

Litigation - Canada

Carey v Laiken: Supreme Court considers civil contempt of Mareva injunctions

Contributed by **Dentons**

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Case Comment

In *Carey v Laiken* (2015 SCC 17) the Supreme Court 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.

Case

Judith Laiken obtained an *ex parte* Mareva injunction, freezing the assets of various defendants, including Peter 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, Sabourin sent Peter W G Carey, his legal counsel, a cheque for C\$500,000, which Carey deposited into his trust account. Sabourin instructed Carey to try to settle with Laiken. When settlement did not succeed, Sabourin instructed Carey to return the balance of the funds to him, which Carey did. On learning of the transfer, Laiken applied to have Carey found in contempt.

The court confirmed and discussed the three elements of civil contempt, which must be established beyond a reasonable doubt. The court must:

- assess whether the order stated "clearly and unequivocally what should and should not be done";
- determine that the party alleged to have breached the order had actual knowledge of that order; and
- find that the party alleged to have breached the order committed the breach intentionally.

Carey defended the application on two grounds:

- that the release of funds was not a 'transfer'; and
- that the Mareva order conflicted with Carey's solicitor-client obligations, specifically relating to privilege.

The Supreme Court rejected both arguments, dismissing the appeal with costs and upholding the Court of Appeal's order that the appellant pay the respondent's costs for the contempt application, fixed at \$20,000.

Comment

The decision does not represent a fundamental change of the law regarding civil contempt and Mareva orders. Nonetheless, 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 party and assets are subject to it. 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 the parties 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 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.

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