IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pan v. Liu,*
2023 BCSC 790

Date: 20230202
Docket: S229344
Registry: Vancouver

Between:

An Dong Pan

Plaintiff

And

Xu Dong Liu, Jie Liu and Hui Lan Shan

Defendants

Before: The Honourable Mr. Justice Coval

Oral Reasons for Judgment

Counsel for the Plaintiff:	B. Desruisseaux
Counsel for the Defendants:	D. Yaverbaum
Place and Dates of Hearing:	Vancouver, B.C. January 5-6, 2023
Place and Date of Judgment:	Vancouver, B.C. February 2, 2023

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Introduction

[1] This is the decision on two interlocutory applications that were heard together.

[2] The defendants, Jie Liu and Hui Lan Shan, apply for payment out to them of all but $21,500 of the $431,000 from the proceeds of sale of their condominium, currently held pursuant to a court order discharging the plaintiff's certificate of pending litigation ("CPL") on the condominium.

[3] The plaintiff opposes that payment out. Alternatively, if he is unsuccessful in holding the funds in response to that application, he seeks a *Mareva* injunction freezing those funds.

[4] For the reasons that follow, I order that the defendants should receive payment out of the proceeds of sale apart from $21,500 to remain in trust as security for the plaintiff's claim against them.

The Parties

[5] The plaintiff is a realtor who resides in Richmond.

[6] The defendants, Jie Liu and Hui Lan Shan, are husband and wife.

[7] The defendant Xu Dong Liu is their adult daughter. For clarity, I will refer to them as the Father and Mother (or together as the Parents) and the Daughter.

The Claim

[8] The plaintiff filed his notice of civil claim on November 16, 2022, and the CPL on November 24, 2022. He filed an amended notice of civil claim (the "ANOCC") on December 2, 2022, apparently in response to the defendants' notice of application to cancel the CPL that was filed on November 28, 2022.

[9] The ANOCC alleges that the defendants jointly operate a consulting business to assist clients exchange and transfer Chinese currency from China into Canadian and American dollars in Canada.

[10] The plaintiff alleges that, on January 8, 2020, he referred a friend and client of his, Mr. Xi Long Chen, to a woman he knew named Jing Cai. Mr. Chen wished to exchange RMB for Canadian dollars. Through his business connections, the plaintiff knew that Ms. Cai could provide currency exchange services. She told the plaintiff that she could arrange the transaction Mr. Chen desired, namely exchanging his RMB2,371,850 for the equivalent in Canadian dollars (around $445,000).

[11] In this litigation the plaintiff alleges that, at the time, Ms. Cai was operating as an agent for the defendants as undisclosed principals.

[12] The plaintiff alleges that Mr. Chen then transferred his RMB to a designated bank account in China, identified by Ms. Cai. But Mr. Chen never received the corresponding payments of Canadian dollars which Ms. Cai had promised would be delivered in January 2020.

[13] The claim pleads that the plaintiff, feeling responsible for Mr. Chen's loss due to his introduction, refunded Mr. Chen's $445,000 and took assignment of Mr. Chen's rights and legal and equitable claims against the defendants, pursuant to written assignment agreements dated October 9 and December 1, 2022.

[14] The claim alleges that, in response to the plaintiff's efforts to recoup the money, the Daughter and her husband (whom I will refer to as the Son-in-Law) became involved. They represented to the plaintiff that he would be repaid.

[15] Between March and July 2020, the Son-in-Law did repay the plaintiff $14,000, leaving an outstanding balance of $431,000. The ANOCC seeks payment of the $431,000, plus accrued interest, from all three defendants.

[16] On November 24, 2022, the plaintiff's CPL was filed against the Parents' condominium on Odlin Road in Richmond.

[17] The pleading supporting the CPL was that:

> 43. Liu used the Amounts Owing to the Plaintiff in whole or in part, for the maintenance and/or improvement of the Odlin Property held by Jie and Shan as registered owners.

> 44. Jie and Shan holds the Odlin Property in trust, or in the alternative, constructive trust for the Plaintiff.
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> 45. In the alternative, the Defendants have been unjustly enriched at Chen's expense, and Chen made absolute assignment to the Plaintiff of all legal choses in action, including but not limited to any trust or constructive trust with respect to the Dong Property and the Cai Property, arising from the Agreement.

The Odlin Road Property

[18] The Odlin Road property is a residential strata property in Richmond. It is a two-bedroom apartment that the Father and Mother purchased in October 2018. They listed it for sale in April 2022 and entered into a purchase and sale agreement, September 29, 2022, with a scheduled completion on November 29, 2022.

[19] On November 28, 2022, in these proceedings, Justice Walker granted the Parents' application to discharge the CPL so that the sale could complete. He ordered that $431,000 of the proceeds for sale be held in trust, subject to further order of the court, or agreement of the parties, regarding the appropriate amount of security in exchange for the discharge.

[20] The reason he postponed deciding the amount of security was the pending decision from Justice Veenstra, in separate proceedings described below, about the amount of security that should be posted in exchange for the discharge of another CPL registered against the Odlin Road property for a similar claim by a plaintiff named Ms. Mo.

[21] The CPL being discharged, the sale completed on November 29, 2022. The $431,000 is held pending this application.

The Parents' Position

[22] The Daughter acknowledges that she is in the currency exchange business which she runs out of an office in Richmond.

[23] The Mother has sworn an affidavit denying her involvement in the Daughter's currency exchange. She describes the Father's main business as a logistics company in China that he has run since 1995.

[24] The Mother says she has never met or communicated with the plaintiff or Mr. Chen, which the plaintiff does not contest. Her affidavit confirms that the Father advises that the same applies to him.

[25] Her affidavit also provides their history with the Odlin Road property, including that it was purchased on October 29, 2018, has never been mortgaged, and was never renovated from 2020 to 2022. They listed it for sale in April 2022 and plan to possibly use the proceeds to purchase a new property in Coquitlam where they intend to live.

[26] The Daughter claims to have had only a minor role in Mr. Chen's transaction. She says that, in January 2020, Ms. Cai told her she had a currency exchange transaction and so the Daughter told her husband, the Son-in-Law, about it. He provided the Daughter with some banking information that she sent to Ms. Cai and that was the extent of her involvement.

[27] The Son-in-Law confirms that Mr. Chen deposited 2.3 million RMB into the designated bank account in China, which he says belonged to his currency supplier. He says his supplier kept Mr. Chen's money and did not provide the Son-in-Law with the matching Canadian funds to pay Mr. Chen. He denies receiving any of Mr. Chen's funds.

[28] It is uncontested that the Son-in-Law paid the plaintiff $24,000 towards the debt.

Related Litigation

[29] There are two other lawsuits that relate to these proceedings and are of relevance to these applications.

Plaintiff against Ms. Dong and Jia Hao Dong

[30] On October 26, 2020, the plaintiff sued the Daughter, the Son-in-Law and Ms. Cai in a separate Vancouver action, No. S2010806. That action is based on the same transaction pleaded in these proceedings. It alleges the same material facts and causes of action except there is no mention of the Parents nor any claim made against them.

[31] On November 18, 2021, the plaintiff obtained default judgement against the Son-in-Law for $431,000.

[32] A notice of trial was filed on August 10, 2022.

[33] As I understand it, the plaintiff has not served the Daughter or taken steps to prosecute the claim.

Judy Mo v. the Defendants

[34] In separate proceedings in New Westminster, filed on August 5, 2022, Ms. Mo claims (round numbers) $80,000 against the three defendants in this action for amounts allegedly advanced to the Daughter in January and February 2022, and a CPL against the Odlin Road Property.

[35] The claim alleges that the Daughter operated her currency exchange consulting business “with the assistance” of her parents. The CPL was registered on the basis that the defendants had fraudulently diverted and misappropriated the plaintiff's funds and used them to maintain, improve and/or finance the Odlin Road property.

[36] On November 10, 2022, in order to proceed with the contract to sell the Odlin Property, the Parents filed a notice of application to discharge the Mo CPL, based on hardship and inconvenience if the sale were lost.

[37] On November 24, 2022, Justice Veenstra ordered the Mo CPL discharged in exchange for the posting of $8,000 security: *Mo v. Liu*, 2022 BCSC 2183.

[38] At paras 15-16, he arrived at $8,000 because the claim for an interest in land was weak, and, on the evidence, this was the total the Parents had spent on the Odlin Road property since Ms. Mo's had paid her money to the Daughter. In other words, it was the most of Ms. Mo's money that could possibly be traced to the Odlin Road property putting Ms. Mo's case at its best (i.e. assuming the Parents were liable to Ms. Mo and her money was used for all payments made for their property since the money was received).

[39] Counsel for the Parents submits that the plaintiff's CPL in these proceedings was modelled on the Mo CPL, and filed just before their sale to create maximum leverage over the Parents.

CPL Discharge Application

[40] The Parents say the plaintiff's security should be limited to $21,500, on the same basis as the approach in *Mo*.

[41] Their evidence is that $21,500 is the total they have expended on the Odlin Road property since Mr. Chen paid his RMB into the bank account provided by their son-in-law.

[42] These expenditures on the property are comprised of monthly strata fees, hydro bills, and property taxes, which they have specified. The property has never been mortgaged and so no such payments have been made. Their evidence is there have been no renovations on the property since 2020.

[43] The plaintiff's position is that the entire $431,000 should remain as security. He argues that the Parents have provided insufficient evidence to establish that his claim against the land is limited to the $21,500, and he has not yet had document production or examination for discovery and so additional information and evidence may appear.

Governing Law

[44] The recent decision of the Court of Appeal in *Save-A-Lot Holdings Corp. v. Christensen*, 2023 BCCA 35, at paras. 47-57, makes clear that, generally speaking, the amount of security for a CPL cancelled under s. 257(1)(a) of the *Land Title Act*, R.S.B.C. 1996, c. 250, is discretionary and may take into account the probability of the plaintiff's success regarding its claims against the land and the possible range of damages to which the plaintiff may be entitled in relation to that claim. There is no hard and fast rule that the amount of security must never exceed a party's asserted interest in the land in issue.

[45] The Court relied on *Wosnack v. Ficych*, 2022 BCCA 139, which held:

> [29] I also agree with the appellant that *Xiao* supports this interpretation. If a CPL must be cancelled under s. 254 where a claim to an interest in land that constitutes only part of an action has been dismissed, the amount of security ordered where a CPL is cancelled under s. 257(1)(a) should be set by considering only that part of an action that claims an interest in land.
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> [30] That said, I would not go so far as to say that the amount of security must never exceed a party's asserted interest in the land in issue. I see this determination as one requiring a proper exercise of discretion. The court must only consider factors that are relevant when setting the amount of security. What is relevant includes the probability of a party's success and the possible range of damages to which the party may be entitled, in relation to the claim involving an interest in land. What is not generally relevant are other claims within an action that do not involve, or are unrelated to, an interest in land. The discretion granted to the court in s. 257 is broad, but it is not unfettered: see *Hansra v. Hansra*, 2017 BCCA 199 at para. 44.
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> [Emphasis in original.]

Analysis

[46] In my view, the plaintiff's claim for an interest in the Odlin Road Property is weak for two reasons.

[47] First, for the reasons described below in the *Mareva* section, at this stage the plaintiff's claim against the Parents is purely speculative on the merits.

[48] Second, even if those claims were made out, the plaintiff has neither pleaded material facts nor provided any evidence supporting a claim for an interest in the Odlin Road Property.

[49] The only basis provided is the bare allegation, without supporting material facts, that; (a) “Liu used the Amounts Owing to the Plaintiff in whole or in part for the maintenance and/or improvement of the Odlin Property held by Jie and Shan as joint owners”; or (b) they were unjustly enriched and so hold the property in trust for the plaintiff.

[50] The defendants have proffered evidence that the total amount they have spent on their property, since Mr. Chen paid his money, is $21,500. Thus, putting the plaintiff’s case at its best on the current evidence, that appears to be the maximum value of his claim as against the property.

[51] If the strength of the plaintiff’s case against the Parents and the Odlin Road Property were stronger, it might be appropriate to require some additional security, pending the plaintiff’s investigations in discovery. But in my view, that is not appropriate in these circumstances.

[52] Also counting against this approach is that the plaintiff has been prosecuting the claim in the other proceeding since late 2020, so has had much time to investigate the facts.

[53] I therefore accept the Parents' position in their notice of application that, in these circumstances, the security posted in exchange for cancellation of a CPL should be limited to $21,500.

***Mareva* injunction application**

[54] The plaintiff claims entitlement to a *Mareva* injunction to secure his entire claim of $431,000 by freezing the proceeds in trust, on the basis of a strong *prima facie* case and evidence of disposition or dissipation of assets.

[55] He claims a strong *prima facie* case based on the affidavits he has obtained from other persons alleging being similarly victimized by the Daughter in currency exchange transactions, in some cases with the Parents' alleged involvement.

[56] Regarding evidence of disposal or dissipation of assets, the plaintiff says that this can be assumed in circumstances of apparent fraud by the Parents.

[57] In addition, he argues that the Parents provided no explanation for their decision to sell Odlin Road, and no corroborating evidence for their claim they intend to use the funds to purchase a new home in Coquitlam or that they require the proceeds to complete that purchase, pay living expenses, or for some other immediate purpose.

[58] The plaintiff says the Parents have significant ties to the People's Republic of China (PRC) and Odlin Road was their only known asset in Canada. He argues that there is no treaty between Canada and the PRC regarding the mutual recognition and enforcement of judgments. The ability of the plaintiff to enforce a British Columbia judgment against the Daughter and the Parents in the PRC is uncertain at best. Even if it is possible for the plaintiff to enforce a British Columbia judgment against the Daughter and the Parents in the PRC, doing so would likely entail another round of difficult and costly litigation in a foreign jurisdiction.

Governing Law

[59] The leading case on the test for a *Mareva* injunction in this Province is *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420. Justice D. Smith, for the court, quoted the caution from Newbury J.A. in *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 59 B.C.L.R. (3d) 196 (C.A.), that:

> [23] … It may be that the cautious approach to *Mareva* injunctions favoured in *Aetna* now requires some refinement almost 15 years later in light of the globalization of business transactions and the speed with which assets may now be moved across borders. As *Mooney v. Orr* indicates, the law is moving incrementally in that direction. …

[60] Justice Smith summarized the test in paras. 14-15 and 18:

> [14] Whether applying the two-part or the three-part test for conventional interlocutory injunctions, the overarching consideration in determining whether to grant a *Mareva* injunction in this province is the balance of justice and convenience between the parties. Since *Aetna,* that element of the test now embraces many additional factors that previously may not have been considered: *Silver Standard* at paras. 19–20. Those factors include the relative strength of the parties' cases, evidence of irreparable harm or a real risk of dissipation of assets, whether the defendant's assets are inside or outside the jurisdiction, the potential effects on third parties, and factors affecting the public interest. As Newbury J.A. observed in *Silver Standard*:
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> > [23] … It may be that the cautious approach to *Mareva* injunctions favoured in *Aetna* now requires some refinement almost 15 years later in light of the globalization of business transactions and the speed with which assets may now be moved across borders. As *Mooney v. Orr* indicates, the law is moving incrementally in that direction.
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> [15] However, she also cautioned that:
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> > [21] … 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.
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> …
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> [18] In sum, British Columbia has forged a flexible approach to applications for *Mareva* injunctions from the more stringent rules-based approach in *Aetna*. Under this approach, "[t]he fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case": *Mooney v. Orr No. 2* at para. 43. The legal test requires an applicant to establish: (1) the threshold issue of a strong *prima facie* or good arguable case; and (2) in balancing the interests of the parties, to consider all the relevant factors, including (i) the existence of exigible assets by the defendant both inside and outside the jurisdiction, and (ii) whether there is evidence of a real risk of disposal or dissipation of those assets that would impede the enforcement of any favourable judgment to the plaintiff.

[61] Justice Smith also referred to the Court of Appeal's decision in *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481, where Saunders J.A. stated:

> [44] … While the term "*Mareva* injunction" is used to denote any order impounding assets or freezing assets before judgment (outside of statutory remedies such as builders liens or garnishing orders), they are not all alike. Awareness of the root issue is helpful in sorting out the exercise of discretion.

> [45] Unlike a *quia timet* injunction, in which the issue is removal of assets from the jurisdiction, an injunction to protect the processes of the court may not involve extraterritorial considerations but may engage issues of dissipation. But at its root, the issue is the risk of harm through either dissipation of assets or removal of them to a place beyond the court's reach.
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> [Emphasis added in *Kepis*.]

[62] In *Tracy*, Saunders J.A. also stated:

> [46] In all cases, great caution is to be shown to avoid the mischief of litigious blackmail or bullying, and due regard must be paid to the basic premise that a claim is not established until the matter is tried. Great unfairness may be occasioned, and the administration of justice brought into disrepute, by an order which impounds assets before the merits of the claim are decided. It is useful to recall the words of Huddart J.A. in *Grenzservice Speditions Ges.m.b.H. et al. v. Jans et al.* (1995), 129 D.L.R. (4th) 733, 15 B.C.L.R. (3d) 370 (S.C.) at 755-756 at p. 23:
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> > [*Mareva* and Anton Pillar orders] represent an extraordinary assumption of power by the judiciary. Judges must be prudent and cautious in their issue.

Analysis

[63] In my view, the plaintiff has not demonstrated anything close to a strong *prima facie* case (also described as a good arguable case) against the Parents.

[64] In this regard it is important to note again that the plaintiff first sued over this transaction in October 2020 and so has had plenty of time to gather evidence and prosecute his case.

[65] Importantly, there is no evidence of the Parents having any involvement in the transaction on which the plaintiff sues, and they deny such involvement. At this stage, the claim against them is just speculation and accusation.

[66] The plaintiff himself cannot provide any evidence of the Parents' involvement. He did not participate in the transaction in question, except to introduce Mr. Chen to Ms. Cai. He has never met or communicated with the Parents.

[67] Further, his own evidence and pleadings cut against his claims of the Parents' involvement.

[68] In his affidavit of November 27, 2022, he says that, in February 2020, he "became aware" that Ms. Cai, in her dealings with Mr. Chen, was the agent of the Daughter. He does not say she was the agent of the Parents.

[69] As mentioned above, in his notice of civil claim in S2010806, filed October 30, 2020, he sued the Daughter, Son-in-Law and Ms. Cai for this same transaction, without alleging any role of the Parents or any connection to the Odlin Road property. In that action, he also filed an affidavit from a creditor of the Son-in-Law, April 15, 2021, who says that Ms. Cai told him she was an agent for the Son-in-Law, not the Parents.

[70] His November 2022 affidavit says he learned of the Parents' role in these types of transactions through a WeChat group in November 2022.

[71] The plaintiff's affidavit sworn to support the CPL in the *Mo* action on November 16, 2022, is problematic to his credibility and his case. First, he provides no basis to suggest that the Parents were involved in the transaction for which he sues except to say, based on no supporting material facts, "I verily believe that Xu Dong Liu's parents were aware of her operations and assisting her." Second, he swears to a different version of events than pleaded in his ANOCC in this case. He does not mention Mr. Chen or Ms. Cai, but says he was the Daughter's customer and it was his $450,000 that was misappropriated (paras. 2-4).

[72] I make no general findings about his credibility in this interlocutory application but just note the difference in the version of events.

[73] The evidence regarding the Parents' potential legal liability in the other transactions is also weak. I will deal only with the two strongest allegations.

[74] First, there is Ms. Elizabeth Gong, who swore an affidavit in these proceedings, December 1, 2022. Ms. Gong alleges that the defendants owe her approximately $2 million. Although she describes most of her dealings as with the Daughter, she says the Mother persuaded her to invest her money and guaranteed her funds would be safe.

[75] The Daughter's affidavit says Ms. Gong was one of her currency suppliers but that they ceased doing business in 2018 because she failed to pay. She denies owing money to Ms. Gong or introducing her to her Mother, or that she ever visited Odlin Road. The Mother also denies ever speaking with Ms. Gong. She says the Father advises her the same is true of him.

[76] A difficulty for Ms. Gong's evidence is that the plaintiff attaches Ms. Gong's WeChat message on November 25, 2022, from a group chat which the plaintiff describes as "victims of the defendants' currency exchange".

[77] In the exchange, Ms. Gong describes her dealings with the defendants in very different terms than in her affidavit. She appears to allege transactions of only $140,000, not $2 million, and does not mention the Mother persuading her to invest or guaranteeing her repayment.

[78] The translation of Ms. Gong's message is:

> Xu Dong Liu instructed my husband to pick up Cash from her mother's place, and her mom gave my husband $60,000 or $80,000 Cash in Canadian dollars. I witnessed both in 2018 and 2019 that Su Dong Liu were accompanied by her parents when doing currency exchange with me. Of course, for currency exchange.

[79] Another difficulty for Ms. Gong is that her affidavit suggests she lived close to the Odlin Road property and so would often walk there to conduct her currency exchanges. She describes this commencing in August and September 2018, when she gave $880,000 to the Daughter and Mother. The defendants did not purchase Odlin Road until October 5, 2019.

[80] The second affiant who alleges the most details about the Parents' involvement is Ms. Mo.

[81] In her affidavit of December 1, 2022, she alleges the Father spoke with her on the phone in January 2022 about organizing a business account for the currency transfers, and that another person on the line, who she believes was the Mother,

said there would be no issue with them transferring the money as their family had a hotel business in China and several properties in Vancouver.

[82] The Mother denies ever speaking with Ms. Mo. She says they never owned a hotel in China. The Daughter denies ever telling Ms. Mo that her parents were involved or including them in a call with her.

[83] The only documentation Ms. Mo provides are WeChat conversations with the Daughter about the details of her transaction, in which the Parents are not involved.

[84] I find that, on the current evidence, the plaintiff does not have anything close to a strong *prima facie* case against the Parents. There is nothing to show their involvement in the transaction in question, and the evidence of their involvement in other similar transactions is vague and problematic.

[85] In my view, a *Mareva* injunction is not just and equitable based on such a weak case on the merits. In my view, it is also important that the plaintiff has been prosecuting the case for well over two years and so has had much time to gather his evidence.

[86] There are additional factors weighing against the plaintiff's *Mareva* application.

[87] In the absence of an evidentiary basis to suggest the Parents' involvement in fraudulent activity, there is no compelling evidence of a risk of dissipation of assets.

[88] The Parents have lived in Canada since 2020. The Father is a permanent resident and the Mother a Canadian citizen. They listed the Odlin Road property for sale in April 2020 before any claims or allegations were made against them regarding their Daughter's business. There is no evidence to suggest their sale was for other than legitimate personal reasons. Their evidence is that they have been looking at two-bedroom apartments in Coquitlam and plan to use the proceeds from Odlin Road to buy a new property.

[89] Finally, although the plaintiff has offered his undertaking for damages, he has provided no evidence of the financial value of that undertaking.

[90] For these reasons the plaintiff's *Mareva* application is dismissed.

Conclusion

[91] The Parents' application is granted for payment out of all of the $431,000 sale proceeds less $21,500 which remains as security for the plaintiff's claim against the Parents.

[92] The plaintiff's application for a *Mareva* injunction over the sale proceeds is dismissed.

[93] Subject to hearing submissions from counsel, I would order costs of the application to the Mother and Father in the cause.

(SUBMISSIONS ON COSTS)

[94] THE COURT: All right. Well, thank you. I am just going to stay with the order that costs of this application are to the Mother and Father in the cause. I do accept Mr. Desruisseaux's submission there was some evidence of the plaintiff's suspicion about the Parents' involvement. I think in my view at least in the end, it did not hang together and did not stand up. But these are very serious allegations and it does seem to me that, in the end, if the plaintiff succeeds against the Parents, he should not have to pay costs of this application. So the costs are to the Parents in the cause.

"Coval J."