

CANADA / JUDGMENT

Simon Fraser University v. Saidi

2013 BCSC 2287

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2287 Simon Fraser University v. Saidi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Simon Fraser University v. Saidi,

2013 BCSC 2287

Date: 20131101

Docket: S136240

Registry: Vancouver

Between:

Simon Fraser University

Plaintiff

And

Siamak Saidi, Alfanipo Research Inc., Alpo Scientific Inc.,

Zeyed Science Inc., T2C Science Inc., and

POFA Science Canada Inc.

Defendants

Before: The Honourable Madam Justice H. Holmes

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

William D. Holder

Counsel for Defendants:

Carl May, articulated student

(as agent for Dale North)

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 30, 2013

Place and Date of Judgment:

Vancouver, B.C.

November 1, 2013

- [1] THE COURT: Mr. Saidi seeks an order varying the terms of an injunction to allow for the release of some assets. He seeks access to those assets to fund his ordinary living expenses and his legal expenses in these civil proceedings and in criminal proceedings concerning substantially, or perhaps entirely, the same subject matter.
- [2] The civil and the criminal proceedings are based on allegations that over the course of almost two years while Mr. Saidi was employed as Director, Finance in the Faculty of Science at Simon Fraser University (SFU), Mr. Saidi wrongfully converted to his own use funds totaling approximately \$847,000 through the use of more than 500 false invoices for supplies which were never actually requested or received. The invoices said to be false were issued by the five corporate defendants, each of which is said to have a registered and records office with the same address as a property in Abbotsford owned by Mr. Saidi.
- [3] The injunction in respect of which relief is now sought was granted by Goepel J. on August 23, 2013, modifying in minor respects a substantially similar injunction he granted on August 20, 2013. The key provision, which freezes Mr. Saidi's assets and under which he now seeks the release of some assets, reads as follows:
1. An interlocutory injunction enjoining and restraining the Defendants by themselves, or by their agents and servants, from selling, mortgaging, pledging, transferring, assigning, diminishing, or otherwise disposing of or dealing with any of their assets located in British Columbia or anywhere worldwide, whether those assets are held directly or indirectly, until final disposition of this action or until further order of this Honourable Court, except as is necessary for the payment of ordinary living expenses of the Defendant, Saidi and except as is necessary for the Defendant, Siamak Saidi . . . to carry on his ordinary course of business.
- [4] In this application, Mr. Saidi seeks the release of the following three assets, to the extent I will describe:

- a chequing account at the Bank of Montreal (the BMO account), which had a balance of approximately \$6,300 at the time the injunction was issued
- a real property in Belcarra, and
- a real property in Burnaby.

He seeks the release of those assets to the extent that the real properties be ordered sold and the proceeds of sale held in trust, except as follows: a proportion of those proceeds would be released to Mr. Saidi corresponding to the amounts paid from the BMO account toward the mortgages on the real properties over the course of approximately 15 months after Mr. Saidi left his employment at SFU and took up similar employment with Cultus Lake Park. It is common ground that Mr. Saidi left his employment at SFU for reasons unrelated to the allegations that ground the civil and criminal proceedings, and that when the allegations were made or became known some 15 months later, they brought an end to his employment at Cultus Lake Park.

- [5] The parties disagree on the extent, if any, to which these assets may be viewed as falling within a proprietary claim by the plaintiff. As Mr. May candidly and properly noted, a defendant seeking the release (from the effect of a freezing injunction) of assets over which the plaintiff claims a proprietary interest must meet a different and more demanding test.
- [6] In *Right Business Limited v. Affluent Public Limited*, 2012 BCSC 1541, Goepel J. helpfully reviewed and summarized the law concerning the release of assets from a freezing injunction for a defendant's reasonable use in the ordinary course of business. Relying on the reasons of Molloy J. in *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*, [2003] O.T.C. 7, Goepel J. in *Right Business* (at paras. 28-29) explained the distinction between proprietary and Mareva injunctions:
- [28] In *Credit Valley*, Molloy J. drew a distinction between Mareva and proprietary injunctions. At paras. 15-16, [she] noted the distinction between such injunctions:

15 It is important at the outset to distinguish between the proprietary injunction and the Mareva injunction. A proprietary injunction is granted to preserve an asset in the possession of a defendant, which the plaintiff says belongs to the plaintiff, or is subject to a trust in favour of the plaintiff. It is typically sought in cases of alleged theft, conversion or fraud where the defendant, by some wrongdoing, comes into the possession of the plaintiff's property. The purpose of the injunction is to preserve the disputed property until trial so that the property will be returned to the plaintiff if successful at trial, rather than used by the defendant for his own purposes.

16 A Mareva injunction does not require the plaintiff to show any ownership interest in the property subject to the injunction and does not require the plaintiff to establish a case of fraud or theft. It is a recognized exception to the rule established in *Lister v. Stubbs* (1890), 45 Ch. D.1 that the court has no jurisdiction to attach the assets of a debtor for the protection of a creditor prior to the creditor obtaining judgment. Because of the exceptional nature of the relief, the test on the merits for obtaining a Mareva injunction is more onerous than for other injunctive relief and requires that the plaintiff establish a strong *prima facie* case: *Chitel v. Rothbart* (1983), 39 O.R.

(2d) 513 at 522 and 532 (C.A.). In addition to the other requirements for an injunction, the plaintiff must show that the defendant is taking steps to put his assets out of the reach of creditors, either by removing them from the jurisdiction of the court or by dissipating or disposing of them other than in the normal course of business or living: *Chitel v. Rothbart* at p. 532-533.

[29] After discussing the test that has been applied in granting relief from a Mareva injunction, [Molloy] J. went on to note that additional considerations apply to a defendant's motion to vary a proprietary injunction. In that regard, [she] noted that it was one thing to permit payment out of ordinary expenses of monies belonging to a defendant but quite another to permit the defendant to use monies which may be in fact the plaintiff's. After reviewing the authorities [she] concluded at para. 25:

25 ... Where the plaintiff has frozen assets and advanced an arguable case that those assets are subject to a proprietary claim by the plaintiff, there is an onus on the defendant to put forward credible evidence as to the source of the subject assets if the defendant seeks to use the funds for his own purposes. It is only where the defendant can demonstrate that the assets are from a source other than the plaintiff that the usual rules for variation of a Mareva will apply. Otherwise, his right to use the funds will be subject to the balancing of interests in the exercise of the court's discretion.

[7] As to the test to be followed where assets sought to be released from an injunction include those in relation to which the plaintiff has a proprietary claim, Goepel J. (at para. 31 of *Right Business*) adopted the following from *Credit Valley* (at para. 26):

26 Accordingly, the test to be applied is as follows:

- (i) Has the defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction?
- (ii) If so, has the defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the plaintiff, i.e. assets that are subject to a Mareva injunction, but not a proprietary claim?
- (iii) The defendant is entitled to the use of non-proprietary assets frozen by the Mareva injunction to pay his reasonable living expenses, debts and legal costs. Those assets must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.
- (iv) If the defendant has met the previous three tests and still requires funds for legitimate living expenses and to fund his defence, the court must balance the competing interests of the plaintiff in not permitting the defendant to use the plaintiff's money for his own purposes and of the defendant in ensuring that he has a proper opportunity to present his defence before assets in his name are removed from him without a trial. In weighing the interests of the parties, it is relevant for the court to consider the strength of the plaintiff's case, as well as the extent to which the defendant has put forward an arguable case to rebut the plaintiff's claim.

- [8] The parties agree that this is the test to be applied in this application, but they disagree about how it applies on the evidence.
- [9] Mr. Saidi submits that the court need not engage in the balancing of interests required by step (iv), which poses a higher threshold for the defendant to meet, because the funds he seeks through this application can be provided by assets in relation to which the plaintiff cannot assert a proprietary claim.
- [10] This position first treats Mr. Saidi's Cultus Lake Park income as outside the proprietary claim, an approach which SFU does not dispute. The Cultus Lake Park income, which amounted in total to approximately \$72,545, was deposited directly by the employer into the BMO account. There is no suggestion that that income has any relationship to the funds Mr. Saidi is said to have taken from SFU by fraudulent or wrongful means.
- [11] However, Mr. Saidi then reasons also that the Cultus Lake Park income indirectly funded the assets now sought to be released, a proposition with which SFU disagrees. Mr. Saidi submits that the BMO account itself should be viewed as a non-proprietary asset because funded by the Cultus Lake Park income. He submits that portions of the equity in two of the real properties (in Belcarra and Burnaby) should also be so viewed, the portions corresponding to the proportion represented by the mortgage payments from the BMO account during the period when Mr. Saidi was receiving the Cultus Lake Park income. He submits that the BMO account monthly statements for the period of the Cultus Lake Park income support the reasonable inference that that income funded the payments for the mortgages on those two properties which, it is agreed, were paid from the BMO account.
- [12] SFU responds that even though the Cultus Lake Park income is itself outside any proprietary claim by the plaintiff, it is far from clear that the BMO account and the real properties should therefore be treated as also having that character. This is because the monthly statements for the BMO account show large deposits and withdrawals which are not explained in the evidence, in addition to the numerous debits, withdrawals, or payments for evidently ordinary living expenses such as at grocery and other stores. SFU notes also that the evidence on this application does not indicate whether transfers from the BMO account to the mortgage accounts funded principal or, rather, interest in relation to the mortgages, and submits that it is therefore difficult to estimate what proportion of the equity in those properties should be viewed as outside the plaintiff's proprietary claim, even if the court were to accept that the Cultus Lake Park income funded the mortgage payments by way of the BMO account.
- [13] SFU submits that, in any event, if the analysis moves to step (iv) of the test in Credit Valley, the application clearly cannot succeed because that step requires, among other things, an assessment of the strength of the plaintiff's case and the extent to which the defendant has put forward an arguable case to rebut it. SFU submits that on the evidence in this application, its own case is extremely strong. SFU notes that Mr. Saidi offers no indication at all of any defence he may have, or even whether he has one at all.

- [14] On the evidence in this application, SFU's submissions carry considerable force.
- [15] However, I find it unnecessary for the following reason to determine whether the assets now in issue fall outside SFU's proprietary claim, and therefore whether Mr. Saidi should succeed in his application at step (iv). For the most part, the evidence on the application in any event does not support the release of assets for the purposes sought. I will explain.
- [16] The "ordinary living expenses" Mr. Saidi seeks to pay from assets that are subject to the injunction consist in large part of the mortgage payments on the Burnaby and Belcarra properties as well as on a third property Mr. Saidi owns. These mortgage payments amount in total to more than \$5,000 per month. One or more of the mortgages is in arrears, and the Burnaby property may be subject to foreclosure.
- [17] I am not persuaded that on the face of the matter, mortgage payments on three separate properties fall within the meaning of "ordinary living expenses" as used in Goepel J.'s order, quoted earlier. Counsel could offer no case authority to suggest that the payments should so qualify. Without more information about Mr. Saidi's relationship to those properties, the obvious inference is that at least two of them are investment properties. Indeed, Mr. Saidi indicates that he receives regular rental payments in respect of one of the properties. It is not even clear, on the evidence, which of the three properties was Mr. Saidi's residence before his arrest on the criminal charges. For these reasons, it is difficult to see the costs of maintaining the three properties as the type of necessities of life for which "ordinary living expenses" are usually intended to provide.
- [18] Nor am I persuaded that the evidence supports the release of the funds Mr. Saidi requests for legal expenses. SFU does not disagree that necessary and reasonable legal expenses likely fall within the scope of the provision in the order for the release of assets as necessary for the payment of ordinary living expenses or for Mr. Saidi to carry on his ordinary course of business. However, SFU submits, and I agree, that the evidence in this application is not sufficient to establish that the funds sought are necessary.
- [19] The evidence is essentially as follows. Counsel for Mr. Saidi and the corporate defendants in the civil proceedings deposes that thus far her firm has received \$5,000 from a personal friend of Mr. Saidi's, an amount which has been applied primarily to complying with the order made in conjunction with the Mareva injunction that Mr. Saidi within 30 days list in detail all of his and the corporate defendants' assets. Counsel deposes that Mr. Saidi's account at the firm is outstanding in the amount of \$6,549. She deposes that she requires a retainer of \$30,000 to continue to act, and that she is advised that Mr. Saidi's criminal counsel requires a further retainer of \$20,000 to act in the criminal proceedings and is not prepared to continue as counsel "if he is not provided a further retainer."

- [20] I use quotation marks in that last reference to indicate that despite some ambiguity in the first mention in civil counsel's affidavit of a "further" retainer for criminal counsel (the ambiguity relating to whether the retainer would be further to a previous retainer for criminal counsel, or further to the retainer sought for civil counsel), the second reference in the affidavit implies that it would be the former, following after a retainer criminal counsel has already received.
- [21] The difficulty for Mr. Saidi in this application is that the evidence offers no information at all about how or even when the proposed retainers would be applied, and therefore provides no basis for a conclusion that the proposed legal expenses are either reasonable or necessary.
- [22] For the most part, this is not a situation where the court can infer from the very fact of Mr. Saidi's situation that certain legal expenses are almost inevitable unless Mr. Saidi is to represent himself, and that therefore those legal expenses are reasonable and necessary. This is because the evidence discloses very little about Mr. Saidi's current status in relation to the criminal proceeding. Counsel candidly indicated that they could not reliably advise the court about this. It is known only that Mr. Saidi has been in custody since his arrest on the criminal charges in late August 2013, but there is no information about whether that is because he has been detained or denied bail, or because he consented to remain in custody pending a future application for bail. There is no information about the status of the criminal proceedings themselves, or even whether Mr. Saidi intends to plead guilty or not guilty or has already done so. There is no information about whether the matter has been scheduled for preliminary inquiry or trial, and if so, for when.
- [23] As with the proposed retainer for criminal counsel, there is no information in the evidence concerning the proposed retainer for civil counsel, or how it would be applied. For example, does civil counsel expect that the summary trial, which counsel advised is scheduled for November 20, 2013, will exhaust the retainer? If so, some explanation would be needed for why that proceeding would require fees in the amount indicated.
- [24] The evidence also includes no information about the anticipated sequence of the civil and criminal proceedings, except for Mr. Holder's information about the scheduled summary trial. There are obvious potential issues arising from that sequence, depending on what it is, and Mr. Saidi offers no evidence in this application about whether he will seek to have one of the proceedings held in abeyance pending the other.
- [25] For these reasons and others, I cannot conclude on the available evidence in this application that legal fees totaling \$50,000 are at this stage necessary for Mr. Saidi.

- [26] Despite the lack of detail in the evidence concerning Mr. Saidi's intentions in relation to the civil and the criminal proceedings, I conclude that it is nonetheless reasonable to infer from the nature of the proceedings that legal advice is or will be necessary for Mr. Saidi to make informed decisions about the way or ways in which he will participate in these proceedings. I am prepared to infer a reasonable need for some legal advice at this stage without express evidence to that effect.
- [27] I will therefore release from the BMO account the amount of \$8,800. While I am not satisfied on the evidence in this application that the BMO account falls largely outside the scope of the plaintiff's proprietary claim, I am reasonably confident that the \$8,800 amount I mentioned may be so viewed because the amount may be characterized in two coinciding ways.
- [28] First, the amount represents the balance in the account before the injunction froze it, with the addition of the amount of a further deposit from Cultus Lake Park, which one may reasonably infer must have been made after the freezing order. If that further deposit was not in fact made, then the amount to be released will be reduced to the amount available in the account.
- [29] Second, the amount also represents approximately the total amount of four deposits made by SFU for what I understand to have been consulting work Mr. Saidi did after leaving his director's position with SFU, payments which SFU does not submit fall within its proprietary claim.
- [30] My order is that the lesser of \$8,800 or the amount in the BMO account be released to Mr. Saidi for his legal expenses.
- [31] Otherwise, his application is denied. But in all the circumstances there will be liberty to Mr. Saidi to reapply.
- [32] Does anything require clarification? Or anything further to be dealt with?
- [33] MR. HOLDER: My Lady, as we indicated on Wednesday there was a garnishing order which attached the account, so I just wanted to raise that point in the sense that there might have been a certain amount in the account and those funds then would have been attached after the date of the closing of the balance that you referenced in your reasons. So some money from that account may or may not have found its way into court having been paid into court pursuant to the garnishing order by the bank. I take your reasons therefore to mean that whether the funds still -- I am not sure why there would still be any funds remaining in the account given the garnishing order -- whether the funds are on the account or whether they are the funds from that account or paid into court, those are the monies to be released.
- [34] THE COURT: Exactly. Thank you.
- [35] Anything further?

[SUBMISSIONS RE COSTS]

[36] THE COURT: In my view of the nature of the application and the nature of the proceeding as a whole, it is appropriate that the matter of costs be left to the trial judge.

"H. Holmes, J."

The Honourable Madam Justice H. Holmes

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