

CANADA / JUDGMENT

Gayhart (Estate) v. Schanck

2021 BCSC 1570

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Supreme Court of British Columbia

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2021 BCSC 1570 Gayhart (Estate) v. Schanck

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gayhart (Estate) v. Schanck,

2021 BCSC 1570

Date: 20210812

Docket: S1913846

Registry: Vancouver

Between:

The Estate of Myong-He Gayhart

Plaintiff

And

John G. Schanck

Defendant

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiff:

W. Simpson

Counsel for the Defendant:

R. Clark, Q.C.

Counsel for the Attendee, Angela Schanck:

A. Peck

Place and Dates of Hearing:

Vancouver, B.C.

February 2 & March 24, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 12, 2021

Introduction

- [1] There are three applications before me. Two were filed by the plaintiff in February 2020.
- [2] In the first application, the plaintiff seeks disclosure of documents and information arising from an ex parte Mareva injunction freezing the assets of Mr. Schanck by Justice Groves on December 5, 2019 that requires him to swear an affidavit providing the details of all of his assets whether in or outside British Columbia.
- [3] In the second application, the plaintiff seeks documents from third parties, the Canadian Imperial Bank of Commerce and Mr. Schanck's wife Angela Schanck. The plaintiff seeks an order that Ms. Schanck attend before a court reporter to be examined by the plaintiff and provide documents relating to her assets and/or joint assets with Mr. Schanck. The plaintiff also seeks an order that John Schanck serve further and better particulars regarding his version of facts, additional facts and legal basis referred to in the affidavit and response to civil claim sworn and filed on December 31, 2019. The plaintiff also seeks a further Mareva injunction based on affidavits filed after December 5, 2019.
- [4] Mr. Schanck applies to set aside the ex parte Mareva injunction and seeks to strike some of the plaintiff's pleadings. This application was filed in November 2020.

Background

Nature of the Dispute

- [5] Myong-He Gayhart was a former wife of the defendant John Schanck. In 2015, they were residents of Florida. They were divorced in Florida on July 16, 2015. The divorce proceedings were in the Circuit Court, Fourth Judicial Circuit, In and For Duval County, Florida, case number 2012-DR-005580 Division: FM-B.

- [6] On July 16, 2015, the Florida Circuit Court entered the consent final judgment of dissolution of marriage in the divorce proceedings. It was signed by Ms. Gayhart and Mr. Schanck. The Florida Circuit Court reserved jurisdiction to enforce the terms of the consent dissolution judgment.
- [7] Under the terms of the consent dissolution judgment Mr. Schanck was ordered to pay US\$2.5 million to Ms. Gayhart (the "equalizing payments") as follows:
- a) \$650,000 on July 27, 2015,
 - b) \$350,000 within 60 days of July 27, 2015, and
 - c) \$1.5 million in equal monthly instalments over 42 months beginning on January 1, 2016 to accrue interest annually at the Wall Street Journal prime rate resetting every year on January 1.
- [8] The consent dissolution judgment payment provided that all of the equalizing payments shall survive the death of Ms. Gayhart and may be enforced by her estate. It further provided that Mr. Schanck will be in default of the consent dissolution judgment if he is more than 10 days late on any instalment of the equalizing payments.
- [9] Mr. Schanck made monthly payments from January 2016 to July 2016. He has not made any monthly payments since July 2016.
- [10] Ms. Gayhart died on August 24, 2016.
- [11] On September 12, 2016, the present plaintiff was substituted for Ms. Gayhart in the divorce proceedings. The plaintiff obtained judgments against Mr. Schanck for each instalment of the equalizing payments he did not pay.
- [12] Extensive proceedings took place in Florida. On December 20, 2016 the Florida Circuit Court entered a judgment against Mr. Schanck for the five missed monthly instalments from August to December 2016. The December 20, 2016 judgment was paid in February 2017.
- [13] On March 7, 2017, the Florida Circuit Court entered an "Order Establishing Procedures for Entry of Future Judgments, etc.," providing for the plaintiff to seek monthly periodic judgments against Mr. Schanck.
- [14] Between February 2017 and June 10, 2019, the plaintiff obtained 24 additional judgments against Mr. Schanck. Mr. Schanck paid eight of those judgments. There are 16 judgments obtained by the estate that have not been paid.
- [15] In February 2017, Mr. Schanck and his current wife Angela travelled to British Columbia. They currently reside in British Columbia.

- [16] On March 29, 2017, the Florida Circuit Court entered an order requiring disclosure of Mr. Schanck's banking documents from UBS Financial Services Inc. (UBS) It also issued a Stipulated Protective Order (the Florida Protective Order) that strictly limited the disclosure of those documents to the parties to the Florida action and restricts their use to that litigation, prohibiting their use in any other litigation or proceedings.
- [17] Further proceedings occurred in the Florida Circuit Court and Florida Appellate Court from March 2017 to August 2017.

Cayman Court Mareva Injunction

- [18] On October 17, 2018, the plaintiff obtained an ex parte Mareva injunction in the Grand Court of the Cayman Islands, relying on the documents obtained from UBS. The Cayman Court was advised of the Florida Protective Order and that using the USB documents was a "technical breach" of it by the plaintiff's counsel. The plaintiff's Florida counsel swore an affidavit that contains his undertaking to the Cayman Court to either obtain UBS consent or a court order permitting the use of the UBS documents after service of the Mareva injunction. The plaintiff's Florida counsel further advises the Cayman Court "we would not propose to disclose this material or the sealing order to them or anyone else, until the conditions in the Protective Order have been met".
- [19] On November 8, 2018, plaintiff's counsel wrote to UBS seeking its consent to use of the UBS documents. On November 16, 2018 UBS replied. It stated that the UBS documents were designated confidential to protect Mr. Schanck's interests. UBS did not provide consent. It advised that it took no position on any use of the UBS documents or on any application respecting their use.
- [20] Further proceedings in the Florida Circuit Court occurred between August 28, 2018 and April 2019 that resulted in orders that Mr. Schanck provide a fact information sheet on or before March 4, 2019; and that Mr. Schanck show cause why he should not be held in contempt for violating the order. The show-cause hearing was scheduled for April 18, 2019, Mr. Schanck failed to appear. On April 30, 2019 the Florida Circuit Court entered a contempt order against Mr. Schanck for failure to comply with its earlier orders and issued a writ of bodily attachment against Mr. Schanck.
- [21] On July 19, 2019, the plaintiff obtained a "Norwich Pharmacal Order" in the Cayman Islands that required disclosure from third parties to the plaintiff. One of the third parties was RBC-Cayman from which the plaintiff obtained numerous documents.
- [22] Under Cayman Islands law such documents are confidential and subject to an implied undertaking of confidentiality which is confirmed by statute: The Confidential Information Disclosure Law, 2016 of the Cayman Islands (Law 23 of 2016), particularly, s. 3(1) and 4(2) provide:

3(1) Where a person owes a duty of confidence, the disclosure by that person of confidential information -

- (a) in compliance with the directions of a court pursuant to section 4;
- (b) in the normal course of business or with the consent, express or implied, of a principal;
- (c) to a constable of the rank of inspector or above investigating a criminal offence committed or alleged to have been committed within the Islands;
- (d) in compliance with an order or search warrant made by the Central Authority pursuant to the Criminal Justice (International Cooperation) Law (2015 Revision);
- (e) in compliance with an order made by the Cayman Authority pursuant to the Mutual Legal Assistance (United States of America) Law (2015 Revision);
- (f) in compliance with an order for evidence made by the Grand Court pursuant to the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order, 1978 (S.I 1890/78);
- (g) To the Monetary Authority, where the disclosure is made pursuant to a duty imposed under the Monetary Authority Law (2013 Revision) or regulatory laws;
- (h) to the Financial Reporting Authority pursuant to a duty imposed by the Proceeds of Crime Law (2014 Revision) or Terrorism Law (2015 Revision);
- (i) to the Anti-Corruption Commission pursuant to a duty imposed by the Anti-Corruption Law (2014 Revision); and
- (j) in accordance with, or pursuant to, a right or duty created by any other Law or Regulation,

Shall not constitute a breach of the duty of confidence and shall not be actionable at the suit of any person.

4(2) If a person intends to or is required to give evidence in or in connection with any proceeding being tried, inquired into or determined by any court, tribunal or other authority, whether within or without the Islands and the evidence consists of or contains any confidential information within the meaning of this Law, the person shall apply for directions in accordance with this section before giving that evidence, unless that person has been provided with the express consent of the principal.

BC Court Mareva Injunction

[23] On December 5, 2019, in the BC Supreme Court, the plaintiff applied for and obtained an ex parte Mareva injunction in this action relying on the UBS documents, that were subject to the Florida Protective Order, and the documents provided to the Cayman Court.

[24] In Part 2 of the notice of application, Factual Basis, the plaintiff outlines the proceedings in the Florida courts as well as the Cayman Court. There is no reference to the Florida Protective Order of March 28, 2017. The plaintiff does not describe that it was in breach of its

undertaking to the Cayman Court to obtain either the UBS consent or a court order permitting the use of the UBS documents. The plaintiff does not disclose that UBS did not provide the consent or that there was no court order from the Florida Circuit Court permitting use of the UBS documents. The plaintiff does not refer to the Cayman documents as confidential and subject to an implied undertaking of confidentiality that is confirmed by statute from disclosure to this Court. The plaintiff does not say that the documents upon which it relies in the Mareva application were being used in breach of both the Florida Protective Order and the Cayman Court and law.

- [25] At page 9 under Part 3, Legal Basis, the plaintiff states that at paragraph 7(e) "the plaintiff has breached a previous protective document order when using the documents obtained under such order for seeking relief in the Cayman Islands."

Events following the filing of the Notices of Application

- [26] As noted, on February 20, 2020 the plaintiff filed a new application for a Mareva injunction. That application is a duplication of the previous application with obvious updates. It makes the same reference to the Florida Protective Order and the undertaking to the Cayman Court.
- [27] On February 28, 2020 the plaintiff applied to the Cayman Court for permission to use the Cayman documents in support of its applications in other jurisdictions. In that application, the plaintiff referred to the implied undertaking and stated at paragraph 11 that it is seeking the order "out of an abundance of caution." The plaintiff did not advise the Cayman Court that it had already breached the undertaking by using the UBS documents in support of its Mareva injunction on December 5, 2019 in this court.
- [28] In April 2020, Mr. Schanck's counsel prepared an application to set aside the Mareva injunction obtained on December 5, 2019. The focus of the application is on the plaintiff's undisclosed breach of the Florida Protective Order, the Cayman Confidentiality Law and the plaintiff and counsel's breach of the undertaking. Through inadvertence, the application was not filed or delivered until November 23, 2020.
- [29] On November 24, 2020 the plaintiff applied to the Florida Circuit Court on an emergency basis seeking an order and amending or clarifying the Florida Protective Order. In that application the plaintiff does not disclose that it has already used the documents in the Cayman Court or the counsel's undertaking in the Cayman Court. In its application the plaintiff asserts that Mr. Schanck's raising the breach of the Florida Protective Order in its "recent Canada filing" is an "egregious example of a lack of clean hands" and an attempt by Mr. Schanck to use his "mischaracterization of this Court's order to avoid the legitimate attempt to collect on this Court's judgments."

[30] On December 1, 2020 the Florida Circuit Court judge reiterated that the Florida Protective Order prohibits the use of the UBS documents elsewhere. The plaintiff's motion was not granted. The plaintiff needed to seek an order amending or discharging the Florida Protective Order on notice.

[31] On February 2, 2021 this hearing commenced. The application was set to continue on March 24, 2021. On March 17, 2021 the plaintiff applied to the Florida Circuit Court for an order, on notice, varying or clarifying the Florida Protective Order. On March 23, 2021 Florida granted the order discharging the Protective Order.

Notice of Civil Claim

[32] The notice of civil claim (NOCC) was filed by the plaintiff on December 5, 2019.

[33] In Part 1, the Statement of Facts, the plaintiff outlines the Florida divorce proceedings, the failure to pay 16 judgments obtained by the estate and the Cayman Court proceedings. At paragraph 38 of the NOCC, under the heading "Fraudulent Preference and Fraudulent Conveyance", the plaintiff asserts Mr. Schanck has hidden assets, and transferred assets among companies, firms, entities, businesses and entities he controls to avoid paying the Florida judgments.

[34] In Part 2, the Relief Sought is:

- 1) Recognition and enforcement of the Unsatisfied Florida Judgment
- 2) Judgment in the amount of the Canadian equivalent of US\$980,094.16 as of November 27, 2019
- 3) Interest after November 27, 2019
- 4) Injunction
- 5) Order for the detention, custody or preservation of property
- 6) A declaration that Mr. Schanck has hidden or transferred assets to avoid payment of the Florida Judgments, and an order that Mr. Schanck reverse those transactions
- 7) Costs
- 8) Such further or other relief as this Court may deem just.

Analysis

[35] Although the applications by the plaintiff were first in time, they are based on the Mareva injunction granted by Groves J. in December 2019, or alternatively, on the validity of the NOCC. Logically, the first matter to deal with is the validity of the Mareva injunction, and then Mr. Schanck's application to strike the NOCC. The result of those considerations will then form the basis to determine whether the plaintiff is entitled to disclosure that it seeks from Mr. Schanck, from Ms. Schanck and CIBC.

Mareva Injunction

Legal Framework

[36] The legal principles that apply to Mareva injunctions was summarized by Justice Smith in *China Citic Bank Corp. v. Yan*, 2016 BCSC 2332 at paras. 10-16:

10. The term "Mareva injunction" generally refers to an order that prevents 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 judgment unenforceable: I Spry QC, *Equitable Remedies*, 9th ed, (Australia: Thompson Reuters, 2013) at 514. It is recognized as a "harsh and exceptional remedy that should only be available in the clearest of cases": *Netolitzky v. Barclay*, 2002 BCSC 1098 at para. 22. However, it is not limited to any particular, pre-defined set of circumstances. In *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 168 D.L.R. (4th) 309, the Court of Appeal said at paras. 20 and 21:

[20] . . . 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.

11. The basic test for a Mareva injunction was summarized in *567 Hornby Apartments Ltd. v. Le Soleil Hospitality Inc.*, 2009 BCSC 711 at para. 12; the Court must consider:

[12] . . .

- (a) the existence of a strong prima facie case or a good arguable case (there is no strict formula); and
- (b) having regard to all relevant factors in the case, whether granting an injunction would be just and convenient (in other words, the balance of convenience).

12. Because Mareva injunctions are invariably sought on ex parte applications, they are subject to the general rules governing such applications. Those are summarized in *Pierce v. Jivraj*, 2013 BCSC 1850 at para. 37:

[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.

[Citations omitted]

13. On the question of the effect of a material non-disclosure, the Ontario Superior Court of Justice has noted in *Re Ghana Gold Corporation*, 2013 ONSC 3284 at para. 28:

[28] In his text *Sharpe, Injunctions and Specific Performance*, looseleaf ed. (Toronto: Canada Law Book 2012) Canada Law Book, Sharpe J.A. stated at para. 2.45 that inflexible application of this rule is to be avoided and failure to make full disclosure is not invariably fatal. He referred to English authority that has held that a court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of an ex parte order, nevertheless to continue the order, or to make a new order on the same terms. He also states that if dissolution would result in injustice to the plaintiff, the punitive rationale for dissolving the injunction may be outweighed. Justice Sharpe also referred to opinion that expressed concern that applications to dissolve for non-disclosure were becoming routine, a view which in recent experience in our courts is all too true. See *Univalor Trust S.A. v. Link Resource Partners Inc.*, [2012] O.J. No. 5021.

[Emphasis added]

14. The duty of disclosure applies to matters known to the plaintiff or matters that it ought to have known had it made all reasonable inquiries: *BMF Trading v. Abraxis Holdings Ltd.*, 2000 BCSC 1691 at para. 118, rev'd on other grounds 2001 BCCA 288. That test must be applied with recognition of the fact that injunction applications are typically brought in situations of some urgency. As was stated in *Mooney v. Orr*, [1994] B.C.J. No. 2652 (S.C.) at para. 20:

- [20] . . . An ex parte chambers application is not a trial and should not be turned into one by demands for an unrealistic standard of disclosure. Disclosure must be full in the sense that it must be adequate to the demands of the particular application and always fair to the absent defendant. ...
15. A Mareva injunction may be set aside if the plaintiff overstated its case when applying for the injunction: *Royal Bank v. Boussoulas*, 2010 ONSC 4650.
16. An application to set aside a Mareva injunction should be approached as a hearing de novo, but should not be decided simply on the basis that the judge hearing the application would have exercised his or her discretion differently from the judge who made the original order: *Netolitzky* at para. 20; *Ma v. Nutriview Systems Inc.*, 2011 BCCA 389 at para. 14. The court may consider new or additional material that is put forward as well as the evidence on which the original application was based: *Ma* at para. 17.

Positions of the Parties

- [37] In this case, Mr. Schanck argues that the failure of the plaintiff to disclose that the UBS documents were subject to the Florida Protective Order and that their use in the Cayman Islands proceeding was in breach of that order, and further, that there was a specific undertaking made by the plaintiff's counsel to the Cayman Court in respect of the Florida Protective Order that was not fulfilled and is not a full and fair disclosure of all relevant and material matters that are known. Mr. Schanck says that the plaintiff's conduct is more serious than the breach of the implied undertaking. It is a deliberate breach of the Florida Protective Order, a deliberate breach of an undertaking to the Cayman Court and a deliberate breach of the prohibitive statute of the Cayman Islands applicable to documents obtained in a foreign jurisdiction.
- [38] Mr. Schanck asserts that the material put before Groves J. in December 2019 specifically omitted the existence of the Florida Protective Order and that the use of UBS documents by the plaintiffs in the Cayman Court in breach of that order. He says that the current application seeking a Mareva injunction also fails to refer to the Florida Protective Order and the use of the documents by the plaintiff in breach of that order.
- [39] In response, the plaintiff argues that there is no prejudice to Mr. Schanck in the plaintiff's use of the UBS documents. They are John Schanck's own documents and he should have disclosed them. Further, Mr. Schanck has not given evidence of any prejudice to him.

Discussion

- [40] In the application before Groves J. and in the current application before me for a Mareva injunction, the Cayman Islands proceedings are described as a basis for granting the Mareva injunction in British Columbia. The application refers to the Cayman Court entering a judgment of \$558,828.82 plus interest in favour of the plaintiff against Mr. Schanck on March 19, 2019 and a judgment of the principal sum of \$239,416.83 plus interest and costs in favour

of the plaintiff against Mr. Schanck on September 9, 2019. The application also refers to the plaintiff applying for an appointment of a receiver over Mr. Schanck's account at RBC Cayman. The application goes on to describe Mr. Schanck's asset transfers using the UBS account in the United States.

- [41] In respect of disclosure, the plaintiff says that included in the reasons for not granting the order are that the plaintiff has breached a previous Florida Protective Order when using the documents for seeking relief in the Cayman Court.
- [42] In my view, the reference to a breach of the Florida Protective Order deliberately minimizes the plaintiff's conduct in respect of that order. The plaintiff breached the Florida Protective Order but, as Mr. Schanck points out, that was not the only breach. The plaintiff's counsel breached the undertaking to the Cayman Court to get UBS's consent or have the Florida Protective Order amended or eliminated, breached the legislation of the Cayman Islands in respect of disclosure and in failed to advise the BC Court that the plaintiff continued to be in breach of the Florida Protective Order in support of its application of the Mareva injunction.
- [43] While I recognize that not every omission results in the Mareva injunction being set aside, I find that the plaintiff did not make full and frank disclosure of all material facts. Its description of the existence of the Florida Protective Order is at best perfunctory; it does not refer to its breach in the Cayman Courts, or the undertaking to the Cayman Courts, or its breach of Cayman Islands law. These were facts that were well known to the plaintiff. It is not an innocent non-disclosure; it appears to be deliberate.
- [44] I consider that if this Court was advised of these facts and given a full understanding of them that it may have affected whether the Mareva injunction was granted. As *Pierce v. Jivraj* points out, it is for the court to determine if the fact is material, not the applicant or his legal advisors.
- [45] I find that the plaintiff appreciated that the failure to disclose was material by the steps that it took after the Mareva injunction was granted by this Court in December 2019, after it filed this application in February 2020 and before the hearing of it commenced on February 20, 2021. On February 28, 2020, the plaintiff applied to the Cayman Court for permission to use the documents from the Cayman Court proceedings in a related hearing before the Florida Circuit Court on March 18, 2020, without disclosing their use before the BC Supreme Court in December 2020. On November 24, 2020, the plaintiff applied to the Florida Circuit Court to amend or discharge the Florida Protective Order, which was denied.
- [46] Having found that these facts and their non-disclosure was material, I must consider whether the plaintiff ought to be deprived of any advantage gained by reason of the breach of duty to disclose.

- [47] I find that the plaintiff did not provide full and fair disclosure to this Court in December 2019 when it obtained the Mareva injunction or in February 2020 when it filed the application for a second Mareva injunction. I therefore set aside the Mareva injunction granted by Groves J. on December 5, 2019 and decline to impose a further Mareva injunction.
- [48] I recognize that the Florida Protective Order has now been set aside by the Florida Circuit Court, but this occurred a year after the application for the Mareva injunction was made in February 2020 and after the first day of my hearing this application in February 2021.
- [49] As I have set aside the order of Groves J. of December 5, 2019 and declined to grant a further Mareva injunction, the obligations of Mr. Schanck to make disclosure in accordance with such an order no longer exists.

Application to Strike Notice of Civil Claim

Legal Framework

- [50] Rule 3-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 requires that a notice of civil claim set out a concise statement of material facts giving rise to the claim, a concise summary of the legal basis for the claim. If fraud is alleged, the particular facts with dates and items must be plead: Rule 3-7(18).
- [51] The test governing applications to strike pleading was set out in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 17, 19 and 22:
17. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.
 19. The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
 22. A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven. No evidence is admissible on such a motion. It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[citations omitted]

Positions of the Parties

- [52] Mr. Schanck seeks to strike paragraph 38 of the NOCC that states: "Mr. Schanck has hidden assets, and transferred assets among companies, firms, entitles, businesses and entities he controls to avoid paying the Florida Judgments." He also seeks to strike paragraph 6 under Part 2: Relief sought: "A declaration that Mr. Schanck has hidden and transferred assets to avoid payment of the Florida Judgments, and an order that Mr. Schanck reverse those transactions".
- [53] Mr. Schanck says that beyond the bald statement at para. 38, the NOCC does not allege that there was a fraudulent transfer of assets, it is an action to register a foreign judgement in debt for the payment of maintenance under a Divorce Order. While there are some allegations related to commercial transfers in the notice of application, most are years old and did not occur after the Mareva injunction was issued by the Cayman Court. It is not alleged that they were improper.
- [54] Mr. Schanck asserts that the plea should be struck or alternatively, the plaintiff should be given a short period in which to amend the pleadings.
- [55] The plaintiff argues that Mr. Schanck's motion to strike is seeking an extraordinary remedy. It also says that the application is premature because there has been no disclosure of documents in this court. The plaintiff asserts that it should be granted leave to amend.

Discussion

- [56] I do not hesitate in finding that the pleadings are defective and do not comply with the rules governing pleadings. However, striking the paragraphs in the pleadings that Mr. Schanck seeks results in there essentially being no basis to a claim.
- [57] I disagree with the plaintiff that it is entitled to disclosure before the pleading can be struck. That assertion appears to be based on a valid Mareva injunction and I have set aside the Mareva injunction. There is no obligation to disclose before a valid NOCC is filed.
- [58] Nevertheless, the plaintiff may have a claim and ought to be allowed to amend its pleadings to set that out. I agree that the time frame should be relatively short, and therefore grant leave to the plaintiff to file a NOCC that complies with the Rules, on or before September 30, 2021.

Disclosure from Third Parties

- [59] I decline to order disclosure from third parties, including the Canadian Imperial Bank of Commerce or Ms. Schanck. There is no Mareva injunction in effect and the pleadings require amendment before any obligation to disclose arises from the parties to the litigation, let alone third parties.

Summary

- [60] The Mareva injunction issued on December 5, 2019 is set aside.
- [61] The plaintiff has until September 30, 2021 to amend its pleadings. If it does not do so within the required time, the NOCC is stuck.
- [62] The application requiring disclosure from third parties is dismissed.
- [63] As Mr. Schanck has been successful in these applications, and because I have found that the plaintiff was not forthright in its application for a Mareva injunction, Mr. Schanck is entitled to the costs of these applications in any event of the cause.

"Gropper J."

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