COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pangaea Resources Limited v. Harder,* 2024 BCCA 286

Date: 20240807
Docket: CA49488

Between:

Pangaea Resources Limited, InCor Services Limited, George Molyviatis and Jocelyn Bennett

Appellants
(Defendants)

And

Lorne Harder, Springhill Investments Ltd. and Harder Investments Ltd.

Respondents
(Plaintiffs)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated November 14, 2023 (*Harder v. InCor Holdings Limited*, 2023 BCSC 2021, Vancouver Docket S237204).

Counsel for the Appellants:	D.R. Shouldice
Counsel for the Respondents:	P.J. Sullivan S.R. Shuchat
Place and Date of Hearing:	Vancouver, British Columbia June 14, 2024
Place and Date of Judgment:	Vancouver, British Columbia August 7 2024

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Butler

Summary:

Court of Appeal dismisses appeal from Mareva injunction granted pre-judgment against several defendants in connection with loans made by plaintiffs. A strong prima facie case had been shown, and the inclusion of the defendants Pangaea, Bennett and Molyviatis was justified on the evidence. As well, CA noted that non-parties may be included in Mareva injunctions where necessary to prevent dissipation of assets or to otherwise ensure that the court will be in a position to enforce its judgments should one be granted.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] By order dated December 22, 2023, Mr. Justice Milman in the court below granted a Mareva injunction against Mr. George Molyviatis, Ms. Jocelyn Bennett, InCor Holdings Limited ("IHL"), InCor Holdings PLC and Pangaea Resources Ltd. ("Pangaea"), collectively referred to in the order as the "Injunction Defendants", to maintain proceeds of disposition from any sale of securities of certain companies (the "Issuers") until further order of the Court or written agreement between the parties. The order also prohibited the Injunction Defendants from transferring any securities of the Issuers except by sale at market value. This 'freeze' portion of the order was supplemented by 'disclosure' terms, which required the Injunction Defendants to provide the plaintiffs' solicitor with lists of their respective assets as of the date of the order, whether in British Columbia or not, and whether such assets were held individually by an Injunction Defendant or jointly held with another person, or by another on their behalf. A copy of the terms of the order is attached as a schedule to these reasons.

[2] No order was made against the defendant InCor Services Limited ("ISL"), which was not represented at the hearing below; nor was any order sought or made against InCor Energy Minerals Limited, InCor LeadFX Limited Partnership or LeadFX Inc., although they were also defendants. The chambers judge referred in his reasons to IHL (previously known as InCor Holdings PLC), Mr. Molyviatis, Ms. Bennett and Pangaea collectively as the "responding defendants". To complicate things further, only Mr. Molyviatis, Ms. Bennett, Pangaea and ISL are appellants in this appeal; IHL has not appealed.

Factual Background

[3] The plaintiff/respondents are Mr. Harder and two of his wholly-owned corporations, Springhill Investments Ltd. ("Springhill") and Harder Investments Ltd. In 2019, Mr. Harder had received substantial funds on the sale of his insurance business and wished to invest some of those funds in high-return (and therefore high-risk) vehicles. In the past, he had invested in and played an active role in the management of Cascadero Copper Corporation, a publicly-owned corporation listed on the TSX. Evidently he was a director and chairman of the board of Cascadero; his sister had been the company's CEO until her death in May 2019.

[4] In the course of seeking to find new management for Cascadero, Mr. Harder met another shareholder, Mr. Molyviatis. Mr. Molyviatis introduced him in turn to his business partner, Ms. Bennett, and eventually their companies. It appears that both individuals live somewhere in Europe and as the chambers judge noted at para. 15 of his reasons, "they quickly developed a rapport with Mr. Harder and he came to trust them." The chambers judge described IHL and the other corporations with which Mr. Harder came into contact through Ms. Bennett and Mr. Molyviatis:

> On August 23, 2019, Mr. Molyviatis sent Mr. Harder a promotional summary of IHL's business. Among other things, the document describes IHL as an "early stage development investor …" There is a dispute between the parties about the degree to which the speculative nature of IHL's investment strategy was brought home to Mr. Harder at the time, although a review of that document suggests that it should have been apparent that IHL was a far cry from a blue-chip investment prospect.
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> Through IHL, Mr. Harder became involved with a number of its associated businesses, including the following:
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> a) Pangaea, which is a mining company based in Belize, of which Ms. Bennett is a director and shareholder (Ms. Bennett has deposed that Pangaea holds her own, Mr. Molyviatis' and a third InCor group investor's interests);
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> b) the defendant LeadFX Inc. ("LeadFX"), a Canadian company whose shares were, until May 2019, publicly traded on the TSXV and whose main asset appears to be an interest in a lead mine in Western Australia that is no longer operational;
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> c) the defendant InCor Energy Materials Limited, also known as the "InCor Fund" ("IEML"), a New Zealand limited partnership that holds

shares in LeadFX and whose limited partners include Ms. Bennett, Mr. Molyviatis, Mr. Harder, IHL and 20 others;

d) the defendant ISL, the entity to which Ms. Bennett instructed Mr. Harder to send many of his advances, although Ms. Bennett says that neither she nor Mr. Molyviatis is an officer or shareholder of that entity; and

e) Besra Gold Inc. ("Besra"), a Malaysian gold exploration company whose shares trade on the Australian Stock Exchange. [At paras. 19–20.]

Although the chambers judge did not refer to the basis on which the Court assumed (*in personam*) jurisdiction over of any of these corporations, one suspects it is unlikely that any of them — or indeed either of the individual defendants — has assets in this province. I will proceed on the assumption that the judge was satisfied the Court had jurisdiction by reason of attornment or on some other basis.

[5] It was Mr. Harder's evidence that Mr. Molyviatis and Ms. Bennett told him they held a majority interest in IHL, although at the time of the hearing below he was no longer confident of that assertion. Beginning in October 2019, Springhill purchased a 12.3% interest in IHL for $3.5 million by way of a private placement, and a number of partnership units in InCor Energy Minerals Ltd.

[6] In early 2021, Mr. Molyviatis and Ms. Bennett also began to request a series of *loans* for various purposes from Mr. Harder. He agreed, apparently without legal advice, to provide several such loans, mainly through Springhill. The chambers judge summarized them as falling into three categories. The first was the "Cascadero Share Purchase Loan", which began with an agreement on Mr. Harder's part to cause Springhill to lend IHL up to $6,308,050. Of this, $3 million was to be used for IHL's ordinary "working capital purposes" and the balance to purchase shares of Cascadero in order to allow it to "demonstrate confidence from an arms-length party". In anticipation of the loan, IHL issued a promissory note to Springhill on March 4, 2021. However, within a couple of months, Ms. Bennett proposed (and Springhill apparently agreed) that that promissory note should be superseded by another note in the amount of $6,308,050, which would be used to "provide IHL with a 'lending facility'." (At para. 27.) It was also agreed that by

separate letter, IHL would grant Springhill a security interest over approximately $8.5 million worth of other securities held by it. Further, Springhill as holder of the note was to receive 500,000 shares of IHL as "interest" on the loan.

[7] The chambers judge recounted Mr. Harder's evidence concerning this loan as follows:

> Mr. Harder says that he or Springhill acquired the Cascadero shares contemplated to be purchased from the individuals and companies listed on the May 17, 2021 Promissory Note and transferred those to IHL as promised. In addition, Springhill was supposed to advance a further $1 million to IHL at a later date to allow IHL to participate in an anticipated Cascadero rights issuance. According to Mr. Harder, the figure of $1 million was only an estimate and the amount ultimately requested turned out to be only $780,000. Accordingly, on January 5, 2022, Mr. Harder arranged for a further $780,000 to be wired to ISL. The purpose of that remittance was described as "repayment of loan." Mr. Harder says that the rights issuance ended up being oversubscribed and costing only $600,000 but he was never refunded the extra $180,000. In addition, he says, he never received the 500,000 shares in IHL that were promised as interest on the loan, nor the side letter of undertaking pledging the securities worth $8.5 million that he was supposed to have received. [At para. 30; emphasis added.]

On the other hand, Ms. Bennett's evidence was that:

> …Mr. Harder has advanced a total of $6,538,050 under this credit facility, which is significantly more than the face value of the May 17, 2021 Promissory Note. That figure includes the following sums:
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> a) $2,308,050 to procure the Cascadero shares;
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> b) $2 million to enable IHL to participate in a private placement of Western Gold Ltd., an investment supported by Mr. Harder;
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> c) $1,450,000 for IHL and LeadFX's working capital needs; and
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> d) $780,000 to participate in the Cascadero rights offering. [At para. 31.]

[8] The new note was dated May 17, 2021 and stated a due date of December 31, 2021. It listed various persons to whom portions of the loan funds were to be disbursed, including Cascadero.

[9] The second category of borrowing arose in connection with an IPO being carried out by Besra Gold Inc. ("Besra"), a Malaysian exploration company. In June 2021, Ms. Bennett contacted Mr. Harder requesting a loan of $4 million (AUD)

for a maximum of three months in order to complete the IPO. Ms. Bennett told him that Besra had issued many millions of dollars worth of debentures to Pangaea and offered Mr. Harder a "fee" of 1 million convertible debentures of Besra. The judge found that:

> Mr. Harder agreed to advance the loan as requested. That same day, he arranged to wire $4 million to *ISL*, describing the purpose on the remittance form as being "for a short term loan." Upon receiving the funds, Ms. Bennett emailed him to thank him and to advise that she would send the associated promissory to him "in the next couple of hours." She emailed a draft promissory note to him two days later, on June 23, 2021. The email stated that they were "also preparing the promissory note/loan agreement between IHL and Pangaea which will grant the specific security as we discussed over the assets of Pangaea."
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> The promissory note as executed by Ms. Bennett and Mr. Molyviatis on behalf of IHL (the "June 21, 2021 Promissory Note") states that IHL promises to repay Springhill $4 million on or before December 31, 2021. Springhill was to be paid interest in the form of 1 million shares of Besra, with a par value of A$0.20 per share.
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> The Besra IPO completed in October 2021, raising approximately $10 million. The plaintiffs assert that they appear to have been the largest investor in the IPO but they never received the 1 million Besra shares promised as interest, nor did they receive the pledge of security over Pangaea's assets.
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> In addition, the defendants did not repay the principal amount of the loan by December 31, 2021 as promised. The defendants say that they have been unable to pay the balance since then because the IPO has not yet generated sufficient capital gains. Nevertheless, the plaintiffs have discovered through public filings that between April and October of 2023, Pangaea disposed of Besra shares yielding proceeds of $4,629,341.57.
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> Pangaea's trades in Besra shares attracted regulatory scrutiny from the Australian Stock Exchange. In August 2023, after receiving inquiries from the regulator, Besra issued a news release stating that Ms. Bennett, who had until then been a director and chair of Besra's board, had been removed as chair and was asked to resign as a director, for failure to comply with Besra's trading policy. [At paras. 34–8; emphasis added.]

[10] I note a few features of these findings. First, the evidence to which we were referred does not explain the legal means by which Pangaea would become obliged, or could properly undertake, to pledge its assets as security for IHL's debt to Springhill, but I assume it would have involved a guarantee of some kind by Pangaea. I also note the reference to Springhill's $4 million advance being made to *ISL*, as opposed to *IHL*. This may be just one example of the treatment by

Ms. Bennett and Mr. Molyviatis, evidently without question by Mr. Harder, of the various companies almost interchangeably and without explanation. As well, I note that the promissory note dated June 21, 2021 stated the principal of IHL's loan as $4 million (CDN), not $4 million (AUD). Finally, the reference in para. 36 of the chambers judge's reasons to 1 million Besra *shares* may be intended to refer to $1 million worth of *debentures*. Presumably, these matters of detail will be resolved at trial as necessary.

[11] The third category of loans discussed by the chambers judge involved LeadFX, a Canadian corporation of which Mr. Molyviatis was a director. Its largest shareholder was a group known as "Sentient Equity Partners" and according to Ms. Bennett, IHL wished to privatize LeadFX and buy out Sentient Partners with a view to reopening a defunct lead mine in Australia owned by the company. Mr. Harder was persuaded to wire $350,000 on August 23, 2021, $450,000 on December 13, 2021 and $250,000 on February 1, 2023 to LeadFX on Springhill's behalf. The judge continued:

> In the case of the first two of these wire transfers, the remittance form describes the purpose of the advance as "share purchase." Mr. Harder has been unable to locate any documentation of the terms under which these advances were made, although he asserts that they were all intended to be short-term loans that would be repaid in a few days.
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> There is some support for this suggestion in the record, at least with respect to the December 13, 2021 advance. On December 14, 2021, Ms. Bennett emailed Mr. Harder to thank him for the $450,000 received the previous day. The email stated as follows:
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> > A sincere big thank you for helping [IHL] out with LeadFx.
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> > The funds arrived yesterday, so all is well for the rest of the year.
> >
> > We expect to be in funds in the next few days and will immediately return the funds to you.
> >
> > In the meantime, I will send you a promissory note for this loan of $450k tomorrow for your files.
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> No such promissory note was provided. None of these loans have been repaid to date.
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> In addition, in March 2022, Mr. Harder was approached to grant another loan, this time to IHL, in the amount of $300,000. Mr. Harder agreed to do so. On March 8, 2022, Ms. Bennett sent him an email attaching a draft promissory note between IHL and HIL [Harder Investments Ltd.] stipulating that the

> principal amount of $300,000 was to be repaid by IHL by December 31, 2022. The draft was not signed. On the following day, March 9, 2022, Mr. Harder caused Springhill to wire $300,000 to ISL, stipulating the purpose of the remittance was "for a short term loan."
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> Ms. Bennett says that all of these loans were for the purpose of providing bridge financing for LeadFX, to be repaid only when it completes its restructuring and raises enough new money to make those payments. [At paras. 42–6; emphasis added.]

[12] In the spring of 2022, Mr. Harder began to make demand on his loans to Besra and LeadFX. From then until October 2023, when the plaintiffs commenced their action, his requests for repayment, or at least progress reports, were generally met with silence, although he did receive two payments of $1 million each later in 2022. (According to his pleading, this was received from *ISL*.) His last advance was made in February 2023, following which he experienced a "change of heart" in light of the 'runaround' he was receiving and news of a criminal investigation underway in Switzerland into the conduct of Ms. Bennett and Mr. Molyviatis. Finally, he learned that between April and October 2023, Pangaea had disposed of a large number of Besra shares. None of the proceeds had been remitted to Mr. Harder or his companies.

Proceedings in Supreme Court

Pleadings

[13] The plaintiffs commenced their action in the Supreme Court of British Columbia on October 24, 2023. The plaintiffs' Notice of Civil Claim summarized the "notes and investments" made by the plaintiffs, asserting various warranties, misrepresentations (including negligent and fraudulent misrepresentation and "misrepresentation by silence"), lack of good faith, unjust enrichment, conspiracy by unlawful means, breach of contract, duty of care and fiduciary duty. The relief sought included tracing and constructive trust, damages, interim and permanent injunctive relief, and an accounting for profits. The pleading ended with an endorsement made pursuant to subparas. 10(a) and (c)–(i) of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28.

[14] In their Response filed November 3, 2023, the defendants provided their version of the various transactions. Most notably, they pleaded that Springhill had in October 2019 entered a "Framework Agreement" with IHL that contemplated Mr. Harder's future participation in IHL and other ventures. The loan evidenced by the promissory note dated May 17, 2021, was said to constitute a "credit facility" under this Agreement rather than a term loan. The note dated June 21, 2021 was acknowledged to be due and owing, but IHL pleaded that it was "taking steps to liquidate certain of its positions in Besra in an orderly and reasonable manner to permit [IHL] to repay the balance due." Every allegation of misrepresentations was denied, as was the existence of a duty of good faith or fiduciary duty.

[15] A later amendment to the defendants' Response referred to jurisdictional responses filed by IHL, Pangaea, ISL, LeadFX, Mr. Molyviatis and Ms. Bennett on November 21, 2023, pursuant to R. 21-8 of the *Supreme Court Civil Rules*. In addition, the amendment asserted that the parties to the alleged Framework Agreement and a related subscription agreement had agreed that any dispute or claim arising thereunder would be resolved by arbitration under the rules of the London Court of International Arbitration. Finally, Pangaea, ISL, and LeadFX denied the existence of any "real and substantial" connection between British Columbia and the claims against them. Since this jurisdictional response was not in existence at the time of the hearing below, it was not referred to by the chambers judge and is not invoked or relied on by the parties in this court.

Application for Mareva Injunction

[16] The plaintiffs' application for a Mareva injunction in the court below first came before Madam Justice Murray in late October 2023, at which time counsel for both groups of parties appeared, except for ISL. An interim consent order was agreed upon that prohibited IHL, Pangaea, Ms. Bennett and Mr. Molyviatis from disposing of the proceeds of sale of any securities of Besra, Cascadero, Search Minerals Inc., Western Gold Ltd. or LeadFX until further order of the Court or written agreement of the parties. (The order was initially sealed in part but was later unsealed as spent.) The full hearing of the application was scheduled for November 7, 2023.

[17] Mr. Justice Milman heard the plaintiffs' application on that date, and issued his reasons, which are indexed as 2023 BCSC 2021, on November 14, 2023. After reviewing the factual background, he summarized the law in British Columbia relating to Mareva injunctions, quoting a passage from *Kepis & Pobe Financial Group Inc. v. Timis Corporation* 2018 BCCA 420:

> In sum, British Columbia has forged a flexible approach to applications for *Mareva* injunctions from the more stringent rules-based approach in *Aetna* [*Financial Services Ltd. v. Feigelman* [1985] 1 S.C.R. 2]. 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* [(1994) 100 B.C.L.R. (2d) 335 (S.C.)] 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. [At para. 18, emphasis added.]

[18] Turning to the question of whether the plaintiffs had established a strong *prima facie* case, he characterized the case as involving two kinds of claims. The first was based on fraudulent misrepresentations allegedly made by Ms. Bennett and Mr. Molyviatis, especially relating to the level of risk of the investments and loans made by the plaintiffs, and the failure of Ms. Bennett and Mr. Molyviatis to inform Mr. Harder of the "speculative nature" of IHL's businesses and later, the fact they were under investigation in Switzerland for fraud and misappropriation of funds. (At para. 55.)

[19] However, the chambers judge found that the responding defendants had raised "arguable defences" to this aspect of the plaintiffs' claims. For one thing, Mr. Harder appeared to have had "at least enough business savvy to appreciate that the potential for high returns would carry with it a commensurately higher level of risk", and the nature of IHL's business as described in the promotional literature he had been given would also have made it apparent that the investment carried significant risk. As for the Swiss investigation, Ms. Bennett deposed that she and Mr. Molyviatis themselves had not learned of its existence until December 2019. By

that time Mr. Harder had made his initial investment. As well, it was unclear whether knowledge of the investigation would have made a difference to him in light of the denial by Ms. Bennett and Mr. Molyviatis of any wrongdoing. The judge continued:

> ... Mr. Harder had developed an extraordinary level of trust in Ms. Bennett and Mr. Molyviatis. The allegations were unproven, and on the record before me, remain so today. They appear to be unrelated to the plaintiffs' investments. In any event, Mr. Harder continued to advance funds after learning of the investigation in November 2022. I appreciate that he may have done so because he was by then already heavily committed and was seeking to protect the investments he had already made, but these are merely arguable allegations that do not rise to the level of a strong *prima facie* case. [At para. 57; emphasis added.]

[20] The chambers judge reached a "different conclusion", however, with respect to the second category of alleged wrongs — certain *loans* made by the plaintiffs. (At para. 58.) He found that these had been made on condition that they would be repaid in the short term and indeed some of them were already due and payable at the time of the hearing below. This included $2 million still owing by IHL under the $4 million promissory note dated June 21, 2021, which had been due and payable since December 31, 2021. The same was apparently true of the $450,000 owing (but not evidenced by a note as promised by Ms. Bennett) on the advance made to LeadFX in December 2021. Both loans, the chambers judge found, were intended to be repayable "in the short term."

[21] The judge found that the explanation given by the responding defendants for having failed to pay these loans when due was "not convincing". In his words:

> ... They say that payment will be forthcoming in the ordinary course. Their suggestion of imminent payment is not particularly credible in light of their history of making many previous promises of imminent payment that did not materialise. Also of concern is the fact that they have not explained why more of the proceeds from Pangaea's disposition of the Besra shares was not paid to the plaintiffs in satisfaction of these acknowledged debts, other than to assert that the price of Besra shares has yet to rise to the desired level. [At para. 60.]

[22] Aside from these loans, the judge accepted that there was a "debatable issue" as to whether the other loans made by the plaintiffs were in fact required to be repaid within a few months, as the plaintiffs contended. Although Ms. Bennett had

deposed that the promissory notes did not reflect the parties' actual agreement, she offered no explanation as to why they had been drafted as they were. On the other hand, the parties had been consistently "sloppy" in documenting the loans. In some cases, no effort had been made to reflect the transactions accurately. The carelessness extended to Mr. Harder's wiring remittances, which often misstated their true purposes. There was also some support in the evidence for the responding defendants' contention that IHL's promissory note for $6,308,050 dated May 17, 2021, had been intended to create a "credit facility" with no fixed term for repayment — despite the due date on the note of December 31, 2021. Milman J. continued:

> ... That the parties did not anticipate that the entire debt would be repaid by that date is apparent from the fact that a significant part of the initial advance was not expected to be made by that date. In particular, the $1 million to be advanced for the anticipated Cascadero rights issuance was not in fact advanced until early 2022. This undermines the plaintiffs' suggestion that the entire advance was supposed to have been repaid in full by December 31, 2021.
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> Regardless of whether all of the loans were supposed to be repaid in short order however, the responding defendants have failed to explain why the plaintiffs never received the pledged security as promised in connection with the May 17, 2021 Promissory Note and the June 21, 2021 Promissory Note. Under the May 17, 2021 Promissory Note, Springhill was to receive a side letter of undertaking pledging securities held by IHL that were said to be worth $8.5 million. Under the June 21, 2021 Promissory Note, Springhill was to receive a pledge of security over Pangaea's assets. That unexplained failure is sufficient to raise a strong *prima facie* case in favour of the plaintiffs in that regard. [At paras. 63–4; emphasis added.]

[23] In the end, the judge concluded that the plaintiffs had demonstrated a strong *prima facie* case in respect of the $2.5 million debt acknowledged to be due and payable under IHL's June 21 promissory note, and IHL's failure to provide the promised collateral to secure payment of both the May 17 and June 21, 2021 notes. (At para. 65.)

[24] Turning next to whether the interests of justice favoured an injunction, the plaintiffs alleged that assets that might be available to pay what was owing to them were in the process of being dissipated, as evidenced by Pangaea's disposition of shares in Besra in 2023 with "only part" of the proceeds being used to pay the plaintiffs. The defendants denied that this disposition constituted a dissipation of

assets, but they offered no specific suggestion as to what assets of theirs would be available to meet any judgment that the plaintiffs might obtain. On the contrary, Ms. Bennett's affidavit suggested that IHL had insufficient resources to repay the loans, including those amounts acknowledged to be due and owing by the time of the hearing. As for the defendants' argument that a freeze order would prejudice other investors in their ventures and that the plaintiffs would be "better served by letting [the responding defendants] go about their business in the ordinary course", the judge rejected that contention in light of the defendants' "previous promises of imminent payment" that had repeatedly proven not to be credible. (At para. 68.)

[25] Being satisfied that that the corporate plaintiffs' undertaking as to damages was sufficient for the issuance of an injunction, the chambers judge concluded that the interests of justice favoured the granting of an "order to freeze, at a minimum" the following:

> a) IHL's assets, to the extent necessary to secure the amounts owing under the May 17, 2021 Promissory Note ($6,308,050, plus "interest" of approximately $50,000), the June 21, 2021 Promissory Note ($2 million, plus "interest" of approximately $50,000) and the December 13, 2021 advance ($450,000), for a total of $8,858,050; and
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> b) Pangaea's assets, to the extent necessary to secure the amount owing under the June 21, 2021 Promissory Note ($2 million, plus "interest" of approximately $50,000) for a total of $2,050,000, if IHL's assets prove insufficient for this purpose. [At para. 70.]

[26] However, rather than making a "narrower freezing order" directed at these two items, the judge elected to leave Murray J.'s wider interim order in place "for the time being". He also granted disclosure orders that would apply to all of the defendants including, he said, ISL.[1] The order would require disclosure on the part of all the defendants because of a concern that the assets of IHL or Pangaea, including proceeds from the disposition of the Besra shares, might have been diverted for extraneous purposes, given the failure of the responding defendants to explain why a larger portion of Besra's IPO proceeds had not been applied to the plaintiffs' debt.

[1] Neither Murray J.'s order nor that of the chambers judge included ISL in the definition of "Injunction Defendants", with the result that ISL has neither disclosure obligations nor is it caught by the "freeze" provisions of Milman J.'s order.

(At para. 73.) If such a diversion had taken place, he said, the assets remaining in IHL and Pangaea might now be insufficient to accomplish the purpose of the freeze order. (At para. 73.)

[27] In order to balance the plaintiffs' interest in obtaining the order with the interest of the Injunction Defendants in carrying on their business in the ordinary course, however, the order would provide that once one or more of those Defendants had produced the information required by the order, it would be open to the plaintiffs or to an Injunction Defendant who had complied with the disclosure order, to return to court for a variation of the terms taken from Murray J.'s order "in light of that additional information." (At para. 75.)

[28] On November 21, 2023, Pangaea, ISL, Ms. Bennett and Mr. Molyviatis filed a notice of appeal and sought leave to appeal. Leave was granted on January 17 of this year.

On Appeal

[29] The appellants asserted two grounds of appeal in this court, namely:

> a) the chambers judge erred in principle in granting the Freezing Order and the Disclosure Order as against the appellants because the chambers judge found that no strong *prima facie* case exists against the appellants; and
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> b) to the extent the chambers judge may have found that a strong *prima facie* case exists against Pangaea, such finding is not supported by the evidence.

I emphasize that the appellants made no objection to what may be called the "jurisdictional" elements of the chambers judge's order, which as seen above, were not raised as a substantive matter until the pleadings were amended following the issuance of the chambers judge's order. I shall therefore touch only briefly on these elements below.

[30] Counsel for the appellants began his submissions by suggesting that the primary question raised by the appeal was whether, where a strong *prima facie* case has *not* been found, a defendant may be properly made subject to a Mareva

injunction. With respect, that question does not arise here: Milman J. found that although a strong *prima facie* case had not been shown with respect to the plaintiffs' investments (as opposed to loans), a "different conclusion" arose concerning the loans. The judge clearly accepted the requirement of a "strong *prima facie* or good arguable case" as referred to in *Kepis & Pobe*, and applied in *Zheng v. Anderson Square Holdings Ltd.* 2022 BCSC 801 at para. 10. I regard this as a generalized question that looks at the strength of an applicant's case as a whole rather than at which cause of action is likely to succeed against which individual defendant. As we have seen, the judge chose to leave in place Murray J.'s "wider" order against all the Injunction Defendants instead of making a "narrower" order directed only at IHL and Pangaea. He found that no strong *prima facie* case existed against any of the defendants *in connection with the transactions other than the loans.* In connection with the loans, however, such a case was found to exist.

[31] At the outset of their written argument, the appellants acknowledged that Mr. Justice Milman's order was a Mareva injunction, which of course is an extraordinary remedy restraining a defendant from removing, dissipating or disposing of its assets before the plaintiff can obtain a judgment. (Citing *Zheng* at para. 10.) This is the 'freeze' element, and is usually accompanied by disclosure requirements, as in this case. The appellants went on to submit that the basic premise of a Mareva injunction is that the defendant is a "rogue bent on flouting the process of the court, such as to justify the exceptional and drastic measure of freezing the defendant's assets before trial, and before judgment." On this point, they cited paras. 19–20 of *Coleco Investments Inc. v. Cymax Stores Inc.* 2019 BCSC 97, where the Court quoted this statement from a text without specific comment. The Court went on to say, however, that misconduct or fraudulent behaviour is often present, but is not a "necessary factor" to "meet the test" for a Mareva order. (At para. 28.)

[32] Without entering into a review of the many cases of this court dealing with Mareva injunctions (ranging from *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998) 59 B.C.L.R. (3d) 196, *Tracy v. Instaloans Financial Solutions Centres*

(B.C.) Ltd. 2007 BCCA 481 and *ICBC v. Patko* 2008 BCCA 65 to *Kepis & Pobe* (*supra*)), I agree with the Court in *Coleco* that formulations of the purpose of Mareva orders such as that quoted in *Coleco* should be avoided in favour of the more nuanced and "flexible" approach taken by courts in this province. Certainly Mareva orders are not confined to cases of fraud. Madam Justice D. Smith in *Kepis & Pobe* summarized Mareva injunctions as follows:

> In *Tracy*, a five-member division of this Court affirmed this approach to *Mareva* injunction applications. The Court also clarified that these orders remain "a species of interlocutory injunction with special requirements" (at para. 44) and may vary depending on the nature of the exceptions to the rule against execution before judgment (from *Aetna*). Writing for the Court, Justice Saunders stated:
>
> > [44] … While the term "*Mareva* injunction" is used to denote any order impounding assets or freezing assets before judgment (outside of statutory remedies such as builders liens or garnishing orders), they are not all alike. Awareness of the root issue is helpful in sorting out the exercise of discretion.
> >
> > [45] Unlike a *quia timet* injunction, in which the issue is removal of assets from the jurisdiction, an injunction to protect the processes of the court may not involve extraterritorial considerations but may engage issues of dissipation. But at its root, the issue is the risk of harm through either dissipation of assets or removal of them to a place beyond the court's reach.
> >
> > [Emphasis added.]
>
> As well, in *ICBC v. Patko*, Chief Justice Finch, writing for the Court, again endorsed the approach from *Mooney v. Orr No. 2* [(1994) 100 B.C.L.R. (2d) 335 (S.C.)] to applications for *Mareva* injunctions, stating:
>
> > [25] Under the flexible *Mooney No. 2* approach, the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: *Mooney No. 2* at para. 43. In order to obtain an injunction, the applicant must first establish a strong *prima facie* or good arguable case on the merits. Second, the interest of the parties must be balanced, having regard to all the relevant 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 judgment: *Mooney No. 2* at para. 44. [At paras. 16–17; emphasis added.]

(See also the cases cited at footnote 227 of Stephen G.A. Pitel and Andrew Valentine, "The Evolution of the Extra-territorial Mareva Injunction in Canada: Three Issues" (2006) 2 *J.P.I.L.* 339.)

[33] The appellants' second ground of appeal is a more concrete argument directed at the inclusion of Pangaea in the "freeze" portion of the order until further order of the Court or written agreement of the parties. In the appellants' submission, the plaintiffs were able to demonstrate a strong *prima facie* case only as against IHL and only in respect of the two discrete items described at para. 65 of the reasons, namely:

> a) the $2.5 million debt [consisting of $2 million plus $50,000 "interest" and the advance of $450,000 reflected by the June 21 promissory note in favour of IHL] that is acknowledged to be ... due and payable; and
>
> b) IHL's failure to provide the promised pledges of collateral to secure payment of the May 17, 2021 Promissory Note and the June 21, 2021 Promissory Note.

The appellants say these provide a basis for claims against IHL alone, and that the fact the plaintiffs recently amended their pleading to include an allegation that IHL's June 2021 promissory note was in fact part of a tripartite short-term loan agreement to which Pangaea was also a party, cannot be considered by this court because it is irrelevant to the appeal.

[34] With respect, the amendment is relevant, and no rule was cited to us that would preclude our considering it. To ignore it would result in the expenditure of time and resources for no good reason. As already suggested, moreover, the notion of a tripartite agreement could be inferred from the evidence quite apart from the later amendment. Milman J. found that Ms. Bennett and Mr. Molyviatis, on behalf of IHL, sought a loan of $4 million in June 2021 in order to enable Besra to carry out its IPO. They assured Mr. Harder he would receive a "fee" of one million Besra shares and a "pledge of security over Pangaea's assets." (At para. 64.) They said they were "preparing the promissory note/loan agreement between IHL and Pangaea which will grant the specific security as we discussed over the assets of Pangaea." In other words, some form of guarantee was to be prepared such that Pangaea's assets would be properly encumbered to secure IHL's debt to Springhill. In the event, however, the plaintiffs never received the Besra shares nor any pledge of security from Pangaea: see para. 34. The judge found that IHL's unexplained failure to

provide these was "sufficient to raise a strong *prima facie* case in favour of the plaintiffs in that regard."

[35] These conclusions are sufficient to dispose of the appellants' second ground of appeal. Out of an abundance of caution, however, it may be useful to advert briefly to the position of the individual defendants, Ms. Bennett and Mr. Molyviatis, as well, given the appellants' oral argument in this court that a cause of action was shown against IHL only.

[36] At least at this stage of the litigation, the evidence indicates that Ms. Bennett and Mr. Molyviatis were purporting to act on behalf of, and bind, not only IHL but Pangaea (of which Ms. Bennett was a director and which was said to hold some "interests" on behalf of Mr. Molyviatis); LeadFX (on behalf of which Ms. Bennett was seeking capital); and Besra (of which she was a director and board chair until she had to resign in August 2023). Again, corporate identities were seemingly meaningless in the arrangements directed by the individual defendants. Ms. Bennett and Mr. Molyviatis were clearly acting together in directing, or perhaps seeming to direct, the various corporate entities that benefited from the plaintiffs' funds. As well, the judge expressed a concern that Ms. Bennett and Mr. Molyviatis may have diverted assets of IHL or Pangaea for extraneous purposes and were still in a position to do so.

[37] In any event, the law with respect to Mareva injunctions has evolved in Canada, as in other jurisdictions, such that even *innocent* parties against whom causes of action do not lie, or do not lie directly, may properly be subject to such orders. One of the seminal English cases is *Mercantile Group (Europe) A.G. v. Aiyela* [1994] 1 All E.R. 110 (C.A.), where the Court of Appeal ruled that a Mareva injunction lay against the wife of the debtor "as incidental to and in aid of the enforcement" of the substantive right constituted by the judgment owed by that debtor. Hoffmann L.J. also noted *Bankers Trust Co. v. Shapira* [1983] All E.R. 353, in which a pre-judgment Mareva order was made against a bank that had innocently received the proceeds of fraud. In his words, the bank had "innocently become

mixed up in the fraud" but it was still necessary to join it in the freeze of the debtor's funds to enforce the later judgment of the court. (At 115.)

[38] Sir Thomas Bingham, M.R., agreed that the Mareva injunction in *Mercantile Group* should be continued, adding that he was:

> … very pleased to reach that conclusion, for if jurisdiction did not exist the armoury of powers available to the court to ensure the effective enforcement of its orders would in my view be seriously deficient. That is in itself a ground for inferring the likely existence of such powers, since it would be surprising if the court lacked power to control wilful evasion of its orders by a judgment debtor acting through even innocent third parties. The jurisdiction is of course one to be exercised with caution, restraint and appropriate respect for the legitimate interests of third parties. (At 117; emphasis added.)

The appeal was dismissed.

[39] Although the English rules are of course different from the rules of the Supreme Court of British Columbia, it appears the Supreme Court of Canada has approved of the inclusion of 'non-parties' where necessary in injunctions, including Mareva injunctions. In *Google Inc. v. Equustek Solutions Inc.* 2017 SCC 34, Abella J. wrote for the majority:

> ... *Norwich* disclosure may be ordered against non-parties who are not themselves guilty of wrongdoing, but who are so involved in the wrongful acts of others that they facilitate the harm. In *Norwich*, this was characterized as a duty to assist the person wronged (p. 175; *Cartier International AG v. British Sky Broadcasting Ltd.*, [2017] 1 All E.R. 700 (C.A.), at para. 53). *Norwich* supplies a principled rationale for granting injunctions against non-parties who facilitate wrongdoing (see *Cartier*, at paras. 51-55; and *Warner-Lambert Co. v. Actavis Group PTC EHF*, 144 B.M.L.R. 194 (Ch.)).
>
> This approach was applied in *Cartier*, where the Court of Appeal of England and Wales held that injunctive relief could be awarded against five non-party Internet service providers who had not engaged in, and were not accused of any wrongful act. The Internet service providers were ordered to block the ability of their customers to access certain websites in order to avoid facilitating infringements of the plaintiff's trademarks. (See also Jaani Riordan, *The Liability of Internet Intermediaries* (2016), at pp. 412 and 498-99.)
>
> The same logic underlies *Mareva* injunctions, which can also be issued against non-parties. *Mareva* injunctions are used to freeze assets in order to prevent their dissipation pending the conclusion of a trial or action (*Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.); *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R.

> 2). A *Mareva* injunction that requires a defendant not to dissipate his or her assets sometimes requires the assistance of a non-party, which in turn can result in an injunction against the non-party if it is just and equitable to do so (Stephen Pitel and Andrew Valentine, "The Evolution of the Extra-territorial Mareva Injunction in Canada: Three Issues" (2006), *2 J. Priv. Int'l L.* 339, at p. 370; Vaughan Black and Edward Babin, "Mareva Injunctions in Canada: Territorial Aspects" (1997), *28 Can. Bus. L.J. 430*, at pp. 452-53; Berryman, at pp. 128-31). Banks and other financial institutions have, as a result, been bound by Mareva injunctions even when they are not a party to an underlying action. [At paras. 31–33; emphasis added.]

[40] The majority in *Equustek* also confirmed that "where necessary to ensure the injunction's effectiveness", a court can grant an injunction enjoining a person's conduct "anywhere in the world." (At para. 38; see also *Mooney v. Orr* (1994) 98 B.C.L.R. (2d) 318 (S.C.); *First Majestic Silver Corp. v. Davila* 2013 BCSC 1209; *Dexia Credit Local v. Rogan* 2008 BCSC 1406.) In the case at bar, the plaintiffs sought a freeze over the Injunction Defendants' assets, including specifically assets located in various foreign jurisdictions. However, the freeze terms of the Mareva order granted by Milman J. were not described expressly as having extra-territorial reach. (The disclosure portion of the order did refer to assets "whether in or outside British Columbia.") Given the judge's findings that Ms. Bennett and Mr. Molyviatis lived "somewhere in Europe", that Pangaea was "based in Belize", that Besra was a Malaysian company and that IHL was "formed under English law", however, one might infer the judge intended his order to have extra-territorial effect. Respectfully, it would have been preferable to avoid any uncertainty on this point by stating so expressly. In this regard, the Supreme Court of British Columbia has issued a practice directive that provides a model order for the preservation of assets, which directive includes wording specifically suggested where the injunction is "worldwide". (See *Supreme Court Civil Practice Direction on Model Orders,* PD-47.)

[41] There is certainly no doubt that in this instance, the individual defendants are "mixed up" — and indeed were the font and source of — the tangled web of transactions that will be the subject of trial, and that they may still be in a position to direct or assist in dissipating assets of the various corporate entities referred to in these reasons. As such, even if no substantive cause(s) of action were ultimately

found against them, their participation would likely be necessary to enforce the order made below.

[42] As far as ISL is concerned, since it was not named as an “Injunction Defendant” in Milman J.’s order, it is not necessary to address its position further.

Disposition

[43] For the foregoing reasons, I would dismiss the appeal.

“The Honourable Madam Justice Newbury”

I agree:

“The Honourable Madam Justice Fenlon”

I agree:

“The Honourable Mr. Justice Butler”

Schedule

THIS COURT ORDERS THAT:

1. Paragraph 3 of the Order of Justice Murray dated October 27, 2023 in this matter (the “Murray Order”) be and hereby is continued. For greater certainty, the defendants, Incor Holdings Limited, George Molyviatis, Jocelyn Bennet, Pangaea Resources Limited and Incor Holdings PLC i (the “Injunction Defendants”), will maintain the disposition from the proceeds (the “Proceeds”) from any sale of any securities of Besra Gold Inc., Cascadero Copper Corporation, Search Minerals Inc., Western Gold Ltd. or LeadFX Inc. (collectively the “Issuers”) in their respective brokerage accounts until further order of the court or written agreement between the Injunction Defendants and the plaintiffs;
2. Paragraph 4 of the Murray Order be and hereby is continued. For greater certainty, the Injunction Defendants will not transfer any securities of the Issuers other than the sale of securities of the Issuers at market value, held in brokerage accounts until further order of the court or written agreement between the Injunction Defendants and the plaintiffs;
3. The Injunction Defendants must, within ten days of service of this Order, provide the plaintiff's solicitor with a list (the “Injunction Defendant’s Asset List”), verified by their affidavit setting out all of the Injunction Defendants' assets as of the date of this Order whether in or outside British Columbia and whether in their own name or not and whether solely or jointly owned, and details of all such assets, including the nature of each asset, all identifying numbers and other identifying information, its exact location as of the date of this Order, and whether the asset is held in the Injunction Defendants' name or jointly held with another person, or by another on their behalf;
4. The Injunction Defendants will provide copies of all their brokerage account statements and bank account statements from August 2021 to present. If these details are not included in the brokerage account statements, the Defendants will also provide the name of brokerage, account numbers and contact information for their account representative;
5. If the Injunction Defendants holds any assets over which they have no beneficial interest, that asset shall be included in the list, along with an indication that the asset is held in trust for others;