
CANADA / JUDGMENT

Enroxs Energy and Mining Group v. Saddam

2021 BCSC 291

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 291 Enroxs Energy and Mining Group v. Saddam

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Enroxs Energy and Mining Group v. Saddam,

2021 BCSC 291

Date: 20210128

Docket: S2012062

Registry: Vancouver

Between:

Enroxs Energy and Mining Group

Petitioner

And:

Nader Saddam

Respondent

Before: The Honourable Mr. Justice A. Ross

Oral Reasons for Judgment

Counsel for the Petitioner:

M. Nowina

B. Sakamoto

Counsel for the Respondent:

J. Bradshaw

E. Cribb, Articled Student

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 21, 27-28, 2021

Place and Date of Judgment:

Vancouver, B.C.

January 28, 2021

- [1] THE COURT: In this application the respondent, Mr. Nader Saddam, applies to discharge or vacate a freezing order that was made by this court November 27, 2020, on an ex parte basis. I will refer to that order as the "Freezing Order." He also seeks other forms of relief, including a stay of this proceeding while he pursues certain relief in the courts of Dubai. As an alternative, he seeks a variation of the Freezing Order.
- [2] This application is also brought by Mr. Saddam's spouse, Ms. Narges Kashani-Javid. She says that some of her assets have been affected by the Freezing Order.
- [3] This litigation arises out of a soured business relationship between the petitioner and the respondent. The business venture was in the area of oil and gas services and involved the exportation of certain equipment from China to Dubai. The breakdown in that relationship resulted in litigation in multiple jurisdictions, including an arbitration award in Switzerland. That arbitration decision granted the petitioner an award of \$4.8 million against the respondent.
- [4] In this proceeding, the petitioner asks the B.C. court to recognize and then enforce the Swiss arbitration award. In order to protect its chances of executing on the Swiss arbitration award, the petitioner obtained the Freezing Order against the respondent's assets in British Columbia.
- [5] The respondent submits that the Freezing Order should be overturned on several grounds, but in overview he says that there is reason to query the amount owed to the petitioner by the respondent, and as a result the petitioner does not have a strong prima facie case. In that regard he points to the ongoing claim in Dubai which, he says, will change the quantum of the petitioner's claim in British Columbia. In addition, the petitioner says that the balance of convenience does not favour the petitioner.

- [6] For the reasons set out below, I dismiss the respondent's application to discharge or vacate the Freezing Order. I also dismiss the application for a stay of this proceeding. I adjourn his application to vary the Freezing Order, to allow the parties to negotiate terms that will be satisfactory to both of them.

Factual Background

- [7] I now turn to the factual background. The petitioner, Enrox Energy and Mining Group, is 100 percent owned by Mr. Michael Pacha, who is a French national. The respondent, Mr. Saddam, is a Canadian national and former engineer in the oil and gas industry. Mr. Pacha and Mr. Saddam met in 2013. Soon after meeting Mr. Pacha, Mr. Saddam ended his career as an oil and gas engineer and commenced a business relationship with Mr. Pacha.

- [8] On May 21, 2014, the two men entered into three agreements:

1. a memorandum of understanding,
2. a letter of undertaking, and
3. a loan agreement.

The memorandum of understanding outlined the parties' intent to cooperatively develop a group of multinational companies in the oil and gas sector under the title Enrox Energy Group.

- [9] Under the terms of the loan agreement, Mr. Pacha agreed to advance US \$2 million to Mr. Saddam in order to finance the purchase of certain equipment. That equipment would be purchased in China and exported to the United Arab Emirates, ("UAE"). Mr. Saddam points to the following provision in the loan agreement:

If for any reason Borrower fails to make any payment on time, Borrower shall be in default. In case of default, any goods and/or materials purchased by the Borrower in the name of the Lender after his consent, will be imputed against the amounts due by the Borrower to the Lender under this loan agreement.

- [10] The loan agreement also included a governing and jurisdiction clause. It provided:

This agreement shall exclusively be governed by and construed in accordance with the substantive laws of Switzerland. Any dispute, controversy or claim arising out of or in relation to this contract, including validity, invalidity, breach or termination thereof, shall be resolved by way of arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force on the date when the notice of arbitration is submitted in accordance with these rules. There shall be one sole arbiter, and the place of arbitration shall be Geneva.

- [11] The business relationship between the two men soured in early 2015. In late 2014 a transaction had been initiated by Mr. Saddam and Mr. Pacha to bring certain equipment to Dubai from China. Customs regulations in the UAE required that the equipment be re-exported out of the country within six months of arrival or face duties levied against, and payable by, the owners.
- [12] In June 2015 the parties undertook to re-export the equipment. Mr. Saddam says that Mr. Pacha not only knew about the re-exportation of the equipment, but he also issued the required customs letters to UAE authorities.
- [13] Mr. Saddam says that Mr. Pacha unilaterally decided to go back on the equipment re-exportation. Mr. Saddam says that, contrary to the facts, Mr. Pacha alleged that Mr. Saddam acted without his consent or instruction. Further, Mr. Saddam alleges that Mr. Pacha took contradictory positions regarding his participation in the re-exportation of the equipment and the ownership of that equipment at different points in time and in different jurisdictions. I return to that point below.
- [14] In April 2015 Mr. Pacha executed certain documents that resulted in him taking control of a company that was, until that point, owned by Mr. Saddam, Caspian Energy Solutions. According to Mr. Saddam, he received no warning of Mr. Pacha's dissatisfaction, nor did he receive notice of the execution against his interest in Caspian Energy Solutions.
- [15] Following the souring of the relationship, Mr. Pacha filed numerous criminal and civil claims against Mr. Saddam in the UAE. The first of those claims led to Mr. Saddam's arrest and the confiscation of his passport. Ultimately Mr. Saddam was acquitted of all criminal accusations; however, he was incarcerated for a period of time in Dubai. Mr. Pacha also filed a civil complaint in Dubai against Mr. Saddam that was, to an extent, successful. Mr. Saddam says that he was only required to return one cheque to Mr. Pacha as a result of that claim.
- [16] However, the primary path that Mr. Pacha pursued was the Swiss arbitration. Pursuant to the terms of the loan agreement, Mr. Pacha sought judgment against Mr. Saddam through an arbitration in Geneva. He sought to enforce repayment of the amounts advanced under the loan agreement.
- [17] Mr. Saddam concedes that he attorned to that jurisdiction and participated in that hearing. He also concedes that the arbitrator found that he was liable to pay certain amounts to the petitioner. However, he says that the arbitration award is not final in relation to the quantum of his debt. I discuss his position below.
- [18] The Swiss arbitration decision is dated January 28, 2020. It ordered Mr. Saddam to pay \$4,850,000 to the petitioner. I note that those amounts are expressed in currencies including the Emirates dirham, euros, and US dollar. The petitioner advises that the total amount of the arbitration award is \$4,850,000.

- [19] The amounts awarded in the arbitration decision included payment by the petitioner to companies owned by Mr. Saddam. The arbitrator found that those payments, which were for the purchase of equipment, constituted indirect loans to Mr. Saddam. As noted, Mr. Saddam participated in the arbitration and was represented by counsel.
- [20] On November 16, 2020, Mr. Pacha, on behalf of Enrroxs, commenced this proceeding in the Supreme Court of British Columbia seeking recognition and enforcement of the Swiss arbitration award against Mr. Saddam.
- [21] On November 23, 2020, Justice Marzari granted the petitioner an order in the character of a Mareva injunction, which I described above as the Freezing Order. That order, among other things, prevents Mr. Saddam from removing from British Columbia, or in any way disposing of or diminishing the value of, his assets in British Columbia, whether in his own name or not, and whether solely or jointly owned.
- [22] In particular, the Freezing Order applies to:
- a) Mr. Saddam's family home at 1395 Palmerston Avenue, West Vancouver;
 - b) the property and assets of his businesses known as 3XP Global Inc. and Enersol FZE;
 - c) any money in the accounts at Royal Bank of Canada (RBC) branches located in British Columbia; and
 - d) a Maserati vehicle imported to Canada by the respondent.
- [23] The terms of the Freezing Order provide an exception for up to \$10,000 Canadian per month in legal and living expenses, but requires that Mr. Saddam advise the petitioner in writing of the source of those funds. I am advised that the Freezing Order was served on Mr. Saddam's bank and his spouse.

Legal Basis

- [24] I now turn to the legal basis for and against this application as submitted by the parties. First, I note that the respondent does not take the position that the petitioner failed in its obligation of full and frank disclosure in an ex parte application. Second, both parties agree that following the granting of a Mareva injunction on an ex parte basis, an application to set aside that order should proceed as a hearing de novo. The second judge, however, should not substitute his or her view for that of the originating judge.
- [25] The parties both cite the reasoning in *Ma v. Nutriview Systems Inc.*, 2011 BCCA 389. Paragraphs 8-9 of that decision state:
- [8] If leave to appeal is granted, the applicant proposes to argue that:
- a) The chambers judge erred in finding that the order of March 11, 2011 was a Mareva Injunction;

- b) Regardless of the characterization of the March 11, 2011 order, the chambers judge erred in not applying what is described by the applicant as the fraud exception to the general hostility to prejudgment execution, and ruling that there were arguments that could provide a defence to the applicant's action; and
- c) That the chambers judge erred in failing to articulate his reasons for finding that there were significant matters in the affidavit relied upon by the applicant that were proven unreliable.

Discussion

- [9] The factors to be considered on an application for leave to appeal are, subject always to the interests of justice, those set out in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326, at para. 10:
- (1) whether the point on appeal is of significance to the practice;
 - (2) whether the point raised is of significance to the action itself;
 - (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
 - (4) whether the appeal will unduly hinder the progress of the action.
- [26] The law is clear that the following elements are required to obtain a Mareva injunction:
- a) the applicant must demonstrate a strong prima facie case or good arguable case, and
 - b) the balance of convenience favours the granting of the order.
- [27] Although the parties agree on the broad statements of this legal test, they each focus on language in the cases that supports either a more liberal or a more conservative approach to that test.
- [28] Mr. Saddam in his submissions focuses on cases indicating that the ultimate question is whether it is just and equitable that the applicant should have the right to monitor the movement or expenditure of capital assets by the respondent during the course of the proceedings between them. He cites *Kepis & Pobe v. Timis*, 2018 BCCA 420. When assessing the burden on the petitioner, he also submits that the evidence tendered by the petitioner does not satisfy the strict factors required in the case law.
- [29] In general, Mr. Saddam poses the question of whether it is just and equitable that the petitioner should execute against his personal assets, including his family home, before proceeding against the equipment that was the subject of the loan agreement. In response to that general submission, the petitioner notes that this injunction does not seek to execute, only to prevent the disposal or dissipation of those assets.
- [30] Both counsel cite the reasoning of the Court of Appeal in *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481:

[40] In that context, Huddart J. cited *B.C. (A.G.) v. Wale* at paras. 43 and 44:

[43] This relaxed approach to applications for Mareva injunctions may be seen as fitting well with the established approach for granting interim injunctions in British Columbia. While there is a longstanding two-pronged test for the granting of an interim injunction, the Court of Appeal cautioned in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), at 346, that "... the judge must not allow himself to become the prisoner of a formula. The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case." The Court of Appeal affirmed the traditional test in *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96, (C.A.) and added (at p. 102) that:

Resort to the decided cases in which the test has been applied will provide the necessary limits to that flexibility, not so much through what those cases say, but more through what they decide about whether an interim injunction should be granted on each set of particular facts.

[44] The comparable approach to a Mareva injunction would be to require a strong *prima facie* (which seems to have been favoured in *Aetna*, *supra*) or a good arguable case (as expounded in *Ninemia*, *supra*,) to cross the threshold, and then to balance the interests of the two parties, having regard to all the relevant factors in each case, to reach a just and convenient result. Included in such factors will be evidence that establishes the existence of assets within British Columbia (for a domestic injunction) or outside (for a national or international injunction) and a real risk of their disposal or dissipation so as to render nugatory any judgment.

[41] The Mooney No. 2 approach was affirmed by this Court in *Silver Standard*. There, in the context of a foreign defendant entitled to receive funds from a Canadian defendant, the Court approved an order setting aside a Mareva injunction against the foreign defendant and reinstated a garnishing order against the second defendant. In doing so, Newbury J.A., for the Court, considered the criteria for a Mareva injunction. With reference to *Mooney No. 2*, she held:

[20] I agree with this approach, which in my view is true to the historical roots of injunctions generally and Mareva injunctions in particular. Thus I would be reluctant to adopt a hard and fast rule, as counsel for the defendants urged upon us, that a Mareva injunction may never be made or continued unless there is a fraudulent intent on the part of the debtor; or where the payment in question is one proposed to be made in the ordinary course of business; or where it would materially and adversely affect an innocent third party. (In the latter regard, Mr. Moshonas referred us to *Galaxia Maritime S.A. v. Mineralimportexport (Eleftherios)*, [1982] 1 All E.R. 796 (C.A.) at 800, *Northern Sales Co. v. Government Trading Corp. of Iran*, *supra*, at 75-6. But this factor cannot be taken too far, for almost every Mareva injunction is likely to inconvenience another party in some way.) The overarching consideration in each case is the balance of justice and convenience between the parties, and those concepts can embrace many factors that do not fit easily into the "rules" or

"conditions" advanced by the defendants.

- [21] Having said that, however, it is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted.
- [23] As an appellate court, we are in a position to interfere with the Chambers judge's exercise of his discretion only if he acted on a wrong principle or was otherwise clearly wrong in his conclusion. I cannot say that that occurred, and indeed I believe he properly applied the law to the facts before him. It may be that the cautious approach to Mareva injunctions favoured in *Aetna* now requires some refinement almost 15 years later in light of the globalization of business transactions and the speed with which assets may now be moved across borders. As *Mooney v. Orr* indicates, the law is moving incrementally in that direction. At present, however, the balance of convenience and justice is generally seen to weigh against the granting of an injunction that will prevent a defendant from paying a debt incurred in the ordinary course of business, simply in order to provide pre-judgment security to a plaintiff. That factor, and the consideration of Dukat's position, led the Chambers judge to conclude that the Mareva injunction should be set aside in this case. No basis for our interference has been shown.
- [31] As noted, Mr. Saddam argues both parts of the test, strong prima facie case and balance of convenience. On the second aspect, as discussed below, Mr. Saddam submits that the petitioner has not demonstrated a real risk of disposal or dissipation of assets.
- [32] I now turn to the question of whether there is a strong prima facie case.
- [33] Mr. Saddam submits that there is no strong prima facie case for three reasons, the third being the most forceful:
1. There is reason to question the Swiss decision.
 2. Mr. Pacha provided inconsistent evidence in other proceedings.
 3. Although the Swiss arbitration decision was made, there is another proceeding in Dubai to determine the ownership and value of certain equipment. If successful in that proceeding, the respondent will have a decision which may exceed the amount of the petitioner's judgment in the Swiss arbitration. Hence, he argues the quantum of the petitioner's judgment against him is not certain.

- [34] I will deal with each of these arguments in order. First, Mr. Saddam made submissions suggesting that the Swiss arbitration decision was incorrect. He tendered evidence and made submissions indicating that he had instructed his Swiss counsel to appeal the arbitration award but they failed to do so. He noted that he retained counsel in Dubai after dealing with the Swiss lawyers. Mr. Saddam framed his lack of an appeal as a failure to meet the filing deadline.
- [35] I note, however, that within Mr. Saddam's affidavit, there is correspondence to Mr. Saddam from his lawyers in Switzerland. One email includes advice to Mr. Saddam that there was no real chance of success on any appeal.
- [36] In response, the petitioner argues that I should not look behind the Swiss arbitration award. He further argues that this email from Swiss counsel confirms that Mr. Saddam's own lawyers did not see any error in the decision.
- [37] I agree with the submissions of the petitioner that it is not for this court to look behind the Swiss arbitration decision. I accept its conclusions.
- [38] Second, in his submissions, Mr. Saddam alleges that Mr. Pacha made inconsistent statements about the purpose of the loan agreement and the ownership of the equipment purchased with the amounts advanced under the loan. Mr. Saddam says that in the UAE criminal and civil proceedings, Mr. Pacha claimed that the company called Enrox DMCC was the sole owner of the equipment and that Mr. Saddam was interfering with its ownership interest by seeking to complete the equipment exportation. However, in the arbitration proceeding, Mr. Pacha claimed that his company was only a lender and that all of the equipment and any proceeds derived therefrom belonged to Mr. Saddam. Mr. Saddam alleges that it was on this basis that the arbitration proceeding resolved in favour of the petitioner.
- [39] However, as noted by the petitioner, this issue was raised in the Swiss arbitration case and discussed in the decision. I find that accepting the respondent's argument on this point would again require me to look behind the arbitration award. Whether Mr. Pacha took inconsistent positions does not affect this proceeding, which seeks enforcement and recognition of the Swiss decision.
- [40] Mr. Saddam's third and primary submission is that the first element of the Mareva injunction test is not met. He notes that on August 30, 2020, he (Mr. Saddam) initiated proceedings in the Dubai Commercial Court of First Instance claiming ownership and the hand over of equipment that was purchased with the proceeds under the loan agreement. In that proceeding, Mr. Saddam alleges that, to the extent that Mr. Pacha alleges that the equipment belongs to Enrox DMCC, Mr. Saddam is entitled to setoff or, as the loan agreement describes it, "impute" the value of that equipment against the debt amount. Mr. Saddam alleges that the value of his claim in the Dubai action is in the range of \$4,983,000 Canadian.

- [41] Mr. Saddam submits, in this application, that it will be necessary to resolve his action in Dubai before the parties can determine the net effect of their business arrangement. To that extent, he argues that the Swiss arbitration award does not deal with the entirety of the business relationship. He says that the decision from Switzerland specifically does not deal with the ownership of the equipment in Dubai. In his words, the recognition and enforcement of the Swiss arbitration award is not "right."
- [42] In response to that submission, the petitioner says the Swiss arbitration award sets out in detail the factual and legal basis by which the respondent was found liable to the petitioner. The decision runs 64 pages and addresses all issues. The basis for finding Mr. Saddam's liability was under the loan agreement, which, as noted, included the arbitration clause.
- [43] The argument that Mr. Saddam proffers as a basis to stay the current petition, (i.e., the claim he is making in Dubai), was raised and rejected in the Swiss arbitration. At para. 122, the arbitrator wrote:

The sole arbitrator is of the considered opinion that, in light of the wording of the private loan agreement, Exhibit C-8, the issue of the ownership of the equipment is of no relevance for the question presently at stake of the repayment of the funds provided under the private loan agreement. Indeed, the private loan agreement states that the money received must be paid back within 24 months from the date of signature of the loan agreement. The fate of the equipment which these funds allowed to purchase has basically no influence on this repayment obligation, bearing in mind, however, that in the case of default, any debt, goods and/or materials purchased by the borrower in the name of the lender after his consent will be imputed against the amounts due by the borrower to the lender under this loan agreement, Exhibit C-8, page 2, bottom. In light of the evidence filed, the sole arbitrator understands that the equipment bought with the money provided under the private loan agreement was effectively invoiced to and/or purchased in the name of Enrox DMCC which was owned by Mr. Pacha. Therefore, the value of that equipment, to the extent it was 'purchased by the borrower in the name of the lender,' could possibly have been 'imputed against the amount' due by Mr. Saddam to the claimant under the private loan agreement. However, no evidence of that value has been adduced in the present proceeding, and no contention/claim has been made in this respect by the respondent, for whom such an imputation would have been a way to reduce his exposure/indebtedness vis-à-vis the claimant. Be it as it may, in light of the foregoing and in the absence of relevant evidence and proper claim, this issue of guarantee/pledge/ownership of the equipment shall be disregarded.

- [44] I note here that Mr. Saddam points to other portions of the decision, specifically para. 111, indicating that the arbitration was exclusively about the amount of repayment. In particular, he points to the sentence in para. 111:

The present arbitration is exclusively about the repayment of the amount lent under the private loan agreement concluded between Enrox Energy Group and Mr. Saddam.

However, in my opinion, that limitation does not assist Mr. Saddam. The arbitration award does what it says it does.

- [45] The petitioner submits that Mr. Saddam had the opportunity to provide the evidence of the value of the equipment in the Swiss arbitration proceeding but chose not to do so. That was a strategic decision. Mr. Saddam's setoff claim is one which would be covered by the loan agreement and was arbitrable. The Swiss arbitration decision is clear: Mr. Saddam chose not to argue that issue. He cannot now use that strategic decision as a shield to this proceeding.
- [46] I also note that in this proceeding, counsel for the petitioner has made his client's position clear. If Mr. Saddam pays the amount awarded by the arbitrator, his client will be happy to sign over the equipment to Mr. Saddam.
- [47] I also note that the petitioner in this proceeding, along with the other defendants in the Dubai proceeding, have raised a jurisdictional defence that the matters in dispute as claimed by the plaintiff must be litigated by arbitration in Switzerland. The petitioner submits that the legal system in the UAE recognizes the enforceability of arbitration contracts and awards. The UAE is a signatory to the International Center for Settlement of Investment Disputes Convention and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The petitioner notes that there has been no decision from the Dubai Commercial Court of First Instance on the jurisdictional argument. That issue is set to be decided at the end of that proceeding.
- [48] All of that is to say that the petitioner submits that he has a very strong prima facie case. He is seeking to have the court in B.C. recognize a foreign arbitration award. He submits, and I accept, that there is a strong legislative and public policy ground for recognizing this type of award. The petitioner references the International Commercial Arbitration Act, R.S.B.C. 1996, c. 233. and the exclusions in s. 36. He says that none of those exclusions apply.
- [49] Further, on the issue of the British Columbia court's duty to recognize foreign arbitration awards, the petitioner points to the decision in *Sociedade-de-fomento Industrial Private Limited v. Pakistan Steel Mills (Private) Corporation*, 2014 BCCA 205 [Pakistan Steel Mills], which discusses the policy background:
- [44] In my view, the answer lies in the legislation as well as the flexible test set out in *Silver Standard and Tracy*. The New York Convention and the enabling legislation in British Columbia recognize an international arbitration award on the same basis as if it were a domestic award originating in this province. The language of the legislation is not ambiguous in this regard. A real and substantial connection is presumed to exist. It would be illogical to ignore this presumed jurisdictional connection for interlocutory purposes, but recognize it for final judgment purposes. The statutory scheme anticipates an action to enforce the award. There are only limited grounds on which the defendant could dispute the award in a recognition action per art. V of the New York Convention and s. 36 of the International Commercial Arbitration Act. I reiterate that I do not see how a real and substantial connection could exist for some but not all purposes in pursuing the claim

through to judgment and enforcement.

- [45] I conclude that the recognition and enforcement proceeding is akin to a domestic proceeding, and that the judge ought to have approached the application on the basis that it was akin to a domestic proceeding.
- [46] This conclusion does not entirely resolve the question that was before the chambers judge. Overlying this statutory scheme is still the court's equitable jurisdiction to grant, or decline to grant, a Mareva injunction. The overarching factor in granting the injunction is whether doing so achieves a balance of justice and convenience between the parties: *Silver Standard* at para. 20. Depending on the facts of the case important factors may include the merits of the underlying claim, the risk of dissipation of the asset, the balance of convenience and the interests of third parties.
- [47] In my view, the following factors militated towards a finding that the injunction was properly ordered: first, the merits of SFI's claim were very strong, approaching certainty given the limited grounds upon which the claim could be defended; second, the assets were about to leave the jurisdiction; third, the debtor had refused to pay the award over the ten months since it had been made; and, finally, damage to the third party could be alleviated, as it was, by SFI's fortified undertaking.
- [50] I accept the reasoning in *Pakistan Steel Mills* regarding the recognition of foreign arbitration awards.
- [51] Hence, having considered the evidence and the submissions of both parties, I accept that there is a strong prima facie case for the petitioner in these proceedings.
- [52] I now turn to the balance of convenience. Mr. Saddam submits that the Freezing Order is causing hardship for himself and his wife, Ms. Kashani-Javid. He also argues that the petitioner has not satisfied the burden of establishing the risk of disposal or dissipation of assets.
- [53] First, Mr. Saddam says that he and his family have faced significant financial challenges as a direct result of Mr. Pacha's criminal and civil cases against him. He alleges that he lost more than \$20 million US in active contracts as a result of the criminal and civil allegations in various legal actions commenced by Mr. Pacha. Mr. Saddam further says that he is in debt to family and financial institutions in excess of \$2 million Canadian due to the cost to defend the various legal proceedings.
- [54] Mr. Saddam's material lists his assets including his automobiles. It is fair to say that there is little equity or value in his vehicles. Although the Freezing Order mentions a 2010 Maserati, that vehicle was sold in March of last year. In respect of international assets, Mr. Saddam says that he only owns one investment account held in Dubai which holds approximately \$20,000.

- [55] The bulk of Mr. Saddam's assets are jointly owned with his spouse. His only real property is comprised of the family home in West Vancouver. The couple live there with one of their sons. Their other son attends university in Montreal.
- [56] The family home has an assessed value of approximately \$2.6 million. As noted, it is owned jointly. It is encumbered by mortgages to the Royal Bank in the amount of approximately \$1 million and to an individual named Nariman Saddam in an underdetermined amount. I discuss that second mortgage below.
- [57] On the issue of inconvenience or prejudice to non-parties, the respondent's evidence indicates that, as a result of the restraint on the couple's RBC account, the family has had difficulty making their monthly payments. According to his affidavit material, Mr. Saddam and his family have fixed expenses of approximately \$18,000 per month. He says that the Freezing Order threatens his son's university education and the couple's mortgage with RBC.
- [58] I note that the Freezing Order provides for monthly expenses of \$10,000. Further, the petitioner has made other accommodations, such as allowance for the payment of a retainer to counsel, since the original Freezing Order was made.
- [59] Mr. Saddam says that the Freezing Order will, or may, have the following impacts on himself and his family:
1. He has been unable to pay the retainer to his counsel, although that has now been allowed.
 2. He and his spouse will be unable to pay their mortgage, taxes, utilities and maintenance costs on their family home.
 3. His son will be unable to attend university.
 4. They will have no ability to pay their day-to-day living expenses.
 5. The spouse is unable to deal with assets that she jointly owns with the petitioner, against whom there is no claim.
- [60] In answer to these arguments, the petitioner notes, and I accept, that the true difficulty expressed by the respondent is as follows:
1. The petitioner and his wife have a joint RBC account.
 2. They pay most of their monthly expenses out of that account by automatic withdrawal.
 3. In most months, Ms. Kashani-Javid makes a deposit to that R.B.C. account which is then depleted by the automatic withdrawals.

- [61] The source of the funds deposited to the RBC account is not known, but to the extent those funds belong to Ms. Kashani-Javid, it is not a concern of the petitioner. Hence, the only real prejudice to the family relates to the operation of this joint RBC account. As a result, the petitioner says that Ms. Kashani-Javid can fix this problem entirely by moving the automatic withdrawals to an account that she controls by herself.
- [62] I accept this characterization of the prejudice to the non-party. In the grand scheme of balancing the convenience between the petitioner and the respondent, I do not consider these problems faced by the Saddam family to be significant. The respondent family can overcome the impact of the injunction by changing their banking pattern.
- [63] To date, the petitioner has shown that it is willing to adjust the terms in order to facilitate necessary payments. I expect the terms can be varied if necessary to allow the family's expenses to be covered.
- [64] The respondent also argues that the injunction could possibly trigger a cancellation of the couple's mortgage with RBC. However, there is no evidence to support that submission.
- [65] As noted, the respondent also submits that the petitioner has not satisfied the evidentiary burden of establishing that there is a risk of disposal or dissipation of the respondent's assets. I do not accept that submission.
- [66] As noted above, Mr. Saddam and his wife granted a mortgage to Nariman Saddam, who is believed to be the respondent's brother. The mortgage is in an undeclared amount. It was registered after the date of the Swiss arbitration award. It is stated to be based on prior advances of funds made by Nariman Saddam.
- [67] Counsel for Mr. Saddam submits that there is no evidence that this mortgage was undertaken for any purpose related to dissipating his assets. Further, he submits that the mortgage itself does not impede the petitioner's ability to execute at some point against Mr. Saddam's assets. If the Swiss arbitration award is ultimately recognized in B.C., the petitioner will be able to challenge the validity of the mortgage as a fraudulent preference.
- [68] In response, the petitioner notes that the mortgage was granted after the Swiss arbitration award. Further, it is in an unusual format. It is in an undeclared amount to an individual believed to be Mr. Saddam's brother.
- [69] Despite the submissions of counsel for the respondent, I am satisfied that the granting of the mortgage to Mr. Nariman Saddam provides sufficient evidence of the risk of dissipation of assets. Put another way, the granting of the mortgage in favour of Nariman Saddam raises sufficient red flags to satisfy the evidentiary burden on the petitioner seeking this injunction regarding dissipation.
- [70] Therefore, on the basis of all the evidence, I find that the balance of convenience favours the granting of the Freezing Order.

Summary and Conclusions

- [71] As noted above, I have found that the petitioner has demonstrated a strong prima facie case. Thus, taking into account all of the issues raised under the banner of both strength of the petitioner's case and the balance of convenience, I am satisfied that the petitioner has satisfied the burden upon him. There are assets in B.C. There is a risk of dissipation. Inconvenience to non-parties can be mitigated relatively easily.
- [72] In addition, I note that the respondent has, to date, refused to pay the award made by the Swiss arbitrator.
- [73] I see no reason to vacate or discharge the order of Justice Marzari, and I dismiss the respondent's application for that relief. That being the case, it follows that I also dismiss the respondent's application for a stay of this proceeding pending the outcome of the Dubai proceeding.
- [74] I note that the third point of relief sought by the respondent is a variation of the Freezing Order. It is my understanding that the parties have been in discussions regarding the terms of that order and a possible variation that would provide the necessary protection and flexibility for each party. However, there was no finalization of those discussions pending my decision on upholding the Freezing Order. On that basis, I adjourn the application in relation to varying the Freezing Order, to allow the parties the opportunity to negotiate the varied terms moving forward. If the parties are unable to reach agreement, I will hear further submissions on appropriate terms.
- [75] I have not heard submissions on costs. Unless there are terms or offers of which I am not aware, the petitioner is entitled to its costs in the cause.
- [76] That ends my reasons. Are there any questions?
- [77] MR. BRADSHAW: My Lord, it's Mr. Bradshaw. Just a question on the dismissal of the stay application. I would implore the court to actually grant that with liberty to reapply. This application was brought with 24 hours' notice before the actual digging in to the materials before we had a retainer, and I would like the opportunity to be able to argue that again at the hearing of the petition.
- [78] THE COURT: Mr. Nowina?
- [79] MR. NOWINA: So, My Lord, in the affidavits that have been filed before you, I actually made that specific proposal to my friend that he not proceed with his stay application today, but rather it be heard on the return of the actual petition. My friend rejected that proposal and said that he wanted to argue the application stay now, so in the circumstances I think it's appropriate that your order stand as has been ordered.

[80] THE COURT: I must say, I am sympathetic, Mr. Nowina, to Mr. Bradshaw's position in this case, or on these facts, and although the argument was made, I have to say it was a bit of: "If you are with me on the first part, then come with me on the second part." I have really dealt with the first part. There may, however, be an argument - let me just say, I think it would be just and equitable to allow Mr. Saddam to bring that stay application or to have liberty to reapply on the stay application. So I will make that a term of my order.

[81] MR. NOWINA: Thank you, My Lord.

[82] MR. BRADSHAW: Thank you, My Lord.

[83] THE COURT: Thank you both for your submissions. They were very helpful.

"A. Ross J."

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