

2014 ONSC 5050
Ontario Superior Court of Justice

O2 Electronics Inc. v. Sualim

2014 CarswellOnt 12203, 2014 ONSC 5050, [2014] O.J. No. 4126, 244 A.C.W.S. (3d) 688

O2 Electronics Inc., Plaintiff and Alex Sualim, Sandra Sualim also known as Sandra Oluwole-Aina, 2078749 Ontario Ltd. carrying on business as Fast Track Haulage and Signature Digital Media, Bauhaus Home Builder Ltd., and Ozili Inc., Defendants

Perell J.

Heard: August 26, 2014
Judgment: September 8, 2014
Docket: CV-14-504183

Counsel: Spencer F. **Toole**, for Plaintiff
Claudio R. Aiello, for Defendant, Sandra Sualim

Subject: Civil Practice and Procedure; Torts

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Remedies

II Injunctions

II.4 Form and operation of order

II.4.h Continuance of interim or interlocutory injunctions

II.4.h.v Miscellaneous

Headnote

Remedies --- Injunctions — Form and operation of order — Continuance of interim or interlocutory injunctions — Miscellaneous

Plaintiff, which alleged that it was victim of fraud perpetrated by defendant AS, obtained Mareva injunction — Plaintiff brought motion to continue Mareva injunction — Defendant SS, who was wife of AS and was not implicated in fraud, opposed continuation of Mareva injunction and asked that it be dissolved nunc pro tunc — Mareva injunction would be continued provided that injunction would be dissolved in 100 days unless plaintiff filed proof that it was corporation in good standing and that these reasons for decision had been served on trustee in bankruptcy of principal of plaintiff — Plaintiff had met test for Mareva injunction — It would not be appropriate to order plaintiff to post security for its undertaking as to damages — Issue of whether there should be security for costs, generally, should be addressed pursuant to R. 56.01 of Rules of Civil Procedure — Plaintiff's motion should not be dismissed for material non-disclosure because there was no material non-disclosure that would affect issuance of injunction — Alternatively, if there was some material non-disclosure, court had

discretion to continue injunction, and it was appropriate to exercise this discretion — Any delay in seeking Mareva injunction was insufficient to dissolve injunction in case at bar.

Table of Authorities

Cases considered by *Perell J.*:

Aetna Financial Services Ltd. v. Feigelman (1985), 1985 CarswellMan 19, 1985 CarswellMan 379, [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, [1985] 2 W.W.R. 97, 56 N.R. 241, 32 Man. R. (2d) 241, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145 (S.C.C.) — referred to

Bank of Montreal v. Mitchell (1997), 25 O.T.C. 344, 143 D.L.R. (4th) 697, 1997 CarswellOnt 589 (Ont. Gen. Div. [Commercial List]) — referred to

Bank of Montreal v. Mitchell (1997), 151 D.L.R. (4th) 574, 1997 CarswellOnt 2602 (Ont. C.A.) — referred to

Bank of Montreal v. Tassone (1998), 1998 CarswellOnt 3915, 14 P.P.S.A.C. (2d) 213 (Ont. Gen. Div.) — referred to

Bank of Montreal v. Tassone (1999), 15 P.P.S.A.C. (2d) 285, 1999 CarswellOnt 2426, 123 O.A.C. 118 (Ont. C.A.) — referred to

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Bardeau Ltd. v. Crown Food Service Equipment Ltd. (1982), 67 C.P.R. (2d) 198, 26 C.P.C. 297 at 306, 38 O.R. (2d) 411, 1982 CarswellOnt 1267 (Ont. H.C.) — referred to

Bell ExpressVu Ltd. Partnership v. Rodgers (2007), 52 C.P.C. (6th) 312, 2007 CarswellOnt 7551 (Ont. S.C.J. [Commercial List]) — referred to

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EnerNorth Industries Inc., Re (2009), 2009 ONCA 536, 2009 CarswellOnt 3886, 55 C.B.R. (5th) 1, 96 O.R. (3d) 1, (sub nom. *EnerNorth Industries (Bankrupt), Re*) 254 O.A.C. 235 (Ont. C.A.) — referred to

Forestwood Co-operative Homes Inc. v. Pritz (2002), 156 O.A.C. 359, 2002 CarswellOnt 490, 31 C.B.R. (4th) 243 (Ont. Div. Ct.) — referred to

Las Vegas Strip Ltd. v. Toronto (City) (1996), 13 O.T.C. 308, 1996 CarswellOnt 3426, 34 M.P.L.R. (2d) 233, 38 C.R.R. (2d) 129, 30 O.R. (3d) 286 (Ont. Gen. Div.) — referred to

Las Vegas Strip Ltd. v. Toronto (City) (1997), 32 O.R. (3d) 651, 99 O.A.C. 67, 1997 CarswellOnt 1279 (Ont. C.A.) — referred to

Massa v. Sualim (2013), 2013 CarswellOnt 17330, 2013 ONSC 7520 (Ont. S.C.J.) — referred to

Massa v. Sualim (2013), 2013 CarswellOnt 18062, 2013 ONSC 7926 (Ont. S.C.J.) — referred to

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Massa v. Sualim (2014), 2014 CarswellOnt 12563, 2014 ONSC 5171 (Ont. Div. Ct.) — considered

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Parallel Medical Services Ltd. v. Ward (2002), [2002] O.T.C. 276, 2002 CarswellOnt 1181 (Ont. S.C.J.) — referred to

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663309 Ontario Inc. v. Bauman (February 2, 2001), Doc. Toronto 646/2000 (Ont. Div. Ct.) — referred to

830356 Ontario Inc. v. 156170 Canada Ltd. (1995), 1995 CarswellOnt 4360 (Ont. Gen. Div.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 106 — considered

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 56.01 — considered

Words and phrases considered:

Mareva injunction

A *Mareva* injunction is an injunctive order that restrains the defendant from dissipating assets or from conveying away his or her own property pending the court's determination in the proceedings.

MOTION by plaintiff to continue Mareva injunction.

Perell J.:

A. Introduction and Overview

1 This is a motion to continue a *Mareva* injunction. A request to amend the style of cause was unopposed and this request should be granted.

2 The Plaintiff, O2 Electronics Inc., which alleges that it was the victim of a fraud perpetrated by the Defendant, Alex Sualim, obtained a *Mareva* injunction by Order of Justice Chapnik dated July 11, 2014, which Order was extended by the Orders of Justice Goldstein dated July 21, 2014 and Justice Himel dated July 31, 2014.

3 The Defendant, Sandra Sualim, who is the wife of Mr. Sualim, opposes the continuation of the *Mareva* injunction, and she asks that it be dissolved *nunc pro tunc*.

4 Mrs. Sualim is not implicated in the fraud, but she and the corporations owned by her and Mr. Sualim have been sued to trace Mr. Sualim's allegedly ill-gotten gains. Although it is very likely that Mr. Sualim is aware of the *Mareva* injunction, he has not yet been served with the Orders.

5 In opposing the continuation of the *Mareva* injunction, Mrs. Sualim makes seven somewhat interconnected arguments.

6 First, she argues that the injunction should be dissolved because O2 Electronics unnecessarily moved without notice and did not make full and fair disclosure in obtaining the *Mareva* injunction. In particular, she argues that the principal of O2 Electronics, Behnam Carmili, who provided the evidence for the *Mareva* injunction, did not disclose that: (a) the claim was really his personal claim; (b) he is personally bankrupt; and (c) O2 Electronics has no corporate status because it is non-compliant with New York State corporate and tax statutes and has been dissolved as a corporation.

7 Second, she argues that a *prima facie* case for an injunction has not been made out. She submits that although Mr. Carmili can show that he has been the victim of a fraud, no one can connect Mr. Sualim to the fraud, except by relying on evidence illegally obtained by the FBI and the RCMP, and she points out that in a related action, *Massa v. Sualim* [2014 CarswellOnt 12563 (Ont. Div. Ct.)], there is a motion seeking leave to appeal to the Divisional Court on the basis of the alleged misuse of this evidence.

8 Third, she argues that the balance of convenience favours not continuing the injunction.

9 Fourth, she submits that there is no evidence of any dissipation of assets, and, therefore, a crucial element of the test for a *Mareva* injunction has not been met.

10 Fifth, she submits that there is no substance to O2 Electronics' undertaking as to damages.

11 Sixth, she submits that O2 Electronics' motion for an injunction should be dismissed because of the delay in seeking the remedy and because of the prejudice it has caused to her.

12 Seventh, she submits that if the *Mareva* injunction is to be continued, it should only be on strict terms that O2 Electronics post security for the undertaking as to damages.

13 For the reasons that follow, I reject Mrs. Sualim's arguments. I shall continue the *Mareva* injunction provided that the injunction shall be dissolved in 100 days unless: (a) O2 Electronics files proof that it is a corporation in good standing and (b) O2 Electronics files proof that these Reasons for Decision have been served on the trustee in bankruptcy of Mr. Carmili.

14 By way of a summary of my reasons, a *Mareva* injunction has already been granted to Mr. Leon Massa, and O2 Electronics is a privy of Mr. Massa, and, therefore, practically speaking, there are issue estoppels that a *Mareva* injunction should extend to O2 Electronics' claim, except for the matter of whether the amount of assets frozen by injunction should be uncapped and whether the Order should be modified for normal business activities, and for the payment of ordinary living expenses and reasonable legal expenses to defend the lawsuit.

15 In any event, independent of any issue estoppels, O2 Electronics has met the test for a *Mareva* injunction. In this

regard, in the circumstances of this case, it would not be appropriate to order O2 Electronics to post security for its undertaking as to damages. The issue of whether there should be security for costs, generally, should be addressed pursuant to rule 56.01.

16 Further, having satisfied the elements for a *Mareva* injunction, O2 Electronics' motion should not be dismissed for material non-disclosure because there was no material non-disclosure that would affect the issuance of the injunction. Alternatively, if there was some material non-disclosure, nevertheless, the court has discretion to continue the injunction, and it is appropriate to exercise this discretion in the immediate case. Similarly, any delay in seeking the *Mareva* injunction is insufficient to dissolve the injunction in the case at bar.

17 Therefore, the *Mareva* injunction in the case at bar should continue until trial or until further order of this court. Mrs. Sualim and the other Defendants are at liberty to apply for a modification of the Order to allow the Defendants to operate their business in the normal course and to maintain their normal standard of living, including the payment of ordinary living expenses and reasonable legal expenses to defend the lawsuit.

18 I am not seized of this matter, but if the parties cannot agree about a modification of the Order, I am prepared to hear a motion to settle any modifications to the Order within 30 days of the release of these Reasons for Decision. I also recommend that the parties consider consolidating or co-ordinating this action with the *Massa* action.

B. Factual and Procedural Background

19 Alex Sualim is married to Sandra Sualim, and normally, they reside in Ontario with their three children, all of whom are under the age of five. Mr. And Mrs. Sualim are the owners of the corporate defendants, 2078749 Ontario Ltd. (c.o.b. as Fast Track Haulage and, Signature Digital Media), Bauhaus Home Builder Ltd., and Ozili Inc.

20 Mr. Sualim is currently an involuntary resident of Arizona, U.S.A., where he is on bail waiting for a trial on criminal charges. It is alleged that he was the mastermind in a multi-million dollar fraud.

21 The "advance payment" fraud has been described as sophisticated, but like many frauds and Ponzi schemes, it is largely built on the gullibility and folly of the victims, including in the immediate case, Mr. Carmili and his corporation, O2 Electronics, which in June 2011 received a cold-call email message from a person identified as Jennifer McEwan, who was a fraudster assuming a false identify.

22 In her vague email message, Ms. McEwan, the imposter, offered a business opportunity to Mr. Carmili. Mr. Carmili never met the imposter or the other participants in the fraudulent scheme. Nevertheless, taken in by false documentation, he had his corporation, O2 Electronics, pursue what was portrayed to him as a lucrative business opportunity.

23 Mr. Carmili was led to believe that Ms. McEwan was an executive of a Canadian corporation located in Calgary that had been purchasing silicon germanium, a semiconductor for computer chips, from a Chinese company.

24 Ms. McEwan's proposal was that O2 Electronics should purchase germanium from the Chinese manufacturer with funds supplied by the Canadian corporation and then resell the germanium to the Canadian company at a substantial profit. Under this proposal, O2 Electronics would not have to pay the upfront purchase monies to the Chinese manufacturer.

25 O2 Electronics agreed to participate and it received purchase orders from the Calgary corporation, which, in truth, did not exist, and O2 Electronics made orders with the Chinese company, which also did not exist.

26 O2 Electronics communicated with representatives of the bogus Chinese company, who were also phonies.

27 The upfront money that was supposed to be supplied to O2 Electronics by the imposter Ms. McEwan's bogus corporation did not materialize, and, in part, because of pressure from the bogus representatives of the bogus Chinese company, O2 Electronics began to pay for the goods itself using funds from its own bank account.

28 O2 Electronics blithely made wire transfers of money to the foreign bank accounts of the fraudsters. They have

disappeared with the money.

29 It appears that some of the lost funds may have been borrowed from family, friends, or business associates of Mr. Carmili, and it appears that some funds were paid without being routed through O2 Electronics' bank account. Mr. Carmili deposed that he provided \$1.25 million (USD) to O2 Electronics so that it could complete the transactions with the Chinese supplier.

30 Some boxes of supposed germanium were delivered, but O2 Electronics never opened them because it was told that the germanium was fragile. Had the boxes been opened, garbage would have been discovered and no silicon.

31 O2 Electronics invested \$5.5 million dollars. It was paid nothing, and it received nothing of value.

32 O2 Electronics, Leon Massa, and several others were the victims of this fraud. Mr. Massa lost \$840,000 (USD). Something in the order of \$13 million (USD) in all was stolen.

33 None of the victims met the fraudsters, and the victims rely on the information from an FBI investigation in the United States to identify Mr. Sualim as the criminal mastermind.

34 Mr. Massa and O2 Electronics also rely on information from FINTRACT filings made available by the RCMP, which passed on the information to Mr. Massa's lawyers. Mr. Carmili retrieved the information from court files in the *Massa* action. FINTRACT filings are information that Canadian financial institutions must disclose to the RCMP or CSIS when they have a suspicion of money laundering or certain other illegal activities. See *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17.

35 The FBI relied on circumstantial evidence associated with Mr. Sualim's email accounts to connect him to the fraud. The U.S. investigators determined that the perpetrators of the fraud repeatedly utilized two email accounts owned by Mr. Sualim and that he used the email accounts in his personal capacity during the relevant time.

36 The FINTRACT filings with respect to the Sualims indicated, among other things, that during the time of the frauds, Mr. Sualim's reported income was approximately \$41,000 and Mrs. Sualim's reported income was approximately \$59,000, but almost \$1.2 million had been transferred from foreign accounts to their corporation 2078749 Ontario Ltd. and they had deposited approximately \$330,000 in cash and approximately \$700,000 in wire credits into their personal bank accounts and then moved the money into other accounts, where the monies were used for purchases that did not seem related to their businesses' undertakings.

37 Absent the information from the FBI and the RCMP, Mr. Massa, who is a resident of British Columbia, and O2 Electronics, which is a New York State corporation, and its principal and sole shareholder, Mr. Carmili, cannot identify Mr. Sualim as the fraudster.

38 In October 2013, while vacationing in the United States, Mr. Sualim was arrested and charged with various offences including fraud.

39 In November 2013, Mr. Carmili had conversations with FBI agents, and they suggested that he speak to Ontario lawyers.

40 Meanwhile, in December 2013, Mr. Massa retained the Canadian law firm Bennett Jones, and he commenced an action against Mr. and Mrs. Sualim and their corporations for fraud and to trace the gains of the fraud.

41 On December 5, 2013, on a without notice motion, Justice Stinson granted Mr. Massa a *Mareva* injunction. See *Massa v. Sualim*, 2013 ONSC 7520 (Ont. S.C.J.). Justice Stinson concluded that the various elements necessary to justify an injunction had been satisfied.

42 On December 12, 2013, on consent, approximately \$40,000 was released from the frozen funds of the Defendants.

43 As revealed by subsequent court orders, the *Mareva* injunction froze assets with a net value of approximately \$3.2 million, including a matrimonial home worth \$1.9 million.

44 In December 2013, Mr. Carmili, who had also spoken to Bennett Jones, retained different lawyers, but O2 Electronics did not immediately commence an action, and it changed legal representation several times before commencing an action.

45 On December 20, 2013, Mrs. Sualim brought a motion to cap the amount of the *Mareva* injunction granted to Mr. Massa. See *Massa v. Sualim*, 2013 ONSC 7926 (Ont. S.C.J.). The motion was heard by Justice Morgan.

46 Mr. Carmili attended the motion before Justice Morgan as a spectator, but he was allowed to testify about his intentions to commence proceedings. Mr. Carmili testified that he had been consulting Ontario lawyers and planned to obtain a *Mareva* injunction. He said that steps were underway to commence an action and to seek interlocutory relief.

47 Mr. Carmili's evidence was relevant because Mr. Massa had persuaded Justice Stinson to order that almost all of the Defendants' assets be frozen beyond the amount needed to protect just Mr. Massa. Justice Morgan, however, capped the amount of the *Mareva* injunction at \$1.6 million.

48 On January 15, 2014, Mr. Carmili filed a voluntary petition in bankruptcy in the United States Bankruptcy Court.

49 On January 24, 2014, Justice Stewart heard a motion to continue the *Mareva* injunction in the *Massa* action. Mrs. Sualim was represented at the hearing, as was Mr. Sualim by separate counsel. O2 Electronics did not participate.

50 Before Justice Stewart, the Sualims sought the expungement of the FINTRACT documents and the FBI materials. They also sought the dissolution of the injunction. In the alternative, they sought an order requiring Mr. Massa to post security in support of his undertaking as to damages. Justice Stewart reserved judgment continuing the injunction in the interim.

51 On April 17, 2014, Justice Stewart released her Reasons for Decision continuing the *Mareva* injunction. See *Massa v. Sualim*, 2014 ONSC 2103 (Ont. S.C.J.).

52 Justice Stewart decided that the impugned evidence should not be expunged and that the *Mareva* injunction should be continued without the necessity of Mr. Massa posting security to support his undertaking as to damages.

53 The Sualims served notice that they are seeking leave to appeal Justice Stewart's decision to the Divisional Court.

54 On May 14, 2014, O2 Electronics finally commenced its own action against Mr. and Mrs. Sualim and their corporations for fraud and to trace the gains of the fraud.

55 On June 17, 2014, Justice Stewart varied the terms of the *Mareva* injunction by specifying what assets were bound by the order. See *Massa v. Sualim*, 2014 ONSC 3695 (Ont. S.C.J.).

56 On the same day, June 17, 2014, Justice Lederer heard the Sualim's leave to appeal motion. He reserved judgment, and his decision is still under reserve.

57 On July 8, 2014, pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. 43, Mr. Sualim obtained an order from Master Glustein staying the *Massa* action pending the completion of the criminal trial in Arizona, which was scheduled for August 2014, but which has been adjourned to February 2015. The action was stayed but the *Mareva* injunction remains in force.

58 Meanwhile, O2 Electronics finally took steps to obtain a *Mareva* injunction for itself. On July 11, 2014, on a motion made without notice, Justice Chapnik granted an interim *Mareva* injunction to expire on July 21, 2014. Justice Chapnik was made aware of the *Massa* action; it was noted in Mr. Carmili's affidavit and was referred to in O2 Electronics' factum. In the recital, her Order mentions the decisions in the *Massa* litigation.

59 On July 21, 2014, Justice Goldstein extended the interim order for a further 10 days.

60 On July 23, 2014, Mrs. Sualim was served with the motion record and with the *Mareva* injunction Order.

61 On July 31, 2014, Justice Himel continued the interim Order, and scheduled a hearing for August 26, 2014 to determine whether the *Mareva* injunction should be continued until trial or further order of the court.

62 On August 1, 2014, Mrs. Sualim delivered her responding affidavit. In that affidavit she disclosed that Mr. Carmili was in personal bankruptcy and that a search of New York Department of State's Division of Corporations website revealed that O2 Electronics had been dissolved as a corporation.

63 On August 12, 2014, Mr. Carmili delivered another affidavit and deposed that he was unaware of the dissolution of O2 Electronics and that his inquiries indicated that the dissolution was an administrative error associated with the filing of O2 Electronics 2010 State and Federal Corporate Income Tax Returns. He deposed that O2 Electronics was continually in business and had filed subsequent returns and that (similar to the situation in Ontario) after the corporation rectifies its corporate and tax filings, it is possible to revive the corporation *nunc pro tunc*. He deposed that steps were underway to revive O2 Electronics.

64 On August 26, 2014, I heard the motion to continue the *Mareva* injunction. At the time of the hearing, O2 Electronics was still a dissolved corporation.

65 I reserved judgment maintaining the *status quo* in the interim.

C. Discussion and Analysis

Introduction

66 A *Mareva* injunction is an injunctive order that restrains the defendant from dissipating assets or from conveying away his or her own property pending the court's determination in the proceedings.

67 Because procedural law disfavors pre-judgment execution, to obtain a *Mareva* injunction, a plaintiff must satisfy the normal criteria for an injunction and also several additional criteria. For a *Mareva* injunction, the moving party must establish: (1) a strong *prima facie* case; (2) that the defendant has assets in the jurisdiction; and (3) that there is a serious risk that the defendant will remove property or dissipate assets before the judgment. A *Mareva* injunction should be issued only if it is shown that the defendant's purpose is to remove his or her assets from the jurisdiction to avoid judgment. The moving party must also establish that he or she would suffer irreparable harm if the injunction were not granted and that the balance of convenience favors granting the injunction. Absent unusual circumstances, the plaintiff must provide the undertaking as to damages normally required for any interlocutory injunction.

68 See: *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.); *United States v. Yemec* (2005), 75 O.R. (3d) 52 (Ont. Div. Ct.); *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.); *Di Menza v. Richardson Greenshields of Canada Ltd.* (1989), 74 O.R. (2d) 172 (Ont. Div. Ct.).

69 As revealed in the Introduction to these Reasons for Decision, Mrs. Sualim challenges almost every element for a *Mareva* injunction, and she advances several discretionary matters that may disentitle O2 Electronics from the continuation of the existing Order.

70 I shall address Mrs. Sualim's various challenges in the following order under the following headings: (1) Material Non-Disclosure; (2) Delay and Want of Notice in Seeking Injunctive Relief; (3) Issue Estoppel; (4) The Merits of the request for a *Mareva* Injunction; and (5) Security and the Terms of the *Mareva* Injunction.

1. Material Non-Disclosure

71 On a motion for an interlocutory injunction made without notice, there must be full and fair disclosure of all material facts: *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.); *Sherwood Dash Inc. v. Woodview Products Inc.*, [2005] O.J. No. 5298 (Ont. S.C.J.); *Parallel Medical Services Ltd. v. Ward*, [2002] O.J. No. 1498 (Ont. S.C.J.) at paras. 15-19.

72 A material fact is one that the court may need to know in coming to its decision and that if not disclosed may affect the outcome of the decision: *Pazner v. Ontario* (1990), 74 O.R. (2d) 130 (Ont. H.C.).

73 The moving party on a motion without notice must inform the court of any points of fact or law known to it that favour the other side: *United States v. Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.); *United States v. Yemec* (2005), 75 O.R. (3d) 52 (Ont. Div. Ct.). It is not sufficient to simply attach relevant documentary evidence as an exhibit to the applicant's supporting affidavit without revealing or highlighting the material facts: *830356 Ontario Inc. v. 156170 Canada Ltd.*, [1995] O.J. No. 687 (Ont. Gen. Div.); *Cimaroli v. Pugliese*, [1987] O.J. No. 2464 (Ont. H.C.).

74 If there is material non-disclosure, the court may dissolve the injunction notwithstanding that it otherwise would have been appropriate to continue it: *Forestwood Co-operative Homes Inc. v. Pritz*, [2002] O.J. No. 550 (Ont. Div. Ct.); *Bardeau Ltd. v. Crown Food Service Equipment Ltd.* (1982), 38 O.R. (2d) 411 (Ont. H.C.).

75 However, the court has discretion and may continue an interlocutory injunction, if the undisclosed facts were not material or the non-disclosure was not intentional. In exercising its discretion to continue the injunction in circumstances of non-disclosure, the court should consider: (a) the practical realities that there is often urgency or an emergency that explains why the motion is made without notice; (b) whether facts were intentionally suppressed or whether simple carelessness or ignorance was the cause of the non-disclosure; (c) the pervasiveness of the non-disclosure; (d) the difficulty of determining what is a material or an immaterial non-disclosure; and (e) the significance to the outcome of the motion of the matters that were not disclosed to the court: *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2000] O.J. No. 4341 (Ont. S.C.J. [Commercial List]); *Bell ExpressVu Ltd. Partnership v. Rodgers*, [2007] O.J. No. 4569 (Ont. S.C.J. [Commercial List]); *United States v. Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.).

76 In the case at bar, Mrs. Sualim argues that Mr. Carmili, who provided the evidence for the *Mareva* injunction for O2 Electronics did not disclose that: (a) the claim was really his personal claim and not his corporation's; (b) he is personally bankrupt; and (c) O2 Electronics has no corporate status because it is non-compliant with New York State corporate statutes.

77 The evidentiary record that I have reviewed indicates that some of the money paid to the fraudsters was made directly from funds in O2 Electronics' bank account, and *prima facie*, it appears that O2 Electronics was the victim of the fraud. There is also evidence that indicates that other payments were made on O2 Electronics' behalf by third parties, who, presumably, were lending money to O2 Electronics, although the loans seem to be oral agreements and not to have been properly documented. There is also evidence that indicates payments made from O2 Electronics' bank account may have been funded by third parties who, once again, may have been making inadequately documented loans to O2 Electronics. In other words, even if Mr. Carmili made a personal investment, there is ample evidence that O2 Electronics was defrauded.

78 In part from this evidence about payments to the fraudsters and, in part, from several statements made by Mr. Carmili, where he states that he himself has been defrauded, Mrs. Sualim submits that O2 Electronics has no claim and that the genuine claimant is Mr. Carmili. She submits that Mr. Carmili, for some nefarious reason associated with his personal bankruptcy, wishes to disguise his personal claim and attribute it to his corporation, O2 Electronics. I disagree with this submission.

79 As I view the matter, the far better view of the matter is that Mr. Carmili (as is not uncommon for the sole shareholder of a corporation) conversationally does not differentiate himself from his own corporation, and directly or indirectly, they both were defrauded. At the highest, the evidence indicates that a portion of the losses were losses of Mr. Carmili personally, but that O2 Electronics undoubtedly was defrauded for most of the \$5.5 million that was invested in the fraudulent scheme. The corporation was the target of the fraud, and it was only indirectly, as a shareholder and perhaps as a lender to his own corporation that Mr. Carmili was also victimized.

80 I do not regard the information that Mr. Carmili (or more correctly his estate in bankruptcy) might have a personal claim as a material non-disclosure in O2 Electronics' motion for an injunction. Had this information been provided to the

court, the court might have suggested that Mr. Carmili's trustee in bankruptcy be advised of O2 Electronics' proceedings. This would allow the trustee to seek to be added as a party or to monitor the proceedings. The information would not, however, have changed O2 Electronics' case for a *Mareva* injunction. Given that there was ample evidence that O2 Electronics was the victim of a fraud, the fact that there was another claimant; i.e., O2 Electronics' owner, would not be a reason for refusing a *Mareva* injunction.

81 I also do not regard the information that O2 Electronics is offside in its New York State corporate filings as material non-disclosure. O2 Electronics was not aware of the situation when it commenced its litigation, and it has blithely been carrying on its business since 2011, notwithstanding that it has technically not been in existence. There is also evidence that suggests that the problem is more an administrative error by New York officials than a default by O2 Electronics.

82 In any event, this is a problem that can be solved. The law in New York is similar to the law in Ontario in that a corporation's charter or articles of incorporation can be revived *nunc pro tunc*.

83 I conclude, therefore, that there is no material non-disclosure that would justify not granting a *Mareva* injunction. Further, if there is any material non-disclosure, I would exercise the court's discretion to continue the injunction nevertheless.

2. Delay and Want of Notice in Seeking Injunctive Relief

84 It is a fundamental aspect of procedural justice that a party be given notice of the proceedings and an opportunity to be heard. Generally speaking, a court will not decide a matter where the motion is made without notice to the affected party, unless the affected party has been noted in default or there is some circumstance that would justify an interim or temporary order to be followed by notice and opportunity to have the order set aside or not continued.

85 *Mareva* injunctions are, however, often made without notice so that the defendant will not dissipate assets pending the hearing of a motion designed to prevent the dissipation of assets. Mr. Massa followed this path in his action against the Sualims. Where *Mareva* injunctions are granted without notice, the court will make an interim order and provide the defendant with an opportunity to challenge the granting of the injunction.

86 In the immediate case, O2 Electronics proceeded without notice. However, because O2 Electronics was aware of the existing *Mareva* injunction, arguably it ought to have given notice to the Sualims and not proceeded without notice before Justice Chapnik.

87 That said, there were some countervailing factors, the *Massa* order had been capped by Justice Morgan's order, and the risk of the dissipation of assets beyond the capped sum persisted and perhaps was even intensified because Justice Morgan's reasons made it clear that each potential plaintiff had to protect its own interests. Justice Morgan was aware of O2 Electronics' claim that would overtop all of the Sualims' assets, and his capped order does not preclude further orders. In this last regard, it is worth noting that there was a potential conflict of interest between claimants, all of whom have unsecured claims against the Sualims' assets. There is not enough money to restore all the claimants, and any recovery would have to be shared proportionate to the amount of the claims. O2 Electronics' claim amounts to over 40% of the overall loss and is five times larger than Mr. Massa's claim.

88 I might have exercised my discretion differently than Justice Chapnik and required that notice be given, but in the particular circumstances, it is understandable and acceptable that Justice Chapnik allowed the initial *Mareva* injunction to be made without notice. She made an interim order that was considerably narrower than the relief requested by O2 Electronics, which also sought a quite intrusive disclosure order. A very serious fraud has been perpetrated, and Justice Chapnik's Order, in effect, maintained the *status quo*, which was that there was a capped *Mareva* injunction with the potential of more claimants coming forward. These claimants, like O2 Electronics, would ultimately have to justify the continuation of a more expansive *Mareva* injunction.

89 Similarly, the delay from December 2013 to July 2014 in taking steps to secure its own *Mareva* injunction is problematic, because a plaintiff's delay in seeking an equitable remedy may justify refusing the remedy. However, in the circumstances of the immediate case, Mrs. Sualim knew the claim was coming, and I do not see how her position has changed detrimentally by the delay in O2 Electronics seeking the *Mareva* injunction. She remains entitled to apply for

modifications to the Order for normal business and living expenses and for legal fees.

90 In my opinion, in all the circumstances of the case at bar, justice requires that the *Mareva* injunction be heard on its merits with both sides having an opportunity to answer the other's allegations. I, therefore, would not dissolve the *Mareva* injunction on the grounds of delay and want of notice in seeking injunctive relief.

3. Issue Estoppel

91 Although this motion was not argued as a matter of issue estoppel or abuse of process, O2 Electronics' argument hinted at this prospect, and there is merit to this argument.

92 In other words, in the context of Mr. Massa's contested motion for a *Mareva* injunction, both the privies of Mr. Massa and Mrs. Sualim have already had their day in court about the merits of granting a *Mareva* injunction. The idea behind privity is that a participant in a later proceeding should be bound by the determination in an earlier proceeding because of his or her relationship, called privity, with a party in that prior proceeding. Privity, which is not a precise concept, can be established by blood (heirs and successors), title or community of interest. More generally, privity is established if there is a sufficient degree of identification between persons such that it would be just to conclude that the decision in a proceeding in which one of them is a party should be binding on the other person in other proceedings in which the other is a party.

93 See: *EnerNorth Industries Inc., Re* (2009), 96 O.R. (3d) 1 (Ont. C.A.) at para. 62; *Bank of Montreal v. Mitchell*, [1997] O.J. No. 602 (Ont. Gen. Div. [Commercial List]), aff'd. [1997] O.J. No. 2848 (Ont. C.A.); *Bank of Montreal v. Tassone*, [1998] O.J. No. 4040 (Ont. Gen. Div.) at para. 6, aff'd. [1999] O.J. No. 1935 (Ont. C.A.); *Banque nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce*, [2001] O.J. No. 53 (Ont. C.A.); *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Ont. Gen. Div.), aff'd. (1997), 32 O.R. (3d) 651 (Ont. C.A.).

94 In my opinion, apart from the particular matters of whether full and fair disclosure was made and the matters of delay and proceeding without notice, discussed above, there are issue estoppels binding on Mrs. Sualim in the immediate case that each of the criteria for a *Mareva* injunction have been satisfied. These issue estoppels will become final should leave to appeal not be granted by Justice Lederer.

4. The Merits of the Request for a Mareva Injunction

95 In any event, putting aside whether there are any issue estoppels and treating the matter as a case of first instance, in my opinion, the criteria for a *Mareva* injunction are satisfied in the case at bar.

96 On a motion to continue a *Mareva* injunction obtained without notice, the plaintiff has the burden of satisfying the court that the order should stand: *Vannatto Estate v. Smith*, [1999] O.J. No. 2264 (Ont. S.C.J.) at para. 8.

97 In the immediate case, there is a serious issue for trial that O2 Electronics has been defrauded, and there is sufficient evidence to establish that there may be a disposition of assets by the Defendants to avoid judgment. There is irreparable harm if the injunction is not granted, and the balance of convenience favours granting the injunction, which can be adjusted to allow the Defendants access to their assets for living expenses and legal fees.

98 The prospect of a dissipation of assets may be inferred from the nature of the fraudulent activity, which involved moving money around the world. See *663309 Ontario Inc. v. Bauman*, [2000] O.J. No. 2674 (Ont. S.C.J.) at paras. 41-42, aff'd. [2001] O.J. No. 1213 (Ont. Div. Ct.), where the possible inference was recognized but not drawn. It also can be inferred from the suspicious movement of money disclosed by the FINTRACT disclosures, which, once again, manifested the movement of funds around the world.

99 I appreciate that the recent dispositions of property may have nothing to do with dissipating assets but rather have been for the purposes of raising money for Mr. Sualim's legal and living expenses in Arizona pending his criminal trial, but there is sufficient other evidence to infer a risk of disposition.

100 I appreciate that the evidence identifying Mr. Sualim as the mastermind of the fraud is circumstantial, but at the moment, what may be just a coincidence of Mr. Sualim's connection to an email address and suspicious movement of money through their bank accounts go unexplained by the Sualims. This omission of an explanation is particularly notable for Mrs. Sualim who is not facing criminal charges in the United States and who is protected in Canada by the right against self-incrimination.

101 The disclosure by Mr. Carmili of the information from the FBI sources breaches no law, and all that can be said against it is that it is hearsay evidence, but hearsay evidence is admissible on interlocutory motions in Ontario provided that the deponent indicates the sources of his or her information and belief.

102 I express no opinion as to whether the RCMP ought not to have disclosed the FINTRACT information, but the proceeding now before the court is a civil proceeding, and I am not aware of any principle apart from abuse of process that might justify excluding relevant evidence on an interlocutory motion in this civil proceeding.

103 In short, even granting that there is weakness in the evidence identifying the Defendants as the perpetrators of the fraud or as financial recipients of the proceeds of the fraud, there is a good case for a *Mareva* injunction in the circumstances of this case.

5. Security and the Terms of the Mareva Injunction

104 O2 Electronics has given the normal undertaking as to damages, but Mrs. Sualim submits that there is no substance to the undertaking. Where there is evidence that the undertaking as to damages is insufficient, the court may require that the undertaking be supported by security: *Time/System International A/S v. Custom Planner Inc.*, [1986] O.J. No. 3049 (Ont. H.C.) at paras. 35-36; *Van Wagner Communications Co., Canada v. Penex Metropolis Ltd.*, [2008] O.J. No. 190 (Ont. S.C.J.) at paras. 72-74.

105 However, there is no evidence that O2 Electronics is insolvent or without financial means, and I was told that it continues to carry on business. It may have the financial substance to stand behind its undertaking. That said, O2 Electronics is both a corporation and not a resident of Ontario, which in the normal course would expose it to having to post security for costs under rule 56.01. Thus, it is likely that O2 Electronics will be obliged to post security for costs.

106 However, I am unable based on the current record to determine a motion for security for costs, and I am unable to determine the merits of Mrs. Sualim's objection to the undertaking and, in any event, it is a matter of judicial discretion whether a plaintiff must post security to support its undertaking as to damages.

107 In my opinion, the matter of whether any security should be posted and the amount of the security, if any, should be resolved in the context of a rule 56.01 motion. Under that rule, Mrs. Sualim and the other Defendants can seek an order for security for costs against O2 Electronics on a variety of grounds. The matter of whether security should be posted should and can be better resolved in the context of rule 56.01. Therefore, without prejudice to a motion under rule 56.01, I would not exercise the court's discretion to require O2 Electronics to post security for its undertaking as to damages.

108 In the particular circumstances of the case at bar, I would, however impose a term on the granting of a *Mareva* injunction. The *Mareva* injunction shall continue until further order of the court unless: (a) O2 Electronics files proof that it is a corporation in good standing; and (b) O2 Electronics files proof that these Reasons for Decision have been served on the trustee in bankruptcy of Mr. Carmili.

109 I impose this term for two reasons. First, the current status is that technically O2 Electronics does not have status to be a party, being a dissolved corporation. This must be rectified for its action to go forward.

110 Second, it may be that Mr. Carmili's trustee in bankruptcy may have some interest in the action now before the court either because it manages O2 Electronics or because Mr. Carmili may have a claim that is an asset of his estate in bankruptcy. Therefore, a copy of these Reasons for Decision should be served on the trustee, who may take steps as it may be advised.

D. Conclusion

111 Therefore, the *Mareva* injunction in the case at bar should continue until trial or until further order of this court.

112 Mrs. Sualim and the other Defendants are at liberty to apply for a modification of the Order to allow the Defendants to operate their business in the normal course and to maintain their normal standard of living, including the payment of ordinary living expenses and reasonable legal expenses to defend the lawsuit.

113 Although I am not seized of this matter, if the parties cannot agree about a modification of the Order, I am prepared to hear a motion to settle any modifications to the Order within 30 days of the release of these Reasons for Decision.

114 If the parties are unable to agree about costs, they may make submissions in writing beginning with O2 Electronics within 20 days of the release of these Reasons for Decision followed by Mrs. Sualim's submissions within a further 20 days.

Order accordingly.