CITATION: *McRae-Yu v Profitly Inc., et al,* 2024 ONSC 1593
COURT FILE NO.: CV-23-92340-00CP
DATE: 2024/03/15

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
TAYLAN MCRAE-YU Plaintiff / Responding Party	Sohaib Mohammad, for the Plaintiff/ Responding Party
– and –	
PROFITLY INCORPORATED, DMCB HOLDINGS INC., IVAN AVRAMENKO, ALEXANDRA STINSON and JOHN DOE Defendants/Moving Parties	N. Joan Kasozi and Nicholas Patterson for the Defendants/Moving Parties
	HEARD: November 14, 2023

Proceeding under *The Class Proceeding Act, 1992*

REASONS FOR DECISION

HOOPER J.

[1] This motion was brought to set aside the Mareva injunction order of this court made on June 15, 2023 and amended on June 23, 2023. The underlying litigation is a proposed class action, the plaintiff being the representative of that class. The litigation involves allegations of fraud and fraudulent misrepresentation against the defendants in the sale of a non-fungible token (NFT) collection.

[2] The defendants are alleged to have been involved in the development and marketing of an NFT collection by a group who called themselves Boneheads. In the responding material, it is conceded that Mr. Avramenko and DMCB Holdings were involved in the development and launch of this project. Profitly Incorporated was involved in the marketing of the project. Alexandra Stinson's involvement is specifically denied. In this decision, when I refer to "the defendants", I

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will be referring only to Mr. Avramenko, DMCB Holdings Inc. and Profitly Incoporated. Ms. Stinson will be discussed separately.

[3] The original Mareva injunction order was granted as a temporary freeze of all of the defendants' accounts, both in conventional banks and in cryptocurrency. The injunction was granted without notice to return before me within ten days. Prior to that return date, the parties negotiated a modified consent order to allow the defendants to pay for living expenses with access to corporate and personal bank accounts until the full motion could be argued on a mutually agreeable timetable. The defendants and Ms. Stinson were still denied access to their cryptocurrency wallets and cryptocurrency assets under this modified order.

[4] The issue before me on this motion is whether the modified injunction order freezing access to the defendants' cryptocurrency wallets and cryptocurrency assets should stay in place until the trial of this matter or a further order of this court. For the reasons that follow, and subject to possible modification to that order, I find that the injunction should stay in place for all but Ms. Stinson.

Background Facts

[5] NFTs are cryptocurrency-based assets. They can be developed within a collection wherein the developers create numerous NFTs to be offered to the public at the same time. The offering of a collection for public sale is called "minting". Once all NFTs in a collection have been sold, that NFT is deemed to have been minted.

[6] An NFT is initially sold by a smart contract--a self-executing contract formed when certain conditions are fulfilled. Smart contracts are transparent. Their terms are transparent. Each NFT is given a unique identification number which allows it to be distinguishable from all other NFTs. It is this unique identification number that allows an NFT to be sold, exchanged, or traded between owners.

[7] NFTs can be anything digitally tokenized on a blockchain. One popular form of NFT is a piece of digital art. Holders of an NFT own the original copy of the digital file – thereby holding the original piece of art. The value of an NFT token (after the initial sale) is completely market-driven with the secondary sale price being determined by the consumer. As a result, excitement

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and anticipation surrounding an NFT collection provides confidence to potential purchasers that an NFT will, at minimum, hold its value with the hope that its value will increase into the future.

[8] The NFT market has experienced volatility. In 2021 however, when the Boneheads' NFT project was launched, NFTs were seen to be a potentially valuable investment.

[9] The plaintiff has been involved in the blockchain and cryptocurrency space as a consumer and investor for over a decade. His affidavit states that he has purchased hundreds of NFTs over this time. In May 2021, the plaintiff became aware of an NFT collection known as Bored Ape Yacht Club (BAYC). This NFT collection was apparently one of the first to attract purchasers, not only through the nature of their NFTs, but by also promising ownership benefits including BAYC merchandise, exclusive membership-only perks, and early access to new BAYC NFT collections. BAYC was considered by those in the NFT world to be an extremely successful NFT collection as it offered its consumers access to an ongoing community with ongoing benefits and privileges. As a result, some of the tokens in the BAYC original collection became extremely valuable.

[10] In the summer of 2021, the plaintiff came across another NFT collection, this time from a new development team - Boneheads. The plaintiff states that he became interested in the Boneheads' project because he found the NFT art to be distinctive and visually appealing, there was a lot of interest in this upcoming collection from other NFT consumers, and the Boneheads' developers had set out an ambitious road map of benefits and privileges that would flow with ownership. Boneheads' NFT launch was a "surprise blind mint" meaning that none of the prospective purchasers would know which specific piece of art they were purchasing. This was part of the appeal of this mint since each consumer had the opportunity to acquire a token that could prove to be extremely valuable.

[11] The future benefits set out on the Boneheads' website included physical collectibles, exclusive drops of new NFTs, and a lifetime membership to a digital Cabana. On the evidence before me, it would appear that consumers were drawn to the Boneheads' collection not only for their NFTs, but for the exclusive community they would join through ownership.

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[12] In addition to providing prospective purchasers with an outline of future plans for the Boneheads collection, two promotional promises were advertised before the Boneheads collection was opened for public sale:

a. "[t]hat everyone who buys a Boneheads NFT will get an opportunity to participate in a secondary credit sale for the chance to win $1M"

b. That one lucky randomized token holder would get a monetary mystery box valued at a quarter million dollars, "revealed instantly at the end of the mint."

[13] The plaintiff states that these promises as well as the membership benefits led him to participate in the Boneheads mint on August 20, 2021. The mint for the Boneheads' NFT opened at 7:58 UTC (Coordinated Universal Time). The collection was sold out by 8:34 UTC, less than 40 minutes later. The mint generated 950.5 ETH (Ethereum) which, at the time, equated to approximately $4,005,047.38 CAD.

[14] Once the mint closed, the 950.5 ETH earned by the Boneheads was distributed into three crypto wallets. There was no reveal of a "monetary mystery box" winner. There has not been an opportunity to participate in a secondary credit sale for a chance to win one million dollars. According to the plaintiff, within minutes of the mint closing, the once highly responsive Boneheads team of developers put their chat response into "slow" mode and eventually advised the chat group that they were taking a few days off.

[15] The plaintiff and other Boneheads consumers began to suspect that they had been the victim of a rug pull – a scam in which an NFT developer props up the product with fake promises, mints the collection, and then takes the proceeds of the mint and disappears. The plaintiff acknowledges, however, that the Boneheads team did not completely disappear. While they were not as responsive as they were before the NFT collection was minted, the Boneheads did remain in the chat groups and have continued to communicate their efforts to fulfill the membership benefits promised. This has been categorized as a "slow rug pull;" a modified scam where the NFT developer continues to make false promises to pacify disappointed consumers with false hope, never intending to fulfill those promises. That this was a rug pull, or a slow rug pull, was the primary concern raised before me on the initial motion brought without notice.

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[16] The plaintiff purchased 36 Boneheads NFTs during the mint, spending $15,169.03 CAD in total on those purchases. He has not sold any of these NFTs alleging that, given the suspected slow rug pull by the developers, the collection has become worthless.

[17] The defendants filed two affidavits of Ivan Avramenko. Mr. Avramenko is one of the Boneheads founders. His evidence is that he founded Boneheads to connect the world of fashion with NFTs. He maintains that the Boneheads' NFT is a legitimate project he has been working on for over two years. He states that the collection was developed through his corporation, DMCB Holdings. He offers no explanation as to Profitly Incorporated's involvement, although he is listed as a director of that company. He also does not explain how DMCB Holdings developed the collection when its Articles of Incorporation are dated after the public mint. Although Mr. Avramenko denies Alexandra Stinson had any personal involvement in the Boneheads, he does not explain why she apparently received over $100,000 from the initial mint.

[18] Mr. Avramenko acknowledges that the Boneheads marketed six benefits consumers could receive with each Boneheads NFT purchase. He submits, however, that these were all marketed as future benefits with the purchasers knowing that as of the initial public mint none of the benefits were ready to be pushed out to the Boneheads NFT community. As a result, he takes the position that the plaintiff could not have relied on receiving these benefits when he made the original purchase.

[19] Mr. Avramenko further denies that any pre-sale representations included timelines for the benefits to crystallize. Given that these benefits would only be available to those who held Boneheads NFTs in their crypto wallets, he submits that these benefits were developed with the view that those purchasing a token in the collection would hold that token for a long period of time. While Mr. Avramenko acknowledges that the development of these benefits has taken longer than originally expected, given there were no deadlines promised, his position is that there has been no misrepresentation, fraudulent or otherwise.

[20] With respect to the two giveaways promised to token holders, explanations were given within the material as to why those promises were not fulfilled. For the purposes of this motion, however, Mr. Avramenko states that these representations were never officially made by the

Boneheads team and were not part of the original smart contract entered into by the plaintiff when he made the NFT purchases.

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Issues before the court

[21] The following issues are before the court:

a. Did the plaintiff fail to make full and frank disclosure on the original motion to justify the setting aside of the court's order?

b. If the answer to (a) is no, does the plaintiff meet the test to maintain the injunction?

c. If the injunction should continue, should it continue for the personal defendants?

d. If the injunction should continue, should the plaintiff, as a representative plaintiff for a proposed class, be relieved from his obligation to provide an undertaking for damages?

Law and Analysis

[22] Subsection 101(1) of the *Courts of Justice Act* provides the Superior Court of Justice with jurisdiction to grant an interlocutory injunction "where it appears to a judge of the court to be just or convenient to do so."[1] A Mareva injunction is an injunctive order that restrains the defendant from dissipating assets or from conveying away its property pending the court's determination in the proceedings. It is an extraordinary remedy as it, in effect, permits pre-judgment execution against the defendant's assets. In cases of fraud, however, the court's general reluctance to allow pre-judgment execution is outweighed by the more important goal of ensuring the civil justice system provides a just and enforceable remedy against unconscionable conduct.[2]

[23] Where fraud is alleged, the courts have found it can be appropriate for the initial motion to be brought without notice to ensure an order is obtained before those purportedly responsible for

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[1] RSO 1990, c C.43, s.101(1)

[2] *2092280 Ontario Inc. v. Voralto Group Inc.,* 2018 ONSC 2305 (Ont. S.C.J.) at para 28

the fraud become aware of the action. This way, if any further assets are dissipated, that dissipation can be remedied through the contempt powers of the court.[3]

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[24] When a party initially proceeds without notice, however, the law imposes an exceptional duty upon them to make a balanced presentation of the facts. This is often referred to as full and frank disclosure. The failure of a moving party to make full and frank disclosure on a motion brought without notice is sufficient grounds to later set that order aside.[4]

Issue (a) - Did the plaintiff fail to make full and frank disclosure in the original motion brought without notice before the court?

[25] The defendants argue the plaintiff made the following material misstatements and/or omissions in his original motion, thus justifying the setting aside of this order:

a. The plaintiff mischaracterized the Boneheads marketing of future benefits as promises when they were only meant to show purchasers the direction in which the project was headed and which products might be developed over time.

b. The plaintiff omitted to advise the court that the pre-mint publicized giveaways were not on the Boneheads website or part of the NFT smart contract.

c. The plaintiff failed to advise the court that he had been banned by the chatgroup Discord (the chatgroup used by the Boneheads' community) because he had made a number of false and damaging statements about the Boneheads, thereby breaching the rules of the platform. The defendants suggest that because the plaintiff was no longer on the Discord platform, he misrepresented the Boneheads development team as slowing down communications when, in reality, the plaintiff was no longer able to see the extent of communication continuing between the development team and purchasers.

[26] As a result of these misstatements and omissions, the defendants argue that the court's injunctive order ought to be set aside.

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[3] *2092280 Ontario Inc. v. Voralto Group Inc.,* 2018 ONSC 2305 (Ont. S.C.J.) at paras 11-12.

[4] *Chitel v. Rothbart* [1982] OSC (Court of Appeal) At para. 20; see also Rule 39.01(6) of the *Rules of Civil Procedure* RRO 1990, Reg. 194.

[27] I do not accept this position. The original injunction motion before the court was voluminous, with nearly 200 tabs including screenshots of the Boneheads' website and the communications that advertised the giveaways. The court was not misled by the plaintiff as to the nature of those communications.

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[28] Further, the defendants' suggestion that the plaintiff misrepresented the level of post-mint communication from the Boneheads' development team has been addressed by the affidavit of Dominic Simpson, a volunteer moderator on Discord, who confirmed the development team's slow responses, the ongoing promises being made to pacify disgruntled token holders, and the fact that even these new promises remain outstanding.

[29] I find the plaintiff made full and frank disclosure on the original motion.

Issue (b) Has the plaintiff met the test to continue this injunctive order?

[30] Although the defendants have brought this motion to set aside the injunction order, given it was originally granted without notice to them, the burden of continuing the order remains with the plaintiff. In order to have the injunction continue, the following test must be met:

a. The plaintiff must show that he has a strong *prima facie* case;

b. The defendants have assets within the jurisdiction;

c. There is a serious risk that the defendants will remove or dissipate their assets before judgment can be obtained;

d. The plaintiff will suffer irreparable harm if the injunction is not continued; and

e. The balance of convenience favours the continuation of the injunctive relief.[5]

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[5] *10390160 Canada Ltd et al. v. Casey et al.*, 2022 ONSC 628 at para. 3: *Chitel et al. v. Rothbart et al.*, (1982) 1982 CanLII 1956 (ON CA), 39 O.R. (2d) 513.

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Strong *Prima Facie* Case

[31] In order to establish a strong *prima facie* case, the plaintiff must show, on a balance of probabilities, that this case is likely to succeed. This standard does not require the plaintiff to prove his case.[6] Rather, when conducting an initial examination of the case, the motions judge must be convinced that, based on the law and the evidence presented, there is a substantial likelihood that the plaintiff will ultimately succeed in proving their allegations and obtaining judgment.[7]

[32] Although the defendants conceded that the future benefits formed part of the marketing campaign prior to the mint, Mr. Avramenko's affidavit attempts to walk back the nature of the representations made. Within his affidavit, Mr. Avramenko describes these as "potential" benefits, which I take to mean that these were not actually promised to the purchasers. He further states at paragraph 48 of his affidavit:

> … The Roadmap was a list of NFT endeavors that Boneheads had considered creating but was never a fixed product offering.

[33] A fair reading of the marketing material prior to the mint does not accord with Mr. Avramenko's description. These benefits were promised to Boneheads NFT holders. They were not simply endeavours being considered by the development team. While there was no timeline provided for the future benefits' delivery, the additional affidavits of Mr. Wilde and Mr. Simpson filed by the plaintiff set forth a disturbing number of ongoing promises being made to the Boneheads community which remain unfilled. I further note that one promise did have a fixed timeline – the reveal of a mystery box winner valued at $250,000 which was to occur instantly at the close of the mint. As stated above, no winner was revealed.

[34] The defendants submit that the promise of revealing a mystery box winner cannot be binding as it was not on the Boneheads' webpage, or part of the smart contract entered into by the

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[6] *Voysus Connection Experts Inc. v. Shaikh*, 2019 ONSC 6683 at para. 56
[7] *R. v. Canadian Broadcasting Corp*., 2018 SCC 5, at para 17.

plaintiff but was only advertised through social media posts. I disagree. Social media posts are representations that can have legal consequences.[8]

[35] On the evidence before me, I find that the plaintiff has met the evidentiary burden of a strong *prima facie* case for fraudulent misrepresentation.

The Defendants have assets within the jurisdiction

[36] The defendants have not disputed that they have assets within Ontario. As a result, this second branch of the test has been met.

There is a serious risk that, absent an injunction, the Defendants will dissipate their assets to avoid judgment

[37] Although it is conceded by the defendants that the nature of cryptocurrency makes it easy to instantly and anonymously dissipate, they argue that this factor alone is insufficient to support a finding that the defendants will dissipate their assets to avoid a judgment. In making this argument, the defendants rely upon *Kirshenberg v. Schneider*:

> 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.
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> 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.[9]

[38] The defendants further submit that the plaintiff has failed to adduce any direct evidence that the defendants are actively dissipating their assets. They suggest that legitimate reasons have been put forth for the removal of funds. The fact that this might impact a prospective plaintiff's ability to recover on a judgment does not justify the continuation of the Mareva injunction.[10]

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[8] *Probhash Mondal v. Kirkconnell* 2023 ONCA 523 at para. 40

[9] [2023] ONSC 2809 at paras. 42 and 43.

[10] *R. v. Consolidated Fastfrate Transport Inc.* (1995), 1995 CanLII 1527 (ON CA)

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[39] The plaintiff contends that given the fraudulent nature of the launch and the Boneheads' continued misrepresentations of the benefits attached to this NFT collection, the real risk of dissipation of assets can be proven by inference. He relies upon the following comment from Justice Strathy*:*

> Rather than carve out an "exception" for fraud, however, it seems to me that in cases of fraud, as in any case, the Mareva requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.[11]

[40] While the defendants have suggested that the funds were paid to those who developed and continue to work on the Boneheads project, the evidence on this point is extremely vague. Mr. Avramenko does not identify a single person who received funds other than himself. He does not explain why over $100,000 in funds were traced to Ms. Stinson other than to deny her involvement. He also does not set out any of the costs that had been incurred in developing this project.

[41] The plaintiff is not required to adduce direct evidence showing the defendants are actively dissipating their assets. A serious risk of dissipation is sufficient and may be inferred from the surrounding circumstances.[12] As I have already found there exists a strong *prima facie* case of fraudulent misrepresentation, I find that the defendants are very likely to attempt to dissipate the remaining assets or remove them from this jurisdiction.

<u>The plaintiff will suffer irreparable harm if the injunction is not continued</u>

[42] Irreparable harm is defined as harm that "cannot be quantified in monetary terms or which cannot be cured." The plaintiff indicates that he and the potential class will suffer irreparable harm if the injunction is not continued. In response, the defendants have focused on the amount invested

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[11] *Sibley & Associates LP v. Ross* 2011 ONSC 2951 (C.A.) at para 63.
[12] 2018 ONSC 2305 at para. 23.

in the NFT collection by McRae-Yu personally, not the fact that he is the representative of a proposed class.

[43] According to the Boneheads' website, there were 9500 NFTs available for the public mint. The plaintiff and the two other affiants supporting the injunction collectively purchased 114 NFTs from this collection. There are, therefore, many more potential consumers who may wish to join in on this litigation. If there is a finding of fraud, there is virtually no chance that the defendants, as perpetrators of this fraud will be held accountable without this injunction.

[44] I therefore find that the proposed class will suffer irreparable harm if this injunction is not continued.

The balance of convenience favours the continuation of the injunctive relief.

[45] The defendants suggest that they will be prevented from continuing to develop the Boneheads project without ongoing funds. I note, however, that although the public mint yielded over $4,000,000 CAD, only $500,000 has been frozen by this injunction. There is insufficient evidence from the defendants to explain how the $3.5 million was used or what ongoing expenses require access to the frozen funds.

[46] On the evidence before the court, I find that the balance of convenience tips in favour of maintaining the injunction. However, I have been advised through court administration that the parties are seeking a further date before me to discuss possible modification of this injunction o include *inter alia* the payment of legal fees. If the defendants wish to put forth further evidence as to how the $3.5 million was used and why the Boneheads need access to the additional $500,000 for ongoing operational expenses, the court is open to hearing that evidence and modifying the injunction order.

Conclusion on Issue (b)

[47] I find the plaintiff has met the test to continue the injunction.

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Issue (c) - Should the injunction be continued against the personal defendants?

[48] Although I have found that the injunction should be maintained, there remains an issue as to whether the personal defendants' assets should also continue to be enjoined.

[49] Alexandra Stinson is a director of Profitly Incorporated. She is also identified as having the Twitter handle @lexibone as well as social media accounts under "lexistinson" and "alexandrasilver". The Twitter handle and social media accounts contained marketing material for Boneheads' NFT.

[50] Following the public mint, the plaintiff traced over $100,000 to Ms. Stinson. The defendants deny Ms. Stinson had any involvement in the development and launch of Boneheads.

[51] At this preliminary stage, I must determine if the findings I have made on this injunction motion justify tying up Ms. Stinson's personal cryptocurrency assets. There is no direct evidence she was personally involved in the launch of Bonehead. While Ms. Stinson is a director of Profitly Incorporated, there is insufficient evidence on the record before me to support a piercing of the corporate veil to create personal exposure. As a result, the injunction pertaining to Ms. Stinson will be set aside.

[52] The same cannot be said for Mr. Avramenko. Mr. Avramenko is a director of both Profitly Incorporated as well as DMCB Holdings Inc. He confirms that he was the driving force behind Boneheads and initially received the majority of the funds from the mint. Although he attempts to shield himself from personal liability by stating that he developed Boneheads through DMCB Holdings Inc., DMCB's corporate documents confirm that this entity was not incorporated until 5 days after the public mint. I find that the injunction should remain against Mr. Avramenko's personal cryptocurrency wallets and cryptocurrency assets.

Issue (d) - Should the plaintiff be relieved of the requirement to provide an undertaking for damages?

[53] Ordinarily, a party seeking an injunction must give an undertaking to pay such damages as a condition of obtaining the order. The court has the discretion to waive this requirement under Rule 40.03. When the original motion was brought before me, I indicated I would not require this

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undertaking for the limited time of the original order but would revisit this issue during the full hearing of this motion.

[54] There is authority that an undertaking for damages should not be required from a representative plaintiff acting for the benefit of a class.[13] This makes sense given the unique benefit class action proceedings have in our society. As stated by the Supreme Court of Canada[14]:

> 26. The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated *vis-à-vis* the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.
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> 27. Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W. K. Branch, *Class Actions in Canada* (1998), at para. 3.30; M. A. Eizenga, M. J. Peerless and C. M. Wright, *Class Actions Law and Practice* (1999), at §1.6; Bankier, *supra*, at pp. 230-31; Ontario Law Reform Commission, *Report on Class Actions* (1982), at pp. 118-19.
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> 28. Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, *supra*, at para. 3.40; Eizenga, Peerless and Wright, *supra*, at §1.7; Bankier, *supra*, at pp. 231-32; Ontario Law Reform Commission, *supra*, at pp. 119-22.
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> 29. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs

[13] *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2006 BCSC 1018 aff'd in part, 2007 BCCA 481.
[14] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26-29

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> of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law – The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 *Harv. L. Rev.* 1806, at pp. 1809-10; see Branch, *supra*, at para. 3.50; Eizenga, Peerless and Wright, *supra*, at §1.8; Bankier, *supra*, at p. 232; Ontario Law Reform Commission, *supra*, at pp. 11 and 140-46.

[55] Under the circumstances of this case, I exercise my discretion pursuant to Rule 40.03 to waive the requirement of this undertaking.

Costs

[56] At the conclusion of the hearing, I asked each party to upload their cost outlines including any offers to settle to Caselines. I undertook not to review those further submissions until after I reached my decision. This allows me to determine costs of this step without requiring additional submissions from the parties.

[57] I find that the plaintiff was ultimately successful on this motion. The injunction against Ms. Stinson was set aside, but she filed no affidavit and there are no individual costs put forth on her behalf.

[58] There were no offers to settle. As a result, I find the plaintiff should be entitled to his costs on a partial indemnity basis.

[59] In considering the factors under Rule 57.01(1), I note that the motion was necessary and of significant importance to the parties. Although the plaintiff's costs were somewhat higher than the defendants, his costs include the original motion and the return of the motion. The plaintiff also bore the evidentiary burden.

[60] I find the plaintiff's fees to be reasonable and award costs in the amount of $32,826.50 inclusive of HST and disbursements. Those costs are payable by Mr. Avramenko, Profitly Incorporated and/or DMCB Holdings Inc. No costs are awarded to Ms. Stinson nor is she responsible for paying any costs.

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Conclusion

[61] As a result of the foregoing, the injunction will remain against all defendants except Ms. Stinson. Costs are awarded to the plaintiff in the amount of $32,826.50.

[62] I understand the parties have requested a case conference before me which has been scheduled for July 24, 2024. At that time, I am open to hearing submissions from the parties as to whether further modification should be made to this injunction order including making additional sums available for legal expenses or legitimate operating expenses. Those submissions can be filed and uploaded to Caselines as Case Conference briefs. They should not be sent to the court through correspondence.

Justice Jaye Hooper

Released: March 15, 2024

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