COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sociedade-de-fomento Industrial Private Limited v. Pakistan Steel Mills Corporation (Private) Limited,* 2014 BCCA 205

Date: 20140602
Docket: CA041130

Between:

Sociedade-de-fomento Industrial Private Limited

Appellant

And

Pakistan Steel Mills Corporation (Private) Limited

Respondent

Before: The Honourable Madam Justice Levine
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of British Columbia, dated July 22, 2013 (*Sociedade-de-Fomento Industrial Private Limited v. Pakistan Steel Mills Corporation (Private) Limited*, 2013 BCSC 1304, Vancouver Docket S112686).

Counsel for the Appellant: M.J. Latella, C. Doria

Counsel for the Respondent: H.H. Van Ommen, Q.C., A.L. Cameron

Place and Date of Hearing: Vancouver, British Columbia, May 7, 2014

Place and Date of Judgment: Vancouver, British Columbia, June 2, 2014

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Madam Justice Neilson

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Summary:

Sociedade-de-fomento Industrial Private Limited ("SFI"), appeals from a judgment of a chambers judge. The judge held that SFI did not make full, fair and frank disclosure to the court that granted the original Mareva injunction about the potential enforcement of an arbitration award in Pakistan. The Mareva injunction secured an arbitration award (the "Final Award") made outside of British Columbia in the approximate amount of US $9 million. The judge found that the Mareva injunction was wrongly obtained and declared that SFI was liable in damages to the respondent, Pakistan Steel Mills Corporation (Private) Limited ("PSM"). The quantum of damages was to be assessed in a further proceeding.

Held: Appeal allowed.

British Columbia has incorporated the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as "the New York Convention") into its domestic law by way of the Foreign Arbitral Awards Act, R.S.B.C. 1996, c. 154. The New York Convention and the adopting provincial legislation require the Supreme Court of British Columbia to recognize and enforce an international arbitration award on the same basis as a domestic award. The judge erred in setting aside the Mareva injunction by overlooking this effect of the New York Convention. The judge erred by conducting a type of forums conveniens analysis in favour of enforcement in Pakistan and in her conclusion that the appellant failed to disclose a material fact on its application for a Mareva injunction. The amplified evidence supported the representation made by the applicant to the granting judge, that enforcement of the Final Award in Pakistan would be "challenging".

Reasons for Judgment of the Honourable Madam Justice Garson:

Introduction

[1] This appeal concerns the intersection of the statutory right to enforce an international arbitration award in British Columbia regardless of the parties' connection to this jurisdiction and the well-established principles of law concerning interlocutory *Mareva* injunctions that the respondent says favour, in this case, enforcement of the award in the debtor's home jurisdiction.

[2] Sociedade-de-fomento Industrial Private Limited ("SFI"), appeals from a judgment of Madam Justice Ross. Ross J. held that SFI did not make full, fair and frank disclosure to the court about the potential enforcement of an arbitration award

in Pakistan when it obtained an *ex parte Mareva* injunction in the Supreme Court of British Columbia. The *Mareva* injunction secured an arbitration award (the "Final Award") outside of British Columbia in the approximate amount of US $9 million. The judge found that the *Mareva* injunction was wrongly obtained and declared that SFI was liable in damages to the respondent, Pakistan Steel Mills Corporation (Private) Limited ("PSM"). The quantum of damages was to be assessed in a further proceeding. Ross J.'s reasons for judgment may be found at 2013 BCSC 1304.

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[3] For the reasons that follow, I would allow the appeal. British Columbia has incorporated the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (commonly known as "the *New York Convention*") into its domestic law by way of the *Foreign Arbitral Awards Act*, R.S.B.C. 1996, c. 154. The *New York Convention* and the adopting provincial legislation require the Supreme Court of British Columbia to recognize and enforce an international arbitration award on the same basis as a domestic award. In my view, the judge erred in setting aside the *Mareva* injunction by overlooking the effect of the *New York Convention* which explicitly permits parties to an international arbitration to enforce the award in any contracting state.

Background Facts

[4] The background is succinctly described by the chambers judge at paras. 3–29. I shall quote from her judgment. First, she gave a general overview:

> By way of background, in June 2010, SFI obtained judgment against PSM pursuant to an arbitration conducted at the International Chamber of Commerce International Court of Arbitration (ICC) (Final Award). In an effort to enforce the Final Award, SFI obtained a *Mareva* injunction from this court. The injunction contained the usual undertaking as to damages.
>
> PSM had purchased a shipment of coal that was loaded on a vessel in British Columbia. The injunction was served, preventing the vessel from leaving the jurisdiction. The detention of the vessel resulted in loss suffered by the charterer. When the charterer applied to set aside the injunction, SFI agreed to indemnify the charterer and took an assignment of the charterer's cause of action for its loss.
>
> SFI seeks to recover all of its costs incurred in enforcing the Final Award, including the amounts paid to the charterer. PSM takes the position that the *Mareva* injunction was wrongly obtained and further that it suffered damage

> as a consequence. It seeks a declaration that SFI is liable to it for the losses it suffered because of the injunction. It also disputes SFI's entitlement to recover many of the costs and disbursements it seeks, in particular the amounts paid to the charterer.

[5] She then set out the background to the application: at paras. 6−15. None of these facts are in dispute:

> SFI is a company incorporated in 1957 in India. SFI is engaged in the business of mining and the export of iron ore. It employs over 500 people and maintains registered offices in Margao, Goa, India.
>
> PSM is a Pakistani company, based in Bin Qasim, Karachi, Pakistan. It is engaged in the production and manufacture of steel. PSM is owned by the Government of Pakistan and is Pakistan's largest industrial undertaking, with an annual production capacity of 1.1 million tonnes of steel. PSM employs approximately 17,000 officers and workers.
>
> Between October 13, 2006 and June 21, 2010, SFI and PSM were parties to an arbitration pursuant to the Rules of the ICC Court of Arbitration (the Arbitration). The Arbitration related to SFI's claims for breach of contract for the supply of iron ore.
>
> On June 21, 2010, the arbitral tribunal rendered its Final Award. By the Final Award, the majority of the tribunal awarded SFI damages, pre and post Final Award interest, costs and reimbursement for fees and expenses of the tribunal. The Canadian dollar amount of the Final Award in favour of SFI was $8,673,492.55.
>
> In the months following the Final Award, PSM did not pay SFI any of the amount owing under the Final Award, despite repeated demands for payment by SFI.
>
> In July 2010, SFI retained Diligence Inc., a litigation support firm based in the United Kingdom, to assist with the identification and location of assets of PSM in order that SFI could recover the amounts owed to it pursuant to the Final Award. Diligence was unable to identify overseas assets of PSM against which SFI could seek to enforce its arbitral award other than significant quantities of iron ore and coal. Diligence confirmed that PSM typically purchases its coal on a FOB basis.
>
> By August 2010, Diligence learned from Internet searches that PSM was making arrangements to import coal from British Columbia. It identified three shipments of coal purchased by PSM from Teck Coal Ltd. The first shipment of 55,000 metric tonnes was loaded and shipped in late February 2011.
>
> A second shipment of approximately 50,000 metric tonnes was scheduled to take place between April 25 and May 5, 2011. The shipment was to be loaded onto the MV Theoforos I (the Vessel). Diligence confirmed that, consistent with PSM's usual course of business, the sale was to be on a FOB basis. The shipment was to be approximately 50,000 metric tonnes, with a value of approximately USD 16.5 million.

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[6] Next she described the litigation background:

> On April 21, 2011, SFI filed a petition in this court seeking payment of the amounts owed pursuant to the Final Award. It applied for and obtained an *ex parte Mareva* injunction from Mr. Justice Myers restraining any use of PSM's assets, including preventing the Vessel from leaving British Columbia or PSM from disposing of assets aboard any vessel in British Columbia without first paying into court security in the amount of $9,000,000 (the *Mareva* Order).The *Mareva* Order required SFI to provide an undertaking as to damages as follows:
>
> > to abide by any order of this Honourable Court as to damages in case the Court may be of the opinion that the Respondent or any innocent third party shall have suffered any damage by reason of this Order, which Fomento ought to pay.
>
> …

[7] I omit the judge's reference to the disputed question of service of the *Mareva* injunction as in my view it is not relevant to the questions that arise on this appeal.

[8] The judge then summarized the various efforts taken by SFI to fortify its undertaking as to damages and to deal with the ship charterer:

> SFI arranged at the State Bank of India (Canada) for a Bank Guarantee/Standby Letter of Credit dated May 17, 2011 in the amount of CDN $1 million as fortification for its undertaking given pursuant to the *Mareva* Order.
>
> Oceanwide Services GmbH (Oceanwide) was the charterer of the Vessel pursuant to a charter party. Oceanwide reached an agreement dated May 20, 2011 with SFI by which it agreed to refrain from proceeding with its application to set aside the *Mareva* Order in return for receiving indemnity from SFI for its losses. In return it assigned to SFI its rights against PSM or the cargo in respect of any amounts paid by SFI pursuant to the agreement.
>
> Pursuant to an application brought by Oceanwide, SFI consented to an order granted on May 20, 2011 by which SFI agreed to pay USD $150,000 to Oceanwide as partial payment for its losses incurred to date by reason of the *Mareva* Order.
>
> On May 24, 2011, Mr. Justice Leask granted a further consent order on application by Oceanwide by which SFI agreed to immediately pay a further USD $158,438.83 in further partial payment of losses suffered by Oceanwide incurred to date by reason of the *Mareva* Order. The Order provided for further payments of USD $43,913.66 by May 26, 2011, USD $117,827.32 by May 30, 2011 and USD $65,870.49 by June 2, 2011.

[9] Next, the judge outlined the steps taken by PSM to eventually discharge the *Mareva* Order and obtain the release of the vessel and its coal:

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> On May 25, 2011, PSM retained Fasken Martineau DuMoulin to act for it in these proceedings.
>
> On May 26, 2011, SFI sought an order for an appointment of an interim receiver to sell the coal. PSM sought an adjournment of the application on the basis that it had only retained counsel the previous day. Mr. Justice Groves appointed a receiver, but with authority only to market, not to sell the coal without further order of the court.
>
> On May 30, 2011, Mr. Justice Willcock, on application by SFI, granted an order amending the *Mareva* Order by increasing the amount required to discharge the order to CDN $9.7 million.
>
> …
>
> By orders made on June 8, 2011 by Mr. Justice Harris, by consent and on June 23, 2011, by Mr. Justice Blok, by consent, SFI was to pay a further US $185,242.80 to Oceanside as partial payment of its losses by reason of the *Mareva* Order.
>
> PSM posted $937,000 security on June 9, 2011 by paying the funds into court pursuant to the June 8, 2011 consent order of Madam Justice Arnold-Bailey and the June 9, 2011 order of Mr. Justice Greyell. The Greyell order provided for the payment of post Award interest. Pursuant to the Order of Greyell J., the *Mareva* Order was discharged except to the effect of preserving the undertaking as to damages, the security provided by SFI in relation to the undertaking and the liberty on the part of any person or third party to apply for payment by SFI of any damage suffered by reason of the *Mareva* Order.
>
> By order dated September 21, 2011, Master McDiarmid approved the accounts of the receiver, fixing the remuneration of the Receiver and its counsel at $59,149.67 and ordered that the amount be paid from the funds paid into court by PSM and held as security pursuant to the orders of Arnold-Bailey J. and Greyell J.

[10] She noted that the international arbitration award was recognized in this jurisdiction:

> By order dated December 1, 2011, Mr. Justice Pearlman recognized and enforced the Final Award and ordered PSM to pay SFI $8,998,885.52 in partial satisfaction of SFI's claims. The funds were drawn from the security that PSM had paid into court. The order of Pearlman J. required PSM to pay post Award interest, in accordance with the Award. The order proved that SFI was to fortify its undertaking as to damages by posting security by way of a bank guarantee in the amount of CDN $2,798,454.50.
>
> By consent order dated April 25, 2012, Mr. Justice Goepel declared that SFI was further indebted to Oceanwide in the amount of US $12,307.73 for additional hirer, CDN $46,588.14 for additional port expenses and CDN $32,000 in costs with payment to be made from the bank guarantee.
>
> By orders dated May 3, 2012, Mr. Justice Davies fixed the amount of post Award interest PSM was required to pay SFI and ordered payment out of that

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> amount from the funds held as security. PSM was required to increase the security paid into court by an additional $550,000.

[11] In summary, by the time that the application came on before the chambers judge, PSM had paid the full amount of the judgment obtained enforcing the Final Award, the ship had sailed from Vancouver, PSM had paid a further amount of $550,000 into court and SFI had paid $2,798,454.50 into court pursuant to its undertaking as to damages.

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International Arbitration Award Recognition and Enforcement

[12] In *Yugraneft Corp. v. Rexx Management Corporation*, 2010 SCC 19, Mr. Justice Rothstein described the manner in which international arbitration awards are recognized and enforced in Canadian provinces. At paras. 8–11 he explained:

> In Alberta, the recognition and enforcement of foreign arbitral awards is governed by the *ICAA*, which incorporates both the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can. T.S. 1986 No. 43 (the "New York Convention" or "Convention"), and the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, ann. 1 (1985) ("Model Law"), into Alberta law. The relevant provisions of each instrument are found in the appendices attached hereto (Appendix A for the Model Law and Appendix B for the Convention).
>
> The New York Convention was adopted in 1958 by the United Nations Conference on International Commercial Arbitration. The purpose of the Convention is to facilitate the cross-border recognition and enforcement of arbitral awards by establishing a single, uniform set of rules that apply worldwide. It requires each Contracting State to recognize and enforce arbitral awards made in the territory of another State, and that recognition and enforcement can only be refused on the limited grounds set out in art. V (see Appendix B). Pursuant to art. I, the obligation to recognize foreign awards applies not only to awards granted in other Contracting States, but also to those granted in all States other than the one in which enforcement is being sought, regardless of whether or not they are party to the Convention.
>
> The Convention is currently in force, having been ratified by over 140 countries, and is considered a great success. Lord Mustill, former judge of the Court of Appeal of England and Wales and member of the House of Lords, and former Vice-President of the International Court of Arbitration of the International Chamber of Commerce, has stated that the New York Convention
>
> > has been the most successful international instrument in the field of arbitration, and perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.

> (M. J. Mustill, "Arbitration: History and Background" (1989), 6 *J. Int'l Arb.* 43, at p. 49)
>
> The Convention was ratified by Canada on May 12, 1986, once each provincial legislature had enacted the necessary implementing legislation.
>
> The Model Law was developed in 1985 by the United Nations Commission on International Trade Law ("UNCITRAL"). Unlike the New York Convention, which is a treaty, the Model Law is not an international agreement intended for ratification. Rather, it is a codification of international "best practices" intended to serve as an example for domestic legislation. The explanatory note of the UNCITRAL secretariat states that the Model Law
>
> > reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.
> >
> > (Model Law, Part Two, at para. 2)
>
> The Model Law has been adopted, subject to some modifications, by every jurisdiction in Canada. Like the Convention, the Model Law limits the ability of national courts to interfere with international arbitration proceedings. Article 36 of the Model Law also limits the grounds on which enforcement of an international arbitral award may be refused (Appendix A). These grounds are essentially identical to those set out in art. V of the New York Convention.

[13] Though *Yugraneft* concerned an award being enforced in the province of Alberta, the discussion in that case is equally applicable to British Columbia. The relevant legislation in British Columbia is found in two somewhat overlapping statutes: the *Foreign Arbitral Awards Act* and the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233.

[14] Of relevance to this appeal is s. 4 of the *Foreign Arbitral Awards Act* which provides that foreign arbitral awards may be enforced in this province by application to the Supreme Court of British Columbia. The underlying proceeding in this appeal is SFI's application to enforce its foreign arbitral award in the Supreme Court. That Act incorporates the *New York Convention*. Article III of the Convention requires the state (here British Columbia) to recognize and enforce the award when proceedings are commenced, without imposing more onerous conditions or fees than would be the case for the recognition of a domestic award. It reads:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or

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> higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

[15] The *International Commercial Arbitration Act* is, for the most part, concerned with international arbitrations conducted within British Columbia: See s. 2. Exceptionally, s. 35(1) is expressly not limited to arbitrations conducted within British Columbia. That section provides:

> Subject to this section and section 36, an arbitral award, irrespective of the state in which it was made, must be recognized as binding and, on application to the Supreme Court, must be enforced.

[16] The third statute of relevance to this appeal is the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. Section 10 of the *CJPTA* articulates factors which establish a presumed real and substantial connection between British Columbia and those facts on which a proceeding is based for the purposes of determining jurisdiction. Of particular relevance to this appeal is s. 10(k) which provides that a real and substantial connection is presumed to exist in a proceeding to enforce an arbitral award made outside British Columbia.

[17] Thus, it can be seen that the *New York Convention* operates through the statutes of this province to remove jurisdictional boundaries and the need for expansive inquiries into whether a proceeding has a real and substantial connection to British Columbia as an enforcing jurisdiction.

[18] PSI does not dispute the jurisdiction of British Columbia's Supreme Court to enforce the arbitral award made against it; rather, PSI argues that different considerations apply in an interlocutory enforcement proceeding like the *Mareva* injunction here at issue. SFI disputes this argument. It says the judgment below effectively undermines the enforcement scheme of the *New York Convention* by driving a wedge between recognition proceedings and interlocutory enforcement proceedings. I now turn to the reasons for judgment of the chambers judge.

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Reasons for Judgment of the Chambers Judge: 2013 BCSC 1304

[19] The judge made the following order:

> 1. The Petitioner is liable to the Respondent for the damages suffered by the Respondent caused by the Mareva Injunction issued by the Honourable Court on April 21, 2011 ("the Mareva Injunction").
>
> 2. The determination of the quantum of the damages suffered by the Respondent caused by the Mareva Injunction will be the subject of further proceedings of this Honourable Court.
>
> 3. The application of the Petitioner, filed April 10, 2013, is dismissed, with costs to the Respondent.
>
> 4. The Petitioner is entitled to the costs of this proceeding generally.
>
> 5. The Respondent is entitled to its costs of the proceeding relating to the Mareva Order.
>
> 6. This Court declines to give directions with respect to disallowing particular items of the Petitioner's costs or disbursements, as requested by the Respondent.

[20] After reciting the facts, the judge reviewed the well-known principles that govern the test for granting a *Mareva* injunction. She noted that it is an extraordinary remedy, that the applicant must show a good arguable case for the underlying claim, and that the granting of the injunction must on balance be just and convenient. At para. 32 she said:

> As noted, the approach is to be flexible, not constrained by fixed rules. Factors to be considered in relation to the issue of the balance of convenience include, the presence of assets within British Columbia or outside the jurisdiction, whether there is a risk of dissipation of assets, whether the transactions are in the ordinary course of business, whether the injunction would have a material adverse effect on an innocent third party, and whether there is fraud or dishonesty in dissipating funds or removing assets from the jurisdiction. Any remedy given is to be proportionate to the balance of convenience and not tie up assets beyond the value necessary to satisfy any likely judgment: *Tracy* at para. 56.

[21] She continued at para. 34 to note that there must be a real risk of dissipation of the assets. She noted that on an *ex parte* application the applicant must make full, frank and fair disclosure of the material facts. None of these principles is controversial.

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[22] In applying those principles to the case before her, the judge stated that the fact that SFI succeeded on the merits was not a bar to PSM's claim against SFI for damages arising out of a wrongly obtained *Mareva* injunction.

[23] She then proceeded to consider "whether SFI discharged its duty to make full frank and fair disclosure of the material facts": para. 44. She stated that SFI had failed to disclose that the award could have been enforced in Pakistan: para. 45.

[24] She stated at paras. 46−49:

> It is clear that SFI was entitled, pursuant to s. 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, to commence an action in the province to enforce the Final Award. However in my view, given the limited association of either party with this jurisdiction, the ability of SFI to enforce its award elsewhere and in particular in Pakistan, was a material fact that should have been disclosed to the chambers judge.
>
> In that regard, I note that the connection of each party to the jurisdiction has been considered to be a material factor in assessing the balance of convenience: *Aosta Shipping Co. Ltd v. Gulf Overseas General Trading LLC*, 2007 BCSC 354. In *Blue Horizon Energy*, the enforceability of the arbitral award in the jurisdictions in which the parties were incorporated was expressly addressed as part of the analysis of the balance of convenience. In *Silver Standard Resources*, the court considered the ability to enforce an award absent the injunction, noting the absence of reciprocating legalisation for the enforcement of judgments between Russia and British Columbia or other means by which a judgment could realistically be enforced. In *United States of America v. Friedland*, [1996] O.J. No. 4399 (C.J. (Gen. Div.)), Sharpe J. noted at para. 126:
>
> > Even assuming the Plaintiff were able to show a strong prima facie case against Mr. Friedland, it is my view that in assessing and in balancing the burden the injunction would impose on Mr. Friedland, with the risk that the Plaintiff's lawful claims might be defeated, the Court was entitled to know about the other possible available avenues of recourse available to the Plaintiff. It is possible that apprised of all of these facts relating to the other parties, the Court might still have granted the injunction but it is by no means, in my view, self-evident, given the exceptional nature of Mareva relief.
> >
> > [Emphasis added by Ross J.]
>
> What was disclosed with respect to other means of enforcing the award was limited to the following from Affidavit #1 of Francisco Pereira:
>
> > 24. I believe that SFI will face considerable difficulty, and may be incapable of, obtaining payment of the millions of dollars awarded to it by the Tribunal if the assets of the

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> Respondent, including assets in British Columbia sufficient to satisfy the Final Award, are not frozen immediately, pending SFI obtaining a British Columbia judgment enforcing the Final Award. This belief is based on:
>
> 1) the lengthy history of this matter, with the dispute dating back almost 6 years;
>
> 2) the location of the Respondent in Pakistan and the obstacles to enforcing the Final Award and collecting on the debt in that jurisdiction; and,
>
> 3) the Respondent's failure to voluntarily satisfy its debt to SFI or to provide any proper response to SFI's repeated demands for payment of same, even now, almost 10 months after the Final Award was made.
>
> 25. In the interest of full disclosure, while I am not in any position to know the full details of the Respondent's financial situation, based on news items published in local media in Pakistan and general industry knowledge, its apparent financial challenges may provide some context for the Respondent's failure to date to make payment of its debt to SFI. Attached hereto and marked as Exhibit "Q" to this affidavit are true copies of information obtained from the Internet regarding such matters. I don't have first-hand knowledge of the issues discussed in these articles and cannot say that they represent the full range of media articles about these matters. However, as these articles were within my possession at the time of this affidavit, I am disclosing them to the Court in the context of this affidavit.
>
> The affidavit discloses no evidence that SFI had made an inquiry regarding the possibility of enforcement of the award in Pakistan. SFI did not disclose that Pakistan is a signatory to the treaties with respect to enforcement of international arbitration awards, thus the award would be enforceable in Pakistan.

[25] She later reiterated her conclusion that there was material non-disclosure:

> [58] In this case as stated, I am satisfied that there was material non-disclosure. In addition, there are many factors that weigh against the granting of a *Mareva* injunction. Neither party had strong ties to this jurisdiction. While it is the case that PSM had not paid the Final Award, there was no suggestion of fraud or dissipation of assets. The British Columbia transactions were in the ordinary course of business. In addition, the injunction would have a significant impact on an innocent third party.

[26] She set out that portion of the transcript from the hearing before the judge who granted the *Mareva* injunction in which she said that counsel for SFI had failed to make full disclosure. Counsel responded to the judge's question as follows:

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> THE COURT: What I thought -- I guess you didn't say that. I thought you were saying that there is a presumption that they won't pay the award or you won't be able to collect it by normal enforcement procedures in Pakistan.
>
> MR. LATELLA: Well, I don't know if I would characterize that as a presumption per se, but one can well imagine the challenges that one might face as an Indian entity trying to enforce against the Pakistani state entity. There certainly hasn't been any response is the reality of the situation. And the -- I think the first point though that you have to consider is why would the Indian entity need to start in Pakistan? That's not the way the New York Convention works. That's not the way enforcement of arbitral award generally works. It is not a defence in any way to say, well, but did you try these other jurisdictions first? And so I think the issue is they are not simply choosing British Columbia because they think it might be as good a place as any. There is a reason that they are starting with this jurisdiction. And had they, over the last ten months, thought that they had any better opportunity to try and enforce in Pakistan, I expect they would have done so.

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[27] As to the relevance of the enforceability of the award in Pakistan, the judge noted at para. 46 as quoted above, that the "limited association of either party with this jurisdiction, the ability of SFI to enforce its award elsewhere and in particular in Pakistan" was a factor to be considered when assessing the balance of convenience necessary to grant a *Mareva* injunction.

[28] At para. 56 the judge said, "implicit in SFI's submission is an assumption that the fact that it was entitled to enforce the Final Award in British Columbia somehow entailed that it was entitled to a *Mareva* injunction."

Grounds of Appeal

[29] The parties join issue on two central arguments in this appeal.

[30] First, is the question of whether SFI's disclosure was full, frank and fair. On the basis of the evidence SFI contends that its statement about the difficulty in enforcing the judgment in Pakistan was well-founded: particularly, it says, when expert reports that may be said to amplify the evidence that was before the judge who granted the *Mareva* injunction is taken into account. The respondent counters that the 'amplification' expert evidence reinforces its position that the judgment could in fact be enforced in Pakistan. Below I shall describe in greater detail the evidence about enforceability in Pakistan.

[31] Second, the appellant argues that the judge erred by conducting a *forum conveniens* type of analysis. The appellant says that the *New York Convention* and the British Columbia legislation incorporating that convention into British Columbia law obviates the need to conduct any sort of analysis as to whether the judgment should or could have been enforced in Pakistan. The appellant says that the statutory scheme provides a "gateway" to both the recognition and enforcement of the award in British Columbia. The appellant argues that to recognize that the award could be converted into a British Columbia judgment, but at the same time to deprive the petitioner of the ability to access the full panoply of enforcement remedies available to any other plaintiff or petitioner in British Columbia, runs counter to the underlying basis of the *New York Convention*.

[32] The respondent argues that a *Mareva* injunction is an extraordinary remedy, and its applicable governing principles do include consideration of the availability of enforcement proceedings elsewhere, regardless of the operation of the *New York Convention*.

Discussion

[33] I turn first to what I shall call, for the sake of expediency, the '*forum conveniens*' argument.

[34] PSM argues that SFI makes a flawed assumption that because it was *prima facie* entitled to recognize and enforce the Final Award in British Columbia, it was also entitled to a *Mareva* injunction. It says that a *Mareva* injunction is not simply a "step towards enforcement" that creditors can seek as of right; but rather it is an extraordinary equitable remedy available only if a court determines that granting such an order is just and convenient in all of the circumstances. PSM says that SFI's *prima facie* entitlement to enforce the Final Award does not alter what a court can consider in determining whether to exercise its discretion. PSM says that in this case the judge quite properly included the availability of enforcement measures in Pakistan in determining whether SFI failed to properly disclose relevant information such that the court was led to wrongfully issue the injunction.

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[35] PSM also disputes the assertion that the failure to issue a *Mareva* injunction, on the basis that the award could have been enforced in Pakistan, would violate Canada's international obligations. Indeed, it says Canada's obligation to ensure that foreign arbitral awards are enforced domestically is not even engaged in this case. PSM argues that the *New York Convention* does not concern discretionary injunctive relief sought prior to the recognition of such an award. It is PSM's submission that this case simply concerns the circumstances in which a discretionary and extraordinary *Mareva* injunction should be granted and the consequences which arise when such an order is improperly obtained.

[36] I turn to the authorities the judge relied on to support her conclusion that the possibility of enforcement was a relevant factor in granting the *Mareva* injunction.

[37] At para. 47 the chambers judge cited *Aosta Shipping Co. Ltd. v. Gulf Overseas General Trading LLC*, 2007 BCSC 354, for the proposition that the "connection of each party to the jurisdiction has been considered to be a material factor in assessing the balance of convenience" in granting or refusing a *Mareva* injunction. In my view, *Aosta* is not helpful to the analysis at hand. Unlike in this case, *Aosta* was decided on the basis of the common law balance of convenience test, without recourse to s. 10(k) of the *CJPTA* because there was no arbitration award to consider in that case. As noted above, that section codifies the presumption of a real and substantial connection to this jurisdiction when the proceeding, as here, is for the enforcement of an arbitral award made outside British Columbia.

[38] The chambers judge also relied on *Blue Horizon Energy Inc. v. Ko Yo Development Co. Ltd*., 2012 BCSC 58, in concluding that the enforceability of the arbitral award in the jurisdiction in which the parties were incorporated should be addressed as part of the *Mareva* injunction analysis. In *Blue Horizon*, a *Mareva* injunction was granted over assets that were soon to be shipped to Asia. The defendants had no continuing connection to British Columbia once the assets were shipped. The defendant companies were incorporated in Hong Kong and the

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People's Republic of China. The judge noted that arbitral awards were enforceable in Hong Kong but that most of the companies' assets were in mainland China where enforcement was "uncertain": at para. 13.

[39] However, it is important to note that the analysis undertaken in *Blue Horizon* concerned questions about the possible future enforcement of an arbitral award. An arbitral award had yet to be obtained. In fact, no arbitration had been commenced in *Blue Horizon*. The case did not engage the provisions of the *Foreign Arbitral Awards Act* or the other statutory schemes at play in this case as laid out above and I do not find it helpful to the analysis this Court must undertake.

[40] The judge also relied on *Silver Standard Resources v. Joint Stock Co. Geolog* (1998), 168 D.L.R. (4th) 309. She noted that in *Silver Standard* a factor favouring ordering the injunction was the absence of reciprocating legislation. Presumably she relied on it by contrast because she found that a judgment could be enforced in Pakistan. I do not find *Silver Standard* helpful in resolving the specific question before us, but it is helpful insofar as it articulates the flexible test for the granting of a *Mareva* injunction:

> [19] Many of the foregoing cases were considered by Huddart J. (as she then was) in *Mooney v. Orr*, (1994) 100 B.C.L.R. (2d) 335 (B.C.S.C.). The facts of that case were unusual in that the defendant by counter-claim was found to have had "both the capacity and inclination from which can be inferred the intention to hide assets from potential judgment creditors" including the plaintiff by counter-claim. At the same time, however,
>
> > . . . the evidence does not establish the probability or even a real risk that Mr. Mooney is about to do the Orrs irreparable injury. Indeed, it does not establish that he will do anything to harm the Orrs. It establishes only that Mr. Mooney has structured his affairs well before he met Mr. Orr so as to protect any offshore property he may have from execution. He has shown no inclination to dissipate his B.C. assets or to transfer them abroad.
> >
> > The real question on this application becomes whether this court will restrain a litigant like Mr. Mooney from dealing freely with capital assets already abroad before the proceeding was commenced, and probably before the cause of action arose. This is a different issue from that of active and imminent dissipation of assets for which the Supreme Court of Canada approved the use of the *Mareva*

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> injunction in *Aetna*, *supra*, as an exception to the long-standing practice of not requiring security before judgment. [at 350-1; emphasis added in *Silver Standard.*]

In that context, Huddart J. suggested a "relaxed approach" to applications for *Mareva* injunctions under which provincial superior courts could develop their own policies for the exercise of the discretion and avoid becoming `prisoners of a formula' (a phrase taken from the often-quoted judgment of McLachlin, J.A. (as she then was) *in B.C. (Attorney General) v. Wale*, (1986) 9 B.C.L.R. (2d) 333 (B.C.C.A.), at 346 (aff'd at [1991] 1 S.C.R. 62.) By taking a flexible approach, the court may take account of a wide variety of circumstances, including "the relative strengths of the parties' cases, evidence of irreparable harm one way or the other, potential effects on third parties, and factors affecting the public interest." (at 349) Further, Huddart J. said, such an approach:

> . . . prevents the judge from becoming a prisoner of a fixed formula and places the emphasis where it belongs, on the justice and fairness of the order inter partes. It is fair to both sides, because, while maintaining the burden on the plaintiff to establish grounds for the application, it justifies calling upon the defendant to meet the case brought by the plaintiff, by putting forth evidence to support his position.
>
> By this approach, the ultimate question becomes, is it fair and just that the applicant should have the right to monitor the movement or expenditure of capital assets by the respondent during the course of the proceedings between them?
>
> Along the route to an answer, the court must consider whether and to what extent the justification put forth in a particular case permits that right. This question directs attention to the value underlying the court's examination of whether there is real risk of dissipation of domestic assets and/or foreign assets, whether that analysis is performed as part of the three-pronged test that predominates at the ex parte stage or of the underlying "fit and just" test likely to be given flesh only at the inter partes continuation hearing. [at 350]

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

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> 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.

[41] Last, the judge relied on *United States of America v. Friedland*, [1996] O.J. No. 4399 (C.J. (Gen. Div.)). She quoted Sharpe J., who said at para. 126:

> Even assuming the Plaintiff were able to show a strong prima facie case against Mr. Friedland, it is my view that in assessing and in balancing the burden the injunction would impose on Mr. Friedland, with the risk that the Plaintiff's lawful claims might be defeated, the Court was entitled to know about the other possible available avenues of recourse available to the Plaintiff. It is possible that apprised of all of these facts relating to the other parties, the Court might still have granted the injunction but it is by no means, in my view, self-evident, given the exceptional nature of Mareva relief.

The judge chose to emphasize the passage concerning other possible available avenues of recourse. I do not understand *Silver Standard* to require in all cases a finding that the asset sought to be restrained be the only avenue of recourse. The test is a flexible one as set out in *Silver Standard,* the governing authority in this jurisdiction.

[42] A five-member division of this Court affirmed the *Silver Standard* approach in *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481. Madam Justice Saunders wrote at para. 44:

> I do not consider that the general approach to *Mareva* injunctions in British Columbia requires modification. It may, however, require clarification and a reminder that it is a species of interlocutory injunction with special requirements. Those requirements relate to the general rule against pre-judgment execution and may vary depending on the nature of the exception into which the injunction fits (with reference to the four categories of exception given as examples in *Aetna Financial*). While the term "*Mareva* injunction" is used to denote any order impounding assets or freezing assets before judgment (outside of statutory remedies such as builders liens or garnishing orders), they are not all alike. Awareness of the root issue is helpful in sorting out the exercise of discretion.

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[43] None of these authorities grapple with the issue in the case at bar: namely, whether the judge erred in deciding that an injunction to secure an international arbitration award ought not to have been issued where the parties had little connection to British Columbia and where the arbitration award could have been enforced in Pakistan. Counsel has not drawn our attention to any case that directly considers this point.

[44] In my view, the answer lies in the legislation as well as the flexible test set out in *Silver Standard* and *Tracy*. The *New York Convention* and the enabling legislation in British Columbia recognize an international arbitration award on the same basis as if it were a domestic award originating in this province. The language of the legislation is not ambiguous in this regard. A real and substantial connection is presumed to exist. It would be illogical to ignore this presumed jurisdictional connection for interlocutory purposes, but recognize it for final judgment purposes. The statutory scheme anticipates an action to enforce the award. There are only limited grounds on which the defendant could dispute the award in a recognition action per art. V of the *New York Convention* and s. 36 of the *International Commercial Arbitration Act*. I reiterate that I do not see how a real and substantial connection could exist for some but not all purposes in pursuing the claim through to judgment and enforcement.

[45] I conclude that the recognition and enforcement proceeding is akin to a domestic proceeding, and that the judge ought to have approached the application on the basis that it was akin to a domestic proceeding.

[46] This conclusion does not entirely resolve the question that was before the chambers judge. Overlying this statutory scheme is still the court's equitable jurisdiction to grant, or decline to grant, a *Mareva* injunction. The overarching factor in granting the injunction is whether doing so achieves a balance of justice and convenience between the parties: *Silver Standard* at para. 20. Depending on the facts of the case important factors may include the merits of the underlying claim,

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the risk of dissipation of the asset, the balance of convenience and the interests of third parties.

[47] In my view, the following factors militated towards a finding that the injunction was properly ordered: first, the merits of SFI's claim were very strong, approaching certainty given the limited grounds upon which the claim could be defended; second, the assets were about to leave the jurisdiction; third, the debtor had refused to pay the award over the ten months since it had been made; and, finally, damage to the third party could be alleviated, as it was, by SFI's fortified undertaking.

[48] On the other side of the equation was the presumably significant inconvenience of arresting and detaining a ship with a valuable commodity on board in circumstances where the commodity's value exceeded the amount of the Final Award. None of these latter factors persuaded the granting judge to decline the injunction application, nor did they factor into chambers judge's analysis in a decisive way. The availability of enforcement proceedings in Pakistan was not in my view an entirely irrelevant factor. In some cases, but not this one, a strong case might be made out that there was no risk of dissipation because of other available enforcement proceedings. Such considerations may properly be part of the balance of convenience analysis. Where, in my view, the chambers judge erred was in her implicit assumption that there was an onus on the appellant to turn first to Pakistan's courts because of the parties' limited association with British Columbia.

[49] The judge found that the appellant failed to disclose a material fact, that is the availability of enforcement in Pakistan, in the *ex parte* proceeding. As I have said such foreign proceedings could be a factor in the balance of convenience/dissipation analysis. Accordingly, I turn to the evidence on this point. It will be recalled that counsel for the appellant told the judge who granted the injunction that enforcement in Pakistan would be challenging. However, his submissions rested primarily on the proposition that there was no onus on the appellant to resort to enforcement proceedings in that jurisdiction because of the provisions of the *New York Convention*. Additionally, Francisco Pereira, SFI's Director, deposed to his belief that

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it would be difficult to enforce the award in Pakistan for a variety of reasons. The appellant did not tender expert evidence as to Pakistani law before the granting judge.

[50] Both parties tendered expert evidence concerning Pakistani law before the chambers judge. The respondent relied on the opinion of Mr. Salman Raja an advocate of the Supreme Court of Pakistan. He was asked if the Final Award was enforceable in Pakistan. He opined that the likelihood of success of enforcement of the Award through the courts of Pakistan was high. He estimated that the recognition and enforcement process would take between 12 and 18 months. One of the defences available to the respondent would be a public policy defence, which has been interpreted as incorporating Islamic Law with respect to interest payments. In a previous case, a superior court in Pakistan disallowed the recovery of interest on the enforcement of an arbitral award. There is some question as to whether other courts will follow this precedent. With reference to a number of cases, he expressed the view that Pakistani courts are supportive of international commercial arbitration.

[51] The appellant relied on a similar opinion also from an advocate of the Supreme Court of Pakistan, Mr. G.H. Malik. Mr. Malik was generally in agreement with Mr. Raja's opinion except that, "[Mr. Raja's] Report does not take into account the delays encountered by all litigation, including proceedings to enforce awards, which unfortunately are endemic." He opined that Mr. Raja's estimate of the time to enforce the award was "entirely erroneous". Mr. Malik agreed with Mr. Raja that the question of the enforceability of that portion of the award representing interest was unsettled under Pakistani law. As to the question of delay, Mr. Raja made reference to a number of cases as examples, and expressed the view that inordinate delay occurs in all Pakistani judicial proceedings.

[52] The interest portion of this judgment is substantial: by order of the Supreme Court, post-Award interest was fixed at $427,684.60.

[53] The chambers judge concluded that the representation made by the appellant at the original hearing did not meet the full, frank and fair disclosure obligations of a

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party seeking an injunction. With the greatest of respect, I disagree with the chambers judge. She reviewed the appellant's disclosure through the lens of her erroneous conclusion that the onus was on the appellant to establish it could not enforce the award in Pakistan. As I have already said that is not the test. In any event, the appellant did not say that the award could not be enforced, rather he stated that enforcement would be "challenging" which implies it could have been enforced, but with some difficulty. The analysis should have been directed more to the question of whether considering all the circumstances, it was just and convenient to grant the injunction. The judge's balance of convenience analysis ought to have taken into account the delay that would accompany enforcement proceedings in Pakistan, as well as the considerable doubt about the enforcement of that part of the award representing interest under Pakistani law.

[54] I cannot agree with the chambers judge that the appellant failed to disclose a material fact. The amplified evidence supports the representation that enforcement of the Final Award would be challenging in Pakistan There is no amplified evidence that materially alters the balance of convenience analysis done by the granting judge.

[55] That leaves the question of SFI's petition for damages that was dismissed by the chambers judge as set out in its Notice of Application filed April 10, 2013. On appeal, SFI seeks an order that it recover the full amount of its claim against PSM, which totals $849,188.97, and, to the extent possible, that the amount awarded be paid to it from the approximately $800,000 held in court.

[56] SFI says that these additional losses were caused by PSM's inaction, tactical or otherwise. As the chambers judge allowed PSM's petition to set aside the *Mareva* injunction and made an order that PSM's damages be assessed, she did not consider SFI's damages claim. Thus the reasonableness of the charges SFI incurred has not been assessed in the court below; accordingly that question should be remitted for assessment to the Supreme Court.

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Disposition

[57] I would allow the appeal of the order made by Ross J. on July 22, 2013, in which she declared that SFI is liable to PSM for the damages suffered by PSM caused by the April 21, 2011, *Mareva* injunction. That order should be set aside. As SFI's claim for damages was not assessed in the Supreme Court I would remit that claim to the court below for assessment.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Madam Justice Neilson"

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