CITATION: Kirshenberg v. Schneider, 2023 ONSC 2809
COURT FILE NO.: CV-23-698336-0000
DATE: 20230510

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Aaron Kirshenberg

AND:

Daniel Benjamin Schneider, Trustart Technologies Limited and Svella Financial Corp. c.o.b. as Zaftr Inc.

BEFORE: J.T. Akbarali J.

COUNSEL: *Jacob Kaufman, Ayda A-Tabrizi and Noah Kochman*, for the plaintiff

No one appearing for the defendants

HEARD: May 2, 2023

ENDORSEMENT

Overview

[1] The plaintiff brings this urgent, *ex parte* motion seeking a preservation order over digital assets including cryptocurrency contained in a digital wallet, a worldwide *Mareva* injunction, and an *Anton Piller* order. The *Anton Piller* order the plaintiff seeks includes certain unusual features which the plaintiff argues are necessary to ensure the cryptocurrency is not transferred out of the digital wallet before it can be preserved.

[2] For the reasons described below, I grant the preservation order. I do not grant the *Mareva* injunction. I grant the *Anton Piller* order with some modifications.

Background

[3] The plaintiff and the defendant Daniel Schneider met over Twitter in July 2021. Each ran their own e-sports organization.

[4] Schneider is the sole officer and director of the defendant Trustart Technologies Limited, a company incorporated under the laws of Ontario. Zaftr Inc. is the business name of Svella Financial Corp., a corporation incorporated under the laws of Alberta, of which Schneider is the former sole director. The record indicates that Schneider and Zaftr are closely linked; for example, calls to Zaftr go to Schneider's phone.

[5] Schenider indicated to the plaintiff that he is a cryptocurrency entrepreneur and that he facilitates the exchange of cryptocurrency to fiat currency (that is to say, traditional currency like US dollars). The record indicates that Schneider represented to the plaintiff that Trustart was a registered money services business governed by Fintrac, and that it facilitates the exchange of cryptocurrency to fiat currency. The plaintiff understood that Trustart and Zaftr were intertwined. It appears that Zaftr was, at least the relevant time, registered with Fintrac. The plaintiff understood that Zaftr is a brokerage.

[6] In December 2021, the plaintiff and Schneider discussed Schneider going into business with the plaintiff with respect to the plaintiff's planned minting of a non-fungible token ("NFT") which would be sold in exchange for cryptocurrency, and specifically, Ether. Schneider eventually decided not to become involved with the NFT venture.

[7] On December 23 and 24, 2021, the first sales of the NFT went online. The venture was a success, leading to millions in revenue for the plaintiff, in the form of Ether. Schneider messaged his congratulations to the plaintiff.

[8] The plaintiff told Schneider that he considered using an exchange like Coinbase to exchange his Ether into USD, but was unhappy about the cost of doing so. The plaintiff deposes that Schneider encouraged the plaintiff to use Schneider's exchange, assuring him that he would not find better pricing anywhere in the world. Schneider explained that his company had no wire limit restrictions, and that once the plaintiff sent Ether to him, he would then wire the USD equivalent to the plaintiff's bank account. He told the plaintiff that the wire transfers were instant.

[9] According to the plaintiff, Schneider also warned him that he was a target and was not safe, because it was widely known that the plaintiff had earned millions in Ether, and people knew where he lived. Schneider told the plaintiff that he had a friend who was attacked at gunpoint for his cryptocurrency, and counselled the plaintiff to stay in a hotel.

[10] The plaintiff states that he was scared by Schneider's warnings, and reassured by Schneider's representations that Trustart was a registered money services business governed by Fintrac. The plaintiff deposes that, as a result, he agreed to proceed with the transaction.

[11] On December 24, 2021, the plaintiff agreed to a test exchange of Ether for USD. He transferred $25,000 USD worth of Ether to a cryptocurrency wallet (which is elsewhere in these reasons referred to as a digital wallet) which he believed belonged to Schneider and/or Trustart. He deposes that Schneider confirmed that Trustart controlled the cryptocurrency wallet into which the Ether was transferred. It is also possible that the cryptocurrency wallet is owned or controlled by Zaftr, or by another person or entity entirely.

[12] In less than 45 minutes, the plaintiff's bank account had been credited with $25,000 USD by Trustart.

[13] About five minutes later, following the success of the first exchange, the plaintiff transferred Ether worth $500,000 USD to the same cryptocurrency wallet. This exchange did not go well. After receiving the Ether, Schneider advised the plaintiff that he did not have the funds to

pay him, but would request them from his liquidity provider. Schneider indicated he could send the plaintiff $50,000 USD later that day and the rest of the funds on December 29, 2021.

[14] Schneider did not send any money, nor did he return the Ether, despite the plaintiff asking him to do so. Schneider provided various assurances that the funds would be paid following the anticipated closing of a business deal on January 10, 2022, from which Schneider expected to receive $1,000,000. On January 6, 2022, the plaintiff received $50,000 USD from Trustart. No funds came in to the plaintiff on January 10, 2022, the date the deal was supposed to close. The plaintiff continued to follow up with Schneider, who had various explanations for the fact that the funds had not yet been paid, and continued to promise the funds would become available soon, and the balance owing would be paid to the plaintiff.

[15] On January 25, 2022, Schneider promised the plaintiff that the remaining balance would be paid no later than February 4, 2022. The parties negotiated and signed an agreement that confirmed that the plaintiff had sent $500,000 USD in Ether to a cryptocurrency wallet controlled by Trustart, and that $450,000 USD remained to be paid, and would be sent to the plaintiff by no later than February 4, 2022.

[16] On February 2, and 3, 2022, Schneider continued to reassure the plaintiff that the funds would be paid, and provided the plaintiff with a copy of the wire transfer receipt confirmation from the deal that was to have closed on January 10, 2022. However, February 4, 2022 came and went without any payment made to the plaintiff.

[17] Schneider explained that he had not, in fact, received the $1,000,000 USD he was owed from the business deal, but only received fake wire receipts and excuses.

[18] On February 18, 2022, Schneider claimed to have returned an additional $50,000 USD to the plaintiff, but the plaintiff did not receive those funds. However, on February 28, 2022, the plaintiff did receive a second $50,000 USD from Trustart. On March 9, 2022, Trustart sent the plaintiff another $50,000 USD. The balance remained outstanding.

[19] In April 2022, the plaintiff, who is a US resident, engaged US counsel to address the funds owing with Schneider. On June 7, 2022, the plaintiff and Schneider, on behalf of Trustart, signed a settlement agreement. In it, they agreed that $350,000 USD was outstanding, and that Trustart would make monthly payments to the plaintiff of $50,000 USD, on the 15th day of each month (later varied to the 1st day of each month). The settlement agreement also provided for an additional $50,000 USD to be paid as an interest payment. It also included a penalty payment, whereby a payment delayed for more than five business days would accrue a penalty payment in the amount of $10,000 USD to a maximum of $50,000 USD.

[20] Trustart made a payment of almost $50,000 on June 8, 2022, and thereafter failed to make any payments under the settlement agreement.

[21] At the same time, the plaintiff is able to see, from the blockchain, that millions of dollars worth of Ether continue to be transferred in and out of the cryptocurrency wallet said to be

controlled by Trustart. On the date the plaintiff swore his affidavit, the cryptocurrency wallet held Ether equivalent to over $26,000,000 USD.

Issues

[22] The plaintiff raises the following issues on this motion:

a. Should the court grant an interim *ex parte* order for the custody and preservation of the cryptocurrency wallet, and any and all digital assets inside the digital wallet including the passcodes to the wallet up to the equivalent of $300,000 USD?

b. Should the court grant a *Mareva* injunction restraining the defendants from dealing with their assets and directing certain banks to freeze the defendants' accounts?

c. Should the court grant an *Anton Piller* order requiring the defendants to permit the plaintiff's solicitors, the cryptocurrency receiver, and other necessary persons, to enter into and remain in the premises of the defendants for purposes of identifying, inspecting, seizing and preserving evidence and assets related to this action, including the cryptocurrency, and if so, on what terms? Should the court compel Schneider to be summonsed to court to answer questions on the cryptocurrency wallet, assets, and passcodes?

The Preservation and Custody Order

[23] The plaintiff relies on r. 45.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, under which the court may make an interim order for the custody or preservation of any property in question in the possession of a party that is relevant to an issue in the proceeding. A court may appoint a receiver, or receiver and manager, under r. 41 of the *Rules of Civil Procedure*, and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The plaintiff seeks this preservation and custody order only in respect of the $300,000 USD balance owing from the second transfer of Ether to the cryptocurrency wallet, and not with respect to the interest payment or penalty payments the plaintiff claims under the settlement agreement.

[24] In order to obtain a preservation order, the moving party must establish that: (1) the assets sought to be preserved constitute the very subject matter of the dispute; (2) there is a serious issue to be tried regarding the plaintiff's claim to that asset; and (3) the balance of convenience favours granting the relief sought by the applicant or moving party: *BMW Canada Inc. v. Autoport Limited*, 2021 ONCA 42, at paras. 42-43; *Taribo Holdings Ltd. v. Storage Access Technologies Inc.*, 2002 CarswellOnt 3811 (S.C.), at para. 5.

[25] I consider each of these elements in turn.

[26] First, do the assets sought to be preserved constitute the very subject matter of the dispute? The assets include the digital assets inside the cryptocurrency wallet. The plaintiff describes these digital assets as "including, but not limited to, any and all access numbers, identification codes, authentication codes, username(s), login codes and passwords, and defines these as "tokens inside

the defendants' digital wallet". The plaintiff defines the "assets sought to be preserved" to include the tokens inside the defendants' digital wallet, and also "any real, personal, or other property related to the tokens inside the defendants' digital wallet, including, but not limited to the proceeds from their sale, dissipation, conversion or exchanges, whether in fiat or otherwise".

[27] The plaintiff notes that courts in Ontario have yet to explicitly consider whether cryptocurrency is property. Courts in the United Kingdom and British Columbia have held that, at least for purposes of injunctive relief, cryptocurrency is a type of property. For example, in *AA v. Persons Unknown*, [2019] EWHC 3556 (Comm), at paras. 59 and 61, Bryan J. held that even if a crypto asset might not be a thing in action on a narrow definition of the term, it is property because it meets the four criteria set out in Lord Wilberforce's definition of property in *National Provincial Bank v. Ainsworth*, [1965] 1 AC 1175: that it is definable, identifiable by third parties, capable in their nature of assumption by third parties, and has some degree of permanence. Bryan J. concluded that cryptocurrency is a form of property capable of being the subject of a proprietary injunction.

[28] Similarly, Skolrood J. of the British Columbia Supreme Court, granted a preservation order over digital currency: *Shair.com Global Digital Services Ltd. v. Arnold*, 2018 BCSC 1512, at paras. 15-17.

[29] In *Cicada 137 LLC v. Medjedovic*, 2021 ONSC 8581, Myers J. granted a preservation order and *Anton Piller* order with respect to $15,000,000 in digital assets stored in a digital wallet. He made no finding about the nature of digital assets as property, but held, at para. 6, that:

> It is enough for present purposes to find that people invested value to obtain control of the tokens that the defendant appears to have taken. The law will determine in due course whether the digital tokens are a *specie* of property and/or whether the defendant has any right to keep them (or control over them) or the value that they represent from the plaintiff regardless of how the law classifies them.

[30] While I find Bryan J.'s reasoning broadly appealing, I am disinclined on an urgent, *ex parte*, motion to make any determination about whether Ether or other digital assets are a *specie* of property. The issue has not been argued. However, I agree with the jurisprudence to date that, an interim preservation order or injunctive order is available, where the elements of the test are made out, in respect of cryptocurrency or other digital assets.

[31] There is a simple way of looking at the issue. The Ether inside the cryptocurrency wallet is fungible. The plaintiff's Ether went into the account and $300,000 USD worth of it has neither been converted to USD and paid to the plaintiff, nor returned. As such, I accept that the tokens inside the defendants' digital wallet constitute the very subject matter of the dispute.

[32] Second, is there a serious issue to be tried? Undoubtedly there is. The plaintiff advances multiple causes of action. For the purposes of this test, I need only focus on one: unjust enrichment. The plaintiff has made out a serious case that one, some, or all of the defendants have been unjustly enriched by the transfer of the plaintiff's Ether, and the plaintiff has correspondingly been deprived of its value without any juridical reason.

[33] Finally, does the balance of convenience favour granting the relief sought? I find that it does. As the court has acknowledged, the nature of cryptocurrency is such that it can be easily moved and is hard to trace. The defendant that Schneider represented controls the cryptocurrency wallet – Trustart – has entered into a settlement agreement acknowledging that funds are owed to the plaintiff as a result of the transfer of Ether. Although there is enough Ether in the cryptocurrency wallet (many times over) to return the missing Ether to the plaintiff, the defendants have taken no steps to do so. The plaintiff risks great prejudice if the Ether is not preserved, while there is little apparent harm to the defendants of preserving the $300,000 USD worth of Ether which one or more of them have taken and not returned or converted. I also note that the plaintiff has offered an undertaking as to damages, and the record suggests that the plaintiff has sufficient assets to make good on the undertaking, given the success of the NFT minting in 2021.

[34] In the result, I grant the motion with respect to the preservation and custodial order.

Mareva Injunction

[35] The plaintiff seeks a worldwide *Mareva* injunction against all the defendants, freezing assets in an amount equal not just to the $300,000 USD in missing Ether that was transferred but also with respect to the interest and penalty payments owing under the settlement agreement.

[36] A court can grant a *Mareva* injunction under s. 101 of the *Courts of Justice Act* and r. 40.01 of the *Rules of Civil Procedure*.

[37] The test to obtain a *Mareva* injunction is well known: *Jajj v. 100337 Canada Limited*, 2014 ONSC 557, at para. 131; *Sibley & Associates LP v. Ross*, 2011 ONSC 2951, at para. 10. The moving party must establish:

a. It has a strong *prima facie* case;

b. There must be some grounds for believing that the defendant has assets in the jurisdiction;

c. There is a real and genuine risk the defendant will dissipate its assets for the purpose of avoiding judgment;

d. The moving party will suffer irreparable harm;

e. The balance of convenience weighs in favour of the moving party.

[38] In addition, the moving party must make full and frank disclosure of all matters in its knowledge that are material for the court to know, and must give particulars of the claim against the defendant, stating the ground and amount of the claim, and fairly stating the points made against it by the defendant. The moving party must also give an undertaking as to damages.

[39] Here, the plaintiff seeks a worldwide *Mareva* injunction. In a worldwide *Mareva* injunction, the requirement that there be assets in the jurisdiction is modified, because a worldwide

Mareva injunction is based on *in personam* jurisdiction against any person properly made a party to the proceeding in the jurisdiction: *SFC Litigation Trust (Trustee of) v. Chan*, 2017 ONSC 1815, at paras. 27-45.

[40] In my view, while the plaintiff can make out many of the factors required for a *Mareva* injunction, the motion fails because the plaintiff has not established a risk of dissipation of assets for the purposes of avoiding judgment.

[41] In *Sibley*, Strathy J. (as he then was), held that, in cases of fraud, the risk of dissipation of assets can be established by inference that can arise from the circumstances of the fraud itself. The plaintiff argues that he has established a strong *prima facie* case of fraud, in that the defendants engaged in misrepresentation and deceit to conceal their fraudulent activity. This, coupled with their ability to transfer cryptocurrency anywhere in the world instantaneously and anonymously raises the risk of dissipation, according to the plaintiff.

[42] I accept that the nature of cryptocurrency is that it is easy to instantaneously and anonymously dissipate it. However, if this alone were enough to make out the risk of dissipation of assets, cryptocurrency or other digital assets would routinely become the subject of *Mareva* injunctions, when a *Mareva* injunction is meant to be an extraordinary remedy.

[43] The question is not so much whether the cryptocurrency can be easily dissipated, but whether there is a risk that it will be dissipated to avoid judgment.

[44] While I accept that the record makes a strong case that the defendants, or at least one of them, has been willing to take and keep what is not theirs, I am not satisfied that the cryptocurrency will be dissipated for purposes of avoiding judgment, or that there are sufficient indicators of fraud in this case to warrant such an inference, because:

a. Trustart has made payments to the plaintiff of $150,000 USD over time, and entered into two repayment agreements through its sole officer and director, Schneider. While the agreements have been breached, and funds remain owing, fraudsters are not known to repay funds to their victims, especially when the repayment would not continue and expand the fraud.

b. The $500,000 USD in Ether was transferred to the cryptocurrency wallet in December 2021, and there remains significant activity and cryptocurrency in that digital account. Fraudsters generally remove the proceeds of their fraud from known locations as quickly as possible, and especially once the victim of the fraud becomes alert to the fact that their funds were wrongfully taken.

c. While I recognize that it is possible that Zaftr controls the cryptocurrency wallet, there is little evidence of Zaftr's direct involvement in the plaintiff's Ether transactions. It is one thing to preserve fungible Ether in the cryptocurrency wallet into which the plaintiff's Ether was deposited; it is another to freeze the assets of a corporate defendant with little basis other than possibility and Schneider's status as

> its former sole director to lead one to suspect that it has been involved in the wrongdoing.

[45] I note, too, that the effect of the *Mareva* injunction, if ordered, would be to freeze assets sufficient to provide execution before judgment with respect to the penalty and interest fees under the settlement agreement (assuming that the preservation order is successfully executed and preserves the Ether that has not been returned or converted into fiat currency and paid to the plaintiff). I see no reason for claims for interest and penalty fees to justify execution before judgment simply because the known assets from which the defendants could pay those fees are in the form of cryptocurrency. Moreover, while there might be legal theories on which the plaintiff could claim those amounts from Schneider, at present at least, it is harder to see a theory on which those amounts could be claimed from Zaftr.

[46] I find that the plaintiff has not established that a worldwide *Mareva* injunction ought to be ordered. This extraordinary remedy is not made out on the record before me.

Anton Piller **Order**

[47] The plaintiff seeks an *Anton Piller* order.

[48] To grant an *Anton Piller* order, the following conditions must be met: (1) the plaintiff must demonstrate a strong *prima facie* case; (2) the damage to the plaintiff resulting from the defendant's alleged misconduct, potential or actual, must be very serious; (3) there must be convincing evidence that the defendant has in its possession incriminating documents or things; and (4) it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work: *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, at para. 35.

[49] The requirements for an *Anton Piller* order are met in this case.

[50] First, the plaintiff has established a strong *prima facie* case with respect to, at least, unjust enrichment. I reach this conclusion for the same reasons that I earlier indicated the plaintiff had established that there is a serious issue to be tried. I recognize that a strong *prima facie* case is a higher standard than a serious issue to be tried. The plaintiff meets the higher standard without difficulty.

[51] Second, without an *Anton Piller* order, the plaintiff will be unlikely to be able to find the passcode to allow the custodian to preserve and take possession of the cryptocurrency. In other words, the *Anton Piller* order is required to make the preservation order meaningful. Without the *Anton Piller* order, the plaintiff will have no realistic way of preserving the property that I have found ought to be preserved, leading to the serious risk that the plaintiff will be unable to enforce the preservation order that it has demonstrated is justified.

[52] Third, there is convincing evidence that the defendants have incriminating documents or things, including, in particular, the passcode for the cryptocurrency wallet. It is conceivable that the passcode could be in a ledger, a hard wallet, or even written down on a piece of paper.

Schneider represented that the cryptocurrency wallet was controlled by Trustart, but given that Zaftr was, at least at the relevant time, a registrant with Fintrac, and the evidence in the record linking Zaftr to Schneider, the plaintiff notes that any one of the defendants could conceivably control or own the cryptocurrency wallet and have the information with respect to the digital passcode. I accept this evidence, and on that basis, find that the *Anton Piller* order is justified as against all three defendants.

[53] Fourth, there is a real possibility that the evidence, and in particular the passcode, is at risk of being destroyed if the defendants, or any of them, seek to prevent the plaintiff's ability to preserve the cryptocurrency.

[54] I conclude that an *Anton Piller* order is warranted in this case to ensure that the preservation order is not toothless.

[55] The issue is the appropriate terms of the *Anton Piller* order. The plaintiff notes that the tradition execution of an *Anton Piller* order did not preserve the cryptocurrency in *Cicada*, and it seeks to apply that experience to fashion terms that will ensure the *Anton Piller* order is effective.

[56] Two aspects of the plaintiff's proposal are of note: (i) the proposal that the independent solicitor remain with the defendant during the time period between service of the order and execution of the order, when the defendant may obtain legal advice; and (ii) the proposal that the defendant be brought before the court on the day of the execution of the order to give sworn evidence about the digital assets, and in particular, the passcode to the cryptocurrency wallet, so that the court may exercise its powers if necessary to ensure the order is effective. In other words, a defendant that is not forthcoming in such a scenario might be at risk of penalties associated with contempt in the face of the court, including a fine or imprisonment.

[57] With respect to the first proposal, the plaintiff argues that it is necessary for the independent solicitor to supervise the defendants to ensure that they do not use the time before execution of the order to transfer the cryptocurrency from the cryptocurrency wallet. Steps that can be taken to mitigate against this risk include seizing the defendants' electronics and ensuring that the individual defendant or representatives of the corporate defendants are either limited to a landline, or a smart phone on which guided access or some other limitation is placed, to ensure the defendant only has access to a telephone to obtain legal advice. However, the plaintiff is concerned that the defendant could call someone other than a lawyer to provide the digital passcode, enabling a third party to transfer the cryptocurrency from the digital wallet before the *Anton Piller* order can be executed. To guard against this risk, the plaintiff argues that an independent solicitor ought to be present for the defendant's telephone conversations.

[58] I am concerned that this proposal unduly intrudes upon solicitor client privilege. However, I also appreciate the risk that the court's order could prove ineffective if the defendant has the ability to arrange for the transfer out of the cryptocurrency before the order can be executed.

[59] In my view, more safeguards are needed to protect solicitor client privilege. This can be done by:

a. Limiting the defendants to use of a landline, or smart phone limited to use of the telephone only, to obtain legal advice;

b. Allowing the independent solicitor to be in the room for the phone call and to confirm the defendant(s) are speaking to counsel, at which time the independent solicitor shall wear noise-cancelling headphones to ensure they cannot hear what is being said, and, if necessary, listening to music to drown out the sounds of the conversation.

[60] Following the protocol above will enable the independent solicitor to ensure that the defendants speak only to counsel, but not allow the independent solicitor to hear what is being said, thus preserving solicitor client privilege.

[61] With respect to the second proposal, I have several concerns with the idea of causing the defendants to be examined before a judge during or immediately following the execution of the search authorized by the *Anton Piller* order. While I understand the concern that the *Anton Piller* order and preservation order can be defeated if the passcode is not found during the search and the defendants refuse to reveal it, in my view, it is heavy-handed to haul a defendant before the court for an examination under oath within hours of being served with a preservation order and *Anton Piller* order, and, under threat of a finding of contempt and potential fine or imprisonment, require the defendant to give evidence without sufficient time to obtain legal advice or to be prepared for an examination by counsel. The proposal may make it more likely that the court's orders will be effective, but it would do so at the expense of procedural fairness to the defendants. Especially here, where I have concerns about the strength of the evidence of fraud, as opposed to other wrongdoing, I am not inclined to dispense with procedural fairness to the defendants.

[62] Moreover, on a practical level, the plaintiff's suggestion is not workable. This court is under-resourced and cannot accommodate an on-the-fly examination when it happens to be convenient during the execution of the *Anton Piller* order.

[63] As a result, I do not order the examination of the defendants to take place before the court as suggested by the plaintiff.

Conclusion

[64] The motion for a preservation and custodial order is granted. The motion for an *Anton Piller* order is granted, although the proposal that the independent solicitor sit in on the defendants' discussions with counsel is modified as described herein to ensure that solicitor client privilege is preserved, and the proposal for an in-court examination of the defendants during or at the conclusion of the execution of the search is dismissed.

[65] The motion for a *Mareva* injunction is dismissed.

[66] My endorsement herein departs from the draft order filed by the plaintiff. The plaintiff shall revise his draft order in accordance with my endorsement, and shall send it to me for signature.

[67] To ensure the *Anton Piller* order is effective, the plaintiff shall advise my assistant once the order has been executed. Thereafter, I will release these reasons to the publisher.

[68] As an *ex parte* order, this matter must return to court within ten days. The motion shall return on May 19, 2023, at 10 a.m., for 45 minutes.

[69] Costs are reserved to the return of this motion.

J.T. Akbarali J.

Date: May 10, 2023