IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *China Citic Bank Corporation Limited v. Yan,* 2016 BCSC 2332

Date: 20161213
Docket: S165830
Registry: Vancouver

Between:

China Citic Bank Corporation Limited

Plaintiff

And:

Shibiao Yan

Defendant

Before: The Honourable Mr. Justice Smith

Reasons for Judgment

Counsel for the Plaintiff:	R. Kaardal, Q.C. K. Leung
Counsel for the Defendant:	M. Hewitt E. Segal
Place and Date of Hearing:	Vancouver, B.C. October 31 and November 1, 2016
Place and Date of Judgment:	Vancouver, B.C. December 13, 2016

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[1] The plaintiff bank is seeking to enforce an award from an arbitration tribunal in China that requires the defendant to pay an amount equivalent to about $10 million. Prior to commencing proceedings in this Court, the plaintiff obtained an *ex parte* Mareva injunction freezing the defendant's assets in British Columbia. The defendant – who denies the debt to the plaintiff and says he was unaware of the Chinese arbitration proceedings – now applies to set aside the injunction.

[2] The defendant is the former majority shareholder and general manager of Tanyuan Wood Business Co. Ltd. ("Tanyuan"), a furniture manufacturing company in China. The plaintiff says that in June 2014 it extended a RMB 50 million (about CDN $10 million) line of credit to Tanyuan. It says Tanyuan withdrew the full amount in a single transaction and never repaid the loan. At issue is whether the defendant personally guaranteed the loan to the company.

[3] The loan agreement between Tanyuan and the plaintiff provided for arbitration under the applicable Chinese law. The plaintiff commenced arbitration proceedings in July 2015. The arbitration tribunal issued an award on March 17, 2016, finding the defendant jointly liable for payment of the debt. The defendant did not attend the arbitration hearing and says he did not receive notice of it. His subsequent appeal to a Chinese court was dismissed.

[4] In the material filed in support of its injunction application, the plaintiff alleged that the defendant and his wife "disappeared" from China after the loan funds were withdrawn and were later discovered to have a home and other assets in Vancouver.

[5] The Mareva injunction was granted by Mr. Justice Bowden on June 24, 2016 following an *ex parte*, in camera hearing. It prohibited the defendant from removing from British Columbia, disposing of or dealing with all assets up to a total value of $10 million and referred specifically to four real properties and accounts at four named banks.

[6] The order was varied by Mr. Justice Affleck, by consent, on September 9, 2016 to remove the reference to the real properties, which the defendant says he

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holds only as a trustee for other parties, and to remove the reference to assets of a company that had been named in the original order. The effect of the amendment is that the injunction now applies primarily to any cash the defendant may have on deposit in British Columbia.

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[7] The plaintiff's initial injunction application on June 24, 2016 was a stand-alone application made prior to the commencement of any action. Counsel for the plaintiff (who was not counsel on this application) told Bowden J.:

> So the bank is seeking to have an injunction on a temporary basis to restrain his assets so that they can, you know, a week from now file notice of a civil claim in order to enforce the arbitration award.

[8] In fact, the plaintiff did not file pleadings a week later and never did file a notice of civil claim. Instead, it filed a petition more than two months later – on August 31, 2016 – seeking recognition and enforcement of its arbitration award pursuant to the *Foreign Arbitral Awards Act*, R.S.B.C. 1996, c. 154 ("*FAAA*"). That legislation gives force in British Columbia to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention" ("Convention"). It requires this Court to enforce a foreign arbitral award, subject only to certain specified defences for which the debtor has the burden of proof.

[9] Counsel for the plaintiff referred to the *FAAA* and the enforceability of the Chinese arbitration award in the hearing before Bowden J. However, the material before the court, including an affidavit from a bank vice-president, also alleged deliberate misrepresentations by the defendant in obtaining the loan. Those allegations are not repeated in the plaintiff's petition, which simply relies on the enforceability of the arbitration award.

LEGAL PRINCIPLES

[10] The term "Mareva injunction" generally refers to an order that prevents a defendant from removing assets from the jurisdiction or from disposing or dealing with them within the jurisdiction in a way that will render an eventual judgment

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

> [20] ...The overarching consideration in each case is the balance of justice and convenience between the parties, and those concepts can embrace many factors that do not fit easily into the "rules" or "conditions" advanced by the defendants.
>
> [21] Having said that, however, it is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted.

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

> [12] ...
>
> (a) the existence of a strong *prima facie* case or a good arguable case (there is no strict formula); and
>
> (b) having regard to all relevant factors in the case, whether granting an injunction would be just and convenient (in other words, the balance of convenience).

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

> [37] On an *ex parte* application, the relevant principles include the following:
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> 1) the applicant must make full and frank disclosure of all material facts;
>
> 2) a material fact is one that may affect the outcome of the application;

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3) it is for the court to determine if the fact is material, not the applicant or his legal advisors;

4) the duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made;

5) the extent of the inquiries required depend on the circumstances of the particular case;

6) if material non-disclosure is established, the court may deprive the applicant of any advantage gained by reason of the breach of duty to disclose;

7) the failure to provide such full and frank disclosure will allow a court to set aside the order without regard to the merits of the application;

8) in deciding whether the Order should be set aside, the court must consider the importance of the non-disclosed fact to the issues which were to be decided by the judge at the ex parte hearing;

9) an innocent non-disclosure is an important consideration, but not decisive as to whether the breach is such that the Order is to be set aside; and

10) not every omission necessarily results in the order being set aside.

[Citations omitted]

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

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

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

> [20] ... An ex parte chambers application is not a trial and should not be turned into one by demands for an unrealistic standard of disclosure. Disclosure must be full in the sense that it must be adequate to the demands of the particular application and always fair to the absent defendant. ...

[15] A Mareva injunction may be set aside if the plaintiff overstated its case when applying for the injunction: *Royal Bank v. Bousssoulas*, 2010 ONSC 4650.

[16] An application to set aside a Mareva injunction should be approached as a hearing *de novo*, but should not be decided simply on the basis that the judge hearing the application would have exercised his or her discretion differently from the judge who made the original order: *Netolitzky* at para. 20; *Ma v. Nutriview Systems Inc.*, 2011 BCCA 389 at para. 14. The court may consider new or additional material that is put forward as well as the evidence on which the original application was based: *Ma* at para. 17.

DISCUSSION

[17] The defendant in this case, alleges that a number of inaccurate or misleading statements were made to the Court on the injunction application. Some of these are said to be inaccurate only on the basis of subsequent evidence put forward by the defendant that the plaintiff had no reason to know of. For example, the plaintiff told Bowden J. that the defendant had acquired certain properties in British Columbia, based on evidence that he was the registered owner. It could not have anticipated the defendant's subsequent assertion that he has no beneficial interest in those properties. For present purposes, I will deal only with the more significant matters that do not fall into that category.

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[18] Counsel for the plaintiff told Bowden J. that the 30-day period for appealing the arbitration award had expired. In fact, Chinese law provides a period of six months during which a party can apply to cancel an arbitration award. The 30-day period referred to by counsel apparently deals with applications to correct computational or other non-substantive errors in an award.

[19] This point may now be somewhat academic as the defendant did subsequently apply to the court in China to set aside the arbitration award and that application was dismissed on October 20, 2016. The defendant believes further avenues of appeal or judicial review may still be available.

[20] A translation of the arbitration award that was attached to an affidavit before Bowden J. indicated that the defendant had notified the arbitration panel in writing that he would not attend the hearing. However, this appears to have been a translation error. A subsequent translation states that the defendant was absent although he had been informed in writing of the hearing.

[21] In any event, it is not disputed that the arbitration award was made in the absence of the defendant. The issue is whether he knew of the hearing. The plaintiff was not required to anticipate the defendant's present evidence that he did not.

[22] Of much greater significance, is the following statement in the affidavit that was before Bowden J., from Xumin Wang, a bank vice-president:

> Based on the information obtained by CITIC Bank from its routine anti-money laundering due diligence, CITIC Bank believes that Mr. Yan and Ms. Gao disappeared from China shortly after the line of credit under the Loan Agreement was fully drawn in the amount of RMB 50 million in one transaction.

[23] To similar effect, counsel for the plaintiff told the Court:

> So it looks like as if he sort of was living in China, obtaining a loan on behalf of the company, and then moving to Vancouver never to return to China.

[24] Although not explicitly stated, the clear implication was that the defendant absconded with the loan proceeds. In fact, the defendant has produced copies of

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bank documents indicating that the bank was directed to and did pay the funds to another company that supplied raw material to Tanyuan. The defendant says that contradicts the assertion that he fled with the funds and that this information was in the bank's possession when it applied for the Mareva injunction.

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[25] The question of what became of the funds advanced to Tanyuan by the plaintiff is, strictly speaking, not relevant to the plaintiff's present claim made in its petition. The claim is simply for enforcement of an arbitration award based on a commercial guarantee contract and does not require proof of any deliberate wrongdoing. But a suggestion of deliberate wrongdoing makes the case for an extraordinary equitable remedy such as a Mareva injunction much stronger. The presence of such allegations was likely to influence the Court even though the plaintiff knew or ought to have known it would never need to prove those allegations.

[26] In a similar vein is the following statement in Mr. Wang's affidavit:

> CITIC Bank believes that Mr. Yan and Ms. Gao made the Representations to CITIC Bank that were deliberately untrue in order to obtain RMB 50 million from the CITIC Bank.

[27] As said above, the petition ultimately filed by the plaintiff does not allege deliberate or fraudulent misrepresentation. I find that the plaintiff's reference to such misrepresentation was also likely an attempt to strengthen its case for a Mareva injunction.

[28] In short, the plaintiff overstated its case and made prejudicial allegations that it knew or ought to have known would not be relevant to its eventual claim against the defendant. I find the defendant has shown sufficient grounds on which the Mareva injunction could be set aside: *Royal Bank*. But whether it should be set aside still requires consideration of the strength of the plaintiff's case and the balance of convenience: *Hornby* at para. 12. If those factors strongly favour the plaintiff, they may still outweigh the plaintiff's deficient or erroneous disclosure.

[29] The strength of the plaintiff's case flows from the fact it is relying on an arbitration award that the law generally requires this Court to recognize. In

Sociedade-de-fomento Industrial Private Limited v. Pakistan Steel Mills Corporation (Private) Limited, 2014 BCCA 205, the Court of Appeal said at para. 3:

> [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.
>
> [Emphasis added]

[30] The Court of Appeal in *Sociedade* went on to say that a Mareva injunction had been properly granted, in part because the plaintiff's claim to enforce a foreign arbitration award was "very strong, approaching certainty given the limited grounds upon which the claim could be defended": at para. 47.

[31] In this case, the defendant has raised one of the specific defences to the general application of the Convention. He maintains he was unaware of the arbitration proceeding and the legislation should therefore not apply, pursuant to para. 1(b) of the Convention which states:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> ...
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; …

[32] I have been provided with a translation of the judgment of the court in China that heard and rejected the defendant's application to set aside the award on October 20, 2016. The court appears to have accepted that the defendant was not personally served with the notice of application, but relied on a published notification in a newspaper, which is deemed to be sufficient service under Chinese Law.

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[33] It will be for the judge hearing the plaintiff's petition to consider whether that substitutional service and the Chinese court's reliance upon it preclude the defendant from relying on the defence created by the Convention. The burden of proving the defence will be on the defendant. While I would not go so far as to say that the plaintiff has a case that is "approaching certainty", its ability to rely on the Convention and the *FAAA* certainly gives it a strong *prima facie* case: *Sociedade* at para. 47.

[34] As to the balance of convenience, the assets now covered by the injunction consist primarily of bank deposits – the most liquid and easily moveable kind of assets. The existing order does not completely deny the defendant access to those funds. It allows him to spend "reasonable amounts" on ordinary living expenses, reasonable and proper business expenses, and legal expenses. If there is a disagreement on what constitutes reasonable expenditure, that dispute can be the subject of further application.

[35] In addition to having moveable assets, the defendant also appears to be highly mobile. He does not claim to be a permanent or full-time resident of British Columbia. His affidavit says that his wife and daughter now live in Vancouver, but that he still has a residence in China. He further states:

> 45. ...
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> (d) I visited my wife and daughter in Vancouver from December 5-15, 2015, and then I remained in China from December 16, 2015 through January 25, 2016.
>
> (e) I came to Vancouver on January 26, 2016, intending to stay until the end of my daughter's school year. I have remained in Vancouver since the end of June 2016 to deal with these proceedings.

[36] The evidence therefore shows a very real risk of assets being removed from the jurisdiction, which is, historically, the original basis for a Mareva injunction.

[37] I also note that the period during which the defendant's assets are subject to the order may be relatively short. That is because the plaintiff's claim is brought by

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petition, which is at least capable of coming on for final disposition at an earlier date than would be the case in an action commenced by a notice of civil claim.

[38] Taking all those factors into consideration, I find that the balance of convenience still favours maintaining the injunction.

DECISION

[39] The defendant's application is therefore dismissed but, in view of my finding that the plaintiff overstated its case on the application before Bowden J., I decline to award its costs on this application.

"N. Smith J."

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