

CANADA / JUDGMENT

Bush v. Fennell

2023 BCSC 2115

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2023 BCSC 2115 Bush v. Fennell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bush v. Fennell,

2023 BCSC 2115

Date: 20231201

Docket: S237139

Registry: Vancouver

Between:

Joanna Rudnicki Bush

Plaintiff

And

David Fennell, Nassau Capital Management Partners Inc., Laurentian Mountains Resources Inc.,
and Laurentian Mountains Investments Limited

Defendants

Before: The Honourable Justice K. Loo

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

November 20, 2023

Place and Date of Judgment:

Vancouver, B.C.

December 1, 2023

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- [1] On this application, the plaintiff, Joanna Rudnicki Bush ("Ms. Rudnicki"), seeks a Mareva injunction in aid of matrimonial proceedings in the United States. At issue are whether she made full and fair disclosure to this Court when she sought, and was granted, an interim and time-limited ex parte injunction on October 20, 2023 (the "Mareva Order"), and whether this Court ought to exercise its discretion to grant a new injunction, and, if so, on what terms.

Background

- [2] The parties are spouses who are currently engaged in matrimonial litigation in the state of New York in the United States. Upon commencing divorce proceedings in New York, certain "automatic orders" (the "Automatic Orders") were entered, requiring the parties to maintain the financial status quo pending the determination of the divorce proceedings. Paragraph 1 of the Automatic Orders states:

Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expense and for reasonable attorney's fees in connection with this action.

- [3] The Mareva Order was granted by Justice McDonald on October 20, 2023. At para. 1, it provides, in part, that:

the Defendant David Fennell must not:

- (a) Remove from British Columbia or in any way dispose of or deal with or diminish the value of any of his assets that are in British Columbia whether in his own name or not and whether solely or jointly owned.
- (b) This prohibition in 1(a) applies to all of David Fennell's assets, and includes the following assets in particular:
 - (i) Securities held in David Fennell's accounts at Haywood Securities Inc., including, without limitation, in the following accounts: YC16566C and YC16566U.

- [4] The Mareva Order also provides that:

4. This Order does not prohibit the Defendants from dealing with or disposing of any of their assets in the ordinary and proper course of business.
15. The Defendant David Fennell must, within seven days of the service of this Order, provide the Plaintiff's solicitor with a list (the "Defendant's Asset List") verified by affidavit setting out all of the Defendant's assets as of the date of this Order whether in his 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 Defendant's name or jointly held with another person, or by another on their behalf.
- [5] The securities in the Haywood Securities accounts referred to in the Mareva Order (the "Securities") include approximately 60 million shares in Reunion Gold Corporation ("Reunion"), a Canadian public company, held both personally by David Fennell and through the three corporate defendants. Mr. Fennell is the founder and Executive Chairman of Reunion. The Reunion shares in the Haywood Securities accounts that are held by or on behalf of Mr. Fennell appear to be worth in excess of \$20 million CAD.
- [6] The ex parte injunction application was heard by Justice McDonald on October 20, 2023.
- [7] There was evidence before her that Mr. Fennell had sought to encumber the Securities for the purposes of a business transaction. Ms. Rudnicki put in evidence a term sheet between a third-party lender, Earlston Investment Corp. ("Earlston"), and Mr. Fennell, which was signed by Earlston but not by Mr. Fennell (the "Term Sheet"). The Term Sheet contemplated that Mr. Fennell would borrow \$7 million CAD from Earlston, and that the security for the loan would include a pledge of his Reunion shares and a General Security Agreement "over all of the Borrower's [Mr. Fennell's] present and after-acquired personal property". The Term Sheet stated that the closing was "expected to occur on or about October 31, 2023".
- [8] Notwithstanding that the Term Sheet was not signed by Mr. Fennell, the imminent risk of the transaction contemplated in it (the "Proposed Transaction") underlaid the granting of the Mareva Order.
- [9] Mr. Fennell has deposed that the Proposed Transaction relates to a project involving the development of mining properties in Guyana and Suriname. I understand Mr. Fennell's position to be that the Proposed Transaction would be in the "usual course of business" for him and is therefore not caught by the Automatic Orders. Specifically, he has deposed that:

The proposed loan of \$7 million is part of the "normal course" of operation of my business with LMR [the corporate defendant, Laurentian Mountains Resources Inc.] and the nature of the transaction is similar to what I have been successfully doing for the last 40 years in business.
- [10] As he was entitled to, Mr. Fennell brought an application on November 6, 2023, to set aside the Mareva Order on two days' notice. Ms. Rudnicki sought, and was granted, a brief adjournment. The adjournment was granted on the following terms:

- a) A term in the Mareva Order requiring the production of a Defendant's Asset List was stayed pending the hearing of this application (the "First Adjournment Term");
 - b) Mr. Fennell was entitled to use \$500,000 of the cash funds in his Vancouver brokerage accounts to exercise 2.5 million warrants in the Reunion shares (the "Second Adjournment Term"); and
 - c) Mr. Fennell was entitled to collateralize half of the assets in the Vancouver brokerage accounts for the purpose of the Proposed Transaction (the "Third Adjournment Term").
- (collectively, the "Adjournment Terms").

[11] The Mareva Order was set to expire on November 20, 2023, the day of this hearing. At the conclusion of the hearing, I extended the Mareva Order on the condition that the Adjournment Terms would continue, pending my determination of this application.

Issues in the Application

[12] The following issues arise on the determination of this application:

- a) Is it appropriate to set aside the Mareva Order on the basis of non-disclosure?
- b) If so, should this Court still consider whether to issue a new injunction?
- c) Should a new Mareva injunction be granted?

[13] I will address each of these issues in order.

Material Non-Disclosure

[14] In *Northwestpharmacy.com Inc. v. Yates*, 2018 BCSC 41 [Northwestpharmacy.com], the Court set out the procedure to be followed on a motion to set aside a Mareva injunction. Strictly speaking, this is not a set-aside motion because the Mareva Order will expire upon the issuance of these Reasons, but 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. See *Mooney v. Orr*, [1994] B.C.J. No. 2652 (S.C.); and *Global Chinese Press Inc. v. Zhang*, 2015 BCSC 874, at para. 11.

[16] A material fact is one that may affect the outcome of the application. See *Pierce v. Jivraj*, 2013 BCSC 1850, at paras. 37-38.

[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. See *Pierce v. Jivraj*, cited above, at paras. 22 and 37-38; and *Hollinger Inc. v. Radler*, 2006 BCCA 539 at para. 39.

- [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. See *Mooney v. Orr*, cited above, at para. 30; and *MacLachlan v. Nadeau*, 2017 BCCA 326, at paras. 28, 32 and 37.
- [15] In *Save-A-Lot Holdings Corp. v. Christensen*, 2019 BCSC 115 [Save-A-Lot], 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.
- [16] In the case at bar, Mr. Fennell alleged non-disclosure in respect of a large number of issues. I will attempt to group his allegations into categories.

Mr. Fennell's Corporate Email Account

- [17] In my view, the most significant argument in respect of non-disclosure, and the claim on which the most time was spent in submissions, relates to the means by which Ms. Rudnicki obtained access to the Term Sheet and the other evidence concerning the Proposed Transaction.
- [18] Ms. Rudnicki acknowledged that she obtained the evidence regarding the Proposed Transaction from Mr. Fennell's corporate email account. She accessed this account by using an iPad in her possession that was set up to access Mr. Fennell's corporate email.
- [19] It appears from the evidence that Ms. Rudnicki took the iPad, with Mr. Fennell's knowledge, from Nassau where Mr. Fennell resides, to New York where Ms. Rudnicki resides, approximately 18 months before the commencement of the New York divorce proceedings. On various occasions before the ex parte injunction was sought on October 20, 2023, Ms. Rudnicki accessed the corporate email account to discover facts about Mr. Fennell's personal activities with which she then confronted him.
- [20] In particular, in March 2022, she confronted him about an affair and told him that she had learned of it by looking through his email.
- [21] In May 2023, she learned about another affair and confronted Mr. Fennell about it. Mr. Fennell has deposed, and Ms. Rudnicki has acknowledged, that he asked her to stop accessing his email at this time.

- [22] With the help of an information technology professional employed by Reunion, Caroline Dufour, Mr. Fennell undertook to prevent Ms. Rudnicki from gaining access to his email account. However, Ms. Dufour's evidence does not demonstrate that anything in this regard was done between May and October 2023. In any event, Mr. Fennell's efforts were somewhat inexplicably ineffective until October 23, 2023, three days after the Mareva Order was granted.
- [23] Mr. Fennell does not take the position that the evidence regarding the Proposed Transaction is inadmissible because of the manner in which it was obtained. Rather, his position is that Ms. Rudnicki ought to have disclosed the means by which she accessed the emails - in particular, she should have disclosed that he had specifically told her not to access his emails in May 2023, and that the corporate email account contained privileged material. He submits that if she had disclosed such information on the ex parte application, Justice MacDonald may have declined to grant the injunction based on the clean hands doctrine: *Wang v. Wang*, 2020 BCCA 15 at para. 46.
- [24] By contrast, Ms. Rudnicki's position is that Mr. Fennell had no expectation of privacy in his corporate email account. She argues that he knew that she was accessing his email over a significant period of time. There is no specific evidence that the password was changed between June 2022 and October 2023.
- [25] In my view, Ms. Rudnicki's failure to clearly describe how she obtained access to the emails amounted to a material non-disclosure. I do not find persuasive her argument that Mr. Fennell had no expectation of privacy because he knew about her access but had not done anything to stop her, particularly in light of her acknowledgement that he had in fact told her to stop accessing his emails in May 2023. Further, she knew that the account was Mr. Fennell's corporate email account. Ms. Rudnicki thus reasonably ought to have appreciated that it would contain privileged and other confidential information.
- [26] Although I cannot discern with certainty what Justice McDonald would have done had the facts regarding Ms. Rudnicki's access to the emails been disclosed to her, the definition of materiality in *Pierce v. Jivraj*, 2013 BCSC 1850 requires me only to find that disclosure may have changed the result: para. 37. In my view, this test is satisfied.

Mr. Fennell's Business Practices

- [27] Mr. Fennell argues that Ms. Rudnicki did not adequately disclose the nature of his business affairs in the ex parte application. I understand his argument to be that if such information were disclosed, the Court would have been more likely to understand that the potential encumbrance of the Securities would fall within the ordinary business exception in the Automatic Orders.

[28] In my view, this claim does not meet the materiality threshold. It is not realistic to conclude that the injunction may have been refused had Ms. Rudnicki made further disclosure about Mr. Fennell's business affairs. It is difficult to see how Justice McDonald could have reached any conclusion more favourable to Mr. Fennell other than that there was an arguable case about whether the Proposed Transaction was in the usual course of his business. That conclusion would not have changed the result of the ex parte application.

Ms. Rudnicki's Financial Situation

[29] Mr. Fennell advances various arguments which essentially amount to a complaint that Ms. Rudnicki had failed to accurately disclose her own financial situation to the Court.

[30] However, in my view, Mr. Rudnicki's personal financial situation was not material to the granting of the Mareva Order. For the reasons below, I am of the view that the quantum of Ms. Rudnicki's entitlement in the New York proceedings is not relevant to this application.

[31] Further, Mr. Fennell alleges that Ms. Rudnicki understated her financial status. As pointed out by Ms. Rudnicki, to the extent that her assets or income are relevant to the issue of her ability to satisfy an undertaking for damages, a failure to disclose more income and assets would be to her prejudice, not to her benefit. It cannot be said that the disclosure of these facts may have affected the outcome of the ex parte application, in the sense that it may have persuaded the Court not to grant the injunction.

Inconsistencies in Ms. Rudnicki's Affidavits

[32] Ms. Rudnicki has filed three affidavits in this proceeding so far. Her first affidavit was before the Court on the ex parte application and the other two were filed subsequently in support of her position in this hearing.

[33] Mr. Fennell alleges that there are inconsistencies between Ms. Rudnicki's first and third affidavits. Assuming that the third affidavit is correct on these inconsistent points, Mr. Fennell argues that Ms. Rudnicki's evidence was incorrect on the ex parte application and therefore misled Justice McDonald.

[34] Ms. Rudnicki deposed in her first affidavit that Mr. Fennell was always secretive about "our finances" and did not want her involved in his business affairs. In her third affidavit, Ms. Rudnicki deposed that "I was familiar with our income and expenses because my role in the marriage and as family counsel meant that I was paying for all family and household bills". In my view, these statements are not necessarily inconsistent. I take the first statement to mean that Mr. Fennell did not disclose to her the extent and details of his or their assets or investments, while I take the second statement to mean that Ms. Rudnicki was familiar with the family's day-to-day income and expenses.

- [35] Further, Mr. Fennell argues that Ms. Rudnicki's first affidavit suggests that she found out about his filing of the divorce papers by accident, while it is clear from her third affidavit that she deliberately conducted a search of the court records. However, I find that there is no material inconsistency in these statements upon a careful reading of the relevant paragraphs.

Overstatements or Misstatements in Submissions

- [36] Mr. Fennell alleges that counsel for Ms. Rudnicki made overstatements or misstatements in the ex parte application. For example, Ms. Rudnicki's counsel submitted that "contrary to the New York order, Mr. Fennell was in discussions to leverage his stock " In my view, although it is correct that having discussions could not be a breach of the Automatic Orders, Justice McDonald was aware of the terms of the Automatic Orders and she could not have been misled by this submission.
- [37] Mr. Fennell also cites various passages from the initial ex parte hearing in which Ms. Rudnicki's counsel suggested that Mr. Fennell may have already done something to encumber his assets and breached the Automatic Orders. However, as I understand Ms. Rudnicki's position on the ex parte application, it was possible that the Proposed Transaction could have taken place and she simply did not know. She was aware of the unsigned Term Sheet and that there were negotiations but not whether another term sheet had been signed or acted upon since. During the ex parte hearing, Ms. Rudnicki's counsel said that the Automatic Orders were at risk of being breached or "may have already been breached". In my view, that was not an improper characterization of the situation from Ms. Rudnicki's perspective.

Whether Inquiries Ought to Have Been Made

- [38] In *Pixhug Media Inc. v. Steeves*, 2016 BCSC 1714, aff'd 2016 BCCA 433 [Pixhug Media], regarding the obligation of disclosure on an ex parte injunction, the Court held:
- [24] The test as to materiality is objective and applies to all matters known to the plaintiff, or matters that it ought to have known had it made all reasonable inquiries prior to the application: *BMF Trading v. Abraxis Holdings Ltd.*, 2000 BCSC 1691 at para. 118.
- [39] Relying on this passage, Mr. Fennell argues that upon finding the Term Sheet, Ms. Rudnicki could have, and ought to have, made inquiries to him about whether the Proposed Transaction was proceeding, or whether the Securities would indeed be encumbered. However, in my view, it is not reasonable to expect Ms. Rudnicki to have done so. When the dissipation of assets is at risk, it is accepted that applications for Mareva injunctions are a matter of urgency and that it is reasonable to bring them on an ex parte basis.

- [40] In any event, one might ask: what would she have found out had she made the inquiries suggested? Mr. Fennell may have advanced the argument that the Proposed Transaction was in the ordinary course of his business, but he could not have made that case with any certainty. Further, as will be discussed below, there is no clear evidence from Mr. Fennell that he does not intend to proceed with the Proposed Transaction, or that he is prepared to wait for a determination from the New York court before seeking to encumber the Securities.
- [41] In my view, Mr. Fennell has not suggested anything that would have been material to the ex parte application which Ms. Rudnicki likely would have learned from making such inquiries.

Preparation of an Asset List in the New York Proceedings

- [42] There is evidence that in the New York proceedings, the parties have agreed to exchange, and are preparing, asset disclosure statements, although no specific date has been set to exchange those documents. Mr. Fennell contends that this evidence ought to have been brought to the attention of Justice McDonald.
- [43] In my view, that evidence would not have been material to the granting of the injunction enjoining the encumbrance of the Securities.
- [44] It may, however, have been relevant to Justice McDonald's order requiring Mr. Fennell to prepare an asset list in this proceeding. That issue will be addressed further below.

Conclusion Regarding Material Non-Disclosure

- [45] Ms. Rudnicki's failure to disclose the privacy issues relating to the iPad constituted a material non-disclosure which, in my view, would justify setting aside the Mareva Order. For the reasons set out above, none of the other allegations of non-disclosure is sufficiently material to meet this threshold.
- [46] As stated, the ex parte injunction in this case will expire upon the issuance of these Reasons. An order setting it aside is therefore unnecessary. That said, non-disclosure at the ex parte stage will be considered in determining whether a new injunction ought to be issued: Northwestpharmacy.com at para. 18.

Should a New Mareva Injunction be Granted?

- [47] As set out above, this Court has the jurisdiction to grant a new Mareva injunction, despite non-disclosure at the ex parte stage.
- [48] This issue is governed by the principles set out by the Court of Appeal in *MacLachlan v. Nadeau*, 2017 BCCA 326 at para. 37:
- a) 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;

- b) 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;
- c) 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;
- d) the degree and extent of the applicant's culpability may range from innocent non-disclosure to bad faith, which may include deliberate misstatements;
- e) 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;
- f) 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
- g) the discretion is to be exercised judicially, in accordance with established principles, including those outlined in Brinks-MAT.

[49] Considering the specific non-disclosure in this case, it is my view that it is appropriate to consider the issuance of a new Mareva injunction. On the evidence before me, I am unable to find that the non-disclosure was deliberate or that the nature of the failure and the degree and extent of Ms. Rudnicki's culpability are so severe that a new Mareva injunction ought to be denied without considering the merits of the application and the balance of convenience.

Application for a New Mareva Injunction

Legal Principles

[50] The law regarding the granting of a Mareva injunction is well-settled. The two-part test was described by the Court of Appeal in *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 at para. 18:

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.

[51] In *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481, the Court of Appeal (as a division of five justices) held:

[46] In all cases, great caution is to be shown to avoid the mischief of litigious blackmail or bullying, and due regard must be paid to the basic premise that a claim is not established until the matter is tried. Great unfairness may be occasioned, and the administration of justice brought into disrepute, by an order which impounds assets before the merits of the claim are decided. It is useful to recall the words of Huddart J.A. in *Grenzservice Spedition*

Ges.m.b.H. et al. v. Jans et al. (1995), 129 D.L.R. (4th) 733, 15 B.C.L.R. (3d) 370 (S.C.) at 755-756 at p. 23:

[Mareva and Anton Pillar orders] represent an extraordinary assumption of power by the judiciary. Judges must be prudent and cautious in their issue.

- [47] At the same time, assets are easily moved from jurisdiction to jurisdiction, and if, as in Mooney, a party seeks the intervention of the court and also seeks to put his assets beyond reach, the court has the ability to respond. As said by Newbury J. in Mooney No. 1:
- [11] ... The reasons for extending Mareva injunctions to apply to foreign assets are valid in British Columbia no less than in England and Australia - the notion that a court should not permit a defendant to take action designed to frustrate existing or subsequent orders of the court, and the practical consideration that in this day of instant communication and paperless cross-border transfers, the courts must, in order to preserve the effectiveness of their judgments, adapt to new circumstances. Such adaptability has always been, and continues to be, the genius of the common law.
- [52] The new order is sought in aid of an ongoing proceeding in New York. The Mareva Order was granted in aid of the same proceeding. There is no independent cause of action being advanced in British Columbia. As a result, it is necessary to consider whether this Court has jurisdiction to grant injunctive relief where no substantive relief is being sought in British Columbia, and where the injunction sought is ancillary to a foreign proceeding asserting foreign law.
- [53] In *United States Securities and Exchange Commission v. Sharp*, 2023 BCSC 425, Justice Francis addressed this question and answered it affirmatively, concluding that this Court has the jurisdiction to grant a Mareva injunction in aid of a foreign proceeding, even where the issue between the parties is not justiciable before this Court: paras. 35-36. In my respectful view, her decision in this regard was correct, and it must be followed in any event.

Strong Prima Facie Case or Good Arguable Case

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

- [56] Ms. Rudnicki submitted that she is required to demonstrate a strong prima facie case or a good arguable case that the encumbrance of the Securities would breach the Automatic Orders.
- [57] Mr. Fennell submitted that Ms. Rudnicki must demonstrate that she has a strong prima facie case or a good arguable case in the underlying matrimonial action for a division of assets.
- [58] In my view, both of these questions ought to be considered, although the first is of greater significance in this application.
- [59] The question of whether Ms. Rudnicki has a strong prima facie case or a strong arguable case that the encumbrance of the Securities would breach the Automatic Orders turns on whether the Proposed Transaction is properly characterized as being in the usual course of Mr. Fennell's business. There was conflicting evidence on this issue from two experts who are both highly qualified and experienced members of the New York bar. In light of such competing evidence, and their assertions that the case law is sparse on what is in the usual course of business in this context, it is not at all clear to me whose position is preferable. In such circumstances, in my view, it is fair to characterize either side as having a good arguable case.
- [60] The question of whether Ms. Rudnicki has a strong prima facie case or a good arguable case in the underlying matrimonial action for a division of assets is, of course, governed by the family law regime in New York.
- [61] In my view, Ms. Rudnicki has a strong prima facie case or good arguable case that she will be entitled to some share of the marital assets. The parties were married for 18 years, and although the expert evidence regarding New York matrimonial law is conflicting, neither expert says that Ms. Rudnicki is likely to receive nothing.
- [62] Mr. Fennell has submitted that the Court must look to the quantum likely to be awarded to Ms. Rudnicki in assessing this issue. However, it is important to recall that the Term Sheet contemplated a General Security Agreement over all of Mr. Fennell's present and after-acquired property. If the Proposed Transaction were to proceed, Ms. Rudnicki would suffer prejudice so long as she has some entitlement to an award in the New York proceedings.

Balance of Convenience

- [63] In *Shakeri-Saleh v. Estate of Ahmadi-Niri*, 2022 BCSC 700 at para. 321, the Court held:
- [321] Depending on the case, the relevant factors to be considered on the balance of convenience analysis may include:
- a) the residency of the defendant;
 - b) enforcement rights of judgment creditors in the jurisdiction where the defendant's assets are located;

- c) evidence showing the existence of assets within British Columbia or outside;
- d) evidence showing a real risk of the disposal or dissipation of assets to render a judgment nugatory;
- e) evidence of irreparable harm;
- f) the strength of the plaintiff's case;
- g) the nature of the transaction giving rise to the action;
- h) the risks inherent in the transaction;
- i) the amount of the claim;
- j) the defendant's assets;
- k) evidence that the injunction would have a material adverse effect on an innocent third party; and
- l) the history of the defendant's conduct.

[Emphasis added]

- [64] As indicated, the Court must consider the risk of dissipation of assets as part of the balance of convenience analysis. As this Court held in *Save-A-Lot*, "the fundamental harm addressed through a Mareva injunction is the risk of harm through either dissipation of assets or removal of them to a place beyond the court's reach": para. 30, citing *Tracy* at para. 45.
- [65] In my view, permitting a defendant to encumber assets, thereby granting a security interest over those assets to a third party which would prevail over the plaintiff's interests, effectively constitutes dissipating them or placing them beyond the court's and the plaintiff's reach.
- [66] On one hand, if an injunction is not granted, and Ms. Rudnicki turns out to be correct that the Automatic Orders, properly construed, enjoin the encumbering of the Securities, Ms. Rudnicki may be prejudiced such that if the Proposed Transaction proceeds, and the mining project fails, assets which might otherwise be hers in the matrimonial proceeding would have been dissipated.
- [67] On the other hand, if an injunction is granted, and Mr. Fennell turns out to be correct that the Automatic Orders, properly construed, do not prohibit him from encumbering the Securities, Mr. Fennell will have been prejudiced by the enjoining of the Proposed Transaction. As will be discussed below, it is possible, although uncertain, that Ms. Rudnicki would be unable to satisfy any judgment on the undertaking in those circumstances.
- [68] There are at least two facts relevant to the balance of convenience that have not yet been discussed in these Reasons.

[69] First, in an October 27, 2023 letter from Mr. Fennell's New York attorney, Sherri Sharma, to Ms. Rudnicki's New York attorney, Michelle Haskin (the "Sharma Letter"), Ms. Sharma stated:

Regarding your client's unfounded concern that the Automatic Orders have been violated (they have not), we remain available at any time to provide relevant information. All you had to do was ask. If Mr. Fennell decides to go forward with any such transactions your client will be informed, and we will seek Ms. [Rudnicki]'s "consent" per the Automatic Orders of, if she withholds consent, seek a court order.

[70] Second, during the hearing, counsel for Ms. Rudnicki advised the Court that Ms. Rudnicki filed a motion in the New York proceedings on Monday, November 20, 2023. It appears from the evidence of Ms. Haskin that Ms. Rudnicki, though this motion, seeks to hold Mr. Fennell in contempt of the Automatic Orders, and she also seeks a temporary restraining order preventing him from collateralizing all of the marital assets. However, it is unclear to me whether the New York court is expected to opine directly on the issue of whether the Proposed Transaction falls within the "usual course" exception in the Automatic Orders. It appears from the evidence of Ms. Haskin that a hearing and decision on at least part of this motion may be expected in 40 days or less.

[71] As indicated above, Mr. Fennell has assured Ms. Rudnicki through counsel that he will seek her consent or a court order before proceeding with "any such transactions". However, it is notable that Mr. Fennell's British Columbia counsel served materials to set aside the Mareva Order on November 1, 2023, only five days after the Sharma Letter was sent.

[72] Indeed, while Mr. Fennell's counsel submitted that this Court ought not to assume that Mr. Fennell is going to violate the New York order, she was not able to advise the Court that the Proposed Transaction is not going to proceed. Mr. Fennell has not deposed that the Proposed Transaction is not proceeding, or that he does not intend to undertake any such transaction pending a determination by the New York court. Rather, his evidence is that the Proposed Transaction is important and urgent, and that it is within the normal course of his business. At the adjournment application, the thrust of his submissions was that he needed the Mareva Order to be set aside so that the Proposed Transaction could proceed.

[73] In my view, there is a real risk of the dissipation of assets. It is reasonable for this Court to infer that absent a Mareva injunction, Mr. Fennell would likely proceed with some transaction that will encumber the Securities, notwithstanding the prejudice that this course of action could potentially cause to Ms. Rudnicki's share upon a distribution of the marital assets.

- [74] It is relevant to the balance of convenience that counsel for Mr. Fennell was unable to provide the Court with any advice or evidence about when the Proposed Transaction or any such transaction might take place, or whether any relevant deadlines have been imposed on Mr. Fennell by the proposed lenders. As stated above, a determination from the New York court may be forthcoming in 40 days or less.
- [75] Further, it is relevant to the balance of convenience to consider the Sharma Letter, wherein Mr. Fennell assured Ms. Rudnicki through counsel that the Proposed Transaction or any such transaction would not proceed, absent her consent or an order of the New York court. It is certainly arguable that Mr. Fennell ought to be held to that assurance.
- [76] I find that the balance of convenience weighs in favour of granting a new injunction. The irreparable nature of the prejudice that Ms. Rudnicki would suffer if an injunction were not granted and a transaction encumbering the Securities were to proceed; Mr. Fennell's assurance through counsel in the Sharma Letter; and the lack of any evidence that the Proposed Transaction or any such transaction must proceed before the New York court has an opportunity to determine the motion before it all favour granting an injunction against Mr. Fennell. Ms. Rudnicki's non-disclosure at the ex parte stage does not outweigh these factors.

The Duration and Scope of the New Injunction

- [77] Although I have concluded that the balance of convenience favours the granting of a new injunction, the duration and scope of that injunction shall be limited.
- [78] First, it seems clear that the New York court is much better suited to determining whether Mr. Fennell is entitled to encumber the Securities than this Court. Therefore, in my view, an injunction ought to be issued by this Court only until a decision is made on this issue by the New York court.
- [79] If the New York court were to rule that encumbering the Securities would be in Mr. Fennell's usual course of business and, in turn, would not violate the Automatic Orders, Ms. Rudnicki's strong prima facie case or good arguable case would fall away. If that is the case, it would not be appropriate for this Court to continue the extraordinary remedy of a Mareva injunction to restrain conduct which the New York court has held to be lawful.
- [80] Second, by agreeing to the Third Adjournment Term allowing the encumbrance of half of the Securities, Ms. Rudnicki has implicitly conceded that an injunction over all of Mr. Fennell's British Columbia assets is not necessary to protect her entitlement in the matrimonial proceeding. It is not known whether Mr. Fennell has taken any steps to encumber the unrestrained half of the Securities, but it would not be appropriate to reverse the Third Adjournment Term now, given that Mr. Fennell could have lawfully exercised his rights under that term at any time since November 6, 2023. Accordingly, the new injunction will restrain only the remaining half of the Securities.

The Case Against the Corporate Defendants

- [81] Ms. Rudnicki seeks to restrain the three corporate defendants from encumbering or disposing the Reunion shares owned by Mr. Fennell but held by those companies. Filed securities documents show that Mr. Fennell is the beneficial owner of these shares held by the corporate defendants, and there was no evidence before me which contradicts these documents. As a result, subject to the discussion below, the injunctive relief being granted in this application will also encompass the Reunion shares held by the three corporate defendants on behalf of Mr. Fennell.
- [82] As the injunction being granted will restrain only half of the Securities, the parties should consider whether they can agree on a term of this Court's order identifying which Securities are restrained. It may be that the restrained Securities will not include the shares held by the corporate defendants, in which case no order needs to be made against them.

Other Issues

Breach of the Mareva Order

- [83] Ms. Rudnicki's written undertaking in support of the Mareva Order required her to "take all reasonable steps to notify, in writing, any person or entity which the Plaintiff serves with a copy of the Order of any changes to the Order that might affect that person " Mr. Fennell alleges that Ms. Rudnicki has breached this undertaking by failing to advise Haywood Securities and Earlston of the Adjournment Terms. This appears to be a breach but, in my view, it is not of sufficient gravity to warrant a denial of the injunction.

Objections to Evidence

- [84] Ms. Rudnicki objected to the admission of a second affidavit affirmed by Alyssa Rower, a New York attorney Mr. Fennell retained to provide opinion evidence as to New York law, and the affidavit of Ms. Dufour, who gave evidence regarding the steps taken to prevent Ms. Rudnicki from gaining access to Mr. Fennell's corporate email account. These affidavits were delivered the week before the hearing of this application.
- [85] In my view, the affidavits were late and arguably improper reply, but counsel for Ms. Rudnicki was able to deal with them effectively in submissions, and I find that the interests of justice do not require their exclusion. In any event, their exclusion would not change the result of this application.

Security for the Undertaking

[86] If it turns out that Mr. Fennell is entitled under the Automatic Orders to encumber the Securities, and the injunction being granted here denies him an opportunity to engage in the Proposed Transaction or a similar transaction, he will be entitled to advance a claim for damages based on Ms. Rudnicki's undertaking, presumably for lost profits. Mr. Fennell submits that Ms. Rudnicki should be required to post security to secure her undertaking as to damages.

[87] The Court may order the posting of such security if it finds that an undertaking given by the successful applicant for an injunction would be insufficient, given their lack of assets: Pixhug Media at paras. 102-104, citing *Luu v. Wang*, 2008 BCSC 1810 at paras. 22, 25. The relevant factors to be considered in such a determination include:

- (a) the potential for the defendant to suffer substantial damages;
- (b) the likelihood of the plaintiff being in a financial position to perform under an undertaking as to damages;
- (c) the value of the property involved;
- (d) the probable lead time to trial;
- (e) where security is ordered, the court must determine an amount that is just and equitable to both parties. The amount ordered is not a measurement or pre-estimation of damages

[88] In my view, there is no evidence that would enable this Court to make a meaningful assessment of the expected profits which might arise from the mining venture related to the Proposed Transaction. Further, although there is only limited evidence regarding Ms. Rudnicki's claim in the New York proceedings, it can reasonably be expected that she will be entitled to some assets of significance from those proceedings. She is the registered owner of the house in which she resides, and Mr. Fennell has deposed that this house is worth approximately \$1 million USD.

[89] The scant evidence as to the likely quantum of damages on the undertaking and the limited evidence regarding Ms. Rudnicki's entitlement to assets in the matrimonial proceeding do not permit this Court to make a finding that Ms. Rudnicki's undertaking would be insufficient. In these circumstances, she is not required to post security.

Defendant's Asset List

[90] I have concluded that Mr. Fennell is not required to produce a Defendant's Asset List as defined in the Mareva Order.

[91] First, such a list is not necessary in the circumstances of this case. Where there is a finding in a Mareva injunction case that the defendant is a fraudster, or that there is a general risk that the defendant will dissipate his assets, the ordering of an asset list is a corollary to the injunctive relief which allows both the court and the plaintiff to determine what assets are

frozen. An order which generally restrains a defendant's assets is difficult or impossible to monitor or enforce without knowing what and where those assets are. However, in this case, as indicated above, the injunction is limited to half of the Securities and so there is no question as to the identity and location of the assets which are subject to this Court's order.

- [92] Second, there is no independent cause of action advanced or separate relief sought by Ms. Rudnicki in British Columbia. Therefore, to the extent that a Mareva order may be used as a form of early compelled discovery, it would not be appropriate to do so in this case.
- [93] Third, both parties are preparing asset lists in the New York proceedings and an order for the production of an asset list in this proceeding would be duplicative.
- [94] Finally, Ms. Rudnicki's failure to disclose to Justice McDonald that asset lists are being prepared in the New York proceedings weighs against granting the relief sought in this case.

Conclusion

- [95] Subject to the Second Adjournment Term and the Third Adjournment Term, both of which shall be continued, I order a new Mareva injunction (the "Order") in favour of Ms. Rudnicki, restraining the half of the Securities not encompassed by the Third Adjournment Term.
- [96] Ms. Rudnicki's application to compel Mr. Fennell to prepare a Defendant's Asset List in this proceeding is dismissed.
- [97] The injunction should be expressly tied to the outcome of any relevant motions advanced in the New York court. Further, it should be time-limited to ensure that a determination from the New York court is sought as soon as possible.
- [98] To this end, the Order shall be subject to any order by the New York court finding that the encumbrance of the Securities is permitted by the Automatic Orders. If such an order is made, the Order will be discharged 72 hours after the New York order is made, without any further necessary application to this Court.
- [99] The Order will remain in force up to and including January 31, 2024, unless it is varied or discharged as contemplated above or by a further order of this Court. If a determination of the New York court cannot reasonably be obtained before that date, an extension may be granted upon application.
- [100] If the New York court determines that the encumbrance of the Securities is not permitted by the Automatic Orders, there shall be no automatic discharge or variation of this Order. The Order shall expire according to its terms or the parties shall be at liberty to apply to this Court, for a variation or discharge of the Order or for a continuation, on appropriate evidence.

[101] Costs of this inter partes application shall be payable by Mr. Fennell to Ms. Rudnicki at Scale B. Given Ms. Rudnicki's non-disclosure on the ex parte application, no costs shall be payable by either party on that application or the adjournment application.

"The Honourable Justice Loo"

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