

SUPREME COURT OF NOVA SCOTIA

Citation: IFORM Works Inc. v. Maynard Holdings Limited, 2022 NSSC 210

Date: 20220720

Docket: Hfx No. 514986

Registry: Halifax

Between:

IFORM Works Inc.

Plaintiff

v.

Maynard Holdings Limited

Defendant

Decision

Judge: The Honourable Justice Peter Rosinski

Heard: July 13, 2022, in Halifax, Nova Scotia

Counsel: Colin D. Piercey, for the Plaintiff
Gavin Giles, QC, for the Defendant

By the Court:

Introduction

[1] **Maynard** is presently continuing to build a multi-unit residential complex (“MR Apartments”) which it expects to complete in **mid-September 2022**.

[2] To complete construction, Maynard continues to use a crane and equipment [“the Crane” and “the Roberts Street Equipment”] which **Optimo** Group Inc. likely owned and sold to **IFORM** Works Inc. in **February 2022**, subject to Maynard’s security interest in the onsite **Crane (Potain MD365)** pursuant to a promissory note given by Optimo to Maynard. Maynard has not permitted Optimo/IFORM to retrieve the Crane or the Roberts Street Equipment from its site.

[3] Maynard continued to use the Crane and equipment after **mid-January 2022**, when it purported to terminate the “contract” between itself and Optimo (Exhibit 3 herein - dated January 7, 2021 - but I accept that termination notice was sent on January 13, 2022, being a letter from Maynard principal, Anthony Daniel, to Mr. Hamid Nikkhah).

[4] Thereafter, it also barred, Mr. Nikkhah, the principal of Optima (and anyone else on its behalf) from entering the property (Exhibit “B” to Jean Alphonse

affidavit - letter of January 4, 2022, from Anthony Daniel to Mr. Nikkhah barring him from attending the work site “for any reason” thereafter).

[5] Since termination of the Maynard/Optimo contract by Maynard, Maynard has not had the agreement of either Optimo or IFORM to permit Maynard use of either the Crane or any of Optimo’s Roberts Street Equipment. Maynard did not suggest that it owned the Roberts Street Equipment, nor does it have identified any security interest it might have therein. The promissory note is secured only by the Crane.

[6] IFORM has demanded that Maynard release to it, the Crane and all the equipment which Optimo owned and was on the MR Apartments project site at the time of the purported termination of their agreement in mid-January 2022.

[7] IFORM argues that Maynard has not been entitled to use the Crane since it terminated its contract with Optimo (noting that the “contract” is Exhibit “C” to the Nikkhah affidavit and it represents the entirety of the agreement between Maynard and Optimo).

[8] It says that *after* Maynard terminated the contract with Optimo for the Crane and the Roberts Street Equipment, IFORM purchased those assets, in relation to

which only the Crane was encumbered to the extent of the promissory note, which debt IFORM has always intended and offered to pay off.

[9] Maynard has refused to release either the Crane or the Roberts Street Equipment to Optimo or IFORM.

[10] I am satisfied that IFORM/Optimo only formally concluded their agreement of purchase and sale for all of Optimo's (and Civil Tech's) assets *after* Maynard terminated its contract with Optimo.

[11] IFORM has made a motion to this Court:

1. to have the Roberts Street Equipment forthwith returned to it;
2. to have Maynard cease use of the Crane; and
3. to be forthwith advised of what amount is outstanding on Maynard's security interest in the Crane so that IFORM can pay out the amount and claim unencumbered ownership of the Crane.

Maynard's position in brief

[12] Maynard considers itself effectively the owner of the Crane because: it partially financed Optimo's purchase of the Crane, and consequently still has a security interest therein; and it is also suing Optimo in relation to their agreement

(in a separate proceeding). Maynard acknowledged that since terminating the contract between itself and Optimo in January 2022 (the contract had no express termination clause, or completion date clause), it has not been paying rent or any monies otherwise for the use of the Crane or the Roberts Street Equipment to Optimo or IFORM.

[13] However, Jean Alphonse on its behalf, testified that in his view “[Maynard has already] paid for the Crane” because it advanced monies to Optimo to assist it with its cash flow difficulties in relation to the project, which monies he says remain due and owing to Maynard.

[14] I note that none of those monies are due and owing under the loan/promissory note, and that they are therefore not secured by the Crane (or the Roberts Street Equipment).¹

[15] Maynard also claims Optimo was, and remains in default on the promissory note. However, the meagre express provisions in the note show it has no end date for payment, and no stipulation requiring payments to be made on a schedule, nor does it expressly support Maynard’s claim to possession of the Crane, or to use the Crane.

¹ The loan term and conditions (Schedule “A” to promissory note – Exhibit “F” Saberi May 19, 2022 affidavit).

[16] In cross-examination, Mr. Alphonse contended that Maynard “has no business relationship with IFORM”, therefore, in spite of its knowledge of IFORM’s purchase of Optimo’s assets, Maynard has no obligations to IFORM.

IFORM’s position in brief

[17] According to Navid Saberi, principal of IFORM, in his May 19, 2022, affidavit:

“In or about February 2022, IFORM completed the purchase of the assets of Optimo and Civil Tech [a related company] for the total sum of \$655,000... [which] was paid in three instalments, with the final instalment being paid in or about February 23, 2022... On February 1, 2022, Optimo executed a conveyance whereby Optimo conveyed a portion of the equipment to IFORM . A copy of the Optimo conveyance is attached as Exhibit “D” “

[18] In that exhibit, the “General Conveyance” recitals include:

Whereas [IFORM] has agreed to purchase and [Optimo] has agreed to sell a certain tower cranes and form work equipment, being the assets described in Schedule “A “herein, and known as the “Tower Cranes”, pursuant to an Agreement made as of **November 22, 2021...**

[19] Schedule “A” includes, *inter alia*:

Tower Crane Potain MDT 187
Tower Crane Potain MD 365
Peri skydeck slab form
Peri skytable slab flyer
Peri Trio wall form
Dora form
Column form
Wall forms

Stair forms
Concrete Buckets 5
Tools
... [etc.]

What IFORM wants the court to order

[20] IFORM seeks interlocutory relief from this court as against Maynard.

[21] Specifically, it argues (submission of June 2, 2022):

“We are counsel for IFORM Works Inc. (“**IFORM**”), the Plaintiff in the above noted matter.

IFORM brings this motion for relief in respect of certain construction equipment and materials belonging to IFORM which is currently in the possession of the Defendant, Maynard Holdings Limited (“**Maynard**”). The equipment and materials which are the subject of this motion can be divided up into the “Crane” and the “Roberts Street Equipment”, as those terms are defined below. IFORM seeks different relief in respect of each.

With respect to the Roberts Street Equipment, IFORM seeks a Temporary Recovery Order pursuant to Nova Scotia Civil Procedure Rule 43 compelling the return of that equipment, as well as directions on the enforcement of the Temporary Recovery Order to ensure its safe retrieval.

In the event that this Honourable Court is not prepared to immediately grant a Temporary Recovery Order (or the enforcement of that Order is in any way postponed) IFORM is seeking an immediate Order for Inspection of the Roberts Street Equipment under Rule 17.05, and a Preservation Order over the Roberts Street Equipment under Rule 42.

IFORM also seeks an Order for an immediate inspection of the Crane under Rule 17.05, as well as a Preservation Order over the Crane under Rule 42.

With respect to the Crane, IFORM also seeks certain relief under the *Personal Property Security Act*, S.N.S. 1995-1995, c. 13 (the “*PPSA*”). The Crane is owned by IFORM. IFORM acknowledges that that the Crane is the subject of a security agreement signed by the former owner of the Crane. A registration statement has been registered by Maynard under the *PPSA*. Accordingly, Maynard claims a security interest in the Crane and entitlement to retain possession of the Crane on that basis pending satisfaction of its outstanding loan. However, there is considerable disagreement between the parties as to the proper amount outstanding on the loan. Therefore, IFORM seeks an Order:

1. Requiring Maynard to comply with a demand made under section 19 of the *PPSA*, and to provide a full and complete accounting under oath of the debt secured by the Crane, per its obligations under paragraph 19(3)(b) of the *PPSA*;
2. Setting a hearing date in chambers, as soon as possible after that full and complete accounting is provided for the Court to rule on the accuracy of the accounting provided by Maynard and determine the amount of the debt secured by the Crane; and
3. Requiring Maynard to cease its unlawful use of the Crane in its construction work, pursuant to subsections 18(4) and 64(2) of the *PPSA*.

In [the] event, this Honourable Court is not prepared to grant an immediate Order restraining the use of the Crane, pending resolution of the dispute regarding the Crane, IFORM is seeking an order requiring Maynard to provide proof of insurance, proof of maintenance, and proof that the Crane is safely secured, and regular daily reports on the use of the Crane.

It is IFORM's position that Maynard does not hold any form of security over the Roberts Street Equipment, and that therefore, it is not subject to the *PPSA*. If, however, this Honourable Court should be satisfied that the Roberts Street Equipment could be subject to the *PPSA*, then IFORM seeks the same relief in respect of the Crane referred to above for the Roberts Street Equipment.

In sum, IFORM seeks:

- **In respect of the Roberts Street Equipment:** A Temporary Recovery Order under Rule 43; or, if this Order is not immediately granted, a Preservation Order under Rule 42, an Order for inspection under Rule 17.05, and, in the event that Maynard may have security over the Roberts Street Equipment, the aforementioned relief under the *PPSA*; and
- **In respect of the Crane:** A Preservation Order under Rule 42, an Order for inspection under Rule 17.05, the aforementioned relief under the *PPSA*.

Maynard has unlawfully used, and in the case of the other Roberts Street Equipment, both unlawfully used and unlawfully retained, IFORM's personal property, and IFORM suffers daily losses as a result. The relief that it seeks in this motion is both urgent and necessary."

My conclusions regarding the orders sought by IFORM

[22] I am satisfied that IFORM is entitled to the following relief:

1. a Temporary Recovery Order under Rule 43 in respect of the "Roberts Street Equipment".²

² Mr. Alphonse conceded in cross-examination that Maynard does not consider the Roberts Street Equipment was ever "security" for the loan to Optimo to purchase the Crane.

2. this will be coincident with each of:
 - a. *PPSA* orders in relation to only the Crane pursuant to sections 18, 19, and 64; and,
 - b. the execution of a Preservation Order under Rule 42 regarding the Crane, in conjunction with an Inspection Order under Rule 17.05, to permit a proper itemization of both the contents of Optimo's/IFORM's assets collectively referred to as the "Roberts Street Equipment" *and* to permit an examination of the Crane, its condition and that of any of its associated equipment.³

³ While Maynard argued that the Equipment has not been sufficiently identified, so as to allow seizure of it by a party such as the Sheriff, I find this a hollow reasoning since that Equipment was not security and therefore there was no need previously to itemize the contents thereof; moreover Maynard has refused representatives of either Optimo or IFORM to attend and catalogue what is likely their property as included within the reference: "Roberts Street Equipment". I note Mr. Saberi, in his May 19, 2022, affidavit estimated the value thereof at para. 52 as \$75,000. The contents thereof are notionally set out in Exhibit "D" of Mr. Saberi's May 19, 2022, affidavit and in Schedule "A" to the General Conveyance between Optimo and IFORM. Mr. Saberi in his May 19, 2022, affidavit at para. 37 swears that he is advised by Mr. Nikkiah that the Roberts Street Equipment includes the equipment listed at Exhibit "I". Therein, IFORM claims it owns 10,000 ft.² of Peri Skydeck slab forms. This is, in contrast to the inventory relied on by Mr. Alphonse/Maynard, which was created by Dash Pinero on June 4, 2022 an ex-employee of Optimo/Civil Tech who was still present on the site working with Maynard. He concluded in writing at Exhibit "A" to Mr. Saberi's July 5, 2022, affidavit that only 4677 ft.² "was brought on site. There was never a need or space for 10,000 ft.² of panels." At the time he was working for Maynard, and he has not filed an affidavit. All I have is hearsay of his written listing, which purports to reflect the untested evidence he could give. I am inclined to give this second-hand evidence little weight. Notably, at paragraph 57 of his May 27, 2022, affidavit Mr. Saberi stated: "The Roberts Street Equipment includes a great deal of concrete formwork... has the potential to depreciate in value very rapidly... typically only be used a limited number of times before need substantial repair... I do believe that Maynard is using IFORM's concrete formwork in its construction activities at the property. This will cause IFORM's concrete formwork to degrade rapidly." Among other reasons, this is an example of why I have ordered an Inspection Order as well as the other relief outlined herein.

3. an immediate declaration that the debt outstanding and owing by Optimo/IFORM under the promissory note based on the evidence presented at the motion, is provisionally fixed at \$266,106.52 as of March 16, 2022, and attracting 4% interest per annum thereafter until the date of payment;⁴
4. that immediately upon payment of the outstanding amount by way of certified check from IFORM to Maynard, or by way of other manner of payment acceptable to Maynard, only if also agreed to by IFORM, a conditionally ordered Temporary Recovery Order under Rule 43 in respect of the Crane; and I direct cooperation from Maynard in relation to documentation required to effect those changes such that: the previous registration thereof under the *Personal Property Security Act* is forthwith corrected to reflect the payment in full of the outstanding amounts associated with the promissory note, and all other necessary ancillary processes.

[23] I remain open to IFORM suggesting slightly modified language in the Order(s) to issue.

⁴ The terms of the promissory note at Exhibit "F" to Mr. Saberi May 19, 2022, affidavit include: "This Note may be paid in whole or in part at any time without bonus or penalty and without prior written notice."

Background

[24] I had before me the affidavits of Hamid Nikkhah, Navid Saberi and Jean Alphonse. Each of them were cross-examined thereon, and three exhibits were added to the record. Generally speaking, I found each of them credible.

[25] Where their evidence differs, I do not ascribe the differences to purposeful dishonesty, but rather reliability concerns, and have concluded that I prefer the evidence of Mr. Saberi, then next Mr. Alphonse, and lastly that of Mr. Nikkhah.

[26] Civil Tech, (a company related to Optimo) and Optimo are construction companies operating in and around Halifax Nova Scotia, whose driving force has been Hamid Nikkhah. He has a civil engineering background.

[27] For convenience, I will refer to Optimo as if it were the only relevant company of Mr. Nikkhah in the circumstances.

[28] Its focus within the construction industry involves the execution of foundation and 'superstructure' work, i.e. formwork for footings, vertical element in concrete slabs. In furtherance of this work, Optimo also supplies and utilizes construction cranes, concrete formwork and ancillary materials, all for the construction of concrete structures from multi-unit residential buildings.

[29] Maynard hired Optimo to complete some of the construction work on its Roberts Street, Halifax, “MR Apartments” project.

[30] The only written reference to their agreement, and what might be considered a “contract” signed August 27, 2020, required that Civil Tech provide the labour and materials for the work and in return it would receive \$1.425 million plus HST.⁵

[31] In Mr. Nikkhah’s accompanying letter to a Maynard principal, it states:

“Civil Tech Constructions Ltd. is pleased to present this enclosed quote for your review. We would like to offer our services for execution of foundation and structure of Maynard project for the amount of [amended by handwriting to \$1,425,000 Canadian plus tax]. In advanced payment equal to 10% of the contract value shall be made upon signing the contract. Payment shall be made every two weeks.”

[32] The following headings are included in the documentation: scope of work; scope of supply; bill of quantity; final price.

[33] Under “scope of supply” only the following is included:

- we will supply form, tools and equipment to complete our scope of work including Crane,
- supply of concrete and steel rebar is others responsibility,

⁵ Exhibit “C” to Mr. Nikkhah’s affidavit sets out this document.

- the provision of sufficient lighting is the owner's responsibility,
- lighting and access way to the job site is owner's responsibility.

[34] Notably, there is no listing of what equipment specifically will be used, nor is any description of what kind of crane referenced.

[35] There is no further written documentation that provided any more detail than the meagre descriptions therein – which were signed by Mr. Nikkhah and Mr. Alphonse on or about August 27, 2020. Mr. Nikkhah testified that he had anticipated receiving a formal CDCC compliant contract, but one was never presented, and hence both parties operated on the basis that the August 27, 2020, documentation constituted the entire written contract between Maynard and Optimo.

[36] Optimo worked for approximately 16 months and received just less than \$950,000 for the work to date.

[37] Jean Alphonse has “since early 2020 been consistently engaged on behalf of Maynard in the conception, design, development and construction of a residential apartment building at civic number 5665 Roberts St., Halifax, NS [“MR Apartments”].”

[38] Maynard advanced money to Optimo to continue the work, as it appeared Optimo was having cash flow issues. Mr. Alphonse was of the view that by December 2021, Optimo should have been substantially finished with the work, but had only completed 50% of it.

[39] In a December 21, 2021, letter to Maynard, Mr. Nikkhah stated in part:

Sequel to our meeting earlier, Optimo group Inc./ IFORM Works Inc. management has given due consideration to the existing situation. Let us first assure you, our commitment to do this work wholeheartedly... We, after a lot of considerations, can propose two options moving forward with your project at Maynard Street...:

Option No. 1

Consent to the assignment and amendment of the existing contract in place with Optimo Group Inc., namely Maynard Holdings dated August 27, 2020. With the assignment and amendment being in favour of IFORM Works Inc. and the revised price being an additional amount of \$335,000 to be paid in addition to the initial contract price of \$1.425 million. If this option is chosen, the assignment and amendment will provide that IFORM Works Inc. shall commence work on the job upon assignment being signed and delivered and will proceed with in a good and workmanlike manner to finish the job by end of February 2022, weather permitting and further provided all the prerequisite work is completed. ...

Option No. 2

Optimo Group Inc. will continue to work at Maynard... till the commencement of December 2021 holidays. Thereafter, work will proceed based on the existing contract amount... subject to temporary or longer work stoppages until Optimo Group Inc. is able to outsource fundraising and obtain funds or financing in the amount of \$335,000, which funds will be able required to enable Optimo Group Inc. to finish [the] job.

As discussed, your urgent attention and communication about the option to be chosen is required as the December 2021 holidays starting December 24, 2021. In the event the Option 1 is chosen on or after December 24, 2021, then IFORM Works Inc. reserves the right to increase the additional amount to be charged to reflect increases in the cost of labour and materials required to finish the job.

[40] Maynard's response was to reject both the assignment to IFORM of the agreement between Optimo and Maynard with respect to the work on the MR Apartments project, and that the stipulated price increase by \$335,000. Maynard also rejected the suggestion by Optimo, that it would not return to work at the MR Apartments site until it secured new financing.

[41] On January 5, 2022, Maynard received a letter which, although it is titled as being from Optimo, appeared to have been sent on behalf of both Optimo and IFORM.

[42] Optimo clarified that:

... Let us be clear, we do not have any legal contract between the companies, and it is just a mere proposal signed, we are still waiting for a contract from you with a proper instrument of judgement like schedule, time, and financial layout. We already have suffered a lot of delays from your end in the shape of unavailability of site, thereby causing us a lot of hold time which never claimed so far. We are just asking you to consider the amount which has occurred due to slippage of time at your end due to nonavailability of site, and Covid 19, not just the reason but one of the reasons... Going forward we have the right to enter the job site as per our proposal acceptance and if you want to walk away from these proposals, which you accepted and allowed us to work leading towards formal contract it will have implications for you, we have the right to claim holding charges, rental charges, loss of business opportunity and likewise towards your end.

[43] In simple terms, IFORM was prepared to continue the project to completion with what had been Optimo's crane and equipment for a further \$335,000.

[44] Mr. Alphonse on behalf of Maynard rejected the demands of Optimo.

[45] He reiterated that Optimo was required to complete the project for the lump-sum price of \$1.425 million [“no extras”] and that it should provide a timely schedule by which it would commit to the completion of the work within a defined and reasonable period of time.

[46] By mid-January 2022, the relationship between Optimo and Maynard had irretrievably broken down.

[47] Since then, it is likely that Maynard has kept all the Roberts Street Equipment, and the Crane on the site of its MR Apartments project.⁶

[48] It has treated each as if it is entitled to have unrestricted possession and use thereof until it completes that project, which Mr. Alphonse estimates will be in the middle of September 2022.

Why I conclude the requested orders are appropriate here

[49] *PPSA* Orders (only applicable to the Crane):

1. an order immediately requiring Maynard to comply with a demand made pursuant to section 19 of the *Personal Property Security Act*, and to provide a full and complete accounting under oath of the debt

⁶ From the evidence it also became clear that there are legitimate concerns about whether Maynard has maintained any form of insurance on the Crane, which it has said it considers it has already paid for.

secured by the Crane, per its obligations under section 19(3)(b); and only if necessary,

2. confirming the amount of the debt outstanding and owing by Optimo/IFORM to Maynard after an expedited hearing date in chambers is set by the court; and
3. pursuant to subsections 18(4) and 64(2), of the *Personal Property Security Act*, an order directing Maynard immediately cease its use of the Crane in its construction work or in any other manner, without the express written agreement of IFORM.

[50] This debt arises from the promissory note and there is no dispute that the amount outstanding at March 16, 2022 is \$266,106.52, nor that it attracts 4% interest per annum.

[51] This is the only security interest as against the Crane. There is no evidence to support there being any security interest against the Roberts Street Equipment.

[52] It is in the interests of justice to make such order forthwith and consequently a declaration, as it would permit IFORM to pay off the promissory note thereby giving it an unencumbered likely ownership interest in the Crane.

[53] Maynard will be receiving the money it is owed. The promissory note provided for full payment of the outstanding debt *at any time*.

[54] It is also reasonable that Maynard be required to cooperate fully in facilitating the release of the security.

[55] I am well satisfied that IFORM fully intends to expeditiously pay off the security interest of Maynard.

[56] Once that security interest is released, Maynard likely will have no entitlement to possess or use the Crane beyond that point in time.

[57] To avoid any prejudice to IFORM arising from inherent delays in this process, it is also in the interests of justice to immediately order Maynard to cease its use of the Crane in its construction work or in any other manner, without the express agreement of IFORM.

[58] I conclude that it is *not* in the interests of justice, as an alternative to such a *PPSA* “cease and desist” order, a Preservation Order, or an Inspection Order, to require that Maynard provide proof of insurance, proof of maintenance, and proof that the Crane is safely secured, and regular daily reports on the use of the Crane, where, with a mere payment and release of the security interest, IFORM alone

likely will be the owner of the Crane, with no other party entitled to possession or use thereof.

2-a Preservation Order under Rule 42

[59] IFORM seeks such order in relation to the Roberts Street Equipment and the Crane as an alternative to a Temporary Recovery Order.

[60] As I am satisfied that the criteria for the issuance thereof, and that it is in the interests of justice to grant, a Temporary Recovery Order in relation to the Roberts Street Equipment, I need not go on to examine this alternative (which is in the nature of injunctive relief - *Korem v. Crown Jewel Resort Ranch Inc.*, 2011 NSCA 102) for the Equipment.⁷

[61] I am satisfied that CPR 42 and the injunctive relief prerequisites have been made out by IFORM in relation to the Crane - see *Google v. Equustek Solutions Inc.*, 2017 SCC 34; and *Korem*, supra.

⁷ While not materially significant to my decision, I accept that Maynard likely has a self-interest in *not* physically removing the assets in question from the site until that portion of the project is completed, but rather continuing to use them to complete construction on their MR Apartments project, which it estimates will be mid-September 2022.

[62] On an examination of the test for granting injunctive relief, and based on the evidence presented, I am satisfied that in relation to the Crane (bearing in mind the filed pleadings):

1 - There is a *serious issue* to be tried. IFORM's claims to ownership and possession of the Roberts Street Equipment and the Crane are not frivolous. Although on a limited record, I am satisfied that its claims are strong, namely that there is a *prima facie* case to this effect.

[63] I do so conclude, because Maynard has not presented any material evidence and basis why in law it is entitled to continued possession *and* use of the Roberts Street Equipment.

[64] Similarly, in relation to the Crane: It is undisputed that the Crane was bought by Optimo, that Maynard terminated its contract with them no later than mid-January 2022, and that IFORM purchased all of Optimo's assets including the Crane and the Roberts Street Equipment in early February 2022 and completed payment therefor by February 23, 2022.

[65] Other than because of its security interest therein - which could have entitled Maynard to possession of the Crane - I note neither of the terms of the promissory note ("the loan will be secured with a first charge on the Crane (Potain MD-365 SN 410563 year 2008)") nor the *PPSA* registration wording ("all present and after-acquired personal property that results from the sale, disposition or other

dealings with the collateral, described above or the proceeds therefrom including all additions, substitutions and replacements and amounts owing thereunder”) expressly entitle Maynard to continued possession thereof. Nor do they entitle Maynard to “use” the Crane, (see s. 18(4) *PPSA*). Maynard has not identified any other bases for its claim to use the Crane.

[66] I infer that, upon receipt of my order requiring Maynard to advise of the outstanding balance on the promissory note, IFORM will forthwith fully pay that amount, and thus likely be entitled to unencumbered possession of the Crane.

2 - Irreparable Harm

[67] Continuing to deprive IFORM of possession of the Crane, which it has owned since February 2022,⁸ until the outstanding debt on the promissory note is

⁸ Maynard (para. 74) has argued that “Optimo had sold all of its equipment and had transferred all of its personnel to IFORM and purported also to have assigned the Optimo/Maynard contract to IFORM, something not acceptable to Maynard. In that regard, Maynard refers to the provisions of section 43(5) of the *Judicature Act*, and that none of the factors set out therein with respect to a valid contractual assignment are found within the motion record – see also the decision of the Ontario Court of Appeal per Rosenberg JA *Simex Inc. v. IMAX Corporation*, (2005) 206 OAC 3. In *Simex*, the court stated: “50 There is no rule of law that prevents a party to a contract (here IMAX/Ridefilm) from assigning the rights or benefits of the contract to a third party (SimEx), while keeping the burdens. To the contrary, without the consent of the other party to the contract (here Midland/Robots), the ordinary rule is that the party (IMAX/Ridefilm) can only assign the benefits and will remain personally liable to the other party (Midland/Robots). See *Rodaro*, *supra* at paras. 33-4 and G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at 727.” In *Rodaro v. Royal Bank of Canada*, *supra*, Justice Doherty stated: “33 Aside from limitations imposed by statute, public policy or the terms of a specific contract, a party to an agreement may assign its rights, but not its obligations under that agreement, to a third party without the consent of the other party to the contract. A party will not, however, be allowed to assign its rights under a contract if that assignment increases the burden on the other party to the agreement, or if the agreement is based on confidences, skills or special personal characteristics such as to implicitly limit the agreement to the original parties: *Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd.*, [1902] 2 K.B. 660 (Eng. C.A.) at p. 668, *aff’d.*, [1903] A.C. 414 (U.K.

paid off, risks potential *irreparable* harm to IFORM, insofar as “ IFORM runs the risk of not being able to participate in many different construction projects which it otherwise may have been retained to work on. As a relatively new company, losing out on an opportunity such as this, particularly during a time where construction is very active, could be devastating to both [its] reputation and ability to obtain a foothold in the construction industry. Furthermore, given that the Crane is a regulated piece of the construction equipment, there is potential for IFORM to suffer irreparable harm in the event an accident of some nature was to occur with the Crane. This is particularly serious where IFORM, as an owner, has no control over the use and operation of the Crane, yet is nonetheless potentially subject to regulation as owner under the *Crane Operators Regulations* made under section 49 of the *Technical Safety Act*, SNS 2008 c. 10. These regulations, on their face, place certain obligations on the owners of cranes with respect to, among other things, the manner in which cranes must be maintained and operated... Without having access to the Crane, knowing how it is being operated, or even knowing whether it is insured, Maynard is potentially exposing IFORM to unlimited liability by denying

H.L.); *Tru-Wall Group Ltd. v. Stadium Corp. of Ontario Ltd.*, [1995] O.J. No. 2610 (Ont. Gen. Div. [Commercial List]) at paras. 10-14; and P.S. Atiyah, *The Law of Contract*, 4th ed. (Oxford: Clarendon Press, 1989) at pp. 378-79.” To be clear, there is nothing in the agreement between Optimo and Maynard regarding the transfer of the assets or any assignment of rights or obligations of the parties; moreover, I accept the evidence of Mr. Saberi, that in spite of not having available the agreement of purchase and sale of the assets of Optimo/Civil Tech to IFORM, the evidence establishes there was a transfer of title to the assets of Optimo/Civil Tech, not an assignment of contractual rights and/or obligations.

access to the Crane or any information regarding its use” (per pages 13-14, June 1, 2022, brief filed by IFORM);

3 - The balance of convenience favours IFORM.

[68] Maynard has had much time and notice to make alternative arrangements for a Crane and equipment. On this record, its position to refuse to let IFORM take back the Roberts Street Equipment is indefensible. This reality informs my view of Maynard’s conduct in relation to the Crane. I note IFORM offered to let Maynard rent the Crane as needed, but Maynard refused this interim solution.

[69] IFORM has met the onus.

4 - An Inspection Order under Rule 17.05

[70] This case calls out for such an order.

[71] I look to IFORM to create a draft order in a form likely acceptable to Maynard in accordance with the Rule. This order should be enforced at the convenience of IFORM with a reasonable period of written notice to Maynard, but it need not be any more than 48 hours, although it may be such longer period of time as expressly agreed to in writing by IFORM.

[72] It is likely, that IFORM will quickly pay out the security interest of Maynard, so that it will have an unencumbered ownership interest in the Crane.

[73] Mr. Nikkhah was last on site in February 2022 and has been refused entry since then.

[74] No one from Optimo or IFORM has since been permitted on site.

[75] It is in the interests of justice that IFORM have an immediate opportunity to have its representatives of choice, including expert persons, examine the condition of the Crane, and the Roberts Street Equipment, per expansive terms as contemplated by Rule 17.05 and 17.06.

4-a Temporary Recovery Order under Rule 43 (re only Roberts Street Equipment)

[76] Rule 43.01 reads:

(1) A temporary recovery order is available in limited circumstances, before a proceeding is heard and determined, to obtain possession of property claimed in the proceeding.

[77] IFORM seeks such order compelling the return of the Roberts Street Equipment, as well as directions on the enforcement thereof to ensure the safe retrieval of the assets (p. 10 of its June 1, 2022, brief).

[78] Rule 43.02 requires a motion supported by an affidavit and a bond of a recognized surety company or the party's own bond with, unless the prothonotary permits otherwise, two or more sureties, and must otherwise comply with CPR 43.04.

[79] I am satisfied IFORM's present intention regarding the proposed bond contained in its written briefs (including a payment into court in the amount of \$93,750 which is equivalent to 1 ¼ times the value of the Roberts Street Equipment), namely, providing its own bond in accordance with CPR 43.02(2)(b), is appropriate.

[80] Rule 43.03 requires an affidavit which "must provide reliable evidence of the value of the property and establish all of the following:

1. the party is entitled to possession of the property, the party who has possession of the property is not entitled to withhold possession from the party seeking the order, a demand for possession has been made, and the demand has been refused;
2. the party has retained a lawyer to advise the party about the motion and received advice about the party's entitlement to possession and the party's obligation under the bond.

[81] Thus, IFORM must establish through reliable evidence that:⁹

1. it is entitled to possession of the property;
2. Maynard has possession of the property and is not entitled to withhold possession from IFORM;
3. IFORM has made a demand for possession, and the demand has been refused;
4. IFORM has retained a lawyer to advise about the motion and received advice about its entitlement to possession and its obligations under the bond [I am confident that this prerequisite has been satisfied - see Justice Hamilton's reasons in *Brett v Superior Propane Inc.*, 2002 NSCA 111, regarding the non- compellability of counsel as a witness.]

[82] The property in question includes only the Roberts Street Equipment.¹⁰

⁹ Maynard argues that Justice Davison in *Barefoot* at paragraph 16, under the old CPR 48, intended to make it a requirement for replevin that only property that could be specifically identified (and valued) should be ordered recovered; and because there is no detailed and complete listing of Optimo's assets transferred to IFORM in evidence- there should be no such order. The Inspection Order should largely answer these concerns, as it will allow a refinement to the identification of Optimo's Roberts Street Equipment as shown in Exhibit "D" of the Nikkhah affidavit and the General Conveyance Schedule "A" to Exhibit "D" of the Saberi May 19, 2022 affidavit.

¹⁰ Although Mr. Saberi has estimated the value of the equipment to be \$75,000 in his affidavit at paragraph 53, I heard testimony from more than one witness about the scarcity of personnel and equipment, including Cranes, persisting since the full effect of Covid 19 set in after the Spring of 2020 and which effects continue to this day. I

[83] To what standard must IFORM “establish” these prerequisites?

[84] There is presently an action herein, in which IFORM ultimately seeks to establish on a balance of probabilities that Maynard has wrongfully detained and used the Crane and Equipment. Nominally, it relies upon the tort of conversion, unjust enrichment and *quantum meruit*.

[85] In relation to CPR 43 in general, I find Justice Gabriel’s reasons in *Raised Media Inc. v. Pleiades Robotics Inc.*, 2020 NSSC 326 to be helpful, although that was a situation of motions for summary judgement.

[86] Therein he stated:

8 To explain, “replevin” refers to a right possessed by someone claiming entitlement to ownership or possession of property (that is alleged to have been wrongfully taken or to have been otherwise wrongfully detained) to get it back before trial, upon providing proper security. When “replevin” is sought, the Court does not determine the right to ownership or possession as between the parties *inter se*. It merely determines who is to possess the chattel(s) and under what circumstances, pending the determination by the Court at trial as to ownership.

9 I observe that *Civil Procedure Rule* 43.01 provides:

43.01(1) A temporary recovery order is available in limited circumstances, before a proceeding is heard and determined, to obtain possession of property claimed in the proceeding.

appreciate that in spite of a nominal valuation of \$75,000 for the equipment, if it is not returned to IFORM, it may not be as easily obtained otherwise, if at all, and if so, it is arguable that in an environment of scarcity the equipment could be significantly more expensive than would otherwise be the case. Though I could infer this generally to be the case, I have precise evidence before me which went unchallenged, that the value was \$75,000, and no reliable evidence of “scarcity” regarding Maynard’s ability to obtain alternative equipment - thus it is appropriate to use that amount as the basis for the amount of the bond, or conversely, the payment of monies into court.

(2) A party may obtain temporary possession of property, in accordance with this Rule.

10 This would appear to substantively codify the relief which would have been provided by the common law concept of replevin. It would also appear to relegate it to an interlocutory motion pending a determination on the merits of the case in which it has arisen. As a result, it would not have been possible to grant "summary judgment" to the Plaintiff with respect to a replevin claim, in any event.

[87] Specifically in relation to what standard IFORM must "establish" the evidence in support of its motion(s), I find substantial value in Justice Davison's decision, albeit under the old Rule CPR 48, as set out at paragraphs 16-17, in *Barefoot v. Paranet Services Inc.*, (2000) 182 NSR (2d) 117.

[88] In *Barefoot*, (affirmed 2000 NSCA 75, per Bateman, JA) Justice Davison used the following language:

16 During the submissions of counsel for the applicant, there were continual references to the rights of the parties under the contract. Those are matters to be determined at trial. The remedies available under *Civil Procedure Rule* 48 relate to a specific identified piece of property and the Rule incorporates the law of replevin. **The plaintiff only had to show on a prima facie basis that he was entitled to possession of the property in order to be entitled to a recovery order.**

17 In *Businex Business Centres (Canada) Inc. v. TR Services Ltd.* (1992), 17 C.P.C. (3d) 313 (Ont. Gen. Div.), Justice Dunn of the Ontario Court of Justice (General Division) referred to the scope of inquiry of an inquiry under similar rules in Ontario as follows:

The determination of the merits of this action is not within the scope of my inquiry on this motion. While the plaintiff's claim may indeed have merit it is not for me to decide. The law is clear on the scope of the inquiry of R. 44, similar to that of R. 359 which is no longer in force. it is set out in *Ryder Truck Rental Ltd. v. Walker* (1959), [1960] O.W.N. 70 (H.C.) affirmed [1960] O.W.N. 114 (H.C.) at p. 71:

The first matter for consideration is the scope of the enquiry under Rules 359-60. Having regard to the nature of the relief obtainable in a replevin action, which allows a preliminary taking of possession before trial, in my view **it is not contemplated that the Court at this stage should embark upon a trial**

of the issues raised but only require the plaintiff to show the facts upon which it bases its claim, and if these facts afford substantial grounds for the plaintiff's claim, then the order should be granted. This is consistent with *Gilchrist v. Conger* (1854), 11 U.C.Q.B. 197, where it was held on an application to set aside a *praecipe* order that the question of whether the defendant did in fact either take or detain the goods must be left to be ascertained upon the trial as that involved the merits of the case. Therefore, in my opinion the enquiry is limited to determining whether there are substantial grounds for the plaintiff's allegations, which if proved, bring the case within the statute.

[My bolding added]

[89] IFORM must therefore “only show a substantial ground for [its] claim” or as otherwise stated by Justice Davison, a “prima facie basis that [it] is entitled to possession”.

[90] As will be otherwise evident from my reasons herein, I am satisfied that IFORM has established these grounds for possession of the Roberts Street Equipment, and it is prepared to satisfy the other prerequisites of Rule 43.

[91] I would therefore be prepared to make such Order; I remain open to IFORM suggesting language that is suitable to effect the expeditious and orderly recovery of the Roberts Street Equipment.

[92] Before I conclude all of the above-noted remedies I have approved of as appropriate, I will address Maynard's position that IFORM/Optimo do not come to

this court with “clean hands” and therefore they should be disentitled to some or all the relief requested by IFORM.

[93] Does the “clean hands” doctrine apply, and does it operate against IFORM’s requested orders? It does not.

[94] Maynard states its position in its brief:

... As regards the ‘equities of the situation’, a not unreasonable inference is that IFORM engaged in an end run regarding Maynard’s contractual right, and then dictated to Maynard that the completion of the contract would only be available in the event of a huge uptick in the agreed-upon lump-sum price... When Maynard demurred to IFORM’s dictatorial approach, IFORM’s reaction was to demand “it’s” equipment back. Such an approach is in complete disregard of Maynard’s rights, not to mention its natural and reasonable expectations, that it will get to complete the work [in] something of a timely fashion. It is IFORM which has put itself in its current position, but now nevertheless seeks the exercise of this Honourable Court’s jurisdiction on its equity side. But trite law is that equity will not assist of volunteer.

...

For the reasons stated above, even if IFORM’s entitlement to the impugned equipment was provable to the extent necessary to found a Recovery Order, IFORM’s record has not been clean. This is because it purports to have purchased equipment which it knew would have been intended by Maynard for use over an extended period, was quite content to respect that extended period, but only got its back up and demanded the return of the impugned equipment when Maynard demurred to usurious demand for another \$335,000.

[95] The evidence presented establishes that Optimo/Civil Tech were experiencing cash flow problems after they began to use their Crane and Equipment to work on Maynard's project site.¹¹

[96] Optimo approached Maynard to see if their agreement could be modified to address these issues. Maynard refused.

[97] Optimo began to have discussions with IFORM, and considered multiple solutions to its cash flow problems.¹²

[98] I accept the evidence of Mr. Saberi that he had verbally advised Mr. Alphonse in mid-December 2021 at a meeting:

that IFORM would be willing to take an assignment of the Maynard Contract... from Optimo for the original contract price of \$1.425 million plus an additional amount of \$335,000. IFORM was only willing to take an assignment of the Maynard Contract under this precondition, given that there would have been significant costs beyond the original contract price associated with the assumption of responsibilities under the Maynard Contract, and the additional monies would have been necessary for completion of the project.

Mr. Alphonse refused this offer on behalf of Maynard at the mid to late December meeting... At no time thereafter did IFORM take an assignment of the Maynard Contract,

¹¹ Mr. Nikkhah on behalf of Optimo gave evidence that delays were occasioned because of Maynard's lack of preparedness etc. in relation to the site. Mr. Alphonse attributed Optimo's problems to their "incapacity" which was evident early on (para. 29).

¹² Mr. Alphonse agreed that in mid-December 2021 he met Mr. Saberi and Mr. Nikkhah, and he "thought, that he and Mr. Saberi were joining forces in poured concrete structural framing and in the precast concrete contracting businesses, and that going forward, they would effectively be acting as partners."

either at this meeting or any time thereafter.... Approximately one month after... in or about mid-January 2022, Mr. Nikkhah advised me, and I believed, that Maynard had purported to terminate the Maynard Contract with Optimo. It was only after learning of the purported termination of the Maynard Contract that IFORM's purchase of the Roberts Street Equipment was finalized in or about February 2022."

[99] Firstly, the "clean hands" doctrine should only apply to instances where a party (Maynard) has come to the court seeking equity "with clean hands" – see e.g., *Nagel's Debt Review Inc. v. Mosiuk*, 2019 SKCA 16.

[100] Maynard may also be criticized for having, after it terminated its contract with Optimo in January 2022, made a unilateral decision to detain the Roberts Street Equipment at its site without any persuasive legal basis to do so. Moreover, it did not make rental payments to Optimo, or give an accounting of how much of the money Maynard had calculated was owing by Optimo, would be reduced by Maynard's continued use of the Roberts Street Equipment.

[101] While Maynard may have through its security interest had some basis to claim possession of the Crane, it certainly had no basis to use the Roberts Street Equipment - Mr. Alphonse conceded this in cross-examination.

[102] As IFORM's counsel put it: Maynard is resorting to a self-help remedy effectively executing on the assets of IFORM (by its possession and use of the Roberts Street Equipment, and by its *use* of the Crane) before a judgement is rendered.

[103] Secondly, the argument that IFORM has not acted with “clean hands” is not substantiated on the evidence herein.

[104] Lastly, while a Preservation Order, being a form of injunctive relief may be seen to be an “equitable” creation by the court, the same cannot be said of a Temporary Recovery Order, which I am granting in relation to the Roberts Street Equipment.

[105] Generally, I find the argument that the equities should play a role herein as not persuasive.

Conclusion

[106] I therefore confirm the Orders that I have earlier identified herein - all to be forthwith enforced as I stipulated.

[107] I will receive written costs submissions (10 pages maximum) if the parties cannot agree, within 20 days from the release of this decision.

Rosinski, J.