

CANADA / JUDGMENT

Oneworld Accuracy Inc. v. Fok

2014 BCSC 148

COURT

Supreme Court of British Columbia

DECIDED

30 January 2014

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2014 BCSC 148 Oneworld Accuracy Inc. v. Fok

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Oneworld Accuracy Inc. v. Fok,

2014 BCSC 148

Date: 20140130

Docket: S138609

Registry: Vancouver

Between:

Oneworld Accuracy Inc.,

Oneworld Accuracy Biologistics Corp. and

Oneworld Accuracy Italia S.R.L.

Plaintiffs

And

Martin Tsz Wah Fok also known as Tsz Wah Martin Fok,

also known as Fok Tsz Wah, also known as Tsz Wah Fok,

also known as Martin Fok and

Yun Zhu Wang also known as Wang Yun Zhu

Defendants

Corrected Judgment: The front page of the judgment was corrected

on February 5, 2014

Before: Associate Chief Justice Cullen

Reasons for Judgment

Counsel for the Plaintiffs:

C.S. Wilson

& M.D. Brechtel

Counsel for the Defendants:

A. Gangji

Place and Date of Hearing:

Vancouver, B.C.

January 20, 2014

Place and Date of Judgment:

Vancouver, B.C.

January 30, 2014

- [1] On November 20, 2013, following an ex parte application brought by the plaintiff, I issued a Mareva injunction enjoining the defendant Martin Tsz Wah Fok from removing from British Columbia or in any way disposing of or dealing with or diminishing the value of his assets that are in British Columbia, whether in his own name and whether jointly or solely owned, except as permitted by the order.
- [2] On November 22, 2013, I issued a second Mareva injunction, adding the defendant Wang Yun Zhu as a defendant in the action and extending the terms of the injunction to her.
- [3] Paragraphs seven to nine of the order set forth the exceptions as follows:
7. This Order does not prohibit the defendants from spending up to \$10,000 a month in total between the two defendants on ordinary living expenses and a total of \$10,000 on legal advice and representation. Before spending any money on living, business or legal expenses, the defendants must advise the plaintiffs' solicitors in writing of the intended source of the funds to be expended.
 8. This Order does not prohibit the defendants from dealing with or disposing of any of his assets in the ordinary and proper course of business.
 9. The defendants may agree with the plaintiffs that the above spending limits should be increased or that this Order should be relaxed in any other respect but any such agreement will be effective only if confirmed in writing and signed by all parties.

The duration to the order was up to and including December 20, 2013 "unless before then it is varied or discharged by Order of this Court".

- [4] On December 19, 2013, the parties appeared again with the plaintiffs seeking an order extending the injunction to the date of trial or in the alternative, to April 21, 2014. The defendants opposed the plaintiffs' application and sought to set aside the injunction.
- [5] The hearing was not completed on December 19, 2013. I extended the injunction to January 20, 2014 and adjourned the hearing to that date on the following terms:
1. The Mareva injunction granted on November 22, 2013 be continued until Monday January 20, 2014, except as set out below.
 2. The Mareva injunction granted on November 22, 2013 be temporarily lifted with respect to the defendants' Royal Bank of Canada bank account with institution number 003, branch transit number 07600 and account number 5134960, and with respect to the defendants' RBC Homeline Plan account, identified as account number 001 04880-85604437-001, as identified in the attached document, for the sole purpose of allowing the defendant, Mr. Fok, to withdraw a maximum of \$12,000 for ordinary living expenses and \$10,000 for payment to counsel, Mr. Alnoor Gangji, for legal expenses, in total from both accounts, after which the said accounts will be subject to the continuing Mareva injunction.
 3. The defendants make and serve upon the Plaintiffs' solicitors an affidavit disclosing the full value of all of their assets, including any real property (the "Assets"), identifying with full particularity the nature of the Assets and their exact location as of the date of this order and whether the same are held in the defendants' names or jointly held or held by nominee(s), trustee(s), or otherwise on the defendants' behalf;
 4. The defendants provide consent to their banks to provide their bank statements, from November 2006 until present, to the plaintiffs' counsel through counsel for the defendants.
- [6] The plaintiffs' application, opposed by the defendants, continued and concluded on January 20, 2014, at which point I reserved judgment, extending the injunction until Monday, February 3, 2014 at the end of business.
- [7] This is a case involving fraud and theft. The evidentiary and factual context put before the court at the ex parte application on November 20, 2013 was set out in the oral Reasons for Judgment granting that Mareva injunction. Paragraphs one to nine of those Reasons read as follows:
- [1] THE COURT: This application for a Mareva injunction arises out of an action brought by the plaintiffs against the defendant alleging that over the course of his employment with the plaintiffs as a controller, the defendant has converted funds of the plaintiff to his own benefit over a period of some years. The precise time frame during which this occurred and the precise amount which is at issue is, as of the date of this application, unclear, as the plaintiffs have not yet had an opportunity to conduct a forensic accounting of their financial

records to determine that amount.

- [2] The underlying evidence which I was provided with reveals that the defendant was employed with the plaintiffs for a period of approximately seven years from 2006 until mid November of 2013.
- [3] The evidence also reveals that over the past few years from the point when the defendant was working on his own in overseeing the plaintiffs' financial records and financial dealings - although the revenues of the plaintiff increased - it appears that cash flow was very tight, and that was not explained. It was attributed to the fact that the defendant was working on his own and that he was perhaps not as effective or efficient as he ought to be.
- [4] Matters proceeded throughout the summer and fall of 2013 to the point where the plaintiff determined it had to discharge the defendant and did so, giving him the option of either severance pay or working to the end of his notice period between mid October and May of 2014.
- [5] As things progressed, more and more irregularities were revealed by the evidence, to the point where the plaintiffs confronted the defendant with not just the irregularities, but also the concerns that arose from the irregularities.
- [6] In the result, the defendant somewhat precipitously elected to resign his employment from the plaintiffs' employ without engaging what he was entitled to, that is, any severance pay, and shortly after his departure from the plaintiffs' employ, acting through a criminal defence lawyer, he caused the plaintiffs to be sent a cheque in the amount of \$300,000 together with an irrevocable direction to pay without any representation.
- [7] The irrevocable direction to pay reads as follows:

I, Tsz Wah Martin Fok, hereby irrevocably direct Anthony P. Serka, Q.C. to pay \$300,000 I have forwarded to his trust account to Oneworld Accuracy Inc. or its solicitor in trust without any preconditions or assurances or a consideration being obtained from Oneworld Accuracy Inc. I confirm that I have executed this irrevocable direction to pay freely and voluntarily without any assurances or representations or pressure on me.

- [8] The fact of the unconditional and irrevocable direction to pay in the amount of \$300,000 crystallized suspicions that the plaintiffs had that indeed the defendant was wrongfully and fraudulently converting funds rightfully belonging to it, and other surrounding facts which tend to support that conclusion include the fact that when searched, his work personal computer revealed that he had used to research the subject of conditional sentences. It also revealed that there had been some deletion of accounting files and that the backup of his accounting files did not go on to the employer's server, but rather went on to his personal working computer.

- [9] In addition to that, the tight cash flow, despite the growing revenues, the existence of unpaid invoices, the existence of invoices which had been posted to the accounting program but without approval, the defendant's failure to remit Family Maintenance Enforcement payments, deductions, and his mis-use of employee deductions, as well as his failure to pay GST and made other payroll deductions, all are indicative of the diversion of funds from the plaintiff company to the defendant's benefit.
- [8] Since that determination, additional evidence has been brought to light.
- [9] In particular, in an affidavit sworn November 22, 2013, Daniel Taylor, the CEO, Director and beneficial shareholder of the plaintiff Oneworld Accuracy Inc. and the Director and Officer of the related plaintiff companies, deposed that he spoke with the defendant Mr. Fok on November 20, 2013 and that Mr. Fok informed him that he had stolen money from the plaintiff companies, and said that he had given all the money to his lawyer to be repaid. Mr. Fok also told Mr. Taylor that the amount of money he had loaned to Mr. Taylor in December 2009 was money which he had stolen from the company. Mr. Taylor deposed that he had been loaned \$220,000 from Mr. Fok in December 2009 which he had repaid in the ensuing two years with interest.
- [10] Mr. Fok did not inform Mr. Taylor of any further details. Mr. Taylor deposed that on November 22, 2013 he was informed by Oneworld's Director of Operations that the Director of Operations had opened and recovered accounting files from Mr. Fok's personal work computer which revealed that the accounting files falsely showed that Yun Zhu Wang (Mr. Fok's wife) was an employee of Oneworld and that between November 7, 2011 and December 31, 2012, she had been paid a gross salary of \$120,000. The net funds of \$92,282.67 were paid into a CIBC account on Ms. Wang's behalf.
- [11] The accounting files further revealed that Ms. Wang was paid a gross salary of \$5,000 between January 1, 2012 and February 7, 2012, with a net payment of \$3,737.05.
- [12] In a subsequent affidavit sworn by Mr. Taylor on December 17, 2013 he deposed that he received information from Simon Anderson C.A., a financial consultant who has worked with Oneworld, that on or about February 1, 2012 a wire transfer for \$100,000 was sent from Oneworld's U.S. dollar account to an account at the Hong Kong Shanghai Banking Corporation in Hong Kong held by Cheung Po Lam. Mr. Taylor deposed that there was no basis for such a payment and that he believes it to be an example of the defendant's misappropriation of funds.
- [13] Mr. Taylor further deposed that Mr. Anderson has informed him that the accounting investigation has revealed "additional suspicious transactions of \$125,000, but that significant work is necessary to properly investigate these transactions and that sum involved payments to third parties, not Fok or Wang."
- [14] The defendant Fok has sworn three affidavits, the first on December 17, 2013, the second on December 18, 2013, and the third on January 9, 2014, sworn jointly with his wife.

- [15] In his first affidavit, Mr. Fok deposes that he "repaid with interest all the funds I owed to the plaintiffs. No further funds are owed by me to the plaintiffs. My wife Yun Zhu Wang had no knowledge of any of the financial dealings with respect to the plaintiffs."
- [16] Mr. Fok gave no further explanation of or accounting for his assertion that the \$300,000 paid to the plaintiffs comprised all the funds he stole with interest. He made no reference to the \$120,000 paid, in part, into a CIBC account on behalf of his wife, the assertion that the \$220,000 loan which he made to Mr. Taylor in 2009, which was repaid in the ensuing two years, was money he stole from the plaintiff companies, or to the \$100,000 wire transfer from a Oneworld account to an account belonging to someone unknown to the plaintiffs (Mr. Lam).
- [17] In his second affidavit of December 18, 2013, Mr. Fok did refer to the \$100,000 wire transfer as a "transaction included in the \$300,000 he paid to Mr. Serka." He made no reference to the \$220,000 funds which he is alleged to have stolen from the plaintiff companies on or before 2009, nor did he make any reference to the salary paid on behalf of his wife.
- [18] In paragraph five of his affidavit of December 18, he deposed as follows:
- I do not know what "suspicious" transactions in excess of \$125,000 Mr. Taylor is talking about in paragraph 11 in his affidavit of today. No details have been provided and I believe if details are provided that a legitimate explanation exists which will prove that neither I nor my wife or anybody on our behalf received those funds.
- [19] In the defendants' third affidavit sworn January 9, 2014, Mr. Fok and Ms. Wang deposed as to "the full value of all (their) assets, including any real property identifying with full particularity the nature of the assets and their exact location as at the date of the order "
- [20] The affidavit does not refer to or explain anything about the \$220,000 used in the 2009 loan nor does it refer to or account for the CIBC bank account into which the funds were paid on behalf of Ms. Wang.
- [21] In oral submissions on January 20, 2014, counsel for the defendants represented that some of the funds which were misappropriated came from payments which Mr. Fok made to himself for invoices from third parties amounting to approximately \$57,000. As I understand it, counsel for Mr. Fok was representing that the \$120,000 paid to Mr. Fok's wife and the \$100,000 wire transfer to Hong Kong to Mr. Lam, together with the \$57,000 in additional transactions comprised the full amount of the misappropriated funds, with interest bringing it up to \$300,000. Nowhere in Mr. Fok's affidavit material, however, or in his representations to the Court via his counsel has Mr. Fok addressed or accounted for the \$220,000 which, according to Mr. Taylor, he admitted he stole from the plaintiff and loaned to Mr. Taylor in 2009.

- [22] At this point, there is no accounting evidence revealing the theft of \$220,000 during or prior to 2009, but neither is there any evidence from Mr. Fok of where the funds comprising the loan to Mr. Taylor came from, or, once repaid, where they went.
- [23] I am thus left with a body of evidence and representations from counsel tending to establish that there was at least approximately \$520,000 which Mr. Fok took from the plaintiffs (the \$220,000 loaned to Mr. Taylor in 2009; the \$120,000 to \$125,000 paid into a CIBC account as salary to Mr. Fok's wife; the \$100,000 wire transfer to Mr. Lam in Hong Kong, plus the \$57,000 which Mr. Fok apparently acknowledges receiving from the ostensible payment of third party invoices; not including the evidence of "suspicious transactions" in excess of \$125,000).
- [24] There is also evidence from Mr. Taylor that "all bank reconciliations, bank statements and cancelled cheques from June 2010 forward are missing" and prior to that "there are many missing bank reconciliations and cancelled cheques". Mr. Taylor also deposed that Mr. Fok deleted various accounting files from his workplace laptop computer.
- [25] It is in the face of that evidence that the plaintiffs seek to maintain the injunction against the assets of the defendants and the defendants resist such an order.
- [26] The defendants' position is that the injunction is a hardship to them in that despite the terms of the order enabling them a monthly allowance for their support and access to funds as legal fees, they have been unable to properly retain counsel.
- [27] Counsel for the defendants argues further that the defendants owe no further money to the plaintiffs given the substantial payment of \$300,000 which they have already made. The defendants' contend in the alternative that all the assets covered by the injunction are legitimately acquired and the granting of the injunction is, in the circumstances, an instance of pre-judgment execution which this Court should decline to grant. The defendants rely on *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 168 D.L.R. (4th) 309, 59 B.C.L.R. (3d) 196 (BCCA), in which Newbury J.A. held as follows in para. 23:
- [23] The Chambers judge had before him all the relevant facts and law. He was also reluctant to set down a hard and fast rule. In his words:

I am not prepared to go so far as to hold that a Mareva injunction should never be issued where funds or assets are being removed from the province in the ordinary course of business and there is no evidence of any scheme to avoid judgment creditors. There might be special circumstances where such an order is warranted, although at present, I cannot imagine what those circumstances might be. I am, however, of the opinion that such an order should not generally be made [para. 57].

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.

- [28] It is the defendants' submission that the injunction should be set aside to enable the defendants to deal with their assets, properly retain counsel, and defend this action on the merits.
- [29] In the oral reasons delivered November 20, 2013 granting the injunction, the test for the issuance of a *Mareva* injunction was set forth as follows at para. 16:
- [16] This case is not completely dissimilar from a case decided by Mr. Justice Blair, *University of British Columbia v. Moscipan*, 2012 BCSC 292. In that case, Justice Blair set out the conditions which must be satisfied before an injunction such as this is granted, at para. 8 and 9, as follows:
- [8] In *Insurance Corp. of British Columbia v. Patko*, 2007 BCSC 743, Madam Justice Fisher, at paras. 33 to 38, canvassed on the law with respect to the granting of an injunction to freeze assets before judgment, concluding that the applicant must show:
- (a) the plaintiff has demonstrated that it has a strong *prima facie* case;
 - (b) the plaintiff has shown that there is a real risk of assets being dissipated before a judgment is obtained;
 - (c) in British Columbia the plaintiff need not demonstrate an improper purpose to the anticipated dissipation of assets;
 - (d) the dissipation of assets will have the effect of hampering or defeating the plaintiff's attempts to realize on any judgment that it may obtain; and
 - (e) the risk of dissipation may be inferred from evidence showing the plaintiff's strong *prima facie* case.
- [9] Fisher J. also found that the court should take a flexible approach considering the interests of both parties, stating at para. 37:

Applying the flexible approach in *Mooney v. Orr*, the court may consider the interests of both parties, taking into account a number of factors, including the strength of the plaintiff's case, the nature of the transaction giving rise to the action, the risks inherent in that transaction, the amount of the claim, the defendant's assets and the history of the defendant's conduct.

- [30] In light of the evidence placed before me at that time, I concluded as follows at para. 17:
- [17] In my view, those conditions are met in the case at bar as a result of the circumstances which I have outlined that give rise to the action and to this application. The evident deceit which the defendant has employed in converting his employer's funds to himself over an apparently significant period of time simply does not anchor any likelihood that such behaviour would not continue in the event such an order or injunction were not granted.
- [31] While I accept that in an ordinary case there is a reluctance to grant a Mareva injunction against non-proprietary assets because of the general rule against execution before judgment, there are exceptions to that rule, of which fraud is one. In *Netolitzky et al v. Barclay et al*, 2002 BCSC 1098, Madam Justice Dillon stated as follows at paras. 23-26:
- [23] It is important to this case that the purpose of Mareva injunctions is not limited to prevention of dissipation of assets to avoid payment of a judgment. It is also available as a form of security (*Mooney*, supra at 350; *Delmas v. Orion 2000 Technologies Ltd.*, [1997] B.C.J. No. 836 at para. 19 (Q.L.) (S.C.); *Delmas v. Orion 2000 Technologies Ltd.* (1997) 18 C.P.C. (4th) 239 at 253; *Mishkin (Trustee of) v. Roddy Diprima Ltd.*, [1996] B.C.J. No. 2660 (Q.L.) (S.C.); *Miskin (Trustee of) v. Roddy Diprima* (1996), 28 B.C.L.R. (3d) 181; *Leaton Leather & Trading Co. v. Ngai* (1997), 32 B.C.L.R. (3d) 14 at 16 (S.C.)). This purpose is significant here because the plaintiff does not allege that there is a risk of disposal or dissipation of assets. Rather, the plaintiff says that a prima facie case of fraud may give rise to an inference that assets are at risk.
- [24] Fraud is a recognized exception to the general hostility to prejudgment execution. In *Aetna*, supra at 12-14, Estey J. described fraud as the third exception to the general rule against execution before judgment. He said:

However, the abhorrence which the common law has felt towards execution before judgment has always been subject to some obvious exceptions:

...

3. to prevent fraud both on the court and on the adversary:

In *Campbell v. Campbell* (1881), 29 Gr. 252, both the general rule and the exception to it on the basis of fraud, were succinctly stated by Boyd C. at p. 254-55, as follows:

Where no fraud has been committed the Court will not restrain a defendant from dealing with his property at the instance of a creditor or person who has not established his right to proceed against that property. But where a fraudulent disposal has actually been made of the defendant's property, (as is admitted by the demurrer in this case,) then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance, until the plaintiff can obtain a declaration of its invalidity, and a recovery of judgment for the amount claimed.

More recent cases in which the fraud exception have been applied include *Toronto (City of) v. McIntosh* (1977), 16 O.R. (2d) 257 (Ont. H.C.J.); and *Mills and Mills v. Petrovic* (1980), 30 O.R. (2d) 238 (Ont. H.C.J.)

[25] In *Mills and Mills v. Petrovic* (1980), 30 O.R. (2d) 238 at 238-239 (H.C.J.), the court said:

There is no doubt that the law is clear that an interim or interlocutory injunction will not be granted to restrain a defendant from parting with or encumbering his property before a creditor has established his right by judgment. Basically, the Courts will not grant execution before judgment. Counsel have advised me that in the many cases which state that principle, they can find none where the principle was applied in a case in which the claim against the defendant was for theft or fraud. It is my opinion that equity demands that there be an exception to that principle where there is substantial evidence supporting an allegation that the defendant has defrauded or stolen from the plaintiff. This case does not directly fall within the factual situations which were before Steele J. when he decided *City of Toronto v. McIntosh et al.* (1977), 16 O.R. (2d) 257, and *Robert Reiser & Co., Inc. v. Nadore Food Processing Equipment Ltd.* (1977), 17 O.R. (2d) 717, 81 D.L.R. (3d) 278, 25 C.B.R. (N.S.) 162. However, it does not appear to me to be an unreasonable extension of the principle upon which he acted in those cases to permit equity to give a person who has been defrauded or stolen from by a defendant, some measure of relief that would not be available to a plaintiff in an ordinary action where fraud or theft are not issues.

[26] *Mills* involved a strong case in fraudulent conveyance that an employee had stolen \$100,000 from her employer when she was engaged as an accountant. As such, it is a historically classic example of the fraud exception applied to fraudulent conveyances.

[32] In the context of the evidence before her, Dillon J. held as follows at paras. 32 and 33:

[32] The plaintiff has established a strong *prima facie* case of theft and fraud. The defendant has failed to meaningfully respond to the plaintiff's evidence that was supported by documentation and an accountant's analysis. The plaintiff has shown that the defendants have defrauded the plaintiffs of at least \$40,486 over a two month period, more probably \$315,644 over three years, and quite possibly \$560,000. The amount established before the originating judge was \$40,486. It is not within my discretion to determine that this amount was not significant enough to warrant a *Mareva* injunction without evidence of dissipation of assets. The originating judge obviously thought that it was. But, the case is even stronger now and there is no substantial defence or explanation offered. The magnitude of the shortfall is substantial. The defendants have been shown to have each benefited from the fraud that has been of long duration and involved substantial concealment and dishonesty. The inference can be drawn from the circumstances that there is a real risk of dissipation of assets.

- [33] None of the defendants have filed any material about their financial status despite an order to do so. None have asserted that there are sufficient assets in British Columbia to satisfy a judgment. No prejudice has been shown to the defendants as Mr. Barclay has been given a liberal monthly allowance for living expenses and legal fees and other details have been adjusted to allow for normal activity. The assets that were disclosed on December 5, 2001 are relatively liquid.
- [33] The circumstances outlined by Justice Dillon are not dissimilar to the case at bar. The plaintiffs' case of fraud is a strong one. The only real issue to be determined is the quantum of the assets taken. In the present case, the defendants' affirmatively allege that the full amount of what has been taken, together with interest, was returned to the plaintiffs with the \$300,000 payment in November of 2013.
- [34] The defendants have not, however, offered any objective documentary evidence in support of the assertion that all the stolen funds have been returned. Moreover, on the basis of evidence placed before the Court by the plaintiffs, it appears that the amount of the fraud is significantly higher than the amount alleged by the defendants.
- [35] In addition, there is now evidence, not previously before the Court in the original ex parte application, that some of the money which was taken was sent offshore to Hong Kong. In my view, that strengthens the prospect that if not restrained by an injunction, the defendant Mr. Fok would seek to avoid the consequences of any monetary judgment by sending assets out of the jurisdiction. Although Mr. Fok deposes that the \$100,000 sent to Hong Kong comprised part of the \$300,000 payment, there is no confirmatory evidence of that, nor is there any evidence of where the \$220,000 and interest repaid by Mr. Taylor to Mr. Fok arising from the 2009 loan went, or where it presently is.
- [36] Additionally, as I understand it, Mr. Fok concedes through his counsel that he took approximately \$57,000 by making payments to himself for invoices submitted by third parties. That potentially adds to the funds at issue and appears to offer partial confirmation of the plaintiffs' assertion that the \$125,000 in "additional suspicious transactions" revealed by the ongoing accounting investigation may be attributable to the defendants' fraud. As such, it casts some doubt on the veracity of Mr. Fok's assertion in paragraph five of his December 18, 2013 affidavit to the effect that neither he nor his wife had anything to do with the "suspicious transactions".
- [37] In my view, the circumstances revealed by the current state of the evidence are more compelling than they were at the original ex parte hearing. There is evidence that some of the funds were sent offshore, there is evidence of fraud in amounts considerably in excess of \$300,000, there is evidence of further "suspicious transactions" corroborated in part by the defendants' representations through his counsel to be attributable to him, and despite ample opportunity, the defendants have offered no evidence to support their assertion that the entire amount of the fraud has been repaid.

- [38] The present order allows for a significant monthly allowance to enable the defendants to support themselves and to allow for legal fees. I have been told the defendants were unable to pay a retainer for counsel, but I have no details of why that is so.
- [39] In my view, the circumstances in the case at bar justify maintaining the injunction. The risk of the dispersal of assets is patent and, at this point, in part because of the loss and destruction of records, the full amount of the fraud is unknown, although it appears significantly in excess of the \$300,000 claimed by the defendants. While I acknowledge the step taken by the defendant Mr. Fok in repaying a significant sum to the plaintiffs, the current state of the evidence does not support a conclusion that those funds comprise all that is at stake in this law suit.
- [40] In my view, the potential discrepancy between what Mr. Fok has repaid and what he may still owe is significant and, in the face of an admitted fraud, the conditions for maintaining the Mareva injunction are met. Accordingly, the plaintiffs are entitled to the order which they seek and on the terms which they seek either until trial or until further order of this Court. The defendants are at liberty to apply for a future release of funds for legal expenses and they are granted leave to apply for a variation of this order in the event of a material change in circumstances. The plaintiffs are obliged to provide the defendants with the results of their accounting investigation as those results become known.
- [41] The plaintiffs are entitled to their costs of this application in any event of the cause.

"A.F. Cullen ACJ."

Associate Chief Justice Cullen

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