

CANADA / JUDGMENT

Atom Holdings (Re)

2024 BCSC 1397

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1397 Atom Holdings (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Atom Holdings (Re),

2024 BCSC 1397

Date: 20240801

Docket: S242143

Registry: Vancouver

In the Matter of Part XIII of the

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-6,

As Amended

- And -

Atom Holdings (In Official Liquidation Under the Cayman Islands Companies Act, 2023 Revision)

- And -

Angela Barkhouse and George Kimberley Leck, in their capacities as joint official liquidators of
Atom Holdings

- and -

Docket: S242230

Registry: Vancouver

Between:

Atom Holdings (In Official Liquidation Under the Cayman Islands Companies Act, 2023 Revision)

Plaintiff

And

Su Weiyi a.k.a. Victor Su

Defendant

Corrected Judgment: The text of the Judgment was further corrected at paragraphs 3 and 24, the cover page was updated, and the text at paragraphs 29 (d) and 45 were redacted on September 19, 2024 for publication purposes.

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver

June 20-21, 2024

Place and Date of Judgment:

Vancouver

August 1, 2024

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I. Introduction

- [1] The defendant Mr Su applies to set aside or vary the Anton Piller evidence preservation ("APO") and Mareva asset freezing orders issued ex parte by this Court on April 4 and 8, 2024, respectively, in parallel bankruptcy (petition: Vancouver action no. S242143) and civil (notice of civil claim: Vancouver action no. S242230) proceedings.
- [2] The petitioner/plaintiff in those proceedings (the "applicants") apply to extend the freezing order.
- [3] As is not uncommon with such orders, this is very much real-time litigation. As the Court was preparing to release these reasons, the defendant was arrested on July 18, 2024 in Hong Kong on charges alleging theft of cryptocurrencies from ten cryptocurrency wallet addresses with an approximate value of US\$16.74 million dollars: the property of 51 AAX Exchange Platform customers.

II. Facts

A. Cryptocurrency

- [4] These reasons refer to certain international cryptocurrency platforms, as well as digital tools used to access and move cryptocurrency funds. In *United States of America v. Ellingson*, 2023 BCSC 2335, Justice Warren provides a useful overview of cryptocurrency, in the context of Bitcoin cryptocurrency:
- [19] In order to acquire Bitcoins in the first instance, a user typically must purchase them from a Bitcoin exchange platform. These exchange platforms accept payments of currency in some conventional form and exchange the money for Bitcoins. Again, to purchase Bitcoins or cash out Bitcoins for conventional currency, an individual typically must establish an account with an exchange platform. Certain Bitcoin exchange platforms require account holders to provide valid identification.
- [20] Bitcoins obtained from an exchange platform are moved to an anonymous "wallet" controlled by the user. Each wallet is designated by a string of letters and numbers. The user can then use the Bitcoins to conduct anonymous financial transactions by transferring Bitcoins from his or her anonymous wallet to the anonymous wallet of another Bitcoin user.
- [21] All Bitcoin transactions are recorded on a public ledger known as the "Blockchain", which can be viewed by anyone with an Internet connection using certain publicly available websites. However, the ledger only reflects the movement of funds between anonymous wallets and, therefore, cannot by itself be used to determine the identities of the persons involved in the transactions.
- [22] A Bitcoin wallet can contain multiple Bitcoin addresses, each of which is uniquely identified by an alphanumeric string. A Bitcoin address essentially acts as a separate bank account which can be associated with any number of Bitcoins. A Bitcoin wallet also contains

cryptographic keys for each Bitcoin address that is associated with the wallet, which allows only the owner of the wallet to transmit Bitcoins associated with those Bitcoin addresses to other Bitcoin addresses. Buyers and sellers of illegal goods such as narcotics often use multiple anonymous wallets and accounts in order to disguise their connection to the source of the payments. These wallets and accounts are not registered to a specific user and cannot be easily connected with a real individual. However, as noted, an exchange platform has to be used to cash out Bitcoin for traditional currency and at least some of those platforms require account holders to provide valid identification.

[Emphasis added.]

[5] A brief glossary of other terms mentioned in these reasons:

- a) **Binance:** the largest cryptocurrency exchange. It requires account holders to provide proof of personal identification;
- b) **cold wallet:** a physical storage device, such as a flash drive or hard drive, for storing in an offline format private keys/access codes to allow the holder access to their particular blockchain network and to manage their cryptocurrencies. As a cold wallet exists offline, in physical form, it is less vulnerable to online attack. In contrast, a hot wallet is an online software storage wallet for cryptocurrency keys: as it is always connected to the internet, it is more vulnerable to malicious actors. Common examples of hot wallets include mobile apps, dedicated computer programmes, and browser extensions;
- c) **Ether:** the cryptocurrency of the Ethereum platform: a decentralised blockchain with embedded applications;
- d) **FTX Trading Ltd.:** a cryptocurrency exchange, founded by Sam Bankman-Fried and Gary Wang, placed in Chapter 11 bankruptcy proceedings in the United States in November 2022;
- e) **key:** a private key akin to a password allowing users to access and manage their cryptocurrency. It consists of a string of letters and numbers. A key may be stored on a hot wallet, or on a cold wallet, on a piece of paper, or otherwise;
- f) **MetaMask:** a software application that serves as a virtual wallet for its holder to interact with the Ethereum blockchain, allowing users to send and receive cryptocurrencies and tokens (among other functions). It is a "hot" - that is, online - wallet;
- g) **USDT:** a "stablecoin", a type of cryptocurrency that is pegged to a fiat (that is, conventional government-issued paper) currency, namely the US dollar.

[6] In his first affidavit, Mr Devost further explains the relationship between cryptocurrency wallets, keys, and the blockchain:

In this affidavit, I refer to cryptocurrency wallets as "storing" cryptocurrency. It should be noted for clarity that cryptocurrency cannot literally be "stored" on a wallet, as cryptocurrency only exists on a decentralized and publicly verifiable ledger known as a "blockchain." Strictly

speaking, what is stored on a cryptocurrency wallet is only the "private key" to a given unit of cryptocurrency, which is required to transact with the block chain. As the practical effect of possessing the private key to a given unit of cryptocurrency is to have control over that unit of cryptocurrency, in common parlance a cryptocurrency wallet is generally said to "store" the cryptocurrency and I will follow that convention herein.

B. Atom / AAX

- [7] These proceedings arise from the collapse of a Cayman Islands-based cryptocurrency company, Atom Holdings, incorporated, and now in liquidation, pursuant to the Cayman Islands Companies Act, 2023 Revision.
- [8] Atom was a holding company for a number of subsidiary companies incorporated in various jurisdictions, including Hong Kong, Singapore, Seychelles, and Malta (the "AAX Group").
- [9] The AAX Group operated a cryptocurrency exchange platform (the "AAX Platform").
- [10] The AAX Group used its system wallets for the daily operations of the AAX Platform, including receiving and transferring cryptocurrency to and from other cryptocurrency exchanges, and storing AAX customers' cryptocurrency. The AAX system wallets were all standard "hot" wallets (see above), which stored the AAX Platform's cryptocurrency holdings via online software programmes. It is likely that the AAX system wallets would have been secured by a key, code, or passphrase within the control of members of the AAX Group's management.[1]
- [11] On November 11, 2022, the FTX cryptocurrency exchange, unrelated to AAX, declared bankruptcy, creating a crisis in the cryptocurrency industry.
- [12] That month, the AAX Group issued a series of public statements seeking to reassure the users of its platform. It acknowledged that a large number of users had requested withdrawal of their cryptocurrency assets. On November 19, 2022, the AAX Group issued a statement reassuring users that it would gradually resume normal operations. That was its final public statement.
- [13] Since that time, users of the AAX Platform have been unable to withdraw their assets. At the time of the collapse, the AAX Platform held various cryptocurrencies recorded as an amount equivalent to US\$212,207,603, along with deposited/pledged cryptocurrency to various platforms which provided broker, market maker, liquidity and settlement services recorded as an amount equivalent to US\$215,533,831.
- [14] The AAX Platform and application were shut down by mid-December 2022. All AAX social media accounts were either deleted or have ceased posting.
- [15] Following the AAX collapse, all of the directors, officers, and management of the AAX Group have resigned or gone into hiding. Two former AAX executives (Thor Chan and Liang Haoming) have been arrested by Hong Kong police. The defendant now joins their number.

- [16] On March 9, 2023, the Grand Court of the Cayman Islands (the "Cayman Court") appointed Angela Barkhouse and George Leck as the Joint Official Liquidators of the AAX Group (the "Liquidators").
- [17] On March 16, 2023, the Liquidators passed resolutions for Atom Holdings that replaced the incumbent directors, including the defendant, with the Liquidators.
- [18] On July 11, 2023, the Cayman Court ordered the winding up of Atom Holdings.
- [19] Since their appointment, the Liquidators have taken steps to recover assets of the AAX Group, and have initiated court proceedings in various jurisdictions to that end.
- [20] The Liquidators were unable to take direct control over Atom International Technology Limited ("Atom Hong Kong"), as all the shares in that entity had been transferred to the defendant on February 22, 2022, for HKD \$1.
- [21] Accordingly, on May 10, 2023, the Liquidators obtained from the High Court of the Hong Kong Special Administrative Region three forms of relief: an injunction to restrain Atom Hong Kong from dissipating its assets and disposing of its records; a proprietary injunction against the defendant over the Atom Hong Kong shares; and a freezing order against both the defendant and Atom Hong Kong within Hong Kong up to the value of HKD \$8.79 million. The defendant swore an affidavit in those proceedings.
- [22] To assist in the investigation and recovery of assets, the Liquidators retained Matthew Devost, a Reston, Virginia-based expert in cybersecurity. Mr. Devost has served as an adjunct professor in that field at Columbia and Georgetown Universities.

C. These proceedings

- [23] On April 4, 2024, counsel for the Liquidators appeared ex parte before this Court in the Bankruptcy and Insolvency Act proceeding. This Court granted three orders (2024 BCSC 721):
- an order pursuant to Part XIII of the Bankruptcy and Insolvency Act, RSC 1985, c. B-3 [BIA], ss. 269, 272, recognizing the Cayman Islands liquidation proceedings as a "foreign main proceeding", and issuing certain ancillary relief;
 - an order pursuant to s. 272 of the BIA, but substantially in the nature of an Anton Piller order, authorizing the seizure and preservation of evidence and assets of the plaintiff against the defendant (the "APO"); and
 - a sealing order.

- [24] On April 5, 2024, at around 10 am, the Independent Supervising Solicitor (Mr Melton: the "ISS"), the search party (led by the search officers, Messrs Munro and Clark, with three digital forensic experts (including Mr Devost), and two other search party members) and a translator, executed the APO at the British Properties house where the defendant and his family reside.
- [25] On April 8, 2024, the applicants appeared ex parte before the Court to obtain leave to commence the civil action, in the name of Atom Holdings, against the defendant, and to obtain the freezing order. The orders were granted: 2024 BCSC 722. The Court ordered the defendant to provide passwords to certain electronic devices removed from his house during the APO search.
- [26] On April 12, 2024, the ISS filed his report with the Court. The search officer has also filed reports with the Court dated April 7, 12, 19; May 14; and June 17, 2024, setting out developments in the search process.
- [27] On April 19, 2024, the Court ordered the defendant to provide a list of assets pursuant to the freezing order.
- [28] On May 15, 2024, the defendant applied to set aside the orders, and the applicants applied to continue the freezing order. This Court adjourned the set-aside application, and confirmed the continuation of the freezing order until resolution of that application. This Court also ordered that the defendant attend a cross-examination with respect to the execution of the APO and his affidavit in relation to the APO. The Court provided directions to counsel with respect to the scope of this cross-examination.

D. The evidence against the defendant

- [29] At the April 4th hearing, the applicants set out the key points of evidence against the defendant, largely gathered from the Liquidators' review of the Atom Hong Kong data and materials:
- a) the defendant was a key figure in the AAX Group and the operation of the AAX Platform. He was publicly listed as a director of several AAX Group companies: Atom Holdings (Caymans), AAX Asia, Atom Malta, and Atom Hong Kong;
 - b) the defendant was an authorised signatory of the Atom Holdings bank account;
 - c) on February 22, 2022, all of the shares in Atom Hong Kong were transferred to the defendant for only HKD \$1;
 - d) the defendant appears to have held an account that processed over US\$100 million in AAX transactions between June 2022 and February 2023. That account was held under the email address victor[number redacted]@gmail.com. The "Know Your Client" identity documentation provided to Binance for the account is the defendant's Chinese passport;

- e) a March 2020 Slack message sent by Daniel Chen (an AAX Group employee) to Thor Chan (a former AAX executive), states that "Victor" was needed to "open the old safe" and "complete cold wallet backup phone's update [sic]";
- f) an AAX Excel spreadsheet refers to a "Vic MetaMask" wallet holding significant crypto assets on behalf of the AAX Platform (the "Victor MetaMask Wallet");
- g) in the Google Workspace data obtained by the Liquidators, a user account with the domain addresses "victor@atomintl.com" and "victor@aax.com" had two Google Chrome bookmarks for the MetaMask Wallet's entries on etherscan.io and another public blockchain search website, "debank.com";
- h) between July 28, 2021 and September 22, 2022, a total of 11,010.08 Ether and 8,499,888 USDT were transferred to the Victor MetaMask Wallet from AAX System Wallets;
- i) an August 2022 Slack message written by Sarah Mok (AAX Group employee) states: "25/8/2022 USDT - Vic's metamask return 1M to 103881, so total is (USDT 8,500,000 - USDT 1,000,000) = USDT 7,500,000";
- j) on August 25, 2022, the blockchain recorded two transactions in which US\$1 million was moved from the Victor MetaMask Wallet to another address;
- k) since July 2023, all assets held in the Victor MetaMask Wallet have been dispersed, with the exception of approximately 6,000 Ether that could not be moved as it was pledged as collateral to a Swiss-based smart contract company; and
- l) the defendant had failed to assist the Liquidators with their investigations into the AAX Group.

[30] Given this extensive evidence of the defendant's management and operational control of the AAX Group, the defendant's August 18, 2023 affidavit that he swore in the parallel Hong Kong proceedings (in response to the freezing order), in which he claimed to be only an investor in AAX, appeared to be untrue:

..the core management team of Atom Group worldwide, which I was never a part of. I know little English, and had and still have no experience in management, overseas corporate work or IT or crypto matters. My role was limited to that of an investor, and to introduce friends and investors interested in crypto industry to invest in the AAX Platform. Further, I do apologize to the Honourable Court for not having all the documents regarding Atom Group, because I was merely an investor and do not have the documents regarding its operation, which I understand were managed and kept mainly by Andy and Cooper;

[Emphasis added.]

[31] The applicants also cited the affidavit of Mr Devost summarising his February 26, 2024 Zoom interview of Lin (Peter) Lin, the founder and a former executive of the AAX Group:

37. In affirming this Affidavit, I have reviewed a recording of my interview of Mr. Lin, and affirm that the following is an accurate transcription of exchanges that took place between myself and Mr. Lin:

(a) An exchange starting at 43 minutes and 21 seconds into the interview:

Matt Devost: (43:21)

Victor doesn't seem that technical on Slack, though. Like would he need to have a, somebody that's helping him, or is he more technical than is indicated in his conversations?

Peter Lin: (43:35)

You mean operating the wallet?

Matt Devost: (43:38)

Yeah, operating the wallet. Understanding the system. He seemed to not have a high level of sophistication.

Peter Lin: (43:44)

Yeah. But he has enough, uh, knowledge to understand how the system works. And, uh, I'm pretty sure that he is the one operating the cold wallet by himself.

(b) An exchange starting at 52 minutes and 8 seconds into the interview:

Matt Devost (52:08):

...Is there anybody else besides Victor I should be thinking about?

Peter Lin (52:18):

Honestly speaking, I don't think anyone else.

Matt Devost (52:21):

Do you think it's a hundred percent Victor?

Peter Lin (52:25):

Yeah. He's gots to it [sic].

Matt Devost (52:29):

Okay. So you think he has the cold wallet, he would have access to the system wallet keys. He would have access to the MetaMask wallet. You think it's Victor that has access to everything?

Peter Lin (52:43):

Yes.

[Emphasis added.]

[32] At the April 8th hearing, the applicants supplemented their case with evidence discovered during and after the execution of the APO:

- a) during the search, the defendant abruptly reached over and slammed shut the lid of his primary laptop;
- b) the search party observed the MetaMask browser plugin open on the defendant's personal laptop. Records of transactions involving the MetaMask wallet were located on the internet browsing history on that laptop;
- c) the search party located partial and complete seed phrases[2], one of which generated the address of a cryptocurrency wallet ("0xee2"), likely controlled by the defendant. That wallet has received 839 Ether of cryptocurrency (worth approximately US\$2.8 million) from identified AAX system wallet addresses since the appointment of the Liquidators. One of the AAX wallets was held on the MetaMask application;
- d) the search party located in a safe a cell phone with three different SIM cards, and a set of physical safe keys labelled "AIA Tower", the address of Atom Holdings's former office in Hong Kong. Mr Devost averred that there was a "very high likelihood that the cell phone is the AAX Cold Wallet " holding a significant portion of the AAX cryptocurrency holdings.

[33] Further, and importantly, at 12:42 am on April 6, 2024 -- that is, just hours after the APO execution ended -- the blockchain recorded a transaction in which 4,869 Ether (worth roughly US\$16 million) was transferred from the MetaMask wallet to a new wallet address. The timing may be a remarkable coincidence. Of course, at the time, only the defendant and his wife (in addition to the applicants and their counsel) knew of the APO and these proceedings, which are subject to a sealing order.

[34] At the present hearing, the applicants point to other alleged incriminating and evasive actions by the defendant since the two orders:

- a) not providing full access to digital assets, passwords, PINs, and other authentication mechanisms, as required under the APO, including to his primary mobile telephone, the mobile telephone found in the safe, his primary laptop, and the MetaMask account;
- b) specifically, providing some PINs and passwords that did not work, thus endangering access to those devices and preservation of their data, through automatic lock or erasure functions;
- c) swearing two false affidavits of assets, both of which omitted a TD bank account;
- d) through his counsel's repeated objections, refusing to answer most of the questions posed in his court-ordered June 5, 2024 examination; and
- e) only providing cursory and incomplete sworn evidence in response to the substantial evidence mustered against him at the April 4 and 8 hearings, as cited above.

[35] To this list must be added the arrest of the defendant last week in Hong Kong.

III. Law

[36] In *Wu v. Ma*, 2024 BCCA 196, Voith JA summarises the key considerations governing an application for a freezing order:

[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. Instalogs 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

[Emphasis in original.]

[37] In the recent case of *Canadian Western Bank v. John Doe*, 2024 BCSC 555, Justice Loo surveys the approach governing an application to set aside an ex parte preservation order:

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

- [15] In the set-aside hearing, a court considers whether the ex parte order should be set aside because of material non-disclosure by the ex parte applicant. If not, the court proceeds to a hearing de novo on the merits of the injunction application, where the ex parte applicant must again meet the tests for obtaining the injunction, even though that party is the respondent on the set-aside application .
- [16] A material fact is one that may affect the outcome of the application .
- [17] The applicant in the ex parte application must be "profoundly fair", must disclose all important aspects of the evidence, and must avoid opinion and invective
- [18] If a court finds material non-disclosure, it may, and likely will, set aside the Mareva order. However, material non-disclosure is relevant as well in the second part of the analysis. The court can take non-disclosure on the ex parte hearing into account when it is deciding whether to maintain an existing Mareva order, or grant a new one. .
- [13] In *Save-A-Lot Holdings Corp. v. Christensen*, 2019 BCSC 115, Justice W.A. Baker held:
- [4] If I find there has been a material non-disclosure, I can set aside the Mareva order. However, in *Kerston v. Seyedzadeh*, 2013 BCSC 1330, at paragraphs 15 to 16, the court confirmed that even where there has been a material non-disclosure, the court retains the discretion to consider whether the injunction should stand in light of additional evidence on the set-aside application.

[authorities omitted]

IV. Discussion and decision

A. Was there material non-disclosure?

- [38] In *Pierce v. Jivraj*, 2013 BCSC 1850, rev'd on other grounds (sub nom. *Pierce v. Baynham*), 2015 BCCA 188, leave to appeal to SCC ref'd, 36531 (26 November 2015), Justice Dley provides an oft-cited summary of the duties of full and frank disclosure on an ex parte application, in the specific context of an Anton Piller Order:
- [37] On an ex parte application, the relevant principles include the following:
- 1) the applicant must make full and frank disclosure of all material facts;
 - 2) a material fact is one that may affect the outcome of the application;
 - 3) it is for the court to determine if the fact is material, not the applicant or his legal advisors;
 - 4) the duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made;
 - 5) the extent of the inquiries required depend on the circumstances of the particular case;

- 6) if material non-disclosure is established, the court may deprive the applicant of any advantage gained by reason of the breach of duty to disclose;
- 7) the failure to provide such full and frank disclosure will allow a court to set aside the order without regard to the merits of the application;
- 8) in deciding whether the Order should be set aside, the court must consider the importance of the non-disclosed fact to the issues which were to be decided by the judge at the ex parte hearing;
- 9) an innocent non-disclosure is an important consideration, but not decisive as to whether the breach is such that the Order is to be set aside; and
- 10) not every omission necessarily results in the order being set aside.

[38] An ex parte applicant must be "fastidious" in disclosing all important aspects of the evidence and pointing out what defenses may be available to the opposing party. An applicant is not to exaggerate or misrepresent the strength of the claim being advanced. The duty of disclosure is onerous, particularly when seeking the draconian nature of Anton Piller relief: *Green v. Jernigan*, 2003 BCSC 1097, at paras. 24-25.

[39] There is no dispute that both Mr. Pierce and his counsel were aware of the three regulatory sanctions. Mr. Pierce deliberately chose not to disclose those facts. It was not his function to decide what was or was not relevant material for the court to analyze. Whether something is or is not a material fact is for the court to determine.[3]

[Emphasis added.]

[39] In *MacLachlan v. Nadeau*, 2017 BCCA 326, Madam Justice Dickson surveys and distills the principles governing material nondisclosure:

[37] In my view, the following key principles emerge from the foregoing authorities:

- i. on an application, inter partes, for a Mareva injunction following the grant of an ex parte injunction, the judge is to proceed with a de novo hearing;
- ii. on the de novo hearing, the whole of the facts, including any incorrect or incomplete facts upon which the ex parte injunction was based, are to be taken into account;
- iii. if the applicant failed to comply with the duty to make full and frank disclosure on the ex parte application, the nature of the failure and the degree and extent of the applicant's culpability are highly material factors for consideration;
- iv. the degree and extent of the applicant's culpability may range from innocent non-disclosure to bad faith, which may include deliberate misstatements;
- v. where material non-disclosure is established, the applicant should be deprived of any advantage derived by the breach of duty on the ex parte application;

vi. in every case, the judge has a discretion in determining, on the whole of the facts, whether, and, if so, on what terms to grant a new Mareva injunction; and

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

[40] At para. 35 of MacLachlan, Justice Dickson quotes the principles in Brinks-MAT Ltd. v. Elcombe, [1988] 3 All ER 188 (CA) at 192, which guides judicial considerations and consequences of a failure to comply with the duty to make full and frank disclosure of material facts:

(i) The duty of the applicant is to make a full and fair disclosure of all the material facts....

(ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers....

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

(iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including

(a) the nature of the case which the applicant is making when he makes the application,

(b) the order for which application is made and the probable effect of the order on the defendant: ..., and

(c) the degree of legitimate urgency and the time available for the making of inquiries....

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

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

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

'... when the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'

[Emphasis added; formatted into list form.]

[41] The defendant's counsel argued forcefully that the applicants failed in their obligation of full and frank disclosure, by omitting to disclose to the Court the full transcript of Mr Devost's February 26, 2024 Zoom interview with Mr Lin, or the communications surrounding the interview. The defendant specifically argues that:

- a) Mr Devost used extortionate and dishonest means to coerce Mr Lin to attend the Lin interview. In particular, Mr Devost represented to Mr Lin that:
 - i. he could choose between cooperating with the investigation in exchange for financial compensation, or face criminal charges;
 - ii. unless Mr Lin agreed to attend the interview and cooperate with the Liquidators' investigation, they would "initiate international criminal charges" against Mr Lin;
 - iii. Mr Devost had "deep-state connections" within the highest levels of the Chinese government and judicial system;
 - iv. the Liquidators had "overwhelming" evidence linking Mr Lin to the theft and concealment of the AAX Digital Assets; and
 - v. the defendant was cooperating with the Liquidators' investigation, including by providing sworn statements in the United States that implicated Mr Lin in the alleged wrongdoing.
- b) during the interview, Mr Devost tricked Mr Lin, into providing inaccurate evidence about the defendant, by stating that:
 - i. Mr Lin was the Liquidators' "suspect number one" for the theft of the AAX Digital Assets, and that the Liquidators had direct evidence linking Mr Lin to the theft;
 - ii. the Liquidators did not have any evidence indicating that the defendant had accessed any of AAX's systems, including the AAX Wallets;
 - iii. the defendant had cooperated with the investigation by going "to the United States and fil[ing] an affidavit with the [Liquidators] under a notary"; and
 - iv. Mr Lin may be able to evade criminal charges if he would be willing to provide statements to the effect that the defendant "is the bad guy here".

[42] The defendant also argues that the threats and promises made by Mr Devost to Mr Lin should have been disclosed to the Court to allow an assessment of both the reliability of Mr Lin's hearsay evidence and of Mr Devost himself as a source of evidence.

- [43] The defendant argues that those omissions, coupled with Mr Devost's aggressive investigative techniques, ought to disentitle the applicants from the use of the Lin evidence, ought to result in the setting aside of the APO and freezing order, and ought to disentitle the applicants from continuation of these extraordinary remedies.
- [44] The defendant also argues that these non-disclosures and actions constituted "unclean hands", disentitling the applicants to these equitable remedies, citing EAM Global Logistics Ltd. v. Khataw, 2023 BCSC 1575 at paras. 49-50; and Royal Bank of Canada v. Boussoulas, 2012 ONSC 2070 at para. 51.
- [45] The defendant similarly argues that the applicants committed material non-disclosure by not advising the Court of Mr Lin's assertion to Mr Devost that "many people would" have access to the recovery keys associated with the AAX system wallets, including "the engineers the people who maintain the cloud system and the people who operating the system wallet would have - all have access to the system wallet". He argues that Mr Lin or others might have had the means to get access to the victor[number redacted]@gmail.com account, by using a Lin Gmail account as the defendant's recovery email address; while he denied doing so, Mr Lin could have changed the defendant's password, and accessed the defendant's Gmail account. In short, any of those individuals, rather than the defendant, could have been responsible for the US\$2.8 million transfer (and the later USD\$16 million transfer).
- [46] The Court declines to give force to the defendant's submissions. As set out in the recitation above of the evidence before the Court in the ex parte applications, the impugned Lin evidence was merely icing on the cake. The orders were issued based on the compelling totality of the evidence against the defendant. Again, public searches already established the defendant's important role in the AAX Group: the defendant has since confirmed those directorships in his examination. The applicants also presented compelling, if circumstantial, evidence linking the defendant to AAX digital assets and wallets, and the transfers of assets. Even more compelling was the dishonesty of the defendant's sworn assertion that he was not involved in the Atom group of companies as anything but an investor. Had the Lin evidence never been presented to the Court, the Court would still have issued the orders. In short, any imperfections in the Lin evidence -- either in its acquisition or presentation -- were immaterial to the final result: it would have made no difference.
- [47] To paraphrase Brinks-MAT Ltd., the circumstances of its acquisition were not of "sufficient materiality to justify or require immediate discharge of the order without examination of the merits"; that fact was not of sufficient importance to the issues decided by the Court. Ultimately, the subjects of the alleged non-disclosure were not material facts, in the sense of being necessary for the consideration and the outcome. Had the applicants never cited the Lin interview, the order would still have been issued on the compelling evidence before the Court.

- [48] The Court concedes that it is a close call. It would have been prudent and preferable for the applicants to have disclosed this information in the ex parte hearings. Specifically, it would have been preferable and prudent for the applicants to have provided the entire Lin transcript and communications, highlighting the specific passages impugned by the defendant. The applicants could then have noted, and the Court would have accepted, that there was a limited number of individuals controlling the AAX companies (as set out in affidavits of Mr Leck (a Liquidator) and of the defendant himself, in the Hong Kong proceedings). The applicants could also have shown that the assembled evidence made out a strong case that the defendant was a central AAX figure, with managerial and technical direction of the AAX Group, and with a likely ability to effect the impugned assets transfers set out above. Again, the Court's decision to issue the orders was not based upon a categorical finding that the defendant had transferred the assets, and this evidence in itself was not material to that decision. Indeed, applicants' counsel frankly and expressly stated that it could not categorically show that the defendant himself had transferred those funds, and that there was always the theoretical possibility that any electronic transfer could have, in fact, been effected using an unauthorised access code or password or otherwise. As illustrated by Wu, Anton Piller and Mareva orders are, by their nature, often issued on circumstantial and inferential, rather than certain and direct, evidence.
- [49] I also agree specifically that applicants' counsel should have noticed the express reference in the Devost affidavit to the transcript of the Zoom interview, carried out investigations, and obtained and reviewed that interview transcript. Mr Ramsay falls on his sword and admits that he ought to have noticed the reference, and ought to have investigated further. Ultimately, while not sanctioning those imperfections, the Court notes that the standard on an ex parte application is one of reasonableness, not perfection: *Banner Carpets Ltd. v. Lai*, 2024 BCSC 105 at para. 43; *Takhar v. Takhar*, 2020 BCSC 2049 at para. 40; *Regal Ideas Inc. v. Haus Innovations Inc.*, 2018 BCSC 136 at para. 31; *United States of America v. Friedland* [1996] OJ No. 4399 (Gen Div) at para. 31. I also accept that this failure (as well as the failure of Mr Devost to include and describe the entire Lin transcript and communications) represents inadvertent rather than deliberate or bad faith non-disclosure of a fact that would not have changed the outcome of the hearing, as per *MacLachlan* at paras. 34, 35, 37(iii) and (iv); and *Brinks-MAT Ltd.* at 192(vi).
- [50] I reach this conclusion partly in light of Mr Ramsay's balanced presentation at the ex parte hearings, generally and in specific reference to the Lin evidence. He took pains to emphasise, repeatedly, that Mr Lin's evidence was "all hearsay" and that the Court may be inclined to afford it limited weight. These comments were consistent with the general fairness of presentation by the applicants' counsel in other regards. He similarly emphasised that there was no evidence directly linking the defendant to the US\$2.8 million or \$16 million transfers, and that such evidence was purely circumstantial, and that it may be wholly rebutted by the defendant at a future date.

- [51] I will address the non-disclosure of the Devost investigatory techniques that the defendant forcefully argued were dishonest and extortive.
- [52] Even in a criminal context, where Canadian Charter of Rights and Freedoms [Charter] values are directly engaged and where the liberty of an accused is at stake, courts recognise that investigators may and, indeed, at times, must resort to tricks, traps, and techniques that dip below beatific standards of honesty or fairness. As recognised by Lamer J (as he then was) in his concurring reasons in *Rothman v. The Queen*, [1981] 1 SCR 640 at 696-97:

I hasten to say also that, if the second portion of the rule is not a true discretion, it is even less a blanket discretion given judges to repudiate through an exclusionary rule any conduct on the part of the authorities a given judge might consider somewhat unfortunate, distasteful or inappropriate. There first must be a clear connection between the obtaining of the statement and the conduct; furthermore that conduct must be so shocking as to justify the judicial branch of the criminal justice system in feeling that, short of disassociating itself from such conduct through rejection of the statement, its reputation and, as a result, that of the whole criminal justice system, would be brought into disrepute.

The judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal-aid lawyer eliciting in that way incriminating statements from suspects or accused; injecting Pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.

[Emphasis added.]

- [53] Citing *Rothman*, in *R. v. Adams*, 2013 BCSC 828 (again in the heightened criminal law context), Dley J recognised the ability of investigators to use reasonable methods up to the threshold of impermissible conduct that "shocks the community":

- [67] The police are not expected to announce their investigations or necessarily "play by the rules". Investigators are entitled to use whatever reasonable methods are necessary to detect criminal activity. Criminal investigations are not to be considered from the perspective of the faint of heart .
- [54] These statements apply with more force in a civil proceeding, particularly in the context of applications for freezing and Anton Piller orders, which are designed specifically to counteract the unlawful activities of rogues, and to limit their evasion of court processes. Excessive judicial pearl-clutching at how the sausage gets made and how evidence is gathered would undermine the ability of any party to obtain such orders in a complex multi-jurisdictional fraud case such as the present, with thick and diverse investigatory files. Even outside of the context of Anton Piller and Mareva orders, illegally obtained evidence, if relevant, is generally and presumptively admissible in a civil dispute: *Voysus Connection Experts Inc. v. Shaikh*, 2019 ONSC 6683 at para. 40.
- [55] Turning to the present case, while Mr Devost's techniques and statements skate close to, and indeed, at times, may skate past, the lines of good sportsmanship and honesty, they do not affront the Court so far as to set aside the orders, or to decline to continue those orders, especially given the seriousness of the allegations and the strength of the evidence.
- [56] As a preliminary observation, it is not clear how much, if at all, Mr Devost's statements to Mr Lin deviated from the truth. Mr Devost may well have connections to the Chinese government. It is not controversial that all high-ranking members of the Atom Group face potential prosecution: indeed, two figures (and now three) have already been arrested in Hong Kong. Mr Lin is or was almost certainly a target of the Liquidators or prosecutors: perhaps not "suspect number one", but likely high on the list given his centrality to the AAX. At the time of the interview, at an earlier stage of the investigation, Mr Lin may have been "suspect number one". The defendant did in fact swear an affidavit identifying Mr Lin as the CEO and founder of Atom. In any case, it is hardly a rare, novel or shocking technique for an investigator to seek to elicit evidence from one suspect by suggesting that another suspect has turned against them.
- [57] The defendant suggests that Mr Devost's technique constituted criminal extortion under s. 346 of the Criminal Code, RSC 1985, c. C-46. Apart from that bare citation, no case law evidencing convictions on similar facts is provided. In any case, the Canadian Criminal Code would not apply to a Zoom call between a US-based investigator and a Hong Kong-based interviewee. Nor is citation of Rule 3.2-5 of the Law Society of British Columbia's Code of Professional Conduct for British Columbia, prohibiting lawyers from threatening criminal proceedings, applicable or informative to the present impugned statements of a non-British Columbian non-lawyer.

[58] The Court declines to set aside the orders on the grounds of any of the alleged non-disclosure. Alternatively, even any of alleged non-disclosure surrounding the Lin interview were material, this Court would exercise its discretion on this de novo hearing not to dissolve the orders, and to reissue the orders on the present and updated evidentiary foundation.

B. The modifications to the Anton Piller order

[59] The defendant argues that the applicants:

designed and operationalized the APO to fundamentally strip away the usual protections afforded to targets of Anton Piller orders. This impeded a thoughtful, fair, and responsible execution of the APO. The Liquidators modified the APO to prevent Mr Su from obtaining legal advice on the APO from his counsel in Hong Kong that the Liquidators knew was already engaged to deal with a related action involving Atom Holdings and Mr Su, and proceeded with execution of the APO at a time of day that effectively prevented Mr Su from contacting his Hong Kong counsel.

[60] These reasons will address the thrust of these objections -- the defendant's limitations in contacting Mandarin-speaking counsel -- in the next section, with respect to the execution of the APO.

[61] The order largely followed this Court's Preservation of Evidence Model Order (PD-47; 2015/08/01). Modification of that model order is not inherently sinister. The Model Order expressly anticipates alterations to its terms to suit the circumstances:

.This model Order does not alter the law with respect to Anton Piller Orders in the Province of British Columbia and its terms may not be appropriate for all types of cases. Additional, alternative or related relief may be sought and obtained from the Court.

[62] Applicants' counsel complied with that practice direction, and good practice generally, in providing a black-line version of the draft order setting out proposed amendments to the Model Order. The majority of the departures from the Model Order were designed to protect the defendant and the integrity of the process. For example, in addition to the independent supervising solicitor, the order appointed a separate search officer with an obligation to report to the Court, as well as to guard and review any seized data and material prior to release to the parties, in the interests of safeguarding privileged documents. The order also adopted some of the safeguards set out in *Kirshenberg v. Schneider*, 2023 ONSC 2809, such as having the ISS wear headphones while the defendant speaks to his lawyer, to protect privilege: *Kirshenberg* at para. 59(b).

[63] The primary change objected to by the defendant is the tightening of the time for the defendant to seek legal advice from two hours to one hour, between arrival at the residence and seizure of materials. The Court accepted the presented rationale:

- [22] We are dealing with digital evidence that could be deleted or dissipated at the click of a key. Cryptocurrency is, by its very nature, designed to be somewhat secretive, and difficult to penetrate and seize.[4]
- [64] This fragility and transience of digital assets is not controversial: it is regularly recognised by Canadian Courts in the context of such ex parte orders; see, for example, *Canada West Tree Fruits Ltd. (The View Winery) v. Saywell*, 2024 BCSC 611 at para. 67; *Kirshenberg* at paras. 33, 53.
- [65] These were reasonable concerns and modifications, accepted by the Court. There was ample evidence that the defendant is sophisticated in the realm of encrypted Internet commerce with significant cryptocurrency assets at stake, at a time when all AAX executives face a real prospect of arrest or detention. The risk of instantaneous dissipation is much higher here than when seizing the phones of a poacher or street-level drug dealer.
- [66] Further, while the Model Order refers to a two-hour window (para. 13), its default term contemplates a maximum rather than a minimum of two hours: "for a period not to exceed two hours (unless the Independent Supervising Solicitor agrees to a longer period) " As quoted above, the Model Order defers to and does not supplant governing law. *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36 at para. 40(2)(v) [*Celanese*] itself only requires that the defendant "be given a reasonable time to consult with counsel ." [emphasis added to both].
- [67] The defendant argues that it was irrational to shorten the window for legal advice to one hour: if the feared asset transfer can take place in a nanosecond, one hour will make no difference.
- [68] This rhetorical point has some force, but the tightening of the window was a practical balance in the circumstances, where some time must be provided to the defendant to seek legal advice as per *Celanese* at para. 40(2)(v). The defendant is not seriously suggesting that no time should have been provided to confer with counsel.
- [69] Further, while the ability to confer with counsel is an important term of the model order and an important aspect of due process, as a practical matter, it serves more as a reassurance and explanation to the defendant rather than a means to receive legal options and strategies. When presented with an Anton Piller order based upon the court's model order, there is little advice to be given apart from "Yes, this is a legitimate court order that you should obey. You notionally are free to ignore it, but you will face contempt of court proceedings." As noted somewhat puckishly by Lord Denning in the original, eponymous *Anton Piller KG v. Manufacturing Processes Ltd & Ors*, [1976] Ch 55, CA at p.60:

But the Order sought in this case is not a search warrant. It does not authorise the Plaintiffs' Solicitors or anyone else to enter the Defendant's premises against his will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the Defendants. The

Plaintiff must get the Defendant's permission. But it does do this: It brings pressure on the Defendants to give permission. It does more. It actually orders him to give permission -- with, I suppose, the result that if he does not give permission, he is guilty of contempt of Court.

[70] And, ultimately, this objection is more notional than real: more than two hours passed between the arrival of the search party at the house and the commencement of the gathering of evidence, while the ISS explained the order through the translator.

C. The manner of execution of the APO

[71] Celanese at para. 40 sets out guidelines for the preparation and execution of an APO:

(1) Basic Protection for the Rights of the Parties

(i) The order should appoint a supervising solicitor who is independent of the plaintiff or its solicitors and is to be present at the search to ensure its integrity. The key role of the independent supervising solicitor was noted by the motions judge in this case "to ensure that the execution of the Anton Piller order, and everything that flowed from it, was undertaken as carefully as possible and with due consideration for the rights and interests of all involved" (para. 20). He or she is "an officer of the court charged with a very important responsibility regarding this extraordinary remedy" (para. 20) .

(ii) Absent unusual circumstances the plaintiff should be required to provide an undertaking and/or security to pay damages in the event that the order turns out to be unwarranted or wrongfully executed .

(iii) The scope of the order should be no wider than necessary and no material shall be removed from the site unless clearly covered by the terms of the order .

(iv) A term setting out the procedure for dealing with solicitor-client privilege or other confidential material should be included with a view to enabling defendants to advance claims of confidentiality over documents before they come into the possession of the plaintiff or its counsel, or to deal with disputes that arise...

(v) The order should contain a limited use clause (i.e., items seized may only be used for the purposes of the pending litigation) .

(vi) The order should state explicitly that the defendant is entitled to return to court on short notice to (a) discharge the order; or (b) vary the amount of security .

(vii) The order should provide that the materials seized be returned to the defendants or their counsel as soon as practicable.

(2) The Conduct of the Search

(i) In general the order should provide that the search should be commenced during normal business hours when counsel for the party about to be searched is more likely to be available for consultation .

- (ii) The premises should not be searched or items removed except in the presence of the defendant or a person who appears to be a responsible employee of the defendant.
- (iii) The persons who may conduct the search and seize evidence should be specified in the order or should specifically be limited in number
- (iv) On attending at the site of the authorized search, plaintiff's counsel (or the supervising solicitor), acting as officers of the court should serve a copy of the statement of claim and the order and supporting affidavits and explain to the defendant or responsible corporate officer or employee in plain language the nature and effect of the order.
- (v) The defendant or its representatives should be given a reasonable time to consult with counsel prior to permitting entry to the premises .
- (vi) A detailed list of all evidence seized should be made and the supervising solicitor should provide this list to the defendant for inspection and verification at the end of the search and before materials are removed from the site...
- (vii) Where this is not practicable, documents seized should be placed in the custody of the independent supervising solicitor, and defendant's counsel should be given a reasonable opportunity to review them to advance solicitor-client privilege claims prior to release of the documents to the plaintiff.
- (viii) Where ownership of material is disputed, it should be provided for safekeeping to the supervising solicitor or to the defendant's solicitors.

(3) Procedure Following the Search

- (i) The order should make it clear that the responsibilities of the supervising solicitor continue beyond the search itself to deal with matters arising out of the search, subject of course to any party wishing to take a matter back to the court for resolution.
- (ii) The supervising solicitor should be required to file a report with the court within a set time limit describing the execution, who was present and what was seized .
- (iii) The court may wish to require the plaintiff to file and serve a motion for review of the execution of the search returnable within a set time limit such as 14 days to ensure that the court automatically reviews the supervising solicitor's report and the implementation of its order even if the defendant does not request such a review..

[Citations omitted.]

[72] The execution in the present case was not flawless; it encountered some complications, both external and self-inflicted. Few APO executions proceed in a calm and fully anticipated manner. Other inhabitants of the house (the defendant's wife and mother, and, later, a child), were upset and confused by the search. Again, while regrettable, an APO will often by its nature be unusual and upsetting to a defendant as well as to other occupants of the residence. The words of Justice McMahon in *Canadian Derivatives Clearing Corp. v. EFA*

Software Services Ltd., 2001 ABQB 425 apply equally here:

- [58] Finally, EFA complained that the execution of the Anton Piller/Preservation Order was "intrusive". In my view, this is simply irrelevant. An Anton Piller order is intrusive by nature and definition. I did not grant the original ex parte order under a misapprehension that there would be absolutely no disruption to EFA in the execution of the order. I also note in passing that this was less intrusive than a "pure" Anton Piller order would have been, as it involved only copying of hard drives and documents, not seizure.[5]
- [73] Until fraudsters renounce matrimony, procreation, and cohabitation, this upset is a natural occurrence in the execution of this extraordinary remedy. Nothing that the search party did was particularly aggressive or unusual, or exacerbated the circumstances beyond what would have occurred in the usual course. It appears that the ISS interacted with the wife in as sympathetic a manner as could be expected in the circumstances.
- [74] I turn to specific criticisms of the execution of the APO raised by the defendant.
- [75] First, the defendant notes that it was the first time that the ISS had overseen an Anton Piller order. Defendant's counsel delighted in the ISS's confirmation on cross-examination that he had never read Anton Piller or Grenzservice Speditionen Ges.m.b.H. v. Jans (1995), 15 BCLR (3d) 370 (SC). The independent supervising solicitor had, however, read the binding, comprehensive, instructional, and more recent decision in Celanese, which cites and synthesises those decisions: that review was sufficient and appropriate.
- [76] Second, the search party did not enter through the front door of the defendant's house. That door was bounded by large glass windows. The search party saw people inside the house, including a woman who appeared to be heading towards a second entrance door, in the three-car, two-bay garage attached to the house. The garage was located further down the driveway, to the left of the front door, beside the artificial waterfall. The garage doors were all open, and there was nothing inside. The search party took a few steps into the garage and knocked on the door connecting the garage to the main body of the residence. The defendant's wife opened the door and let them into the kitchen on the other side. The ISS reviewed the order with the wife at the kitchen table rather than outside the residence. Only the ISS, the search officer, and the translator entered the house; the police officers, who were only there to address potential safety concerns, did not enter the house, and exited the garage.
- [77] Defendant's counsel argues forcefully that the few steps taken into the garage represented an unauthorised entry into the residence, in breach of the APO.
- [78] If knocking on the garage side door rather than the front door was a breach of the order, that breach was de minimus. The search party's presence in the garage was fleeting and brief. While the garage was an attached rather than a detached garage, in practical terms, that is a happenstance of architecture: the garage was clearly a garage distinct from the living quarters of the family. The garage doors were wide open. As described by the ISS under

cross-examination, "[i]t looked more like the outside. It just looked like a continuation of the driveway. The main thing you could notice was the door which appeared to be a second entrance for the house." The garage was empty: no evidence was present, nor items or documentation going to the core biographical integrity of the defendant or the other occupants. It was an open garage, not a bedroom or an office.

- [79] Under the more stringent Charter scrutiny, in a criminal context, with liberty at stake, *R. v. Dhindsa*, 2013 ONCJ 32, similarly dismissed complaints about entry into a garage by the police. The police followed the accused, suspected of driving while impaired, into his garage, and discovered a liquor store bag in the car. Justice K Caldwell noted:
- [44] there is a very significant difference in an entry to a garage versus an entry to a home. The garage in this case is fully enclosed, with a garage door and a door leading from the garage into the home. The privacy interests in the home are based, however, upon the age old concept of a man's home as his castle, and the privacy rights that allow people to conduct all those intimate details of private life behind closed doors, free from prying eyes. Such activities occur within the four walls of the home itself, however, not in the garage. The garage is simply a place we park our cars, as Justice Rosenberg found the driveway to be in *Lotozky*. It is enclosed, unlike a driveway, however the privacy interests are not those found within the home itself, particularly when the garage door is wide open.
- [80] Third, the defendant objects that the explanation of the order to the wife (through a translator) occurred in the kitchen rather than at the front door. Accounts are contradictory on this point. The wife provides the conclusory assertion that the search party "all entered the family home without my invitation or permission". The report of the ISS states that "[w]ith the assistance of the translator, the independent supervising solicitor introduced himself and the search officer. Ms Kong invited the ISS, the search officer and the Translator into the Premise[s]." Under cross-examination, the ISS confirmed, twice, that the wife was friendly and invited them in. In his report to the court, the search officer also recounted that she invited them in. While there may have been communication difficulties, I am confident on the totality of the evidence that the search party did not physically force its way into the residence and, to some extent, the wife either overtly or implicitly invited them into the kitchen, where they placed the binders containing the application materials and the order on the kitchen table. On the evidence before me, I cannot conclude that there were any improprieties in the entry into the house.
- [81] Fourth, as the defendant was not at home, the ISS left the scene of the residence with a search officer and translator to the nearby gym, where they found the defendant; they discreetly told him of the need to return home, took his phone, and returned to the residence with him. The defendant notes that the ISS and Mr Munro stopped supervising the search during his trip to the gym. The second search court officer, Mr Clarke, however, remained at the residence: for this short period there was thus nonetheless an officer of the court present at the residence.

[82] Fifth, the defendant objects to the seizure of the phones of the wife, grandmother, and nanny by the search party. Those phones fall under the broad definitions of "evidence for seizure" on the "premises" as set out in the order. Of course, the kind of person whose actions attract an APO often will store or hide evidence and other sensitive materials on or in devices or other receptacles ostensibly owned by family members, employees, or associates. As stated in *Netsmart Inc. v. Poelzer*, 2002 ABQB 800 at para. 45:

It would be completely absurd if a party executing such an order was obligated to accept the labelling which had been placed on electronic media by an opposing party as being accurate and thus it was entirely appropriate to seize CDs and floppy disks and review the same before they were returned to the Defendants. By the same token, it was entirely proper to examine the hard drives on the computers, for without examining the data on a hard drive, a physical inspection of the hard drive would reveal nothing.

[83] Sixth, the defendant argues that he was deprived of the ability to speak to his counsel of choice: his Hong Kong counsel in the parallel proceedings in that jurisdiction. The ISS provided the defendant an off-the-shelf telephone with which to call a lawyer, and provided the names and contact numbers of two Mandarin-speaking lawyers at national firms (including Edward Wang, an esteemed counsel at Mr McGowan's own firm) to call if he needed local counsel; the stated thought was that lawyers at a national firm would have ready access to barristers familiar with Anton Piller and Mareva orders. Unfortunately, and unbeknownst to the ISS, the phone provided could only make local calls (it is not contended that this limitation was deliberate). The defendant also argues that the APO execution should have been timed to allow contact with Hong Kong counsel during Hong Kong business hours.

[84] Starting with the last objection, it would be impossible to comply with the Celanese and Model Order requirement that the APO execution take place during local business hours if one were to coordinate it with the Hong Kong time zone: the defendant would be complaining even more loudly if the execution had taken place at 3 am PST to accommodate the defendant's Hong Kong counsel. Second, it could be questioned how helpful a Hong Kong counsel would be in interpreting and advising on a British Columbia order. Third, the defendant did already have a local Mandarin-speaking counsel: Mr Jerry Liu, who had assisted him with his mortgage just a few months earlier, who notarised his first affidavit in these proceedings, and who attended these court hearings. Fourth, it was reasonable for the ISS to provide the names of local Mandarin-speaking lawyers whose practice in large firms would give them ready access to litigation counsel who could readily advise on a British Columbia-issued APO (although it is conceded that the best practice would have been for the ISS to clear conflicts in advance of the APO execution, to avoid delay).

- [85] Seventh, the defendant complains that the search party did not leave until around 6 pm, although the order only authorised the search between 9 am and 5 pm. The substance of the search itself, however, was completed before 5 pm. The party was delayed in its departure through technical difficulties in printing out a list of items seized, as required under the order. That term exists for the protection of the defendant. No bad faith or prejudice attended the delayed departure.
- [86] Eighth, the defendant complains that the search party filmed a portion of the search. The order expressly anticipates and permits the search party to film the premises for the purpose of capturing "before" and "after" images of the house: para. 13(c). There is no evidence that the filming was undertaken for any other purpose, or that it was otherwise abusive.
- [87] Finally, the defendant complains about certain communications made to financial institutions in order to enforce and effect the freezing order. He complains that the applicants overstepped the terms of the order in seeking from financial institutions information about the defendant's accounts, and in carbon copying a bank officer from one bank in email communications with another bank. The defendant argues that such communications breach privacy legislation. Again, no authority is provided for such findings in factually similar circumstances, or as a basis for setting aside a freezing order. If tortious or statutory liability arises as a result of those communications, the defendant is free to pursue those remedies in another context. In themselves, those actions do not move the Court to set aside the orders or to decline to continue them.

D. Should the orders stand and continue?

- [88] The Court confirms that while the applicants failed to disclose facts that prudently and responsibly ought to have been disclosed, the omitted facts were not material, in the sense of being critical to the decision to be made, or the decision that was made. Even had those facts been disclosed, the outcome would have been the same.
- [89] Even if I am incorrect in finding that none of the silent facts constituted material non-disclosure, or that nothing in the execution of the APO ought to result in the setting aside of the orders, the strength of the totality of the evidence would nonetheless prompt this Court to exercise its discretion to maintain the orders, following *MacLachlan; Save-A-Lot Holdings Corp. v. Christensen*, 2019 BCSC 115 at para. 4; *Kerston v. Seyedzadeh*, 2013 BCSC 1330 at paras. 15-16; *Bush v. Fennell*, 2023 BCSC 2115 at paras. 49, 95; *EAM Global Logistics Ltd.* at para. 52; and *Canada West Tree Fruits Ltd.* at paras. 76, 80.
- [90] Further and finally, and in any case, the Court would confirm and issue afresh the orders on this inter partes return hearing. The evidence, as originally presented and as expanded since the original hearings, establishes a strong *prima facie* or good arguable case on the merits: that the defendant has unilaterally directed Atom assets of AAX and/or its customers to his own benefit, and that there remains a real risk of dissipation that would render a final judgment nugatory if the orders are set aside or otherwise not continued. The balance of

convenience between the parties, including considerations of recovery for the hundreds of AAX Platform users, strongly weighs in favour of continuing the orders. The evidence seized under the APO shall remain seized, and the freezing order shall continue until trial or further order of the court.

- [91] The strong prima facie case found on the evidence as it stood in April has been strengthened considerably by the further post-order evidence of the \$16 million transfer, set out above. The timing and the totality of the evidence presents a strong case not only that the defendant is dissipating his assets but that he has dissipated his assets in breach of an order of this Court.
- [92] The strong prima facie case is also strengthened by the defendant's obfuscatory actions after those orders, as set out above. He omitted his TD bank account from his first two affidavits of assets, while listing two accounts held at other institutions. A defendant who provides an incomplete or misleading affidavit of assets loses the confidence of the court, and the provision of such an affidavit may indicate noncompliance with the original order beyond the affidavit itself: *Cloutier c. Cloutier*, 2010 QCCS 4270 at para. 16; *Obegi v. Kilani*, 2011 ONSC 2933 at para. 13.
- [93] The defendant is further guilty of non-compliance with court orders: he failed to provide complete and accurate passwords and other information necessary to access the electronic devices and accounts subject to the APO, in breach of the APO, as well as a specific subsequent court order. A defendant's breach of court orders in itself permits the inference on its own of a real risk of dissipation: *Le Soleil Hospitality v. Louie*, 2009 BCSC 1442 at paras. 9-11; *Wang v. Yu*, 2017 BCSC 1076 at para. 61; *LLS America LLC (Trustee of) v. Dill*, 2018 BCSC 2316 at para. 85.
- [94] Further, and compellingly, the defendant has provided only sparse evidence addressing the original allegations against him. His one filed affidavit focuses solely on the execution of the APO. His two other affidavits remain unfiled. They are brief (4 and 14 paragraphs, respectively), and tightly and carefully worded. For example, in response to the potent evidence of the set of safe keys labelled "AIA Tower" (the address of Atom Holdings's former office in Hong Kong), found in the safe in the defendant's house, he dodges the central inference that he is a directing corporate and technical mind of the AAX Group, instead providing this vague and unhelpful evidence:

I believe that the keys are for a safe that was located at Atom Holdings' former office located in the AIA Tower in Hong Kong. I do not know whether the safe remains in Atom Holdings' former office, or who has possession of the safe.

- [95] The defendant had nine weeks to prepare a comprehensive responsive affidavit rebutting and denying the heavy and multifarious allegations against him. It was anticipated that the parties would return on an inter partes basis for the Court to consider the continuation of the orders based on a full consideration of the evidence from both sides: see para. 22 of my April 8, 2024 oral reasons. That anticipated affidavit could also have addressed prejudice to

the defendant, a critical consideration in the balance of convenience: he provides little evidence in this regard.

- [96] The defendant objects that he is under no obligation to rebut these allegations, as the applicants bear the burden of proof. This Court of Appeal recently addressed this issue, in the specific context of a freezing order, in *Wu*:
- [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"... Nor is there, strictly speaking, an "evidential" or "provisional" burden on the other party. 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 .
- .
- [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.
- .
- [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)

[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".

[Citations omitted; italicised emphasis added; bolded emphasis in original.]

[97] The Wu Court reversed the Chamber Judge's order that the freezing order be set aside on the narrow basis that there was no evidence that the defendant still possessed assets within British Columbia. The Court of Appeal concluded that an adverse inference could and should have been drawn from the defendant's silence, where the defendant was in the best position to provide evidence as to what happened to the money withdrawn from his accounts:

[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.

[98] The timing of the defendant Mr Ma's draining of his account, just after the judgment in that case (see para. 41), of course has some parallels with the US\$2.8 million and \$16 million cryptocurrency transfers to and from wallets held by the defendant. Taking into account the relative ability of each party to produce evidence and those transfers, and the present defendant's ongoing vagueness about those transfers, as well about his exact role in the AAX Group, in addition to his false evidence in the Hong Kong proceedings, when he is the best position to provide comprehensive evidence on those issues, it is appropriate that these orders continue, or alternatively be issued afresh.

E. Security

[99] The defendant seeks an order that the applicants post security into court for the continuance of the freezing order in the amount of CAD\$250,000, or alternatively, an amount to be set by the Court.

[100] The applicants have already provided the usual undertakings for damages in order to obtain the APO and the freezing order. The applicants, however, have provided no evidence of activities or assets in British Columbia that would provide reassurance to the defendant and the Court that if the orders are eventually set aside and the proceedings dismissed, the defendant would receive a compensation or costs award for the orders or for the proceedings generally.

[101] Under security for costs jurisprudence, foreign corporate plaintiffs without proof of assets in British Columbia are generally obligated to post security: see, e.g., *Endurance Equipment, LLC v. Teal-Jones Group*, 2020 BCSC 533 at paras. 28-29; *Aggregate Mining Process LLC v. Vezer Industrial Professionals Canada Ltd.*, 2019 BCSC 1101 at para. 21. A similar principle should apply in the present circumstances. The Court orders the applicants to post CAD\$150,000 with the Court Registry, or by way of a letter of credit or other form approved by the defendant, by September 1, 2024.

V. Conclusion

[102] The defendant has filed a Jurisdictional Response challenge to these proceedings. It is not clear whether this filing seeks to avert a trial of the ultimate issues in British Columbia, or simply to challenge the Court's jurisdiction to issue orders such as those already issued and now confirmed against the defendant. While the Court cannot read minds, it may well be that the sole relief sought against the defendant in British Columbia is that already sought, in the form of the APO and the freezing order, with the ultimate adjudication of the case against the defendant occurring in the Cayman Islands, or elsewhere. If these proceedings are limited to ancillary relief (as in, for example, *United States Securities and Exchange Commission v. Sharp*, 2023 BCSC 425 and the authorities surveyed therein at paras. 22-35), it may well be that the defendant sees no need to bring the application, or that the application is bound to fail. The applicants shall advise the defendant as soon as possible, and no later than September 1, 2024, of its litigation intentions in British Columbia.

[103] If the defendant wishes to pursue his jurisdictional challenge, he is to secure as early a date that is convenient to the Court and the parties. The parties shall exchange and provide to the court written arguments 10 days before the hearing date, with written reply submissions three days before the hearing date. If I am unavailable to hear the matter, the parties are at liberty to appear before another Chambers Judge.

[104] If the applicants do in fact wish to proceed to a trial or a final hearing in British Columbia, then as per usual freezing order jurisprudence, they should move as swiftly as possible towards that goal: see *Wu* at para. 53. To that end, the parties should proceed with the discovery process, with all due speed. The fact that a jurisdictional challenge has been filed does not automatically impose a stay of proceedings, and the obligation rests on the defendant to obtain a stay: Rule 21-8(1) and (4) the Supreme Court Civil Rules, B.C. Reg. 168/2009; *Burke v. NYP Holdings, Inc.*, 2005 BCSC 1287 at para. 14.

[105] With an eye to moving this matter forward, the Court specifically confirms that the search officers may make available to the applicants and their legal and technical advisors the items and digital evidence seized during the execution of the APO, for analysis and listing. The defendant should move promptly to review the potentially privileged items held by the ISS under article 28 of the APO, and assert any privilege, as appropriate, without delay.

[106] Finally, the parties shall consider whether it is necessary (as per *Sherman Estate v. Donovan*, 2021 SCC 25) to maintain the sealing order on its present broad terms, or at all, beyond the usual sealing of the affidavits of assets. The sealing order may have been justifiable before the execution of the APO and freezing order, but that moment has now passed. There is a clear public dimension to this litigation beyond the interests of the three litigants. The parties are to confer and provide brief written submissions on this point no later than September 15, 2024 if they wish to retain any restrictions on this file.

[107] The Court is grateful for the able submissions of counsel.

"Crerar J"

[1] See Devost Affidavit #1, paras. 16-19.

[2] In Devost Affidavit #1, Mr Devost explains that " . [c]ommon practice would provide for management to have access to a recovery seed phrase that would serve as a backup to the [hot AAX] System Wallets ."

[3] Applying these principles, the Pierce Court " set the Order aside even without considering the merits of the application because there has been a complete and utter failure by Mr Pierce to provide full and frank disclosure of all material facts as required on an ex parte application": para. 36. Specifically, the applicant Mr Pierce had failed to disclose, and his counsel actively avoided disclosing to the Court, that he was the subject of two SEC decisions that ordered Mr Pierce to pay US\$9.4 million, in a fine and disgorgement order and the reasons for them. Apart from those facts casting " .serious questions on his character and credibility as a stock promoter in the stock promotion marketplace" (para. 27) they went to the core of the alleged defamation on which the action and the APO were based.

[4] The defendant criticises the applicants' stated concerns that the defendant's devices and accounts might have been set with "dead man's switches": automatic deletion provisions. The defendant argues that there is no proof that the defendant had ever used such switches, and that the applicants used "that fictional notion as a stalking horse". While that term was used in the ex parte applications, it remains something of a stalking horse in the defendant's argument. The thrust of the concern, shared by the Court in issuing the order, is the speed at which digital assets can be transferred or deleted.

[5] Justice McMahon ultimately varied the Anton Piller order, on other bases: namely that there was no justification for preservation of certain documents in independent hands: paras. 52, 66.

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