

CANADA / JUDGMENT

United States Securities and Exchange Commission v. Sharp

2024 BCSC 1456

COURT

Supreme Court of British Columbia

DECIDED

26 June 2024

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2024 BCSC 1456 United States Securities and Exchange Commission v. Sharp

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States Securities and Exchange Commission v. Sharp,

2024 BCSC 1456

Date: 20240626

Docket: S226494

Registry: Vancouver

Between:

United States Securities and Exchange Commission

Plaintiff

And:

Frederick L. Sharp, Zhiying Yvonne Gasarch,

Courtney Kelln, Mike K. Veldhuis, Paul Sexton,

Jackson T. Friesen, and Graham R. Taylor

Defendants

Before: The Honourable Justice Francis

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff (by video):

W. Chamberlain

M. Ruby

Counsel for Frederick Sharp (by video):

J. Narwal, KC

Place and Date of Hearing:

Vancouver, B.C.

June 18 and 19, 2024

Place and Date of Judgment:

Vancouver, B.C.

June 26, 2024

- [1] THE COURT: The United States Securities and Exchange Commission ("SEC") seeks a Mareva injunction against Mr. Sharp. In February 2023, I heard the SEC's application for a Mareva injunction with respect to other defendants named in this proceeding. I granted the injunction sought. My reasons for judgment indexed at 2023 BCSC 425 [Mareva #1] should be read in conjunction with these reasons, as they more fully discuss the background facts in this matter, as well as my analysis of the legal issues, many of which are the same as arise in this application.
- [2] There are, however, some factual differences between the circumstances of the other defendants in February 2023 and those facing Mr. Sharp today. The SEC submits that these facts only serve to buttress their application for a Mareva injunction on certain terms. Mr. Sharp submits that in all the factual circumstances, no injunction should be granted. He has also separately applied for a stay of this action. Both the stay application and the Mareva injunction application were heard before me, and these are my reasons for judgment on both.
- [3] The action is related to civil and criminal proceedings (the "US Proceedings") before the United States courts. The SEC filed a complaint against the defendants alleging that the defendants were involved in a fraudulent scheme to circumvent a number of provisions of US securities legislation. In the complaints, the SEC alleges that the defendants were involved in a "pump and dump" scheme in which the defendants acted in concert to raise the share prices of public companies that were controlled by their affiliates, and then to sell their shares at an artificially inflated price. The defendants are all residents of BC. Mr. Sharp is alleged to have been the mastermind of the operation.

- [4] In the complaint, the SEC seeks disgorgement remedies from the defendants as well as civil monetary penalties. The SEC obtained a restraining order in the US civil proceeding freezing the assets of the defendants and preliminary injunction orders against certain defendants. Additionally, the BC Securities Commission issued preservation orders against the defendants.
- [5] On May 12, 2022, the SEC obtained default judgment against Mr. Sharp in the US civil proceeding.
- [6] On July 7, 2022, the SEC commenced an action in this Court seeking enforcement of the default judgment against Mr. Sharp (the "Enforcement Action").
- [7] On August 11, 2022, the SEC commenced the action herein seeking Mareva injunctions over assets owned by Mr. Sharp and the other defendants.
- [8] On January 9, 2024, Mr. Sharp and the other defendants were indicted by a grand jury on criminal charges of securities fraud and conspiracy to commit securities fraud.
- [9] On June 14, 2024, Justice Sharma granted the SEC's summary judgment motion in the Enforcement Action. Mr. Sharp's civil liability as well as the amount to which Mr. Sharp is liable has therefore now been quantified by an order of this Court.
- [10] I will deal with Mr. Sharp's stay application first, as the Mareva injunction application will be moot if the stay is granted.

Stay Application

- [11] There is a presumption against granting a stay of civil proceedings where the defendant is involved in criminal proceedings arising from the same facts. In the recent case of *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*, 2023 BCSC 1557 [PacNet], Justice Fitzpatrick reviewed the current jurisprudence and set out the following principles that apply in this case, adopted from the earlier decision of *Stickney v. Trusz* (1973), 1973 CanLII 423 (ON SC), 2 O.R. (2d) 469:
 - a) at the outset, there is a presumption against the granting of any stay of these civil proceedings;
 - b) the applicant defendants bear a high burden of establishing exceptional or extraordinary circumstances that may justify the Court exercising its discretion to order a stay in the circumstances; and
 - c) even if such circumstances are established, the applicant defendants bear the further burden of persuading the Court that no means are available in these civil proceedings to address or ameliorate the concerns raised as to any potential prejudice arising from the criminal proceedings: *EchoStar Satellite Corp. v. Quinn*, 2007 BCSC 1225 at para. 79.

- [12] The Stickney test was fleshed out by the Manitoba Court of Appeal in *The Director of Criminal Property and Forfeiture v. Gurniak*, 2020 MBCA 96, wherein the Court stated at paras. 39 - 41:
- [39] When an individual faces a civil proceeding concurrent to a related criminal charge, the concern that arises is whether continuation of the civil proceeding may infringe the individual's right to a fair trial in the criminal matter. In such cases, the ordinary three-part test referred to above is not used.
- [40] Instead, the relevant test for a court, in exercising its discretion, is whether there are exceptional or extraordinary circumstances which show that the right of the applicant on the criminal charge cannot adequately be addressed by the rules governing the civil proceeding or a remedy available to an accused in the criminal process (see *Lieu*). There is no presumption in favour of a stay solely from the fact that concurrent criminal charges are pending. Indeed, the presumption is exactly the opposite. The law assumes that concurrent proceedings can be conducted fairly unless shown otherwise.
- [41] The threshold to justify the granting of a stay of a civil proceeding in favour of a criminal proceeding is a high one and the burden is on the defendants to meet that test (see *Schreiber v. Canada (Attorney General)* (2001), 2001 CanLII 20859 (ON CA), 160 CCC (3d) 131 at para 4).

Whether Exceptional or Extraordinary Circumstances have been Established

- [13] Mr. Sharp's stay application is based on the following proposition, which is set out at para. 2 of the legal basis of his notice of application:

where a party, such the Respondent on this application, seeks enforcement of a foreign judgment arising from the same facts as concurrent criminal proceedings within the same jurisdiction, it is submitted that s. 13 of the Charter mandates a stay of the enforcement proceeding.

- [14] Mr. Sharp's position can be summarized as follows: Sections 13 and 7 of the Charter provide use and derivative use immunity to a witness who is compelled to testify and risks self-incrimination. However, Mr. Sharp cannot avail himself of s. 13 protections in the United States where the Fifth Amendment protects the right to remain silent but does not provide use immunity. For this reason, counsel for Mr. Sharp submits that the action should be stayed because a Mareva injunction in this proceeding will include the requirement that he provide an asset list. Mr. Sharp has no use immunity in the US to prevent prosecutors in his criminal matter from using the asset list against him. This would result in his constitutionally protected rights in the US be violated.

- [15] This issue engages US law, and both sides tendered expert opinion evidence about US law. Both experts were qualified to give an opinion on US law, and their credentials were not challenged. The disagreement between the expert really turns on the application of a Second Circuit Court of Appeal decision called *United States v. Allen*, 864 F (3d) 63 (2d Circ 2017), and its impact on Fifth Amendment rights as they pertain to evidence compelled in a foreign proceeding.
- [16] Mr. Drabick is the lead prosecutor in a case against Mr. Sharp in the US. In his affidavit, he explained that Allen stands for the proposition that the Fifth Amendment prohibits US criminal authorities from using an incriminating statement against the proponent if the statement was compelled, including by a foreign court. This means that evidence compelled by this Court is prohibited from being used in a US criminal prosecution.
- [17] Mr. Asner, the expert who provided an opinion on Mr. Sharp's behalf, distinguishes Allen. In Allen, the defendants were compelled to testify by a foreign authority, namely the UK Financial Conduct Authority; in Mr. Sharp's case, it is the US SEC that is seeking to compel sworn testimony from Mr. Sharp. The SEC is not a foreign authority vis-a-vis the US criminal prosecution against Mr. Sharp, and as such Mr. Asner opined that Allen does not protect Mr. Sharp from having the asset list used against him in the US criminal proceeding. In my view, Mr. Asner's opinion is somewhat flawed because he fails to recognize that the order sought by the plaintiff is an order of this Court, not an order of the SEC. If the order is granted, it will not be the SEC compelling Mr. Sharp to provide an asset list, but rather the Supreme Court of British Columbia. It is on this basis that Mr. Drabick says that Allen would prohibit the use of evidence compelled by this Court in Mr. Sharp's US prosecution.
- [18] In any case, there are two reasons why I am not satisfied that Mr. Sharp has met the first branch of a test for a stay.
- [19] First, Mr. Sharp's application, and the evidence of his expert, are framed as if it is incumbent upon him only to establish some risk of his Fifth Amendment rights being violated in order for a stay to issue. This is not correct in law. In an application for a stay where there are both criminal and civil proceedings pending against the same person arising out of the same facts, it is incumbent on the applicant to show "some specific or particular way in which he will be prejudiced in his criminal trial": *Stickney*, p. 29.
- [20] In *Tak v. British Columbia (Securities Commission)*, 2023 BCCA 76, at para. 56, in considering whether Mr. Tak's testimony could be compelled by the BC Securities Commission in a case where Mr. Tak asserted that he risked that testimony would be used against him in a future criminal proceeding, the Court of Appeal stated that Mr. Tak bore the burden of establishing that no reasonably comparable protection to s. 7 of the Charter was available with respect to the use of his testimony in the foreign criminal prosecution. The court further elaborated on the nature of the burden as being based on "real and substantial" risk:

- [63] The breach asserted in this case is not a prospective breach, in that it is said to occur at the time of testimonial compulsion. However, the nature of the breach necessarily involves an assessment of future risk of two things: (1) the risk to Mr. Tak of a future criminal prosecution in the U.S., and (2) the risk that derivative use immunity will not be available to him if that occurs. In this context, Mr. Tak must establish on a balance of probabilities that these risks are "real and substantial".
- [21] At its highest, the opinion evidence of Mr. Asner establishes that there is some risk that Allen will be held by a later court not to provide immunity in the context of evidence compelled by an order of a court in a foreign civil proceeding. I cannot find that he has established that this risk is real or substantial. Mr. Asner does not refer to any US case law which states that evidence compelled in a foreign civil proceeding will not be protected from use. He simply notes that he has been unable to find "binding authority permitting the SEC to circumvent a witness' constitutional right against self-incrimination by invoking the authority of a foreign court". Given the heavy burden of an applicant in this type of application, this is simply insufficient to establish real and substantial risk to Mr. Sharp.
- [22] I accept Mr. Drabick's opinion that Mr. Sharp will have protections against self-incrimination with respect to evidence compelled in this proceeding, even though it is a civil proceeding and not a criminal one. His approach is one that accords with the underlying precept of the Fifth Amendment, namely that it applies only at the time of use, and that it depends on voluntariness or lack of it, regardless of the source of compulsion: PacNet, at para. 89.
- [23] The second reason I am not persuaded that the first branch of the test is met is that Mr. Drabick, the lead prosecutor in the criminal proceeding against Mr. Sharp, has deposed that he has no interest in seeing the asset list, and indeed he has requested that the court include a term in the injunction order that the SEC is prohibited from sharing the information with law enforcement due to his concern about tainting the criminal proceeding. Mr. Asner submits that Mr. Drabick's statements are effectively not worth the paper they are written on because he is not bound by any such promise not to use the asset list, nor obviously is any other prosecutor. However, given the high burden on the applicant to show that there is real and substantial risk that his fair trial rights will be put at risk unless a stay is granted, I find this submission to misconstrue the burden on this application. It is not for the SEC on this application to prove that Mr. Sharp's fair trial rights will be preserved. It is for Mr. Sharp to prove on a balance of probabilities that there is a real and substantial risk of his right to a fair trial being compromised. He has not done so.
- [24] In the event I am incorrect on the first branch of the application, I find that the stay application must fail on the second branch. Mr. Sharp bears the further burden of persuading the court that no means are available in these civil proceedings to address or ameliorate the concerns raised as to any potential prejudice arising from the criminal proceeding. He has not done so. In my view, the terms of the order, as I will discuss more fully below, adequately address any Fifth Amendment concerns Mr. Sharp may have with

respect to disclosure of the asset list.

[25] As such, the application for a stay is dismissed.

Mareva Application

[26] Because Mr. Sharp's response to the application was prepared in advance of my decision on the Mareva application with respect to the other defendants, many of the issues raised in the response to application have now been determined in the context of my earlier decision in Mareva #1. I will not revisit those. However, in oral submissions counsel for Mr. Sharp honed the bases on which he resists the application for a Mareva injunction against him to three issues:

1. risk of dissipation of assets;
2. delay; and
3. Constitutional risks to which Mr. Sharp will be exposed if the asset list is ordered.

[27] To be more specific, Mr. Sharp concedes there is a strong prima facie case and resists the application for a Mareva injunction on balance of convenience factors only. I will deal with each of the three issues Mr. Sharp raises separately, beginning with dissipation of assets.

Dissipation of Assets

[28] Mr. Sharp argues that there is no real risk of dissipation of assets. As I found in my earlier decision, the fraud alleged in this case is very serious. The US civil Court and this Court have now found Mr. Sharp liable on the facts as alleged in the initial complaint, namely that he was a mastermind of complex securities fraud scheme that, as I noted in my prior judgment, involved shell companies, secret encrypted communication and a clear pattern of deceptive behaviour. Given Mr. Sharp's unique role at the helm of this fraudulent operation and given that he has now been found liable in this Court for such behaviour, in my view, this is clearly a case in which it is appropriate to infer that there is a risk of dissipation of assets. I therefore find, as I did with the other defendants, that this is a factor that weighs in favour of granting the injunction sought.

Delay

[29] Counsel for Mr. Sharp refers to a number of cases in which the delay in bringing a Mareva injunction application played into the court's decision not to grant one.

[30] Delay is a component of the balance of convenience test. It can be relevant in assessing the risk of dissipation of assets. A plaintiff who does not pursue injunctive relief with due dispatch may be one who is not particularly concerned that the assets will be dissipated.

- [31] In this case, as I have found, there is a risk of asset dissipation, notwithstanding the delay in getting the matter to court. Further, I cannot find that the plaintiff has been less than diligent in moving the matter forward. This case was complicated by the fact that it is a multiparty and multi-jurisdictional case with different counsel acting for different defendants. The reason the application for a Mareva injunction against Mr. Sharp was not heard with the application regarding the other defendants in February 2023 was, I am advised, his own counsel's lack of availability.
- [32] There have been adjournments of the Mareva application with respect to Mr. Sharp. Some of them have been at the request of Mr. Sharp, and some of them have been on the consent of both parties. I have been case-managing this case since the parties first appeared before me in chambers in November 2022, and at no time have I observed this case to languish. There have been regular case management conferences, and every adjournment request, including those made by Mr. Sharp, has been reasonable. The parties have, to their credit, come up with an agreed status quo to preserve the assets pending this hearing being held. This no doubt gave the plaintiff some comfort that adjournments could happen without the plaintiff suffering irreparable harm, but this does not lead to a finding that the plaintiff is no longer entitled to the security of a Mareva injunction if they otherwise meet the criteria. I do not find there has been unreasonable delay on the part of the plaintiff in bringing this application.

Extent to which SEC is Under-secured

- [33] An additional factor relevant to the balance-of-convenience analysis that is particularly applicable to Mr. Sharp is the extent to which the SEC is under-secured in terms of obtaining disgorgement from this particular defendant. The total amount of disgorgement for which Mr. Sharp is liable, inclusive of interest, is close to \$29 million US. Only about \$2.2 million US is secured by the BC Securities Commission's preservation orders.

Conclusion of Balance of Convenience

- [34] As I noted in Mareva #1, there are a number of factors that the court may consider on the balance of convenience analysis, and those were helpfully set out by Justice Matthews in *Shakeri-Saleh v. Estate of Ahmadi-Niri*, 2022 BCSC 700 at para. 321. They include:
- a) the residency of the defendant;
 - b) enforcement rights of judgment creditors in the jurisdiction where the defendant's assets are located;
 - c) evidence showing the existence of assets within British Columbia or outside;
 - d) evidence showing a real risk of the disposal or dissipation of assets to render a judgment nugatory;

- e) evidence of irreparable harm;
- f) the strength of the plaintiff's case;
- g) the nature of the transaction giving rise to the action;
- h) the risks inherent in the transaction;
- i) the amount of the claim;
- j) the defendant's assets;
- k) evidence that the injunction would have a material adverse effect on an innocent third party; and
- l) the history of the defendant's conduct.

[35] In the case of Mr. Sharp, the following two factors are of particular importance in weighing the balance of convenience: the presence of assets in BC, and the fact that the plaintiff is woefully unsecured with respect to his disgorgement claim.

[36] Also of specific relevance to Mr. Sharp, unlike the other defendants at the time that I made issued the Mareva injunction against them, liability and disgorgement have already been determined in both the US Proceedings and in this Court.

[37] As a result of the determination of the summary judgment application against Mr. Sharp on June 14, 2024, the Mareva injunction sought by the plaintiff, which was originally a prejudgment Mareva injunction, is now a post-judgment injunction.

[38] The court may order a prejudgment or post-judgment Mareva injunction pursuant to its inherent jurisdiction, Rule 10-4 of the Supreme Court Civil Rules, and ss. 39(1) and (2) of the Law and Equity Act, R.S.B.C. 1996, c. 253: *First Majestic Silver Corp v. Davila*, 2013 BCSC 1209 at para. 35.

[39] In *First Majestic*, Justice Dickson, as she then was, noted that:

The over-arching consideration in each and every case is the balance of justice and convenience between the parties. This is true whether a Mareva injunction is sought in a pre- or post-judgment context. As to the latter, however, the concern noted in *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481, about tying up a defendant's assets to provide security for a judgment that may never be obtained is obviously no longer a factor for consideration. In my view, this is a significant difference which should be weighed in the balance. Whereas here, the application is brought after an award has been made in favour of the plaintiff.

[40] In all of the circumstances, I am satisfied that the balance of convenience weighs in favour of the granting of the injunction against Mr. Sharp in this case.

Asset List Issue

[41] The primary point of contention in the hearing before me related to the provision of a list of the defendant's assets to the plaintiff as part of the Mareva order. The plaintiff submits that an asset list is necessary to "breathe life" into the Mareva injunction. Mr. Sharp submits that any order that involves disclosure of his assets to the SEC, even under strict terms, puts his Fifth Amendment rights at risk in the US criminal proceeding.

[42] I have already discussed why I do not accept the risk to Mr. Sharp's fair trial rights to be as grave as he has submitted. I am also concerned that a Mareva injunction that does not compel the defendant to produce an asset list could be of little use to the plaintiff since they would not know the amounts or the whereabouts of Mr. Sharp's assets.

[43] As Justice Loo noted in the recent case of *Bush v. Fennell*, 2023 BCSC 2115:

Where there is a finding in a Mareva injunction case that the defendant is a fraudster, or that there is a general risk that the defendant will dissipate his assets, the ordering of an asset list is a corollary to the injunctive relief which allows both the court and the plaintiff to determine what assets are frozen. An order which generally restrains a defendant's assets is difficult or impossible to monitor or enforce without knowing what and where those assets are.

[44] I agree. In this case, in order for the freezing order to be useful at all, an asset list is critical.

[45] The terms of the proposed order that deal with the asset list are, in my view, sufficient to protect against any risk that the asset list could impede Mr. Sharp's right to a fair trial in criminal matters in the US. Specifically, the proposed order:

- a) requires the asset list to be sealed pending final determination of the US criminal proceeding;
- b) mandates that, once the US criminal proceeding is determined, counsel for the SEC shall have access to the asset list but on strict terms, including not to disclose it to the US attorney's office of the District of Massachusetts, the FBI, or any other person involved in a criminal investigation or proceeding of any of the defendants in the US; and
- c) states that counsel for the SEC may only use the asset list and other sealed material for the purposes of the BC civil proceedings.

[46] Mr. Sharp submits that these protections are inadequate because there is nothing to stop the SEC from flouting my order once the asset list is unsealed and providing the asset list to prosecutors who could use it against Mr. Sharp in further criminal prosecutions.

[47] Not only is this concern speculative, but it is based on the premise that government actors will act in a manner that violates court orders, and if Allen is correct law, the Fifth Amendment of the US constitution. I cannot find that this poses a realistic enough risk that the plaintiff should be deprived of access to the information that will breathe life into the Mareva injunction.

[48] I am prepared to grant the order on the terms sought. I note that at the close of the hearing before me, counsel discussed some minor amendments to the terms of the freezing order that can be made on consent. An amended order was sent to me yesterday afternoon, and I have reviewed the proposed changes. I am content to make the order on the terms attached in the form of order that was sent under cover of a letter to the court from Mr. Ruby dated June 25, 2024.

"Francis, J."

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