

On appeal from an Endorsement of a Master of the Court of Queen's Bench dated January 7, 2020.

Date: 20201105

Docket: CI 17-01-11532

(Winnipeg Centre)

Indexed as: Dowd et al. v. Skip the Dishes Restaurant Services Inc.

Cited as: 2020 MBQB 155

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

RYAN DOWD and 5783934 MANITOBA LTD.,
operating and carrying on business as
CRAVERS,

plaintiffs,

- and -

SKIP THE DISHES RESTAURANT SERVICES INC.,

defendant.

) APPEARANCES:

) S. Norman Rosenbaum

) Jason Zushman

) Darren Pawella

) for the plaintiffs

) John B. Martens

) Andrew W. Boumford

) Daniel G.C. Glover

) for the defendant

) Judgment delivered:

) November 5, 2020

PERLMUTTER A.C.J.Q.B.

INTRODUCTION

[1] The plaintiffs appeal the Master's decision dismissing the plaintiffs' motion for an interim order for the preservation of property under Queen's Bench Rule 45.01(1).

BACKGROUND

[2] This action involves the plaintiffs' claims of co-creation of the online ordering system of the defendant Skip the Dishes Restaurant Services Inc. ("Skip"). Included in

the amended statement of claim is a claim for a "declaration of constructive trust in the current undertaking of [Skip] including delivery platform/delivery app. ...as subsumed within the operation of JUST EAT PLC", a declaration of a partnership as between the plaintiffs and Skip, and related rights, entitlements, and damages. The plaintiffs filed a notice of motion for an order of interim preservation of the delivery app and delivery platform of Skip "from alienation" to Takeaway.com N.V., The New Takeway.com or any combination thereof, pending the trial of this matter.

[3] In the Master's Endorsement, wherein she dismissed the plaintiffs' motion for a preservation order, she stated (at paras. 3-5):

Having considered all of the evidence, I am not satisfied, on the face of the pleadings as they existed at the time of this motion, that there is any defined property which is the subject matter of this action, and which is properly subject to an order of preservation.

The instigation of the plaintiffs' motion appeared to be a pending transfer of shares, or ownership of one non-party to another non-party. When asked, the plaintiffs identified that they were seeking the court issue an order that the remaining defendant "not alienate the property at issue", which was defined, say the plaintiffs, as software or a delivery platform app. I disagree.

In my view, the property, as per the pleadings, is defined as confidential information. The plaintiffs claim that information was inappropriately used by the defendant. Confidential information is not property that, in my view, could be the subject of an order of preservation....

PARTIES' POSITIONS

[4] It is the plaintiffs' position that there was a joint partnership venture between them and Skip, there were promises made by Skip to the plaintiffs in terms of participation in this partnership, and there was provision of information by the plaintiffs that is incorporated into the basis of this joint venture which was a delivery platform. That is, the plaintiffs say that Skip is essentially a delivery platform and the plaintiffs'

confidential information in the form of intellectual property and the plaintiff, Ryan Dowd's ideas went into development of this delivery platform. The plaintiffs allege that they have a proprietary interest in this delivery platform, which they also variously label as a delivery app or delivery system. For the purpose of a preservation order, they define the property in question as the "delivery software".

[5] The plaintiffs argue that a merger between Just Eat PLC, which has a controlling interest in Skip, and Takeaway.com, which is based in the Netherlands, will put control of the delivery platform beyond the jurisdiction of this court. In support of their concern about the impact of this merger on the control of the delivery platform, they rely, for example, on evidence from the JustEat.com website of an announcement dated August 5, 2019, relating to a share combination of Takeway.com and Just Eat PLC, and a statement in this announcement that:

Clearances have not been, nor will they be, obtained from the securities commission or similar authority of any province or territory of Canada.

[6] The plaintiffs say that even if this merger is already complete, a preservation order would not be moot, as suggested by Skip, because Skip remains in the jurisdiction and still has control over the delivery platform. As such, they say that the same underlying concern remains about "alienation" of this property if it is conveyed to a jurisdiction beyond the reach of this court. They argue that if they are without ability to tether the subject matter of the claim to this court, they may be left without the means to bring about the enforcement of any remedy that may be granted at trial. They seek to preserve the delivery software by an order that this delivery software not be sold.

The plaintiffs argue that such an order would not interfere with the day-to-day use of the delivery software, which addresses any concern about the balance of convenience.

[7] Skip advanced numerous and varied arguments as to why the plaintiffs have not met their onus to be granted a preservation order. At the core of these arguments is that the plaintiffs are not able to define with sufficient particularity the property in question that they seek to preserve so that it could be the subject of a preservation order and that if the property could be sufficiently described, the evidence is insufficient to meet the test for a preservation order.

THE LAW

[8] An appeal from a decision of a master to a judge is a fresh hearing. The judge is entitled to exercise an independent discretion although a master's decision is not an inconsequential opinion (*Glenwood Label & Box Mfg. Ltd. v. Brunswick Label Systems Inc. et al.*, 2017 MBQB 177, para. 7).

[9] Rule 45.01(1), which deals with an interim order for the preservation of property, provides as follows:

The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party.

[10] There is little commentary in Manitoba case law about Rule 45.01(1). There is some Manitoba case law regarding Rule 45.02. Rule 45.02 provides as follows:

Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

[11] Rule 45.02 was recently considered in ***Knight et al. v. Sandhu et al.***, 2019 MBQB 71, with respect to a motion to preserve a specific fund. In ***Knight***, the Master noted that the burden is on the moving party to “make it clear that such an order ought to be granted” (para. 26). In my view, the same applies to a motion under Rule 45.01.

[12] There is also Manitoba case law regarding the approach to attaching orders under Rule 46. In ***Clark et al. v. Nucare PLC***, 2006 MBCA 101, Scott C.J.M. (as he then was) wrote as follows (para. 72):

What should the motions court judge take into account in exercising the court's discretion at the first stage (the application for the attaching order) and at the second stage (a review of an existing order)? It will likely not be helpful to speculate about an exhaustive list, but clearly the strength of the plaintiff's claim, the possibility of undue hardship to the defendant, the relative economic positions of the parties involved, and the court's overall level of comfort with the indicia of reliability in the plaintiff's affidavit evidence are all important criteria. They require the fullest disclosure by plaintiffs given the reality that pre-judgment attachment orders are "an extreme, if not drastic, judicial intervention"...

[13] While an attaching order is obviously a different form of pre-judgment remedy than an order for the preservation of property, in light of the intrusive nature of both remedies including the potential hardship or harm to the party who is the subject of these pre-judgment orders, in my view, similar weighty considerations arise. It is my view that these considerations are sensibly reflected in the analysis of the Ontario Superior Court of Justice Divisional Court in ***BMW Canada Inc. v. Autoport Limited***, 2019 ONSC 4299, which reformulated the following test for motions brought under the equivalent Ontario Rule 45.01 (Rules of Civil Procedure, RRO 1990, Reg 194, s 45.01) (which is worded identically to the Manitoba Rule) (para. 53):

- a. the property sought to be preserved is the property in question in a proceeding or relevant to an issue in the proceeding;

- b. there is a serious issue to be tried with regard to the property;
- c. the interim preservation or custody of the property is necessary to enable a party to advance or defend its claim; and
- d. the balance of convenience favours granting the relief sought by the applicant or moving party.

[14] In ***BMW Canada***, the Court also confirmed “[t]he onus is on the moving party seeking a preservation order under Rule 45.01 to meet the test” (para. 73).

[15] I agree with, and am adopting, the analysis in ***BMW Canada***. In addition, I am adding an initial consideration to be satisfied on a motion for an order for the preservation of property under Rule 45.01, namely that the property in question is readily identifiable. It is my view that this consideration is implicit in the requirement in Rule 45.01, that the interim order for preservation be for “property in question in a proceeding or relevant to an issue in a proceeding”. In ***BMW Canada***, there was no issue about the identity of the property in question. However, in the case at hand, as discussed below, the ready identification of the property in question is at issue.

[16] The test to grant a preservation order, as outlined in ***BMW Canada***, along with the additional consideration of the property in question being readily identifiable, are, in my view, sensible and properly track the wording of Rule 45.01. It is my view that this interpretation accords with the modern rule of statutory interpretation, which requires that the words of an Act “be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (***BMW Canada***, para. 45).

ANALYSIS

[17] In the case at hand, the statement of claim includes the following:

- The allegation that “pursuant to their partnership [Joshua] Simair [who was previously named as a defendant as the owner and operator of Skip] and Skip requested that [the plaintiffs] Dowd and Cravers provide a coded delivery system, driver, delivery and customer information, guidance and assistance (collectively “the information”) in order to assist in the design of the online ordering system which was being developed by Cravers and Skip” (para. 20).
- Reference to “software which was developed in furtherance of the partnership and which incorporated the proprietary information, guidance and expertise which was provided by the Plaintiffs to Simair and Skip” (para. 25).
- Reference to the “Plaintiffs’ proprietary information and work product” (para. 44).
- Reference to Skip having developed a “technologically advanced delivery platform” (para. 45).
- The allegation that “[p]ursuant to the partnership the Plaintiffs would provide exclusive delivery services and, *inter alia*, their expertise, assistance and guidance in converting the Plaintiffs [sic] extensive experience with physical delivery into an online form” (para. 120).
- In the descriptions of the plaintiffs’ causes of action, there is reference to various “information” that the plaintiffs provided to Skip, such as “proprietary and confidential information”, “business information”, “personal documents and

information”, and “market intelligence, pricing, driver and food delivery service information”.

[18] The plaintiffs’ response to a demand for particulars includes reference to:

- “Dowd and Cravers were to provide their market intelligence, pricing information, drivers, guidance and expertise”. “Simair and Skip were to provide marketing, joint development of an online ordering system utilizing said pricing information”. “Dowd and Cravers were to have the right of exclusive delivery for all orders placed through the online ordering system” (response to question 5).
- An “online ordering system which was developed by the parties” (response to question 10).
- “...October through December 2012 there was ongoing disclosure of knowledge, information, guidance and advice which was integrated into the partnership and the ordering system and method which was developed” (response to question 14).
- “Dowd made clear to Simair that he would not share his proprietary information without the promise of exclusivity and partnership” (response to question 16).
- Dowd and Cravers provided market intelligence, delivery expertise and pricing information to Simair who then incorporated this into Skip’s online ordering system and requested this information on an ongoing basis. Simair and Skip made continuous requests of Dowd for the information, guidance and advice so as to capture the most efficient data for the ordering system and to tailor the ordering system for delivery. This property was then incorporated into the

operation of Skip which was subsequently sold to Just Eat PLC (response to questions 21 and 23).

[19] In Mr. Dowd's Affidavit (affirmed August 19, 2019), he deposed to the following:

From the many reports which have been provided by Just Eat PLC, I am concerned based upon that material that Skip delivery technology and delivery rights, which are the subject matter of my claim against the Defendant, are the subject and vulnerable to merger with a non Manitoba and non Canada situate entity, Takeway.com N.V., and the resultant merged entity will not be situate in Manitoba or Canada (para. 20).

[20] Mr. Dowd further deposed that:

"...Just Eat PLC is currently using the technology and rights which are the subject matter of my claim..." and "...I helped to develop the technology that is used by Just Eat PLC and its subsidiaries..." (paras. 35 and 37).

[21] In the plaintiffs' motion brief, they include extracts from Mr. Dowd's cross-examination of May 10, 2018, on his affidavits (affirmed April 13, 2018 and May 8, 2018), which also refers to Mr. Dowd's intelligence that he had given to Simair and includes the following evidence by Mr. Dowd:

66 Q. Now, is it your allegation, sir, that the software system developed by Skip Canada incorporated the mature pricing system that you say was developed by Cravers?

A. I believe that the intelligence that I had given Josh [Simair] through the – through our meetings went into the system of – the system – the idea was that everything that I had learned up until this point, at that point they, I think they had maybe 18 restaurants on a piece of paper, or whatever, at that point and he asked me to partner up to basically run all of their deliveries. And then we would work with all my intelligence and put the idea of the digital end of the marketing where he would basically do all the marketing online and we'd work together in the partnership...

...

657 Q. ...

A. Well the idea was is that we were going to put my intel from experience together and my logistics and stuff together with this software platform I guess, right, and we were going to be working this thing together, right.

. . .

680 Q. And to your knowledge sitting here today, you don't know whether or not that information was incorporated into the Skip Canada website or not?

A. Well, I feel that the information that I was providing, it became to a certain point that whatever it was that needed to be learned was learned and then I was cut. I was basically cut and shut out from the carrying on of what was going on. I felt that, you know, we had a partnership and that we were going to continue on. The warmth that Josh showed me when I first met him and the way that he, you know, made me feel almost like a, like I was a cousin or a brother, you know. And smiling and everything is great and we love you and blah blah blah. You know, I feel like that had a lot to do with, you know, me, you know, giving up the information that I gave up. And then all of a sudden there was a cold shoulder. One day all of a sudden there's no calls coming in. Sorry, Ryan, I'm a different Josh now.

[22] At the hearing of this appeal, Skip's counsel questioned the appropriateness of using the foregoing and other evidence from Mr. Dowd's cross-examination on affidavits that were filed in support of a different motion and were not evidence before the Master in her adjudication of the motion for a preservation order that is the subject matter of this appeal. Rule 62.01(13)(b) provides that if an appeal is from an order of a master, the parties may not adduce further evidence, except with leave of the judge hearing the appeal. Here, the plaintiffs did not seek leave to adduce this evidence. Given my adjudication of the outcome of this appeal as discussed below, little turns on the inclusion of this evidence.

Is the property in question readily identifiable?

[23] I share the Master's view that the property, as the plaintiffs have defined it, cannot be the subject of an order for preservation because it is not readily identifiable. While the Master referred to the property as "confidential information", in the course of argument before me, it was understood that this property is also in the nature of intellectual property.

[24] In the plaintiffs' notice of motion, they seek an order of interim preservation of the "delivery app and delivery platform of Skip". In the course of argument of this appeal, for the purpose of a preservation order, they defined the property in question as the "delivery software". Regardless, it is my view that none of Mr. Dowd's evidentiary references to the "technology", "delivery rights", and "intel from experience together and my logistics and stuff" or other descriptions that the plaintiffs use with reference to the property that they seek to preserve describe this property in a manner that it could reasonably or practically be the subject of a preservation order. Mr. Dowd's evidence that "I helped to develop the technology that is used by Just Eat PLC and its subsidiaries" is vague and without any reliable evidentiary support, detail or description. Similarly, it is unclear to me what the "delivery app" or "delivery platform" or "delivery software" or "delivery software and method" or "online ordering system" or "proprietary information, guidance and expertise which was provided by the plaintiffs" or "knowledge, information, guidance and advice which was integrated into the partnership and the ordering system and method which was developed" or "market intelligence, delivery expertise and pricing information" constitute for the purpose of

defining the property that would be the subject of a preservation order. As Skip's counsel asked rhetorically in argument, is it algorithms? graphics? a program downloaded onto a Manitoban's mobile phone? As argued by Skip's counsel, nothing in evidence relates to the specifics of source code or some specific matter that could be identified in any constructive or practical way to be able to form the subject matter of a preservation order.

[25] The plaintiffs claim a proprietary interest by virtue of their alleged co-creation of Skip's online ordering system through the plaintiffs' supply of information, guidance, expertise, work product, and intelligence. If the plaintiffs' allegations are accepted, this information is now presumably spread throughout the operations of Skip and those who use Skip's service. That is, the property, to the extent that the plaintiffs' have endeavoured to define it, is not of a nature that it can be reasonably preserved. It is not for example like the cars that were sought to be preserved in ***BMW Canada***.

[26] This all raises practical concerns about not only how to reasonably define the property to be preserved but also enforcement of an order. How would Skip readily identify the property to be preserved? How would Skip know if it was complying with the preservation order? How would the court address an allegation of non-compliance? Without this kind of clarity about specifically what is to be preserved, Skip could be dealing with ongoing allegations by the plaintiffs of non-compliance with the preservation order. This matter is essentially about intellectual property. To me, the plaintiffs' definition of property that they seek to preserve simply remains too imprecise, indefinite and ambiguous in the context of intellectual property. The property in

question needs to be precisely defined in a manner that it can be readily identified. This is necessary for the preservation of the property as well as any questions about compliance with, and enforcement of, the preservation order.

[27] I am not concluding that intellectual property can never be the subject of a preservation order, but on the facts of the case at hand, I agree with the Master that the property, to the extent that the plaintiffs' have endeavoured to define it, cannot properly be the subject of an order for preservation. The nature of the property that the plaintiffs seek to preserve does not lend itself to an order under Rule 45.01 because it is intangible, such that it is not readily identifiable.

Is the property sought to be preserved the property in question in this proceeding or relevant to an issue in this proceeding?

[28] Having concluded that the property, as the plaintiffs have defined it, cannot be the subject of an order for preservation because it is not readily identifiable, I find as well that the plaintiffs have not met their onus of demonstrating that this property is in question or relevant to an issue in this proceeding.

Is there serious issue to be tried with regard to the property?

[29] Even if the property to be preserved could be sufficiently identified in the manner argued by the plaintiffs, much of this identification and the plaintiffs' claim to a proprietary interest in this property is based on the allegations in the statement of claim and the response to the demand for particulars. There is little reliable evidence to substantiate the plaintiffs' claim. In my view, it is insufficient to largely rely on the allegations in the statement of claim and response to a demand for particulars in support of a motion for a preservation order under Rule 45.01. Reliable evidence is

required. Indeed, it should be apparent that a moving party cannot obtain a preservation order, which is in aid of a legal right, unless the moving party has demonstrated a serious issue to be tried that the moving party has this legal right. Otherwise, without reliable evidence of a serious issue to be tried with regard to the property, a moving party could obtain a preservation order without demonstrating on a threshold level (of a serious question to be tried) that the party possesses such a legal right.

[30] While different from, say, the pre-judgment remedy of an interlocutory injunction, the resulting order for the custody or preservation of the property in question may have similar features to an interlocutory injunction. If a party could rely mainly on the statement of claim and response to a demand for particulars with no reliable substantiating evidence in support of a motion for a preservation order, there would be an illogical incongruity between the demands for an interlocutory injunction for potentially similar relief to a preservation order and the remedy of a preservation order. As I said, while the two remedies are different, they both involve intrusive pre-judgment orders that may result in similar remedies, both involve the question of whether there is a serious issue to be tried, and both raise considerations of the balance of convenience and potential harm.

[31] Given this absence of reliable evidence in the case at hand, I am not satisfied that the plaintiffs have demonstrated a serious issue to be tried with regard to the property.

Is the interim preservation of the property necessary to enable the plaintiffs to advance their claim?

[32] As a ground for their motion, the plaintiffs rely on their concern about “alienation of the property” by being conveyed to a jurisdiction, which is beyond the reach of the court. In her endorsement, the Master stated that “The instigation of the plaintiffs’ motion appeared to be a pending transfer of shares, or ownership of one non-party to another non-party.” In the course of argument of this appeal, the plaintiffs’ counsel indicated that the triggering incident for the motion for a preservation order was the merger and the concern that Skip’s assets would flow to the jurisdiction of the merged entity (Takeaway.com in the Netherlands) and that this merged entity would not be subject to the authority of this court. Assuming, without deciding, that in the circumstances of the case at hand this is a legitimate ground for a preservation order, I largely agree with Skip’s argument as to why the evidence does not support a preservation order on this basis.

[33] In Mr. Dowd’s affidavit, he attached numerous corporate searches and references to reports by Just Eat PLC and the media, along with content of the websites operated by Takeaway.com and JustEat.com as evidence of a prospective merger between Just Eat PLC and Takeaway.com by the end of 2019. Mr. Dowd deposed that:

- I am very concerned about my ability to enforce my rights as against [Skip] given the numerosity [sic] of incorporations, continuances and amalgamations that [Skip] has utilized to govern its affairs (para. 34).
- I am also very concerned about my ability to enforce my rights as against [Skip] given that Just Eat PLC is currently using the technology and rights which are the subject matter of my claim, among Just Eat PLC, and as widely distributed throughout its subsidiaries on a worldwide basis (para. 35).

- I am further concerned that...I will have no way of effectively enforcing any judgment that may be made owing to the continued distribution and dissemination of my property and rights which is being conducted without my full knowledge or consent (para. 37).
- I am even more concerned about this state of affairs given the way in which JustEat PLC and Takeaway state, in their own materials regarding the merger, indicate [sic] that they do not intend to comply with, or may not be compelled to comply with the laws of Canada, the Provinces or the United States even in the event of judgment being made against them (para. 38).

[34] I do not see how a change in shareholdings would in themselves create the concerns identified by Mr. Dowd. At the time that the statement of claim was filed, Just Eat PLC was a beneficial owner of the shares of Skip. The impetus for the plaintiffs' motion was an announcement made by Just Eat PLC that it might be merging with a Dutch Company, Takeway.com with the proposed arrangement still resulting in a controlling interest for Just Eat PLC. Before the statement of claim was filed, Just Eat PLC was a UK-based owner of Skip. A shift of shares from one non-Canadian owner of shares to another non-Canadian owner of shares would not itself bear on the property at issue. Even if it were relevant, as I said, the shareholders of Just Eat PLC were to still have a controlling interest.

[35] In the course of the appeal hearing, I questioned the plaintiffs' counsel about the plaintiffs' expressed concern that the delivery platform or app or delivery software would in fact be placed outside the jurisdiction of this court, in light of the evidence that Skip remains located and operates in Manitoba. As argued by Skip's counsel, implicit in the plaintiffs' position is that Skip continues to have control over the delivery platform or app or delivery software. The plaintiffs' counsel indicated that "on the press of a button", control of the asset can go outside of the jurisdiction and that because of the merger, there is "at least a concern that the legal authority over the asset flows out,

away from North America into the Netherlands". However, Skip remains an operating federally incorporated Canadian corporation with its headquarters in Manitoba. As admitted by Mr. Dowd, Skip continues to operate in Winnipeg. In these circumstances, "a **concern** that the legal authority over the asset flows out, away from North America into the Netherlands" is, in my view, simply insufficient to meet the plaintiffs' evidentiary onus. Skip is the named defendant and is defending this action. There is no reasonable basis to conclude that the property in question, to the extent that the plaintiffs have most recently attempted to define it as delivery software, has left the jurisdiction, has been transferred to another entity, or is subject to a sale.

[36] The plaintiffs' concern is that control of the delivery software will be placed outside the jurisdiction of this court. As noted above, I have undertaken this part of my analysis on the basis that I assumed, without deciding, that this is a legitimate ground for an interim order for the preservation of property under Rule 45.01. Nevertheless, I will also provide my view that I doubt the use of Rule 45.01 in this manner. Fundamentally, the nature of a preservation order is to protect and preserve the property in question or relevant to an issue in a proceeding pending the outcome of the trial. The plaintiffs' concern is not directed at the "preservation" of property. The plaintiffs are not concerned that by the time they reach trial the property will cease to exist. This is not a situation where the goods are at risk of spoiling before trial or evidence is relevant to an issue at trial, and therefore, need to be preserved. To accept that, in these circumstances, a preservation order under Rule 45.01, is the appropriate remedy to prevent the removal of assets from a jurisdiction or to limit or prohibit the

use of intangible property such as confidential information/intellectual property would in my view, be somewhat novel.

Does the balance of convenience favour granting the relief sought?

[37] My comments (above) as to why I am not satisfied that the plaintiffs have demonstrated that the interim preservation of the property is necessary to enable the plaintiffs to advance their claim also largely apply to my analysis of the balance of convenience.

[38] In my view, the balance of convenience does not favour granting the relief sought by the plaintiffs for the following reasons. As I mentioned, Skip continues to operate in Manitoba. There is no reliable evidence of the impact of any merger on the ongoing operations of Skip in Manitoba or on the delivery platform or app or delivery software or delivery system. In my view, a consideration in a motion of this nature may be whether it can be assured by the preservation order that the party who succeeds at trial will not have suffered damage or harm during the litigation that could not be compensated by an award of monetary damages. As I alluded to above, a preservation order is generally an intrusive order on the party who is the subject of the order. It is not unreasonable to consider whether a preservation of Skip's "delivery app" or "delivery platform" or "delivery software" or "delivery system" could cause harm. Of course, here, these considerations are difficult, if not impossible, given the lack of specificity about the property that the plaintiffs seek to preserve. Even if such harm could be quantified, I take note that the plaintiffs have not proposed any undertaking as to damages.

Impact of the Master's decision on discovery

[39] Finally, in the course of argument, the plaintiffs' counsel raised as a basis to have appealed the Master's order dismissing the motion for a preservation order that the Master's reasons would be interpreted as confining relevancy for the purpose of discovery. While it may very well be that the lack of particularity in defining the property in question as discussed above gives rise to similar concerns, objections and arguments about relevancy for the purpose of discovery, it does not follow that comments made in the Master's adjudication of the plaintiffs' motion for a preservation order would bind a future adjudication of relevancy for the purpose of discovery. Simply put, the test for a preservation order is different from the test of relevancy for the purpose of discovery. I do not see how, on the facts of this case, that this is a proper ground of appeal.

CONCLUSION

[40] In carefully considering and balancing the relevant considerations, I am not satisfied that the plaintiffs have met their onus for the interim order for the preservation of property that they seek. Accordingly, the plaintiffs' appeal of the Master's decision is dismissed. If counsel cannot agree as to the issue of costs, I will receive written submissions.

_____ A.C.J.Q.B.