

SUPREME COURT OF NOVA SCOTIA

Citation: *Brae Transport Limited v. Logan*, 2022 NSSC 214

Date: 20220726

Docket: No. 515237

Registry: Halifax

Between:

Brae Transport Limited

Applicant

v.

Edwin W. Logan

Respondent

Judge: The Honourable Justice Gail L. Gatchalian

Heard: July 25, 2022, in Halifax, Nova Scotia

Counsel: Tim Hill, Q.C., for the Applicant
Heather Wyse, for the Respondent

By the Court:

Introduction

[1] This is a motion by the Respondent, Edwin W. Logan, to discharge an interim Mareva injunction granted *ex parte* to the Applicant, Brae Transport Limited, which freezes Mr. Logan's assets, including all his bank accounts. Brae claims that Mr. Logan, its former Chief Financial Officer, committed fraud and breached his fiduciary duty by using Brae bank accounts and credit accounts to make several unauthorized payments. Brae seeks special damages in an amount exceeding \$640,000, as well as aggravated and punitive damages, from Mr. Logan. Mr. Logan says that all of the impugned payments were authorized by Brae and its owner, Erville Ellsworth.

[2] In support of continuing the interim Mareva injunction, Brae relies on the affidavit evidence of Mr. Ellsworth and Ross Landers, an independent accountant hired by Brae. In support of discharging the interim injunction, Mr. Logan filed his own affidavit evidence. Mr. Ellsworth and Mr. Logan were cross-examined on their affidavits.

[3] Even though this is a motion brought by Mr. Logan, the parties agreed that Brae bears the burden of satisfying the court, pursuant to *Civil Procedure Rule* 42.11 and the common law, that:

1. there is a strong *prima facie* case that Brae will be successful on the merits,
2. there is a genuine or serious risk of disappearance of assets (dissipation or concealment) by Mr. Logan that could otherwise satisfy a judgment, and
3. the balance of convenience favours Brae.

See *The Water Shed Water Conditioning Limited v. MacAskill*, 2019 NSSC 183 at para.26.

[4] In determining whether the interim Mareva injunction should be discharged, I will consider Brae's claims that Mr. Logan used funds from Brae bank accounts and credit accounts to make the following unauthorized payments to himself or for his benefit:

1. an excessive salary
2. excessive vacation pay
3. contributions to a retirement savings plan

4. other benefits
5. delivery of home heating oil to his home
6. repairs to vehicles not owned by Brae
7. excessive salary for his son, James Logan
8. fuel charges for his personal vehicle and those of his family members
9. Starbucks Coffee card re-fills
10. Amazon purchases
11. charges for non-existent Brae website
12. transfers from Brae's Credit Union Atlantic Account

[5] It is not disputed that Mr. Logan had signing authority over the accounts of Brae, and exercised control over the accounting software and corporate credit accounts.

Mr. Logan's Salary at Brae

[6] The undisputed evidence is that Mr. Logan received the following income in 2020 and 2021 while at Brae, and that these amounts are reflected in his T4s filed with the Canada Revenue Agency:

	<u>2020</u>	<u>2021</u>
Salary	\$197,125	\$288,000
Vacation Pay	\$40,000	\$45,000
Benefits	\$91,350	\$96,634
Total Gross Pay	\$328,467	\$429,634

[7] Mr. Ellsworth said that, when Mr. Logan was appointed Chief Financial Officer of Brae in March of 2020, he was appointed at a salary of \$135,000 per annum, with the only benefits being a gasoline card and a company vehicle.

[8] Mr. Logan said that his base salary in 2021 at SDS was \$288,000 and his total compensation that year was \$429,634. He said that he never agreed to reduce his salary in 2020 to \$135,000 with no benefits other than a gas card and a company vehicle. He said that he and Mr. Ellsworth agreed that they would both receive the same salary and benefits with Brae as they had been receiving at Scotian Distribution Services Limited (“SDS”). SDS was another company owned by Mr. Ellsworth, where Mr. Logan was the Chief Financial Officer immediately before joining Brae. SDS declared voluntary bankruptcy in early 2020.

[9] Mr. Ellsworth’s evidence was that Mr. Logan’s salary at SDS was \$150,000 in 2017, and that he was not aware of and did not authorize any further increases to Mr. Logan’s salary while at SDS.

[10] Mr. Logan said that Mr. Ellsworth agreed with his salary and benefit levels, and that Mr. Ellsworth signed payroll cheques twice a month at SDS for over 10 years, including Mr. Logan's payroll cheques, until around October of 2019, when electronic transfers were instituted.

[11] Mr. Ellsworth acknowledged that, at SDS, until electronic transfers were implemented, he co-signed payroll cheques that were signed by Mr. Logan. However, he did not review them, as he relied entirely on Mr. Logan. He said that he did not gain access to Brae's accounting software until April of 2022, and it was only then that he became aware of the amounts of money being paid to Mr. Logan.

Vacation Pay

[12] Mr. Ellsworth stated that he never discussed vacation pay with Mr. Logan, and that it was his understanding that vacation pay would be the minimum required under provincial labour standards legislation. Mr. Landers stated that the vacation pay paid by Mr. Logan (20% of salary in 2020 and 16% of salary in 2021), whom Mr. Landers characterized as a two-year employee, far exceed the minimum vacation pay required under the Nova Scotia *Labour Standards Act* of 4% for under 8 years of employment and 6% for over eight years of employment.

[13] Mr. Logan said that his vacation pay was 11% of salary, or approximately six weeks per year, calculated using the minimum requirements under federal labour standards legislation plus a pro-rated amount based on years of service. Mr. Logan says that Brae is federally-regulated because its business crosses interprovincial borders.

Contributions to Retirement Savings Plan

[14] Mr. Landers was not able to find details to support the benefits number on Mr. Logan's T4 slips. However, he believed that one of the benefits that Mr. Logan paid himself consisted of a total of \$152,100 in weekly cash transfers from Brae to a Royal Bank Account, believed by Mr. Landers to be Mr. Logan's personal direct investment account. Mr. Ellsworth's evidence at the *ex parte* motion for an interim injunction was that he had no knowledge of these cash transfers, and that such a benefit had never been part of any Brae employee's compensation package.

[15] Mr. Logan acknowledged that there were weekly transfers to his Royal Bank of Canada account, but that these represented retirement savings contributions that SDS and Brae provided to senior executives, including Mr. Ellsworth, starting in November of 2015. He said that these payments started at \$1000/week, were increased to \$1250/week in 2106, and increased to \$1350/week in or around

October of 2020. He appended to his affidavit a copy of a November 8, 2016 letter from himself to CI Investments in Toronto, authorizing CI Investments to debit SDS's corporate bank account the total amounts of \$3750 on a weekly basis starting November 14, 2016, to be allocated to the RSP account of the following employees: Mr. Logan, Mr. Ellsworth, and Alexander Keough.

[16] In his second affidavit filed in response to the motion to discharge the interim injunction, Mr. Ellsworth acknowledged that RRSP contributions were made for himself and Mr. Logan while they were employed with SDS. He said that this was to cease in January of 2020 when the company got into financial difficulties, although he believes that some further payments may have been made to his RRSP account. Mr. Ellsworth's evidence was that his RRSP contributions while at SDS were \$1,000 per week, but that the payments were to be \$1,000 per month for Mr. Logan.

Other Benefits

[17] Mr. Logan has not yet responded to the claim that the benefit amounts on his T4s that exceeded what he says he received in retirement savings plan contributions were unauthorized. He said that there would have been payroll documents supporting the payment of these amounts, but that Mr. Ellsworth had

those documents destroyed in November of 2021, against the advice of Mr. Ellsworth.

Delivery of Home Heating Oil

[18] Mr. Logan did not dispute that he had Brae pay for a total of \$8,199.88 in home heating oil delivered to his personal residence in 2020, 2021 and from January to May of 2022, as shown in a letter from Aabel Fuels Limited. However, his evidence in cross-examination was that this was suggested to him by Mr. Ellsworth. Mr. Logan said that this occurred as follows. SDS was in discussions with Aabel about installing an on-site diesel tank for SDS's tractors. Mr. Ellsworth went to the Ultramar station on Akerley Boulevard to discuss an issue that SDS was having with one of the drivers. An employee at Ultramar showed him a video of the day in question. Mr. Logan appeared in the video, filling up some jerry cans. When Mr. Ellsworth asked why he needed the jerry cans, Mr. Logan said that his furnace oil had run out, and he needed furnace oil that night. Mr. Logan said that it was at this point that Mr. Ellsworth suggested that Mr. Logan use Aabel to deliver his home furnace oil, since SDS was in discussions with Aabel. Mr. Logan apparently took this to mean that Mr. Ellsworth was authorizing Mr. Logan to pay for the delivery of home heating oil using Brae funds.

Repairs to Personal Vehicles

[19] Mr. Ellsworth identified charges to Brae's credit accounts totalling \$6,309.02 for repairs to vehicles not owed by Brae which he believed to be owned by Mr. Logan or members of Mr. Logan's family.

[20] Mr. Logan responded that all repairs to his vehicle that were paid for by Brae or SDS were authorized. Mr. Logan stated that Mr. Ellsworth also authorized repairs to the vehicles of Brae's office manager and dispatcher, and attached to his affidavit an invoice for the repair of the dispatcher's vehicle paid for by Brae.

[21] Mr. Ellsworth denied that he or Brae authorized repairs to Mr. Logan's personal vehicle. However, he acknowledged that Brae would, on occasion, authorize a repair for an employee's vehicle in order for the employee to access Brae's preferential rate, and that the employee would be required to repay Brae for same.

[22] Mr. Logan denied, in cross-examination, that he was required to reimburse Brae for such repairs.

Employment and Salary of James Logan

[23] Brae claims that Mr. Logan hired his son, James Logan, as an employee and paid him an inordinately high salary given his duties and given the part-time nature of his work. Mr. Ellsworth's evidence was that, while he was aware that Mr. Logan hired James to do some work on a contract basis for Brae in March of 2020, he was not aware that Mr. Logan had hired James as an employee or that James had worked for SDS.

[24] Mr. Logan's evidence was that Mr. Ellsworth was aware of the duties of James Logan, who had previously worked for 12 years at SDS before moving to Brae, and that James Logan was paid a salary and benefits at Brae that was comparable to what he received at SDS.

Fuel Charges for Personal Vehicles

[25] In his affidavit filed on the *ex parte* motion, Mr. Ellsworth suggested that Mr. Logan improperly charged expenses for fuel to Brae's charge account totalling \$58,787.60, predominantly for diesel fuel. He did not identify what portion of the \$58,787.60 he was claiming represented unauthorized fuel purchases by Mr. Logan.

[26] Mr. Logan agreed that, since March of 2020, he has been working from home on Prospect Road in the Halifax Regional Municipality, with periodic travel to the Brae offices in Bedford.

[27] Mr. Logan said that he drove a 2017 GMC diesel and Brae's 2013 diesel Chevrolet truck during the majority of his employment with Brae, and that it was common practice for employees of Brae and SDS to have unlimited use of the companies' fuel cards. Mr. Logan said that employees with this benefit included the office manager, the safety and compliance manager, dispatchers and one of the consultants.

[28] In his second affidavit, Mr. Ellsworth acknowledged that the office manager, the dispatcher, the employee in charge of vehicle safety and Mr. Logan were allowed to fill their vehicle once per week to reflect office use of their personal vehicle.

[29] In cross-examination, Mr. Logan was asked to explain why there were several instances of multiple fuel charges in Falmouth on the same day on his fuel card. He said that these charges may have been incurred by himself or by his son, James. He said that he may have been visiting James at his home in Falmouth on those days, and perhaps they had gone somewhere and needed to fill the tanks again on

the same day. He emphasized that employees' use of fuel cards was unlimited, including for unlimited personal use.

Starbucks Coffee

[30] Mr. Ellsworth points to what he says are several unauthorized charges by Mr. Logan to Mr. Ellsworth's personal Triangle Mastercard, which was used for the business, from March 1, 2020 to May 1, 2022, including \$17,100 for reloads of Starbucks Coffee cards.

[31] The Mastercard statement shows numerous charges to reload a Starbucks Coffee card, every one in an amount of \$100. Many of these \$100 charges occurred within a few days of each other.

[32] Mr. Logan included in his affidavit copies of text message between him and Mr. Ellsworth from September of 2019, in which Mr. Ellsworth asked Mr. Logan whether he purchased a Starbucks Coffee card re-load and placed an Amazon purchase on the Mastercard. Mr. Logan confirmed that he did, and Mr. Ellsworth raised no objection.

[33] Mr. Ellsworth said that he was not aware of the extent of Mr. Logan's purchases from Starbucks.

[34] Mr. Logan testified in cross-examination that he drank a lot of coffee.

Amazon Purchases

[35] Brae said that Mr. Logan charged another \$20,829.62 in other unauthorized purchases, mostly for Amazon purchases and website charges, on Mr. Ellsworth's Mastercard. Brae did not provide much detail about those purchases or why it takes the position that those purchases were not authorized. Mr. Logan said that they were all authorized.

Website

[36] Mr. Ellsworth stated in his affidavit in support of the *ex parte* motion that Brae does not have a website. Mr. Logan responded that Brae does have a website, and included in his affidavit a screen shot of the homepage. In his second affidavit, filed in response to the motion to discharge the interim injunction, Mr. Ellsworth stated that there is not a website "as such." However, he acknowledged in cross-examination that this website, while rudimentary, does have an associated expense that Brae was paying for while Mr. Logan was employed, and that Brae is still paying for.

Transfers from Credit Union Atlantic Account

[37] Mr. Ellsworth appended to his first affidavit a report from Brae's electronic records showing transfers from Brae's Credit Union Atlantic bank account in the amount of \$245.99 approximately once per month from April, 2020 to November, 2021, for a total of \$4,427.82.

[38] Mr. Logan did not respond to the claim that he made these unauthorized transfers. Although he stated in his affidavit evidence that these transfers were retirement savings contributions, counsel for Mr. Logan stated at the hearing of the motion that this statement was erroneous, and that he has not, as of yet, responded to the claim that he transferred \$4,427.82 out of Brae's Credit Union Atlantic account.

Strong *Prima Facie* Case?

[39] The burden is on Brae to show that there is a strong likelihood on the law and on the evidence that it will be successful at the end of the hearing of the Application: see *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5 at para.17.

[40] Brae urges me to find that that there is a strong *prima facie* case of fraud and breach of fiduciary duty against Mr. Logan because there can be no justification for Mr. Logan's salary almost tripling from 2017 to 2021, in a situation where SDS

went into bankruptcy and where Brae was starting up, and that no reasonable company would pay an employee \$1,000 per week in retirement savings contributions, amounting to \$52,000 per year, far in excess of any RRSP deposit room that Mr. Logan could possibly have had. Brae urges me to find that Mr. Ellsworth is more credible than Mr. Logan.

[41] However, Mr. Logan has provided some context for those payments. He has provided evidence of what he earned at SDS, and says that his income was to be comparable at Brae. Mr. Logan's salary and benefit payments were processed through the companies' payroll systems, and the T4s filed with Revenue Canada match the amounts in the companies' payroll systems. Mr. Ellsworth acknowledged that he signed payroll cheques until October of 2019. According to Mr. Logan, James was a 12-year employee of SDS before being hired by Brae. Mr. Ellsworth acknowledged that he may have signed payroll cheques for James Logan. Mr. Ellsworth, while initially denying knowledge of any retirement savings contributions being made to employees, acknowledged that there was such a benefit at SDS, and that his own contributions were made on a weekly basis. Mr. Ellsworth also acknowledged that there was a practice at Brae of allowing employees to charge vehicle repairs to Brae in order to obtain Brae's preferential rate, albeit with a requirement that they reimburse Brae. He acknowledged being

aware, in one instance, of Mr. Logan having used the Mastercard to purchase a Starbucks Coffee card and something from Amazon, and did not inquire any further. Mr. Ellsworth initially denied that Brae had a website, and then acknowledged that it does have a rudimentary website for which Brae is charged a fee.

[42] There are no written employment contracts and there are apparently no documents evidencing the parties' agreement with respect to Mr. Logan's salary and benefits or his son's salary and benefits, or any company policies concerning vehicle repairs or the use of the company's credit facilities. Brae's success on the merits will depend in large part on the respective credibility of Mr. Logan and Mr. Ellsworth. Brae has not established at this point a strong *prima facie* case that Mr. Ellsworth is a more credible witness than Mr. Logan.

[43] In light of all of the evidence, Brae has not established a strong *prima facie* case of fraud or breach of fiduciary duty on the part of Mr. Logan in relation to his salary, vacation pay, retirement savings plan contributions, vehicle repair charges, the salary paid to James Logan, or the Mastercard charges. Furthermore, there was not enough evidence presented by Brae to establish a strong *prima facie* case against Mr. Logan in relation to the benefit amounts on the T4s not accounted for

by the retirement savings plan contributions, or in relation to the transfers from Brae's Credit Union Atlantic Account.

[44] Mr. Logan's explanation for his use of Brae funds to pay for the delivery of heating oil to his home and regarding his use of Brae's fuel card is highly suspect. However, these charges form a small part of damages sought by Brae against Mr. Logan and do not justify continuing the interim Mareva injunction restraining all of Mr. Logan's assets.

[45] In my view, Brae has failed to establish a strong *prima facie* case of fraud or breach of fiduciary duty on the part of Mr. Logan in relation to the bulk of Brae's claims against him.

Conclusion

[46] In conclusion, I grant an order discharging the interim order for a Mareva injunction issued on June 8, 2022. If the parties cannot come to an agreement on costs, I will receive written costs submissions from Mr. Logan by August 23, 2022 and from Brae by September 6, 2022.

Gatchalian, J.