

Case comment

Carey v Laiken: The Supreme Court of Canada considers civil contempt of *Mareva* Injunctions

In *Carey v Laiken* [2015 SCC 17] the Supreme Court of Canada heard an appeal from a decision of the Ontario Court of Appeal, restoring a finding of contempt against a lawyer that returned trust funds to his client in the face of a *Mareva* injunction.

Ms. Laiken obtained an *ex parte* *Mareva* injunction, freezing the assets of various defendants, including Mr. Sabourin. The Order prohibited the defendants and any person with knowledge of the order from “disposing of, or otherwise dealing with” the defendants’ assets. A few months after the order, Mr. Sabourin sent Mr. Carey, his legal counsel, a cheque for \$500,000, which Mr. Carey deposited into his trust account. Mr. Sabourin instructed Mr. Carey to try to settle with Ms. Sabourin. When settlement did not succeed, Mr. Sabourin instructed Mr. Carey to return the balance of the funds to him, which Mr. Carey did. Ms. Laiken, upon learning of the transfer, applied to have Mr. Carey found in contempt.

The Court confirmed and discussed the 3 elements of civil contempt, which must be established beyond a reasonable doubt. First, the Court must assess whether the order stated “clearly and unequivocally what should and should not be done”. Second, the Court must determine that the party alleged to have breached the order had actual knowledge of that order. Third, the Court must find that the party alleged to have breached the order intentionally committed the breach.

Mr. Carey defended the application on two grounds: that the release of funds was not a “transfer” and that the *Mareva* order conflicted with Mr. Carey’s solicitor-client obligations, specifically relating to privilege. The Supreme Court of Canada rejected both arguments, dismissing the appeal with costs, upholding the Court of Appeal’s order that the appellant pay the respondent’s costs for the contempt application, fixed at \$20,000.00.

The decision does not represent a fundamental change of the law regarding civil contempt and *Mareva* orders. That said, the following represent some key messages from the Supreme Court on *Mareva* orders and their enforcement:

- *Mareva* orders must be clear and unequivocal in order for contempt proceedings to succeed. The Order must be clear and should specify which person and assets are subject to that Order. The Order should not be overly broad or otherwise lack clarity in its application and scope.
- Parties obtaining *Mareva* orders must take care to make persons that are subject to the orders aware of the orders. Parties should coordinate effective service and maintain detailed records of those efforts.
- Solicitors should be considered as potential recipients of *Mareva* orders. As found in *Carey*, solicitor-client obligations are not a defence to the directions under a *Mareva* order.

The Supreme Court’s decision in *Carey* reinforces the seriousness with which the courts will view a breach of the terms of *Mareva* orders and highlights the available remedies for the Court and aggrieved parties where parties do not comply with such orders. This decision represents a welcome confirmation by the Supreme Court of Canada of the importance and seriousness of *Mareva* orders in fraud recovery litigation.