

Federal Court



Cour fédérale

Date: 20221017

Docket: T-2032-22

Citation: 2022 FC 1416

Ottawa Ontario, October 17, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CANAMAX HOLDING INC.

Moving Party

and

**NONGHAO FREIGHT INC., COCSO
SHIPPING LINES CO. LTD., COSCO
SHIPPING LINES (CANADA) INC.,
LOCATION WAY INC., 2708042 ONTARIO
INC., AND WEI ("VISON") ZHENG**

Responding Parties

ORDER AND REASONS

[1] By way of Notice of Motion filed on Wednesday, October 5, 2022, the Applicant, Canamax Holding Inc. [Canamax] brought a motion for an interim injunction against Nonghao Freight Inc. [Nonghao], COSCO Shipping Lines Co. Ltd, COSCO Shipping Lines (Canada) Inc.

[collectively, COSCO], Location Way Inc. [Location Way], 2708042 Ontario Inc. [2708042 Inc] and Wei Zheng ordering that:

- a. COSCO and Nonghao issue the original Bill of Lading for a 2017 Ford GT vehicle, VIN #2FAGP9CW1HH200090 [Vehicle], stowed within container #TLLU3031803 [Container];
- b. Restraining Nonghao and COSCO from further deviating the Vehicle or Container from their new final destination at the Port of Prince Rupert, British Columbia, and/or from modifying, altering or changing the shipping instructions and documentation for the Vehicle and Container;
- c. Restraining Nonghao and COSCO from releasing the Vehicle and/or the Container to any party other than Canamax and from taking any steps whatsoever to dispose of or release the Vehicle to any party other than Canamax;
- d. Restraining Location Way and Wei Zheng from, directly or indirectly, taking any steps whatsoever to dispose of or release the Vehicle to any party other than Canamax;
- e. In the alternative, an order directing that the Vehicle be discharged to the custody and control of Canamax and/or its representatives or agents;
- f. Directing Canamax to file its Statement of Claim within fifteen (15) days of the filing of this Motion; and
- g. Such other and further relief as Canamax may advise, or the Court may so direct.

[Motion]

[2] The Motion was originally set down to be heard on October 6, 2022. On that date, Justice Go heard submissions by counsel for Location Way, Canamax and Nonghao. At the request of Location Way, she adjourned the motion and ordered as follows:

1. The hearing for the Motion is adjourned to a date to be determined by this Court. The Parties are to comply with further Directions from this Court regarding filing deadlines and the hearing date and time;
2. Nonghao, COSCO Shipping Lines (Canada) Inc., and COSCO Shipping Lines Co. Ltd. are refrained from releasing the Vehicle from the Container until the Motion is heard and a further Order is made by this Court with respect to the Motion;
3. Nongao is refrained from issuing the original Bill of Lading with respect to the Container to any party pending the determination of the Motion;
4. The Moving Party shall place the amount of CAD \$5,000 into a trust account held by Borden Ladner Gervais LLP in trust for Nonghao forthwith, to cover the storage and handling costs to be incurred by Nonghao, and the Court may order the Moving Party to pay for additional storage and handling costs as incurred by Nonghao as a result of this Motion; and
5. The Parties reserve the right to seek variations of any order that the Court may issue regarding the storage, transfer, or shipping of the Vehicle pending the final determination of this matter.

[3] The Motion was subsequently set down to be heard on October 14, 2022.

[4] In a nutshell, Canamax asserts that it is the legal owner of the Vehicle and that it is a party to the contract of carriage by which the Vehicle was to be shipped, in the Container, to Japan, via ship. Canamax is identified as the shipper in the contract of carriage and pre-paid the ocean freight. However, after the Vehicle and Container were loaded on a vessel and were en route to Japan, through the improper actions of Location Way, Mr. Zheng and Nonghao, the Vehicle and Container were rerouted back to Canada. Canamax asserts that when the Vehicle arrives back in Canada, if it is released without Canamax's express authorization, then Canamax's valuable property will be fraudulently acquired by other parties, including but not limited to Location Way and Mr. Zheng, with little chance of it subsequently being recovered by Canamax, thereby causing Canamax to suffer irreparable harm.

[5] Following the issuance of the above Order by Justice Go, all responding parties were given the opportunity to file motion records. I directed that these were to be filed by 4:30 PM on Tuesday, October 11, 2022. At the request of counsel for Location Way, this was extended to noon on Wednesday, October 12, 2022. None of the responding parties filed responding motion records.

[6] Mr. Zheng, however, filed an unaccompanied affidavit, affirmed on October 12, 2020, in which he identifies himself as the president and sole shareholder of Location Way [Zheng Affidavit]. Although Rule 365(2) of the *Federal Courts Rules*, SOR/98-106 [*Rules*] stipulates the content of motion records, which includes written representations, no written representations

were submitted by Location Way or Mr. Zheng. Instead, counsel for Location Way submitted a chart which reproduced various documents or portions of documents that were already filed, highlighted them and then made submissions in the form of listed comments. This approach is not in keeping with the *Rules* and limited the ability of Canamax and the Court to consider the points raised in advance of the hearing.

[7] In response to the filing of the Zheng Affidavit, Canamax filed what it terms a Reply Motion Record, which included amended written representations and the affidavit of Mr. Quix (Bill) Ling, who identifies himself as the General Manager of Canamax, declared on October 13, 2022 [Ling Affidavit].

Jurisdiction

[8] Canamax has yet to file a statement of claim. In its requested relief found in the Notice of Motion, it indicates that it sought an order which, among other things, directed it to file its statement of claim within 15 days of the filing of its Motion (October 6, 2022). When contacted by the Court in advance of the hearing of the Motion (October 14, 2022) as to the status of the statement of claim, counsel for Canamax responded by email advising that the matter is maritime in nature. The dispute relates to the determination of the parties to the contract of carriage, and as a direct result thereof, the custody and possession of cargo being carried by sea under a bill of lading. Counsel for Canamax submitted that the origin of this dispute remains the freight forwarder's decision to accept the modification of shipping instructions from a non-party to the contract of carriage, who is also not the owner of the Vehicle. Counsel advised that Canamax is not asserting that the Federal Court is the tribunal before which any claim for damages outside of

those relating to the issues arising from the contract of carriage will be determined. Similarly, that it is conscious of the limits to the Court's jurisdiction regarding determining title to the Vehicle.

[9] When appearing before me, counsel for Canamax confirmed that the claim is proceeding on the basis of s 22(1) and, in particular, s 22(2)(i) of the *Federal Courts Act*, RSC, 1985, c. F-7 whereby the Court has jurisdiction with respect to any claim arising out of any agreement relating to the carriage of goods in or by ship.

Form of injunction

[10] I would also observe that while Canamax initially brought its motion based on Rule 374, which pertains to interim injunctions brought on an *ex parte* basis where, due to urgency, notice to the responding parties is not possible, or giving notice would defeat the purpose of the motion. However, it does not appear that the Motion was brought either on an *ex parte* basis or that notice was not given. In any event, the Order issued by Justice Go was, in effect, an interim injunction. My point being that it appears that what Canamax now seeks is actually an interlocutory injunction which will remain in effect until Canamax's claim is resolved.

The test for injunctive relief

[11] As a preliminary point, I note that much – if not most – of the affidavit evidence filed in this matter is concerned with the ownership of and title to the Vehicle. However, it is not the role of this Court on this motion for an interim or interlocutory injunction to make a finding on the

ownership of the Vehicle. Rather, the question of ownership in the context of this Motion pertains only to whether Canamax has met the requirements of the tripartite test in order to be granted an injunction.

[12] As I have previously discussed in *Mercedes-Benz Financial Services Canada Corporation v Maersk Line A/S*, 2018 FC 119 and *Tianjin Zhongyishengshi Technology Development Co Ltd v Yang Ming Shipping (Canada) Ltd.*, 2018 FC 1253, in *R v Canadian Broadcasting Corp.*, 2018 SCC 5 [*Canadian Broadcasting*] the Supreme Court of Canada 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. 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.

[13] The Supreme Court of Canada 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.

[14] 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.

[15] 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.

Canamax’s Affidavit Evidence

[16] Canamax’s motion record includes the affidavit of Mr. Quan (Kenny) Wang, declared under oath on October 4, 2022. Mr. Wang identifies himself as the CEO, sole director and sole shareholder of Canamax. The Wang Affidavit states that, by virtue of Mr. Wang’s position with Canamax, he has knowledge of the matters set out in his affidavit, except where based on information and belief. In that event, the source of the stated information is Mr. Lin, Ms. Rina

Shinchi and/or Mr. Zheng. I note here in passing that the documentation indicates that Ms. Shinchi is Mr. Lin's spouse and is an agent with the broker, LYSR Management Ltd [LYSR].

[17] The Wang Affidavit includes the following statements:

Canamax purchase of the Vehicle

- On or about June 20, 2022 Mr. Wang was advised by Mr. Lin that the Vehicle was available for sale;
- Mr. Lin advised that his company, 2708042 Inc, purchased the Vehicle from Location Way for \$1,448,998.95 on March 31, 2022 by way of a sale contract. Attached as an exhibit to the Wang Affidavit is a copy of an unsigned Wholesale Dealer Contract between Location Way, as vendor, and 2708042 Inc, as purchaser, dated March 31, 2022;
- 2708042 Inc advised Canamax that the sale contract was concluded and that 2708042 Inc had paid the purchase price in full, providing (unspecified) proof of such payment;
- Also attached as exhibits are copies of a signed, undated Wholesale Dealer Contract, of same form, between Prime Leasing Inc [Prime], as vendor, and Location Way, as purchaser, for the sale of the Vehicle for \$1,428,000, as well as a Prime invoice to Location Way in that amount dated May 16, 2022;
- Mr. Wang states that on July 20, 2022, Canamax purchased the Vehicle from 2708042 Inc. for \$1,448,998.95 and made the final payment on August 22, 2022. The Wang Affidavit attaches a signed copy of a Sales Contract between 2708042 Inc. and

- Canamax (the broker being Rina Shinchichi of LYSR), an invoice from 2708042 Inc to Canamax in the amount of sale price and, a signed receipt from 2078042 Inc for four payments in full payment of the purchase;
- Mr. Wang states that, given this, Canamax was a good faith buyer that acquired the Vehicle in the ordinary course of business. Further, that no reservation of ownership was published at the Régistre des droits personnels et réels mobiliers [RDPRM] or under the *Personal Property Security Act*, RSO 1990, c P10 [PPSA] with respect to the Vehicle and that, upon its purchase, Canamax was wholly unaware that Location Way could have retained any title or interest in the Vehicle;

Sale to Japanese Buyer

- Mr. Wang states that on August 15, 2022, rightfully believing itself to be the sole owner of the Vehicle, Canamax entered into a sales contract for the Vehicle with Mr. Mizukami Hiroshi [Hiroshi], a resident of Japan, for \$1,658,999.00. Pursuant to this sales contract, Canamax had the right to retain the original Bill of Lading, and thus the ownership of the Vehicle, until full payment was made by Mr. Hiroshi following delivery. A copy of a Sales Contract, dated September 5, 2022, between Canamax, as seller, Auto Dealer Tokyo and Mizukami Hiroshi, as buyer, and LYSR, as broker, in the amount of \$1,658,999, and a Commercial Invoice between Canamax and Hiroshi in the same amount, dated August 15, 2022, are attached as exhibits;
- Canamax, with the assistance of 2708042 Inc, Location Way, Mr. Zheng and a logistics manager named Amber, hired Nonghao to arrange shipment of the Vehicle to Japan. Copies of a Shipping Order between Canamax as “shipper” and Hiroshi as

- “consignee” dated July 16, 2022, a Canadian Export Reporting System [CERS] Export Declaration naming Canamax as exporter and Hiroshi as consignee, and a proforma Port to Port or Combined Transport Bill of Lading [Bill of Lading] naming Canamax as shipper and Hiroshi as consignee, dated August 31, 2022, are attached as exhibits;
- Mr. Wang states that at all material times, Location Way and Mr. Zheng were part of the communications pertaining to the shipment of the Vehicle to Japan;
 - On August 23, 2022, Nonghao issued to Canamax its freight invoice, naming Canamax as shipper and Hiroshi as consignee. Mr. Wang states that these instructions were confirmed by Location Way. Further, Canamax pre-paid the freight in full, thereby completing its contractual obligations pursuant to its contract with Nonghao. Attached as exhibits are a copy of the Nonghao freight invoice in the amount of \$4150.00 dated August 23, 2022 as well as what appear to be screen shots of various undated telephone bank transfers, said to have been made on behalf of Canamax, in the amounts of \$2500, \$800, \$500 and \$350;
 - Also attached as an exhibit is a print out of a WeChat group conversation which Mr. Wang states was joined by Mr. Bill Xu, a representative of Nonghao, and which group chat was active solely for the purpose of discussing the shipment of the Container/Vehicle (this appears to be based on information received from Mr. Lin). Mr. Wang states that this demonstrates that Canamax was clearly understood to be the shipper and principal party on whose behalf the shipment was arranged;

- Between August 26, 2022 and September 12, 2022, COSCO exchanged emails with Canamax for the purpose of setting up Canamax's company profile in COSCO's system, an exhibit attaches emails in that regard;
- On September 12, 2022, Nonghao requested that Canamax provide proof of purchase and payment of the Vehicle. Mr. Wang states that this was provided on the same day and a copy of a covering email (without attachments) is attached as an exhibit;
- Mr. Wang states that, becoming concerned with the possibility of fraud, on September 14, 2022 Canamax emailed Nonghao requesting the original Bill of Lading, an email is attached as an exhibit in support of this;
- As Nonghao failed to reply and having credible reason to believe Nonghao, at the behest of third parties, altered or might alter the shipping instructions, on September 16, 2022 Canamax's counsel issued a demand letter to Nonghao requiring it to abide by the initial shipping instructions and to issue the original Bill of Lading to Canamax, a copy of the demand letter is attached as an exhibit;
- On September 21, 2022, Nonghao's counsel responded, asserting that Nonghao "has and has no business relationship with Canamax Holding Inc., today or in the past", that Nonghao understood that Location Way owned the Vehicle – attaching a Certificat d'immatriculation issued by the Société de l'assurance automobile du Québec [SAAQ] on September 9, 2022 - and stating that Location Way retained and provided all instructions to Nonghao. A copy of that correspondence is attached as an exhibit;

- On September 22, 2022 Mr. Lin provided a signed declaration to Canamax stating that he was being threatened and extorted by Mr. Zheng and being followed by his men, a copy of the declaration is attached as an exhibit;
- Canamax's counsel again wrote to Nonghao's counsel on September 23, 2022 reiterating Canamax's position that it is the sole owner of the Vehicle and discussing the documents previously provided in support of this position, the letter is attached as an exhibit;
- Counsel for Nonghao responded on September 29, 2022. This letter states, among other things, that: the shipping order was received from Location Way on August 6, 2022; the CERS was declared on August 23, 2022 and sent to Location Way; and, the freight invoice was issued on August 23, 2022 and was sent to Location Way. Further, that Nonghao received a call from Canamax on August 26 or 27, 2022 seeking an amendment to the CERS. This was the first call received from Canamax. Nonghao declined the request and asked that it be made through Location Way, which was done the same day. On September 12, 2022, Nonghao received communications from Mr. Wang advising that he is the owner of Canamax and of the Vehicle. Nonghao asked for proof of ownership, which was provided, but Nonghao stated that it did not know who 2708042 Inc. was and it had no business relationship with Nonghao. However, "on the other side" Location Way had provided the Vehicle registration and proof of full payment of purchase the Vehicle. The letter from Nonghao's counsel also states that Nonghao received bill of lading instructions from Location Way to use Canamax as the exporter. It also issued the freight invoice to Canamax per Location Way's instructions. Funds were received by 4 different

personal email transfers (none of which were from Canamax) and Nonghao states that it was not aware of these payments until Location Way advised that they were for the freight invoice. Nonghao states that Location Way, as its client and the owner of the Vehicle, instructed Nonghao to amend the “shipper” on the Bill of Lading and the CERS and to return the car to Canada stating that Location Way had not been paid for it and suspected fraud. The letter states that Nonghao would do what it could to hold the Container pending agreement by the three parties or a court order.

The Grenier Affidavit

[18] Canamax has also filed the affidavit of H el ene Grenier, a legal assistant with its legal counsel, Borden Ladner Gervais LLP [BLG], indicating that BLG sent documents to Wenqian Cui for translation from Mandarin to English. The transmitted documents are attached as Exhibit V of her affidavit and the received translated documents are attached as Exhibit W of her affidavit. The attached document(s) appears to be WeChat transcript(s) concerning the Vehicle.

The 2708042 Inc. Evidence

[19] The Lin Affidavit states, among other things, that it is made in support of Canamax’s motion for an interim injunction and that:

Purchase of the Vehicle by 2708042 Inc

- In March 2022, Mr. Lin entered into discussions with Location Way regarding the purchase of the Vehicle with the stated intention of reselling it to another buyer;

- On March 31, 2022, 2708042 Inc. entered into a sales contract agreement with Location Way to acquire the Vehicle for \$1,448,998.95, referencing the unsigned Wholesale Dealer Contract attached as an exhibit to the Wang Affidavit;
- 2708042 Inc. paid the entire purchase price to Location Way, inclusive of prior deposits, with the final payment being made on August 22, 2022. Attached as an exhibit are various documents, including a WeChat transcript, debit memos from TD Bank dated May 25, 2022 in the amount of \$240,000 from LYSR M to Location Way, May 16, 2022 in the amount of \$1,000,000 from LTSR M to Location Way, a March 17, 2022 deposit confirmation to Location Way in the amount of \$200,000 and, a document in Chinese which may be a transfer of 49,999.00, currency unstated. Mr. Lin states that once paid in full, he considered that 2708042 Inc had full rights and title to the Vehicle, including the ability to sell it to a subsequent purchaser;

Sale of the Vehicle to Canamax

- Mr. Lin states that on July 20, 2022, 2708042 Inc. sold the Vehicle to Canamax for \$1,448,998.95. Canamax then paid the sale amount in full to 2708042 Inc., referencing the Sales Contract which is an exhibit to the Wang Affidavit;
- On behalf of Canamax and with the assistance of Location Way, Mr. Zheng and a logistics manager named Amber, 2708042 Inc. hired Nonghao to arrange shipment of the Vehicle to Japan. Mr. Lin states that he coordinated the shipment via a WeChat Group in which a representative of Nonghao, Mr. Bill Xu, and a representative of Location Way, Mr. Zheng, were participants and that at all material times Location Way was fully aware of the shipment of the Vehicle to Japan on behalf of Canamax

and that Canamax had entered into a sales contract to sell the Vehicle to a subsequent purchaser in Japan.

Actions of Location Way and Mr. Zheng

- Mr. Lin states that on or about July 1, 2022, Mr. Zheng took the new position that Mr. Lin owed him \$6 million dollars for unrelated previous dealings and demanded that Mr. Lin sign false documents attesting to this. When Mr. Lin refused, Mr. Zheng threatened him in an attempt to extort the money from him. This occurred again on September 8, 2022 at which time Mr. Zheng also advised that the amount paid by 2708042 Inc. for the Vehicle would be allocated towards 2708042 Inc.'s alleged debt and that Location Way was going to repossess the Vehicle. Further, if Mr. Lin did not sign the document, Mr. Zheng would ensure that neither Canamax, 2708042 Inc. or Mr. Lin would ever receive the Vehicle. Mr. Lin states that people who work for Mr. Zheng than began to follow Mr. Lin and his wife, who both filed complaints with York Regional Police on September 29, 2022, copies of which complaints are attached as exhibits to Mr. Lin's affidavit;
- As to the Vehicle registration by Location Way with the SAAQ on September 9, 2022 indicating Location Way as the owner, Mr. Lin states that he considers this to be a false declaration taken for illicit and improper reasons, as it ignores that the sale of the Vehicle by Location Way and the receipt by Location Way of the full sale price;
- On behalf of 2708042 Inc., Mr. Lin consents to the order sought by Canamax.

Affidavit evidence of Wei Zheng

[20] Mr. Zheng identifies himself as the president and sole shareholder of Location Way which is active in the field of sale of luxury vehicle. He states, among other things, that:

- He has been working with Mr. Lin and 2708042 Inc. since the beginning of 2021 but, beginning in 2022, they seemed to be having problems as payments were coming in late and payments for vehicles were being made in increments when they had previously been paid in full. When asked about this, Mr. Lin said that he had temporary difficulties and asked for an accounting of what was owed, referencing the WeChat conversation found as an exhibit to the Wang Affidavit;
- At the end of March 2022, Mr. Lin advised Mr. Zheng that he had a serious buyer for the Vehicle. On March 22, 2022, Mr. Lin advised that he was trying to get funds and asked if Mr. Zheng would purchase the Vehicle if Mr. Lin could arrange to make a deposit. Mr. Zheng states that this is when he drafted the Wholesale Dealer Sale Contract (attached to the Wang Affidavit) with Mr. Lin and 2708042 Inc. but that he did not sign the contract as he was never paid for the Vehicle. This was why he also never transferred the title to the Vehicle to Mr. Lin and 2708042 Inc.;
- Mr. Zheng states that he was then forced to buy the Vehicle to maintain his word and relationship with Prime, a leader in the field of leasing and purchasing luxury vehicles in Quebec, which he did on May 16, 2022, referencing the Prime Invoice, copies of checks and the Prime Wholesale Dealer Sale contract which are exhibits to the Wang Affidavit;

- Mr. Zheng states that neither Mr. Lin nor 2708042 Inc. paid him for the Vehicle and the payments stated to be made were in fact made for other vehicles and to pay (unspecified) losses, attaching as an exhibit what is described, on a covering page, as “Translation of missing texts sent by Moving party on October 6, 2022 done by same translator Wenqian Cui on October 11, 2022”;
- Mr. Lin told Mr. Zheng that he had a partner named Kenny that would help him out with money (presumably referring to Mr. Wang); that the transaction with his buyer in Japan would help Mr. Lin reimburse Mr. Zheng for the debt he had accumulated; and, that in order to make a lot of money selling Vehicle he had to ship it to Japan to show it to a solid buyer and that he would take care of all of the related costs and fees of doing so; Mr. Zheng states that when saw Canamax’s name on the Nonghao freight invoice, he figured it was related to Mr. Lin or 2708042 Inc. “since they shared the same address”;
- On September 12, 2022, Mr. Zheng received a call from Nonghao advising him that someone from Canamax had communicated with them advising that they were the owners of the Vehicle. This is when Mr. Zheng started getting scared of the Vehicle getting stolen and asked for it to be brought back to Canada;
- Mr. Zheng states that even if Canamax paid Mr. Lin and 2708042 Inc for the Vehicle, he did not receive payment for the Vehicle.

Canamax's Further Affidavit evidence

[21] Canamax filed the affidavit of Mr. Ling, who identifies himself as the General Manager of Canamax, and which was declared on October 13, 2022 [Ling Affidavit] as part of its reply submissions. The Ling Affidavit includes the following:

- That it is Mr. Ling's understanding that no original bill of lading has been issued by Nonghao or COSCO and he is not aware of any contract of carriage for the Vehicle, whether by bill of lading or otherwise, which includes Location Way as a party;
- By email of October 9, 2022, Canamax's counsel communicated (to Location Way's counsel) proof of Canamax's direct payment for the Vehicle to 2078042 Inc., which email is included in an exhibit to the Zheng Affidavit, in support of 2078042 Inc.'s signed receipt of payment, found in as an exhibit to the Wang Affidavit), as follows:

June 6, 2022 - \$200,000 (deposit)
June 10, 2022 - \$98,721.10 (deposit)
July 28, 2022 - \$500,000.00
July 28, 2022 - \$162,000.00
August 22, 2022 - \$495,915.00

TOTAL \$1,448,998.95

- Mr. Ling states that the payment of the \$162,000 was first transferred from one Canamax account to another before being paid to 2708042 Inc. on the same day, attaching as an exhibit copies of the bank account statement showing transfers and a July 28, 2022 wire transfer from Canamax to 2708042 Inc.;
- Mr. Ling states that the 2708042 Inc. receipt of payment indicates a deposit of \$291,083.95. This was in fact paid directly by Mr. Hiroshi to 2078042 Inc., on behalf

of Canamax, pursuant to the Sales Contract, attached as an exhibit to the Wang Affidavit, and that Mr. Ling is advised by Ms. Rina Shinchi, principal broker of LYSR, that the deposit paid by Mr. Hiroshi to 2708042 Inc. was in fact made by two deposits. The first on June 6, 2022 in the amount of \$98,721.10 from Peace International Co. Ltd which Mr. Ling is advised is a financing affiliate of the purchaser, Mr. Hiroshi, to the sales broker, LYSR, and on June 9, 2022 transferred an additional \$200,000 to Ms. Shinchi, referencing two Application and Declaration of Remittances dated June 9, 2022 and June 6, 2022, both included in an exhibit to the Zheng Affidavit, neither of which refer to the Vehicle and the second of which refers to the transfer as a personal loan. Further, that Mr. Ling is advised by Ms. Shinchi that the total transfer exceeds \$291,083.95 as it includes the payment of ocean freight, insurance and exchange fees. Further, that Mr. Hiroshi filed the Application and Declaration of Remittances to show the invoices, import documents and custom import duty declarations required by Japan's authority for motor vehicles. The ultimate purpose was to prove that the Vehicle was being imported legally into Japan;

- Based on this, Mr. Ling states that the Vehicle was paid in full by Canamax to 2708042 Inc.

The Latreille Affidavit

[22] The affidavit of Linda Latreille, legal assistant with BLG, declared on October 13, 2022 attaches as an exhibit an email received by Mr. Grodinsky, Canamax's counsel, from Mr. Lin on October 13, 2022. This email states "This is a transfer from Japan, TD bank statement

06/07/2022 \$200,00.00 06/13/2022 \$98,703.60". The attached TD Canada Trust Transaction History references LYSR M and shows a \$200,000 credit on June 7, 2022 and a debit of the same amount the following day as well as a deposit of \$98,703.60 on June 13, 2022 and a transfer out of \$100,000 on the same day. The identities of source of the deposits and to whom the transfers out were made to are not indicated in the statement.

Analysis

i. Serious Issue

Canamax's Position

[23] Canamax submits that it has established a serious issue to be tried.

[24] It submits that it has provided the executed Sales Contract between 2708042 Inc. and Canamax as well documented proof of payment by Canamax to 2708042 Inc., being the 2708042 Inc. Invoice and signed receipt; the Bank of China transfer from Canamax to 2708042 Inc of \$162,000 on July 28, 2022 and the Canamax Current Account statement indicating transfers to 2708042 Inc of \$500,000 and \$162,000 on July 28, 2022. There is also documented proof of 2708042 Inc. payments to Location Way, being the payments of \$200,000 on March 17, 2022, \$1,000,000 on May 16, 2022, and \$240,000 on May 25, 2022 and extensive communications establishing Canamax's rights to the requested relief.

[25] Canamax is listed as the shipper on the Bill of Lading and, as a party to that contract, retains all right, title and interest in the Vehicle (*Arc-En-Ciel Produce Inc v BF Leticia (Ship)*, 2022 FC 843, at para 35-46 [*Arc-En-Ciel*]).

[26] Pursuant to Article 1745 of the Quebec Civil Code, in the context of a sale whereby the seller reserves ownership of a road vehicle until full payment of the sale price, a reservation of ownership must be published in order for the reservation to be enforceable against third persons. As no reservation of ownership was published at the Régistre des droits personnels at reels mobiliers [RDPRM] or under the PPSA with respect to the Vehicle, any reservation of ownership in favour of Location Way would not be enforceable upon Canamax, a *bona fide* third party who purchased the Vehicle.

[27] Further, that the Lin Affidavit, including the police report, makes it clear that Canamax has a clear right to the relief sought and that Location Way and Mr. Zheng's actions are illegal and improper.

[28] Canamax submits that this demonstrates a strong *prima facie* case that the Vehicle is the sole property of Canamax and that it will be released to Location Way or persons unknown if it is released by Nonghao. In light of this, and Location Way's contestation of the ownership of the Vehicle, there is a serious issue to be tried and that similar relief has been granted in similar circumstances in *Intel Auto Trade Inc (Go Luxury Cars) v Ocean Network Express (Canada) Inc* (T-1453-22) [*Intel Auto*].

Location Way and Mr. Zheng's Position

[29] Although Location Way and Mr. Zheng made no written representations, their counsel made lengthy oral submissions when appearing before me. These largely refer to the WeChat conversation(s) and certain documentary evidence and were intended to demonstrate that two of the payments of \$200,00 made by 2708042 Inc. to Location Way preceded the March 31, 2022 unsigned contract for the purchase of the Vehicle by 2708042 Inc. from Location Way; that the \$1,000,000 payment was for payment of other cars and not the Vehicle; and, that the \$240,000 paid on May 25, 2022 was for unspecified "loss of the car(s)" and not for the Vehicle. Further that there was no proof of transfer of property or registration of the Vehicle and that the (unsigned) contract between Location Way and 2708042 Inc. permitted Location Way to repossess the Vehicle.

[30] As to the purchase of the Vehicle by Canamax, Location Way submits Canamax has only demonstrated proof of payment of \$995,000. Location Way asserts that the \$200,000 payment was a personal loan between Shinchis, that the \$98,000 payment was made by Peace International Co. Ltd. to LYSR, and that the \$162,000 payment was a transfer from Canamax to Canamax although it was apparently transferred the same day to 2708042 Inc. And, even if these amounts were paid, there is no proof that 2708042 Inc. in turn paid Location Way in order to justify a claim against the Vehicle.

[31] Location Way submits that no proof has been provided of any payment by Hiroshi to Canamax.

[32] Location Way also asserts, among other things, a lack of due diligence by Canamax as to the ascertaining of ownership of the Vehicle.

Position of Nonghao

[33] Counsel for Nonghao attended the hearing but made no submission.

Analysis

[34] Canamax's underlying assertion before this Court is that Nonghao breached its contractual obligations in altering the terms of the Bill of Lading and following the instructions of Location Way to reroute the Vehicle back to Canada. And, with respect to this motion for an interim injunction, if Nonghao releases the Vehicle to parties other than Canamax, then Canamax will suffer irreparable harm.

[35] Nonghao has not filed any evidence. However, the letter from its counsel to Canamax is an exhibit to the Wang Affidavit. This letter states that the shipping order was received from Location Way – I note, however, that the shipping order makes no reference to Location Way. On that document, Canamax is the identified shipper/exporter and Hiroshi is the identified consignee. The fact that the letter states that the shipping order was sent to Location Way does not change this. Similarly, the letter states that the CERS was sent to Location Way. However, that document identifies the exporter as Canamax and the consignee as Hiroshi, it makes no reference to Location Way. The freight invoice is stated to have also been sent to Location Way. However, that document in the "Bill To" section lists Canamax, the shipper is identified as

Canamax and the consignee is identified as Hiroshi. There is no reference to Location Way. Indeed, the letter states that the freight invoice was, at Location Way's instruction, issued to Canamax. As to payment of the freight, the letter states that funds were received from four different payments via personal email transfers and that Location Way informed Nonghao that these payments were to pay the freight invoice.

[36] Further, the proforma Bill of Lading identifies Canamax as the shipper and Hiroshi as the consignee and confirms that the freight was pre-paid. It makes no reference to Location Way.

[37] Based on this and the other the evidence before me in this motion, on its face, it would appear that Nonghao entered into a contract of carriage with Canamax, who paid for that service. Location Way was not a party to that contract. The letter from Nonghao's counsel also indicates that it was Location Way who instructed Nonghao to amend the shipper on the Bill of Lading and the CERS and to return the car to Canada.

[38] In my view, the decision to alter the Bill of Lading gives rise to a serious issue. That is, whether Nonghao breached the contract of carriage. It appears from the letter by its counsel that that Nonghao accepted documentation from both Canamax and Location Way as to the ownership of the Vehicle, determined that Location Way was the legal owner and, on that basis, apparently altered the Bill of Lading and followed Location Way's instruction to return the Vehicle to Canada. However, as can be seen from the affidavit evidence above, the question of who has legal ownership of the Vehicle is very much a live one.

[39] In that regard, while much effort was expended by Location Way taking issue with the evidence as to the purchase of the Vehicle by Canamax from 2708042 Inc., and the evidence as to whether 2708042 Inc. had paid Location Way for the Vehicle, and many other matters, it is not the role of this Court in the motion for an injunction to determine legal ownership of the Vehicle or the merits of the intended underlying action. Also, while I entirely agree that some of the documents – including some pertaining to Location Way’s interest in or involvement with the Vehicle – give rise to far more questions than they answer as to timing of payments, the purpose of the payments, the intent of the parties, title to the Vehicle and other matters, ultimately this simply serves to confirm that there is a serious issue arising from the alleged breach of the contract of carriage which was premised on Nonghao’s determination that Location Way was the legal owner of the Vehicle. If there was a breach of contract, then the question will ultimately become whether Canamax has suffered resultant damages, which question is tied to the ownership of the Vehicle. I would also note that much time was spent offering interpretations of what was meant by portions of the WeChat(s). However, in the absence of clear affidavit evidence from the participants or cross-examination of deponents as to what was meant, these interpretations are not particularly helpful to the Court.

[40] That said, in *Arc-En-Ceil*, Justice Rochester reviewed the history of bills of lading and stated:

[43] The function of a bill of lading as “document of title” can therefore be broken down into two elements: (i) the bill of lading’s transfer is a transfer of constructive possession entitling the holder to receive the goods from the carrier (the key to the floating warehouse); and (ii) while strictly speaking it does not transfer property in the goods which it represents (it is not a negotiable instrument akin to a bill of exchange or a cheque), it is capable of being part of the mechanism by which property is passed

(*Delfini* at 359; *Canadian Maritime Law* at 570; William Tetley, *Marine Cargo Claims*, 4th ed, (Thompson) at 533 [Tetley]).

.....

[46] The bill of lading can thus be described as a document entitling possession of the goods described therein rather than necessarily identifying the legal owner or the person with the right of property in the goods. By transferring or negotiating the bill of lading, the right to possession is transferred.

[41] Thus, in the context of this motion, Nonghao, by changing the identity of the shipper on the Bill of Lading, permitted Location Way, a non-party to the contract, to provide instructions as to where the Vehicle was to be delivered and also entitled Location Way, rather than Canamax to possession of the Vehicle. Therefore, to the extent that Canamax is seeking an injunctive relief prohibiting Nonghao and COSCO from releasing the Vehicle to any party other than Canamax, it has met the requirement of establishing a serious issue. The threshold to establish a serious issue is “a low one” and “liberal” (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 25 [*Glooscap*] referencing *RJR-Macdonald* at page 337). Canamax need only show that the matter is not destined to fail or that it is “neither vexatious nor frivolous” (*RJR-Macdonald*, *supra* at page 337) and it has done so.

[42] The requested relief for an order requiring COSCO and Nonghao to issue the original, unaltered bill of lading could perhaps be viewed as falling within a mandatory injunction. However, the overall effect of the injunction would be to require Nonghao and COSCO to refrain from giving possession of the Vehicle to any party other than Canamax. As the Vehicle is, or will shortly be, back in Canada, the issue of any breach of the contract of carriage and the ownership of the Vehicle will be resolved by the ensuing litigation, not by the issuance of the

original Bill of Lading. In any event, Canamax has shown a strong *prima facie* case that Nonghao breached the contract of carriage. However, even if I am in error in finding that Canamax has established a serious issue, as set out below, the motion cannot succeed as Canamax has not demonstrated that it will suffer irreparable harm.

ii. Irreparable Harm

[43] Canamax acknowledges that it must demonstrate that it will suffer a harm which cannot be quantified in monetary terms or a harm which cannot adequately be compensated for by damages, even if quantifiable in monetary terms. It submits that Vehicle is extremely rare and valuable and that if it “disappears from Canamax’s view” then Canamax will lose the value for which it paid to 2708043 Inc. to purchase the Vehicle, it will open itself up to potential liability to the Japanese buyer, as well as suffering irreparable reputational damage from its failure to deliver the Vehicle as promised. Further, that no amount of money can guarantee the recovery of a vehicle identical to the Vehicle, let alone in the same condition.

Analysis

[44] In *RJR MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311, the Supreme Court stated:

63 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business

reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.))

[45] And, as stated by the Federal Court of Appeal in *Glooscap*:

[31] To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight. See *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 at paragraph 14; *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

[46] General assertions cannot establish irreparable harm (*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 14-16 [*Gateway*]).

[47] However, as stated by Justice Pentney in *Kameron Coal Management v Canada (Employment and Social Development)*, 2018 FC 715 [*Kameron Coal*] equitable relief must retain its necessary flexibility, and some forms of harm are not easily established, especially in interlocutory proceedings where speed is of the essence and the ability to prepare a complete evidentiary record is necessarily somewhat limited. “What is required, at the end of the day, is a ‘sound evidentiary foundation’ for the assessment of the harm. Mere assertions or speculation on the part of the applicant will not be sufficient” (*Kameron Coal* at para 32).

[48] In this matter, it is clear that the Vehicle is valuable. The sale prices referred to in the motion all exceed \$1.4 million dollars. However, there is no evidence as to why the Vehicle is worth this amount, for example, that it is a rare and highly sought after collector's item or what makes the Vehicle unique to the purported end buyer. Further, even if Canamax has paid for but cannot deliver this Vehicle, while Canamax may suffer a significant financial loss, the loss can certainly be quantified in monetary terms.

[49] Nor is there any evidence before me that Canamax will not be able to collect from the intended respondents should it succeed in its action.

[50] Canamax also claims that it will suffer irreparable reputational damage from its failure to deliver the Vehicle if the interim injunction is not granted. In that regard, Canamax refers to *Intel Auto* in support of this submission.

[51] In *Intel Auto*, following an *ex parte* motion, this Court did grant an interim injunction on an urgent basis enjoining the release of certain vehicles until the motion was heard and a further order was issued. Ultimately, however, the interim injunction was not maintained as, following a hearing, it was found that there had been lack of full and frank disclosure of material facts. At that hearing, with respect to irreparable harm, Intel relied primarily on damage to its reputation with its business partners in China. Affidavit evidence regarding the scope of its business in China was presented and the deponent expressed a concern that its agent in China would no longer do business with Intel if the vehicles were lost (para 49).

[52] In this matter, Canamax has provided no evidence pertaining to the scope of its business and the relative impact it would face to its reputation if this injunction is not granted. The Wang Affidavit asserts only that Canamax will be liable to Mr. Hiroshi if it fails to deliver the Vehicle. The Ling Affidavit is silent as to irreparable harm. There is simply no evidence as to potential reputational damage.

[53] Further, in *Kameron Coal* the harm asserted was to the reputation of the business. However, in that matter, there was no evidence of the nature or extent of any such harm, nor of whether the applicant has undertaken any efforts to try to minimize or avoid such harms through its own communications efforts. Referencing *Gateway*, where the Federal Court of Appeal held that a general assertion is insufficient to establish irreparable harm (*Gateway* at para 13-14), Justice Pentney concluded that the lack of specific evidence of the nature or degree of harm that would occur in the period pending the final determination of the matter by way of the underlying application for judicial review was a factor which weighed against the granting of an injunction.

[54] Finally, I note that when appearing before me, counsel for Canamax referred to the affidavits of Mr. Lin and his spouse filed with the police alleging threats and extortion by Mr. Zheng and attached as exhibits to the Lin Affidavit. As I understood it, the submission made was that declining to issue the injunction would cause Canamax irreparable harm because this would condone illegal conduct. I do not agree with this submission. First, irreparable harm is concerned with harm that may be suffered by the moving party if the relief is not granted (*Glooscap* at para 33). Here the alleged threats and extortion were made against Mr. Lin and his spouse, not Canamax. Canamax's alleged harm is concerned with the loss of possession of the Vehicle,

which it claims to own. Further, the alleged events pertaining to the Lins have already been reported to the police. If the police determine that criminal conduct has occurred then the appropriate remedy will be that charges will be laid by the police. This is not an aspect of the motion before me. The potential refusal of equitable relief in this interlocutory injunction motion does not condone the alleged criminal behaviour.

iii. Balance of Convenience

[55] Given that the test for an injunction is conjunctive, as Canamax had failed to establish irreparable harm, I need not assess the balance of convenience. The motion cannot succeed.

ORDER IN T-2032-22

THIS COURT ORDERS that

1. The motion for an interim injunction brought by Canamax Holding Inc. is dismissed;
and
2. Costs will be in the cause.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2032-22

STYLE OF CAUSE: CANAMAX HOLDING INC. v NONGHAO FREIGHT INC., COCSO SHIPPING LINES CO. LTD., COSCO SHIPPING LINES (CANADA) INC., LOCATION WAY INC., 2708042 ONTARIO INC., AND WEI ("VISON") ZHENG

PLACE OF HEARING: BY VIDEOCONFERENCE USING ZOOM

DATE OF HEARING: OCTOBER 14, 2022

ORDER AND REASONS: STRICKLAND J.

DATED: OCTOBER 17, 2022

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