IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *United States Security and Exchange Commission v. Sharp* 2024 BCSC 2208

Date: 20241204
Docket: S226494
Registry: Vancouver

Between:

United States Security and Exchange Commission

Plaintiff

And

Frederick L. Sharp, Zhiying Yvonne Gasarch, Courtney Kelln, Mike K. Veldhuis, Paul Sexton, Jackson T. Friesen and Graham Taylor

Defendants

Before: The Honourable Madam Justice Francis

Reasons for Judgment

Counsel for the Plaintiff:	M. Ruby W. Chamberlain
Counsel for the Defendant, Jackson T. Friesen:	O. Ahmed
Counsel for the Defendants, Zhiying Yvonne Gasarch, Courtney Kelln, Mike K. Veldhuis and Paul Sexton:	G. DelBigio, K.C. M. Watchorn
The Defendants, Frederick L. Sharp and Graham Taylor:	No appearance at this hearing
Place and Date of Hearing:	Vancouver, B.C. October 9, 2024
Place and Date of Judgment:	Vancouver, B.C. December 4, 2024

Introduction

[1] On March 12, 2023, I granted a *Mareva* injunction with respect to the assets of Mr. Friesen, subject to the plaintiff providing an undertaking as to damages. The *Mareva* injunction order was settled on April 15, 2024 (the "*Mareva* Order"). The *Mareva* Order was made in the context of ongoing litigation in this Court and courts in the United States between the US Securities and Exchange Commission ("SEC")

[2] on the one hand, and Mr. Friesen and his former associates on the other. On the current application, Mr. Friesen seeks to vary the *Mareva* Order to allow him to access additional funds to pay his legal fees, personal and corporate taxes, and living expenses.

[3] A number of the issues between the parties on this application have been resolved by consent. The SEC consents to vary the *Mareva* Order in the manner sought by Mr. Friesen, except that:

a) Prior to the release of funds, the SEC submits that Mr. Friesen should be required to account for the proceeds of sale of a property he disposed of in September 2022; and

b) The SEC takes the position that Mr. Friesen's entitlement to funds should be limited to the payment of his outstanding legal fees in the US and should not include the payment of anticipated future US legal fees.

[4] Despite the discrete nature of these two issues, the application was primarily argued on the broader question of Mr. Friesen's financial disclosure to date and whether he has demonstrated that he has no other sources, beyond frozen assets, from which to pay his reasonable expenses. As such, this application raises issues about the extent to which a defendant who seeks to vary a *Mareva* injunction to allow for the payment of living or legal expenses must satisfy the Court that they have no access to financial sources other than the assets frozen by the order.

Procedural History

[5] On August 5, 2021, the SEC commenced proceedings before the US District Court for the District of Massachusetts (the "District Court") against Mr. Friesen and others by filing a civil complaint alleging violations of US securities law relating to an alleged "pump and dump" scheme in which Mr. Friesen and others were allegedly implicated.

[6] On August 6, 2021, the SEC successfully obtained an *ex parte* temporary restraining order (the "TRO") freezing the assets of the defendants, including Mr. Friesen.

[7] On August 8, 2021 and September 23, 2021, the BC Securities Commission made various preservation orders under the BC *Securities Act* that preserved assets personally held by Mr. Friesen and assets held by companies he controlled (the "Preservation Orders").

[8] On August 13, 2021, an order was made by the District Court on consent, imposing a preliminary injunction (the "US Injunction") prohibiting Mr. Friesen from disposing of any of his assets. The US Injunction provides that Mr. Friesen can spend $5,000 per month for food and basic living expenses for three months, and $200,000 for legal fees.

[9] After the US Injunction was imposed, the Preservation Orders were varied to give effect to the expenditures permitted by the terms of the US Injunction.

[10] On August 11, 2022, the SEC filed a notice of civil claim and notice of application in this Court seeking a *Mareva* injunction freezing the assets of Mr. Friesen and others in support of the proceeding before the District Court. I granted the *Mareva* injunction on March 12, 2023, subject to the SEC providing an undertaking as to damages. The terms of the *Mareva* Order were settled on April 15, 2024.

[11] Part of the reason for the delay between my decision on March 12, 2023, and the settlement of the *Mareva* Order in April 2024, is that there were ongoing discussions between the SEC and the defendants about the provision of an asset list as part of the *Mareva* Order. Specifically, the parties could not agree as to how an asset list might be provided on behalf of Mr. Friesen and the other defendants, while protecting their Constitutional rights in the other proceedings being brought against them in Canada and in the US. Additionally, the parties disagreed about the extent to which the defendants were entitled to a release of funds for living expenses and legal fees.

[12] On April 15, 2024, the parties appeared before me to settle the *Mareva* Order. At that hearing, I ordered, among other things, that the *Mareva* Order pertaining to Mr. Friesen ought to contain a provision allowing him to pay his US legal fees from the funds frozen under the *Mareva* Order.

[13] The *Mareva* Order provides that Mr. Friesen may spend certain sums for living expenses and legal fees, but in doing so, must first exhaust other sources before using the accounts frozen by the BC Securities Commission pursuant to the Preservation Orders:

> Subject to further Orders of this Court, Friesen may apply to spend up to USD $5,000 per month on ordinary living expenses, up to a total of $50,000 on legal advice and representation from Friesen's Canadian solicitor, up to a total of USD $300,000 on legal advice and representation from Friesen's United States lawyers, and reasonable amounts on ordinary and proper business expenses, including payment of taxes owing in Canada by Friesen personally, or by companies controlled by him with assets affected by this Order (the **"Permitted Expenses").** Before making any such application for Permitted Expenses, an Asset List (defined below at paragraph 19) must first be filed with the Court under seal, and Friesen must inform the Court of the source of the payment; communication to the Court regarding the source of the payment may be *ex parte* and under seal. In paying the Permitted Expenses, Friesen must first exhaust other sources before using the accounts frozen by the BC Securities Commission enumerated at paragraph 1(b)(iii) of this Order. This provision does not relieve Friesen of any requirements he may have to satisfy before this Court or the U.S. District Court relating to the Permitted Expenses. However, if this Court, finding a request for an exception for Permitted Expenses to be reasonable, orders payment of such Permitted Expenses, the Commission will consent to Friesen's request for reciprocal relief before the District Court.

[14] On June 17, 2024, Judge Young of the District Court made an order quantifying the disgorgement amount payable by Mr. Friesen and the other defendants in the US proceeding. The amount Mr. Friesen was ordered to pay, expressed in US dollars, was "to not exceed $11,846,176.00." Mr. Friesen has appealed that judgment.

Position of the Parties

[15] The SEC does not dispute the reasonableness of the amounts Mr. Friesen seeks to access from the frozen assets for taxes, living expenses, and legal fees (the "Permitted Expenses"), subject to its position on future US legal fees discussed below. To this extent, the SEC has consented to a number of items of relief sought in the notice of application, varying the *Mareva* Order to provide for the payment of certain expenses. However, the SEC submits that Mr. Friesen has failed to satisfy the Court, that he lacks the resources to pay the Permitted Expenses from sources other than the frozen funds. Other than the asset list under seal, which was reviewed with the Court *in camera* during the course of the hearing, Mr. Friesen has offered no evidence of his ability to pay his living expenses or legal fees. For example, he has not deposed as to his current income, his current employment (if any), what his marital and family circumstances are, or any other evidence that could assist the Court in determining whether he is able to meet his day to day expenses and the cost of his legal fees from sources other than frozen funds. Further, public records demonstrate that in September 2022, Mr. Friesen disposed of a multi-million-dollar home. While the net proceeds of that sale are unknown to the SEC, they submit that it is incumbent on Mr. Friesen to account for those proceeds before he should be entitled to access frozen funds to pay his living expenses.

[16] Mr. Friesen submits that, in order to vary the *Mareva* Order as sought, he must only satisfy the court that he presently has insufficient assets not frozen by the *Mareva* Order to pay the Permitted Expenses. He argues that the notion that he must provide the court with a comprehensive picture of his current income, access to credit, and network of possible financial assistance, as well as an accounting of the proceeds of a property he sold prior to the *Mareva* Order, is not consistent with the

law in British Columbia. He further submits that the plaintiff's insistence that he accounts for the proceeds of sale of his property amounts to a back-door attempt to obtain discovery for the purpose of determining whether the US Injunction has been complied with.

Legal Framework re: variation of *Mareva* injunctions

Mareva Injunctions

[17] In considering Mr. Friesen's request, I am mindful of the special nature of *Mareva* injunctions. The purpose of a *Mareva* injunction is to restrain a defendant from putting assets beyond the court's reach. *Mareva* injunctions are not intended to place the plaintiff in a position of a secured creditor: *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.,* 2024 ONCA 57 at para. 45.

[18] *Mareva* injunctions are an exceptional equitable remedy. Their primary function is to maintain the integrity of the court's process rather than to protect the interests of plaintiffs: *Equustek Solutions Inc. v. Jack,* 2014 BCSC 1063 at para. 132.

[19] It is likely because of the particular purpose of *Mareva* injunctions—that is, the protection of the court's process rather than the provision of security for plaintiffs— that the British Columbia model order contains clauses allowing the defendant to use assets in the ordinary course of business, pay for ordinary living expenses, and pay legal fees: *British Columbia Model Order for Preservation of Assets* at para. 4.

[20] It is also generally accepted by this Court that, except in situations where it is shown that a pool of funds not frozen by a *Mareva* injunction might be used by the defendant to cover such expenses, a *Mareva* injunction should normally contain an express provision allowing the defendant to pay ordinary living and business expenses and reasonable legal expenses to defend the action: *Green v Jernigan,* 2003 BCSC 1097 at para. 15.

Varying *Mareva* Injunctions

[21] The well-accepted test for varying a *Mareva* injunction is set out in *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*, [2003] O.J. No 40, 2003 CanLII 12916 [*Credit Valley*]. In *Credit Valley,* Justice Molloy distinguished between proprietary injunctions (injunctions granted to preserve an asset belonging to the plaintiff but in the hands of the defendant) and *Mareva* injunctions, which do not require the plaintiff to show an ownership interest in the property subject to the injunction: paras. 15–16. However, for both proprietary injunctions and *Mareva* injunctions, a defendant seeking to vary the injunction to permit payment of expenses out of funds frozen by the injunction must satisfy the court that they have no other assets from which to make the payments: paras. 19 and 21.

[22] The requirement that a defendant seeking to vary a *Mareva* injunction must satisfy the court that they have no other assets from which to make necessary payments was adopted by Justice Walker in *Otal v. Azure Foods Inc.,* 2019 BCSC 1510 at paras. 15–22 and described recently by Justice Gomery in *Xie v Lai,* 2021 BCSC 1768 [*Xie*] at para. 22:

> [W]here funds are subject to a proprietary injunction or a non-proprietary *Mareva* injunction, defendants who seek the release of some of the funds for the payment of legal or other expenses must establish, as a preliminary matter, that they have no other assets available to them to pay the expenses.

[23] In this case, the order in issue is a *Mareva* injunction. It is not a proprietary injunction insofar, it is not an injunction which prevents a defendant from dealing with particular assets over which the plaintiff asserts a proprietary interest pending trial. The SEC does not assert a proprietary interest over the assets of Mr. Friesen. Rather, the SEC is seeking to recover funds for investors who have been defrauded.

[24] The SEC argues that the *Mareva* Order should, at least in part, be considered to be a proprietary injunction. This is because a portion of the assets frozen under the *Mareva* Order are also frozen under the Preservation Orders, and the Preservation Orders were made by the BC Securities Commission to preserve

assets in the public interest for the purposes of disgorgement, and in aid of compensation to victims of fraud.

[25] In *Poonian v. British Columbia Securities Commission*, 2024 SCC 28, Justice Côté observed that, while compensation to victims of fraud is not the purpose of s. 161(1)(g) of the BC *Securities Act* (the section that empowers the BC Securities Commission to make disgorgement orders), compensation is a possible effect of a s. 161(1)(g) order because restitution may occur via the claims procedure under the *Securities Act:* para. 112. The SEC relies on the compensatory effect of the Preservation Orders to submit that they are proprietary in nature.

[26] In my view, while disgorgement of ill-gotten gains and compensation to victims of fraud are both important and laudable potential effects of the Preservation Orders, they do not serve to render an asset-freezing order proprietary in nature. In suggesting that that *Mareva* Order is in part a proprietary injunction, the SEC confuses the distinction between proprietary restitutionary remedies that may be available to the victims of securities fraud, and a proprietary injunction which serves the purpose of preserving disputed property that the plaintiff claims an interest in, pending trial.

[27] The SEC also argues that the public interest, a guiding factor in the BC Securities Commissions' decision to issue the Preservation Orders, militates in favour of treating the *Mareva* Order like a proprietary injunction. I disagree. Neither the severity of the alleged wrong (in this case, Mr. Friesen's participation in securities fraud leading to disgorgement liability of almost USD $12 million), nor the public's interest in seeing defrauded investors compensated for the wrongs perpetuated upon them, changes the character of the injunction. The *Mareva* Order is not a proprietary injunction.

[28] *Mareva* injunctions and proprietary injunctions serve a different purpose. This distinction was observed by Justice Molloy in *Credit Valley:*

> [17] The purpose of the *Mareva* injunction is a limited one. It is meant to restrain a defendant from taking unusual steps to put his assets beyond the

> reach of the plaintiff in order to thwart any judgment the plaintiff might eventually obtain. It is not meant to give the plaintiff any priority over other creditors of the defendant, nor to prevent the defendant from carrying on business in the usual course and paying other creditors. The nature of the *Mareva* is such that it is typically sought and granted, in the first instance, without notice to the defendant, but then is subject to a motion by the defendant to vary the injunction to permit payments in the usual course of business or living.
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> [Emphasis added.]

[29] In *XY, LLC v. Canadian Topsires Selection Inc.,* 2015 BCSC 2116, Justice Griffin (as she then was) alluded to the non-proprietary nature of a *Mareva* injunction, citing with approval from the UK authorities:

> [43] The [*Credit Valley*] case relied on by the plaintiff in turn cited as authority the case of *Halifax Plc v. Chandler*, [2001] EWCA Civ 1750 [*Halifax*]. That case does state that a defendant must show that he has no other assets to use if he is seeking to spend moneys frozen by an injunction order, but that case also states at paras. 19-20 as follows:
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> > In the fourth edition of *Mareva Injunctions and Anton Pillar Relief*, Gee says at page 318:
> >
> > > "The court will always be concerned to ensure that a Mareva injunction does not operate oppressively and that a defendant will not be hampered in his ordinary business dealings any more than is absolutely necessary to protect the plaintiff from the risk of improper dissipation of assets. Since the plaintiff is not in the position of a secured creditor, and has no proprietary claim to the assets subject to the injunction, there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with his other creditors, even if the effect of such dealings is to render the injunction of no practical value."
> >
> > In my judgment, the relevant principles are currently stated in that passage.
>
> [Emphasis added.]

[30] It is because of the distinct nature and purpose of *Mareva* injunctions that they are varied as a matter of course to permit payments in the usual course of the defendant's business and life. As a result, in *Credit Valley,* Justice Molloy opined that the test for variation of a *Mareva* injunction was a simple matter of persuading the court that the defendant had no other assets available to them to pay reasonable

expenses. The test for varying a proprietary injunction, in contrast, involves a more complex balancing of interests: *Credit Valley* at paras. 19–21 and 25–26.

[31] Nevertheless, in the case of both types of injunctions, the defendant seeking a variation must show that they have no other assets available to them to pay reasonable expenses. One of the major points of contention between the parties on this application is the scope of evidence required to be adduced by a defendant to establish their inability to pay.

Scope of financial disclosure required of defendant seeking to vary *Mareva* injunction

[32] It is uncontroverted that a defendant must show that they have no other assets available to pay necessary expenses before the court will vary a *Mareva* injunction to allow the defendant access to frozen assets. However, the parties disagree about the extent to which a defendant must also show that they have no other means of paying expenses, such as access to credit, before a *Mareva* injunction will be varied. The SEC submits that Mr. Friesen must first exhaust other sources before accessing any frozen assets. They argue that Mr. Friesen has failed to adduce any evidence in this regard. Mr. Friesen submits that the SEC is attempting to expand the scope of disclosure required of a defendant seeking to vary a *Mareva* injunction beyond what is required under British Columbia law.

[33] In *ICBC v. Dragon Driving School Canada Ltd. et al,* 2004 BCSC 1580 [*Dragon Driving School*], Justice Groberman (as he then was), considered the burden on a defendant in this type of application. He held at paras. 9 and 10:

> I accept the test proposed by Molloy, J. [in *Credit* Valley] is, nonetheless, helpful in guiding the exercise of the court's discretion. The first question is whether the defendant has established on the evidence that he has no assets available to pay expenses other than those frozen by the injunction. The injunction in this case is the worldwide *Mareva* injunction over all of the assets of the defendants, Chiu and Dragon Driving School. By definition, therefore, those defendants can have no assets other than frozen assets from which they can pay legal expenses.
>
> The plaintiff suggests that Mr. Chiu must show not only that he has no assets that are not frozen, but also that he has no other means of paying expenses, such as available lines of credit, or third parties who might voluntarily pay his

> expenses. I have significant doubt that the test should be expanded in that fashion. However, the issue does not arise in this case, because Mr. Chiu has satisfied even this expanded test. He swears in an affidavit that appears to have been affirmed November 15th, 2004 (though the jurat indicates May 27, 2004) that aside from the assets and funds frozen by the court order, he has "no other assets and no other means to provide for [his] legal expenses or living expenses."

[34] Like Justice Groberman, I have doubts that, in this province, the test for varying a *Mareva* injunction to allow for the payment of legal fees and living expenses should be expanded from a consideration of whether the defendant presently has *assets* from which such expenses could be paid (a matter which I am capable of determining on the record before me by reviewing Mr. Friesen's sworn asset list) to a consideration of whether Mr. Friesen has potential sources of income, credit, or family assistance that could pay these amounts.

[35] The SEC relies on *Waxman v. Waxman*, 2007 ONCA 326 [*Waxman*] and the cases that follow it, in support of their argument that, on an application to vary a *Mareva* injunction, the defendant's financial circumstances should be subject to a more rigorous review than mere disclosure of their assets.

[36] In *Waxman*, at para. 18*,* the motion judge had held that the defendant:

> did not have to establish that no other family members could assist him financially. The question was whether [the defendant] personally had funds available to him.

[37] The Ontario Court of Appeal found that the motion judge erred in finding the defendant did not have sufficient personal assets beyond those frozen by the injunction. As a result, the Court of Appeal did not expressly decide the issue of whether it is appropriate to look beyond a defendant's assets in determining whether any funds are available to pay legal fees:

> 43 In addition, even if it were inappropriate to look beyond the assets of Chester and his sons to determine whether any funds were available for the payment of legal fees, it can be said that in this case Chester and his sons did not meet the onus of establishing on proper evidence that they personally had no other assets available to them. While Robert stated in his affidavit that he and his father had made efforts to arrange for funding of legal fees, in cross-examination he refused to answer any questions beyond stating that

> the $100,000 monthly sum was insufficient. I observe that this statement, on its face, would be highly dubious in the eyes of almost any reasonable Canadian. Further, Robert refused to answer any questions about what family resources were being conserved for the payment of Chester's medical fees.
>
> [Emphasis added.]

[38] Although the Court of Appeal in *Waxman* did not precisely endorse a requirement that the Court look beyond the personal assets of a defendant to sources of funding from friends and family, *Waxman* has been repeatedly relied on in Ontario for this proposition: *HMQ v. Madan*, 2020 ONSC 8093 [*Madan*] at para. 17; *Royal Bank of Canada v. Welton*, 2009 CanLII 46165 (ON SC) [*Welton*] at para. 27; *Wayne Safety v. Gendelman et al*, 2024 ONSC 1642 [*Wayne Safety*] at para.18; and *Riar v. Khudal*, 2023 ONSC 4529 [*Riar*] at para. 38. This is likely because, as noted by Justice Newbould in *Welton*, the Court in *Waxman*, while not deciding the point, plainly questioned the proposition that a defendant applicant need not demonstrate a lack of access to credit from family sources: *Welton,* at para. 27.

[39] The Ontario cases relied on by the plaintiff share a characteristic that is absent in Mr. Friesen's case. Each of these cases involve a defendant who, on the evidence, has engaged friends and/or family members in their financial affairs or was otherwise not credible. In *Madan*, there was evidence that the defendant had ferried large sums of money from Canada to relatives in India: at para. 22. In *Riar*, the defendants' living expenses were already being subsidized by friends and family: at para. 98. In *Welton*, one of the defendants deposed that his parents were "independently wealthy" and there was evidence before the court that his mother had contributed to the cost of legal fees: at para. 29. In *Wayne Safety,* the Court held that there were significant credibility concerns arising from inconsistencies and improbabilities in the evidence filed by the moving defendant: at para. 82.

[40] To the extent that there is a line of authority in Ontario that supports a requirement that a defendant seeking to vary a *Mareva* injunction must establish a lack of access to alternative sources of funding, such as family members or lines of credit, it has not been adopted in this province. The only British Columbia case I am

aware of that considers the scope of evidence a defendant must adduce on an application of this nature, other than Justice Groberman's skeptical remark in *obiter* in *Dragon Driving School*, is *Xie.*

[41] In *Xie,* the court was not dealing with a *Mareva* injunction. Rather, Justice Gomery was faced with the question of the test to be applied where an owner of a fund of money held subject to court order seeks the release of part of the fund for the payment of their legal fees in the litigation over the objection of a plaintiff claiming a proprietary interest in the fund: para. 21.

[42] Due to the proprietary claim in that case, Justice Gomery appropriately applied a more rigorous analysis of the defendant's financial circumstances than would apply to an application to vary a pure *Mareva* injunction. He concluded, at para. 30, that:

> The evidence does not establish that Ms. The and 099 are unable to pay their legal fees without recourse to the Fund. Ms. The has not provided evidence of her assets, debt and income. She is clearly not impecunious.

[43] In my view, in circumstances in which the defendant is holding an asset or assets in which the plaintiff asserts an ownership interest, it is necessary for the court to carefully police the extent to which the defendant may encroach on those assets to pay their own personal expenses and legal fees. A different analysis must govern in the case of a *Mareva* injunction, whose sole purpose is to prevent the defendant from deliberately putting his assets beyond the reach of the plaintiff.

[44] Consequently, it is only necessary for Mr. Friesen on this application to show that the Permitted Expenses cannot be funded from assets not frozen by the injunction. In saying this, I do not suggest that a defendant seeking to vary a *Mareva* injunction does not bear a persuasive burden to establish these circumstances. The U.K. authorities refer to the *"*burden of persuasion*"* on the defendant, the need to adduce *"*credible evidence*"* about their other assets, and the notion that judges are entitled to have a *"*very healthy scepticism" about unsupported assertions made by a defendant about the absence of assets: *Kea Investments Ltd v. Watson*, [2020] EWHC 472 (Ch) at para.20.

[45] As is clear from the Ontario cases, if there is evidence that friends or family have been subsidizing a defendant's legal fees or living expenses, it will be very difficult for such a defendant to establish that they lack the means to pay expenses without access to frozen assets. It does not follow that, in this province at least, the court will always require a defendant seeking to vary a *Mareva* injunction to provide evidence of their attempts to access funding for legal fees and living expenses from friends and family members.

[46] As I have noted, a *Mareva* injunction is not a form a prejudgment security; its purpose is maintaining the integrity of the court's process. As such, the court must be cautious about imposing additional evidentiary requirements that would serve as impediments to a defendant accessing their own funds to pay reasonable living expenses or legal fees while under the burden of a *Mareva* injunction. In some cases, additional evidence may be required in order for the court to be satisfied that a defendant has no assets available to pay expenses other than those frozen by the injunction. This is not one of those cases.

[47] I have carefully reviewed Mr. Friesen's sworn asset list. I am satisfied that he has no assets available to pay expenses other than those frozen by the injunction. As such, in my view, it is appropriate to vary the *Mareva* Order*,* subject to my discussion below of the two further specific issues raised by the SEC.

Proceeds of Sale of West 1st Avenue Property

[48] The property located at 2769 West 1st Avenue, Vancouver (the "West 1st Property"), was purchased by Mr. Friesen in May 2013. A mortgage in the principal amount of $1,650,000 was registered on title on November 12, 2021, with Tri City Capital Corp as mortgagee and Mr. Friesen as mortgagor (the "West 1st Mortgage").

[49] On September 19, 2022, Mr. Friesen was served with the notice of civil claim and notice of application seeking a *Mareva* injunction in the proceeding herein.

[50] On or about September 23, 2022, Mr. Friesen disposed of the West 1st Property. The Form A Freehold Transfer stated that the West 1st Property was sold for $3,300,000. The balance of the West 1st Mortgage at the time of sale is unknown.

[51] The SEC submits that the sale of the West 1st Property was in direct contravention of the US Injunction, as well as in contravention of the *Mareva* injunction that the SEC was seeking, but had not yet obtained, at the time of sale. The SEC says that Mr. Friesen must account for the proceeds of sale of the West 1st Property before he is entitled to access funds frozen by the *Mareva* Order.

[52] At the time he sold the West 1st Property, no injunction had been issued from this Court to prevent Mr. Friesen from selling this asset. Whether or not these actions fell afoul of the US Injunction is a matter for the District Court to determine. The enforcement of the US Injunction is extraneous to the matters I must consider in this application.

[53] I have reviewed the asset list, which is under seal, in an *in camera* hearing with counsel for Mr. Friesen. I have no reason to think that Mr. Friesen's sworn asset list is not a complete and accurate list of his current assets. The test for varying a *Mareva* injunction requires reference to the moving parties' current assets and liabilities at the time of the motion: *Trade Capital v. Peter Cook*, 2015 ONSC 7776 at para. 21. As such, I do not find it necessary or appropriate to order Mr. Friesen to account for the proceeds of sale of the West 1st Property as a precondition to the variation of the *Mareva* Order.

Legal Fees

[54] The SEC submits that the Court should not pre-authorize the payment of legal fees to fund Mr. Friesen's US appeal in the absence of evidence that the appeal is meritorious.

[55] Mr. Friesen argues that there is no burden on him to establish, to the satisfaction of this Court, that his appeal is meritorious before he can withdraw sums for anticipated legal fees to pursue his appeal of the District Court disgorgement

order. He submits that he is facing extremely significant and complex litigation in the US and he requires access to funds to pay for legal representation.

[56] To the extent that I am required to assess the merits of Mr. Friesen's US appeal in determining whether he should be entitled to access frozen assets to pay the legal fees associated with that appeal, the merits threshold is very low. In Ontario jurisprudence, in circumstances in which a defendant sought to vary a post judgment restraining order to fund the legal costs of an appeal, the Ontario Court of Appeal has held that the merits inquiry should not go any further than a determination of whether the appeal is an arguable one: *Caja Paraguaya De Jubilaciones v. Obregon*, 2019 ONCA 198 at para. 10.

[57] Mr. Friesen has tendered an affidavit from his lawyer, Maranda Fritz, who deposed as to the status of the District Court proceeding and Mr. Friesen's appeal. She noted that there are two critical court proceedings ahead of Mr. Friesen: the issue of the final amount of disgorgement has yet to be resolved, and Mr. Friesen is pursuing an appeal of the District Court matter.

[58] Ms. Fritz deposed that, while she had initially estimated the legal cost of the appeal to be USD $75,000, the recent procedures and judgments before the District Court had increased her estimate to USD $125,000.

[59] Subsequent to the June 17, 2024 order of Judge Young, quantifying the disgorgement amount at USD $11,846,176, another hearing took place at which the District Court considered the SEC's plan to return the disgorged funds to the defrauded investors, referred to by the parties as a "Fair Fund" plan.

[60] On September 18, 2024, Judge Young held:

> Well aware that this case is on appeal, the Court makes the indicative ruling that, if the jury's verdict is affirmed, the Court intends to allow the Fair Plan motion in its entirety, save only that, if the funds presently ordered disgorged exceed the sum of the identified claimants claims, such funds shall be retained by the SEC subject to further order of the Court.

[61] In ordering that the Fair Fund plan not be created until the appeal has been determined, Judge Young effectively ordered a stay. I infer that a stay would not have been granted if the appeal was not arguable.

[62] Judge Young's most recent order, in addition to suggesting that the appeal is arguable and is not frivolous, also sheds light on the likelihood of further court proceedings, since there will need to be an additional hearing to determine what is to be done with any excess, should the funds ordered disgorged exceed the sum of identified claims. Both the appeal and the anticipated subsequent hearing are matters for which Mr. Friesen will require legal representation.

[63] In my view, Mr. Friesen has a right to appeal the District Court order. He needs to access funds to pay counsel for that purpose, and for the remaining steps before the District Court. It is reasonable for his future estimated US legal fees in the amount of $125,000 to be paid out of his frozen assets.

Conclusion

[64] For reasons discussed above, I conclude that Mr. Friesen has met the evidentiary burden upon him to demonstrate that he is unable to pay the Permitted Expenses from assets other than those frozen by the *Mareva* injunction. I also find that the expenses he seeks are reasonable.

[65] The order shall issue on the terms sought in the notice of application.

"Francis J."