COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Wu v. Ma,*
2024 BCCA 196

Date: 20240527
Docket: CA49284

Between:

Hong Fang Wu

Appellant
(Plaintiff)

And

Zhiyong Ma and Ying Wang

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Voith
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated August 11, 2023 (*Wu v. Ma*, 2023 BCSC 1390, Vancouver Docket S229749).

Counsel for the Appellant:	R.W. Grant, K.C. W. Zhang
The Respondent, appearing in person:	Z. Ma
Place and Date of Hearing:	Vancouver, British Columbia March 11, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 27, 2024

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Justice Skolrood

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Summary:

The appellant, Ms. Wu, appeals an order setting aside a Mareva injunction against the respondent, Mr. Ma. The judge set aside the Mareva injunction because there was "no evidence" the respondent still possessed any assets. The appellant contends that the chambers judge erred in failing to recognize that, in some circumstances, an adverse inference can be drawn against an opposing party who files no evidence, or insufficient evidence, on an application. The appellant says that was the case here, as the respondent failed to provide a credible explanation for why he withdrew large sums from his various bank accounts after he learned the appellant had obtained a judgment against him.

Held: appeal allowed. The appellant established that the respondent had largely emptied his various bank accounts shortly after the judgment was awarded. It was then necessary for the judge to weigh that evidence, together with the respondent's explanation for why he had done so, and consider the relative ability of each party to produce evidence. The respondent's failure to provide a credible explanation for his actions required the judge to consider drawing an adverse inference against him.

Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] The appellant, Ms. Wu, appeals an order setting aside a *Mareva* injunction against the respondent, Mr. Ma. The judge set aside the *Mareva* injunction against Mr. Ma on the narrow ground there was "no evidence" Mr. Ma still possessed any assets.

[2] The appellant's primary submission is that the chambers judge erred in failing to recognize that while the burden of proof lies with an applicant on an application for a *Mareva* injunction, in some circumstances, an adverse inference can be drawn against an opposing party who files no evidence, or insufficient evidence, on the application. She contends that such circumstances existed in the application before the judge, as the judge signalled he did not accept Mr. Ma's explanation for what he had done with the significant sums he had withdrawn from his various bank accounts.

[3] For the reasons that follow, I would allow the appeal.

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Background

[4] In 2018 the appellant commenced an action against Mr. Ma and his company Superoptionforex Consulting Inc. (“SOF Inc.”), for damages flowing from the loss of investment monies she had provided to them (the “2018 Action”). She alleged that they had invested her money in the stock of a single company that subsequently went bankrupt. On October 5, 2022, following a 15 day trial, Justice Winteringham awarded the appellant judgment in the amount of $1,259,484.52 (the “Judgment”). Her reasons are indexed at *Wu v. Ma*, 2022 BCSC 1737. Justice Winteringham concluded that SOF Inc. and Mr. Ma had been negligent and breached their fiduciary duty to the appellant. She found SOF Inc. and Mr. Ma jointly and severally liable to the appellant for her losses.

[5] As of October 5, 2022, Mr. Ma and his now ex-wife, Ms. Wang, had been married for 32 years and had lived in their jointly owned property (the “Property”) for 22 years. Immediately following the Judgment, and before the order after trial could be entered and registered against the Property, Mr. Ma and Ms. Wang filed for divorce. Ms. Wang’s claim sought an unequal division of family property and Mr. Ma’s response to the claim did not oppose that unequal division. They also sold the Property.

[6] On December 6, 2022 the appellant commenced a second action against Ms. Wang, Mr. Ma, and others. In her initial pleading she focused on Ms. Wang and Mr. Ma’s divorce and on their sale of the Property. She alleged various transfers were of no force or effect under the provisions of the *Fraudulent Conveyance Act*, RSBC 1979, c. 142 [*FCA*], or the *Fraudulent Preference Act,* RSBC 1996, c. 164 [*FPA*], or that they had engaged in an unlawful conspiracy with the intention of preventing her from collecting on the Judgment.

[7] On December 8, 2022, the appellant brought a successful without notice application for a *Mareva* injunction. In granting the injunction the judge said:

> … On the evidence that has been put before me, I find there is a strong prima facie case that Mr. Ma, who is already a judgement debtor, has taken steps to dispose of real property and turn it into liquid assets before the judgement against them could be registered against that property. There is also a strong prima facie case of an intention to transfer those assets to his wife, Ms. Wang.

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[8] Although the quick sale of the Property had initially appeared suspicious, subsequent evidence established that the purchasers were, in fact, arm's-length third parties and the appellant discontinued her claim against them. She also amended her claim so that her amended pleading no longer focused on Ms. Wang and Mr. Ma's divorce or on the sale of the Property. Instead, the amended pleading now focused on the fact that almost immediately after the award of the Judgment, Ms. Wang and Mr. Ma drew down their joint line of credit to its limit and withdrew hundreds of thousands of dollars from their joint and individual bank accounts. The appellant's Amended Notice of Civil Claim alleged that a series of transactions, defined as "Fraudulent Transfers", were contrary to the *FCA*, or the *FPA*, or were part of an unlawful conspiracy.

[9] On March 9, 2023 and May 2, 2023, Ms. Wang and Mr. Ma respectively filed applications to set aside the *Mareva* injunction. The applications were heard on May 16–17 and June 22. On August 11, 2023, the judge, in reasons indexed at 2023 BCSC 1390, set aside the injunction he had earlier issued.

[10] Finally, it is relevant that on March 10, 2023, Justice Milman ordered Mr. Ma to attend an examination in aid of execution and to disclose certain documents before the examination.

The Judge's Reasons for Judgment

[11] The judge described the history and basis for each of the 2018 Action, the initial claim filed by the appellant, the without notice *Mareva* injunction he granted, the appellant's amended pleading and the application to set aside the *Mareva* injunction that was before him.

[12] He spent some time describing the withdrawals that each of Ms. Wang and Mr. Ma made from different bank accounts as well as the subsequent flow of funds to other and sometimes new accounts they each established with, in some cases, still further withdrawals from those accounts. For example, as it related to Mr. Ma, the judge said:

> [18] Mr. Ma's share of the proceeds of sale were deposited into an existing TD Bank account in his own name on November 10, 2022, but $150,000 was withdrawn the same day and deposited into a new RBC account. From the funds remaining in the TD account, there was a $20,000 credit card payment on November 14, and transfers totalling $87,628.37 to a new account at the same branch on November 15, 2022. Mr. Ma then made ten cash withdrawals of $5,000 each on the day of the transfer, with a further withdrawal of $20,000 on November 29. By the date of the injunction, the balance in the new TD account was less than $2,800.
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> [19] At an examination in aid of execution, Mr. Ma did not offer a clear explanation for the cash withdrawals other than to suggest that at least some of them involved cash repayments of personal loans from creditors whose full names he could not remember. There is nothing on the TD bank statements to indicate a large repayment on an unsecured line of credit.
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> [20] Meanwhile, withdrawals of $80,000 and $58,000 were made from Mr. Ma's new RBC account on November 14, 2022. One of those withdrawals is recorded as a "purchase", the other as a "funds transfer".

[13] The judge correctly described the requirements for a *Mareva* injunction as well as the principles that govern a "set-aside" application. He also identified the relevant requirements and provisions of both the *FCA* and the *FPA* as well as the constituent elements of a conspiracy.

[14] The judge then turned to the claims made against Ms. Wang and said:

> [34] In relation to Ms. Wang, I find that the plaintiff has failed to show a strong *prima facie* case on the pleadings as they now stand. The injunction was issued at a time when the property—the most significant known asset of the defendants—had been sold in what appeared to be suspicious circumstances, and there appeared to be a risk of disposal or disposition of those funds.
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> [35] The plaintiff now concedes that the property sale was *bona fide* and made in good faith, pursuant to s. 2 of the *FCA* and s. 6 of the *FPA*. As such, anything Ms. Wang did with that money cannot be regarded as a fraudulent transfer under either statute. Further, the evidence shows that Ms. Wang received the share of the net proceeds to which she was legally entitled as joint owner of the property. Her receipt of those funds cannot in any sense be

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> characterized as a "transfer" to her from Mr. Ma. The plaintiff holds no judgment against Ms. Wang and is not her creditor under either statute. Ms. Wang is also not a creditor of Mr. Ma for purposes of receiving a preference under the *FCA*.
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> [36] Counsel for Ms. Wang has gone to some length in attempt to show that most withdrawals from joint lines of credit over the years were made by Mr. Ma, and that Ms. Wang made most of the payments. But even if Ms. Wang withdrew substantial amounts, she did so as the joint owner of those lines of credit. Not being a judgment debtor, she was entitled to protect her share of joint assets from execution of the plaintiff's judgment against Mr. Ma.
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> [37] For the same reasons, I find that there is no evidence amounting to a strong *prima facie* case that Ms. Wang participated in a conspiracy with Mr. Ma to frustrate the plaintiff's ability to collect on her judgment.
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> [38] In any event, I further find that the balance of justice and convenience does not support the continuation of the injunction against Ms. Wang. The effect of the injunction is now to freeze funds she properly holds and to which the plaintiff has no claim as a judgment creditor. That conclusion is not dependent upon, but is strengthened by the fact that Ms. Wang is no longer the spouse of Mr. Ma. Counsel for the plaintiff suggests their divorce is a sham, but I have been given no basis to look behind a valid order of this Court.

[15] The appellant does not appeal any of the foregoing findings but advises that she nevertheless intends to pursue aspects of her claim against Ms. Wang.

[16] The judge then addressed the claim against Mr. Ma. He accepted the claim against Mr. Ma was "somewhat stronger" and found the appellant had established a strong *prima facie* case against Mr. Ma (at para. 39). Importantly for present purposes, he identified that Mr. Ma claimed to have "[given] money to people he described as creditors and now claim[ed] to be unable to identify"; para. 39. He also said:

> [40] Unexplained transfers to unknown third parties indicate a strong *prima facie* case that Mr. Ma has attempted to put exigible assets out of reach of the plaintiff. There is evidence that he hastily divested himself of assets shortly after the decision in the original action and a lack of evidence that he received valuable consideration. Proof of such conduct comes within the "badges of fraud" referred to in *Wu v. Gu*, 2020 BCSC 396 at para. 84.

[17] The judge's conclusions, however, in setting aside the injunction against Mr. Ma, are captured in the following paragraph:

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> [46] Although the plaintiff can be said to still have a strong *prima facie* case, Mr. Ma's most significant known asset—his interest in the property—has been disposed of in a transaction now recognized as *bona fide*. Mr. Ma has since disposed of much of what he received from that sale in transactions that may or may not have been intended to defeat the plaintiff's claim. But the unfortunate fact is that there is no evidence of any significant assets still in Mr. Ma's hands for the injunction to restrain, particularly as funds necessary for living and legal expenses are already exempt from the injunction. As the authorities indicate, the continued existence of exigible assets is a factor to be considered in weighing the balance of justice and convenience. It is one that I find to be determinative on these facts. The injunction has not been shown to have any ongoing practical utility.

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Analysis

[18] A *Mareva* injunction is an equitable remedy that involves the exercise of judicial discretion. A judge's order will not be interfered with unless the judge erred in principle, clearly and demonstrably misconceived the evidence, or made an order that has resulted in a clear injustice: *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, (1998), 59 B.C.L.R. (3d) 196 (C.A.) at para. 23; *ICBC v. Patko*, 2008 BCCA 65 at para. 22.

[19] Though the appellant has raised several issues on appeal, her counsel accepts that the "key argument" being advanced turns on whether the judge erred in failing to appreciate that, in the circumstances of this case, it was open to him to draw an adverse inference against Mr. Ma for failing to provide any, or sufficient, evidence to credibly explain what he had done with the significant sums of cash he had withdrawn from various bank accounts in the month or two after the Judgment was awarded.

[20] This aspect of the appellant's submissions turns on various legal propositions, on the evidence before the judge, and on certain of his findings.

[21] I have said the judge correctly described the objects and requirements of a *Mareva* injunction. He identified that the purpose of a *Mareva* injunction is to "prevent a defendant from removing assets from the jurisdiction, or from disposing or dealing with them within the jurisdiction in a way that will render an eventual

judgement unenforceable"; para. 22: see also *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 at para. 45. He appreciated that a *Mareva* injunction is a "harsh and exceptional remedy"; para.22; see *Tracy* at para. 76. He understood that an applicant for a *Mareva* injunction must "first establish a strong *prima facie* case, after which the focus of the application shifts to the balance of justice and convenience between the parties"; para. 23, see *ICBC v. Patko* at para. 25; *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 at paras. 10 and 18. Finally, he appreciated that there are a broad range of factors that can inform the balance of convenience between the parties; para. 25; see for example *Hornby Apartment Ltd. v. Le Soleil Hospitality Inc*., 2009 BCSC 711 at para. 16.

[22] In order to obtain a *Mareva* injunction the applicant must also establish that the respondent has assets the injunction would cover or pertain to. In Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Toronto: Carswell, 2023) at 2:120, the author explains that "[i]t may not be necessary for the claimant to show specific evidence of the defendant's assets", however, "there must be some material from which it is reasonable to infer or deduce that there are assets on which the injunction will bite"; quoting from *Revenue 7 Customs v. Cozens*, [2011] EWHC 2782 (Ch. D.), at para. 41.

[23] In *ICBC v. Patko*, Chief Justice Finch, for the Court, in an often quoted statement, said:

> [25] …Second, the interests of the parties must be balanced, having regard to all the factors, to reach a just and equitable result. Two relevant factors are evidence showing the existence of assets within British Columbia or outside, and evidence showing a real risk of their disposal or dissipation, so as to render nugatory any judgement…
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> [Emphasis added.]

See also *Kepis* at para. 18.

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[24] In *ICBC v. Patko*, and other authorities that identify the need for there to be "evidence showing the existence of assets within British Columbia or outside", this consideration is engaged at the second stage, or at the balancing of interests stage, of the *Mareva* injunction analysis. The judge correctly identified both the requirement and its proper place in the analysis: para. 46.

[25] Factors that inform the balance of convenience are generally considerations that, depending on the circumstances, may have greater or lesser significance in a particular application. The need for a defendant to either own assets, or to anticipate receiving assets, before a *Mareva* injunction can issue is a requirement of a different nature. It is more fundamental. Indeed, it is antithetical to the core purpose of a *Mareva* injunction to seek such relief against a defendant who has no assets. In such circumstances there is nothing for the defendant to dissipate. There is no prospect of wrongful conduct that needs to be enjoined.

[26] Regardless of the unusual nature of this enquiry within the "balancing of interests" exercise, the judge concluded this factor was "determinative" of the application before him. However, the concern raised by the appellant rests not on the principled requirement that a defendant must either own or anticipate receiving assets before a *Mareva* injunction can be granted, but rather on the judge's finding that "there [was] no evidence of any significant assets still in Mr. Ma's hands for the injunction to restrain"; para. 46.

[27] To appreciate the appellant's submission, it is necessary to understand Mr. Ma's evidence of what he said he did with the significant sums of cash he had removed from various bank accounts in the month or two after the Judgment was awarded. During his examination in aid of execution he gave evidence that he had borrowed various sums of money from at least four different individuals several years earlier. Some of these loans were apparently from as early as 2014 or 2015 but remained outstanding. He could not recall the names of the persons he had borrowed money from, though two of them were called Amy and Peter respectively.

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He could not recall the amounts of the loans. Nor did he have any record of these loans though he said the individuals themselves held IOUs on pieces of paper.

[28] He said that Amy, Peter, and a male he had never met before, but who now held the IOU he had earlier given another unnamed person, separately appeared at his door step. Each individual apparently arrived without warning or notice. Each attendance followed the sale of the Property. Each occurred sometime in the latter part of November or in early December, 2022. He said he paid Amy $50,000 in cash, Peter "in the range" of $80,000–$90,000 in cash, and the unknown male "around $50,000" in cash. The unknown male apparently tore up the IOU he held after their interaction. He said no record existed of these payments.

[29] The judge was properly skeptical of Mr. Ma's evidence of "[u]nexplained transfers to unknown parties": para. 40. Indeed, it was this very evidence that, the judge said, constituted "a badge of fraud" and "indicate[d] a strong *prima facie* case that Mr. Ma [had] attempted to put exigible assets out of reach of the [appellant]"; para. 40.

[30] Nevertheless, as noted, the judge ultimately decided the application on the basis that "there was no evidence of any significant assets in Mr. Ma's hands". The appellant contends it is this finding, in light of the circumstances I have described, that demonstrates the judge's error.

[31] To be clear, the appellant accepts the legal burden of proof on the application rested with her. She says, however, that in circumstances where a plaintiff has done everything they can to establish a fact they are required to prove, but there exists an "informational inequality" between the parties in relation to the fact or issue, an evidential burden may shift to the other party. In the absence of evidence from that party the court may draw an adverse inference against them when weighing the whole of the evidence that relates to the issue. In practical terms, the appellant contends she did everything she could, through bank records and the examination of

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Mr. Ma, to establish he had withdrawn and held significant sums of cash from his bank accounts. It then fell to Mr. Ma to explain with cogent and credible evidence what happened to that money. She contends the judge erred in failing to recognize the evidential burden that lay with Mr. Ma and in failing to then weigh his improbable evidence.

[32] The legal principles that ground the appellant's submission are well established, though they are often applied in different contexts and though aspects of the language used by counsel for the appellant are not quite accurate.

[33] The legal burden of proof is often described as the persuasive burden; Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th ed., Lexis Nexis at 91–92. Where the legal burden of proof lies in relation to a given fact or issue is a question of substantive law.

[34] The burden of proof that lies with a party does not, strictly speaking, "shift"; Sopinka at 112; *Snell v. Farrell*, [1990] 2 S.C.R. 311 at para. 32; *Voltage Holdings, LLC v. Doe #1*, 2023 FCA 194 at para. 39. Nor is there, strictly speaking, an "evidential" or "provisional" burden on the other party; *Snell* at para. 32; Sopinka at 91–92. Nevertheless, the failure of a defendant to respond with exculpatory evidence to evidence proffered by a plaintiff may have consequences. In particular, it is open to a trier of fact, in some circumstances, to draw an adverse inference against the defendant; *Snell* at paras. 32–33; *Hanson-Tasker v. Ewart*, 2023 BCCA 463 at para. 80.

[35] There are numerous contexts in which this principle has been applied. In *Snell*, a medical malpractice case, the question was whether the burden of proof on the issue of causation rested with the plaintiff and how the plaintiff might discharge that burden. The court referred, at para. 29, with approval to the well-known dictum of Lord Mansfield in *Blatch v. Archer* (1774), 1 Cowp. 63:

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> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

[36] The court in *Snell* also said:

> 16 Although, to date, these developments have had little impact in other common law countries, it has long been recognized that the allocation of the burden of proof is not immutable. The legal or ultimate burden of proof is determined by the substantive law "upon broad reasons of experience and fairness": 9 Wigmore on Evidence, paragraph 2486, at p. 292. In a civil case, the two broad principles are:
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> > 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
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> > 2.that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.
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> …
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> 30 In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary. This has been expressed in terms of shifting the burden of proof. In Cummings v. City of Vancouver (1911), 1 W.W.R. 31 (B.C.C.A.), Irving J.A. stated at p. 34:
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> > Stephens [sic] in his Digest (Evidence Act, 1896) says: "In considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge with respect to the fact to be proved, which may be possessed by the parties respectively."
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> > Hollis v. Young (1909) 1 K.B., 629, illustrates the rule that very little affirmative evidence will be sufficient where the facts lie almost entirely within the knowledge of the other side.
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> …
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> 32 These references speak of the shifting of the secondary or evidential burden of proof or the burden of adducing evidence. I find it preferable to explain the process without using the term secondary or evidential burden. It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. See Cross, op. cit., at p. 129. In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted.

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> 33 The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a "robust and pragmatic approach to the ... facts".

[37] These principles, again in the context of a medical malpractice and on the issue of causation, were more recently reaffirmed in *Benhaim v. St-Germain*, 2016 SCC 48, at paras. 52–54. The majority emphasized that “[t]he adverse inference of causation described in *Snell* is permissive precisely because it is a component of the fact-finding process”; at para. 52. Accordingly, there is no requirement the judge apply an adverse inference if a defendant chooses to call no evidence. “Whether an inference…is warranted, and how it is to be weighed against the evidence, are matters for the trier of fact”; at para. 42. The decision to draw an adverse inference “must be based on an evaluation of all of the evidence”; at para. 44.

[38] In *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.,* 2007 ONCA 425, in circumstances that mirror the present appeal more closely, the plaintiff brought an action against R on his guarantee and against R and his wife A on the ground that R’s transfer of his interest in two properties to A were fraudulent conveyances. At the end of the plaintiff’s case, both R and A brought motions for a nonsuit and elected to call no evidence. On appeal, Laskin J.A., for the court, said:

> [39] The crucial question in any fraudulent conveyance action is whether the plaintiff has proved the fraudulent intent of the debtor. While the legal burden to prove fraudulent intent remains on the plaintiff throughout the trial, the plaintiff can raise an inference of fraud sufficient to put a "burden of explanation" on the defendant debtor. The plaintiff typically raises an inference of fraud by putting forward "badges of fraud". These "badges of fraud" vary from case to case. They are no more than typical and suspicious facts that may allow the court to make a finding of fraud absent an explanation from the debtor. See C.R.B. Dunlop, Creditor-Debtor Law in Canada, 2nd ed. (Toronto: Thomson Canada, 1995) at 613-15.
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> [40] The court, however, is not compelled to draw this inference of fraudulent intent from badges of fraud pleaded by the plaintiff. See *Koop v. Smith* (1915), 51 S.C.R. 554, [1915] S.C.J. No. 34, at pp. 558-59 S.C.R. The

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> court may dismiss a fraudulent conveyance action because it has decided that the surrounding circumstances taken as a whole explain away the plaintiff's evidence. It seems to me that is what the trial judge did in this case.

[39] The foregoing passages from *FL Receivables* have been cited more recently in 6071376 *Canada Inc. v. Khedmatgozar*, 2024 ONCA 248 at para. 9.

[40] The principles I have described are not limited to instances where a defendant chooses to call or give no evidence in response to the evidence of the plaintiff. Instead, they extend to cases where the defendant has led some evidence. In *Ediger v. Johnston*, 2013 SCC 18, another medical malpractice case, the court said:

> [36]…. The trier of fact may, upon weighing the evidence, draw an adverse inference against a defendant who does not introduce sufficient evidence contrary to that which supports the plaintiff's theory of causation. In determining whether the defendant has introduced sufficient evidence, the trier of fact should take into account the relative position of each party to adduce evidence (*Snell*, at p.330)
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> [Emphasis added.]

See also *Benhaim* at para. 54.

[41] In this case, the appellant was able to establish that Mr. Ma had largely emptied his various bank accounts in a reasonably short time after the Judgment was awarded. She could do no more with the documents she had obtained and through her examination of Mr. Ma. Only Mr. Ma knew what he did with the cash he had withdrawn from his bank accounts and he gave evidence about that issue. It was then necessary for the judge to weigh that evidence "taking into account the relative ability of each party to produce evidence".

[42] I have considered whether it might be said the judge did engage in weighing the evidence before him and his conclusion, following that exercise, was that he accepted Mr. Ma's evidence that he no longer had any assets in his possession. If that were the case, the judge's findings would be entitled to significant deference.

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[43] In my view, reading the judge's reasons generously, it is apparent the judge did not undertake such an exercise.

[44] First, there is no suggestion in the judge's reasons that he weighed the evidence of the appellant and respondent respectively. There is, for example, no discussion of why he might have chosen to accept Mr. Ma's evidence.

[45] Second, the judge had earlier concluded that the appellant had raised a strong *prima facie* case, in large measure on the basis of the inherently implausible evidence Mr. Ma gave about "unexplained transfers to unknown third parties". That evidence, the judge found, was a "badge of fraud". It would be curious if the judge then chose to accept that same inherently implausible evidence without further corroboration or discussion.

[46] Third, the judge had earlier emphasized that the onus or burden to make out the requirements of the *Mareva* injunction lay with the appellant. There was no apparent recognition by the judge that in the absence of "sufficient" and cogent evidence from Mr. Ma, it was open to the judge to draw an adverse inference against him. To be fair, it should be noted that it does not appear, from the written submissions of the appellant before the judge, that the possibility of drawing an adverse inference in such circumstances was brought to the judge's attention.

[47] Finally, the judge framed his conclusion in terms of there being "no evidence of any significant assets still in Mr. Ma's hands". The judge's emphasis on the absence of evidence suggests he continued to be focused on the onus or burden on the appellant to lead such evidence rather than on his having accepted the evidence given by the respondent.

[48] The judge also commented, and Mr. Ma emphasizes, that Mr. Ma's ongoing living expenses (to an amount of $5,000 per month) and his legal expenses (in amounts that varied over time) were, by virtue of earlier orders, exempt from the *Mareva* injunction. This is true, but the terms of the initial *Mareva* injunction—made

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December 8, 2022—ordered that "[b]efore spending any money on living, business or legal expenses, the Ma defendants must advise the plaintiff's solicitors in writing of the intended source of the funds".

[49] The record indicates that Mr. Ma only complied with this term of the initial *Mareva* injunction order on an irregular basis. The self-evident purpose of this term of the order was to ensure the appellant was kept apprised of Mr. Ma's financial dealings and assets. Having failed, in the main, to comply with the terms of the order, it is not open to Mr. Ma to assert that even if he did not expend the monies he had withdrawn from his bank accounts in the way he described, he would nonetheless have spent that money under the terms of the judge's initial order.

[50] In my view, the judge erred in not recognizing that it was open to him to draw an adverse inference against Mr. Ma. This was based on both the relative ability of each party to explain what happened to the monies Mr. Ma withdrew from his various bank accounts and the improbability of Mr. Ma's account.

[51] However, I see no useful purpose in remitting the matter to the lower court. Absent this error, it seems clear the balance of interests favored the appellant. The appellant already held a judgment against Mr. Ma and his company. Mr. Ma had acted in a manner that indicated there was a real risk he was attempting to dissipate his assets and to frustrate the appellant's ability to recover on the Judgment: *Kepis* at para. 18.

[52] In my view, the judge's order setting aside the initial *Mareva* injunction should, in turn, be set aside. Many of the terms of the initial *Mareva* injunction order are, however, no longer relevant or appropriate. For example, the initial order included Ms. Wang. It included reference to the Property. It also contained other terms that have been overtaken by events. Accordingly, it will be necessary for counsel for the appellant to prepare a new order that incorporates appropriate terms from the "Model Order for Preservation of Assets" and that properly reflects those terms from

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the initial order that continue to be appropriate. If the appellant and respondent respectively are unable to agree on the terms of an order, they are to settle the order before the Registrar of this Court.

[53] One other term of the order will be relevant. In the Sharpe text, the author observes that "… a plaintiff who obtains a *Mareva* order is obliged to proceed as rapidly as possible with the action so that, if the defendant does succeed, the disadvantage will be minimized"; at 2:130. In *Tracy*, the court said that a *Mareva* injunction should not issue "without a commitment by the applicant to expedite the trial" and that the "expected duration of such an order should be addressed before it is made"; at para. 76.

[54] In this case, the appellant filed its amended claim on April 3, 2023, or a little more than a year ago. It has obtained some disclosure of documents. The appellant should now expedite the progress of its action if it intends to pursue the matter. Accordingly, the order being made will have a term of nine months. If the order expires before the action is heard it remains open to the appellant to apply for a new order in the Supreme Court.

[55] Finally, at the outset of the appeal the respondent brought an application to admit fresh evidence. That evidence includes correspondence between the parties leading up to the application to set aside the initial *Mareva* injunction; documents from the 2018 Action including excerpts from examinations for discovery and publicly available documents (such as news releases and website printouts) which predate the set aside application; and correspondence between the parties after the set aside application.

[56] The test for allowing fresh evidence is well-established; *Palmer v. The Queen*, [1980] 1 S.C.R. 759. More recently in *Barendregt v. Grebliunas*, 2022 SCC 22, the majority said that the test for fresh evidence is "purposive, fact specific, and driven by an overarching concern for the interests of justice. It ensures that the admission

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of additional evidence on appeal will be rare, such that the matters in issue between the parties should 'narrow rather than expand as [a] case precedes up the appellate ladder'"; at para. 31, quoting *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44, at para. 10.

[57] I have reviewed the various documents that Mr. Ma seeks to admit. Most of those documents could, with reasonable diligence, have been placed before the chambers judge. Many others are not relevant to the narrow issue raised on appeal. In my view, Mr. Ma's application to admit this evidence should be dismissed.

Disposition

[58] I would dismiss the application for fresh evidence, allow the appeal and, subject to the qualifications I have identified, restore the judge's initial order.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Justice Skolrood"

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