IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Banner Carpets Ltd. v. Lai,* 2024 BCSC 105

Date: 20240123
Docket: S249170
Registry: New Westminster

Between:

Banner Carpets Ltd.

Plaintiff

And

Cou Lai and Heidi Marie Lai

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff, Banner Carpets Ltd.:	T. Dusevic
Counsel for the Defendant, Cou Lai:	N. Chantler
Counsel for the Defendant, Heidi Marie Lai:	J. Bienvenu K. Strobel, Articling Student
Place and Dates of Hearing:	New Westminster, B.C. November 30, December 1 and 19, 2023
Place and Date of Judgment:	New Westminster, B.C. January 23, 2024

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I. Introduction

[1] On May 15, 2023, the plaintiff, Banner Carpets Ltd. (“BCL”), appeared before Giaschi J. on an application without notice, seeking a Mareva injunction. BCL had just commenced this action alleging a theft, over many years, of amounts in excess of $1.2 million by its former bookkeeper, the defendant, Cou Lai. BCL also alleged that his wife, the other defendant, Heidi Marie Lai (now known as Heidi Marie Glasgow), was complicit in and benefited from the theft, either knowingly or being wilfully blind as to the source of the stolen funds.

[2] Justice Giaschi granted the order after a 15-minute hearing, originally for a period of just under 30 days. That period has, by subsequent orders of the court, since been extended in order to allow the parties to arrange for an *inter partes* hearing to consider whether, and on what terms, the order should continue in effect going forward. That hearing finally took place before me.

[3] BCL now seeks to vary and extend the order so that, among other things, it will continue in effect until the conclusion of the trial. The defendants, who are now separated and separately represented, oppose any further extension. They say that the test for a Mareva injunction has not been met and that the original order should not have been granted. Further, they say that BCL failed to make full and frank disclosure before Giaschi J. and has since acted in breach of the order. For all those reasons, they say, the order should not be extended again. In the alternative, if there is to be another extension, they seek to relax its terms to allow for them to pay ordinary living expenses and legal fees from the frozen assets, without having to seek permission from BCL at every turn, as BCL proposes.

[4] For the reasons that follow, I have concluded that the order should be extended until the conclusion of the trial, on the terms set out below.

II. Facts

A. Mr. Lai and the Lai Family Circumstances

[5] Mr. Lai has lived in British Columbia since 1980. He has no foreign citizenship and his entire family resides in British Columbia, except for a sister who resides in Alberta. On July 6, 2002, he married Ms. Glasgow. On March 16, 2011, they purchased the home where they reside, located at 7289 196A Street in Langley (the "Langley Property"). The Langley Property is currently valued at $1,546,000, according to the most recent assessment, and subject to a mortgage with a balance of $451,161.27 outstanding.

[6] They have three children, aged 21, 16 and 13, all of whom are adopted. All of them have neurodevelopmental or neurobehavioural disorders. The two youngest reside with the defendants and are home-schooled. The youngest has fetal alcohol spectrum disorder and requires full-time care. Mr. Lai has deposed that the family expenses total nearly $7,500 every month, including $940.81 in prescription medications, two of which are for the treatment of his own depression symptoms.

B. Events Leading to the Claim

[7] BCL is a small, family-run business that imports and distributes floor coverings. It has three principals, Lynn Herberts, its general manager, her husband, Carey Herberts and their daughter, Chelsea Guarascio.

[8] In 2009, BCL hired Mr. Lai as a bookkeeper. His duties while at BCL included managing BCL's computerised accounting system and overseeing and keeping track of its accounts payable and accounts receivable. Although he did not have signing authority himself, he was responsible for preparing company cheques, which he was supposed to present to one of the authorised signatories, usually Ms. Herberts, for signature. He was paid an annual salary that ranged between $46,000 and $57,216.

[9] On March 30, 2023, Ms. Herberts discovered a company cheque that had been negotiated without having been signed by any of BCL's authorised signatories. Her concern led her to log into BCL's accounting program which, until then, she had

left to Mr. Lai to manage. When she did so, she saw that someone had created 366 cheques that were labelled in the system as “cancelled”. When she inquired with the vendor of the accounting program what this meant, she was told that when a new cheque is drawn, it is assigned a number and that if it is subsequently cancelled in the system, it may still be negotiated at the bank and the funds withdrawn from the account, but there would no corresponding record of the debit in the system.

[10] Upon further investigation, Ms. Herberts learned that the corporate accounting records, which were supposed to have been maintained by Mr. Lai, did not include any of BCL’s bank statements or cancelled cheques. Ms. Herberts contacted CIBC, where BCL does its banking, to obtain those records. CIBC was, at the time, able to provide her with account statements dating back to January 14, 2011 and copies of 178 cancelled cheques dating back to early 2016.

[11] When Ms. Herberts examined those records, she observed that some of the cancelled cheques bore a forged signature that purported to be hers. Others bore her real signature, but she believes that Mr. Lai presented those to her for signature on false pretenses. Both Mr. Herberts and Ms. Guarascio, the other authorised signatories of BCL, have deposed that they did not sign any of the cancelled cheques.

[12] One of the cancelled cheques, in the amount of $486.27, was payable to Mr. Lai personally. The rest were payable to either MBNA Mastercard or Capital One Mastercard, with whom BCL had never had dealings. The face amounts of the 178 cancelled cheques in the records that CIBC had produced to that point totalled $1,282,847.02.

[13] BCL also learned in March 2023 that, in addition to the cancelled cheques, Mr. Lai had been directing e-transfer payments owing to BCL from BCL’s customers into a TD Canada Trust bank (“TD”) account held jointly by the defendants (the “TD Account”), rather than BCL’s bank account at CIBC. BCL does not have an account with TD. In her first affidavit made on May 12, 2023, Ms. Guarascio deposed that

she was able to find $63,490.54 in e-transfers that had been misdirected in that manner during the month of March 2023 alone.

[14] On April 3, 2023, BCL terminated Mr. Lai for cause and reported the defalcation to the police. That same day, Mr. Lai was arrested for theft over $5,000 and released on an undertaking to appear. On April 12, 2023, he was told that his first appearance had been cancelled but that the matter remained under investigation.

C. Litigation History

[15] BCL commenced this action on April 17, 2023, naming both Mr. Lai and Ms. Glasgow (then known as Ms. Lai) as defendants. On the same day, it caused a certificate of pending litigation ("CPL") to be filed on title to the Langley Property. On May 10, 2023, BCL filed an application seeking a Mareva injunction against the defendants, without notice to them, relying on the information set out in the preceding paragraphs.

[16] The application came on for hearing before Giaschi J. on May 15, 2023. He granted the order for a 30-day period, freezing the defendants' assets up to a combined value of $1,282,847.02. The defendants were served with the order later that same day.

[17] The order also required Mr. Lai to deliver an affidavit listing his assets. Mr. Lai's affidavit, delivered in compliance with that term, listed the following as his assets:

a) the Langley Property, jointly owned with Ms. Glasgow;

b) $20 in cash on hand;

c) $78,800 in household effects, jointly owned with Ms. Glasgow;

d) a retirement investment account with Questrade, containing $99,691.55;

e) an RESP account with Coast Capital Savings, jointly owned with Ms. Glasgow and held for the benefit of their children, containing $26,243.39;

f) an investment account with CoinBase, containing $78,814.29;

g) the TD Account, jointly held with Ms. Lai, containing $5,332.21;

h) a 2019 Dodge Ram truck, valued at approximately $34,000; and

i) a 2015 Keystone RV Cougar camping trailer, jointly owned with Ms. Glasgow, valued at $20,000 but subject to a lien believed to exceed that amount.

[18] Ms. Glasgow filed a response to the claim on June 6, 2023. In it, she:

a) denied any wrongdoing;

b) denied having any knowledge of Mr. Lai's defalcations;

c) asserted that she contributed to family expenses with her own income; and

d) asserted that she had no reason to believe that family expenses had been paid from a source other than from the defendants' legitimate earnings.

[19] On November 2, 2023, Ms. Glasgow filed a crossclaim against Mr. Lai.

[20] The defendants filed responses to the injunction application on June 7 and 8, 2023, respectively, opposing any further extension of the order of Giaschi J.

[21] In her affidavit made June 5, 2023 in support of her response to the injunction application, Ms. Glasgow deposed that:

a) she had no access to the TD Account, which "was a joint account in name only" and it was "not possible for [her] to have spent any money from [the TD Account]";

b) the defendants kept their finances separate and she maintained her own savings and chequing accounts, from which she paid her share of the family expenses;

c) Mr. Lai paid the fixed family expenses, such as the mortgage payment, property taxes, utilities, insurance and car payments, while she was responsible for more of the day-to-day expenses, such as groceries, clothing for the children and family activities;

d) she contributed to family expenses using, among other things, funds that she had earned through her former employment at the Richmond School District from 2000–2013;

e) although she has been a homemaker since 2013, she has since received supplemental income from the following sources:

   i. running a daycare in the home, earning approximately $2,700 per month;

   ii. $1,000-$3,000 per month in government disability benefits for the children;

   iii. $780 per month in rent paid by extended family members renting the basement suite; and

   iv. $900 per month from international students;

f) on May 18, 2023, she began working at a community centre;

g) the defendants did not lead a lifestyle that was inconsistent with what she understood their means to be, based on their legitimate earnings; and

h) she was unaware that Mr. Lai held accounts with CoinBase or Questrade until she saw his affidavit describing them.

[22] In his affidavit made June 8, 2023, in support of his application response, Mr. Lai deposed that he would not be responding in detail to the substance of the allegations against him in the notice of civil claim, due to the possible criminal jeopardy he was facing, but he generally denied them. He added that he is no longer employed and was looking for work. He deposed that the family expenses were $7,488.38 per month, the equivalent of $89,860.56 annually. He also deposed that he and Ms. Glasgow shared family expenses equally and that his contribution to the family expenses was paid from the TD Account.

[23] On June 12, 2023, the matter came on for hearing before Gibb-Carsley J. There was insufficient time on that day for the matter to be heard in full. Faced with that predicament, the parties agreed to a consent order that maintained the freezing of the defendants' assets until August 29, 2023, but carved out exceptions for certain accounts and to allow the defendants to spend a "reasonable" amount from the frozen accounts on day-to-day living expenses and legal fees, provided notice was given to BCL before any such expenditure was paid. BCL was given liberty to apply to court if a dispute arose about a particular expense.

[24] The order of Gibb-Carsley J. also stipulated that BCL was required to provide the defendants with seven days' notice of its intention to disclose the order to a financial institution. Despite that last term, BCL's counsel delivered a copy of the order to TD without providing the requisite notice to the defendants, in breach of the order. As a result, on June 28, 2023, TD froze the defendants' account. After further discussions, BCL eventually provided its consent for the account to be unfrozen on August 24, 2023.

[25] On July 14, 2023, BCL obtained an order from Master Nielsen to compel production of records from TD, MBNA and Capital One. After learning that Capital One had recently sold its Mastercard business to CIBC, BCL obtained a supplementary order from Master Nielsen on November 24, 2023, directed at CIBC. BCL has been receiving records from those third parties sporadically since then.

[26] On August 29, 2023, the day that the freezing order of Gibb-Carsley J. was due to expire, the matter came on for hearing before Shergill J. Once again, there was insufficient court time available for the matter to be heard in full. In the result, Shergill J. extended the freezing order to December 31, 2023, or such other date as could be agreed upon or ordered by court.

[27] On October 13, 2023, BCL amended its notice of civil claim to add the allegation that Mr. Lai had wrongfully diverted more than $1.1 million in e-transfers and cash deposits belonging to BCL to the TD Account. The total amount claimed was now in excess of $2.4 million.

[28] On November 16, 2023, Ms. Glasgow delivered a list of documents showing that she maintained credit card accounts with Scotiabank Visa, Capital One Mastercard and TD Visa. The listed records showed that funds from the TD Account were used on 171 occasions to pay Ms. Glasgow's various expenses, including:

a) a total of at least $34,310.54 toward Ms. Glasgow's Capital One Master Card account;

b) a total of at least $6,355.48 toward Ms. Glasgow's Scotiabank Visa account;

c) a total of at least $11,885.20 toward Ms. Glasgow's TD Visa account;

d) 99 monthly Scotiabank loan payment since at least 2016 (in the amount of $227.03 since May 24, 2019), totalling $5,900 per year;

e) $1,000 toward Ms. Glasgow's MBNA Mastercard (on August 24, 2020); and

f) $2,100 toward Ms. Glasgow's MBNA Mastercard (on March 25, 2021).

[29] On November 28, 2023, Mr. Lai filed a response to the claim containing a bare denial.

[30] Ms. Glasgow filed another affidavit on November 30, 2023, in which she deposed, among other things, that she:

a) was no longer using her married surname “Lai”, but had reverted to using her original surname “Glasgow”;

b) “had no control or access to the [TD Account]” which “was for all practical purposes [Mr. Lai’s] account”; and

c) “was never informed of any amount which was paid into or out of that account, except a few rare payments into an account or for a card under my control.”

[31] The matter came on for hearing before me on November 30 and December 1, 2023. At the conclusion of the hearing, I reserved judgment and further extended the freezing order of Gibb-Carsley J. until the release of my decision.

[32] While my decision was under reserve, BCL asked to appear before me again for the purpose of seeking leave to adduce additional evidence, in the form of additional records received from TD on December 1, 2023, while the hearing before me was underway but before they could be brought to the attention of BCL’s counsel. Those records included:

a) a cheque for $390 payable to the defendants that was endorsed by both of the defendants and deposited into the TD Account;

b) cheques paid to Ms. Glasgow from the TD Account, including a $10,000 payment in March 2017;

c) 27 cheques drawn on the TD Account and signed by Ms. Glasgow, dating from 2016 to 2022; and

d) e-transfers to Ms. Glasgow from the TD Account.

[33] Following a supplemental hearing before me on December 19, 2023, I agreed to receive that additional evidence, over the objection of Ms. Glasgow that BCL was improperly seeking to split its case. At the same time, I also agreed, without objection from BCL, to receive a further affidavit prepared by Ms. Glasgow in response to that new information.

[34] In her most recent affidavit, Ms. Glasgow has deposed that she has no memory of signing the cheques drawn on the TD Account and bearing her signature but she does not deny that she did so. Nevertheless, she maintains that she had no control over the TD Account. She acknowledges that her earlier sworn statement, to the effect that "it was not possible for me to have spent any money from the [TD Account]" was overstated, and that she should have said that it was not possible for her to have withdrawn any money from it. She believes that Mr. Lai must have prepared the cheques by filling in the names of the payees and then given them to her to fill in the amounts and the dates and present them to the payees.

D. Other Recent Events

[35] The defendants say that they separated on April 20, 2023, as a result of the allegations against Mr. Lai in this litigation.

[36] Mr. Lai has recently found part-time work at a liquor store. He says he is working about 25-30 hours per week, earning $16.75 per hour. He is unable to work longer hours, he says, because of the need for him to care for and home-school the children.

[37] Mr. Lai paid a total of $50,000 in retainers to counsel for the defendants from the Questrade account. The retainers are now exhausted.

III. Legal Framework

A. The Test for Granting a Mareva Injunction

[38] The test to be applied in determining whether to grant a Mareva injunction was conveniently set out by the Court of Appeal in *Kepis & Pobe Financial Group*

Inc. v. Timis Corporation, 2018 BCCA 420. There, D. Smith J.A., writing for the Court, summarised the relevant considerations as follows:

> [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.

[39] The elements of that test were more recently summarised by Kent J. in *Zheng v. Anderson Square Holdings Ltd*., 2022 BCSC 801, as follows:

> [10] The law regarding Mareva Injunctions was recently reviewed by the Court of Appeal in *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 (paras. 3-19). Some of the observations in that case include:
>
> - A Mareva Injunction is an extraordinary remedy that restrains a defendant from removing, dissipating or disposing of its assets before the plaintiff can obtain a prospective judgment;
> - In most cases the court will be reluctant to interfere with the parties' normal business arrangements, or to 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;
> - In British Columbia, the fundamental question to be decided is whether the granting of the Mareva Injunction is just and equitable in all the circumstances of the case;
> - The test first imposes a threshold requirement on the plaintiff to establish a "strong prima facie" or "good arguable" case against the defendant(s);
> - If this threshold test is met, then the plaintiff must also establish that the interests of justice militate in favour of the injunction in the particular circumstances of the case; and,
> - In balancing the interests of justice, the Court will consider all the relevant factors including (1) the relative strength of the claims and defences, (2) the nature of the defendant's assets inside or outside the jurisdiction, (3) evidence of irreparable harm that might be caused to the parties or third persons, (4) whether there is a real risk of disposal or dissipation of assets that would impede the enforcement

> of any favourable judgment to the plaintiff, and (5) any other factors affecting the public interest.

[40] In assessing the balance of convenience, the following factors were identified by Branch J. in *Fernandes v. Legacy Financial Systems, Inc*., 2020 BCSC 885, as potentially relevant:

> [17] Turning to the balance of justice and convenience as between the parties, factors that may be considered include:
>
> a) the residency of the defendant;
> b) enforcement rights of judgment creditors in the jurisdiction where the defendant's assets are located;
> c) the amount of the claim;
> d) the history of the defendant's conduct;
> e) evidence showing the existence of assets within the jurisdiction or outside;
> f) evidence showing a real risk of the disposal or dissipation of assets to render a judgment nugatory;
> g) evidence of irreparable harm;
> h) the strength of the plaintiff's case;
> i) the nature of the transaction giving rise to the action;
> j) the risk inherent in the transaction;
> k) the defendant's assets; and
> l) evidence that the injunction would have a material adverse effect on an innocent third party.
>
> See *567 Hornby Apartments Ltd. v. Le Soleil Hospitality Inc*., 2009 BCSC 711 at para. 16.

B. Full and Frank Disclosure

[41] In *MacLachlan v. Nadeau,* 2017 BCCA 326, Dickson J.A., writing for the Court, had occasion to consider the circumstances in which a failure to disclose material information to the court on an *ex parte* Mareva injunction application may justify setting aside the resulting order at a subsequent hearing. After canvassing a number of authorities addressing that issue, she summarised the relevant principles to be applied in such circumstances as follows at para. 37:

> [37] In my view, the following key principles emerge from the foregoing authorities:

> i. on an application, *inter partes*, for a Mareva injunction following the grant of an *ex parte* injunction, the judge is to proceed with a *de novo* hearing;
>
> ii. on the *de novo* hearing, the whole of the facts, including any incorrect or incomplete facts upon which the *ex parte* injunction was based, are to be taken into account;
>
> iii. if the applicant failed to comply with the duty to make full and frank disclosure on the *ex parte* application, the nature of the failure and the degree and extent of the applicant's culpability are highly material factors for consideration;
>
> iv. the degree and extent of the applicant's culpability may range from innocent non-disclosure to bad faith, which may include deliberate misstatements;
>
> v. where material non-disclosure is established, the applicant should be deprived of any advantage derived by the breach of duty on the *ex parte* application;
>
> vi. in every case, the judge has a discretion in determining, on the whole of the facts, whether, and, if so, on what terms to grant a new Mareva injunction;
>
> vii. the discretion is to be exercised judicially, in accordance with established principles …

[42] It has also been held that applicants seeking relief in those circumstances have a duty to disclose not only the material facts that are within their direct knowledge, but also those "that ought to have been known had proper inquiries been made": *Pierce v. Jivraj*, 2013 BCSC 1850, at para. 37.

[43] Nevertheless, the applicant is not required to achieve a standard of perfection. Not every detail will be equally important. In *Regal Ideas Inc. v. Haus Innovations Inc*., 2018 BCSC 136, for example, Warren J. noted the need for the court to assess the importance of the withheld information in deciding whether the applicant's failure to disclose it justifies setting aside the *ex parte* order, stating as follows at paras. 30–31:

> [30] It is trite and fundamental that an applicant for an *ex parte* order must make full, fair and frank disclosure of all material facts and potential defences, and if the court subsequently concludes that the applicant failed to do so the court may set aside the order without regard to the merits of the application: *Evans v. Umbrella Capital LLC*, 2004 BCCA 149 at paras. 32–34; *Pierce v. Jivraj*, 2013 BCSC 1850 at paras. 36–38.

> [31] However, not every omission necessarily results in an *ex parte* order being set aside. The full, frank and fair disclosure requirement is not a standard of perfection and it is impractical to expect every nuance of the situation to be brought to the attention of the court: *K.P.I.N. v. K.N.N*., 2005 BCSC 1259 at para. 14. The materiality of any alleged non-disclosure must be assessed by considering the importance of the alleged non-disclosure to the issues decided at the *ex parte* hearing: *Pierce* at para. 37.

C. Expenses and Legal Fees

[44] The court has the discretion to exclude assets from the ambit of a Mareva order to allow the defendant to pay ordinary living expenses and legal fees. As noted by G.P. Weatherill J. in *Access Human Resources Inc. v. Earl,* 2018 BCSC 2347, the model order contemplates that such an exception may be made.

[45] Nevertheless, the exception should not be granted automatically, but must be shown to be justified in the circumstances of the particular case before the court. The factors to be considered in exercising that discretion were helpfully set out by Walker J. in *Otal v. Azure Foods Inc*., 2019 BCSC 1510, citing *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*, [2003] O.J. No. 40, as follows at para. 18:

> (i) Has the defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction?
>
> (ii) If so, has the defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the plaintiff, i.e. assets that are subject to a Mareva injunction, but not a proprietary claim?
>
> (iii) The defendant is entitled to the use of non-proprietary assets frozen by the Mareva injunction to pay his reasonable living expenses, debts and legal costs. Those assets must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.
>
> (iv) If the defendant has met the previous three tests and still requires funds for legitimate living expenses and to fund his defence, the court must balance the competing interests of the plaintiff in not permitting the defendant to use the plaintiff's money for his own purposes and of the defendant in ensuring that he has a proper opportunity to present his defence before assets in his name are removed from him without a trial. In weighing the interests of the parties, it is relevant for the court to consider the strength of the plaintiff's case, as well as the

> extent to which the defendant has put forward an arguable case to rebut the plaintiff's claim.
>
> [Emphasis omitted.]

IV. Discussion

A. Was the order of Giaschi J. improperly obtained?

[46] The defendants argue that counsel for BCL did not make full and frank disclosure in obtaining the original order from Giaschi J. on May 15, 2023, and therefore that the current order should not be extended further.

[47] In particular, Mr. Lai complains that the presentation made to Giaschi J. on that date was improper because counsel for BCL:

a) failed to advise Giaschi J. that Mr. Lai had been arrested and remained under investigation by the police; and

b) misstated the law in submitting that a strong *prima facie* case of fraud was sufficient, by itself, to satisfy the requirement to show a real risk of asset dissipation.

[48] Ms. Glasgow repeats those arguments and complains further that the case against her depends solely on her status as Mr. Lai's spouse, which was insufficient to justify Mareva relief as against her. She also complains that BCL's counsel failed to advise Giaschi J. of the following material facts:

a) that BCL's case against her was different from the case against Mr. Lai, and was devoid of merit;

b) that, unlike Mr. Lai, Ms. Glasgow was not employed by BCL and therefore did not owe it any fiduciary duties;

c) that the defendants may have had other, legitimate, sources of income;

d) that there was no evidence of fraud dating back to 2011, when the Langley Property was purchased;

e) that BCL affidavit included hearsay and other inadmissible evidence; and

f) that BCL had already caused a CPL to be placed on title to the Langley Property (a fact which, had Giaschi J. been told about it, would have made it apparent that Mareva relief was superfluous).

[49] Dealing first with Mr. Lai's complaints, I am not persuaded that Mr. Lai's arrest and the possibility of future criminal proceedings were material facts that had to be disclosed to the court. What must be disclosed are only those facts that may affect the outcome: *Northwestpharmacy.com Inc. v. Yates*, 2018 BCSC 41. In no sense did the outcome of the application turn on whether there was a criminal investigation underway or not.

[50] Mr. Lai's second complaint is that counsel for BCL misstated the law as to the legal test for a Mareva order. The impugned remarks were made in response to Giaschi J.'s question as to why he was being asked to order that the defendants produce a list of their assets at that stage of the litigation. BCL's counsel responded to that question as follows:

> The reason for that is that we don't know anything about their assets, and those assets may be dissipated. As you're likely aware, when you apply for a Mareva injunction, you usually have to – the third element of the tests, I have to give you sufficient evidence or a basis that there is a chance that it will be dissipated. The case law that I have and which is attached, and which you may be aware of, provides that if there is fraud, my obligation then is to show you a *prima facie* case of fraud, and then in that case the third element, dissipation of assts, is met by the allegation of fraud which appears to be true. On that basis, we're asking for that affidavit because we don't know what else they have.
>
> I also have a tracing claim in my Notice of Civil Claim. For example, with respect to the house, that house was purchased two years after he started working for [BCL]. So again, we're early into these proceedings, but I am assuming that money from [BCL] was used to probably make the mortgage payments, maybe purchase that house. The same would be with respect to the truck, the fifth wheel, or any other assets. We're concerned because there is an allegation of fraud which we think is *prima facie*, that we need to get that as soon as possible.
>
> [Emphasis added.]

[51] The defendants take particular exception to those underlined words, which they characterise as a misstatement of the law, and which, they say, had the effect of preventing Giaschi J. from considering the application on a proper legal footing.

[52] I accept that most formulations of the test for granting Mareva relief require the court to consider whether the applicant has demonstrated a real risk of asset dissipation as part of the analysis of the balance of convenience. The leading case in this area is *ICBC v. Patko,* 2008 BCCA 65. There, the court upheld the decision of Fisher J., then of this court, refusing to grant Mareva relief on the basis that the applicant had failed to demonstrate a real risk of asset dissipation, despite having made out a strong *prima facie* case of fraud.

[53] In explaining the result, Finch C.J. stated at para. 26 that it was possible to obtain an injunction to secure future payment of a claim in advance of trial without having to show a risk of asset dissipation, but "in most cases" such a risk must be established before such relief can properly be granted. At para 28, Finch C.J. added that if "serious fraud" is alleged, then the risk of asset dissipation may be inferred from the presence of a strong *prima facie* case of fraud. However, that inference is permissive, but not mandatory and will not follow inevitably. The Court of Appeal concluded that Fisher J. had not erred in refusing to draw the inference in that case, for the following reasons:

> [31] Importantly, Madam Justice Fisher was not able to conclude, based on the circumstances of this case, that there was a real risk of dissipation of assets before judgment could be obtained. She held that the fraud alleged to have been committed by J. Patko was different in kind or degree from the frauds allegedly committed in such cases as ***ICBC v. Leland*** (1999), 91 A.C.W.S. (3d) 49, [1999] B.C.J. No. 2073 (QL) (S.C.) and ***Netolitzky*** [*v. Barclay,* 2002 BCSC 1098]. In those cases the trial judge was able to infer that there was a real risk of dissipation of assets. Madam Justice Fisher noted that in ***Leland*** and ***Netolitzky*** the alleged frauds "involved substantial taking of assets from the plaintiffs in a manner where the fraud was concealed and from which a clear inference could be drawn that the defendant would continue to act in the same way" (para. 40). Here, the alleged fraud committed by J. Patko did not involve any complex taking of property from which inferences could be drawn that the fraud would continue. Rather, the alleged fraud "involved lies and misleading statements for the apparent purpose of avoiding criminal prosecution and obtaining insurance for the damage to his vehicle" (para. 42).

[54] This case is not like *Patko*. Rather, it is more like *Leland* and *Netolitzky*, the cases that were distinguished in *Patko*, inasmuch as it involves “a complex taking of property from which inferences could be drawn that the fraud would continue.”

[55] BCL’s counsel submitted to Giaschi J., based on the evidence that was before the court, that a risk of asset dissipation could and should be inferred in this case from the strong *prima facie* case of fraud that had been made out, given the nature of the fraud alleged. That was not a statement of law that was said to apply to all cases, but rather a submission as to how the law, which Giaschi J. can be presumed to know, should be applied in this one. In any event, I am not persuaded that Giaschi J. was led into error insofar as he may have relied on it.

[56] A similar rationale was held to support Mareva relief *in Access Human Resources*, a case like this one involving an alleged defalcation by a former bookkeeper. In refusing to set aside his earlier Mareva order against the bookkeeper (“Carey), her company (“CEBS”) and her husband (“Doug”), G.P. Weatherill stated as follows:

> [30] Fraud is an exception to the general hostility to prejudgment execution (*Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2; *Netolitzky* at para. 27). Access has established a strong *prima facie* case that Carey and CEBS committed theft and fraud and transferred misappropriated money to Doug. The evidence was strong on November 13, 2018, when the *Mareva* order was issued. Since then, Access' further analysis has made the case even stronger. I am satisfied that these defendants appear *prima facie* to have each benefitted from Carey's fraud over a long period of time, in the order of 10 to 13 years.

[57] Mr. Lai now argues that such a risk ought not to be inferred in this case, inasmuch as Mr. Lai no longer works for BCL and therefore is no longer in a position to continue the defalcation alleged. However, Giaschi J. was told that Mr. Lai had recently been let go and was no longer employed by BCL. That was not a fact that was concealed from the court. Despite knowing of that fact, Giaschi J. was apparently still willing to infer that a risk of asset dissipation continued to exist, given the pattern of conduct revealed by the evidence that BCL had gathered to that point.

[58] Turning to Ms. Glasgow's complaints, it is true that BCL's counsel said virtually nothing about the case as against her in his oral submissions on May 15, 2023. He began his oral presentation by stating that his intention was to "go to the Notice of Civil Claim to show the claim against [Ms. Glasgow], how that arises" but then never did. In the notice of application, which Giaschi J. said he had briefly reviewed, BCL asserted only that Ms. Glasgow was married to Mr. Lai and resided with him.

[59] However, it does not follow that there was material non-disclosure in relation to Ms. Glasgow. It was submitted that stolen funds may have been used to purchase the Langley Property, which is jointly owned. There was evidence in the record before the court showing that the defendants had purchased the Langley Property in 2011, two years after Mr. Lai began working for BCL. In effect, Giaschi J. was invited to infer, by virtue of the fact that the defendants were married and resided together and had purchased real property together, coupled with the amount of money that was apparently stolen for their shared benefit, that Ms. Glasgow was likely in knowing receipt of stolen funds, as alleged in the notice of civil claim.

[60] An inference of that kind was found to be sufficient to justify Mareva relief as against the former bookkeeper's spouse ("Doug") in *Access Human Resources*, on the following grounds:

> [29] I am satisfied, as well, that Access has shown a strong case of fraud against Carey and CEBS. Indeed, the evidence appears to be overwhelming. Given the real property in question is owned jointly by Carey and Doug and the evidence of significant misappropriated money deposited to joint accounts of Carey and Doug and Doug directly, there is a strong inference that assets are at risk and will be removed or dissipated.

[61] A similar order was found to be justified, on similar grounds, in *Vidcom Communications Ltd. v. Rattan*, 2022 BCSC 1379, another case involving an alleged defalcation by a former bookkeeper ("Sharina") in which Mareva relief was also granted against her parents and her common-law spouse, for having been in receipt of the stolen funds. In explaining the result, Crerar J. stated as follows:

> [25] With respect to the properties held in the name of her present or former spouse and her parents, there is a good arguable case that: a) Sharina has a full or partial interest in those properties; and/or b) that defalcated funds were used to benefit those properties in a way that would ground the remedy of a constructive trust, or in these circumstances, a freezing order.
>
> [26] A defendant's spouse or relatives may be subject to a Mareva freezing order even if they are not a party to the action itself: *Mercantile Group (Europe) A.G. v. Aiyela*, [1994] 1 All ER 110 (CA). In the present case, all three other persons face direct allegations of wrongdoing in the underlying action as named defendants.

[62] Nor am I persuaded that counsel for BCL improperly failed to refer to the defendants' other potential sources of income. At that stage, BCL had no such knowledge to conceal. Although Ms. Herberts, in her third affidavit made subsequently on June 9, 2023, reproduced exhibits showing that the defendants were soliciting clients for Mr. Lai's independent accounting business in the spring of 2012, BCL had no means of knowing if any additional income had in fact been generated by those means, or if so, in what amount.

[63] Contrary to Ms. Glasgow's submissions, Giaschi J. was not misled into believing that Ms. Galsgow was a fiduciary of BCL or that BCL had uncovered evidence of fraud dating back to 2011. BCL's counsel was clear about the tentative nature of the evidence that BCL had been able to gather to that point and did not overstate what BCL was able to prove at that early stage. Although I accept that a few of the paragraphs in at least one of BCL's affidavits included inadmissible argument, those paragraphs were not referred to at the hearing. There was no reliance placed on inadmissible hearsay.

[64] Ms. Glasgow's allegation that BCL's counsel improperly omitted mention of the fact that a CPL had been placed on title to the Langley Property is likewise simply not correct. The court was indeed told of it. In any event, although it has been held that a CPL may be relevant in determining whether Mareva relief is required (*Access Human Resources,* at para. 38), a similar argument was specifically rejected in *Vidcom*. It was therefore open to Giaschi J. to conclude that the CPL did not adequately secure BCL, for similar reasons. BCL's claim at the time was for

approximately $1.3 million (it has since grown to over $2.4 million). The defendants' equity intertest in the Langley Property was then said to be worth only about $1.1 million.

[65] For all of those reasons, I am not persuaded that the order of Giaschi J. was improperly obtained.

B. Has BCL satisfied the test for a Mareva injunction on this *de novo* hearing?

i. Strong prima facie case

[66] It is not seriously disputed that BCL has made out a strong *prima face* case of fraud against Mr. Lai. Indeed, BCL's case against him is overwhelming and essentially unanswered. The sole issue on this branch of the test is whether BCL has made out a strong *prima facie* case as against Ms. Glasgow. She argues that BCL's case against her rests on nothing more than an improper "assumption of guilt by marriage".

[67] BCL's case against Ms. Glasgow is still, to a large extent, a circumstantial one. The evidence now before the court shows that a large part of the stolen funds was used to pay credit card debt and other family expenses for her benefit, directly or indirectly.

[68] BCL argues that her assertion of ignorance should be rejected on the basis that she perjured herself by falsely deposing that she had no access to the funds in the TD Account, when in fact she clearly did. There is, in any event, no independent evidence to support her assertion that she bore half of the family expenses, particularly the day-to-day expenses such as groceries, clothing for the children and family activities. Rather, those things appear to have been paid for primarily by way of credit card debt funded by the cancelled cheques and the TD Account with money apparently stolen from BCL.

[69] Of the $2.4 million alleged to have been stolen from BCL, $1.3 million appears to have been fraudulently applied, through the cancelled cheques, to pay the defendants' MBNA and Capital One credit card balances.

[70] According to Ms. Guarascio's analysis, while Mr. Lai was earning an annual salary of approximately $50,000 (or approximately $4,200 per month, before taxes, or $3,300 net), the following family expenses were charged on the MBNA credit card:

a) From January to March 2023, $31,965.94 or $10,655.31 per month;

b) In 2022, $103,305.86, an overage of $8,608.82 per month;

c) In 2021, $56,465.59, an overage of $4,705.47 per month;

d) In 2020, $95,180.78, an overage of $7,931.73 per month;

e) In 2019, $87,523.81, an overage of $7,293.65 per month;

f) In 2018, $66,612.47, an overage of $5,551.04 per month;

g) In 2017, $68,433.76, an overage of $5,702.81 per month; and

h) In 2016, $80,177.82, an average of $6,681.49 per month.

[71] In addition, there were other expenses incurred on the family's Capital One credit card (at least some of which may have been family expenses, but those records have not yet been produced to BCL), as follows:

a) In 2019, $7,469.62 in the month of January;

b) In 2018, $48,902.28, an average of $4,075.19 per month;

c) In 2017, $51,787.29, an average of $4,315.61 per month; and

d) In 2016, $56,854.81, an average of $4,737.90 per month.

[72] The other $1.1 million in stolen funds appears to have been fraudulently e-transferred into the TD Account. Most of those funds appear to have been transferred from there into Mr. Lai's Questrade and CoinBase accounts. I reach that conclusion based on the analysis performed by Ms. Guarascio on the TD Account records, which shows that the following amounts, totalling $1,016,300, were transferred to either the Questrade or the CoinBase accounts from the TD Account, in the following years:

2021	$378,000
2022	$493,300
2023	$145,000

[73] However, Ms. Guarascio's analysis also shows the following amounts as having been drawn from the TD Account to pay family expenses, including credit card debt:

a) From January to March 2023, $28,159.91 or $9,386.64 per month;

b) In 2022, $118,125.75, an overage of $9,843.81 per month;

c) In 2021, $163,166.76, an overage of $13,597.23 per month;

d) In 2020, $143,047.15, an overage of $11,920.60 per month;

e) In 2019, $170,427.96 an overage of $14,202.33 per month;

f) In 2018, $95,782.07, an overage of $7,981.84 per month; and

g) In 2017, $91,833.62, an overage of $7,652.80 per month.

[74] I agree with BCL that these numbers strongly support its allegation that the defendants were living well beyond their means for many years, and that this should have been obvious to Ms. Glasgow.

[75] However, there are other factors weighing against such an inference. First, the theft appears to have been carried out in relatively small increments over many years. The fact that it went unnoticed by BCL's principals over the same period lends credence to Ms. Glasgow's assertion that she had no more reason than they did to take notice of it at the time. The defendants do not appear to have led a flagrantly opulent lifestyle. I am not prepared to assume that Ms. Glasgow must have known precisely how much Mr. Lai was supposed to have been earning at BCL, given her assertion that she had no such knowledge. Those considerations serve to bolster her defence that she was unaware of Mr. Lai's defalcations while they were occurring.

[76] I appreciate that her affidavit evidence has proven to be less than entirely reliable, particularly as it relates to the family finances and the degree to which she had access to the funds in the TD Account. However, the evidence adduced by BCL thus far does not rule out the possibility that her transactions in connection with the TD Account were relatively infrequent and always at Mr. Lai's direction, as she asserts.

[77] Overall, I have concluded that BCL has not made out a strong *prima facie* case of fraud, or knowing participation in fraud, as against Ms. Glasgow. Nevertheless, it is clear that she benefitted from Mr. Lai's unlawful conduct and that she will likely be found to be holding a large part of the frozen assets in her name on a constructive trust for the benefit of BCL, to the extent they were acquired, maintained or improved using stolen funds. Such a claim was held to be sufficient to justify a Mareva order against the spouse of the main perpetrator of the alleged fraud in both *Vidcom* and *Access Human Resources*.

[78] Ms. Glasgow relies on *Sase Aggregate Ltd. v. Langdon*, 2023 ONCA 554, for the proposition that such a claim can succeed only if the stolen funds can be traced into the "innocent" spouse's hands, something that BCL has not shown it can do. However, that case did not involve an application for a Mareva injunction, but rather a final order declaring a constructive trust. In dismissing the appeal from the refusal

to grant such an order, van Rensburg J.A., writing for the Court, began by expressing the Court's unease both with the result and the manner in which the applicant had sought that relief, given that the case did not appear to be suitable for summary disposition.

[79] For those reasons, I am satisfied that BCL continues to show a strong *prima facie* case against both defendants, so as to satisfy the first branch of the test.

ii. Balance of Convenience

[80] The defendants argue that the balance of convenience does not favour a further extension of the injunction, for the following reasons:

a) BCL failed to make full and frank disclosure in obtaining the order of Giaschi J.;

b) The evidence does not disclose a real risk of asset dissipation;

c) BCL's claim is adequately secured by the CPL;

d) BCL breached the order of Gibb-Garsley J. by failing to provide the defendants with notice that it was delivering the order to TD; and

e) The order is causing hardship to the defendants.

[81] I have already rejected the first three of those arguments. The last two present more serious impediments to the relief that BCL seeks. In particular, I agree with the defendants that BCL's breach of the order of Gibb-Carsley J. weighs against extending the injunction, at least in the form proposed by BCL. I also accept that the injunction is causing hardship to the defendants, insofar as their current earnings appear to exceed their financial obligations, even if one were to assume that they could be earning more than they currently are.

[82] However, that hardship must be seen in the context of the defendants' having become accustomed over many years to an artificially elevated lifestyle, apparently using money wrongfully taken from BCL. It must also be weighed against the

prejudice to BCL that would flow from allowing the injunction to lapse, given the very strong *prima facie* case that BCL has presented. The defendants do not appear to have sufficient income or assets to repay BCL anything close to what will be owing if its claim succeeds at trial. Any further depletion of their assets will therefore be likely to mean a commensurate reduction in the amount that BCL can expect to recover from them in this action.

[83] Having weighed those considerations, I have concluded that a freezing order of some kind should remain in effect until the conclusion of the trial.

C. What should the terms of the order be?

[84] In the event the injunction is extended until the conclusion of the trial, as I have now found it should be, the parties also disagree on the terms on which the extension should be granted.

[85] BCL seeks to add the following terms to the order:

a) that the $50,000 retainer paid to counsel for the defendants be returned to the Questrade account; and

b) that all further spending from the frozen assets be subject to BCL's prior approval.

[86] The defendants oppose those proposed new terms. Instead, they argue that any further extension should be granted on terms that:

a) conform to the model order by allowing for reasonable payment of expenses and legal fees;

b) prohibit BCL from contacting the defendants' financial institutions; and

c) exempt any accounts opened after June 12, 2023 from the ambit of the order (a term already reflected in BCL's proposed form of order).

[87] I have already observed that BCL is unlikely to recover anything close to the entire $2.4 million or more that appears to have been stolen. The dissipation of the stolen funds has, in large part, already occurred. The only significant assets left available for BCL to attach if it is successful in its claim are the following:

a) The defendants' interest in the Langley Property, valued at approximately $1.1 million; and

b) The Questrade and CoinBase accounts, which are now said contain a total of approximately $75,000, after having been drawn down to pay retainers totalling $50,000 to the defendants' counsel, and presumably other expenses about which I was not told.

[88] Of these, only the Questrade and CoinBase accounts can realistically be made available to fund the defendants' day-to-day expenses and legal fees.

[89] BCL has, to date, not been able to show that the initial down-payment on the Langley Property in 2011 included stolen funds. However, it appears that most of the deposits into the TD Account, from which Mr. Lai later paid the mortgage, property tax and insurance over the years, as well as his deposits into the Questrade and CoinBase accounts, can be traced directly to stolen funds.

[90] This means that a significant, but as yet undetermined, proportion of the frozen assets appears to have been acquired or maintained with stolen funds, justifying the imposition of a constructive trust in favour of BCL to that extent.

[91] I appreciate that some of the value in the frozen assets can presumably be traced to legitimate sources, such as Mr. Lai's salary and Ms. Glasgow's other sources of income. Given the extent to which the stolen funds have otherwise already been dissipated, however, I attach only limited weight to that factor in assessing the relative strength of the parties' competing interests in these remaining assets.

[92] A factor to which I have attached considerable weight, as I have already mentioned, is BCL's breach of the order of Gibb-Carsley J. During the hearing before me, counsel for BCL candidly acknowledged that the responsibility for that breach was his own, rather than his client's. Nevertheless, a Mareva injunction is, as is often said, extraordinary relief. A successful applicant for that relief bears a correspondingly heavy burden to ensure that the terms of the resulting order, particularly those that are intended to protect the interests of the application respondents, are scrupulously adhered to. In this case, that was not done. I am therefore not prepared to leave BCL and its counsel with the authority to decide what sums can be drawn from the frozen assets to pay the defendants' day-to-day expenses and legal fees.

[93] On the other hand, I am not prepared to allow the defendants to decide what they may appropriately draw either. Mr. Lai has already drawn $50,000 from the Questrade account to pay a retainer to their counsel, without approval from BCL. Any further withdrawals must be carefully limited.

[94] Having weighed all of these considerations, I have concluded that the defendants should be permitted, without the need for approval from BCL, to draw amounts totalling up to a further $50,000, or $25,000 each, from the frozen assets to pay their day-to-day expenses and legal fees between now and the conclusions of the trial, in addition to the amounts that they have already drawn. My order will also retain the term that requires BCL to provide the defendants with seven days' notice before sharing the order with any financial institution that has not already received a copy of it. My order may otherwise be finalised for entry in the form that BCL has proposed.

V. Summary and Disposition

[95] The order sought by BCL is granted on the terms proposed by BCL, subject to the qualifications set out in the preceding paragraph.

[96] Although BCL, having been substantially successful, would normally be entitled to its costs, I am not prepared to make that order in these circumstances. Rather, in view of BCL's breach of the order of Gibb-Carsley J., my order will be that the parties are to bear their own costs of the hearings before Shergill J. and me and the associated exchange of materials.

"Milman J."