

CITATION: Canadian Imperial Bank of Commerce v. Costodian Inc. et al, 2018 ONSC 6680
COURT FILE NO.: CV-18-597240-00CL
DATE: 2018/11/09

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

APPLICANT

COSTODIAN INC., BILLERFY LABS INC., JOSE REYES, and
0984750 B.C. LTD. d/b/a QUADRIGACX

RESPONDENTS

APPLICATION UNDER Rule 43.02 of the *Rules of Civil Procedure*,
R.R.O 1990, Reg. 194

COUNSEL: *Geoff R. Hall* and *Trevor A. Courtis* for the Applicant

Margaret L. Waddell for the Respondent, 08984750 B.C. Ltd. d/b/a QuadrigaCX

Peter W.G. Carey and *Philip Holdsworth* for the Respondent, Jose Reyes,
Custodian Inc, and Billerfy Labs Inc.

BEFORE: Hainey J

HEARD: June 29, 2018

ENDORSEMENT

OVERVIEW

[1] Canadian Imperial Bank of Commerce (“CIBC”) seeks an interpleader order pursuant to rule 43 of the *Rules of Civil Procedure*.

[2] CIBC is currently holding approximately CAD \$25.7 million and USD \$69,000 (the “Disputed Funds”) related to intended cryptocurrency transactions by hundreds of individuals on an exchange platform operated by 0984750 B.C. Ltd. d/b/a QuadrigaCX (“Quadriga”) using payment processor Costodian Inc. (“Costodian”).

[3] From December 2017 to February 2018, 388 individuals or corporations (“Depositors”) made 465 total deposits in the aggregate amount of approximately \$67 million into accounts held by Costodian with CIBC. Jose Reyes (“Reyes”), the sole officer and director of Costodian, transferred a portion of the Disputed Funds to his own personal accounts with CIBC.

[4] On January 8, 2018, CIBC froze Costodian’s two business accounts and three personal accounts of Reyes (collectively, “Disputed Accounts”). CIBC conducted an investigation into the Disputed Funds and the Disputed Accounts. CIBC has not been able to determine to what extent the Depositors, Costodian, Reyes, Quadriga and/or Billerfy Labs Inc. (“Billerfy”) are entitled to the Disputed Funds.

[5] As a result, CIBC brings this application for an interpleader order seeking to pay the funds into court so that the 388 Depositors may be put on notice and the entitlement to the Disputed Funds can be resolved.

[6] The respondents, Billerfy, Reyes and Quadriga oppose CIBC’s application. They submit that the Disputed Funds should be distributed to them in accordance with their business arrangements.

FACTS

[7] Quadriga is an online cryptocurrency exchange. Billerfy is a payment processor that facilitates payments to and from various online platforms such as Quadriga. Costodian is a payment platform that was incorporated for the sole purpose of holding funds deposited by individual investors for buying and selling bitcoin and other cryptocurrencies on the Quadriga exchange. Reyes is the sole officer, director and shareholder of Billerfy and Costodian.

[8] Billerfy and Costodian work in tandem to facilitate payments to and from individual cryptocurrency investors and Quadriga. The business relationship can be summarized as follows:

- (a) a cryptocurrency investor sends a wire transfer to a Costodian account at CIBC;
- (b) Billerfy provides the identity of the investor and the amount of their deposit to Quadriga;
- (c) Quadriga credits the investor’s online wallet with “QuadrigaCX Bucks” which they can use to buy and sell bitcoin and other cryptocurrencies on the Quadriga exchange;
- (d) When the investor wishes to cash out their QuadrigaCX Bucks, they submit a withdrawal request to Quadriga, which forwards these requests to Billerfy;
- (e) Billerfy aggregates these requests, rounds up to the nearest \$500,000 or \$1,000,000, and makes a draw on Costodian’s accounts at CIBC to an account held by Billerfy at another financial institution; and

- (f) Billerfy subsequently transfers the withdrawn funds from that account to the individual investors who submitted the withdrawal requests.

[9] Quadriga and Billerfy entered into an agreement on November 3, 2016, which provides, among other things, that (i) Billerfy was to establish accounts and facilitate payments to and from third parties, (ii) all transactions involving funds in these accounts were carried out solely in accordance with Quadriga's instructions, and (iii) Billerfy had the right to make a withdrawal from these accounts to cover its fees and expenses.

[10] Costodian is not a party to this agreement, and does not have any other contractual relationship with Quadriga.

[11] On September 26, 2017, Reyes applied to open three commercial banking accounts on behalf of Billerfy at the CIBC Branch located at 300 West Beaver Creek in Richmond Hill (the "Beaver Creek Branch").

[12] On September 27, 2017, Reyes attended at the CIBC branch located at 2901 Bayview Avenue in North York (the "Bayview Village Branch") and opened personal chequing, savings and US dollar accounts.

[13] In accordance with CIBC's procedures, the account opening documentation at the Beaver Creek Branch was reviewed by its anti-money laundering ("AML") department. The AML department determined that Billerfy was a money service business and therefore CIBC closed the accounts on November 28, 2017.

[14] On November 30, 2017, Reyes applied to open two small business banking accounts at the Bayview Village Branch on behalf of Costodian with account numbers 02-75115 ("Corporate Expense Account") and 48-10716 ("Transaction Account") Reyes stated in an e-mail to his financial advisor at the Bayview Village Branch that Costodian was "[n]ot related to Billerfy's CMO business".

[15] Between December 4, 2017 and February 20, 2018, 388 Depositors made 465 deposits to the Transaction Account in the total amount of \$67,056,870.68 Nine withdrawals of between \$4 million to \$6 million were made from the Transaction Account to the account held by Billerfy at another financial institution.

[16] Between December 22-28, 2017, Reyes transferred \$1.3 million from the Transaction Account to his personal chequing account, and another \$1 million from the Transaction Account to his personal savings account. Reyes has admitted that he has no interest in these funds and did not notify Quadriga prior to transferring them to his personal accounts.

[17] After the Disputed Accounts were frozen by CIBC, the Transaction Account continued to accept deposits, which gradually decreased over the next several weeks. No deposits have been made to the Transaction Account since February 20, 2018.

[18] CIBC conducted an investigation and requested information from Reyes regarding the activity in the Disputed Accounts and the relationship between the Depositors, Costodian, Billerfy and Quadriga. According to CIBC, the information provided by Reyes was incomplete.

[19] On February 16, 2018, CIBC requested Reyes' consent to speak to the appropriate person at Quadriga about the Disputed Accounts. Reyes initially declined to provide his consent because the CEO of Quadriga, Gerald Cotton ("Cotton"), had indicated that he was not interested in speaking with anyone at CIBC. Reyes eventually provided his consent on March 6, 2018.

[20] On March 15, 2018, CIBC sent an e-mail to Cotton asking to speak with him briefly. He declined and requested that CIBC send questions to him in writing. On March 21, 2018, CIBC sent him an e-mail with a number of questions regarding the relationship of Quadriga with Costodian/Billerfy and the Depositors, and Quadriga's entitlement to the Disputed Funds. Neither Cotton nor anyone associated with Quadriga responded to this e-mail.

[21] CIBC obtained an order in these proceedings authorizing and directing it to disclose the names and contact information of the 388 Depositors and the amounts of the 465 deposits to the Transaction Account, and information regarding the seven Depositors that submitted wire recalls requesting a return of their deposited funds. The issuance of the order was opposed by Costodian, Billerfy, Reyes and Quadriga. CIBC has disclosed this information to the respondents in a confidential Disclosure Brief which has been filed under seal.

ISSUE

[22] Is CIBC entitled to an interpleader order with respect to the Disputed Funds?

POSITIONS OF THE PARTIES

[23] CIBC submits that it is entitled to an interpleader order because it has no beneficial interest in the Disputed Funds and there is a real foundation for the expectation of competing claims for the Disputed Funds.

[24] The respondents submit that there are no competing claims for the Disputed Funds and therefore CIBC is not entitled to an interpleader order and the funds should be released to them.

ISSUE

[25] The sole issue that I must decide is whether CIBC has met its onus of demonstrating that adverse claims have been made against the Disputed Funds, suffice to make interpleader relief available to it.

ANALYSIS

[26] The following principles apply to an interpleader application:

- (a) The applicant is not required to prove competing claims have actually been filed against it;
- (b) The applicant is only required to demonstrate that there is a real foundation for the expectation of competing claims; and
- (c) The applicant is not required to establish that competing claims are valid or likely to succeed only that they are not frivolous.

[27] CIBC submits that there are competing claims among Billerfy, Reyes and Quadriga as to their respective entitlement to the Disputed Funds for the following reasons:

- (a) Reyes states in his affidavit that the Disputed Funds “represent a mix of my personal funds, funds belonging to Costodian and funds held by Costodian and beneficially owned by Quadriga.” He has not indicated what proportion of the Disputed Funds belong to each of these parties.
- (b) Cotton states in his affidavit that the Disputed Funds are all beneficially owned by Quadriga.

[28] I agree with CIBC’s submission that this evidence suggests that there are competing claims among these parties to the Disputed Funds.

[29] CIBC also submits that there are competing claims of the Depositors to the Disputed Funds for the following reasons:

- (a) On February 2, 2018, Reyes sent an email to CIBC stating that “I am under extreme pressure from many clients to address this asap as funds are frozen for a while ...”
- (b) On February 7, 2018, Reyes sent another email to CIBC stating that “lawsuits are being filed against us.”
- (c) On February 8, 2018, Reyes sent another email to CIBC stating that “we can’t hold funds, not ours ... Legally myself personally and my company cannot freeze other people’s money ... I need an ETA please so I can advise all involved.”
- (d) On February 13, 2018, Cotton sent an email to Reyes stating that “we also have multiple lawsuits now as we can’t pay clients.”

[30] Reyes and Cotton have both sworn in their affidavits that no lawsuits have been filed against any of the respondents by Depositors seeking the return of their deposited funds despite what they said in the emails set out above.

[31] However, Reyes has testified as follows:

Q. So you would have been concerned on February 7th that the people using the Quadriga exchange who had deposited funds, may sue Quadriga if they couldn't get their money out?

A. Absolutely, yes.

Q. Okay. And as you just mentioned, you were concerned that they might sue you if they couldn't get their money out as the payment processor, correct?

A. Correct.

Q. Okay. And given that the funds remain frozen in the CIBC accounts, I take it you still have those concerns about potential lawsuits from the users of the Quadriga exchange?

A. Absolutely ...

[32] Reyes and Cotton have both testified that the online wallets of each of the Depositors have been credited with QuadrigaCX Bucks in the amounts of their deposits to the Transaction Account. However, Reyes admitted on his cross-examination that he relied solely on information he received from Cotton to make this assertion.

[33] When Cotton was cross-examined he refused to confirm his evidence as follows:

Q. Okay. So, there are some 388 depositors listed on this document.

A. Yes.

Q. And I take the position of Quadriga is that all of these deposits have been actually credited to the respective accounts in the form of QuadrigaCX bucks?

Ms. Waddell: Well, don't answer that ...

[34] In my view, this was a highly relevant question with respect to whether there is the foundation for an expectation that there will be competing claims to the Disputed Funds by the Depositors. Cotton's refusal to answer the question leads me to draw an adverse inference that Depositors have not been credited with QuadrigaCX bucks in their online wallets. There is, therefore, a real possibility that they will make claims with respect to the Disputed Funds.

[35] For these reasons I am satisfied that CIBC has met the onus of establishing that there is a real foundation for the expectation of competing claims with respect to the Disputed Funds.

[36] CIBC's application is therefore granted. CIBC is ordered to pay the Disputed Funds to the Accountant of the Superior Court to await the outcome of a proceeding in this court, on notice to the Depositors, to determine entitlement to the Disputed Funds.

[37] I agree with the Respondents' submissions that interpleader relief should not be used to extricate the applicant from its own possible liability. In *Canadian Imperial Bank of Commerce v. Bajaj*, 1982 CarswellAlta 354 the court stated as follows at para 8:

Relief by way of interpleader cannot be granted to relieve a person of possible liability because of his own actions.

[38] The respondents allege that CIBC wrongfully froze the accounts. I am not in a position on this record to make any determination as to CIBC's possible liability for doing so. Accordingly, it would be inappropriate for me to extinguish any liability that CIBC may have for freezing the accounts in the absence of an evidentiary record that establishes that CIBC has no liability.

[39] I therefore decline to make the order requested in para. 2 of CIBC's draft order extinguishing CIBC's liability with respect to the Disputed Funds.

[40] With respect to the balance of CIBC's draft order concerning the procedure to determine entitlement to the Disputed Funds, costs of the application and sealing of the confidential brief, counsel shall schedule a 9:30 a.m. attendance with me to deal with these issues.

[41] I thank counsel for their helpful submissions.

HAINY J.

Release Date: November 9, 2018