

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-700210-230
(500-06-001225-230)

MINUTES OF HEARING

DATE: January 10, 2024

THE HONOURABLE MARIE-FRANCE BICH, J.A.

APPLICANT	COUNSEL
S.N.	Mtre ANDREA GRASS Mtre JEFFREY ORENSTEIN <i>(Consumer Law Group)</i> Absent
RESPONDENTS	COUNSEL
ROBERT GERALD MILLER	Mtre KARIM RENNO Mtre AVA LIAGHATI <i>(Renno Vathilakis)</i> Absent
FUTURE ELECTRONICS INC.	Mtre JEAN-PIERRE SHEPPARD Mtre WILLIAM-ANTHONY MARCHETTI- BERRY <i>(Robinson Sheppard Shapiro)</i> Absent

IMPLEADED PARTIES	
ALONIM INVESTMENTS INC. ROBMILCO HOLDINGS LTD. MULTIFORM PROPERTIES INC. 4306805 CANADA INC. 11172247 CANADA INC. RODNEY MILLER	ABSENT AND UNREPRESENTED

DESCRIPTION: Application for leave to appeal from a judgment rendered in the course of the proceeding on November 27, 2023 by the Honourable Eleni Yiannakis of the Superior Court, District of Montreal (articles 30, 31, 32 and 357 C.C.P.).

Clerk at the hearing: Chloé Côté-Sauvageau

Courtroom: RC-18

HEARING

9:57 Continuation of the hearing held on January 8, 2024. Counsel were excused from appearing in Court.

BY THE JUDGE: Judgment – see page 4.

Conclusion of the hearing.



Chloé Côté-Sauvageau, Clerk at the hearing

JUDGMENT

[1] The applicant seeks to appeal the judgment rendered on November 27, 2023, by the Superior Court, District of Montreal (the honourable Madam Justice Eleni Yiannakis), dismissing her motion for a provisional Mareva injunction and safeguard order against the respondents and impleaded parties (five of which are corporate entities directly or indirectly controlled by the respondent Miller, the sixth being his son to whom he transferred one of his properties through various corporate manoeuvres).¹

[2] The application is governed by art. 31 *C.C.P.* as the judgment of the Superior Court was rendered in the course of class action proceedings, and more precisely at the authorization stage of said proceedings (the application for authorization to institute a class action against the respondents was filed before the Superior Court in February 2023 and the Mareva application last October).

[3] According to the judgment of the Superior Court, the Mareva injunction could not be issued as the applicant, although holding an apparent right against the respondents (but not against the impleaded parties, in the judge's opinion), did not demonstrate that there is a real risk of disappearance or dissipation of the assets of the respondents (which they hold directly or through the impleaded parties) such as to render the judgment on the merits of the class action (were the latter to be successful) impossible to execute. Considering her conclusion in that respect, the judge (though stating her doubts in *obiter*) did not find useful to decide whether or not, as a matter of principle, Mareva injunctions can be issued at the authorization stage of a class action or only after the authorization is granted and the class action instituted.

[4] Roughly summarized, the applicant's grounds of appeal are as follows:

- the judge erred in law in not deciding whether a Mareva injunction can be issued before a class action is authorized (according to the applicant, this question is an important and novel question of law);
- she also erred in law in assessing "the probative value of the evidence in the Mareva Motion as if it were on a final or second-to-final (interlocutory) stage, when it was more preliminary (provisional and safeguard)",² whereas "the allegations of the Applicant should have been taken for true and the evidence not having been weighed",³

¹ *S.N. v. Miller*, 2023 QCCS 4524 [the "Judgment"].

² Application for leave to appeal, para. 13.

³ *Ibid.*

- she further erred in concluding that, taken together, the various facts alleged by the applicant, and which were not really contested by the respondents, amounted to evidence that the execution of the final judgment granting the applicant's class action (if such is authorized) would be in peril (on that point, the applicant basically reiterates the arguments submitted to the Superior Court, asking the Court to reassess the matter entirely).

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[5] For the following reasons, leave to appeal will not be granted.

[6] In order to obtain leave to appeal of a judgment rendered in the course of a proceeding, the applicant must, pursuant to art. 31 *C.C.P.*, establish that 1° the judgment at stake determines part of the dispute or causes her irremediable injury, 2° said judgment is tainted by potentially reviewable errors, and 3° granting leave would be in the interest of justice in that the appeal raises a question deserving the attention of the Court and consistent with the guiding principles of procedure, including that of proportionality.⁴ The applicant must also demonstrate that the appeal has reasonable chances of success.⁵ Needless to say, it is not in the interest of justice to grant leave when the appeal is doomed to failure. These cumulative criteria are particularly stringent when applied to provisional or safeguard orders (both discretionary and not binding),⁶ as is the case here, and leave to appeal will be granted in exceptional circumstances only.

⁴ See for instance: *Gotham Devraker Developments Inc. c. Groupe l'Héritage inc.*, 2023 QCCA 1610, para. 2 (motions judge); *Garderie Le Rucher inc. c. Sirois*, 2023 QCCA 1449, para. 5 (motions judge); *Droit de la famille — 231965*, 2023 QCCA 1444, para. 5 (motions judge); *Lortie c. Lavoie*, 2023 QCCA 1296, para. 9 (motions judge); *Concept Special Risks Ltd. c. Telmosse*, 2023 QCCA 1273, para. 6 (motions judge); *Elco Motors Inc. c. Venmar Ventilatio*, 2023 QCCA 507, paras. 5-6 (motions judge); *Tardif c. Allen Entrepreneur général inc.*, 2023 QCCA 505, paras. 17 and ff. (motions judge); *Republic of India c. CCDM Holdings*, 2023 QCCA 327, para. 4 (motions judge).

⁵ See for instance: *Garderie Le Rucher inc. c. Sirois*, *supra*, fn. 4, para. 5 (motions judge); *Gamache c. Dentisterie Minh-Nhat Huynh inc.*, 2023 QCCA 1429, para. 9 (motions judge); *A.B. c. Procureur général du Québec*, 2023 QCCA 999, paras. 13-14 et 21 (motions judge); *Promutuel Vallée du St-Laurent, société mutuelle d'assurance générale c. Noyrigat-Gleye*, 2023 QCCA 683, para. 9 (motions judge); *Allianz Global Risks US Insurance Company c. SNC-Lavalin inc.*, 2023 QCCA 666, paras. 52-53 (motions judge; application for leave to appeal to the Supreme Court, 17 August 2023, n° 40847); *9028-2666 Québec inc. c. Sanscartier*, 2023 QCCA 340, para. 7; *Brosses Lacasse inc. c. Hamel*, 2023 QCCA 178, para. 6 (motions judge); *Compagnie d'assurance Travelers du Canada c. Gervais Dubé inc.*, 2022 QCCA 1107, paras. 16-17 (motions judge); *9004-3167 Québec inc. c. Agence du revenu du Québec*, 2022 QCCA 292, para. 5 (motions judge).

⁶ For instance, see: *9014-4304 Québec inc. c. Société en commandite ACG Kaloom*, 2023 QCCA 1482, para. 9 (motions judge); *Lortie c. Lavoie*, *supra*, n. 4, para. 10 (motions judge); *Gibeault c. Guilbault*, 2023 QCCA 1075, para. 7 (motions judge); *9341-3375 Québec inc. c. Hôtel Le Rosay inc.*, 2023 QCCA 300, paras. 12-13 (motions judge); *Shaulov c. Shaulov*, 2023 QCCA 192, paras. 6-7 (motions judge); *Gagnier c. Procureur général du Québec*, 2022 QCCA 654, para. 18 (motions judge).

[7] The applicant failed to discharge this burden on all three conditions.

[8] Firstly, the Judgment caused no irremediable injury to the applicant (nor the class she wishes to represent) insofar as she is not precluded to renew her Mareva application if she discovers additional facts that could support her claim. That it would probably be useless for her to pursue her present Mareva application to the interlocutory stage, in the absence of facts other than those presented to Justice Yiannakis, cannot be equated with an irremediable injury. She may also have other means of protecting her future right to execution, such as seizure before judgment or, in the case of the transfer of the Westmount property to *mis en cause* Rodney Miller, paulian action⁷.

[9] Secondly, the judge did not commit any reviewable error of law in determining the criteria for the issuance of a Mareva injunction nor in determining the burden of proof incumbent upon the applicant (which requires a *prima facie* demonstration)⁸, except, perhaps, on one point, concerning the absence of specific allegations against the impleaded parties in the Mareva Motion. This error, however, is without consequence considering the conclusion of the judge that the respondents do not engage or have not engaged in conduct indicating that they are trying to “dilapidate or hide their assets in order to evade the execution of a potentially favourable judgment on the merits of the class action [reference omitted].”⁹

[10] This is a matter of factual assessment: were the facts alleged by the applicant – which the judge took for true except on one or two minor aspects – sufficient to establish a real and objective risk that the respondents are attempting to or will dissipate or hide their assets in order to make themselves “judgment proof”? The judge of the Superior Court noted that potential difficulties in executing a future judgment cannot be conflated with a risk of dissipation or hiding of assets¹⁰ nor can they justify, as such, the issuance of a Mareva injunction. Because of their severe effects, Mareva injunctions must remain exceptional. They are also highly discretionary remedies, which calls for deference in appeal.¹¹

[11] Besides stating her disagreement with the judge’s assessment of the situation, the applicant does not actually point out any palpable and overriding error in the conclusions or reasoning of the judge that would justify the Court to intervene. Considering the exacting appellate standard of review in matters of provisional injunctions and safeguard orders, the appeal is thus deprived of any reasonable chance of success.

⁷ As indicated in the Judgment, para. 42.

⁸ *Desjardins Assurances générales inc. c. 9330-8898 Québec inc.*, 2019 QCCA 523, para. 50.

⁹ Judgment of the Superior Court, para. 45.

¹⁰ Judgment of the Superior Court, para. 48.

¹¹ See for instance: *9014-4304 Québec inc. c. Société en commandite ACG Kaloom*, *supra*, fn. 6.

[12] Finally, the question raised by the applicant as to the possibility of issuing a Mareva injunction at the authorization stage of a class action cannot justify that leave to appeal be granted. In the circumstances of the present case, this question is purely theoretical and need not be addressed at this time.

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FOR THE ABOVE-MENTIONED REASONS, THE UNDERSIGNED:

[13] **DISMISSES** the application for leave to appeal, with legal costs.



MARIE-FRANCE BICH, J.A.