IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McKay v. Sidhu,*
2024 BCSC 102

Date: 20240123
Docket: S1711458
Registry: Vancouver

Between:

Lisa McKay

Plaintiff
(Defendant by Counterclaim)

And

Geoffrey Rayjay Sidhu, Abtar Shar Sidhu, and Bracetek Industries Group Ltd.

Defendants
(Plaintiffs by Counterclaim)

Before: The Honourable Justice Kent

Reasons for Judgment

Counsel for the Plaintiff:	A.A. MacDonald
Counsel for the Defendant Geoffrey Rayjay Sidhu:	E.G. Wong
No other appearances	
Place and Dates of Hearing:	Vancouver, B.C. January 10-11, 2024
Place and Date of Judgment:	Vancouver, B.C. January 23, 2024

Table of Contents

Introduction and Overview

[1] On October 17, 2023 the plaintiff made an *ex parte* application before this Court for what is commonly known as a *Mareva* injunction restraining the defendants from disposing of, dealing with or diminishing the value of any of their assets until the "final disposition" of the October 17, 2023 application.

[2] The order required the plaintiff to serve both the *Mareva* injunction and her application materials upon the defendant Geoffrey Sidhu and granted the latter the opportunity to contest the injunction application by serving response materials upon the plaintiff and setting the matter down for a further hearing.

[3] The order thus provided a mechanism for a more fulsome hearing on the merits of the plaintiff's application for a *Mareva* injunction.

[4] The defendant Abtar Shar Sidhu is the father of Geoffrey Sidhu and was the principal of the defendant Bracetek Industries Group Ltd. (“Bracetek”). Mr. Sidhu Sr. died in 2021 and it appears Bracetek has gone out of business and has been dissolved.

[5] Mr. Geoffrey Sidhu filed his Application Response on December 18, 2023 along with a comprehensive affidavit sworn by him on the same date. In his Application Response, Mr. Sidhu seeks to set aside the *Mareva* injunction on the basis that,

- the plaintiff failed to disclose material facts at the initial *ex parte* hearing;
- the plaintiff failed to establish a *prima facie* case on admissible evidence; and,
- it is not just and convenient for the injunction to have been granted or to be continued having regard to all the relevant factors.

[6] The matter proceeded to a hearing before me over two days on January 10-11, 2024. Judgment was reserved.

[7] For the reasons that follow I agree it is appropriate for the *Mareva* injunction to be set aside and an order is granted to that effect.

Applicable Legal Principles

[8] In *Zheng v. Anderson Square Holdings Ltd.*, 2022 BCSC 801 I set out certain legal principles respecting *Mareva* injunctions as follows:

> **II. LEGAL PRINCIPLES RE MAREVA INJUNCTIONS**
>
> 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.
>
> 11 An application for a Mareva Injunction is not a trial where the merits of any claim or defence is determined on a full evidentiary platform that includes cross-examination of witnesses. Nevertheless, the onus is on the plaintiff to establish grounds for the relief sought and this in turn requires evidence to be adduced which will inform the court's assessment not only of the likely merits but also all the other factors that may be taken into account in determining the interests of justice. The defendant opposing the application is not required

to adduce evidence but, from a practical perspective, invariably does so in order to support their position.

12 A question arises whether there is a difference between a "good arguable case" and a "strong prima facie case". In his excellent text, "*Mareva and Anton Piller Preservation Orders in Canada*: A Practical Guide" (2017, Irwin Law Inc., Toronto), David Crerar (now Crerar J. of this Court) observes "the difference in words is arguably a difference without practical consequence" because "in either case, it is more than an arguable case but does not reach the 'bound to succeed' threshold" (page 66, citing *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, para 54 [*Tracy*], emphasis added).

13 Another question also arises whether the plaintiff should have to demonstrate a stronger case on the merits where the disposal of the defendant's assets is occurring in the "ordinary course of business". This, of course, is part of the balancing exercise that the court is required to undertake but, in circumstances very similar to the present case, at least one of my colleagues has opined,

> ...All other factors being equal, I think a corporate defendant that exists for the single purpose of selling its property should be able to continue such a process, if it is done in good faith, and should be considered to be proceeding in the ordinary course of business for the purposes of resisting injunctive relief, even if the effect of it is progressively reducing the assets available to satisfy any eventual judgment.
>
> *The Owners, Strata Plan KAS 3267 v. Happy Valley Resort Ltd*., 2015 BCSC 1955, para. 44 [*Happy Valley Resort*].

14 A "Model Order" for a Mareva Injunction has been developed and is posted on the Court's website. The order does not alter the law regarding Mareva Injunctions and it readily acknowledges that its terms may not be appropriate for all types of cases. Nevertheless, while it generally prohibits the disposal of the defendant's assets, one of the stated exceptions provides:

> This Order does not prohibit the defendant from dealing with or disposing of any of its assets in the ordinary and proper course of business.

15 The commentary accompanying the Model Order states:

> If the defendant is a company which conducts a business, the Order should include terms which permit the distribution of assets as a legitimate part of the business's operations.

16 In *Tracy*, the five member panel of the Court of Appeal noted at paragraph 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. ...

> 17 The Model Order also contemplates that the plaintiff applying for a Mareva Injunction must provide an undertaking to, among other things,
>
> > * pay damages to the defendant(s) or any other person sustained by reason of the Mareva Injunction, if so ordered by the court; and
> >
> > * to pay the reasonable costs incurred by anyone other than the defendant(s) in order to comply with the injunction.
>
> 18 The *Crerar* text notes at p.131:
>
> > The applicant for a freezing order must address the issue of the undertaking in damages and his ability to satisfy that undertaking. Except in the most exceptional cases, the applicant must provide evidence indicating his wealth or, at least, indicating that he has sufficient assets to cover the undertaking. ...
>
> Failure to provide clear evidence that the undertaking is supported by real financial resources may be fatal to a *Mareva* application.

[9] Mr. Justice McIntosh of this court also discussed the *Mareva* injunction and the tests for setting aside such an order in *Northwestpharmacy.com Inc. v. Yates,* 2018 BCSC 41 as follows:

> **MAREVA ORDERS GENERALLY, AND THE TESTS FOR SETTING ASIDE A MAREVA ORDER**
>
> 8 Courts in England and Canada invariably express caution, if not reluctance, before granting *Mareva* orders. Such orders are invasive. In practical terms, they amount to pre-judgment execution against defendants who have had no opportunity to be heard. The *ex parte* procedure, which is invariably needed for obtaining a *Mareva* order, also carries with it the risk that the court, in being asked to grant the application, will be misled through a material non-disclosure by the only party who is in the courtroom. It does not matter whether the non-disclosure is intentional (except as an issue going to costs). Negligent non-disclosure carries the same risk that the court will come to an unjust conclusion. It is trite to say that judicial fact-finding depends for its success on hearing from both sides. When that is gone, there is an inherent risk of injustice resulting.
>
> 9 Justice Estey expressed the concerns of the Supreme Court of Canada in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, at paras. 8 and 43 as follows:
>
> > 8.A second and much higher hurdle facing the litigant seeking the exceptional order [for a *Mareva* injunction] is the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial. Execution in this sense includes judicial orders impounding assets or otherwise restricting the rights of the defendant without a trial. This was enunciated by Cotton L.J. in

Lister & Co. v. Stubbs, [1886-90] All E.R. 797, at p. 799, as follows:

> I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant, the defendant has been ordered to give a security till the debt has been established by the judgment or decree.

Similarly, the limited availability of an injunction to enjoin a defendant from disposing of his assets was referred to in *Burdett v. Fader* (1903), 6 O.L.R. 532, (affirmed (1904), [1904] O.J. No. 108, 7 O.L.R. 72), at p. 533, by Boyd C.:

> The plaintiff may or may not get judgment in the case, but he proposes to restrain the sale or disposition of this stock by the defendant till that is finally determined.
>
> There is no authority for such a course in an action of tort. If the plaintiff is a creditor before judgment, he can sue on behalf of himself and all creditors to attack a fraudulent transfer. If the plaintiff is a judgment creditor, he can proceed by execution to secure himself upon the debtor's property. But if the litigation is merely progressing and the status of creditor not established, it is not the course of the Court to interfere quia timet and restrain the defendant from dealing with his property until the rights of the litigants are ascertained.

The principle has been restated in modern times in *Barclay-Johnson v. Yuill*, [1980] 3 All E.R. 190, where Megarry V.C. stated, at p. 193:

> In broad terms, this establishes the general proposition that the court will not grant an injunction to restrain the defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendente lite merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.

> This problem has been stated and restated many times in this country in the courts of Manitoba and elsewhere ... [Authorities cited.]
>
> ...
>
> 43.There is still, as in the days of Lister, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed of or moved out of the country or put beyond the reach of the courts of the country. This sub-rule or exception can lead to serious abuse. A plaintiff with an apparent claim, without ultimate substance, may, by the *Mareva* exception to the Lister rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial. I would, with all respect to those who have held otherwise, conclude that the order should not have been issued under the principles of interlocutory *quia timet* orders in Canadian courts functioning as they do in a federal system.

10 The tests for obtaining a *Mareva* injunction are similar to those for obtaining injunctions generally, with two qualifications.

11 First, the applicant has a higher standard to meet. Instead of needing to show only a case that is not frivolous, or an arguable case, to borrow the language employed in countless injunction decisions, the applicant needs to show what is sometimes called a strong prima facie case. That is more than an arguable case, although it does not mean that the applicant's case is bound to succeed. See *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd*., 2007 BCCA 481, at para. 54. Courts have cautioned that the precise expression of the test may be difficult. However it is expressed, the test is at least somewhat more rigorous than it is for injunctions generally.

12 Second, for obtaining a *Mareva* injunction, the applicant should demonstrate a real risk that assets will be disposed of or dissipated, such that without the injunction, a judgment would be hollow. The second test, risk of disposal or dissipation of assets, is not rigidly applied. Nonetheless, it remains an important criterion for determining whether *Mareva* relief is called for. See *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2887 (C.A.) at paras. 16-23; and *Tracy*, cited earlier, at paras. 45-46.

13 In *Tracy*, Madam Justice Saunders, writing for the Court, also expressed this caution, at para. 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:
>
> > [*Mareva* and Anton Pillar orders] represent an extraordinary assumption of power by the judiciary. Judges must be prudent and cautious in their issue.

14 For the present applications, two by the Defendants, to set aside the existing Mareva order, and the Plaintiff's application for a new Mareva order, the authorities provide the following guidelines.

15 In the set-aside hearing, a court considers whether the ex parte order should be set aside because of material non-disclosure by the ex parte applicant. If not, the court proceeds to a hearing de novo on the merits of the injunction application, where the ex parte applicant must again meet the tests for obtaining the injunction, even though that party is the respondent on the set-aside application. See *Mooney v. Orr*, [1994] B.C.J. No. 2652 (S.C.); and *Global Chinese Press Inc. v. Zhang*, 2015 BCSC 874, at para. 11.

16 A material fact is one that may affect the outcome of the application. See *Pierce v. Jivraj*, 2013 BCSC 1850, at paras. 37-38.

17 The applicant in the ex parte application must be "profoundly fair", must disclose all important aspects of the evidence, and must avoid opinion and invective. See *Pierce v. Jivraj*, cited above, at paras. 22 and 37-38; *and Hollinger Inc. v. Radler,* 2006 BCCA 539 at para. 39.

18 If a court finds material non-disclosure, it may, and likely will, set aside the *Mareva* order. However, material non-disclosure is relevant as well in the second part of the analysis. The court can take non-disclosure on the *ex parte* hearing into account when it is deciding whether to maintain an existing *Mareva* order, or grant a new one. See *Mooney v. Orr*, cited above, at para. 30; and *MacLachlan v. Nadeau*, 2017 BCCA 326, at paras. 28, 32 and 37.

19 The legal analysis, summarized above, is grounded in fairness. The ultimate question is whether it is just or convenient that the injunction be given, or maintained, in accordance with s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. "[J]ust or convenient" is perhaps not highly informative in itself. However, it derives from the fact that injunctive relief is equitable. It will only be granted, or maintained, in accordance with principles of fairness.

The Pleadings

[10] This action was started by way of the Notice of Civil Claim filed December 11, 2017.

[11] The claim relates to two transactions whereby the plaintiff paid $1,750,000 to Bracetek on December 16, 2015 as a subscription for 1,750,000 class “A” voting common shares of the corporation and on January 14, 2016 paid a further $52,500 to Bracetek to become a “value added reseller” of Bracetek’s products.

[12] The plaintiff claims that she was a victim of a fraudulent investment scheme perpetuated by deceitful means upon an unsophisticated and financially/emotionally vulnerable person.

[13] The various causes of action pleaded against Geoffrey Sidhu include:

- “negligent provision of financial advice”;
- negligent misrepresentation;
- breach of fiduciary duty; and,
- deceit (orchestrating a scheme of falsehoods and deception to induce the plaintiff to “invest” in Bracetek's so they might be diverted for Sidhu's personal gain).

[14] As against the defendant Abtar Sidhu, the plaintiff pleads the same cause of action in deceit and also a cause of action for “knowing assistance/knowing receipt” i.e. asserting liability on the basis that Abtar Sidhu and Bracetek knowingly assisted Geoffrey Sidhu in breaching his fiduciary duties as a result of which they “knowingly received” the benefit of the funds provided by the plaintiff through her investment in Bracetek.

[15] In addition to the same causes of action for deceit and knowing assistance/knowing receipt, civil liability is also claimed as against Bracetek pursuant to s. 135 of the *Securities Act,* R.S.B.C. 1996, c. 418 for damages and/or rescission for enabling the purchase of a security without first delivering the prospectus required under s. 83 of that *Act*.

[16] Counsel for the plaintiff, Mr. MacDonald, was the author of the Notice of Civil Claim. He has also acted for Ms. McKay in relation to both the *ex parte* application for the *Mareva* injunction as well as the January 10-11 rehearing of the matter.

[17] The defendants Abtar Sidhu and Bracetek filed a joint Response to Civil Claim on February 14, 2018. The pleading certainly looks like it was drafted by a lawyer but it is signed by Mr. Sidhu Sr. on his own behalf and also on behalf of Bracetek. The address for service for those defendants is stated to be 989A Manhattan Drive, Kelowna, BC. The pleading states that Abtar Sidhu is renting the 989A Manhattan Drive property and also states that Geoffrey Sidhu is the owner of 989 Manhattan Drive but does not reside there.

[18] The Abtar/Bracetek Response to Civil Claim is 19 pages long but essentially pleads:

- Geoffrey Sidhu was not and has never been a director, officer or shareholder of Bracetek and has never been its authorized representative or in any way involved in the management or operations of Bracetek. These roles have been performed by Abtar alone;

- Bracetek is in the business of selling structural bracing products for the construction industry either directly or through “Value Added Resellers” (“VAR”);

- the structural bracing products sold by Bracetek are based on intellectual property rights, including registered patent rights, owned by companies controlled by Geoffrey Sidhu and which are licensed to Bracetek by way of formal written licensing agreements; Abtar has never been a director or officer shareholder or authorized representative of any of these licensors;

- Abtar met the plaintiff following a request by her to Geoffrey for such a meeting. At this first meeting on December 13, 2015, Abtar gave the plaintiff Bracetek a “standard form Subscription Agreement”;

- Abtar met with the plaintiff on December 16, 2015 to discuss her proposed investment in Bracetek and to review her status as an “accredited investor” for the purposes of securities legislation compliance. At that meeting the plaintiff presented to Abtar an already executed copy of the Subscription Agreement including an appended Accredited Investor Certificate and Risk Acknowledgement Document. She also presented a bank draft payable to Bracetek in the amount of $1,750,000 which, following the meeting, was deposited into Bracetek's bank account in White Rock BC and has since “being used by Bracetek for its own general corporate purposes;

- in January 2016, the plaintiff contacted Abtar to become a Value Added Reseller for Bracetek and signed a formal VAR Agreement dated January 14, 2016 and paid a “non-refundable documentation fee of $50,000” plus applicable taxes;

- on January 26, 2016, the plaintiff informed Abtar she had been instructed by her father to get her money back and thereafter had her lawyer deliver a demand letter dated February 18, 2016 for the return of the $1,750,000 “investment in Bracetek”.

[19] In essence, the pleading denies any deceit respecting the subscription transaction and paints the plaintiff as a sophisticated and knowledgeable individual who pursued an investment opportunity knowing full well all of the risks involved.

[20] Geoffrey Sidhu signed and filed a separate Response to Civil Claim on April 17, 2018. His address for service is also stated to be 989A Manhattan Drive in Kelowna. His pleading is much shorter, only six pages long, although some of his allegations of “Ms. McKay's Representations” (a defined term) use identical syntax to similar allegations in his father's pleading. He too paints the plaintiff as an individual who assured him and his father that she was “accredited investor” with experience in various business ventures including start-up businesses, and that she was the person who pressed to invest in Bracetek and provided to his father an “already completed Subscription Agreement” on December 16, 2015.

[21] Geoffrey Sidhu pleads that he “did not assist [the plaintiff] in completing the [the subscription agreements] in any way” although he “did tell [the plaintiff] that [his father] would want to see her initial the clause on the Subscription Agreement to acknowledge the disclosure of the ownership of the Patent Filings”.

[22] Like his father and Bracetek, Geoffrey Sidhu also alleges in the alternative contributory fault on the part of the plaintiff and a failure to mitigate.

The *Ex Parte* Application for the *Mareva* Injunction

[23] As noted earlier, the plaintiff's *ex parte* application for the *Mareva* injunction was filed on October 17, 2023 and was heard/granted the following day. The motion was supported by the pleadings in the action and two affidavits sworn by Mr. McDonald's paralegal, Vilma Castillo, on September 28, 2023 and October 11, 2023 respectively.

[24] Both affidavits are voluminous. Neither attests to any specific facts but instead they mostly just athenticate numerous exhibits (38 exhibits to the September 28, 2023 affidavit and 10 exhibits to the October 11, 2023 affidavit).

[25] It turns out that Ms. McKay filed a complaint with the British Columbia Securities Commission on February 11, 2016 which triggered a lengthy investigation ultimately culminating in a Notice of Hearing being issued against Geoffrey Sidhu and Bracetek on May 26, 2021 (Mr. Sidhu Sr. had died in March 2021).

[26] In the course of its investigation, the British Columbia Securities Commission

- in February 2019 took possession of the plaintiff's iPhone, computer and other devices for the purpose of conducting a forensic search of electronic documents; and

- on June 16, 2019, filed a certificate of pending litigation against the 989 Manhattan Drive, Kelowna property owned by Geoffrey Sidhu pursuant to s. 151(5) of the *Securities Act*.

[27] The exhibits to the Castillo affidavits included various documents related to the Security Commission proceedings including,

- a Notice of Hearing issued May 26, 2021;
- a September 12, 2022 Settlement Agreement made between Geoffrey Sidhu and the Securities Commission;
- a September 12, 2022 Order issued by the Securities Commission against Geoffrey Sidhu (imposing various prohibitions and also requiring him to pay $900,000 within six months);
- a September 12, 2022 Notice of Discontinuance discontinuing the proceedings against Geoffrey Sidhu;
- a September 27, 2022 Amended Notice of Hearing issued to Bracetek;
- a lengthy affidavit sworn by Ms. McKay on October 14, 2022 describing in detail her dealings with the Sidhus and explaining how she came to mortgage her home in order to invest in Bracetek at the urgings and persuasion of the Sidhus, all of which resulted in not only a loss of the money put into Bracetek but also the sale of her home in order to pay off the mortgage;
- the March 8 “Findings and Decision” issued by the Securities Commission against Bracetek (2023 BCSECCOM 118); and,
- a July 14, 2023 Ruling from the Securities Commission acknowledging receipt of a $900,000 payment from Geoffrey Sidhu and approving a certain “claims process” (pursuant to which the plaintiff applied for and ultimately received approximately $930,000 inclusive of interest).

[28] What is apparent from all of the above is that the plaintiff deliberately decided to delay both the institution and prosecution of her lawsuit against the defendants pending the outcome of the Security Commission proceedings. The lawsuit was filed on the eve of any possible two year limitation period expiry and although some

document discovery did occur in 2018, no action was thereafter taken to set the matter down for trial (and indeed, that step has still not been taken).

[29] The settlement payment by Geoffrey Sidhu resulted in the Securities Commission removing its charge from the title to his property in Kelowna.

[30] On June 29, 2023 Mr. McDonald delivered a Notice of Intention to Proceed in this action. Immediately following the July 14, 2023 Ruling of the Security Commission, on July 17, 2023 the plaintiff applied to the Commission for the return of the $900,000 she had invested in Bracetek.

[31] The plaintiffs *ex parte* Notice of Application was filed October 17, 2023. It contains 13 pages of background facts and relies very heavily on the Security Commission documents, particularly the Geoffrey Sidhu Settlement Agreement, the October 14, 2022 affidavit sworn by Ms. McKay, and the March 8, 2023 “Findings and Decision” by the Commission arising from the amended hearing proceedings against Bracetek.

[32] In the *ex parte* Notice of Application, counsel cited case law supporting the proposition that prior civil or criminal decisions on the merits, including administrative or disciplinary proceedings, can be admissible as evidence in subsequent proceedings (depending upon the purpose for which such prior decision is put forward and the use sought to be made of its findings and conclusions) and that the weight and significance to be given to such prior decisions will depend upon the circumstances of each case: *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 and *MacRury v. Keybase Financial Group Inc.*, 2017 NSCA 8.

[33] The *MacRury* case involved a summary judgment application in a professional negligence/breach of fiduciary duty case against an investment advisor where, much like this case, the evidence tendered on behalf of the plaintiff essentially comprised the professional discipline proceedings against the defendant including a settlement agreement and admissions of fact made by the defendant. Citing *Malik* the Nova Scotia Court of Appeal confirmed that the motions judge did

not err in finding this evidence to be admissible and concluding that the use to be made of the settlement agreement would depend on the circumstances. The Court of Appeal also noted that this was a "a very unusual summary judgment case" inasmuch as the plaintiff "chose not to file any affidavit evidence" on the summary judgment motion presumably to avoid cross-examination. Perhaps not surprisingly, the summary judgment application was dismissed and the action was sent to a full trial.

Mr. Sidhu's Application Response and Affidavit

[34] Paragraph 37 of the Application Response summarizes Mr. Sidhu's position as follows:

> 37. Although the present submission is framed as a response to the Plaintiff's original application (pursuant to the Order, which states that the application has not yet been finally disposed of), the Court should apply the same test as it would on an application to set aside a *Mareva* injunction. Sidhu submits that the Order should be set aside on the basis that:
>
> > a. The plaintiff failed to disclose material facts at the *ex parte* hearing; and
> >
> > b. In any event, and *Mareva* injunction is not warranted because the Plaintiff has failed to establish a *prima facie* case on admissible evidence and granting the injunction would not be just and convenient having regard to all of the relevant factors.
>
> (emphasis in original)

[35] With regard to material non-disclosure to the Court at first instance, the Response to Application lists 13 specific instances and then concludes as follows:

> 43. To sum up, counsel presented an unbalanced and inaccurate view of the facts, characterizing his client is a vulnerable, unexperienced (sic) investor and Sidhu as a predator acting in cahoots with his father. He put McKay's case in the best possible light, and attributed devious motives to events that were capable of innocent explanation. He failed to inform the Court of several material facts supporting Sidhu's case. On this basis alone, the Order should be set aside.

[36] Among other things, counsel complains that:

- the representation to the Court that Ms. McKay had “very little experience making investments” was inaccurate as she had in fact been involved in other “substantial investments”;

- it was inaccurate and untrue for counsel to have represented at the hearing that Ms. McKay did not have any income to service the interest payments on the mortgage loan taken out to make the investment… in fact the amount borrowed by Ms. McKay included an extra $275,000 which was intended to be used to make interest payments on the loan for one to two years while the Bracetek opportunity matured;

- it was incorrect to say that both Sidhu's dissipated funds from Bracetek… Geoffrey Sidhu was not directly involved as an employee, director, officer or shareholder Bracetek and had nothing to do with any alleged “dissipation”… he acknowledges that his companies receive $900,000 from Bracetek however these amounts were validly paid to legitimate license agreements made between those companies and Bracetek long before Ms. McKay entered the picture, and in any event these license fees have already been re-paid as a result of the Settlement Agreement;

- counsel’s representation to the Court that no notice of the *ex parte* application was provided to Mr. Sidhu because there was a real risk of dissipation now that the Security Commission's charge against the Kelowna property has been removed was a gross overstatement… Mr. Sidhu has owned the property since 1999 and has taken no steps to sell or encumber that property in all the years between the Ms. McKay's complaint to the Security Commission are (February 2016) and the registration of the Commission's charge (2019) nor since that charge was lifted in March 2023;

- counsel’s representation at the hearing that Mr. Sidhu was “an admitted rogue” who had “perpetuated a fraud” is an inaccurate characterization given that the fraud allegation was dropped by the Commission, Mr. Sidhu has made no admission of fraud (indeed he denies it), there is simply no evidence

that he had any involvement in the VAR agreement which was negotiated directly between Ms. McKay and Mr. Sidhu's father, and he had in any event paid the $950,000 the commission required of him… Mr. Sidhu has "admitted to nothing more than participation in Bracetek's illegal distribution under section 61 of the *Securities Act"*; and,

- counsel misrepresented the Agreed to Statement of Facts in the Settlement Agreement when he stated that Geoffrey Sidhu "took Ms. McKay through" the subscription agreement and the accredited investor schedule and that "he showed her how to do it"… the Agreed Statement of Facts merely states that "Sidhu discussed the Bracetek investment with the investor before she invested and assisted her in completing the subscription agreement".

[37] Insofar as the hearing was "continued" as a contested matter following notice to and evidence/submissions from Mr. Sidhu, the Application Response raised several substantive legal objections to the granting/continuation of the *Mareva* injunction:

- the *Malik* case is distinguishable, the Security Commission decision resulted from an unopposed hearing against only Bracetek and not Mr. Sidhu, hence the tribunal's findings are not binding against Mr. Sidhu and are not admissible against him in this injunction hearing;

- furthermore, the McKay affidavit was only attached as an exhibit to a paralegal's affidavit and was not sworn in connection with this proceeding… it is thus inadmissible hearsay and cannot be received for the truth of its contents, particularly where, as here, no explanation is made for Ms. McKay failing to file an affidavit in support of this application;

- given that both the commissions Decision and the McKay affidavit are inadmissible, Ms. McKay has failed to demonstrate a strong *prima facie* case in her favour and the threshold test for a *Mareva* injunction has not been met;

- the affidavit sworn by Mr. Sidhu “successfully challenges” Ms. McKay's case. While “there is a great deal of conflicting evidence and many issues that must be determined at trial, there is evidence that, if accepted, would be capable of contradicting Ms. McKay's allegations of deceit, negligence, breach of fiduciary duty and knowing assistance/receipt”. This too means that no strong *prima facie* case has been made out;

- in any event, a *Mareva* injunction is not just and convenient because 1. There is no evidence establishing any risk of dissipation or removal of assets by Mr. Sidhu, 2. there is no evidence to support the $2.8 million value of the restrained assets (particularly since she has now received $930,000 from the Securities Commission), 3. Mr. Sidhu has strong ties to British Columbia where he has lived his entire life, he has owned the Kelowna house since 1999 and made no effort whatsoever to sell or encumber that property and 4. Ms. McKay has delayed many years in seeking this *Mareva* order which combines with the weak evidence on other factors and the material non-disclosures to weigh in favour of setting aside the *Mareva* injunction.

[38] Mr. Sidhu's affidavit comprises 89 paragraphs over 24 pages and has 37 exhibits attached comprising a further approximately 280 pages of material. I do not intend to review it in detail here but I wish to assure the parties that I have read every single word.

[39] Mr. Sidhu sets out a detailed history of his various business ventures including, in particular, the incorporation of various companies, some of whom are the owners of various US patents related to bracing or reinforcing spaced apart joists or other structural wooden members. He explains how Bracetek was incorporated by his father in February 2015 to market a “whole house solution” for bracing floors, walls and roofs which would incorporate the patented technology owned by Geoffrey Sidhu's company and in respect of which formal License Agreements were executed between the parties. These License Agreements granted exclusivity to Bracetek in exchange for certain specified annual license fees (totaling $300,000 per annum)

plus royalties. All of this is portrayed as a *bona fide* business venture on Bracetek's part in respect of which his father intended to "raise equity capital from investors who met prospectus exemption eligibility criteria as "accredited investors"".

[40] Mr. Sidhu describes how he met Ms. McKay online in November 2015 and in person for the first time on November 19, 2015. He recounts his version of her disclosures respecting her financial situation, how she asked for help in obtaining a mortgage and suggesting a good investment opportunity, and the like. He, in turn, told her about his business, his patents and the website he used for marketing those patents and he purports to describe in detail how Ms. McKay pressed to become involved with the patents and the marketing of the technology via Bracetek:

> 42. McKay and I met for tea again on December 15, 2015. I told her that my father was comfortable with her buying my roof truss patent. She surprised me by saying that my father had dropped off a Subscription Agreement at her home and that she was actually interested in investing in Bracetek as well. She told me she had a friend who was advising her on this investment. She did not tell me the friend's name.
>
> 43. On December 16, 2015, McKay met first with me, and then with both me and my father. When she arrived at our one-on-one meeting, she presented an executed copy of the Subscription Agreement, including the Accredited Investor Certificate and Risk Acknowledgement for Individual Accredited Investors. I was surprised because I still believed that McKay was interested in buying my patent. She told me she felt an operating company with three patents had more "upside" than getting a licensing fee from a single patent purchase.
>
> 44. I did not assist McKay in filling out the Subscription Agreement or other documents. I have never completed a subscription agreement and did not know how they are supposed to be filled out. I did ask her to acknowledge that my companies would be receiving licensing fees from her investment. I remember her saying that I "deserved it" before she initialed beside the paragraph referencing the license agreements…
>
> 45. McKay then asked me to drive her to the bank as parking is difficult in the Kerrsidale area.

[41] Mr. Sidhu's affidavit then goes on to describe the ending of his "friendship" with Ms. McKay, her "sudden change of heart about her investment in Bracetek" and the resulting complaint to the British Columbia Securities Commission, the proceedings taken by the Securities Commission including the Settlement Agreement which contained an Agreed Statement of Facts (the terms of which are

recited in his affidavit and copies of which are attached as exhibits), and how he ultimately came to pay “the full $950,000 settlement amount to the Commission on March 3, 2023” by borrowing $750,000 from his mother and using “some of my own savings”.

[42] In his affidavit, Mr. Sidhu points out that in the seven months between the lifting of the Commission charge on the Kelowna house on March 17, 2023 and the service of the *Mareva* Order on October 20, 2023, he “made no efforts to sell or to encumber” the property. He does not, however, say anything about his future intentions regarding that property nor does he in any way address how the continuation of the *Mareva* injunction would cause him harm or otherwise damage his financial interests, irreparably or otherwise.

Analysis

[43] I do not accept Mr. Sidhu's submission that there was material nondisclosure at the *ex parte* hearing, let alone any non-disclosure so egregious as to warrant striking the *Mareva* injunction without more.

[44] I suppose counsel may have gone a little overboard in describing Mr. Sidhu as an “admitted rogue” who had “perpetrated a fraud” but that is certainly one possible description of the situation should Ms. McKay's claim in deceit succeed. So too with counsel's suggestion that the “father and son team basically had things set up so that money could disappear quickly”.

[45] More to the point, however, the Court was given a copy of the Settlement Agreement at the outset of the *ex parte* hearing and studied it very closely. It was aware that Mr. Sidhu was only “convicted” of “illegally distributing securities” to Ms. McKay without a prospectus first being filed by Bracetek and when Ms. McKay was not an “accredited investor”. The Court was aware that the allegations of fraud were not pursued against Mr. Sidhu or, for that matter, against Bracetek itself.

[46] I certainly agree there is a high onus and, indeed, a professional obligation, on the part of counsel to be scrupulously even-handed in prosecuting an *ex parte*

application, particularly so when seeking an extraordinary remedy such as a *Mareva* injunction without notice first being given to the defendant. However, a material fact for these purposes is one that might affect the outcome of the application and a material non-disclosure is one which causes the court to grant an order that it would not otherwise have granted: *Kilman v. Kinrade,* 2022 BCSC 1193 at para. 23. No such non-disclosure occurred here.

[47] At the time of the *ex parte* hearing, the court expressed grave concern to counsel about the propriety of proceeding without notice, particularly when the other side was represented by counsel. It was for this reason that the injunction was granted on a time-limited basis so that notice might be given to the other side and a hearing might occur involving all parties and a more fulsome evidentiary platform. That is precisely what has happened here and I prefer to deal with the matter “on the merits” rather than on the basics of material non-disclosure at the outset.

[48] I also do not accept Mr. Sidhu submissions that both the McKay affidavit sworn in the commission proceeding and the Commission’s “Bracetek Decision” were and are not admissible as part of the injunction application. I agree that it would have been preferable for Ms. McKay to have sworn an affidavit in this proceeding either repeating the contents of the affidavit she swore in the Commission proceeding or attaching the same as an exhibit while re-affirming its contents. This, however, is a merely technical shortcoming in the circumstances of this case and one that ought not control the outcome of the matter.

[49] So too with respect to the Commission's final decision against Bracetek which was of course a matter of public record and published as such on the Commission's website. Whether the findings in that decision are, as a matter of law, binding against Mr. Sidhu who did not participate in the hearing is an interesting legal question but in his Application Response Mr. Sidhu “does not quarrel with [the] basic proposition” that the Settlement Agreement made with the Commission may be admissible in these proceedings, albeit subject to various factors governing its use and weight.

[50] It is in any event fatal to Mr. Sidhu's admissibility complaint that he himself attached a copy of both the Settlement Agreement (2022 BCSECCOM 359) and the commission decision (2023 BCSECCOM 118) as an exhibit to his own affidavit.

[51] Furthermore, as a matter of law, Mr. Sidhu is confronting the prospect of joint liability with Bracetek for the tort of deceit (civil fraud) as alleged in the plaintiff's Notice of Civil Claim. The findings of the Securities Commission related to Bracetek's misconduct may possibly be affixed to Mr. Sidhu as a consequence of any such joint liability should Ms. McKay's claim ultimately succeed.

[52] Counsel for Ms. McKay argues that both the Settlement Agreement and the Bracetek Decision essentially and definitively establish that $1.75 million of Ms. McKay's money was obtained illegally in contravention of the *Securities Act*. He argues that the doctrine of abuse of process prevents Mr. Sidhu from disputing the Agreed Statement of Facts contained in the Settlement Agreement and, in particular, the fact that no prospectus requirement exemption applied to Ms. McKay and that Mr. Sidhu had “acted in furtherance of Bracetek trade to [Ms. McKay] and therefore he illegally distributed securities to [Ms. McKay] contrary to section 61 of the Act”.

[53] Counsel for Ms. McKay also says it would be an abuse of process for the court to allow Mr. Sidhu to dispute his admission that he “discussed at the Bracetek investment with [Ms. McKay] before she invested and assisted her in completing the subscription agreement”. Whether the doctrine of abuse of process applies in this regard will be a matter for the trial judge to determine in due course.

[54] The mere fact that Mr. Sidhu has sworn an affidavit in which he attempts to paint Ms. McKay as a sophisticated investor who willingly pressed to invest in the Bracetek business does not of course mean that such was the case. This too is a matter that the trial judge will ultimately decide after both witnesses have testified in person and in their own voice (i.e. not that carefully crafted by counsel in the form of an affidavit). Suffice it to say for the present that the material before me on this application is more than sufficient to establish a strong *prima facie* case against Mr. Sidhu and this threshold criterion for a *Mareva* injunction is clearly established.

[55] Having met the threshold test of a strong *prima facie* case, it is incumbent upon Ms. McKay to establish that the interests of justice militate in favour of the *Mareva* injunction in the particular circumstances of this case. As noted above, in balancing the interests of justice the Court considers a variety of factors which include the nature of the defendant's assets inside in or outside the jurisdiction, whether there is a real risk of disposal or dissipation of those assets, and whether there is evidence of any irreparable harm that might be caused to the parties or third persons.

[56] It is on these questions that Mr. Sidhu’s submissions gain traction with the Court.

[57] First, I note Ms. McKay's deliberate and strategic decision to delay prosecution of this lawsuit while the Commission investigation and related proceedings were underway. She claimed a *Mareva* injunction in her Notice of Civil Claim but took no steps to secure one. The Security Commission did not file a certificate of pending litigation against Mr. Sidhu's Kelowna property until June 2019, more than three years after Ms. McKay filed her initial complaint and one and a half years after she initiated her lawsuit. She has tendered no evidence explaining that delay.

[58] Mr. Sidhu has only admitted to breaching the *Securities Act* by “furthering” Ms. McKay's subscription for shares in Bracetek without a prospectus and without her qualifying for any prospectus exemption as an “accredited investor”. The “charges” of fraud in relation to those events were dropped by the Commission and have been neither established by any Commission decision nor admitted by Mr. Sidhu in his Settlement Agreement. Mr. Sidhu has disgorged the $900,000 his company ultimately received from the funds Ms. McKay invested in Bracetek and she has thus been made whole for at least that part of her loss.

[59] The alleged causes of action for “negligent investment advice” and for negligent misrepresentation are subject to defences based on contributory fault i.e. any damages recovered should liability be established may be subject to deduction

in proportion to the degree of blameworthiness that the Court may ascribe to Ms. McKay herself. Such a finding also has implications for any allegation of joint liability and, as a matter of law, might result in several rather than joint liability on the part of contributory tortfeasors. This, along with the $930,000 payment already made by Mr. Sidhu to the commission and distributed to Ms. McKay may reduce and even possibly eliminate any further liability on his part, depending on the court's findings respecting the claims in tort.

[60] Furthermore, there is no evidence tendered by Ms. McKay which establishes any real risk that Mr. Sidhu will dispose of his Kelowna home or otherwise dissipate any other assets he may have.

[61] Ms. McKay asks me to draw an inference from the fact that the $1,750,000 she paid for the Bracetek shares was almost entirely and immediately distributed out of the company including, of course, the $900,000 paid as license fees to Mr. Sidhu's companies. But there are other facts which do not support any such inference, namely the fact that at no time during this saga has Mr. Sidhu made any efforts to sell or to other otherwise shield from creditors his Kelowna property, apparently the only home that he owns.

[62] This is a difficult decision and one that is a close call. I am mindful that there is a profound unfairness in an extraordinary pre-judgment remedy which ties up indefinitely the assets of a defendant pending trial, and particularly so where the plaintiff has still not set the matter down for trial some nine years after the date of her loss and over six years since she started her lawsuit. Her recent recovery of $930,000 from the Securities Commission does not fully compensate her losses should she eventually succeed in her claim for the tort of deceit but, in a sense, it has levelled the playing field between these litigants to some degree.

[63] At the end of the day, I conclude that the interests of justice are best served in this case by setting aside the *Mareva* injunction and allowing the litigation to take its course in the usual manner.

Summary and Conclusion

[64] For the reasons stated above the interim *Mareva* injunction issued October 18, 2023 is set aside. In the circumstances, however, costs of both the *ex parte* hearing and the continued hearing which occurred before me on January 10- 11, 2024 will be in the cause.

"Kent J."