IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canada West Tree Fruits Ltd. (The View Winery) v. Saywell,* 2024 BCSC 611

Date: 20240412
Docket: S137950
Registry: Kelowna

Between:

Canada West Tree Fruits Ltd. dba The View Winery

Plaintiff

And

Debra Anne Saywell aka Debbie Saywell

Defendant

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Plaintiff:	J. Craddock
Counsel for the Defendant:	R. Davis
Place and Date of Hearing:	Kelowna, B.C. January 16, 2024
Place and Date of Judgment:	Kelowna, B.C. April 12, 2024

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Introduction

[1] The defendant applies to set aside a Mareva injunction granted on an *ex parte* basis by Justice Hardwick on August 3, 2023. The defendant argues that:

a) The plaintiff failed to make full and fair disclosure of material facts, and

b) In any event, the plaintiff does not have a sufficiently strong case to justify the granting of an extraordinary remedy.

[2] The plaintiff says that its disclosure was appropriate and that it has established both a good arguable case and a strong *prima facie* case.

Background Facts

[3] The plaintiff operates a winery and vineyard in Southeast Kelowna known as The View. It and two other companies (McCulloch Orchard Greens, which operates a golf course, and Excalibur Enterprises, which has rental properties) form what is referred to as the Turton Group. These businesses are owned and managed by members of the Turton family. Jennifer Turton-Molgat ("Ms. Turton-Molgat") is managing shareholder of the plaintiff, while Cindy Turton ("Ms. Turton") manages the other two companies.

[4] The plaintiff hired the defendant in November 2020 to work as its Controller. She replaced Sabrina Fedorak, who had been Controller from October 2011 but had found a new job elsewhere.

[5] The defendant began work on November 30, 2020. Her first two days involved training and onboarding by Ms. Fedorak. Thereafter, Ms. Fedorak worked on some outstanding projects for another couple of weeks – although did so primarily from home – which then concluded her work with the company.

[6] The Turton Group companies had a long-standing banking relationship with the Royal Bank of Canada ("RBC"). The evidence indicates that, several years prior to 2020, the Turton Group companies had begun to use an online business banking program called RBC Express. As of 2020, electronic banking transactions had to be

authorized through the use of a small electronic device that would generate a unique code that could be used for each online transaction. As did the parties, I will refer to this device as the "Token". Only one Token was issued to the Turton Group, and it was issued in Ms. Turton's name. It could only be used in conjunction with a user login in Ms. Turton's name.

[7] It appears that as of 2020, the bulk of the plaintiff's business payments were made through electronic banking, and most if not all of them required a code obtained from the Token.

[8] The evidence with respect to the Token, and with respect to the defendant's role in causing electronic payments to be made from the plaintiff's accounts, was starkly contradictory.

[9] The defendant, in the affidavit filed in support of her application to set aside the injunction, deposed that she did not store the Token, although it was left at her desk on a few occasions; that she did not know where it was stored, although she assumed that it was kept by Ms. Turton; and that she did not use the Token to approve any of the payments alleged by the plaintiff to be fraudulent. In her reply affidavit, the defendant acknowledged having been trained by Ms. Fedorak in how to use the Token, but said that she was not given the Token when Ms. Fedorak ceased working for the plaintiff. The defendant deposed that she did not have the password for Ms. Turton's RBC Express login, and only ever used her own login which had no ability to authorize payments. The defendant's evidence is that, while she was employed by the plaintiff, Ms. Turton was responsible for processing payments from the bank accounts of the Turton Group companies, including the plaintiff; that the accounting group prepared payable run packages for approval by Ms. Turton-Molgat and payment by Ms. Turton; and that Ms. Turton used the Token to complete all of the payments.

[10] The plaintiff responded to this with contradictory evidence from four witnesses:

a) Ms. Turton deposed that although the Token was issued in her name, she understood that it would be in the possession of the company's Controller at all times – initially Ms. Fedorak, and then the defendant; that only the Controller knew how to operate the RBC Express system; that Ms. Turton herself had no knowledge of the system credentials, although she acknowledged that they were issued in her name; and she denied having any knowledge as to how to make or approve a transaction on the RBC Express system;

b) Ms. Turton-Molgat deposed that it was part of the Controller's job duties to arrange for payment of bills and expenses; that the Controller had complete control of the plaintiff's RBC bank account; that only the Controller knew how to authorize payments through the RBC Express system; and that after Ms. Fedorak left, Ms. Turton-Molgat never saw the Token in the possession of any person other than the defendant;

c) Ms. Fedorak deposed that when she was Controller, she used Ms. Turton's RBC Express login to complete transactions, and the Token was always in her possession – either in her laptop bag or locked in her office drawer, and she even took it with her on holiday; that in her training and onboarding of the defendant, she explained that administering the Token was part of her job responsibility; that during the training, she provided the defendant with Ms. Turton's RBC Express password, showed her how to use the Token to facilitate all RBC Express payments, and they completed and filed several transactions together; and that to her understanding, neither Ms. Turton-Molgat nor Ms. Turton knew how to use either RBC Express or Quickbooks; and

d) A Mr. Anthony Clough, who is the plaintiff's current Controller, and who was employed by the plaintiff to work with the defendant beginning in October 2021, also provided an affidavit. Mr. Clough deposed that the only person he saw in possession of the Token was the defendant, and that he

understood that she was the only employee who had access to the Token and knowledge of how to use it.

[11] The record maintained by the accounting department with respect to each electronic payment includes a printout from the RBC account. It is common ground that each such printout indicates that the payment was initiated by Ms. Turton. The defendant says that this is evidence that Ms. Turton was actually involved in each payment; the plaintiff says that this is simply because the Token was issued by RBC to Ms. Turton, but that it was the defendant who used the Token to authorize each payment.

[12] As noted above, the defendant argued that there was material non-disclosure in the plaintiff's application materials. One of the primary matters the defendant says should have been disclosed was the necessity of the Token for payments to be made from the plaintiff's account. The plaintiff's injunction application was supported by only one affidavit – the first affidavit of Ms. Turton-Molgat. With respect to the payment process, Ms. Turton-Molgat's deposed in that affidavit that:

a) The defendant's responsibilities included "arranging for payments of [the plaintiff's] bills and expenses";

b) The defendant had "complete control of our RBC account" and was able to transfer funds electronically from that account; and

c) The defendant made various payments (which will be discussed below) from the plaintiff's RBC account.

[13] There was no reference in this affidavit to the mechanics of how electronic payments or fund transfers were made from the plaintiff's RBC account.

[14] The documents from the start of or during the course of the defendant's employment do not provide a definitive answer as to who was to possess and use the Token and to effect payments from the plaintiff's RBC account.

[15] The plaintiff points to a document attached to Ms. Fedorak's affidavit, sent to Ms. Turton-Molgat on November 24, 2020, in respect of plans for the training and onboarding of the defendant, which attached what the cover email described as "packages for her which we will discuss in detail together", including "Step by step notes for processes like Payable EFT Processing, Payroll Processing, etc. through RBC Express". On the third page of this attachment, there is a heading "Payroll Procedures (Jennifer to review all submission)", which includes point 8:

> 8. Enter each person's net pay into RBC Express by the following steps:
>
> …
>
> j. View Detail and print. Review.
>
> k. Amount should balance the Payroll Report detail.
>
> l. Enter the password and Token Number from the fob.
>
> m. Print summary.

The plaintiff says that this is evidence that using the Token to effect electronic transactions was part of the work the defendant was trained to do.

[16] The defendant, in a reply affidavit filed shortly before the hearing, attached certain texts said to have been received from Ms. Turton. Some of the texts attach what appear to be screenshots or photos of confirmations of electronic payments made. By way of example, a text dated February 2, 2021, attaches a photo of what appears to be an e-transfer of $58.24, with a note "Sorry it took so long on line banking was busy fighting with me". The defendant says that this is evidence that Ms. Turton was in fact doing e-transfers from the plaintiff's accounts.

[17] The financial transactions that are the subject matter of this action commenced on January 7, 2021. A payment was made from the plaintiff's RBC account to the defendant's Mastercard in the amount of $30.00. The payment was recorded in the plaintiff's Quickbooks accounting system as "Fuel – Propane & Diesel". A second payment to the same Mastercard, made on January 11, 2021, was recorded as "Bill Payment – 7327 MAS CARD SCOTIA" and was supported in the plaintiff's financial records by invoice #2019 from Containerworld. The plaintiff

acknowledges that Containerworld is one of its known vendors, but says that it has confirmed with Containerworld that it never issued any such invoice to the plaintiff.

[18] The defendant has tendered evidence that several of the other payments to the defendant's Mastercard account were supported in accounting records by invoices from known suppliers to the plaintiff, but that the invoices upon investigation turned out to be similarly not legitimate, and that the funds did not go to those suppliers but rather were paid to the defendant's Mastercard.

[19] The plaintiff, in the materials filed in support of its initial application, said that it had identified some 75 such transactions by which a total of $359,332.17 was paid by it to the defendant's Mastercard. Those transactions are set out in Exhibit B to Ms. Turton-Molgat's original affidavit.

[20] The defendant denies having initiated or completed any of the payments listed in Exhibit B. She says that all of those payments would have required approval through the Token, and she denies having used the Token to approve any of them.

[21] The defendant does not deny having received funds. She says that the plaintiff paid her for overtime and reimbursed her for business expenses through payments to her Mastercard. She says that Ms. Turton-Molgat instructed her that overtime worked in the office was to be recorded as overtime hours, with those hours to be accrued for additional time off, while overtime worked at home was to be recorded on expense reimbursement forms and submitted for payment to her Mastercard. She said that she submitted a number of expense reimbursement forms both for overtime and for business expenses. She says that those forms were all filed in the plaintiff's financial record filing system, and has demanded that the plaintiff produce them. The plaintiff says that it has searched diligently and been unable to find any such forms.

[22] Ms. Turton-Molgat denies having offered to pay overtime as a business expense, or having asked or agreed to any portion of overtime worked being treated differently. Her evidence is that the defendant always banked her overtime hours

and never asked to be paid for her overtime. Her evidence is that all of the plaintiff's employees are expected to include their overtime hours on their timesheets, and those hours are either banked or paid as overtime pay. She says that the plaintiff has never asked or permitted its employees to submit overtime work as an expense reimbursement.

[23] Ms. Turton-Molgat also says that the plaintiff simply does not reimburse expenses through payment of an employee's Mastercard bills.

[24] The defendant has provided a summary of expenses she has identified on her Mastercard that she says she "expects" were business expenses incurred on behalf of the plaintiff. Those expenses total just under $64,000.

[25] Two transactions in May 2023 that were part of the material before Justice Hardwick did not involve payments to the defendant's Mastercard account.

[26] The first was the purchase of a large storage container from Okanagan Containers at a price of $5,699.40. This amount was paid directly from the plaintiff's RBC account to Okanagan Containers; however, the defendant arranged for Okanagan Containers to deliver the container directly to a property where she keeps her horses. The Quickbooks record for this transaction described it as "Equipment – Cider".

[27] The second was the purchase of a shelter from Capital Automotive Equipment at a cost of $3,225.56. This amount was paid directly from the plaintiff's RBC account to Capital Automotive Equipment; however, the defendant arranged for the shelter to be delivered to and erected on the defendant's property. The Quickbooks record for this transaction initially described it as being for the purchase of a "John Deere", then later changed to reference a "L275 tractor". It was subsequently changed twice to show a known supplier (Rollins Machinery) and then to show a former name for Rollins (Farmco Sales).

[28] The defendant acknowledged having received these two items. She said that this was something she had discussed with Ms. Turton, and that they had agreed

that she would receive the container and the shelter in lieu of payment from the plaintiff for some of her accrued vacation pay. Both Ms. Turton and Ms. Turton-Molgat deny having been part of or aware of any such discussions.

[29] There was extensive evidence with respect to the plaintiff's Quickbooks accounting system. That system tracks who created or edited any accounting entry. An "Audit Trail" report can be created with respect to any transaction that will provide this information. The plaintiff says that all of the entries in its accounting system that relate to the various payments made to the defendant were made using one of two accounts: one identified as "Admin", the other identified as "Debbie". The defendant says that the printouts that were produced by the plaintiff and attached to its affidavits show only who most recently modified each entry. She also says that both the Admin and the Debbie user accounts were shared, with the login information available in a shared computer drive of the plaintiff. The plaintiff says that only the defendant had access to those two Quickbooks accounts, and that the Quickbooks records it has produced show a trail that includes any modifications to an entry – and that where only one entry is shown, it means that the entry was not modified.

[30] The defendant specifically denies having made the Quickbook entries relied upon by the plaintiff. The defendant insists that each of the payments made to her were supported by properly entered Quickbook entries reflecting either expenses she was being reimbursed for or overtime work performed, and that paper records supporting those transactions were generated at the time and filed in the plaintiff's accounting records. The plaintiff says that it has searched for those accounting records and not found any, and that there simply are no Quickbooks entries in its system that relate to the payments to the defendant other than the ones it has disclosed.

[31] When the injunction was granted, the defendant was also required to produce certain banking documents. Among the documents produced were statements for a joint account held by the defendant and her son at a credit union. The plaintiff, through cross-referencing those account statements to its own payments, says that

it has identified a further $82,635.19 of electronic transfers made to that credit union account from the plaintiff's RBC account.

[32] The defendant acknowledges having received those payments. She says that some of them reflect compensation for work she did to help Ms. Turton with management of and year-end financial reporting for the other companies in the Turton Group, as well as for assisting Ms. Turton's father with his taxes and investments. She said she received this extra compensation because it was outside the scope of her regular work for the plaintiff. She says that other deposits reflect compensation for the plaintiff using images of one of her horses in its marketing materials.

[33] The plaintiff says that the defendant was Controller for the Turton Group, and her regular work included work for all three companies and not just for the plaintiff. It points to the defendant's email signature, describing her as Controller for the Turton Group, and says that while her salary was paid by the plaintiff, and the plaintiff's operations constituted a large part of her work, there was no extra pay associated with work she performed for the other companies in the Group.

[34] The plaintiff retains an external accountant to prepare year-end financial statements. It appears that the external accountant did not notice anything out of the ordinary when compiling year-end statements.

[35] The plaintiff's evidence is that it was alerted by Quickbooks of some inquiries made of it with respect to how to make changes to its audit trail. That evidence is not admissible to prove such inquiries, as it is hearsay, but it does provide context for the plaintiff beginning to investigate matters in June 2023.

[36] On June 6, 2023, the plaintiff changed its RBC banking arrangements to a new "soft token" system, where responsible employees were provided with the ability to authorize transactions in their own names using a smartphone application. Use of the original Token ceased.

[37] On June 16, 2023, the plaintiff suspended the defendant from her employment. Her employment was subsequently terminated.

[38] The present action was commenced on August 2, 2023. As noted above, the plaintiff sought and obtained the order of Justice Hardwick on an *ex parte* basis on August 3, 2023.

Positions of the Parties

[39] The defendant submits that, in this case, two key factual issues will be who used the Token to authorize the transactions and who entered information about the transactions into Quickbooks. The defendant says that the plaintiff failed, at the time of the initial application, to disclose that the Token was required for all payments from the RBC account, that the Token was assigned to and used by Ms. Turton, and that the Admin password to Quickbooks was shared. She argues that this is material non-disclosure and, as a result, the Mareva injunction should be set aside as of right.

[40] The defendant further says that the plaintiff is required to but has failed to establish a strong *prima facie* case. She submits that she has answered all of the allegations in the materials she has filed and that, if her evidence is believed, then the plaintiff has no claim against her. She argues that all of the funds identified and relied upon by the plaintiff were for overtime pay and reimbursements that were properly authorized by the plaintiff. She also says that there is no direct evidence that it was the defendant who initiated any of the disputed payments – and in fact, the documents from RBC indicate that Ms. Turton authorized all of the payments. Finally, she says that because the Quickbooks user accounts were shared amongst employees of the plaintiff, there is no proof that she made the entries alleged by the plaintiff to be fraudulent. She also denies having created the invoices that were exhibited to Ms. Turton-Molgat's initial affidavit.

[41] The defendant says that in this case the alleged fraud is hotly contested, and says that in such circumstances an injunction ought not to be granted, relying on *Ma v. Nutriview Systems Inc.*, 2011 BCSC 1033 at para. 16, aff'd 2011 BCCA 389

(Chambers), *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 71, and *Jeana Ventures Ltd. v. Garrow*, 2021 BCSC 769 at paras. 72-74.

[42] The defendant confirmed at the hearing that she has not brought this application based on grounds of hardship, and is not at this point seeking any carving out of any part of the defendant's assets for living expenses or legal fees. The defendant argues that the granting of a Mareva order in the circumstances of this case is not just and convenient, but advances that submission primarily based on the weakness in the plaintiff's case, the defendant's assertion that all payments were approved by the plaintiff and effected by Ms. Turton, and what is said to be a lack of any past history of fraudulent conduct by the defendant.

[43] The plaintiff says that, on its evidence, the defendant had full control of the plaintiff's RBC Express banking access and was the only one with effective access to the Quickbooks accounting system. As a result, the fact that the Token was historically issued in Ms. Turton's name is of little to no relevance and not a material fact that ought to have been disclosed. Similarly, the other allegedly undisclosed fact (that the Debbie and Admin user accounts were shared) is simply untrue.

[44] The plaintiff says that the legal standard for a Mareva injunction in British Columbia is a good arguable case, but in any event, it has established both a good arguable case and a strong *prima facie* case – thus it has met the standard however the test is framed. The plaintiff says that the defendant's explanations are simply not believable, and points in particular to the manner in which the plaintiff's records disguise the true nature of the transactions as well as the fact that the amount alleged to have been diverted to the defendant in the course of just 30 months (just under $450,000) is many multiples of the defendant's actual salary ($60,000 to $65,000).

[45] The plaintiff says that, given the breaches of trust involved and the manner in which these transactions were effected, there is a real risk that the defendant if not constrained by a Mareva order will dissipate all of her assets rendering any judgment nugatory.

[46] The plaintiff also submitted that, given the contradictions in the evidence, this might be an appropriate case for the court to exercise its power under Rule 22-1(4)(a) of the *Supreme Court Civil Rules* and order the cross-examination of one or more witnesses on their affidavits. The defendant objected that it would be inappropriate to make such an order in the absence of a formal notice of application having been filed seeking such an order.

Legal Context

[47] The parties are agreed that an application to set aside a Mareva injunction that was initially made on an *ex parte* basis is to be heard *de novo*, with the proviso that the hearing judge should not substitute their own view for that of the originating judge simply because they might have exercised their discretion differently: *Gulf Islands Navigation Ltd. v. Seafarers International Union of North America (Canadian District)*, 1959 CanLII 291, 27 W.W.R. (N.S.) 652 at 658 (B.C.S.C.), aff'd 28 W.W.R. 517 (B.C.C.A.); *Netolitzky v. Barclay*, 2002 BCSC 1098 at para. 20. As noted in *Girocredit Bank Aktiengesellschaft Der Sparkassen v. Bader*, 1998 CanLII 5573, [1998] B.C.J. No. 1516 (C.A.), recently cited in *MacLachlan v. Nadeau*, 2017 BCCA 326:

> [47] … In this jurisdiction the judgment of the court of Appeal in *Gulf Islands Navigation Ltd. v. Seafarers International Union* requires the review hearing to proceed *de novo*. This does not imply any diminution in the discretion required to be exercised. In deciding whether an interim injunction should be granted or continued the assessment of the balance of convenience very often calls for a high degree of discretion exercised judicially in accordance with known principles.

[48] 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. The law governing the granting of Mareva injunctions has been considered in a series of judgments of the British Columbia Court of Appeal, including:

a) *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 59 B.C.L.R. (3d) 196, 1998 CanLII 6468 (C.A.),

b) *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd*, 2007 BCCA 481 (a five-member division),

c) *ICBC v. Patko*, 2008 BCCA 65,

d) *MacLachlan*, and

e) *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420.

[49] These cases make clear that the approach to Mareva injunctions in British Columbia has evolved in a different manner than in some other provinces, with courts in this jurisdiction adopting a more “flexible” or “relaxed” approach, focused on the balance of justice and convenience: *Kepis & Pobe* at para. 10.

[50] Notwithstanding the flexibility of approach, Mareva injunctions are an exceptional remedy, and it is important to recognize that in most cases it will not be just or convenient to tie up a defendant’s assets merely on “speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted”: *Silver Standard* at para. 21; *ICBC* at para. 26. Caution must be exercised 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: *Tracy* at para. 46.

[51] While the approach in British Columbia is described as relaxed or flexible, there are generally considered to be two stages to the analysis. As summarized in *Kepis & Pobe* at para. 18:

> [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.

[52] With respect to the first or “threshold” issue, as noted in *Tracy* at para. 54:

> [54] The chambers judge used the test of "good arguable case". I do not consider that a strict formula should be applied. Whereas, the Supreme Court of Canada in *Aetna* appeared to favour "strong *prima facie* case", that Court also appeared to leave considerable room for courts to frame the test as fits the nature of the case before them. *Mooney No. 2* recognized both standards, "strong *prima facie* case" and "good arguable case," as formulations that have been used. I expect that the difference in words is a difference without practical consequence. In either case, it is more than an arguable case, and may be met by an assessment that does not reach the "bound to succeed" threshold.

[53] To similar effect are the recent comments of Justice Kent in *Zheng v. Anderson Square Holdings Ltd*, 2022 BCSC 801 at para. 12:

> [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 …* para 54 …
>
> [Emphasis added in *Zheng*.]

[54] I note that there are recent appellate authorities discussing the strong *prima facie* case and good arguable case standards in different contexts. In *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 17, the Supreme Court considered the nature of a strong *prima facie* case required for the granting of a mandatory injunction; while in *Altria Group, Inc. v. Stephens*, 2024 BCCA 99 at paras. 25 and 56, the Court of Appal considered the nature of a good arguable case for purposes of a challenge to the court’s territorial jurisdiction. I do not consider either of these cases to change the established British Columbia approach to the first stage of a Mareva injunction application.

[55] With respect to the second stage, in which the court balances the interests of the parties, as noted in the above excerpt from *Kepis & Pobe* (at para. 18), two of the key factors are:

a) the existence of assets in the jurisdiction, and

b) the risk of dissipation of assets.

Other potentially relevant factors (per *Kepis & Pobe* at para. 14) include:

c) the relative strength of the parties' cases,

d) evidence of irreparable harm or a real risk of dissipation of assets,

e) whether the defendant's assets are inside or outside the jurisdiction,

f) the potential effects on third parties, and

g) factors affecting the public interest.

[56] The court may also take into account the conduct of the applicant generally, including material non-disclosure on the initial *ex parte* application: *Northwestpharmacy.com Inc. v. Yates*, 2018 BCSC 41 at para. 18.

[57] Dealing specifically with the risk of dissipation of assets, as noted in *ICBC*:

> [28] In cases alleging serious fraud, the risk that assets will be dissipated may be inferred from the evidence related to the plaintiff's strong *prima facie* case: *Netolitzky v. Barclay,* 2002 BCSC 1098 at para. 31. This inference is permissive, not mandatory. The existence of a strong *prima facie* case of fraud does not lead inevitably to a finding that there is a real risk of dissipation of assets.

[58] The defendant argues that the plaintiff failed to make full and frank disclosure on the *ex parte* application before Justice Hardwick. When an *ex parte* applicant intentionally holds back from the court evidence or law material to the outcome, equity will almost always deny that applicant further relief: *Global Chinese Press Inc. v. Zhang*, 2015 BCSC 874 at para. 11.

[59] However, as noted by Sharpe J. (as he then was) in *United States of America v. Friedland*, [1996] O.J. No. 4399 at para. 31 (Gen. Div.), cited in *Kerston v. Seyedzadeh*, 2013 BCSC 1330 at para. 10:

> [31] The duty of full and frank disclosure is, however, not to be imposed in a formal or mechanical manner. Ex parte applications are almost by definition brought quickly and with little time for preparation of material. A plaintiff should not be deprived of a remedy because there are mere imperfections in

> the affidavit or because inconsequential facts have not been disclosed. There must be some latitude and the defects complained of must be relevant and material to the discretion to be exercised by the Court. (See *Mooney v. Orr*, (1994) 100 B.C.L.R. (2d) 335; *Rust Check v. Buchowski* (1994) 58 C.P.R. (3d) 324.

[60] In *MacLachlan* at paras. 35-37, Justice Dickson confirmed that an *ex parte* injunction based on incorrect or misleading information is not always required to be set aside; rather, while material non-disclosure is a factor to be considered, the court retains a discretion to continue an order or make a new order. She set out the following key principles to be considered:

> 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; and
>
> vii. the discretion is to be exercised judicially, in accordance with established principles, including those outlined in *Brinks-MAT*.

[61] The reference to *Brinks-MAT* is to the English judgment of *Brinks-MAT Ltd. v. Elcombe*, [1988] 3 All E.R. 188 (C.A.), quoted by Dickson J. at para. 34 of *MacLachlan*. It also provides seven discrete points:

> (i) The duty of the applicant is to make a full and fair disclosure of all the material facts;
>
> (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers;

(iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant: ..., and (c) the degree of legitimate urgency and the time available for the making of inquiries;

(v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains ... an *ex parte* injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty;

(vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(vii) Finally it is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded: .... The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms.

Analysis

[62] An application for a Mareva injunction, as with many other forms of interlocutory injunction, will often come at the earliest stages of an action. The initial application will often be made *ex parte*, even before notice of a claim has been served, because “it is implicit in such an application that the plaintiff believes the defendant to be a rogue. Rogues are likely to take notice as an invitation to dispose of, secrete, or dissipate assets”: *Mooney v. Orr*, [1994] B.C.J. No. 2652 (S.C.) at para. 9. The application to set aside an *ex parte* order will also often come at a very early stage. In such circumstances, the legal rights of the parties will depend upon facts that are in dispute between them. Any assessment to be made by the court of those legal rights is based upon an evidentiary record that is incomplete. In most cases, there will have been no discovery, and the evidence tendered will be

untested by the crucible of cross-examination. The court must be cautious in any effort to resolve conflicts of evidence on affidavits as to disputed facts on which the claims of either party may ultimately depend.

[63] As a result, the tests for different types of interlocutory injunctions acknowledge the limited ability of the court to assess the merits of the case at an early stage, and a significant part of the focus of the court is instead on questions of whether intervention by the court at an early stage is “just and convenient”.

[64] In this case, the parties’ evidence is diametrically opposed and irreconcilable. Either it was the defendant who used the Token to make all payments from the plaintiff’s RBC account, as alleged by the plaintiff, or it was Ms. Turton who made all payments based on submissions prepared by the defendant, as alleged by the defendant. Either the various payments to the defendant were based entirely on the fraudulent invoices set out in the plaintiff’s affidavit evidence, or they were supported by numerous requests for at-home overtime and expense reimbursements, as claimed in the defendant’s evidence. It is simply impossible for both to be true.

[65] I turn to the question of material non-disclosure. It is clear that, if the defendant’s evidence is correct, then the plaintiff is guilty not only of material non-disclosure but also of actively misleading the court. Ms. Turton-Molgat’s evidence was that the defendant had “complete control” of the plaintiff’s RBC account, including being the only person with the ability to effect electronic fund transfers.

[66] The defendant argued that, even if the plaintiff’s evidence is correct, and the defendant did have control of the Token and the ability to initiate electronic transactions, the plaintiff still should have disclosed that the RBC records with respect to each of the transactions showed that they were initiated by Ms. Turton. In my view, if the plaintiff’s evidence is correct, then the association of Ms. Turton’s name with all of the RBC transactions – regardless of who actually effected the transactions – is of minimal relevance and would not meet the threshold of materiality that would impact on the ongoing availability of the injunction.

[67] The third *Brinks-MAT* principle raises the question of whether the applicant made “proper inquiries” before making the application, while the fourth raises the question of whether there is legitimate urgency. If the plaintiff’s evidence is correct, then there was in my view legitimate urgency that would justify the plaintiff seeking injunctive relief before placing the evidence it had assembled before the defendant and asking for her explanations. The assets in question are funds in electronic form and are thus easily redirected.

[68] In all of the circumstances, it is my view that if the plaintiff’s evidence is true, then any failure to disclose details with respect to the Token and the mechanics of the RBC Express system was at worst an innocent error to be given minimal weight in the decision whether to continue the injunction.

[69] I turn now to the two stages of the “legal test” for a Mareva injuction. Stage one requires consideration of “the threshold issue of a strong *prima facie* or good arguable case”: *Kepis & Pobe*, para. 18. The difficulty in assessing the strength of the plaintiff’s case, given the evidence before the court at this point in the proceeding, is that if the plaintiff’s evidence is ultimately believed, then the plaintiff has a very strong case, while if the defendant’s evidence is believed, the plaintiff’s case is not very strong – all of this in a context in which the evidence advanced by the respective parties is in many key aspects irreconcilable. Nor is there an easy way in the circumstances of this case to resolve these factual differences through reference to the documents.

[70] Many of the same concerns infuse analysis of the second stage of the legal test – that is, balancing the interest of the parties to ascertain whether the granting of the injunction is just and convenient. It is my view that, if the plaintiff’s evidence is accurate, and the defendant has in fact diverted approximately $450,000 of the plaintiff’s money to her various bank and credit card accounts, and to the two specific assets that were identified, then these are the sorts of serious allegations of fraud that would lead me to draw an inference that there is a real risk of dissipation of assets. I note that the evidence before me provides no basis to conclude that the

defendant has any significant non-liquid assets within the jurisdiction that would allow recovery were the defendant to remove her liquid assets from the jurisdiction.

[71] In this case, no potential impacts on third parties have been identified. With respect to the public interest, there is a general public interest in ensuring that those who are victims of frauds are not left unable to recover as a result of delays inherent in the legal process. There is also a public interest in not burdening those against whom serious claims are advanced with unnecessary restrictions on the use of their assets unless and until those claims are ultimately proved on the balance of probabilities. Again, however, whether that is an issue in the present case turns on whether the plaintiff's or the defendant's evidence is ultimately proven to be true.

[72] In the present case, both the first and second stages of the Mareva injunction legal test, as well as the question of whether there has been material non-disclosure, all depend largely on this question of credibility.

[73] I noted above the three cases relied upon by the defendant, in which Mareva injunctions were set aside because of the inability of the court to resolve questions of credibility and to otherwise conclude that the injunctions that had been granted on an *ex parte* basis were just and convenient. In *Ma*, Justice Savage (as he then was) commented at para. 16 that fraud was not admitted, but rather was hotly contested, and that based on all of the documentary evidence "arguments are advanced that reasonably could give rise to a defence". In *Nouhi*, Justice Matthews commented that:

> [71] … this is a case where credibility will be a significant issue, and that until witnesses can be heard in full and close examination given to all the evidence and the complicated dealings of the parties, it would be wrong to conclude that there is a strong *prima facie* case …

[74] In *Jeana*, Justice E. McDonald concluded:

> [72] On the application before me, I face a great deal of conflicting evidence and, because I lack the benefit of a full evidentiary record that includes *viva voce* testimony, I am unable to find that Jeana has made out a strong *prima facie* case.

> [73] In my view, this is not a case where the fraudulent conduct relied on by the applicant has been acknowledged by the other side. Rather, as I have already mentioned, the fraudulent conduct is denied and the defendants have tendered evidence that may, if believed, be capable of establishing that none of the alleged wrongful conduct occurred.
>
> [74] In those circumstances, I do not find that it is just and equitable to maintain the *Mareva* Order.

[75] I do not read these cases as concluding that, any time a defendant tenders contradictory evidence that cannot be conclusively disproven on an interlocutory basis, a Mareva injunction cannot be given. Rather, they are instances of application of the flexible British Columbia approach in the context of serious credibility concerns.

[76] In my view, four factors tip the balance in favour of continuing the injunction in this case:

a) The nature of the allegations is quite serious. The allegations involve fraud enabled through the creation of fake invoices and deceptive accounting entries. The manner in which the transactions were said to be disguised involves carefully planned deception.

b) The defendant's evidence, particularly her evidence that:

   i. she submitted overtime and reimbursement requests that should be in the plaintiff's files,

   ii. that she has no idea how the invoices and accounting entries that the plaintiff says are in its records with respect to the payments that were admittedly sent to the defendant were created,

   is such that if this evidence is to be accepted, the Court will necessarily have to conclude that most if not all of the witnesses whose affidavits were tendered by the plaintiff on this application were not only lying but working together to create a false history of fraud on the defendant's part.

c) With respect to the Quickbooks entries, it seems clear from the evidence that the software is designed to retain an audit trail with respect to all changes to transactions, which undercuts the ability of anyone seeking to recharacterize the accounting entries for the many payments to the defendant to do so without leaving a record.

d) The amount involved is substantial – some $450,000. The defendant's evidence includes a list of expenses from her bank account and credit card statements that she "expects" were for the plaintiff's benefit, but with little detail as to what exactly was purchased and how they relate to the plaintiff's business. Those expenses amount to over $60,000 – more than $2,000 a month. If the remaining $390,000 relates to overtime hours worked over the course of 30 months, that would be $13,000 worth of overtime each month for someone whose monthly salary is in the range of $5,000. The explanations provided by the defendant are difficult to reconcile with the amounts that were paid to her.

[77] In light of these considerations, and notwithstanding the contradictory evidence and the serious credibility issues raised, it is my view that this is a case in which the plaintiff has advanced a sufficiently strong good arguable case.

[78] With respect to other factors going to the question of whether the continuation of the Mareva injunction is just and convenient, I would refer again to the significant amount that was paid to the defendant. In this case, there was no evidence as to the assets that might be available should the plaintiff obtain and ultimately seek to recover on a judgment, and the amount of the claim is beyond the ability of many individuals to pay. In my view, the potential prejudice to the plaintiff if it successfully advances a claim of this nature through trial and finds nothing left to recover is the kind of significant prejudice that Mareva orders are intended to address.

[79] I note that the defendant has tendered no evidence of specific prejudice to her in terms of any inability to fund living costs and legal fees to defend this claim. The court has the ability to relieve from such prejudice through orders made varying

the Mareva order to allow the release of appropriate amounts of funds on terms. Any such request would have to be advanced on the basis of material establishing the need for such advances.

[80] I also conclude that I am not satisfied in the circumstances that there is any material non-disclosure that would lead to a conclusion that the Mareva injunction should not be continued.

[81] I acknowledge the plaintiff's suggestion that cross-examination on affidavits is a potential means to address the conflicts in the evidence. However, as Justice Kent commented in *Zheng* at para. 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.

[82] While it seems clear from Rule 22-1(4)(a) that an order for cross-examination is available on an application like the present, that does not mean that cross-examination should be ordered in all such cases. In my view, there is a danger in allowing preliminary interlocutory injunction applications to become, in effect, mini-trials of the claim, conducted without the benefit of discovery and other pre-trial litigation processes. Such a process potentially leads to the drawing of conclusions as to credibility that may then have to be revisited by a different judge, on the basis of a more extensive evidentiary record, when the trial ultimately arises.

[83] I see the flexible approach to Mareva injunctions as allowing the court to assess the questions of whether an injunction is just and convenient without necessarily embarking on a process of cross-examination whenever there is contradictory evidence. There may be cases in which cross-examination on affidavits on a motion like this is appropriate. In my view, this is not such a case.

Conclusion

[84] The application of the defendant is dismissed.

"Veenstra J."