breach of the contract of carriage by Ying Ming. The Statement of Claim seeks interim, interlocutory and permanent injunctive relief, declaratory relief as to the rights of the parties, and actual or prospective damages in the amount of CDN $93,100 being the loss of the Vehicle, as well as shipment and storage fees.

[7] Upon review of the Plaintiff's Notice of Motion filed on November 23, 2018 seeking an injunction on an *ex parte* basis, I noted that the Plaintiff referenced Rules 373 and 377 of the *Rules of the Federal Courts* ("Rules") in support of the injunction request. However, Rule 373 does not speak to *ex parte* motions. Rule 377 concerns preservation of property and Rule 377(2) states that Rule 374 applies to interim orders for the custody or preservation of property referred to in Rule 377(1), with such modification as necessary. Rule 374(1)(a) states that a Judge may grant an interim injunction on an *ex parte* motion for a period of not more than 14 days where the judge is satisfied, in a case of urgency, that no notice is possible.

[8] However, a November 23, 2018 letter from counsel for Tianjin stated that the container carrying the subject Vehicle would land at Port Rupert, British Columbia on November 26 or 27, 2018 for transhipment to Vancouver as the port of discharge. The Affidavit of Mr. Jingbo Gao, director of World Link, affirmed on November 23, 2018 and filed in support of the injunction motion ("Gao Affidavit"), stated that the vessel was scheduled to dock at Prince Rupert on November 23, 2018 and was scheduled to arrive in Vancouver on December 3, 2018. The Plaintiffs' Motion Record included no written representations nor a memorandum of fact and law as required by Rule 364 or 366, speaking to urgency, explaining why it was not possible to give the Defendants notice of the motion under Rule 373(1)(a), or applying the tripartite test for an

injunction. And, significantly, from the materials that were filed, it appeared that CBSA had directed that the Vehicle be returned to Canada by Yang Ming. Because CBSA is a law enforcement agency, regardless of the fact that the Plaintiffs in its Statement of Claim challenged CBSA's jurisdiction to issue that direction, the fact remained that CBSA was engaged.

[9] Considering that the vessel would not dock in Vancouver until December 3, 2018, the absence of submissions explaining why no notice to the Defendants was possible in this circumstance, that CBSA is a law enforcement agency engaged with the Vehicle and its return to Canada, and the public interest in enforcing the law, I directed that this was not an appropriate circumstance to hear a motion for an interim injunction on an *ex parte* basis. And, as CBSA is a large, Canada-wide law enforcement agency, I noted that it was improbable that no notice was possible.

[10] Accordingly, the Plaintiffs were required to serve the interim injunction motion on each of the Defendants, but the interim motion could be heard on an abridged time line. Alternatively, the Plaintiffs could chose to abandon the interim motion and, instead, simply proceed with its anticipated interlocutory injunction motion, with service on the Defendants and the motion being heard on an abridged time line. I also directed that, as a courtesy, the Plaintiffs were to provide the motion to any known third parties having an interest in the Vehicle, such as finance companies.

[11] As to the latter requirement, in November 2018, the Court had been asked by Mercedes-Benz to issue an injunction directing Maersk Line A/S to return six Mercedes-Benz vehicles,

alleged to have been purchased by Tianjin from Québec Inc and shipped to China, as Mercedes-Benz claimed that it held legal ownership of those vehicles by way of assignment of contracts of sale, and that it had not consented to any transfer of title to, or any interest in, those vehicles or to their removal from Canada, which consent was required by the sales contracts. In that matter, Tianjin sought, and was granted, intervenor status (*Mercedes-Benz Financial Services Canada Corporation v Maersk Line A/S*, 2018 FC 119 (*"Mercedes-Benz"*)). Accordingly, Tianjin was aware of the possibility that there may be security interests in such vehicles registered in Canada.

[12] The Plaintiffs refiled their motion, advising that they were now seeking an interlocutory rather than an interim injunction and that service had been affected. They requested that their motion for an injunction be heard prior to December 3, 2018. The Court agreed to hear the motion by teleconference on Friday, November 30, 2018 at 11 a.m. The Defendants were required to file their motion records by 2 p.m. on Thursday, November 29, 2018.

[13] Yang Ming duly filed its motion record. This included the Affidavit of Bella Yang, President of Yang Ming Canada, sworn on November 29, 2018 ("Yang Affidavit"). Amongst other things, Yang Ming's written representations indicated that CBSA had requested return of the Vehicle and instructed Alliance Services International to arrange and pay for the return. The container was expected to be discharged in Vancouver on December 3, 2018 and would then be transhipped from Vancouver to Toronto where it was expected to arrive on December 10, 2018.

[14] Also on November 29, 2018, the Court received correspondence from counsel for Mercedes-Benz advising that Mercedes-Benz is an interested party in the matter as title holder to

and as holder of a registered security interest over the Vehicle. Mercedes-Benz advised that it intended to seek intervenor status but required time to prepare materials for filing in the injunction motion, then scheduled to be heard by teleconference at 11 a.m. the following morning, Friday, November 30, 2018. It sought directions in that regard.

[15] Considering this, and having concerns as to the proper of service of the motion on the CBSA, which had not then entered an appearance or filed a responding motion record, I directed that the Court would proceed with a teleconference at 11 a.m., Friday, November 30, 2018 for the purpose of canvasing with the parties an adjournment of the injunction motion to a date to be discussed. During the course of that teleconference it became apparent that CBSA had not been effectively served. It was also confirmed by counsel for Ming Yang that the Vehicle would, upon arrival in Vancouver, be transshipped by rail to Toronto. Additionally, Tianjin agreed that it would consent to Mercedes Benz being granted intervenor status. Accordingly, I directed that the injunction would be adjourned to December 5, 2018 at 1 p.m., Mercedes-Benz was required to file an informal motion, on consent, seeking intervenor status, and to file its motion record on or before 10 a.m. on December 4, 2018. The Plaintiffs could file any reply on or before 5 p.m. on December 4, 2018. Subsequent to receipt of Mercedes-Benz motion record, the Plaintiffs requested an adjournment of the interlocutory injunction motion. I denied the adjournment, as unnecessary, but permitted the Plaintiffs an extension of the time to file any reply to 11 a.m. on December 5, 2018. The Plaintiffs duly filed a reply and supplementary affidavit of Jingbo Gao affirmed on December 5, 2018.

The test for injunctive relief

[16] As I set out in *Mercedes-Benz*, in *R v Canadian Broadcasting Corp.*, 2018 SCC 5 (*"Canadian Broadcasting"*), the Supreme Court of Canada has recently considered the applicable framework for granting a mandatory interlocutory injunction, which is essentially what the Plaintiffs seek in this matter. The Supreme Court 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 that 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 who would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.

[17] 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.

[18] 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;
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> (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
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> (3) The applicant must show that the balance of convenience favours granting the injunction.

Plaintiffs' Position

[19] Here the Plaintiffs submit they have met the tripartite test. They have established that there is a serious issue to be tried as CBSA had no jurisdiction, when the "Ulsan Express" was on the high seas, to issue a directive that the Vehicle be returned to Canada. Further, that Yang Ming breached its contract of carriage with the Plaintiffs.

[20] As to irreparable harm, the Plaintiffs submit that CBSA's conduct was reprehensible, particularly as CBSA acted on unfounded allegations that the Vehicle was stolen. CBSA provides no evidence to establish this and Mercedes-Benz's evidence indicates only that the

Vehicle was identified as "possibly stolen" on the Canadian Police Information Website VIN Search, it tendered no evidence setting out the facts and circumstances of the alleged theft. Moreover, Mercedes-Benz's evidence establishes that the lessee came into lawful possession of the Vehicle and suggests that the lessee transferred possession to Québec Inc. While this may entail breaches of contract, it is not criminal in nature so as to establish that the Vehicle was stolen. Thus, CBSA's actions were not only unlawful, but were undertaken without lawful basis. In these circumstances, the irreparable harm is to the public interest. This being the harm to the integrity of the justice system if CBSA, a law enforcement agency, is permitted to direct the conveyance of property situated outside of Canada back to Canada using unlawful and extra judicial means. This would bring the proper administration of justice and Canadian laws into disrepute and lead to chaos. Additionally, a resultant loss of Tianjin's property rights in the Vehicle is irreparable harm.

[21] As to the balance of convenience, if the Vehicle is returned to the Plaintiffs then any potential losses will be minimized. Mercedes-Benz can pursue the lessee or others in the civil courts. Mercedes-Benz may also have recourse to insurance. If the Vehicle is returned to the Plaintiffs, the financial risk to Yang Ming, CBSA and the Plaintiffs is almost eliminated. Accordingly, the balance of convenience favours the Plaintiffs.

Yang Ming's Position

[22] In its motion record, Yang Ming submits, fairly, that they are caught in the middle of a dispute between the Plaintiffs and CBSA.

[23] The Yang Affidavit states that on October 24, 2018, Mr. David Lewis of CBSA contacted Yang Ming's Vancouver office and requested that the subject container be brought back to Canada as it contains a vehicle suspected of being stolen. Attached as Exhibit C of Ms. Yang's affidavit is an email string of communications between Yang Ming Canada and CBSA. This includes an October 24, 2018 email from Mr. Lewis asking that the container be held and be brought back to Canada as it contains a suspected stolen vehicle and that CBSA would be in touch the following day to finalize the details. Subsequently, CBSA retained Alliance Services International Limited, a freight forwarder, to organize the return of the container and Ms. Yang states that Yang Ming Canada was informed by Alliance that it would guarantee the payment of all freight and related charges for the return.

[24] The Yang Affidavit further states that on November 2, 2018, the agent for Yang Ming in China was informed that the shipper and consignee were requesting that the original Bill of Lading be issued out of the port of destination in China. Yang Ming Canada asked Mr. Donaldson, of CBSA, whether the shipper and consignee should be informed that, on the instruction of CBSA, the container would be returned to Toronto. By email of same date, Mr. Lewis instructed Yang Ming to advise the shipper and consignee that the container was still enroute to China and not to advise them that it was returning to Toronto. During this time, World Link was following up with Yang Ming Canada as to the delay in delivery and threatening legal action. Yang Ming Canada advised CBSA of this and, by email of November 13, 2018, Mr. Donaldson advised that the Vehicle in the container was confirmed as stolen by Montreal Police, that Yang Ming's customer could contact CBSA, but for all of the details they should

contact Montreal Police at the number provided referencing the occurrence number which was also provided, and that Yang Ming Canada could relay this information to its customer.

[25] Yang Ming submits that by choosing to comply with CBSA's directive of October 24, 2018, it acted in good faith on the strength of representations made by a government law enforcement agency that purported to have the power to give such directions. If this Court should determine that CBSA lacked a valid basis or was *ultra vires* of its statutory authority, Yang Ming is prepared to return the Vehicle to its rightful owner or any other party as ordered by the Court subject to payment by the Plaintiffs of the transportation charges for which they are liable. Yang Ming reserves their right to seek damages against CBSA for either enticing a breach of contract or interfering with its economic relations. Should the Court determine that CBSA had authority to give the impugned directive, then Yang Ming is prepared to remit the vehicle to CBSA, subject to its payment of transportation and storage charges for which it is liable. Yang Ming also reserves its right to seek damages from Québec Inc and World Link for tendering illicit cargo for transportation in violation of their obligations at law and under the Bill of Lading.

[26] While it takes no position on the outcome of the injunction motion, Yang Ming submits that there was no breach of the contract of carriage as its terms permit a defence in the event of a compliance with an order given by CBSA based on its apparent authority. Yang Ming asks that any order of this Court address the payment of its transportation costs and indicate to whom it is to release the Vehicle.

CBSA's Position

[27] For its part, CBSA filed only brief written representations which it states are in response to the accusations made against CBSA by the Plaintiffs in the Statement of Claim and the injunction motion. CBSA states that it takes no position with respect to any of the issues in the action or the motion that are strictly between the corporate parties. CBSA submits that the Vehicle is listed as having been stolen as a matter of record with the Service de Police de la Ville de Montreal. CBSA acted on information and belief, upon which it reasonably relied, in requesting Yang Ming to return the stolen property to Canada (referencing the Yang Affidavit and Exhibit C thereof). CBSA states that the evidence and source(s) for this information and belief pertain to an ongoing criminal investigation by the Montreal Police and, therefore, cannot be disclosed to the corporate parties. CBSA denies that it issued a directive to Yang Ming and states that it did not direct or order Yang Ming Canada to do anything in relation to the stolen property. Its request was for Yang Ming Canada to act voluntarily in returning the stolen property to Canada, not under compulsion of law. As a federal law enforcement agency it was well within the scope of its lawful authority to ask Canadian citizens and corporations for their voluntary cooperation in preventing criminal activity involving the import and/or export of stolen property, and it was entirely reasonable to make that request while the stolen goods were on the high seas.

Mercedes-Benz Position

[28] Mercedes-Benz opposes the interlocutory relief sought by the Plaintiffs and submits that the Plaintiffs are seeking to use the Court and its equitable jurisdiction to gain possession of the

Vehicle in which they do not have an ownership interest. In support of its position, Mercedes-Benz filed the affidavit of Ms. Tasha Neu, National Collections and Loss Recovery Manager of Mercedes-Benz, affirmed on December 3, 2018 ("Neu Affidavit").

[29] The Neu Affidavit attaches a Motor Vehicle Lease Agreement dated July 17, 2018 ("Lease Agreement") between Mercedes-Benz Montreal Est ("Dealer") and Martin Pouliot ("Pouliot") with respect to the Vehicle (Exhibit A). Ms. Neu states that the Lease Agreement, by its terms, was assigned by the Dealer to Mercedes-Benz. Although the Goa Affidavit attaches, as Exhibit D, what it purports to be a sales contract dated July 19, 2018 for the Vehicle, this is in fact an altered version of the front page of the Offer to Lease for the Vehicle, which states that it was prepared by the Dealer for Pouliot. Ms. Neu attaches what she believes to be the actual unaltered front page of the Offer to Lease. She also describes the standard terms and conditions of such lease agreements, including agreement and that default will occur upon the lessee assigning, transferring or encumbering the lessor's interest; the vehicle being lost or stolen; or, the lessee removing the vehicle from Canada or the continental United States. The lessor is stated to be the owner of the vehicle and the lessee has no right, title or interest in or to the vehicle except for the rights expressly granted to the lease under the lease provisions. The lessee also agrees not to transfer, sublease, rent or assign the lease, the vehicle or the lessee's right to use the vehicle without the lessor's written consent.

[30] The Neu Affidavit also states that Mercedes-Benz registered its ownership interest in the Vehicle with the Registre des droits personnels et réels mobiliers on July 26, 2018, registration number 18-0818111-001. A search of that registry conducted on November 30, 2018 indicates

that Mercedes-Benz is the "Cessionnaire", or assignee, and as such it is the owner of the Vehicle. A certified copy of the search result is attached as Exhibit C. Ms. Neu also states that Mercedes-Benz has been the owner of the Vehicle since July 17, 2018 when the Lease Agreement was assigned to it by the Dealer. Attached as Exhibit D of her affidavit is a copy of a Societe de L'Assurance Automobile du Quebec ("SAAQ") document entitled Immatriculer un véhicule neuf acquis d'un commerçant with respect to the Vehicle, which indicates that it was registered with SAAQ in the name of Martin Pouliot as "Locataire" (Lessee) and la Corporation de Services Financiers Mercedes-Benz as "Locateur" (Lessor).

[31] Ms. Neu states that as of the date of her Affidavit there is CDN $97, 532.91 outstanding and owing to Mercedes-Benz pursuant to the Lease Agreement and that at no time has Mercedes-Benz consented to any transfer of the Vehicle or its export to China. Further, she is advised by Mr. Andrew McNaught, Fraud and Arrears Management Analysist for Mercedes-Benz, that he called the Dealer and spoke to Daniel Taraborelli, the Financial Services Manager, who confirmed that the Dealer did not receive a bank draft from TD Bank dated July 19, 2018 in the amount of $114,250.93 from Québec Inc, or any other payment for the purchase of the Vehicle. As to the purported bank draft attached as Exhibit D to the Gao Affidavit, Ms. Nue states that she is advised by Mr. McNaught that he provided a copy of it to Mr. Christian Savage, a Senior Investigator with TD Bank Group's Global Security and Investigations, Eastern Canada, Financial Crimes and Fraud Management Group, who confirmed by email of December 3, 2018 that the purported bank draft is fraudulent (Exhibit F).

[32] Ms. Neu also challenges paragraph 5 of the Gao Affidavit in which Mr. Gao states that he was advised by Mr. Yang (whose position in Tianjin is not stated) that Tianjin made a wire transfer of the CDN $93,100 to Québec Inc "in order to purchase the vehicle" and that the attached Exhibit C (untranslated), described by Mr. Gao as a copy of a wire transfer for CZBank in China to Québec Inc for $93,000 with a lot of Chinese writing. Ms. Nue states that she is advised by Weiru Peng, who is employed by Mercedes-Benz and who is fluent in Mandarin, that Exhibit C of the Gao Affidavit, entitled Application for Funds Transfers (Overseas), actually states in the section entitled "Transac.Remark" that the $93,100 identified in the application is "pre-payment for imported vehicles", while Gao states that the wire transfer "in order to purchase the vehicle".

[33] Mercedes-Benz submits that the Plaintiffs have failed to meet the tripartite test. They have failed to establish a strong *prima facia* case against Yang Ming given that the contract of carriage contains provisions that would authorise Yang Ming to interrupt carriage of the Vehicle upon learning that it was stolen. Nor have they shown a strong likelihood that they will ultimately be successful in their claims against CBSA. As there was no breach of contract, there can be no inducement to do so. Nor have the Plaintiffs shown that CBSA acted unlawfully in requesting Ming Yang to return the Vehicle. Conversely, Mercedes-Benz has put strong evidence before the Court to establish its ownership in the Vehicle. And, under Québec law, which is the law governing the Lease Agreement, as Mercedes-Benz published its ownership interest in the *Registre des droits personnels et réels mobiliers*, the Plaintiffs are presumed to know of Mercedes-Benz ownership interest and cannot invoke the notion of good faith to rebut that presumption. Similarly, the Plaintiffs have not established an entitlement to replevin.

[34] As to irreparable harm, the Plaintiffs have not established this and have quantified their damages at CDN$93,100 along with storage and shipping charges. Further, the Vehicle is a fungible chattel. There is nothing particular or special about it such that damages would not make the Plaintiffs whole should they establish their claims against the Defendants. Additionally, they could seek damages against Québec Inc, which they have not done despite evidence of fraud by Québec Inc and the existence of a contract between Tianjin and Québec Inc. As to the Plaintiffs' attempt to sidestep their lack of irreparable harm by asserting that it would irreparably harm the public interest should this Court not grant the injunction, any consideration of harm to the public interest actually weighs against granting the injunction as granting it would assist in perpetrating a fraud.

[35] Mercedes-Benz submits that the balance of convenience weighs strongly against granting the injunction. If granted, the Vehicle will be unloaded into the Plaintiffs' possession and Mercedes-Benz will be unable to effectively assert its ownership rights to the Vehicle since it will almost certainly disappear into the Chinese market. Conversely, if the injunction is not granted, the Plaintiffs likely have a remedy for damages against Québec Inc or whichever party the Plaintiffs intended to purchase the Vehicle from.

[36] In any event, the Plaintiffs do not come to Court with clean hands and the Court should, accordingly, decline to exercise its equitable jurisdiction in their favour. The Plaintiffs are at best willfully blind to, and at worst knowledgeable of, the fraudulent transaction that resulted in them obtaining the Vehicle. They have submitted altered documents to the Court in support of their alleged ownership interest in the Vehicle. It would not be appropriate for the Court to grant

an injunction to allow the Plaintiffs to recover property that they know they have acquired through fraudulent means. Moreover, the Plaintiffs failed to act in good faith in connection with the motions. They have known since at least October 29, 2018 of Mercedes-Benz ownership interest and security interest in the various vehicles exported to China by way of the Québec Inc export scheme, but did not name Mercedes-Benz as a party to the proceedings, which enabled them to position themselves as the only parties to the action claiming an ownership interest in the Vehicle.

Analysis

[37] In my view, although much has been submitted and said by the various parties, this matter can be disposed of as follows.

[38] When appearing before me counsel for CBSA stated that when the Vehicle arrives in Toronto, CBSA will take possession of it and remove it to a secure warehouse until such time as title has been resolved and the ongoing investigation by the Montreal Police is complete. Further, that there is an active related criminal investigation by that police force. I note here that subsequent to the hearing, CBSA wrote to the Court to clarify that, if the motion is dismissed, the container will be delivered to a CBSA-controlled warehouse for inspection. CBSA will detain the Vehicle and refer the matter back to the local police authority, which will be the Peel Regional Police, for the purposes of the ongoing investigation.

[39] When asked by the Court at the hearing, counsel for CBSA advised that a supporting affidavit was not submitted because whether CBSA made a request to Ming Yang seeking voluntary assistance to bring the Vehicle back to Canada, or issued a directive, is a question of law. Further, the deponent of an affidavit would be subject to cross examination on the ongoing criminal investigation. It short, CBSA's position was that the Vehicle was stolen, based on information provided by the Montreal Police, and that because of the ongoing criminal investigation, CBSA could offer little else in response.

[40] This was not particularly helpful to the Court. However, there is no evidence before me establishing that CBSA issued a directive demanding that Ming Ying return the Vehicle. Moreover, the container is now in Canada so this is not a circumstance where injunctive relief will prevent the consequences of any unlawful directive. And, even if it were accepted that CBSA implicitly directed Ming Yang to do so – and I make no finding in that regard – I am not convinced that the Plaintiffs have demonstrated on the law and the evidence a strong *prima facia* case that will likely succeed. However, even if I am in error on that point, the Plaintiffs cannot succeed on the second two branches of the conjunctive test.

[41] As to irreparable harm, as in the prior injunction motion before me in *Mercedes-Benz*, there is no question that fraud is involved in the removal of the Vehicle from Canada. And again, where the parameters of that fraud lie has yet to be ascertained. However, the evidence tendered by Mercedes-Benz also makes it clear that it has an interest in the Vehicle and that it has not received payment for the outstanding Lease Agreement obligations. As to Tianjin's interest, it was aware from the proceedings in *Mercedes-Benz* that CBSA held the view that the

documentation provided to CBSA by World Link, received from Québec Inc, in that matter was fraudulent. Indeed, that same string of communications is attached as Exhibit M of the Goa Affidavit filed in this motion.

[42] That said, this motion for injunctive relief will not resolve what legal rights those parties have in the Vehicle. However, I agree with Mercedes-Benz that there is nothing special about the Vehicle. Indeed, the Goa Affidavit states that in September 7, 2018, Tianjin contracted with Québec Inc for the purchase of a vehicle of its type – a 2018 Mercedes-Benz GLS450. Not this particular Vehicle. I also agree that the Plaintiffs have quantified their prospective loss as CDN $93,100, plus shipment costs and fees. Nor is this loss certain. If it is established that the Vehicle was not stolen and/or fraudulently removed from Canada and that Tianjin has a valid beneficial ownership interest in the Vehicle that defeats the interests of Mercedes-Benz, there is no evidence that the Vehicle will not be made available to them by CBSA, in which event there will be no loss and no irreparable harm. And, if they fail to establish that they hold an interest in the Vehicle that defeats that of Mercedes-Benz, then it is unlikely that their claim against CBSA and Ming Yang will succeed, as they will have suffered no damages for the loss of the Vehicle, and again there will be no loss and no irreparable harm.

[43] I also place little weight on the Plaintiffs' assertion that irreparable harm to the public interest would arise if the injunctive relief were not granted. Even in the absence of an affidavit from CBSA as to the details of the alleged theft of the Vehicle, the email chain attached as Exhibit C of the Yang Affidavit includes an email from CBSA stating that the Vehicle was confirmed stolen by the Montreal Police. The Plaintiffs claim that there is no proof before me

that the vehicle was stolen and assert that CBSA's action were egregious. They note that the Neu Affidavit only establishes a possible stolen vehicle. In that regard, I note that attached as Exhibit E of the Neu Affidavit is a print out of the Canadian Police Information Website VIN search result for the Vehicle. This states "WARNING: POSSIBLE STOLEN VEHICLE AS OF 2018-12-01 AT 23:32:06. WE HAVE A RECORD ON FILE THAT MATCHES THE IDENTIFIERS THAT YOU HAVE PROVIDED. CONTACT YOUR LOCAL POLICE IMMEDIALTY TO CONFIRM THE INFORMATION AND ASK FOR ASSITANCE". In my view, this does not prove or disprove that the Vehicle was stolen, it merely provides a warning search result.

[44] What the evidence before me does establish is that CBSA believed that the Vehicle was stolen, and that there is fraud, at some level, in connection with the removal from Canada of this Vehicle, and others, including fraudulent documentation. Given this, I do not agree that failing to grant the injunction will result in irreparable harm to the rule of law. And, as noted above, even if the Plaintiffs successfully establish that CBSA unlawfully sought the return of the Vehicle, this does not mean that that Plaintiffs will suffer irreparable harm. They will also have a cause of action against CBSA, and possibly Yang Ming. They also can pursue their loss against Québec Inc, with whom Tianjin contracted for the purchase of the Vehicle, even if successful recovery against Québec Inc may well be uncertain. I agree with Mercedes-Benz that this is a mirror image of its circumstances in *Mercedes-Benz* and that the Plaintiffs herein similarly have not demonstrated irreparable harm.

[45] Concerning the balance of convenience, for the same reasons this favours Mercedes-Benz. Moreover, there is a risk that if the Vehicle is returned to the Plaintiffs, it will again be removed from Canada before the ownership issue is resolved, thereby defeating any interest Mercedes-Benz may have in it.

[46] Finally, as to the clean hands argument, given my findings above, I need not delve deeply into this issue. Mercedes-Benz sets out in its submissions why it believes the Plaintiffs come to the Court without clean hands. The Plaintiffs, in turn, take issue with this. In particular, with any inference by Mercedes-Benz that the Plaintiffs had knowledge of or were compliant in the fraudulent export scheme.

[47] That said, I would note, however, that although the Plaintiffs were aware from the *Mercedes–Benz* injunction motion heard less than one month ago, in which Mercedes-Benz asserted an ownership interest in six other new model Mercedes-Benz vehicle's allegedly purchased by Tianjin from Québec Inc and exported in the same manner and in which motion the Plaintiffs intervened, they still attempted to bring their injunction motion on an *ex parte* basis, even though there was no impediment to service, and without notice to Mercedes-Benz. And, although Mr. Goa also filed affidavit evidence in *Mercedes-Benz*, as he did in this matter, here, in his affidavit, he did not disclose to the Court Mercedes-Benz's involvement in the prior injunction or that there was a possibility that it might have a similar interest in this Vehicle. The Plaintiffs explain this by saying that they were simply seeking an interim injunction to "freeze" the container's transit in Vancouver and that all of these issues would be sorted out later. However, the Notice of Motion clearly states that the relief sought was that the Vehicle be

discharged only to the Plaintiffs or that Yang Ming be compelled to return the Vehicle to Pusan, South Korea for delivery to Tianjin. This would have precluded any party from obtaining possession of the Vehicle – including CBSA – and would have allowed the vehicle to instead to be exported back to China where it would be out of reach of others who might have an interest in it.

[48] As to Exhibit O of the Gao Affidavit, filed originally with the interim injunction motion, this states that Mr. Gao was authorized on behalf of World Link to undertake to abide by any order concerning damages that the Court may make if the granting of the injunction caused damage to the Defendants. This would not have protected the interests of third parties, such as Mercedes-Benz, whose potential interest was not identified to the Court by the Plaintiffs but came to light only because I was also the Judge who decided the *Mercedes-Benz* injunction motion, and, therefore, raised the concern with the Plaintiffs.

[49] In short, when seeking the interim injunction on an *ex parte* basis, the Plaintiffs were not forthcoming to the Court.

ORDER IN T-2021-18

THIS COURT ORDERS that

1. The motion for an interlocutory injunction brought by Tianjin Zhongyishengshi Technology Development Co. Ltd and World Link Logistics Inc. is dismissed;

2. Costs will be in the cause with respect to the Plaintiffs and the named Defendants;

3. The Intervenor, Mercedes-Benz Financial Services Canada Corporation, shall have its costs as against the Plaintiffs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2021-18
STYLE OF CAUSE:	TIANJIN ZHONGYISHENGSHI TECHNOLOGY DEVELOPMENT CO. LTD. AND WORLD LINK LOGISTICS INC. v YANG MING SHIPPING (CANADA) LTD., YANG MING MARINE TRANSPORT CORPORATION AND CANADA BORDER SERVICES AGENCY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 5, 2018
REASONS FOR ORDER AND ORDER:	STRICKLAND J.
DATED:	DECEMBER 7, 2018

APPEARANCES:

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Jean-Marie Fontaine Eric Peterson	FOR THE DEFENDANTS
Elaine Gray Aoife Quinn	FOR THE INTERVENERS

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