COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cascade Aerospace Inc. v. Viking Air Limited,* 2025 BCCA 2

Date: 20250102
Docket: CA49933

Between:

Cascade Aerospace Inc.

Appellant
(Defendant)

And

Viking Air Limited

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated May 15, 2024 (*Viking Air Limited v. Cascade Aerospace Inc.*, 2024 BCSC 841, Vancouver Docket S236674).

Counsel for the Appellant:	A. Winton J. Olson
Counsel for the Respondent:	J.R. Buysen K. Campbell
Place and Date of Hearing:	Vancouver, British Columbia September 16, 2024
Place and Date of Judgment:	Vancouver, British Columbia January 2, 2025

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Madam Justice Horsman

Summary:

This case involves the test for the interim return of property pending trial. The appellant argued that the judge erred in not requiring the applicant seeking the return of its aircraft to demonstrate that there was a risk of disposition of the asset held by the responding party. It also contended that the judge, in applying an interlocutory injunction test erred, in her analysis of irreparable harm. Held: Appeal dismissed. The court clarifies that a risk of disposition is not an element of the test for the interim return of property; a replevin remedy. The court explains that the test is not the injunction test, which requires a demonstration of irreparable harm. Rather, the test involves assessing which party has the better right to possession and what, if any, security needs to be provided to ensure a fair litigation process. Irreparable harm is not a necessary element of that analysis. In any event, the judge did not err in her irreparable harm analysis. The order is upheld because, on the facts found by the judge, the order was supportable on the application of the correct test.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] The principal issue on appeal concerns the test under R. 10-1(4) of the *Supreme Court Civil Rules* for the interim return of property held by one party to another in an action in detinue. Rule 10-1(4) authorizes a court to issue such an order, which I will refer to as a replevin order. The appellant says that the tests for a replevin and a preservation order, under R. 10-1 (1), are the same. Both require a demonstration in the evidence that an asset is at risk of “disposition”. The appellant contends that the judge erred in applying a test, contrary to authority, that did not require any evidence of a risk of disposition of the asset by the party in possession of it.

[2] In ordering the return of the property at issue in this case, the judge applied the *RJR-MacDonald* test for an interlocutory injunction. She concluded that the respondent had demonstrated a strong *prima facie* case that it would succeed at trial to recover the asset, that not ordering the return of the asset may cause irreparable harm, and that the balance of convenience favoured returning the asset.

[3] On this appeal, the appellant alleges, as noted, that the judge erred in not requiring some evidence from the applicant that the asset in its possession was at

some risk of transfer, disposition, or damage or degradation as a freestanding and necessary element of granting a replevin order. In addition, the appellant contends that the judge fell into legal error in concluding that a risk of irreparable harm had been demonstrated. It says the judge had nothing more than a bald and speculative assertion of reputational harm if the asset were not returned so that it could be delivered to a purchaser to which the asset had already been sold.

[4] It is important also to note what is not in issue in this appeal. The appellant does not allege error in the adoption of a strong *prima facie* case as the threshold merits test for a replevin order. Moreover, the appellant does not directly challenge the judge's assessment of the relative merits of the parties' positions at trial. That is to say, more particularly, the appellant does not directly challenge the judge's assessment of its claim to possession of the asset as a defence in the underlying action. Rather, it suggests the judge ought not to have embarked on that inquiry on the state of the record before her, including the absence of evidence in support of some of the appellant's defences.

[5] The respondent contends the judge did not err either in rejecting the argument that a risk of disposition needed to be demonstrated, or in applying the test for an interlocutory injunction, in deciding whether a replevin order should go.

[6] For the reasons that follow, I would dismiss the appeal. In my view, the judge correctly rejected the argument that a replevin order required that the respondent show a risk of disposition of the asset. Moreover, no error in the exercise of her discretion has been demonstrated. On the facts, in my view, the judge did not err in granting the order.

[7] Neither party, however, squarely addressed the question of whether an order of replevin requires an applicant to satisfy the *RJR-MacDonald* test if a risk of disposition of the asset is not a necessary condition for granting such an order. For the reasons I shall explain, I am not persuaded that authority or principle requires an applicant to demonstrate a risk of irreparable harm as a condition of being granted a replevin order. This is so, at a minimum, in situations where the party in possession

of an asset has a lesser claim to possession than the applicant, and is holding onto the property in order to secure a monetary claim.

[8] In these circumstances, at least, the relevant considerations controlling a judge's exercise of discretion in granting an order in replevin should focus on: (1) who has a better claim to possession of the property and (2) the need for and sufficiency of security, weighing and balancing the interests of the parties in the particular circumstances of the case.

Factual Context

[9] The facts material to the issue before us are straightforward. The respondent (Viking) is part of a group of companies in the aviation industry. Viking manufactures, supports, and sells various aircraft and aircraft parts and systems. At issue in this proceeding is possession of one of its aircraft, the legal title to which is vested in another company within the group.

[10] Viking contracted with the appellant (Cascade) to upgrade the avionics system on certain of its aircraft. Cascade was to install the system in Viking's aircraft. The avionics system was supplied by a third party.

[11] A dispute arose between Viking and Cascade under the contract.

[12] Viking had provided an aircraft to Cascade for the installation and upgrade. In the context of the dispute, Viking asked for the return of its aircraft. Cascade refused. It took the position that it had a general and specific lien over the aircraft to secure its claim for damages and other relief arising out of its view of legal liability in the dispute. Cascade assured Viking and the court that the aircraft would be kept in good condition pending the resolution of the dispute so that it was not at risk of disposition. One reason why Viking wanted the aircraft back was that it had been sold, and Viking was obliged to deliver it to the purchaser. Arrangements have since been made to suspend delivery of the aircraft to its purchaser pending the resolution of this appeal.

[13] Viking responded to Cascade's refusal to return its aircraft by starting an action alleging the tort of detinue. Cascade filed a counterclaim alleging breach of contract, and seeking damages and other relief, including a claim for specific performance of the contract. It alleged as a defence to the detinue action its lien claims.

[14] Viking filed an application under R. 10-1(4) and s. 57(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which sought an order for the return of the aircraft.

[15] The judge ordered Cascade to return the aircraft on the posting of security by Viking equal to Cascade's claim for unpaid invoices (US $1,845,000). Cascade claims to have a damages claim in the event of termination of the underlying contract well in excess of its claim for unpaid invoices. The judge did not make any findings relating to the substance of the damages claim advanced by Cascade.

The Issues

[16] It is useful to refer to the issues raised by Cascade as alleged errors warranting appellate intervention. Cascade says that the judge erred by failing to follow a line of authority in the Supreme Court of British Columbia that incorporates a risk of disposition of an asset as a necessary condition for a replevin order, confirming that this condition is equally part of the test for an order preserving property. Two further errors are alleged: that the judge applied a wrong legal standard to whether irreparable harm existed, and erred factually in determining whether irreparable harm had been established.

[17] Both parties devoted considerable effort in their factums to dissecting whether or not the judge fell into legal error by failing to follow an earlier Supreme Court decision which is said to have established or confirmed that evidence of the risk of disposition of an asset is a standalone requirement of a replevin order. To the extent that this effort was directed to whether the judge failed to follow the principles of horizontal *stare decisis*, the effort was wasted. Such an alleged error is not a matter

that this Court will typically review. As Justice Bennett wrote in addressing this issue in *Ludwig v. Bos*, 2010 BCCA 203:

> [17] That finding is sufficient to deal with this appeal. However, there was a third issue raised which I wish to address. A B.C. Supreme Court decision with similar facts, *Cole v. Spicer*, 1996 CanLII 8564, was cited to the trial judge. The appellants say that the trial judge in *Cole* found that there was a duty to provide lateral support to the neighbours' property, even when it was not in a completely natural state, but altered by fill. In his reasons for judgment in this case, the trial judge said that the case was indistinguishable and said, "I decline to follow *Cole v. Spicer* if it was the plaintiff's fill that eroded there". The appellants submitted that the trial judge erred because he violated the principle in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.), where Wilson J. (as he then was) said, at p. 592:
>
> > ... I say this: I will only go against a judgment of another Judge of this Court if:
> >
> > > (a) Subsequent decisions have affected the validity of the impugned judgment;
> > >
> > > (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
> > >
> > > (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.
> >
> > If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.
>
> [18] The question of whether this is an error that this Court will address was answered in *John Carten Personal Law Corporation v. British Columbia (Attorney General)* (1997), 153 D.L.R.(4th) 460 at para. 7 where Lambert J.A. said:
>
> > [7] *In re Hansard Spruce Mills* embodies a rule of judicial comity. It was propounded by Mr. Justice Wilson, later Chief Justice, as a guide for one trial court judge examining an issue which had already been considered and decided by another judge of the same court. It is not a principle that directly binds this Court in dealing with our own previous decisions. Our rules for judicial comity are set out in *Bell v. Cessna* ... (1983), 46 B.C.L.R. 145 (B.C.C.A.) and *British Columbia v. Worthington (Canada) Inc.* ... (1988), 29 B.C.L.R. (2d) 145 (B.C.C.A.). What is more, this Court is not obliged to decline to review a Supreme Court of British Columbia decision because of the *Hansard Spruce Mills* rule, since we are not bound to follow previous Supreme Court of British Columbia decisions. So, no matter what view we might form about whether Mr. Justice Lowry was correct in applying *Hansard Spruce Mills* in this case, we would still be obliged to consider the eight issues that Mr. Carten wished to raise before Mr. Justice Lowry and which he has argued before us. It follows that in this Court the *Hansard Spruce Mills* issue is moot. I do not think that the

> Supreme Court judges, who developed the *Hansard Spruce Mills* rules and who are familiar with their application, need to have any issues connected with the application of those rules resolved by this Court. If the application given to the *Hansard Spruce Mills* rules by Mr. Justice Lowry proves, with the passage of time, to be an impediment to the administration of justice, and if the problem is not correctable by the Supreme Court itself, then no doubt it will come back to this Court and can be considered here in the light of the particular problem that might have arisen. So I do not propose to consider the question of whether Mr. Justice Lowry ought to have applied the *Hansard Spruce Mills* rules.
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> [Emphasis added.]

[18] More recently, this proposition was repeated by Skolrood J.A. (as he then was) in *R. v. Nelson*, 2024 BCCA 72:

> [26] As discussed above, the judge believed he was bound by Fitzpatrick J.'s analysis by reason of the *Hansard Spruce Mills* principles. This Court has held that it is generally not its role to review a trial judge's compliance with the *Hansard Spruce Mills* principles since we are not bound to follow previous Supreme Court of British Columbia decisions: *Kunzler v. The Owners, Strata Plan EPS 433*, 2021 BCCA 173 at para. 126, citing *Ludwig v. Bos*, 2010 BCCA 203 at paras. 18–19; and *John Carten Personal Law Corp. v. British Columbia (Attorney General)* (1997), 153 D.L.R. (4th) 460 (B.C. C.A.) at para. 7.

[19] Whether the judge below fell into error by failing to apply an earlier decision of her court, or applied the wrong line of authority from that court, is a matter of no moment on this appeal. What matters is whether, as a matter of correct legal principle, evidence of a risk to property is a standalone requirement of a replevin order under R. 10-1(4), and, if not, whether the order rested on other legal error. That matter is to be approached directly and on its own merits. It is with this in mind that I turn to examine the reasons for judgment insofar as they focus on the substantive issue rather than the state of previous Supreme Court authority.

Reasons for Judgment 2024 BCSC 841

[20] The judge identified the issues before her at para. 57 as follows:

> The merits of the dispute between Viking and Cascade are not before me. Rather, the issues I have to decide based on the parties' arguments are:
>
> 1. What is the applicable legal test on an application under R. 10-1(4), seeking interim return of property?
>
> a) Does the test under R. 10-1(4) require some evidence to support a reasonable belief that the property is threatened with disposition or transfer outside the jurisdiction?
>
> b) Is the threshold for the first requirement of the *RJR-MacDonald* injunction test: whether there is a "serious issue to be tried" or that there is a "strong *prima facie* case"?
>
> i. Is the injunction being sought in the nature of a prohibitive or a mandatory interim injunction?
>
> 2. Has Viking met the test for the interim return of the property under R. 10-1(4)?
>
> a) If the standard is "a serious issue to be tried" or "strong *prima facie* case", has Viking met the threshold?
>
> i. Is there a serious issue or a strong prima facie case on the issue of whether Cascade has committed the tort of detinue?
>
> (i) What are the legal principles of detinue?
>
> a. Does Viking have a better claim to the CL-215T Property than Cascade?
>
> b. Will there be irreparable harm if the relief sought by Viking is not granted?
>
> c. Does the balance of convenience favour Viking or Cascade?

[21] The judge identified the two principal issues in dispute between the parties: whether a risk of disposition was a standalone and necessary element of the test for a replevin order, as suggested in *Terastream Networks Inc. v. Grossholz*, 2018 BCSC 837, and whether the threshold at the first stage of the test is that there is a "serious issue to be tried" or a "strong *prima facie* case".

[22] It seems apparent from this that the judge proceeded on the assumption that, if a risk of disposition was not a precondition for the interim return of property, then the availability of the order turned on the application of the *RJR-MacDonald* test, therefore including the requirement that the applicant demonstrate a risk of

irreparable harm. As I have already noted, I do not think this is the correct analytical approach to a replevin order or the interim return of property, at least on facts like these. I will return to this later.

[23] The judge made a general reference to R. 10-1, which gives the court discretion to make various orders related to the pretrial preservation and recovery of property. Specifically, R. 10-1(4) provides a remedy in replevin. It reads:

> (4) If a party claims the recovery of specific property other than land, the court may order that the property claimed be given up to the party, pending the outcome of the proceeding, either unconditionally or on terms and conditions, if any, relating to giving security, time, mode of trial or otherwise.

[24] By its terms, the rule clearly provides for an interim return of property on terms pending the ultimate disposition of the dispute. The rule is broad, on its face dealing with the return of any specific property other than land. Rule 10-1(4) may be engaged in a wide variety of circumstances, including situations where two parties are competing for the ultimate right of possession, or other situations where there is no real dispute about which party owns the property, but it is in the possession of another party who is claiming a right to continue to possess it as a means of securing a monetary claim of some kind.

[25] Finally, the rule itself provides no direct guidance as to the criteria a court is to employ in deciding whether to order the return of property. The absence of such guidance suggests the rule confers a broad and flexible discretion responsive to the nature of the dispute between the parties, their competing interests, and the particular circumstances before the court.

[26] The judge identified the different legal positions of the parties on the issue of risk of disposition; the primary issue joined between the parties. Viking asserted that the test on an application for the interim return of property under R. 10-1(4), where there is no intention by the applicant to preserve the property before trial, is the same as the test for an interlocutory injunction. The test does not require any evidence to support a reasonable belief that there is a threat/risk of dispossession or

transfer. That requirement applies in respect of preservation orders made pursuant to R. 10-1(1). Accordingly, Viking said that it was not required to adduce evidence that the aircraft was threatened with disposition or transfer out of the jurisdiction to obtain a replevin order. In support of its proposed approach, Viking relied on *Midland Walwyn Capital Inc. v. Global Securities Corp.*, [1997] B.C.J. No. 2541, 1997 CanLII 1736 (S.C.), and the cases that have followed it.

[27] Cascade asserted a four-part test under R. 10-1(4), rooted in para. 10 of *Terastream*, namely:

a) whether the applicant has a claim on the evidence, and not just on the pleadings, to a proprietary interest in the property;

b) whether there is some evidence to render it reasonable to believe that the property is threatened with disposition or transfer outside the jurisdiction;

c) whether there is a substantial question to be decided as to the plaintiff's entitlement to the property; and

d) whether the balance of convenience favours granting the order.

[28] The judge then turned to consider the implications of a number of cases in the trial court to determine whether she was obliged to follow *Terastream*. For the reasons given above, I need not dwell on that analysis. Suffice it to say that the judge concluded that the tests for a preservation order and a replevin order were not the same. The two types of order serve different purposes, and whereas a threat or risk to the property was a necessary aspect of achieving the objective of a preservation order, the same could not be said of replevin.

[29] The underlying purpose of a replevin order, in broad terms, is to return an asset to the party having the better right of possession pending a determination of the rights of the parties. The difference in the objective of the two rules entails the application of a different, if overlapping, test, but one which does not require evidence of a risk of disposition as a necessary or standalone element of a replevin

order. The question of whether an asset might be at risk could well be relevant to ordering replevin, but would be dealt with under other aspects of the interlocutory injunction test. The judge stated her conclusion at para. 111:

> I conclude that despite similarities or overlapping considerations, the test under R. 10-1(4) should be formulated as the three-part test for an interlocutory injunction. The risk of disposition, or that property will be transferred out of the jurisdiction, is not a standalone requirement of the test but may be a factor in assessing the balance of convenience, as was done in *Global Coal*.

[30] The judge then turned to the application of the injunction test, asking first whether the threshold merits test was a serious question to be tried, as asserted by Viking, or a strong *prima facie* case, as contended for by Cascade. She adopted a strong *prima facie* case standard, following *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 [*CBC*], on the basis that the order at issue should properly be viewed as a mandatory rather than a prohibitive injunction. She cited para. 18 of *CBC*, in which Justice Brown wrote:

> [18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR - MacDonald* test, which proceeds as follows:
>
> (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
>
> (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
>
> (3) The applicant must show that the balance of convenience favours granting the injunction.

[31] This conclusion, coupled with her awareness of the practical impact of making the order on the substantive issues at trial, led the judge into a detailed examination of the relative merits of the parties' substantive positions on the evidence before her. The judge's awareness of these issues is reflected in the following:

> [129] In *Este v. Esteghamat-Ardakani*, 2020 BCCA 202, leave to appeal to SCC ref'd [2018] S.C.C.A. No. 477, the Court of Appeal rationalized the different standards for interlocutory injunctions on the basis that some

interlocutory orders will have the practical effect of determining the ultimate issues between the parties:

> [35] … Although an interlocutory order is only effective until final judgment is given, an interlocutory injunction often operates as the only, and therefore ultimate, resolution of issues between parties. Consistent with these special characteristics, the law of interlocutory injunctions demands there be merit to the position advanced by the applicant, and imposes standards for the anticipated consequences of the order. …
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> [36] A mandatory interlocutory injunction, compelling a person to take a positive action, sets the test higher. Rather than requiring a "serious question to be tried", a mandatory injunction requires that the applicant establish a "strong prima facie case": *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5. …

[130] In this case, the order sought by Viking is the pretrial return of the CL-215T Property. As in *Terekhova*, the order, on its face, could be characterized as either mandatory or prohibitory. If granted, the order would require Cascade to take positive steps to transport the CL-215T Property to Viking, or to arrange transport with Viking. It would have mandatory aspects. However, the order could also be characterized as requiring Cascade to refrain from preventing Viking from accessing or possessing the CL-215T Property.

[131] Looking beyond the form and language in which the order sought is framed, and considering the substance of what is being sought, Viking seeks the return of its CL-215T Property in the underlying action for detinue. In BC, unlike in Alberta, a final order for the return of specific property must be framed in detinue; while the remedy of replevin, codified in R. 10-1(4), provides that interim recovery of property can be ordered: *Neill* at para. 29.

[132] In this case, while other relief, including damages, is sought in the notice of civil claim, fairly read, the return of the CL-215T Property is the primary relief sought by Viking. Returning the CL-215T Property is far more burdensome than changing locks and providing access to a condominium (steps that are easily reversible).

[133] The practical consequences of the order sought would preclude specific performance of the Integration Agreement, the main relief sought by Cascade in its counterclaim. Viking asserts in its submissions that "if the parties are able to resolve their differences, Viking can return the [CL-215T Property] to Cascade and the work can continue. If not, the relationship may be terminated and, no doubt, a dispute will arise over who is responsible for the failure."

[134] I do not accept that this is the practical reality. If the CL-215T Property is returned to Viking, it is to be transferred to Morocco, and it is highly improbable that work will continue. The Integration Agreement will effectively be terminated. What will be left is the dispute about fault for the failure of the Integration Agreement and any damages that flow as a result. The unlikelihood that the work would continue is compounded by De Havilland's new partnership with Universal Avionics, and acquisition of MC2 and ADS as discussed earlier in these reasons.

> [135] Considering the surrounding circumstances in this case, and the practical implications of the order sought by Viking, I conclude that the order sought is, in fact, a mandatory injunction. As a result, Viking must establish that it has a strong prima facie case at the first prong of the injunction test.

[32] In approaching whether a strong *prima facie* case had been established by Viking, the judge examined both the strength of Viking's case to possession of the aircraft, and Cascade's defences to that claim, and Cascade's claim to continued possession pending the resolution of the ultimate dispute. In dealing with the matter in this way, the judge applied the standard mandated by the Supreme Court of Canada in *CBC*:

> [17] … Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.
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> [Footnotes omitted; emphasis added.]

[33] Viking does not contend, on this appeal, that the judge erred in applying a strong *prima facie* test rather than a serious question to be tried standard to the threshold merits test. Equally, Cascade does not challenge the judge's assessment of whether Viking had established a strong *prima facie* case of such merit that it is very likely to succeed at trial. As I referred to above, the challenge appears to be that the judge ought not to have embarked on this inquiry in the absence of evidence that Cascade proposed to lead at trial about the existence of customary liens in the aviation industry. It says that by doing this, the judge, in effect, engaged in a summary determination of the ultimate merits.

[34] I see no merit in this argument. The judge was perfectly aware of the absence of evidence. She notes that the ultimate decision may be different, but she did what she was mandated to do by the Supreme Court of Canada, and that is to engage in

a preliminary review, on the basis of the material before her, of the relative strengths of the parties' claims.

[35] Given the absence of a challenge to the judge's analysis of whether Viking had established a strong *prima facie* case, it is unnecessary to examine the judge's reasons in detail. It is sufficient to note that the judge evaluated Viking's claim to possession, rooted ultimately in ownership of the aircraft by a related company, and the defences raised by Cascade that it had a lien on the aircraft, rooted in a variety of different legal sources, as well as an alleged contractual right under the agreement between the parties to remain in possession of the aircraft until completion of the contemplated work. It is perhaps worthwhile noting the judge's conclusions. The judge concluded that the agreement did not include an express term creating a general lien. The judge concluded that:

> [169] Given the lack of an express term, and the general judicial reluctance to find a general lien, I conclude that it is highly unlikely that Cascade could establish that it is entitled to a general lien, arising from contract, against the CL-215T Property.
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> …
>
> [172] In this case, Cascade has not adduced any evidence, expert or otherwise, in support of its claim that it is trade custom in the aviation industry for aerospace maintenance experts and engineers to retain a general lien over aircraft for debts in respect of their services. Without precluding a different finding by the trial judge, if expert evidence is adduced at trial, as I am told is Cascade's intention, I cannot find that Cascade has established a common law general lien arising from custom at this stage of the proceedings. It seems unlikely that the high bar set out in the case law will be met. This is particularly so in light of the explicit terms of Article 8.8 of the Integration Agreement and the Indemnification Provision
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> …
>
> [192] As a result, I find that Cascade relinquished any right to assert a common law general lien or a particular lien.
>
> [193] As set out, Cascade asserts that the terms of the Integration Agreement require it to maintain possession of the CL215-T Property until its Integration Services are complete, giving rise to a contractual right to retain the CL215-T Property.
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> …
>
> [195] I conclude that those sections do not give Cascade a contractual right to retain the CL215-T Property.

[36] The judge then proceeded to examine whether refusing to return the aircraft would cause irreparable harm. After setting out uncontentious principles identifying the definition of irreparable harm and the requirements for establishing it, the judge turned to the evidence. Given the challenge to this aspect of the judgment, it is convenient to set out the judge's analysis in her own words:

> [206] In this case, Viking submits that the irreparable harm that it may suffer is primarily the potential loss of customers and harm to Viking's business reputation.
>
> [207] In his affidavit, Mr. Côté explains that Longview Services sold the CL-215T Property to Morocco, through the Canadian Commercial Corporation, as part of a government-to-government contract. He says that the latest amendment to the contract provides that the CL-215T is to be delivered to Morocco by 2024. Mr. Côté says that if Longview Services fails to deliver the CL-215T Property, it is at risk of a damage claim or the termination of the contract.
>
> [208] Mr. Côté says that failure to deliver on the commitment to Morocco will harm Viking's and Longview Service's reputation with Morocco, and in the industry more broadly.
>
> [209] While Mr. Côté's affidavit does not explain why the inability of Longview Services to deliver on the contract with Morocco would cause irreparable harm to Viking, I accept that there is a potential that damage to the reputation of one company in the Viking Group could affect the reputation of other companies in the group. Mr. Lemke's affidavit about De Havilland's recent contract and acquisitions suggest that in the marketplace, the various companies in the Viking Group are viewed interchangeably. Potential loss of clients and damage to business reputation are very difficult to establish conclusively.
>
> [210] Viking will not definitively know whether Morocco will decline to make future purchases from it because it is unable to deliver the CL-215T in accordance with the agreement. It also will not be able to identify potential purchasers who did not purchase aircraft from it because of its inability to deliver the CL-215T to Morocco. However, I accept that the purchase of a waterbomber aircraft, at a cost of many millions of dollars, is not undertaken without considering the vendor's ability to deliver on its commitments.
>
> [211] Cascade does not dispute that the CL-215T has been sold to Morocco and that delivery is due in 2024. I accept that Viking, or the Viking Group, may suffer reputational damage, and perhaps face contractual damage claims, if unable to comply with the contractual terms of the sale to Morocco. In other words, I am satisfied on Mr. Côté's evidence that there is a potential for Viking to suffer irreparable harm that is more than speculative.
>
> [212] The second instance of irreparable harm relied on by Mr. Côté in his affidavit is that several other Waterbomber Aircraft have been sold by Viking and delivered to other customers who are awaiting completion of the AUP to modify their aircraft. He says that Viking is "at risk" of losing revenue and

> suffering unquantified harm to its reputation due to its failure to deliver the upgrade its aircraft. Mr. Côté says that operators are at risk if the old avionics systems become unrepairable.
>
> [213] I accept that failure to complete the AUP has the potential for reputational harm to Viking, but these damages, if proven, do not flow from the Cascade's retention of the CL-215T Property but rather from the failed AUP, the blame for which, if any, is yet to be determined.
>
> [214] Given the evidence set out in Mr. Lemke's second affidavit about De Havilland's recent partnership with a new avionics system supplier, and the purchase of two of Cascade's competitors, Viking has not demonstrated how sales to other purchasers are at risk if the CL-215T Property, in Cascade's possession, is not returned to Viking before trial. I do not accept that this evidence establishes the potential for irreparable harm.
>
> [215] The third instance of irreparable harm relied on by Mr. Côté is that the presence of the CL-215T aircraft at Cascade's premises, and its use for tours by school groups and others, threatens its "safety and integrity". In response, Mr. Lemke explains the steps Cascade has taken to ensure the safekeeping of the CL-215T. Nonetheless, it is concerning that as early as July 2023, Mr. Lemke was asking Viking to remove the CL-215T Aircraft from its premises. From the photographs attached to Mr. Côté's affidavit, it appears that the Aircraft is being used by Cascade for social media and public purposes. This was not contemplated by the Integration Agreement.
>
> [216] Related to this, the fourth instance of irreparable harm relied on by Mr. Côté is that social media posts by Cascade with the CL-215T in the background "convey to the market that we continue to pursue a failed program with Cascade" and could "cause confusion in the marketplace as to the status of our upgrade." Although the posts do not identify Viking as the owner of the CL-215T, and there no visible markings in the photographs indicating that the aircraft in the background is a Viking aircraft, I accept that there is potential for confusion in the industry.
>
> [217] To the instances of irreparable harm set out by Mr. Côté, I would add that the value of the CL-215T Property exceeds the claim for damages by about US$10,000,000. Having property of that value withheld, despite Viking's strong prima facie case for its return, has the potential to cause irreparable harm.

[37] Finally, the judge analysed the balance of convenience, concluding that it favoured the return of the aircraft. The judge's conclusion on this aspect of the test is not challenged and is not in issue before us.

Analysis

Does a replevin order require evidence of a risk of disposition by the party in possession of the asset?

[38] Some preliminary comments are in order to set the issues in context. First, the judge accepted that the tests set out in *Midland* was a correct statement of the law, binding on her. *Midland* contemplates two different tests depending on whether the applicant seeking return of the asset intends to preserve it pending trial. In that case, the question is who has the better claim to the property or the better *prima facie* claim to a right of possession, para. 10. However, where the applicant does not intend to preserve the property, the test for injunctive relief applies, requiring satisfaction of the appropriate threshold merits test, irreparable harm, and that the balance of convenience favours return of the property. It is this aspect of the test articulated in *Midland* that I think is in error.

[39] On the facts before us, the applicant does not intend to preserve the property pending trial. The judge therefore accepted that, in that situation, the test for an interlocutory injunction applied. Again, this, in my view, is not correct.

[40] I turn to the alleged legal error.

[41] The fundamental proposition advanced by Cascade is that the various subrules in R. 10-1 all deal with aspects of the preservation of property, and share a common objective of preserving property pending trial. Rule 10-1(4) should, therefore, be viewed as complementary to R. 10-1(1), which explicitly provides for an order to preserve property pending trial, in order to ensure that the property is available when it is determined which party is entitled to it. The replevin rule is intended to supplement possession orders, where a simple possession order may be insufficient to accomplish that objective, and a return of the property is necessary to preserve the asset.

[42] I would not accede to that submission. In my view, possession orders and replevin orders are distinct, and, while there may be overlapping issues, the two orders have different objectives. A possession order is intended primarily to ensure

the continuing integrity of an asset pending a determination of entitlement to it. It is intended to preserve the *status quo*. By contrast, a replevin order is intended to permit the immediate return of property that has been wrongfully retained, or in respect of which one party has a better right of possession than the other. As R. 10-1(4) contemplates, replevin orders have typically been accompanied by ancillary orders, such as the provision of security in place of the security for the claim provided by possession of the asset.

[43] In my opinion, the two different types of orders cannot be assimilated one to the other. The relevant tests for granting an order must reflect the underlying objectives embedded in them. Replevin is a long-standing remedy in the law. In British Columbia, the availability of replevin has been codified by statute to provide a remedy where immediate recovery of the property was essential or where a party with a strong claim to the property would be compelled, to its prejudice, to await the outcome of the trial. In this context, the provision of security in lieu of permitting the other party to continue to hold the property pending the ultimate resolution of the dispute protects the interests of both parties.

[44] As I shall explain, adding a requirement that the applicant be able to demonstrate irreparable harm as a condition of having its property returned is unnecessary, redundant, and inhibits the issuance of replevin in circumstances where it clearly should be ordered.

[45] The fact that the replevin remedy was incorporated into the *Civil Rules*, and was provided for as one of the subrules dealing with preservation, protection and return of property pending trial does not evidence a legislative intent to assimilate the objectives of the subrules into one overriding objective. Replevin did not originate in statute, its origins lie in the common law. The codification of replevin by statute merely changed the procedure guiding the process to follow to obtain such an order: *Pashko v. Canadian Acceptance Corp. Ltd.*, [1957] 12 D.L.R. (2d) 380 (B.C.C.A.) at paras. 13–14. The objective of providing for the immediate recovery of property, pending trial, was not altered by codifying the replevin rule as a subrule

within a general rule dealing with the rights of possession, pending trial, more generally.

[46] It is clear from the language of R. 10-1(4) that a discretionary jurisdiction is conferred on the court to order the return of property pending trial unconditionally or on terms. The broad discretionary aspect of the rule would be defeated if the applicant was either required to lead evidence of a risk of disposition by the party in possession, or assure the court that it would protect and preserve the property. The same is true of requiring the establishment of a risk of irreparable harm. These preconditions would mean that no matter how strong the applicant's claim to ownership or a right of possession of the property were, and no matter how weak the respondent's claim to be in possession, the court would be unable to order replevin. This would undermine both the broad discretionary nature of the order as well as its objectives.

[47] It is important, in this context, not to lose sight of the nature of the claims of the different parties to possess the aircraft. Viking's right to possession is rooted in the fact that the Viking group of companies owns the aircraft. Cascade's right to possession is rooted solely in its claim to have a lien. It is pertinent that a lien typically provides security for another claim, such as a claim to damages or debt. It is a prejudgment remedy of a type of which the courts are generally wary.

[48] Liens of one kind or another exist in various branches of the law. They restrict the use that owners can make of their property. And, generally, liens can be discharged by the posting of security in an amount that the judge considers reasonable in light of a preliminary assessment of the merits of the case. Commonly, a right of ownership trumps the maintenance of a lien if appropriate security is given.

[49] The practical reality, in this case, is that Cascade asserts a possessory lien to protect its position in relation to its dispute with Viking. That dispute is, in substance, a dispute about who is at fault under the contractual arrangements between the parties and what damages, if any, might be owing. This is not a case in which the

outcome of the underlying dispute between the parties will determine which party has a right to the aircraft.

[50] In light of these considerations, I see no error in the judge's conclusion that evidence of a risk of the disposition of an asset by the party in possession is not a necessary standalone element of a replevin order. I would not accede to this ground of appeal.

Did the judge err in her analysis of irreparable harm?

[51] Before turning to the issue of irreparable harm, I acknowledge that Cascade addressed the issues under the heading of the test for an interlocutory injunction as an alternative argument. It argued that, if an interlocutory injunction test is applicable, the judge made several errors.

[52] I propose to address whether the judge erred in her application of the injunction test, even though, as I have indicated, I do not think that to be the applicable test. What follows assumes only for the purpose of discussion that the injunction test is applicable.

[53] The first alleged error is that the judge ought not to have made a replevin order which was tantamount to granting final relief in the detinue action. Secondly, the judge erred by, in effect, converting the preliminary application into a summary trial determining the ultimate merits. Cascade complains that the judge evaluated its assertion of a customary lien in the absence of evidence.

[54] I would not accede to these submissions. First, the judge followed clear and binding authority in concluding that she should apply a strong *prima facie* case to the threshold merits test for an injunction. The Supreme Court of Canada has noted circumstances in which a strong *prima facie* case standard, rather than a serious question to be tried standard, is the relevant merits test. These include where an interlocutory injunction may have the effect of determining final questions, or substantially affecting them, or where an injunction is mandatory rather than prohibitive.

[55] Moreover, the judge correctly identified what has to be established in order to show a strong *prima facie* case. I have quoted, above, the judge's statement of those principles. The judge accepted Cascade's argument that, if the interlocutory injunction test applied, then the merits threshold was a strong *prima facie* case. It is apparent, from the articulation by the Supreme Court of Canada of what constitutes a strong *prima facie* case, that the judge was required to engage in a preliminary analysis, on the evidence before her, of the relative merits of Viking's claim to possession and Cascade's defence to that claim, rooted in its assertion of a lien. The judge did what she was required to do, and she reached her conclusion that Viking would most probably prevail at trial and Cascade's claim to a lien would likely fail. Notwithstanding that conclusion, she nonetheless ordered that Viking post security, in a substantial amount, in respect of unpaid invoices, as a condition of the return of the aircraft.

[56] As I have noted, Cascade does not challenge the judge's analysis of the substantive merits of the case, on the materials that were before her. Rather, it says that she ought not to have engaged in the analysis, in the absence of evidence, on a preliminary basis, since it represents a final determination of the issues at trial.

[57] With respect, it is no bar to issuing an injunction, or, more pertinently, interim relief, that such relief may have the effect of finally determining issues at trial. The judge had the jurisdiction to make the order while applying the correct test in the circumstances. Moreover, the judge recognized that Cascade asserted that it would lead expert evidence of customary practice in the aviation industry at trial. She accepted that, if it were to do so, the judge at trial might reach a different decision to the one that she reached on this application. But the judge was entitled to assess the evidence before her on a preliminary basis. And that is what she did. The judge also recognized, and commented on, the practical effect of her order on the ultimate issues joined between the parties. She took those matters into consideration. In my view, no error has been demonstrated in the way that she assessed them.

[58] For the purpose of this appeal, therefore, we are entitled to accept as the premise of our analysis that the judge committed no reversible error in her conclusion that Viking had established a strong *prima facie* case.

[59] I would add to this comment. Viewed through the prism of a detinue action, the order can be seen as tantamount to a final order, However, the order is far from final in respect of the substantive underlying issues between the parties in dispute. Those issues relate to fault in relation to the contractual arrangements between the parties and, depending on the outcome of those issues, what damages may or may not be owing. In a practical sense, I see little force in the argument that the return of the aircraft was a final determination of the issues in dispute between the parties, and I would be reluctant to accede to an argument that Viking could be denied the return of its aircraft because it brought an application in a detinue action, rather than in response to an action against it for damages. This puts form above substance.

[60] I turn now to the issue of irreparable harm. Cascade says that the judge found irreparable harm on the basis of a bald assertion of potential reputational harm if Viking could not deliver the aircraft to its purchaser. Cascade says that this is a legal error, because it has no proper foundation in the evidence, and can only be treated as merely speculative.

[61] The judge, in the passages quoted above, properly set out the test to establish irreparable harm. The judge accurately set out the evidence led in support of the claim of irreparable harm. It cannot be suggested that she misapprehended that evidence.

[62] I propose to deal, here, only with the judge’s conclusion that the reputational harm alleged established irreparable harm for the purpose of the injunction test. This is so because it is sufficient that the judge found this harm in relation to one subject matter. If the judge committed no error in respect of this alleged harm, then her conclusion that the second part of the interlocutory injunction test has been met is unassailable.

[63] I do not accept that the judge fell into error in concluding that irreparable harm had been established. It is apparent from the judge's reasons that she undertook a contextual analysis in which she appreciated the contract for the sale of the aircraft. This aircraft is a waterbomber used to fight forest fires. It is an expensive aircraft. It is an important tool for authorities engaged in dealing with the increasing threat of forest fires in the world. I think it was open to the judge to conclude that, if Viking could not deliver the aircraft to the Kingdom of Morocco, then the reputation of Viking as a reliable supplier of essential equipment could be affected in unpredictable but realistically plausible ways. In my view, even though the evidence may have been thin, it was open to the judge to find, as a fact, that potential damage to reputation was not speculative.

[64] If any error were committed here, it would not be an error of law. Cascade is compelled to attack a finding of fact. In my view, the standard of review is palpable and overriding error. Such an error has not been demonstrated. I would not give effect to this ground of appeal.

What is the Test for Making a Replevin Order?

[65] I have commented several times that I do not think the test for ordering replevin, as a form of interim relief, is the *RJR-MacDonald* test. That test requires a demonstration of irreparable harm. In my view, the demonstration of irreparable harm is not, and should not be, a condition for receiving the return of specific property pending the resolution of a dispute between parties.

[66] I acknowledge that I am proposing to resolve this appeal on a basis not argued by the parties or considered by the judge. I do not think, in the circumstances of this case, that it is necessary to seek further submissions from the parties, because the judge's findings of fact are sufficient to support her order under the replevin framework set out here, and because, in any event, I would have proposed that the appeal be dismissed on the basis that the appellant had not identified a reversible error.

[67] In my view, replevin is available in circumstances where one party has a better claim to possession than the other, and the other's interest in continued possession can be protected by appropriate conditions, typically by ordering adequate security. As such, replevin is a broad and flexible remedy available to judges where it is just to make the order, having regard to the interests of both parties in all of the circumstances. This, is my view, is consistent with both the historical origins of replevin and principle: namely, the purpose and objects of the remedy.

[68] Historically, the remedy of replevin was an ancient writ issued out of chancery. It provided a remedy where the immediate return of goods was of greater consequence than recovery of damages, where the taking of goods proved to be, or was alleged to be, wrongful. In *Gibbs v. Cruikshank* (1873) L.R. 8 C.P. 454, at 459–461, Lord Bovill described the history of replevin and procedural reforms simplifying the availability of the remedy. The examples he gave included the return of an allegedly wrongful taking of livestock belonging to tenant farmers on appropriate sureties being provided. It appears that many of the cases involved landlords seizing chattels in exercising a right to distrain for rent.

[69] In *Smith v. Jafton Properties Ltd.*, [2011] EWCA Civ 1251, CA at 16 and 34, the English Court of Appeal outlined the legal history of replevin, observing that a tenant could obtain the return of his chattels on paying an *apportionment* of outstanding rent into court pending resolution of the dispute:

> 16. At an early juncture in legal history the common law devised additional remedies for the landlord. The first of these was the right to distrain for rent. The common law regarded the rent as "issuing out of" the land. This meant that if the rent was in arrear the landlord could enter upon the land and (with some exceptions) seize any chattels that he found there. Until the intervention of statute the landlord had no right to sell the chattels that he seized. The seizure of chattels was simply a means of putting pressure on the tenant to pay the rent. Since the landlord had no way of knowing who owned any chattels that he found on the land, the common law permitted him (with some exceptions) to seize anything he found. However, if the seized chattels did not belong to the tenant then in practice the seizure put no real pressure on the tenant to pay the rent, and the landlord would soon release them. If the tenant disputed his liability to pay, or if he claimed that the distress was unlawful, he could bring an action in replevin. This enabled him

> to enjoy the chattels in specie pending resolution of the dispute; but in the meantime he had to provide security for the rent claimed.
>
> ...
>
> 34. While it is true that the landlord can distrain on any part of the leased property for rent due, it is interesting to note that in *Stevenson v. Lambard* Lord Ellenborough CJ was clear that in an action of replevin the obligation to pay rent was apportionable. I have already explained what replevin was (§ 16). In other words, the tenant could have his chattels back on paying an apportioned part of the rent into court pending resolution of the dispute with the landlord. If he had already paid his own apportioned rent to the landlord then it seems to me that at the end of any dispute with the landlord the tenant would have his money back. Thus the fact that the landlord could, in the first instance, distrain on any part of the land is not, to my mind, of great significance.
>
> [Emphasis added.]

[70] From my reading of the cases, it appears common that goods seized on account of an outstanding, but not yet proven, monetary claim were returned to the party having the better claim to them, on the provisions of security. I do not detect additional conditions, equivalent to a finding of irreparable harm, to be elements of the analysis. The emphasis is on the provision of required security as a condition for the return of the goods pending the resolution of the underlying dispute.

[71] The remedy of replevin was imported into the law of British Columbia as part of the reception of English law. A relatively early case is *Harrison Bay Co. v. Gauthier* (1925), 35 B.C.R. 498, [1925] B.C.J. No. 67 (C.A.), which concerned logs that had drifted away from the plaintiff. McPhillips J.A. noted, as a starting point, that "the one in possession is presumed by law to be entitled to the property unless title be displaced" at para. 7. The case turned on whether the plaintiff had demonstrated sufficient good title to the logs to have them given to him (that is to dispossess the defendant by means of replevin), but there was no consideration of whether the logs would be sold, disposed of or milled by either party.

[72] The most useful source tracing the history of replevin in British Columbia is the 1978 Law Commission Report on the *Replevin Act*. It is the source of the recommendation that the remedy of replevin be incorporated in the *Rules*. It notes some nuanced differences between the development of the law in England and in

British Columbia. The Report recognized the utility of replevin as a speedy and effective remedy to recover goods pending the resolution of a dispute, which has the benefit of eliminating the justification for a forcible retaking of property, thereby suppressing the law of the jungle: see Ch. 3, p. 6.

[73] After analysing the history and objects of replevin, the Report recommended a continuing role for the remedy by framing it as a form of interim relief incorporated in the *Rules*. Specifically, it made recommendations about the return of property subject to a lien in the following terms:

> Where a party claims the recovery of specific property other than land and the opposing party does not dispute the title of the claimant but claims to be entitled to retain the property by virtue of a lien or otherwise as security for a sum of money, the Court may order that the claimant pay into Court or otherwise secure the amount of money in respect of which the security is claimed, and any further amount for interest and costs as the Court may direct, and that on the payment being made or other security given, the property claimed be given up to the claimant.

[74] Although the recommended rule was not incorporated as suggested (rather the language is broader), the proposal reflects an appreciation that the critical issues in replevin engage a contest between claims to rights of possession, taking or keeping possession as a means of prejudgment security, and the return of property on the provision of security. Nothing in the proposal suggests the need for proof of irreparable harm, or the application, more generally, of the test for an interlocutory injunction.

[75] In conclusion, I do not think the history of replevin supports importing additional conditions such as irreparable harm or the test for an interlocutory injunction into the analysis. As noted, the object of the remedy is to return property to the party having the better claim to title, on terms if appropriate. Those terms may include the provision of security. As I have pointed out, requiring additional conditions, such as proof of irreparable harm, may defeat the object of the remedy, and is unnecessary.

[76] The overarching consideration in granting a replevin order is weighing, balancing and protecting the interests of the parties to achieve what is just and equitable in the circumstances. As replevin may be granted in a wide array of circumstances, a rigid test is not only inappropriate, but unworkable in practice.

[77] Two broad principles guide the exercise of discretion in ordering replevin under R. 10-1(4). First, the application judge must consider who has the better claim to the property. The question of who has the "better claim" will be a fact-specific inquiry, based on the evidence, rooted in legal principle. Often the contest may be between competing claims to a right of possession. It is for the judge to evaluate their relative nature and strengths. Second, the judge must balance the interests of the parties, and assess whether and how the defendant's interests can be secured if the property is returned permanently or pending trial. The ability to place conditions, if any, on the return of the property provides wide discretion to a trial judge to craft an appropriate order.

[78] It may often be that the most challenging aspect in the exercise of discretion revolves around the terms on which replevin may be ordered. This issue is also likely to be fact specific. Accordingly, in my view, it would be unwise to venture into a hypothetical analysis of when and what security should be ordered, if any. The consideration of these factors is a matter to be left to the discretion of application judges who are alive to the particular circumstances in specific applications. The object must be to ensure a fair litigation process, in light of the issues in dispute, and the benefits, harms or prejudice to the interests of the parties. The discretion of judges to order replevin is broad and flexible. It is not subject to rigid formulas. It is for application judges to deploy their jurisdiction and exercise their discretion in a case by case basis in light of all the circumstances.

[79] Applying the correct legal framework to the case before us, and having regard to the nature of the underlying dispute, the competing claims to possession of the aircraft, the availability of the provision of adequate security for the contract claim,

and the other factors outlined by the judge, the order for return of the property did not rest on reversible legal error.

Disposition

[80] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Horsman"