IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian Western Bank v. John Doe*, 2024 BCSC 555

Date: 20240408
Docket: S240725
Registry: Vancouver

Between:

Canadian Western Bank

Plaintiff

And

John Doe and XYZ Corporation

Defendants

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for the Plaintiff, Canadian Western Bank:	A.C. Luchenko M.A. Turcott J.R. Green
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Place and Date of Hearing:	Vancouver, B.C. March 8, 2024
Place and Date of Judgment:	Vancouver, B.C. April 8, 2024

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Introduction

[1] On this application, CLTS Technologies Ltd. dba Aquanow ("Aquanow" or "CLTS") seeks to set aside the *ex parte* property preservation order (the "*Ex Parte* Order") that I granted on February 9, 2024, in favour of the plaintiff, Canadian Western Bank ("CWB").

[2] At issue is whether CWB made full and fair disclosure to this Court when it sought, and was granted, the *Ex Parte* Order, and, if not, whether this Court ought to exercise its discretion to grant a new preservation order.

[3] This application was heard on March 8, 2024. On March 11, 2024, I issued a memorandum to counsel advising that the *Ex Parte* Order would not be maintained, and that my reasons would follow. These are my reasons.

Background

[4] As part of its operations, CWB holds a bank account used by its finance department for its accounts payable (the "CWB Account"). Access to the CWB Account is carried out through an electronic platform and requires unique credentials including a user ID and password.

[5] It appears clear on the evidence that an individual unlawfully gained access to the credentials for the CWB Account and transferred $14.2 million CAD (the "CWB Funds") from the CWB Account into an account at National Bank. The alleged fraudster suspected of carrying out the transfer was a client of Aquanow and is named in the materials, but his liability is not a matter to be dealt with in this hearing.

[6] At the *ex parte* hearing on February 9, 2024, this Court was advised by then counsel for CWB ("CWB's Former Counsel") that the CWB Funds were transferred from National Bank into an account at connectFirst Credit Union ("connectFirst"), and then from the connectFirst account into certain accounts at the Bank of Montreal (the "BMO Accounts").

[7] At the *ex parte* hearing, this Court granted the *Ex Parte* Order containing the following terms:

> (a) An order freezing account number 004 4585-097 of the Application Respondent, BMO ("BMO Account #2") up to a value of $14,200,000 (the "BMO Account #2 Funds");
>
> (b) An order prohibiting BMO from disposing of, dealing with, or diminishing the value of the BMO Account #2 Funds without the consent of CWB, or further order of this Court;
>
> …
>
> (d) An order freezing all BMO Accounts in the name of CLTS Technologies Ltd. other than the BMO Account #1 and the BMO Account #2 (the "Additional BMO Accounts"), each up to a value of $14,200,000 (the "BMO Additional Accounts Funds");
>
> (e) An order prohibiting BMO from disposing of, dealing with, or diminishing the value of the BMO Additional Accounts Funds without the consent of CWB, or further order of this Court;
>
> …

[8] Somewhat unusually, the *Ex Parte* Order also prohibited "BMO from disclosing this Action, this Application, the supporting Affidavits, or the provisions of the Order to any third party including the person(s) who hold the BMO Account #2 and the BMO Additional Accounts" (the "Disclosure Prohibition").

[9] It is also notable that the *Ex Parte* Order did not contain a term imposing an undertaking as to damages, as will be discussed further below.

Issues

[10] The following issues are to be determined on this application and will be addressed in order below:

a) Should the *Ex Parte* Order be set aside on the basis of non-disclosure?

b) If so, should this Court still consider the issuance of a new preservation order?

c) If so, should a new preservation order be granted?

d) Should an inquiry into damages be ordered?

e) Should special costs be awarded against CWB?

Should this Court Set Aside the *Ex Parte* Order based on Non-Disclosure?

[11] It is trite law that on an *ex parte* application, the applicant must make full and frank disclosure of all material facts. An *ex parte* applicant must be "fastidious" in disclosing all important aspects of the evidence and pointing out what defences may be available to the opposing party. An applicant is not to exaggerate or misrepresent the strength of the claim being advanced. The duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made: *Pierce v. Jivraj*, 2013 BCSC 1850 at paras. 37–38.

[12] Where the *ex parte* applicant fails to provide full and frank disclosure, a court may set aside the order without regard to the merits of the application. In *Northwestpharmacy.com Inc. v. Yates*, 2018 BCSC 41 [*Northwestpharmacy.com*] at paras. 15-18, the Court set out the procedure to be followed on a motion to set aside a *Mareva* injunction. While the *Ex Parte* Order is not a *Mareva* injunction, the parties agree that the same principles apply:

> [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 CanLII 1779 (BC SC), [1994] B.C.J. No. 2652 (S.C.); and *Global Chinese Press Inc. v. Zhang*, 2016 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.

[13] In *Save-A-Lot Holdings Corp. v. Christensen*, 2019 BCSC 115, Justice W.A. Baker held:

> [4] If I find there has been a material non-disclosure, I can set aside the Mareva order. However, in *Kerston v. Seyedzadeh*, 2013 BCSC 1330, at paragraphs 15 to 16, the court confirmed that even where there has been a material non-disclosure, the court retains the discretion to consider whether the injunction should stand in light of additional evidence on the set-aside application.

[14] In the case at bar, Aquanow alleges non-disclosure regarding a variety of issues. The most important of these allegations fall into two categories.

Aquanow's Potential Role in the Fraud

[15] Aquanow submits that, at the *ex parte* hearing, CWB's Former Counsel exaggerated or misrepresented Aquanow's potential role in the fraud that had been carried out concerning the CWB Funds.

[16] In particular, in the context of CWB's notice of civil claim alleging that XYZ Corporation "carried out the fraud", CWB's Former Counsel confirmed, in answer to a question from the Court, that Aquanow was "one of the XYZ Corporations". Although he noted that CWB did not have confirmation that CLTS was the account holder for BMO Account #2, his representation led the Court to conclude that part of the order sought by CWB, freezing all BMO accounts in the name of CLTS, was appropriate.

[17] However, at the time of the *ex parte* hearing, it was known to CWB that Aquanow is a "money services business" and one of connectFirst's largest clients. Had proper inquiries been made, it was likely within CWB's knowledge that Aquanow is the largest digital asset liquidity provider in Canada. More than $100 billion has passed through its platform since it was launched in 2018. In 2023, Aquanow was recognized by Deloitte as one of Canada's 50 fastest growing technology companies based on revenue growth.

[18] Aquanow submits that the record "included some information regarding Aquanow's business", but CWB "did not draw any of that to the Court's attention and

made no effort to present it as an alternative explanation as to how funds arrived in the connectFirst Account". Further, Aquanow submits that the proper factual context would have "supported the inference that monies were deposited with Aquanow without it knowing they were stolen and also served to explain the large incoming and outgoing transactions in Aquanow's accounts".

[19] In my view, CWB ought to have advised the Court of two relevant facts: first, that Aquanow was a money services business which legitimately had large sums moving into and out of its accounts on a daily basis; and, second, while the alleged fraudster may have transferred the CWB Funds to an Aquanow account, there was no evidence that Aquanow was complicit in the fraud, and the apparent legitimacy of its business suggested otherwise. If CWB had done so, this Court may have refused to make the order freezing all of Aquanow's BMO accounts and may have placed specific limitations or conditions on the order in respect of BMO Account #2.

The *Ex Parte* Order's Extraordinary Terms

[20] The second of the two primary categories of non-disclosure alleged by Aquanow relates to the extraordinary terms of the *Ex Parte* Order.

[21] CWB's February 8, 2024 notice of application, the contents of which were relied upon by the Court at the *ex parte* hearing, stated that "CWB is prepared to provide an undertaking to abide by any order that the court may make as to damages". Despite this statement in the notice of application, however, the *Ex Parte* Order did not contain such an undertaking, and neither did the affidavit filed on behalf of CWB. These facts were not brought to the Court's attention. The Court was led to assume that an undertaking would be included in the *Ex Parte* Order and dealt with in the affidavit materials when it was not.

[22] Further, as noted above, the *Ex Parte* Order contained the Disclosure Prohibition. As a result of this term, BMO was unable to advise Aquanow why it had frozen the funds in the BMO Accounts.

[23] In my view, CWB ought to have advised the Court of the Disclosure Prohibition, namely that the order sought would prohibit BMO from disclosing the *Ex Parte* Order's terms to any third party, including Aquanow. Regrettably, at least one of the Court's concerns about notice was assuaged by representations made by CWB's Former Counsel that the *Ex Parte* Order would be served on the account holder. Those representations were made even though serving Aquanow immediately would have been inconsistent with the Disclosure Prohibition.

[24] During the *ex parte* hearing, the following exchange occurred in the context of CWB's application for a sealing order which was refused:

> THE COURT: The order's not going to be sealed; right?
>
> CNSL: No, that's fair. Because it would be served. That's correct.

[25] Further, on CWB's application for short leave to bring the *ex parte* application, which I also heard, the following exchange took place:

> THE COURT: Okay. No conditions of service. Obviously you'll have to serve the accountholder with the order after it's obtained --
>
> CNSL: Of course.
>
> THE COURT: -- if it is.

[26] In fact, CWB provided a copy of the *Ex Parte* Order to Aquanow on February 15, 2024 – six days after the order was granted – and only after Aquanow obtained a court order requiring BMO to disclose the *Ex Parte* Order to it.

[27] Another fact that ought to have been brought to the Court's attention in relation to the Disclosure Prohibition is that funds in the BMO Accounts and the connectFirst account were already on hold. In a February 7, 2024 email from BMO to CWB's Former Counsel, BMO advised that a $14.2 million CAD hold had been put on BMO Account #2, and that there was in excess of $8.5 million CAD being held in that account as a result. BMO also advised that it was holding approximately $2 million USD in another account in the name of CLTS.

[28] In addition, the evidence shows that more than $2.5 million CAD was being held at connectFirst. Although it is unclear on the evidence whether CWB knew about this, I find that it would have discovered this fact had proper inquiries been made.

[29] As a result of the foregoing, approximately $14 million CAD was already on hold at BMO and connectFirst when the *ex parte* application was brought. Yet CWB's Former Counsel advised the Court that "there's obviously a very real concern for dissipation of assets should [the account holder] receive notice of the application".

[30] If this Court had been advised that approximately $14 million CAD was already on hold at BMO and connectFirst, it is unlikely that it would have granted the Disclosure Prohibition. Indeed, notice could have been given to Aquanow in advance of CWB's application for a preservation order so that an *ex parte* hearing may have been unnecessary.

[31] In my view, the omitted facts described above were material in the sense that they may have affected the outcome of the application: *Pierce* at para. 37. Accordingly, the *Ex Parte* Order is set aside.

[32] Aquanow made other submissions regarding CWB's failure to make full and frank disclosure on the *ex parte* hearing. However, in my view, the two categories of non-disclosure allegations set out above are more than sufficient to demonstrate that the *Ex Parte* Order should be set aside.

Should this Court Consider Granting a New Preservation Order?

[33] As set out above, this Court has the jurisdiction to grant a new order despite non-disclosure at the *ex parte* stage. This issue is governed by the principles set out in *MacLachlan v. Nadeau,* 2017 BCCA 326 at para. 37:

> a) 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;

b) 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;

c) 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;

d) the degree and extent of the applicant's culpability may range from innocent non-disclosure to bad faith, which may include deliberate misstatements;

e) 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;

f) 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; and

g) the discretion is to be exercised judicially, in accordance with established principles, including those outlined in *Brinks-MAT*.

[34] In my view, in light of the failures to make full and frank disclosure in this case, it would be inappropriate to consider the issuance of a new preservation order.

[35] Aquanow has not established that the failures were deliberate. Nonetheless, in my view, the nature, degree and extent of the failures were so severe that a new preservation order ought to be denied without considering the merits of the application and the balance of convenience.

Application for a New Preservation Order

[36] In case my refusal to consider the issuance of a new preservation order is incorrect, I will consider whether to grant a new order in the alternative.

Legal Principles

[37] In *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 [*Kepis*], the Court of Appeal held:

> [21] The requirements of Rule 10-1 (formerly Rule 46) were summarized by Justice Grey in *Osooli-Talesh v. Emani,* 2003 BCSC 1924:
>
> > [43] Rule 46 provides that the court may make an order for the preservation of any property that is the subject matter of a proceeding. The court has the discretion whether to make an order under Rule 46. The considerations for the court are as follows (see *Kashani v. Dhalla,* [2002] B.C.J. No. 2201, 2002 BCSC 1353, *Chiu v. Jao,* [1998] B.C.J. No. 2360 (S.C.), *Kongrecki v. Rafael,* 1993 CanLII 1931 (BC CA), [1993] B.C.J. No. 1631 (C.A)):
> >
> > a) Is there a claim on the evidence and not just the pleadings to a propriety interest in property?
> >
> > b) Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?
> >
> > c) Is there a substantial question to be decided as to the plaintiff's entitlement to the property?
> >
> > d) Does the balance of convenience favour granting the order?
>
> [22] The threshold issue is whether the applicant has established a proprietary interest in the disputed property. In the case of disputed property that involves a fund, the applicant must establish that a right to a specific fund is in question. The court may order the fund be paid into court or otherwise secured. This form of preservation order is typically referred to as an impound order.

Analysis

[38] Aquanow argues that CWB has not met what is described in *Kepis* as the "threshold issue" - the establishment of a proprietary interest in the disputed property: see *Kepis* at para. 22.

[39] Aquanow's Chief Compliance Officer, Anna Trinh, deposes that Aquanow is a money services business registered with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). As stated above, Aquanow is the largest digital asset liquidity provider in Canada that deals with both digital and foreign exchange.

[40] Ms. Trinh deposes that Aquanow holds several bank accounts with BMO and connectFirst to facilitate its business. It has two types of accounts: those used for the settlement of client transactions, and those used for the payment of Aquanow's operational expenses. Aquanow has accounts in both Canadian and U.S. currency.

[41] She explains that Aquanow uses its settlement accounts to accept client funds. Those client funds are then used to "pre-fund" or "settle" the client's account. By this, I understand her to say that, if the client is purchasing Bitcoin, for example, the client's funds are accepted into one of Aquanow's settlement accounts in exchange for Bitcoin that is then deposited into the client's digital account.

[42] According to Ms. Trinh, once the CWB Funds were posted to Aquanow's connectFirst account, those funds were credited to the client's account and used to purchase cryptocurrency, which was then deposited into the client's "wallet".

[43] Aquanow does not deny that $15.5 million CAD was wired from Aquanow's connectFirst account to its BMO account after the CWB Funds were first wired to connectFirst. However, according to Aquanow, the funds transferred from connectFirst to BMO were not CWB Funds. It is evident that the amount of these wired funds was different than the amount of the CWB Funds ($14.2 million). In any event, according to Aquanow, the funds paid into the connectFirst account became Aquanow's funds once the cryptocurrency purchased by the client was delivered to him, and those funds were, in turn, commingled with other funds in the connectFirst account.

[44] Aquanow has provided the Court with a timeline showing that the transfer of the CWB Funds to Aquanow's connectFirst account, and the subsequent transfer of funds from connectFirst to the BMO Accounts, were all completed before connectFirst gave notice to Aquanow of a potential fraud. That notice was delivered at 1:11pm EST on January 25, 2024.

[45] Importantly, Ms. Trinh's evidence regarding the facts described above is uncontroverted. After Ms. Trinh's affidavit was filed, the only affidavit made on behalf

of CWB was made by a legal assistant, attaching correspondence, pleadings and corporate documents.

[46] Accepting Ms. Trinh's evidence on these issues, at least for the purpose of this application, Aquanow was a *bona fide* purchaser of the funds for value without notice: see *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.,* 2010 BCCA 357 at paras. 28, 42. Accordingly, I cannot conclude on the evidence before this Court that CWB has established a proprietary interest in the funds in the BMO Accounts.

[47] In case I ought to exercise my discretion to consider the issuance of a new preservation order, I have concluded that a new order ought to be refused.

Inquiry as to Damages

[48] Aquanow seeks an order that the "question of damages to Aquanow caused by the injunction obtained by CWB shall be sent for a reference, inquiry or assessment to an Associate Judge, Registrar or Special Referee".

[49] As discussed above, although CWB did not give an undertaking as to damages on the *ex parte* application, CWB's February 8, 2024 notice of application states that "CWB is prepared to provide an undertaking to abide by any order that the court may make as to damages". In such circumstances, the court can proceed as if the undertaking in damages had been set out in the order: see Steven Gee, *Commercial Injunctions*, 7th ed. (Toronto: Thomson Reuters, 2021) at 381–382. I am prepared to proceed in this manner.

[50] In its response on this issue, CWB submits only that Aquanow's request for an inquiry as to damages is premature. However, it is clear from the authorities that a damages inquiry may be ordered either when the plaintiff's claim has failed on its merits or when the plaintiff has been found to have obtained the injunction improperly: see e.g. *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd.*, 2020 BCCA 120 at paras. 113, 117–119.

[51] For all the reasons above, I have found that CWB obtained the *Ex Parte* Order improperly, and so an order for an inquiry as to damages is granted.

Special Costs

[52] Aquanow seeks special costs of this application, relying on the decision in *Bank of Credit and Commerce International (Overseas) Ltd. v. Akbar*, 2001 BCCA 204 [*Bank of Credit*], wherein Justice Finch held at para. 19:

> I have not been persuaded that the learned chambers judge erred as to the legal standard to be applied on an application for special costs. As is evident from *Leung* conduct deserving of reproof or rebuke need not rise to that which is scandalous, outrageous or constitutes misbehaviour. "Milder forms of misconduct" will suffice. It was open to the chambers judge to characterize "carelessness" in the circumstances, as conduct deserving of censure by the court. I would not give effect to this ground of appeal.

[53] Special costs may be ordered where there has been material non-disclosure or misrepresentation on an *ex parte* application: *Bank of Credit* at paras. 18–19. In *Old Abbey Ales Ltd. v BC Packaging Service*, 2017 BCSC 1877 at para. 13, this Court cited *Bank of Credit* for the proposition that:

> An order for special costs may be made even where the evidence does not establish that the party wilfully misled the Court, but where the party was careless in the face of its obligation of candour and full and frank disclosure to the court …

[54] In these reasons, I have described the primary ways in which CWB failed to meet its duty of full and frank disclosure to the Court on the *ex parte* application. The nature, degree and extent of the failures were severe, and the failures were analogous to those in *Bank of Credit*, wherein special costs were sought, and granted, based on unfounded allegations of fraud, failure to make full and frank disclosure of facts, misstatement of facts and the use of hearsay evidence.

[55] Although I have not found that the failures in this case were deliberate, I am of the view that special costs are warranted in the circumstances. The degree and extent of the carelessness are deserving of reproof or rebuke: *Bank of Credit* at para. 19.

Conclusion

[56] Paragraphs (a), (b), (c)(v), (d), (e) and (g) of the *Ex Parte* Order are set aside.

[57] The question of damages to Aquanow caused by the *Ex Parte* Order shall be sent for a reference, inquiry or assessment to an Associate Judge, Registrar or Special Referee.

[58] Special costs of this application are payable by CWB to Aquanow, forthwith after assessment.

"The Honourable Justice Loo"