IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shen v. Lou,*
2023 BCSC 414

Date: 20230317
Docket: S225924
Registry: Vancouver

Between:

Zhixing Shen

Plaintiff

And

Juanzhen Lou also known as Juan Zhen Lou

Defendant

Before: The Honourable Madam Justice Tucker

Corrected Judgment: The text of this judgment was corrected throughout on April 11, 2023.

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:	L. Li M. Morant G. Douvelos
Counsel for the Defendant:	D. Parlow Y. Gao
Place and Dates of Trial:	Vancouver, B.C. March 2-3, 2023
Place and Date of Judgment:	Vancouver, B.C. March 17, 2023

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[1] The defendant, Ms. Lou, applies to discharge a July 27, 2022 *Mareva* injunction against her. She also seeks an order for an inquiry to assess damages and special costs of this application.

[2] The plaintiff, Mr. Shen, asks that the application be adjourned and, in the alternative, denied.

I. BACKGROUND

[3] On July 20, 2022, Mr. Shen filed a notice of civil claim ("Claim") and applied for a *Mareva* injunction.

[4] The Claim seeks to enforce an April 28, 2015 judgment by a Chinese court ("Chinese Judgment") in favour of Mr. Shen.

[5] The Chinese Judgment results from a breach of contract claim ("Chinese Action") in respect of a loan agreement ("Loan") and letter of guarantee ("Guarantee"). The Loan was for an amount equivalent to about $11.62 million CDN. The Chinese Judgment is against Ms. Lou, Ms. Lou's husband (Wensheng Ma), and a group of Chinese companies known as the "Sanlian" companies, as defendants.

[6] The Claim also seeks a constructive trust over a residential property located in West Vancouver ("Millstream Property"). Ms. Ma is the sole registered owner of the Millstream Property. The trust is sought based on allegations that the Millstream property was purchased, maintained and developed with funds advanced under the Loan. (As it is not expressly pled as a substantive constructive trust, the Claim presumably seeks a remedial constructive trust: *Trainer v. Tractorhill Sales Ltd.*, 2018 BCSC 2043 at para. 23.)

[7] Mr. Shen's application for a *Mareva* injunction was solely supported by his own affidavit #1, sworn July 19, 2022 ("First Shen Affidavit").

[8] The First Shen Affidavit describes and attaches the Chinese Judgment. It then reads, in part, as follows:

> 11. On May 7, 2015, the 2015 Chinese Judgment was duly served on Ms. Lou by service of same on her legal counsel, Mr. Wuchu Wang who represented Ms. Lou in the above Chinese litigation. Attached hereto and marked as Exhibit "C" are true copies of a Power of Attorney signed by Ms. Lou and filed with the Chinese Court appointing Mr. Wuchu Wang as Ms. Lou's legal counsel in the above Chinese litigation, and the Chinese Court's Receipt of Service of the 2015 Chinese Judgment on Ms. Lou through her counsel, Mr. Wuchu Wang, dated May 7, 2015, with certified English translation.
>
> ...
>
> 13. The chart below summarizes the relevant Court Orders issued by the Chinese Court in relation to the 2015 Chinese Judgment:

Date of Issuance	**Name of Order**	**Issued By**	**Summary of Relevant Contents**
2015-04-28	The 2015 Chinese Judgment ("Civil Judgment")	The Chinese Court ("Intermediate People's Court, Hangzhou City, Zhejiang Province")	Ms. Lou and the other seven Chinese Defendants are jointly liable to me for the total amount of RMB ¥69,218,000 (CAD$13.40 million), plus interest from October 1, 2014 to the date of the Chinese Defendants' satisfaction of the 2015 Chinese Judgment.
2015-06-05	"Enforcement Ruling"	The Chinese Court	The Chinese Court orders to seal up, freeze, seize, detain, appropriate and withdraw RMB ¥ 77,512,368 (CAD$15.01 million) or other assets of equivalent value from Ms. Lou and the other seven Chinese Defendants.

			Attached hereto and marked as Exhibit "D" is a true copy of the Enforcement Ruling with certified English translation.
2017-01-11	"Spending Restriction Order"	The Chinese Court	Due to Ms. Lou's failure to comply with the 2015 Chinese Judgment and the 2015 Enforcement Ruling, Ms. Lou is prohibited from a series of spending activities, including "travelling on airplane" and "building new or expanding house and luxurious renovation". Attached hereto and marked as Exhibit "E" is a true copy of the Spending Restriction Order with certified English translation.
2018-07-04	"Written Decision"	The Chinese Court	Due to Ms. Lou's failure to comply with the 2015 Chinese Judgment and the 2015 Enforcement Ruling, Ms. Lou's Chinese passport was revoked and Ms. Lou is prohibited from exiting China or applying for Chinese passport or travel documents for Taiwan, Hong Kong and Macau. Attached hereto and marked as Exhibit "F" is a true copy of the Written Decision with certified English translation.
2019-03-25	"List of Calculations"	The Chinese Court	The Chinese Court confirmed the following amounts owing under the 2015 Chinese Judgment: • As of August 1, 2015, after partial collections of RMB ¥8,450,000 (CAD$1.66 million) and RMB ¥ 18,047,172 (CAD$3.50 million), the remaining enforcement target was RMB ¥ 53,960,428 (CAD$10.45 million); • Interest rate: 1.67% per month (RMB ¥ 894,124

			(CAD$173,086.94) / month); • Additional interest rate for delayed performance: 0.0175% per day (RMB ¥ 9,370 (CAD$1,813.87) / day) (the "Additional Interest Rate"); • As of March 31, 2019, the total amount outstanding under the 2015 Chinese Judgment was RMB ¥ 105,250,328 (CAD$20.37 million). Attached hereto and marked as Exhibit "G" is a true copy of the Chinese Court's Letter dated March 25, 2019 enclosing the List of Calculation with certified English translation.
2019-05-20	"Decision to Detain"	The Chinese Court	The Chinese Court found that during the enforcement of the 2015 Chinese Judgment, Ms. Lou "refused to truthfully disclose assets, breached the High Spending Restriction Order, and up to the present, she has refused to fulfill the obligation stipulated by an effective legal document." For these reasons, the Chinese Court orders that Ms. Lou be placed in judicial detention for 15 days. Attached hereto and marked as Exhibit "H" is a true copy of the Decision to Detain with certified English translation.

14. Ms. Lou breached the above Court Orders and attempted to create an impression that she does not have assets to satisfy the 2015 Chinese Judgment. ...

15. Further, Ms. Lou evaded detention by unlawfully applying for another Chinese passport and travelling from China to Canada in breach of the travel restrictions imposed on her by the Chinese Court. Ms. Lou further withheld information of her significant assets in Canada (as explained hereinafter) from the Chinese Court and me.

...

26. During the above-mentioned Chinese litigation and enforcement proceedings, Ms. Lou has never disclosed to me or to the Chinese Court about her ownership of the Millstream Property.

[9] I adopt for use in these reasons the defined terms for the enforcement orders (i.e., the orders made after the Chinese Judgment itself was issued) set out in the above chart ("Chart"). (I note that the defined term "List of Calculations" refers to an attachment, and does not include the letter that attaches it.) I will refer to these collectively as the "Enforcement Orders".

[10] In the First Shen Affidavit, Mr. Shen attested that the Millstream Property was presently listed for sale and expressed concern that Ms. Lou would transfer the sale proceeds and other assets out of his reach given her conduct under the Chinese Judgment and Enforcement Orders.

[11] A *Mareva* injunction was granted by McDonald J. on July 27, 2022 ("*Mareva* Order") following a without notice hearing.

[12] The *Mareva* Order includes a term that anyone affected by it "may apply to the Court at any time to vary or discharge it on giving no less than 2 days' notice to the plaintiff's solicitor".

[13] The *Mareva* Order obliged Ms. Lou to provide an affidavit listing her assets. Ms. Lou provided an affidavit ("List Affidavit") in August 2022.

[14] On September 7, 2022, Ms. Lou filed her response to the Claim ("Claim Response").

[15] Among other things, the Claim Response alleges the Chinese Judgment is not enforceable against Ms. Lou because the proceeding against her was contrary to natural justice. She alleges that she did not have notice of the Chinese Action as a defendant and was unaware she had been named as a defendant in the Chinese Action until the Claim was filed.

[16] On November 10, 2022, Ms. Lou filed a notice of application to vary the *Mareva* Order ("Variance Application"). She sought to be allowed to re-list and sell the Millstream Property, pay the mortgages, and put the net proceeds in trust with a right to payment out for legal fees and living expenses.

[17] On November 22, 2022, Mr. Shen filed a notice of application for a summary trial. The application relies on Mr. Shen's October 17, 2022 affidavit #2 ("Second Shen Affidavit").

[18] Almost all of the paragraphs in First and Second Shen Affidavits (collectively, the "Shen Affidavits") are identical. The Second Shen Affidavit simply adds quotes from the Chinese Judgment and paragraphs stating that the *Mareva* Order was granted and commenting on the Claim Response.

[19] On November 25, 2022, Mr. Shen filed a notice of application ("Finances Application") seeking production orders and leave to cross-examine Ms. Lou on the List Affidavit and her evidence in support of the Variance Application.

[20] The Variance Application was set for hearing on December 1, 2011. On that date, Justice Hughes ordered that the Finances Application should proceed first. She agreed there was a gap in the evidence regarding the source of some funds transferred to Ms. Lou and that access to other funds could be relevant to the Variance Application. Ms. Lou then consented to attend for cross-examination on December 7, 2022.

[21] The December 7th cross-examination proceeded. The production of certain documents requested during examination was opposed as was Mr. Shen's request for additional cross-examination time, and both points remained unresolved as of the hearing before me.

[22] On January 23, 2023, Mr. Shen filed a second summary trial application ("Summary Trial Application"). It is identical to that filed on November 22, 2022.

[23] At a February 13, 2023 case planning conference before Justice Power, the days of March 2 and 3, 2023 were set for the summary trial.

[24] The parties set examination for discovery dates by agreement.

[25] Mr. Shen was examined on February 13 and 15, 2023.

[26] Ms. Lou was produced on the agreed upon date of February 22nd, but Mr. Li declined to proceed. Mr. Li advised that Mr. Shen would now take the position that a summary trial was not suitable. Mr. Parlow responded that Ms. Lou would continue to maintain that it was.

[27] On February 27, 2023, Ms. Lou filed another notice of application ("Discharge Application") and set it for March 2-3, 2023. The Discharge Application is entirely based on the record in the Summary Trial Application. An unfiled copy of the Discharge Application was served on Mr. Shen on February 27, 2023, and a filed copy was provided the next day. Mr. Shen does not dispute that he was given notice in accordance with the *Mareva* Order.

[28] Mr. Shen did not file a response to the Discharge Application.

[29] On February 28, 2023, Mr. Shen filed a notice of application ("Adjournment Application") seeking:

a) to adjourn the Summary Trial Application,

b) to adjourn the Discharge Application,

c) to cross-examine Ms. Lou and two of her other affiants (Daniel Ma and Wuchu Wang) on their respective affidavits sworn February 21-23, 2023,

d) leave to file further materials in the Summary Trial Application, and

e) leave to file the Adjournment Application.

[30] On March 2, 2023, Mr. Parlow advised that an inquiry had been made through the Registry to McDonald J. about whether the Discharge Application should be brought before her, and that McDonald J. had advised it could be heard by another judge if that judge was prepared to hear it.

[31] Ms. Lou initially opposed both adjournments sought in the Adjournment Application. However, after further considering the amount of hearing time available,

she opted to consent to adjourning the Summary Trial Application and seek to have the Discharge Application determined.

[32] I adjourned the Summary Trial Application generally and indicated that I was prepared to hear the Discharge Application. Other than the remaining adjournment sought, the other relief sought under the Adjournment application was adjourned generally. The parties were directed to set a case planning conference to establish a schedule to deal with the adjourned matters.

[33] As the matters were intertwined, I ruled that I would hear argument on the merits of the Discharge Application and that Mr. Shen could advance his position for an adjournment as his primary position in response. I also granted Mr. Shen leave to add two affidavits to his application record on the Adjournment Application.

II. LEGAL FRAMEWORK

[34] A summary of the principles applicable to *Mareva* injunctions is helpfully set out in *China Citic Bank Corp. v. Yan*, 2016 BCSC 2332 at paras. 10–16. There, Smith N., J. stated:

> [10] The term "*Mareva* injunction" generally refers to an order that prevents a defendant from removing assets from the jurisdiction or from disposing or dealing with them within the jurisdiction in a way that will render an eventual judgment unenforceable: I Spry QC, *Equitable Remedies*, 9th ed, (Australia: Thompson Reuters, 2013) at 514. It is recognized as a "harsh and exceptional remedy that should only be available in the clearest of cases": *Netolitzky v. Barclay*, 2002 BCSC 1098 at para. 22. However, it is not limited to any particular, pre-defined set of circumstances. In *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 1998 CanLII 6468 (BC CA), 168 D.L.R. (4th) 309, the Court of Appeal said at paras. 20 and 21:
>
> > [20] . . . The overarching consideration in each case is the balance of justice and convenience between the parties, and those concepts can embrace many factors that do not fit easily into the "rules" or "conditions" advanced by the defendants.
> >
> > [21] Having said that, however, it is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and

> have difficulty collecting on its judgment if the injunction is not granted.

[11] The basic test for a *Mareva* injunction was summarized in *567 Hornby Apartments Ltd. v. Le Soleil Hospitality Inc.,* 2009 BCSC 711 at para. 12; the Court must consider:

> [12] . . .
>
> (a) the existence of a strong prima facie case or a good arguable case (there is no strict formula); and
>
> (b) having regard to all relevant factors in the case, whether granting an injunction would be just and convenient (in other words, the balance of convenience).

[12] Because *Mareva* injunctions are invariably sought on *ex par*te applications, they are subject to the general rules governing such applications. Those are summarized in *Pierce v. Jivraj*, 2013 BCSC 1850 at para. 37:

> [37] On an *ex parte* application, the relevant principles include the following:
>
> 1) the applicant must make full and frank disclosure of all material facts;
>
> 2) a material fact is one that may affect the outcome of the application;
>
> 3) it is for the court to determine if the fact is material, not the applicant or his legal advisors;
>
> 4) the duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made;
>
> 5) the extent of the inquiries required depend on the circumstances of the particular case;
>
> 6) if material non-disclosure is established, the court may deprive the applicant of any advantage gained by reason of the breach of duty to disclose;
>
> 7) the failure to provide such full and frank disclosure will allow a court to set aside the order without regard to the merits of the application;
>
> 8) in deciding whether the Order should be set aside, the court must consider the importance of the non-disclosed fact to the issues which were to be decided by the judge at the ex parte hearing;
>
> 9) an innocent non-disclosure is an important consideration, but not decisive as to whether the breach is such that the Order is to be set aside; and
>
> 10) not every omission necessarily results in the order being set aside.

> [Citations omitted]

[13] On the question of the effect of a material non-disclosure, the Ontario Superior Court of Justice has noted in *Re Ghana Gold Corporation*, 2013 ONSC 3284 at para. 28:

> [28] In his text Sharpe, *Injunctions and Specific Performance*, looseleaf ed. (Toronto: Canada Law Book 2012) Canada Law Book, Sharpe J.A. stated at para. 2.45 that inflexible application of this rule is to be avoided and failure to make full disclosure is not invariably fatal. He referred to English authority that has held that a court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of an *ex part*e order, nevertheless to continue the order, or to make a new order on the same terms. He also states that if dissolution would result in injustice to the plaintiff, the punitive rationale for dissolving the injunction may be outweighed. Justice Sharpe also referred to opinion that expressed concern that applications to dissolve for non-disclosure were becoming routine, a view which in recent experience in our courts is all too true. See *Univalor Trust S.A. v. Link Resource Partners Inc*., [2012] O.J. No. 5021.
>
> [Emphasis added]

[14] The duty of disclosure applies to matters known to the plaintiff or matters that it ought to have known had it made all reasonable inquiries: *BMF Trading v. Abraxis Holdings Ltd*., 2000 BCSC 1691 at para. 118, rev'd on other grounds 2001 BCCA 288. That test must be applied with recognition of the fact that injunction applications are typically brought in situations of some urgency. As was stated in *Mooney v. Orr*, 1994 CanLII 1779 (BC SC), [1994] B.C.J. No. 2652 (S.C.) at para. 20:

> [20] . . . An *ex parte* chambers application is not a trial and should not be turned into one by demands for an unrealistic standard of disclosure. Disclosure must be full in the sense that it must be adequate to the demands of the particular application and always fair to the absent defendant. ...

[15] A *Mareva* injunction may be set aside if the plaintiff overstated its case when applying for the injunction: *Royal Bank v. Boussoulas*, 2010 ONSC 4650.

[16] An application to set aside a Mareva injunction should be approached as a hearing *de novo*, but should not be decided simply on the basis that the judge hearing the application would have exercised his or her discretion differently from the judge who made the original order: *Netolitzky* at para. 20; *Ma v. Nutriview Systems Inc.*, 2011 BCCA 389 at para. 14. The court may consider new or additional material that is put forward as well as the evidence on which the original application was based: *Ma* at para. 17.

III. ISSUES

[35] There are three issues to be determined:

a) Whether the Discharge Application should be adjourned,

b) Whether the *Mareva* Order should be set aside for material non-disclosure, and

c) If so, whether a new *Mareva* injunction should be issued.

[36] The answers to those questions are, respectively, no, yes and no.

IV. ANALYSIS

A. Objections to the Shen Affidavits

[37] The central objections comprise two categories: (1) the circumstances of affirmation, and (2) allegations of false and misleading content. With respect to both categories, Ms. Lou relies on Mr. Shen's mid-February 2023 discovery testimony.

1. The Affirmation Circumstances

[38] Mr. Shen used a Mandarin interpreter at his discovery. During questioning, he advised that he does not speak or read English. Neither of the Shen Affidavits has an interpreter's endorsement. There is no indication in them that their contents were subject to translation.

[39] At the discovery, Mr. Parlow asked Mr. Shen how he had satisfied himself that he understood the content of the First Shen Affidavit before he affirmed it. Mr. Li interjected to state that he had interpreted for Mr. Shen and that he (Mr. Li) was satisfied that Mr. Shen understood the content. Mr. Parlow then asked Mr. Shen to explain how his affidavit had been interpreted for him. Mr. Li objected, citing relevance and solicitor-client privilege. Mr. Parlow then asked Mr. Shen to explain how he had satisfied himself that he understood the content of his affidavit. Mr. Li objected that the question intruded into solicitor-client communications.

[40] Similar questions – to similar results – were posed in respect of the Second Shen Affidavit.

[41] *Supreme Court Civil Rules* [*Rules*], R. 22-2(7) reads:

> **Interpretation to person swearing or affirming the affidavit who does not understand English**
>
> (7) If it appears to the person before whom an affidavit is to be sworn or affirmed that the person swearing or affirming the affidavit does not understand the English language, the affidavit must be interpreted to the person swearing or affirming the affidavit by a competent interpreter who must certify on the affidavit, by endorsement in Form 109, that he or she has interpreted the affidavit to the person swearing or affirming the affidavit.

[42] The potential consequences of non-compliance with R. 22-2(7) were considered in *British Columbia (Director of Civil Forfeiture) v. Vu*, 2020 BCSC 106. In factual circumstances quite similar to those at hand, Jackson J. wrote:

> [8] The Director argues that both affidavits filed by the Applicant are inadmissible because they contain no reference to the Applicant's use of a translator. At paragraph 10 of the Applicant's affidavit made on July 8, 2019 (the "First Affidavit"), the Applicant deposes that:
>
> > On March 31, 2018, I attended the CSPS station, where Sergeant Haney interviewed me and my son was in attendance, acting as the translator. I was told after the interview by my son that he believes he did not accurately translate the statements made by Sergeant Haney. Sergeant Haney also continued to ask questions after I requested that the interview cease.
>
> [9] The inference to be drawn from this paragraph is that the Applicant is asserting he requires the assistance of an English language translator. However, the First Affidavit as well as the Applicant's affidavit made July 17, 2019 (the "Second Affidavit"), are in English. There is no reference in either affidavit to any translator being used. When this apparent anomaly was raised by counsel for the Director, counsel for the Applicant advised that she had translated the First Affidavit and the Second Affidavit for the Applicant, contrary to the requirement of Supreme Court Civil Rules, R. 22-2(7). The Director argues both affidavits are inadmissible on the basis that they do not contain the required certification of a translator. The Director further argues that, even if the affidavits had included the requisite certification of translation, the Applicant's counsel would not be considered an impartial translator and the reliability that flows from the use of an independent translator would be absent: *Luu v. Wang*, 2011 BCSC 1201 at paras. 8-15.
>
> [10] Relying on R. 22-2(14), counsel for the Applicant argues the absence of any indication that the affidavits were the product of a translation is simply "an irregularity in its form" and that the affidavits should nonetheless be admitted.

> [11] I do not consider failing to provide any indication that the First Affidavit and the Second Affidavit where the product of a translation to be a mere "irregularity in its form". This is particularly so where it appears that the Applicant's ability to speak and understand English could be a fact of some significance in the proceedings. I consider the absence of information that the affidavits were prepared based on a translation to be a serious breach of the *Rules*. In my view, neither of the affidavits are admissible.

[43] To similar effect, see: *Tut v. Evershine Land Group Inc*., 2021 BCSC 453 at paras. 10–12 [*Tut BCSC*], aff'd 2022 BCCA 63 [*Tut BCCA*].

[44] Ms. Lou says the Shen Affidavits are both inadmissible.

2. The Power of Attorney

[45] The Shen Affidavits attach a copy of a power of attorney ("POA") which ostensibly bears Ms. Lou's signature. Under the POA, a Chinese lawyer, Wuchu Wang, is granted the power to represent Ms. Lou at the trial on the Chinese Action.

[46] Mr. Shen's attestation that Ms. Lou had notice of and participated in the Chinese Action rests on the POA. At discovery, he testified that he had never seen Ms. Lou personally participate in the Chinese Action.

[47] Mr. Shen attests that the exhibited copy of the POA is a true copy "of a Power of Attorney signed by Ms. Lou". At discovery, Mr. Shen testified that he has never seen the original POA. Ms. Lou says Mr. Shen's attestation that the attached copy is a true copy is misleading evidence on a central point.

3. Failure to Comply with Enforcement Orders

[48] In the Shen Affidavits, Mr. Shen attests that Ms. Lou flagrantly breached the Enforcement Orders, attempted to create an impression that she has no assets to satisfy the Chinese Judgment, evaded detention in China, and withheld information from him and the Chinese Court about her assets. Each these statements implicitly asserts that Ms. Lou was aware that she was a named party under the Chinese Judgment and aware of the Enforcement Orders against her.

[49] Ms. Lou's evidence is that she ceased living with Mr. Ma in mid-2014 when their marriage fell apart in dramatic circumstances. As she was already a permanent resident of Canada, she began preparing to move to Canada at that time and went back and forth between the countries arranging that in the fall of 2014. In December 2014, she left to permanently live in Canada along with the youngest child of the marriage.

[50] At discovery, Mr. Shen testified that he was aware, in 2014, that Ms. Lou had gone to live in Canada in 2014. In fact, he testified that he believed she was gone to Canada as of the summer of 2014. He also testified that as of 2016 he was aware that she was living in Vancouver.

[51] At discovery, Mr. Shen stated that it was the Chinese Court's "job" to serve the Chinese Judgment and Enforcement Orders on Ms. Lou. He agreed that he did not know whether the Chinese Court had in fact served her. He testified that he took no steps himself to have the Chinese Judgment or Enforcement Orders provided to her nor did he advise the Chinese Court that she was living in Vancouver.

[52] The following exchange, dealing specifically with the Decision to Detain, is illustrative of his answers at discovery:

> 407 Q And turning to exhibit H to your affidavit number 1 which is a "Decision to Detain," and it is dated May 20th, 2019, and it has the stamp of the court in Hangzhou.
>
> A Yes.
>
> 408 Q All right. And with respect to this document you didn't take any steps to let Ms. Lou know that you were asking for this order before it was issued; correct?
>
> A Because I personally was unable to contact her. I was unable to get to her.
>
> …
>
> 410 Q You don't know whether she was notified before you asked to issue this order or before the order was issued.
>
> A Correct.
>
> 411 Q All right.

> A There's no need for me to notify her. That's not something I should do.
>
> 412 Q All right. And you don't know whether this document was ever delivered to her after the order was issued; correct?
>
> A Correct. The Chinese court definitely mailed this document to her according to her residential address.
>
> 413 Q But you're -- [not interpreted.]
>
> A Because after Lou, Juanzhen left for Canada, went to Vancouver, she never applied to the court for change of her phone number or change of her address, so the court was unable to get in touch with her at her Canadian address.
>
> 414 Q Did you check with the court about that, or are you just guessing?
>
> A Because in China if you have not changed your address or phone number at the court, the court would just deliver the documents to the address indicated on your identification card and the number originally left there, and that would be deemed effective.

[53] Mr. Shen's discovery testimony reveals he had no factual basis for attesting that Ms. Lou had disobeyed, disregarded and evaded the Chinese Judgment and Enforcement Orders. To the contrary, his testimony indicates that he either believed or had good reason to believe that they had not been served on her.

[54] There is no dispute about the fact that Ms. Lou knew that Mr. Shen had Mr. Ma put in jail in 2019 for failing to pay Mr. Shen under a court judgment against Mr. Ma. (Ms. Lou says 2019 is when she first learned that Mr. Shen had a judgment against Mr. Ma.) Both sides have provided evidence that Mr. Shen and Ms. Lou conversed twice in 2020 and that in those conversations Ms. Lou asked Mr. Shen to assist in arranging Mr. Ma's release from jail.

[55] Mr. Shen does not assert that he told Ms. Lou that she was named in the Chinese Judgement or subject to the Enforcement Orders in those 2020 conversations. Both sides say that Mr. Shen did make an obscure comment in the second conversation to the effect that he might seek to have Ms. Lou put into jail as well. The evidence before me indicates that no one took this as a serious comment. Mr. Shen does not assert that the comment amounted to notice to Ms. Lou that she was named in the Chinese Judgment. He described the conversation between them

that was not about arranging Mr. Ma's release as consisting of the usual "pleasantries".

B. Disclosure Before McDonald J.

[56] There is no assertion that McDonald J. was aware that Mr. Shen did not understand English or that his counsel had translated the First Shen Affidavit for affirmation.

[57] Ms. Lou submits that the breach of R. 22-2(7) and the fact that Mr. Li did the translation for affirmation made the First Shen Affidavit inadmissible. She also says that providing the First Shen Affidavit to McDonald J. without a Form 109 endorsement attached amounted to an implicit representation to the court that Mr. Shen understood English.

[58] There was nothing before her that could have enabled McDonald J. to flag the R. 22-2(7) and partial translation issues on her own. I agree that the omission of an interpreter's endorsement must be viewed in tandem with an expectation of compliance with R. 22-2(7). Providing an affidavit without any related disclosure is effectively a representation to the Court that the affiant reads English and thus an implied assurance that there are no translation-related reliability issues in play.

[59] Here, there were reliability issues in play and the affidavit was the sole evidence in support of a request for an extraordinary remedy. It is unnecessary to hazard a guess as to how McDonald J. would have ruled with respect to admissibility, as I am satisfied that the true state of affairs would have required the issue of admissibility to be considered and determined and would have been a factor in determining whether a *Mareva* injunction should granted on such evidence even if admitted. The end result might have been a different outcome on the application, thus there was material non-disclosure in the circumstances.

[60] However, there was other material non-disclosure in any event.

[61] Mr. Shen's argument for the *Mareva* Order was centred on his evidence that Ms. Lou had disregarded, disobeyed and actively evaded the Chinese Judgment and Enforcement Orders. McDonald J. expressly referred to conduct having been taken to evade payment in granting the application. Had she been aware there was no evidentiary basis for asserting that Ms. Lou knew of the orders against her, the outcome clearly might have different.

[62] I do not find the POA attestation to be misleading in any way that amounts to a material non-disclosure. His full statement identifies the document as "a Power of Attorney signed by Ms. Lou and filed with the Chinese Court". In context, the import of his statement was that a power of attorney document signed in Ms. Lou's name was filed with the Chinese Court. It is not disputed that a power of attorney document ostensibly bearing her signature was, in fact, filed. There is nothing in the transcript to suggest that McDonald J.'s reasoning would have been impacted had Mr. Shen simply identified his Exhibit C as a true copy of a copy (e.g., taken from his own counsel's file).

[63] The *Mareva* Order is set aside for material non-disclosure.

C. *De Novo* Consideration

[64] The next question is whether a new injunction should be granted on the record as it stands before me and/or whether the application should be adjourned to allow Mr. Shen to file further evidence.

[65] I am mindful that the trial lies ahead. Further, Ms. Lou has indicated that she will take the position that the Summary Trial Application should proceed on the application record as filed. I will avoid to the extent possible commenting on that evidence.

[66] Ms. Lou says the Second Shen Affidavit should be ruled inadmissible. In addition to the R. 22-2(7) breach and the use of a partial translator, she says the following are aggravating circumstances. First, Mr. Li's objections to her counsel's discovery questions pertaining to the translation done for affirmation. Second, the

fact that a number of the paragraphs in the Shen Affidavits are replicated in the Claim and in affidavits sworn by members of Mr. Shen's legal team (i.e., the affidavit #3 of Ms. Morant filed November 17, 2022, and the affidavit #1 of legal assistant K. Verboven filed November 25, 2022). She says that the legalistic language and legal concepts found in the Shen Affidavits amply the concern about Mr. Shen's understanding of, and ability to speak to, the content.

[67] Mr. Shen submits that affidavits are commonly drafted for affiants by legal counsel. He further says that Ms. Lou has filed affidavit evidence with the same deficiencies, pointing to the February 23, 2023 affidavit of Wuchu Wang ("Wang Affidavit").

[68] Mr. Wang is the Chinese lawyer appointed under the POA. His affidavit opens with the following paragraphs:

> 4. On February 9, 2023, I was interviewed virtually by Dan Parlow and Yan Gao who said they are lawyers for Juan Zhen Lou. I had been approached by Ms. Lou's son, Han Xuan Ma or Daniel Ma ("Daniel"), who asked if I would answer some questions of Ms. Lou's lawyers regarding an earlier lawsuit (the "Hangzhou Action") initiated by Mr. Zhixing Shen against Daniel's parents.
>
> 5. Daniel was present in my office during the interview, but Mr. Parlow asked him not to participate in any way, and he agreed. Mr. Gao acted as interpreter of Mr. Parlow's questions and my answers.
>
> 6. At the conclusion of the interview, Mr. Parlow asked if he could prepare a statement for me to review and sign, and I said so long as it is all true, I am willing to do so. This is that statement.

[69] Mr. Gao acted as the interpreter for an interview. While Mr. Gao subsequently commissioned the Wang Affidavit, the translation for affirmation was done by a certified interpreter who completed a Form 109 endorsement. In comparison, Mr. Li did the translation for Mr. Shen's affirmations. Further, while Mr. Parlow's firm drafted the Wang Affidavit for Mr. Wang, Ms. Lou's point is not that counsel should not act as draftsperson, but rather that the language used in the Shen Affidavits itself is additional reason to be concerned about comprehension. There are no comparable deficiencies in the Wang Affidavit.

[70] I return to the admissibility objection.

[71] There is a clear breach of R. 22-2(7). While a breach of R. 22-2(7) is a serious contravention of the *Rules*, there may be mitigating or aggravating circumstances. In *Vu*, the individual who did the translation for affirmation was not neutral and the affiant was the plaintiff and was arguing inadequate translation of other communications as part of the merits. In *Tut*, Ball J. observed that the affidavits also contained unattributed hearsay and the filing party had notice, but nevertheless failed to remedy the deficiencies before the hearing. In both *Vu* and *Tut*, the affidavits were ruled inadmissible in their entirety.

[72] Here, the translation for affirmation was done by Mr. Li, and Mr. Li is not an impartial person. I also agree that the reliability issues arising here were compounded by Mr. Li's discovery objections. The fact that Mr. Li is also Mr. Shen's legal counsel does not immunize the translation for affirmation process from all inquiry. This is another reason why it is ill-advised for counsel acting in the matter to also act as a translator for affirmation.

[73] Further, the deficiencies were flagged to counsel's attention before the hearing. Mr. Parlow commented on the absence of any interpreter's certification at Mr. Shen's discovery. The R. 22-2(7) breach and Mr. Li's translation were raised as admissibility issues, in detail and with supporting authorities, on February 24, 2023, in Ms. Lou's response to the Summary Trial Application.

[74] Mr. Shen says there is no real prejudice from the R. 22-2(7) breach or from Mr. Li's doing the translation for affirmation because his affidavit "largely" attaches documents. However, the Second Shen Affidavit also includes statements of fact – express and implicit – on points both important and contentious.

[75] I find that much of the Second Shen Affidavit is inadmissible for the reasons set out above. Nonetheless, I do not reject it in its entirety. The following portions are admitted: paras. 1–5, 7, 8 (except Exhibit B), 13 (except Exhibit C), 21–23, 25, 26, 30 and 31. These portions: identify the plaintiff, defendant, the Chinese Judgment and the parties named in the judgment; indicate that the Chinese Judgment was served on Mr. Wang; deal with Ms. Lou's ownership of the Millstream Property and

establish the state of title; state that the Millstream Property is Ms. Lou's only asset of significance known to the defendant; and establish that the Millstream Property was listed for sale at the time the Claim was filed. These particular assertions are not otherwise disputed by Ms. Lou. She has filed evidence in her case that independently confirms most (if not all) of them.

[76] In my view, the admissible portions of the Second Shen Affidavit are sufficient to establish a strong *prima facie* case for an enforcement of the Chinese Judgment.

[77] As noted, Ms. Lou does not deny that a POA in her name was provided to Mr. Wang and filed in the Chinese Court. Her evidence is that she was not aware that she was named in the Chinese Action and that she did not sign the (or any) POA. She intends to try to establish that the Chinese Judgment, as against her, was not obtained in accordance with natural justice: *Beals v. Saldanha*, 2003 SCC 72 at paras. 59–65. That is a proper defence and she may well succeed in it, but the existence of a good arguable defence against enforcement does not negate the existence of a good arguable case for enforcement.

[78] That brings us to the second element, the balance of convenience.

[79] An applicant should establish a factual basis that engages the proper purposes of a *Mareva* injunction. A *Mareva* injunction is not simply a tool to ensure the plaintiff does not obtain a hollow judgment. The following paragraphs from *Coleco Investments Inc. v. Cymax Stores Inc*., 2019 BCSC 97, are instructive:

> [20] … [T]he next sentence is important:
>
> > The basic premise of a *Mareva* injunction is that the defendant is a rogue bent on flouting the process of the court, such as to justify the exceptional and drastic measure of freezing the defendant's assets before trial and before judgment [citations omitted].
>
> [21] That supplement to the description is important because counsel for the plaintiffs confirmed that they are not alleging any misconduct or misfeasance by the defendant in this case. The defendant submits that is significant. At paras. 25 of its submissions it states:
>
> > …A *Mareva* injunction is an extraordinary remedy that is only granted in the clearest of cases. In the present circumstances, there is no evidence of malfeasance, misconduct or dishonesty on the part of the Defendant, no evidence (real or impending) of assets being moved

> out of the jurisdiction, no evidence of a flouting of the court's process, and no evidence of dissipation of assets. While the [preceding] considerations are not 'absolute' requirements, they are the 'root' of the injunction, inform the very nature of a Mareva injunction and are important factors.
>
> [22] On that basis the defendant submits there is no factual basis for the injunction. I agree.
>
> ..
>
> [27] I agree with the defendant that judicial statements about a flexible approach were intended to emphasize that under the second branch of the test (balance of convenience), there is no necessary or exhaustive list of factors. However, that flexibility does not alter the foundation of the remedy or its purpose.
>
> [28] Although misconduct or fraudulent behaviour on the behalf of a defendant may not be a necessary factor to meet the test for a *Mareva* injunction, it is commonly present. That is logical and no surprise because the existence of misconduct underscores the reason for the existence of the remedy: to prevent a defendant from moving assets out of the jurisdiction for the purpose of rendering potential judgment in favour of the plaintiffs futile.
>
> [29] At a minimum, there must be a "real risk" of assets being dissipated which would render a judgment nugatory. In *567 Hornby Apartments Ltd. v. Le Soleil Hospitality Inc*., 2009 BCSC 711, Justice Dickson agreed to grant an injunction, in part, as "prejudgment security to avoid an abuse of the process of the Court": para. 17. While the plaintiffs do not assert potential abuse, they do argue an injunction can legitimately be seen as a toll to secure "prejudgment security" of assets. However, Justice Dickson's description is not disjunctive. Moreover, in the following paragraphs she recounted that the defendant was "willing to take steps to avoid compliance with court orders" regarding disclosure: para. 18. She also noted no prejudice would flow to the defendants by the injunction: para. 20.
>
> [Emphasis added.]

[80] At discovery, Mr. Shen testified that he could not say that the Chinese Court had, in fact, served the Chinese Judgment or Enforcement Orders on Ms. Lou, and that he had never taken any steps to effect service. He also testified that he did not inform her that she was a named party to the Chinese Judgment nor advise her of the Enforcement Orders when he spoke with her in 2020. Mr. Wang has already attested that he did not provide a copy of the Chinese Judgment to her and that he never received copies of the Enforcement Orders. Ms. Lou cannot be found to have engaged in conduct designed to avoid paying under the Chinese Judgment, or to have flouted and evaded the Enforcement Orders, absent evidence that she knew of them.

[81] Mr. Shen must point to something to establish there is a real risk of dissipation.

[82] Mr. Shen relies on the fact that Ms. Lou initially denied having ever signed a guarantee for the Loan. Once a copy of the Guarantee was actually produced for her review, she promptly conceded that she had signed the document and that the signature was genuine. Mr. Shen contends this is evidence that Ms. Lou is disingenuous, arguing that her claim not to have any independent recollection of having signed is patently incredible.

[83] While $11.63 million is a large sum in the abstract, the Sanlian companies were in the business of property development. There is no evidence as to whether it was odd or commonplace for Mr. Ma and Sanlian to deal with amounts on that scale or odd or commonplace for Ms. Lou to sign guarantees. In any event, she made a denial in a legal proceeding followed by a prompt admission following production of the document. It is common to make general denials at the outset of litigation. I am not prepared to rely on this conduct as evidence of dishonesty.

[84] The Chinese action against Ms. Lou was for breach of contract. The Claim is to enforce a judgment. This is not an instance where the Claim or the Chinese Action is based on fraud or dishonest conduct or other malfeasance.

[85] Ms. Lou is a permanent resident of Canada. She has been living in the Greater Vancouver area for roughly a decade, all the while holding registered real property in her own name. There is no evidence that suggests she has been hiding the fact that she lives here or the fact that she owns real property.

[86] Turning to the circumstances of the sale of the Millstream Property, on Mr. Shen’s own evidence, the real estate listing had been active for more than three months at the time the Claim was filed. His own evidence also shows that the three significant mortgages registered against the Millstream Property were all in place well before the Claim was filed.

[87] Ms. Lou's evidence is that she bought the Millstream Property in 2010 under a plan to develop it and resell it for profit. The development costs increased well beyond initial expectations and over time she liquidated her other assets and put everything into the Millstream Property and also borrowed additional funds. There is evidence that the development was completed in 2016 and the property promptly listed for $16,880,000. It did not sell, foreign buyer's taxes complicated selling it, and it has been on and off the market and re-listed at increasing lower prices in the years since 2016.

[88] Ms. Lou attests that she is concerned that property values are going to decline further and concerned about the possibility of a tax sale as she is in arrears on the property taxes.

[89] The issue is whether Mr. Shen has established there is a real risk that Ms. Lou will dissipate her assets to avoid paying a judgment. At base, Mr. Shen's case in support of a *Mareva* injunction consists of the fact that the Millstream Property is Ms. Lou's only significant asset and she is looking to sell it.

[90] She has good reasons for selling the Millstream Property, long-standing plans to sell the property, and it was already for sale at the time the Claim was filed. There is nothing suspicious about the facts or circumstances of the proposed sale. Liquidating an asset is not, in and of itself, evidence of a real risk of dissipation: see, for example, *Hollinger Inc. v. Radler*, 2006 BCSC 1712 at para. 55. Mr. Shen has failed to establish any facts that would lead me to infer that Ms. Lou was acting with an intention to move assets out of reach of his Claim.

D. Adjournment Application

[91] As noted, there is no dispute that Mr. Shen had notice of the Discharge Application that complied with the *Mareva* Order and the materials relied upon for the application are those filed as the application record for the Summary Trial Application.

[92] Mr. Shen argued that an adjournment should be granted to enable him to:

a) Re-affirm the Shen Affidavits,

b) Seek leave to and conduct a cross-examination of Ms. Lou, Daniel Ma and Mr. Wang on their respective affidavits,

c) Obtain further evidence about how Ms. Lou was dropped from and then added back into the Chinese Action,

d) Obtain evidence to respond to Ms. Lou's evidence that:

i. she was not served in the Chinese Action,

ii. she was not served with and never saw the Chinese Judgment, and was unaware she was named in it, prior to the Claim, and

iii. she was not served with any Enforcement Orders against her and was not aware any existed prior to the filing of the Claim, and

e) Continue his cross-examination on the List Affidavit.

[93] Mr. Shen argues that discharging the *Mareva* Order will be highly prejudicial to him, whereas continuing it is not prejudicial to Ms. Lou. He submits that the lack of prejudice to her is demonstrated by the fact that she has been able to carry on under it to date. He submits that the *Mareva* Order is the *status quo* and that there is a presumption in favour of maintaining the *status quo* and thus granting the adjournment.

[94] The following considerations are relevant here.

[95] First, it is challenging to imagine any circumstances in which a *Mareva* injunction would not be prejudicial to the subject of it. In any event, the *Mareva* Order is prejudicial to Ms. Lou: she is maintaining a house she developed in order to sell and is doing so in what may well be a dropping market.

[96] Second, the material non-disclosure I found above exists in the past tense. An adjournment would not enable Mr. Shen to cure the state of the July 27, 2022

application record. Additional evidence would only be relevant to the *de novo* consideration.

[97] Third, at his February 13, 2023 discovery, Mr. Shen identified no factual basis for his assertions that Ms. Lou knew she was named in the Chinese Judgment, knew of the Enforcement Orders, or had been served with the Chinese Judgment or Enforcement Orders. Re-affirming the Shen Affidavits would be of no assistance on the point. Mr. Shen did not identify any other source of evidence to support his assertions in his testimony, nor did Mr. Li identify any in argument.

[98] Mr. Shen should be prepared to make his case for dissipation in the circumstances. The order was made more than six months ago. It is not reasonable to propose to attempt to elicit evidence by cross-examining Ms. Lou, Daniel and Mr. Wang on their evidence to the contrary.

[99] Fourth, I have found a strong *prima facie* case. Obtaining additional evidence going to the merits (e.g., the natural justice issue or the constructive trust issue) would not improve Mr. Shen's case on the *de novo* consideration.

[100] Fifth, the *Mareva* Order is not the *status quo* on the *de novo* consideration. The *de novo* consideration is only entered upon after the *Mareva* Order is set aside.

[101] Finally, the dispute about the List Affidavit would be relevant if Ms. Lou was pursuing the Variance Application, but she is not. If the *Mareva* Order was not properly obtained in the first place, adjourning its discharge to allow a dispute about the adequacy of the List Affidavit to play out would be boot-strapping.

[102] As noted by Master Groves (now Groves J.), in *CMIC Mortgage Investment Corp. v. Virdi*, 2005 BCSC 323 at para. 10, the test on any adjournment application is a balancing of prejudices carried out with regard for the interests of justice. Based on the above considerations, I am satisfied the balance favours proceeding.

[103] The application for an adjournment is denied.

V. DAMAGES UNDER UNDERTAKING

[104] By para. 2(c) of Schedule A-1 to the *Mareva* Order, Mr. Shen has given the following undertaking to the Court:

> I undertake … to abide by any Order the British Columbia Supreme Court may make as to damages in the event that this Court is of the opinion that the defendant … has sustained damages by reason of this Order which the Plaintiff ought to pay[.]

[105] Ms. Lou seeks the Court's direction that there be an inquiry as to damages flowing to Ms. Lou from the *Mareva* Order. It is asserted that, among other losses, Ms. Lou missed out on an opportunity to sell the Millstream Property into a better market.

[106] In *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd*., 2020 BCCA 120 [*Ralphs*], the Court of Appeal overturned an order enforcing an undertaking given to pay damages as a condition of obtaining an interlocutory injunction. The chambers judge had applied a presumption that undertakings are to be enforced, and the question on appeal was whether the presumption applies where the claim the interlocutory injunction had been granted in was ultimately dismissed for want of prosecution, rather than on its merits.

[107] In concluding that there was no presumption where there was a dismissal for want of prosecution, the Court affirmed the fact that a presumption did exist in other circumstances. Further, the majority (Hunter and Fenlon JJ.A.) also addressed the present issue: the case where an interlocutory injunction was improperly obtained. Justice Hunter wrote:

> [117] Near the end of the 19th century, the English courts debated the circumstances in which the undertaking could be called on for a damages assessment. In *Smith v. Day* (1882), 21 Ch. D. 421, Sir George Jessel expressed the view that the plaintiff could be called upon to pay damages in relation to the injunction only if the plaintiff had acted improperly in obtaining the injunction. Cotton L.J. considered this too limiting, expressing the opinion that the defendant should be able to have a remedy "where the party obtaining the injunction ultimately turned out to have no title". The debate was resolved in the English courts two years later, in *Griffith v. Blake* (1884), 27 Ch. D. 474, with the views of Cotton, L.J. prevailing. In that case, Cotton, L.J.

> expressed the rule that was accepted by the Supreme Court of Canada in *Vieweger Construction*:
>
> > … whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary.
>
> [118] This expression of the rule has also been accepted as reflecting the ratio of *Vieweger Construction* by the Ontario Court of Appeal in *United States of America v. Yemec*, 2010 ONCA 414 at para. 70.
>
> [119] I do not take this statement of the rule to preclude a defendant from seeking damages on the undertaking when the injunction was improperly obtained. The point being made by Cotton L.J. was that a defendant could also seek damages whenever the plaintiff ultimately failed on the merits, unless there were special circumstances. Stating the rule as Cotton L.J. did was not a restriction of the right to damages, but an expansion. But in the absence of impropriety in the injunction application itself, failure on the merits is a necessary condition for a damages order, because only then can it be said that the plaintiff had no right to protect by an interlocutory injunction.
>
> [Emphasis added.]

[108] I have found that the *Mareva* Order was not properly obtained. The question then is whether, on a consideration of equity, the undertaking for damages should be enforced: *Peter Kiewit Sons Co. Ltd. v. North Pacific Roadbuilders Ltd*., 2005 BCSC 1586 at paras. 46–54, leave to appeal ref'd 2006 BCCA 439. I am satisfied that the equities favour enforcement of the undertaking in the circumstances.

IV. SPECIAL COSTS

[109] Ms. Lou also seeks special costs of this application.

[110] Rule 14-1(1)(b) of the *Rules* allows the court to order the costs of a proceeding to be paid as special costs. Special costs concern litigation conduct and an award of special costs has as its objects the deterrence and punishment of conduct deemed reprehensible: *Smithies Holdings v. RCV Holdings Ltd*., 2017 BCCA 177 at para. 123–134; *Garcia v. Crestbrook Forest Industries Ltd*., [1994] B.C.J. No. 2486, 1994 CanLII 2570 (C.A.).

[111] Ms. Lou argues, in particular, the content of the Shen Affidavits characterizing her as being in "flagrant" and serious contempt of the Chinese Judgment and Enforcement Orders should be considered reprehensible in view of his discovery

testimony indicating that he had no reasonable basis for asserting that she had been served with the Chinese Judgment or the Enforcement Order or was aware of any the Enforcement Orders against her.

[112] Mr. Shen says the POA and the fact that Mr. Wang had signed a Receipt of Service document for the Chinese Judgment provide a solid basis for Mr. Shen's attestation that Ms. Lou was aware of the Chinese Action, participated in it, and that the Chinese Judgment was served on her. He says that he continues to maintain that the POA is valid and that she was served with the Chinese Judgment by delivery to Mr. Wang, and that nothing he said at discovery impacts that.

[113] Mr. Shen's point about the POA and the Receipt of Service for the Chinese Judgment is valid, but it is limited to the Chinese Judgment. The real centrepiece of Mr. Shen's case for the *Mareva* Order was the assertion that she had disregarded, disobeyed and taken steps to evaded the Enforcement Orders. His discovery testimony indicates that he had no basis for stating that she had.

[114] I agree that special costs of the Discharge Application are appropriate. The special costs encompass the preparation of the Discharge Application itself and the March 2 and 3 hearing days. The order of special costs does not extend to the preparation or assembly of the materials as Ms. Lou relied only on the Summary Trial Application record. It does include the additional authorities relating only the Discharge Application.

VI. DISPOSITION

[115] The application to discharge the *Mareva* Order is granted.

[116] Ms. Lou is at liberty to schedule an inquiry to assess damages under the undertaking.

[117] Ms. Lou is granted special costs of the application on the terms detailed above.

"Tucker J."