IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Northwestpharmacy.com Inc. v. Yates,*
2018 BCSC 41

Date: 20180112
Docket: S169416
Registry: Vancouver

Between:

Northwestpharmacy.com Inc.

Plaintiff

And

John Gidden Yates, Debra Ann Yates, Debra Ann Yates as Trustee of the Yates Family Business Trust, Michael John Yates, Sandy Yates, Michael Robert Tozman, Eliane Tozman, Debra LePage, Steven H. Poznanski, 8309469 Canada Limited, Hocgol Processing, Inc., Paymitco LLC, JBI Management Group LLC, Vipci Corp., Paymonex LLP, Epic Capital Group, LLC, John Doe and Jane Doe

Defendants

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment
Applications to set aside *Mareva* injunction

Counsel for Plaintiff:	Tina L. Mihoc Z. Johnson (A/S)
Counsel for the Defendants John Yates, Debra Yates, Debra Yates as Trustee of the Yates Family Business Trust, Michael Yates, Sandy Yates, Michael Tozman, Eliane Tozman, 8309469 Canada Limited, Hocgol Processing Inc., and Epic Capital Group LLC:	Sean Hern Catherine George Chelsea L. Flintoff (A/S)
Counsel for the Defendant Debra LePage:	Robbie S. Fleming Matthew N.E. Cowper
No other appearances	
Place and Dates of Hearing:	Vancouver, B.C. November 27–30, 2017
Place and Date of Judgment:	Vancouver, B.C. January 12, 2018

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INTRODUCTION

[1] The Plaintiff has sued the Defendants for $1,244,273.80 U.S.

[2] I granted the Plaintiff a *Mareva* injunction on October 14, 2016.

[3] The Yates and Tozman Defendants, that is, those Defendants represented by Mr. Hern and Ms. George, and the Defendant Debra LePage, apply to set aside the *Mareva* injunction. (The Yates and Tozman Notice of Application was filed February 8, 2017. The Debra LePage Notice of Application was filed October 13, 2017.)

[4] The Plaintiff brings an application as well. It seeks a new *Mareva* injunction.

[5] In reasons dated September 7, 2017, reported at 2017 BCSC 1572, I stayed this action in favour of arbitration pursuant to an arbitration clause in an agreement between the Plaintiff and a Panama company, Omega Group Inc. I would have also dismissed the action at that time on the ground that this Court lacks territorial competence over the dispute, except that I found the Plaintiff raised a serious question of territorial competence based on one of the five arguments it advanced under s. 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28.

[6] At the beginning of the hearing of the applications which are now before me, I asked all counsel whether the applications could and should proceed, given that the action has been stayed. All counsel said yes, and the applications proceeded accordingly.

[7] My earlier reasons, referred to above and reported at 2017 BCSC 1572, provide a useful background to the present applications. For the present applications, I do not intend to rely on findings of fact made in the earlier reasons but there will be a substantial overlap between the findings of fact in the earlier reasons, and in these reasons. The findings of fact here, however, are based on a fresh analysis from the evidence filed and the submissions made in the present applications.

MAREVA ORDERS GENERALLY, AND THE TESTS FOR SETTING ASIDE A _MAREVA_ ORDER

[8] Courts in England and Canada invariably express caution, if not reluctance, before granting *Mareva* orders. Such orders are invasive. In practical terms, they amount to pre-judgment execution against defendants who have had no opportunity to be heard. The *ex parte* procedure, which is invariably needed for obtaining a *Mareva* order, also carries with it the risk that the court, in being asked to grant the application, will be misled through a material non-disclosure by the only party who is in the courtroom. It does not matter whether the non-disclosure is intentional (except as an issue

going to costs). Negligent non-disclosure carries the same risk that the court will come to an unjust conclusion. It is trite to say that judicial fact-finding depends for its success on hearing from both sides. When that is gone, there is an inherent risk of injustice resulting.

[9] Justice Estey expressed the concerns of the Supreme Court of Canada in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, at paras. 8 and 43 as follows:

> 8. A second and much higher hurdle facing the litigant seeking the exceptional order [for a *Mareva* injunction] is the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial. Execution in this sense includes judicial orders impounding assets or otherwise restricting the rights of the defendant without a trial. This was enunciated by Cotton L.J. in *Lister & Co. v. Stubbs*, [1886-90] All E.R. 797, at p. 799, as follows:
>
> > I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant, the defendant has been ordered to give a security till the debt has been established by the judgment or decree.
>
> Similarly, the limited availability of an injunction to enjoin a defendant from disposing of his assets was referred to in *Burdett v. Fader* (1903), 6 O.L.R. 532, (affirmed (1904), 7 O.L.R. 72), at p. 533, by Boyd C.:
>
> > The plaintiff may or may not get judgment in the case, but he proposes to restrain the sale or disposition of this stock by the defendant till that is finally determined.
> >
> > There is no authority for such a course in an action of tort. If the plaintiff is a creditor before judgment, he can sue on behalf of himself and all creditors to attack a fraudulent transfer. If the plaintiff is a judgment creditor, he can proceed by execution to secure himself upon the debtor's property. But if the litigation is merely progressing and the status of creditor not established, it is not the course of the Court to interfere *quia timet* and restrain the defendant from dealing with his property until the rights of the litigants are ascertained.
>
> The principle has been restated in modern times in *Barclay-Johnson v. Yuill*, [1980] 3 All E.R. 190, where Megarry V.C. stated, at p. 193:
>
> > In broad terms, this establishes the general proposition that the court will not grant an injunction to restrain the defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendente lite merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.
>
> This problem has been stated and restated many times in this country in the courts of Manitoba and elsewhere … [Authorities cited.]
>
> ...
>
> 43. There is still, as in the days of *Lister*, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed of or moved out of the country or put beyond the reach of the courts of the country. This sub-rule or exception can lead to serious abuse. A plaintiff with an apparent claim, without ultimate substance, may, by the *Mareva* exception to the *Lister* rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial. I would, with all respect to those who have held otherwise, conclude that the order should not have been issued

> under the principles of interlocutory *quia timet* orders in Canadian courts functioning as they do in a federal system.

[10] The tests for obtaining a *Mareva* injunction are similar to those for obtaining injunctions generally, with two qualifications.

[11] First, the applicant has a higher standard to meet. Instead of needing to show only a case that is not frivolous, or an arguable case, to borrow the language employed in countless injunction decisions, the applicant needs to show what is sometimes called a strong *prima facie* case. That is more than an arguable case, although it does not mean that the applicant's case is bound to succeed. See *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481, at para. 54. Courts have cautioned that the precise expression of the test may be difficult. However it is expressed, the test is at least somewhat more rigorous than it is for injunctions generally.

[12] Second, for obtaining a *Mareva* injunction, the applicant should demonstrate a real risk that assets will be disposed of or dissipated, such that without the injunction, a judgment would be hollow. The second test, risk of disposal or dissipation of assets, is not rigidly applied. Nonetheless, it remains an important criterion for determining whether *Mareva* relief is called for. See *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2887 (C.A.) at paras. 16–23; and *Tracy*, cited earlier, at paras. 45–46.

[13] In *Tracy*, Madam Justice Saunders, writing for the Court, also expressed this caution, at para. 46:

> In all cases, great caution is to be shown to avoid the mischief of litigious blackmail or bullying, and due regard must be paid to the basic premise that a claim is not established until the matter is tried. Great unfairness may be occasioned, and the administration of justice brought into disrepute, by an order which impounds assets before the merits of the claim are decided. It is useful to recall the words of Huddart J.A. in ***Grenzservice Speditions Ges.m.b.H. et al. v. Jans et al.*** (1995), 129 D.L.R. (4th) 733, 15 B.C.L.R. (3d) 370 (S.C.) at 755-756 at p. 23:
>
> > [*Mareva* and Anton Pillar orders] represent an extraordinary assumption of power by the judiciary. Judges must be prudent and cautious in their issue.

[14] For the present applications, two by the Defendants, to set aside the existing *Mareva* order, and the Plaintiff's application for a new *Mareva* order, the authorities provide the following guidelines.

[15] In the set-aside hearing, a court considers whether the *ex parte* order should be set aside because of material non-disclosure by the *ex parte* applicant. If not, the court proceeds to a hearing *de novo* on the merits of the injunction application, where the *ex parte* applicant must again meet the tests for obtaining the injunction, even though that party is the respondent on the set-aside application. See *Mooney v. Orr*, [1994] B.C.J. No. 2652 (S.C.); and *Global Chinese Press Inc. v. Zhang*, 2016 BCSC 874, at para. 11.

[16] A material fact is one that may affect the outcome of the application. See *Pierce v. Jivraj*, 2013 BCSC 1850, at paras. 37–38.

[17] The applicant in the *ex parte* application must be "profoundly fair", must disclose all important aspects of the evidence, and must avoid opinion and invective. See *Pierce v. Jivraj*, cited above, at paras. 22 and 37–38; and *Hollinger Inc. v. Radler*, 2006 BCCA 539 at para. 39.

[18] If a court finds material non-disclosure, it may, and likely will, set aside the *Mareva* order. However, material non-disclosure is relevant as well in the second part of the analysis. The court can take non-disclosure on the *ex parte* hearing into account when it is deciding whether to maintain an existing *Mareva* order, or grant a new one. See *Mooney v. Orr*, cited above, at para. 30; and *MacLachlan v. Nadeau*, 2017 BCCA 326, at paras. 28, 32 and 37.

[19] The legal analysis, summarized above, is grounded in fairness. The ultimate question is whether it is just or convenient that the injunction be given, or maintained, in accordance with s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. "[J]ust or convenient" is perhaps not highly informative in itself. However, it derives from the fact that injunctive relief is equitable. It will only be granted, or maintained, in accordance with principles of fairness.

WAS THERE MATERIAL NON-DISCLOSURE?

[20] The only ground the Plaintiff had for maintaining this action in this province was its allegation of fraudulent misrepresentation, based on two days of meetings in British Columbia, in April, 2015. (In the reasons reported at 2017 BCSC 1572, I rejected the Plaintiff's four other arguments for this Court having territorial competence.) Even the facts for finding the required serious question to be tried for fraudulent misrepresentation were not clear. I said this in the earlier reasons, at para. 21:

> The Plaintiff's recitation of what it says are the fraudulent misrepresentations by Messrs. Yates and Tozman at the April 8–9, 2015 meetings is found at paragraphs 67–104 of the Arora affidavit sworn October 11, 2016. It is not clear to me which of the Defendants' representations on April 8 and 9 would be argued by the Plaintiff at trial to be fraudulent misrepresentations. However, I do not criticize the Plaintiff's presentation on that question. The case for fraudulent misrepresentation is not simple. Because, for establishing territorial competence, a plaintiff need show only a serious question to be tried, and because, in these pre-trial applications for determining jurisdiction, the facts are not to be scrutinized as fully as they would be at trial, I am prepared to accept that the Plaintiff has presented sufficient evidence to raise a serious factual question of whether there were fraudulent misrepresentations by the Defendants on April 8 and 9, 2015. ...

[21] I quote that paragraph here only because it serves to illustrate the general lack of clarity I found in the Plaintiff's case, both in the territorial competence hearing, and in the earlier *ex parte* hearing resulting in the *Mareva* order. In both hearings, I was shown thousands of pages of evidence, but not a clear theory, factually or legally, of the wrongs committed by the individual Defendants. The Plaintiff was saved in the *ex parte* hearing, and obtained the relief it sought, as a result of two things. First, it did not have to prove its case on the balance of probabilities. Second, and more important for the purposes of the present applications, the Plaintiff repeatedly asserted in the *ex parte* hearing a key fact which, for me, was determinative in deciding to grant the *Mareva* order *ex parte*. The Plaintiff said in the *ex parte* hearing that the moment the Defendants secured the Plaintiff's signature on a contract

with Omega Group Inc., on July 6, 2015, the Defendants stopped the flow of funds to the Plaintiff from then onward.

[22] To me, in the *ex parte* hearing, that was the only clear and unequivocal step any of the Defendants had taken demonstrating fraud or other conduct removing this case from the realm of an ordinary commercial dispute, to one where concerns over matters such as asset dissipation or removal by the Defendants became relevant. The Plaintiff, in the *ex parte* hearing, was aggressive. In its written and oral submissions, and even in the affidavits of its witnesses, it described two groups of the Defendants as the "primary rogues" and the "secondary rogues", respectively. The $1,222,273.80 U.S. the Plaintiff claims was referred to invariably as the "stolen funds". The case was laden with innuendo, but not with proof. I recognize that allegations of conspiracy and fraud ordinarily present unique challenges of proof for a plaintiff. But that, of course, does not relieve a plaintiff from establishing such proof, at least by showing something more than merely an arguable case, when seeking *Mareva* relief. Perhaps to repeat, the fact which tipped the balance in the Plaintiff's favour on the *ex parte* hearing was its submission that the funds coming from the Defendants stopped immediately after the July 6, 2015 contract signing.

[23] Following are portions of the transcript of the *ex parte* hearing, with my emphasis added:

> **Transcript of Proceedings, October 13, 2016**
>
> ***Page 11, lines 7–47, Page 12, lines 1–47, Page 13, lines 1–20***
>
> PLAINTIFF'S COUNSEL: We say now in hindsight, with the benefit of hindsight, that the purpose of persuading - - encouraging the plaintiff to go to ICL was it gave the defendants the chance to actually have the cheques paid to them.
>
> THE COURT: Right.
>
> PLAINTIFF'S COUNSEL: And what happened was when that started to happen fully in early July, the defendants stole $1.2 million.
>
> THE COURT: In early July?
>
> PLAINTIFF'S COUNSEL: It started in full in early July, July 7th, that they might not be correct. There is - - and I'll come to it exactly. There was an agreement that was sent to them on July 7th saying we will only use ICL.
>
> THE COURT: And so do I say in approximately early July?
>
> PLAINTIFF'S COUNSEL: I think July 7th is correct. They switched to ICL completely at the urging of the defendants.
>
> THE COURT: So July 6th?
>
> PLAINTIFF'S COUNSEL: July 6th.
>
> THE COURT: All right. Plaintiff switched entirely to ICL. And what did you say about the million-plus being stolen?
>
> PLAINTIFF'S COUNSEL: Once the contract was signed - -
>
> THE COURT: Mm-hmm?
>
> PLAINTIFF'S COUNSEL: - - the defendants have taken over $1.2 million from those accounts. They don't know where they are. They say they don't know where the money is and they have given a variety of what we say are unbelievable reasons for not paying that money.

We say the intention back in July 6th was to do just that, to get all of the payments into the rogues' hands or rogues' companies' hands and then freeze it and keep it. And the exact amount, My Lord, we say is $1,244,278 U.S.

THE COURT: One-two-four-four-two-seven-eight?

PLAINTIFF'S COUNSEL: Correct. And I'll come back to it in more substantial detail in a few minutes, but on July 6th, when they sent the confirmation that we will only use ICL, the day after that - -

THE COURT: When the plaintiff confirmed.

PLAINTIFF'S COUNSEL: Yes.

THE COURT: Yes.

PLAINTIFF'S COUNSEL: The day after that, the Defendants say their bank froze about $700,000 of the plaintiff's funds for orders that were made after July 6th. Starting July 7th, they put a freeze and they kept all of the proceeds that came in after that date.

THE COURT: Orders from the plaintiff's customers.

PLAINTIFF'S COUNSEL: Correct.

THE COURT: From the plaintiff's customers after July 6th?

PLAINTIFF'S COUNSEL: Correct.

THE COURT: And what is the thinking there?

PLAINTIFF'S COUNSEL: That's the $64,000 question. The thinking is the - - our theory is they wanted this written contract. They wanted the complete switch to ICL. Once they had that, they had control of several months' oncoming orders that they could steal.

THE COURT: And when their bank froze this money, the defendant said that the bank froze the money, is this a bank that's in the defendants' pocket? Is this a bank that's under the defendants' control?

PLAINTIFF'S COUNSEL: No, I don't think so. It's one of their network banks that they had a relationship with.

THE COURT: And do they say why the bank froze the money?

PLAINTIFF'S COUNSEL: They gave a lot of different delayed, conflicting, unbelievable explanations. The short answer, My Lord, and when I take you through the material, is they never gave any legitimate explanation.

THE COURT: For why the bank froze?

PLAINTIFF'S COUNSEL: Correct.

THE COURT: All right.

PLAINTIFF'S COUNSEL: Or even how much it froze. Or where the money is. Or even if you have nothing from the bank, this particular bank, to say that they have frozen this money, and they refused permission for plaintiff's counsel to deal with the bank.

So there's a series of very suspicious circumstances which I will take you to.

THE COURT: So the Defendants stopped you or other counsel for the plaintiff from dealing with the bank?

PLAINTIFF'S COUNSEL: Other counsel from Winnipeg, Mr. Myers.

THE COURT: Stopped the plaintiff from dealing with the bank to see what went on.

PLAINTIFF'S COUNSEL: Correct. And they kept saying – I'm getting ahead of myself – "It's a mistake, we have the funds, we don't know where they are. We're doing an audit. We'll find out where it is."

THE COURT: Mm-hmm.

PLAINTIFF'S COUNSEL: "Don't worry. We've never lost any money. We'll get it." This went on for weeks.

THE COURT: And then the difference between the seven and the 1.244 is what? What's that about? This was - - 700 was - - they said 700 was parked in this frozen account.

PLAINTIFF'S COUNSEL: Yes.

THE COURT: And the other half-million roughly?

PLAINTIFF'S COUNSEL: That was stolen later.

...

Page 45, lines 2–14

PLAINTIFF'S COUNSEL: I said in my remarks that the shipping - - I'm sorry, that the orders after July 6th were all frozen. I will come to this in more detail, but the contract was signed, I think, July 3rd, delivered July 6th to the defendants, but it was retroactive to June 25th and it was after June 25th that all of the processing is done through ICL. And then it was - -

THE COURT: Signed July 3, delivered July 6th?

PLAINTIFF'S COUNSEL: To the defendant and then we were told that on July 7th VIPCI Bank froze - - or VIPCI's bank, BBVI [sic] Bank, froze all transactions that were processed after July 7th.

(Lead counsel for the Plaintiff at the *ex parte* hearing was not Plaintiff's counsel in the present applications.)

[24] The Plaintiff's submissions in the *ex parte* hearing, quoted above, are contrary to the now-undisputed evidence, which the Defendants brought to the Court's attention in the stay application and in these set-aside applications. In fact, after July 6, 2015, when the Plaintiff had signed the contract with Omega Group Inc., the Plaintiff continued to do business with Omega, and, in the summer and early fall of 2015, received a further $4.3 million, representing approximately 90% of the funds the Plaintiff was expecting. Furthermore, the freezing of funds by a bank, named BBVA, which the Plaintiff said in the *ex parte* hearing occurred at the instance of the Defendants the day after the Omega contract was signed, did not take place until a week later. In that week, the Plaintiff received over $600,000 under the Omega contract. Finally, on this aspect of the case, the Plaintiff had said in the *ex parte* hearing that the Defendants induced the Plaintiff, in June 2015, to switch from one form of payment processing, called Cheque 21, to another, called ICL, because the latter method affords the Defendants better opportunity to steal the money. In contrast to that submission, the evidence now supports the conclusion that a bank, the Credicorp Bank, in Panama, had told the Plaintiff it would no longer process payments under the Cheque 21 method. As a result, the Plaintiff required ICL processing from the end of June 2015. The Plaintiff contracted with Omega as part of switching to using the ICL method. The Plaintiff's relationship with Omega and the Defendants did not end until the fall of 2015, when there were disputes over whether payment proceeds could be processed.

[25] In my view, the non-disclosure summarized above was more than material, it was central. Had I known the facts, I would not have granted the *ex parte* order. It was these facts, in my view, which changed the case, from what might be called a somewhat routine commercial dispute, into a conspiracy and fraud case, in which the Defendants had set a trap for the Plaintiff by switching to ICL and taking all the money from then on. I do not imply that the Defendants' conduct in other respects

was blameless, but it would not have resulted in *Mareva* relief for the Plaintiff if it had not been linked to the Defendants supposedly keeping all the money as soon as they obtained the Omega contract.

OTHER ALLEGATIONS OF MATERIAL NON-DISCLOSURE

[26] The well-known credit card companies refused to do business with the Plaintiff because of the nature of its business, and the Plaintiff was not licensed to do business in the United States.

[27] However, in the *ex parte* hearing, Plaintiff's counsel said, "The plaintiff is in the business of selling prescription medications ... The affidavit discloses that it is well-established, respected, and reputable. ... They [the Plaintiff] are recognized by [the Canadian International Pharmaceutical Association] which is the regulatory organization, and Mr. Arora [who has an indirect interest in the Plaintiff] was an officer of CIPA and still is."

[28] Toward the conclusion of the Plaintiff's *ex parte* submissions concerning the Plaintiff's status, I said, "So far, my take away on the [U.S. Food and Drug Administration] part is just that the FDA approach permitted the Plaintiff's business to operate in the U.S., in effect, even though, as you say, it was done through the equivalent of bills of lading or shipping." To which counsel responded that my summary was a fair one.

[29] The evidence is somewhat more complicated than that. Each side filed expert evidence addressing the legality of the Plaintiff's business. It is correct that the Plaintiff has not been subject to enforcement action in the United States. However, foreign internet pharmacies, such as the Plaintiff, are not permitted to import or facilitate the importation of pharmaceutical drugs to the U.S. The Plaintiff is not able to operate its business on the basis that the FDA authorizes it to do so, through licensing or other similar mechanism, but instead because the Plaintiff and other foreign internet pharmacies structure their business in a way that overwhelms the regulatory and prosecutorial resources available to enforce U.S. laws. The Plaintiff's business model is to invite its U.S. customers to enter a contract whereby:

- the customer, not the Plaintiff, is identified as the importer of drugs in the U.S. and the Plaintiff contractually describes itself as the customer's agent;
- the drugs are manufactured in India, Israel or elsewhere—location unknown and not identified;
- the shippers of the drugs are overseas facilities which are affiliated contractually in some way with the Plaintiff;
- the drugs are shipped by international mail, among the approximately 100 million international mail parcels that are shipped into the U.S. every year;
- a customer's contract for the drugs is purportedly governed by the jurisdiction of the shipper, the identity of which the customer does not know until the drugs arrive in the U.S.;

- the customer's payment for the drugs is processed through various electronic channels whereby the customer's banking information is taken by a third-party cell centre, proceed by third-party processing companies and various unidentified banks, and deposited into the Panamanian bank account of a company other than the Plaintiff.

[30] The Plaintiff's website highlights the Plaintiff's membership in the "International Pharmacy Association of B.C." ("IPABC"), and the "Canadian International Pharmacy Association" ("CIPA"). Its membership in the latter organization featured prominently in the affidavit evidence on the *ex parte* hearing. In fact however, both organizations are simply industry lobby associations comprised of member internet pharmacies. The IPABC website is misleading. It states:

> Our members, licensed by the B.C. College of Pharmacists, exist to serve our approximately one million patients. The majority of these patients are from the U.S. and are primarily elderly, disadvantaged and uninsured.

The Plaintiff is listed on the website as a "member" of the IPABC, but it is <u>not</u> licensed by the B.C. College of Pharmacists. CIPA's website is similarly misleading. It claims that "each CIPA pharmacy member is licensed and regulated by the government for safety". The link to a list of member pharmacies is under the heading, "Find a CIPA Member in the CIPA Certified Online Pharmacies List". However, if that heading is selected, one finds only a "list of CIPA Certified Safe Online Pharmacy websites", which includes Northwestpharmacy.com. The list is introduced with a statement that, "Every CIPA member exhibits exceptional standards of quality and adherence to all regulatory requirements set out the by the national and/or regional regulatory bodies that license the pharmacies (also known as chemists or dispensaries in some countries)." The effect was to make the reader think that the Plaintiff and other companies like it are regulated by the Canadian and/or provincial regulatory and licensing bodies, when they are not.

[31] The facts as I have summarized them above would make it difficult to conclude that the Plaintiff is, "well-established, respected, and reputable", as it was described in the *ex parte* hearing. At the same time, the Plaintiff in that hearing, as I have noted earlier, described various of the Defendants as being either "primary rogues" or "secondary rogues". Earlier in these reasons, at para. [17], I noted the law that an applicant in an *ex parte* application must be "profoundly fair", and must avoid opinion and invective. If the applicant does not meet that burden, the order obtained *ex parte* may be set aside even if it is otherwise justified on the merits.

[32] The Plaintiff, in the *ex parte* application, in my view, polarized the positions of the parties, as a well-established, respected and reputable Plaintiff, versus Defendant primary rogues and secondary rogues, so as to depart from its obligation to be "profoundly fair" and to avoid opinion and invective. Standing alone, I would not have taken the polarization summarized above as warranting the setting aside of the *ex parte* order. However, it does not stand alone. It should be considered, with the rest of the evidence, as part of the overall assessment of material non-disclosure or other irregularity stemming from the *ex parte* submissions.

[33] The final allegation of material non-disclosure I consider here is the Plaintiff barely addressing territorial competence in any way on the *ex parte* hearing. As noted above, the Plaintiff in the territorial competence hearing succeeded, tenuously, on only one of the five bases for territorial competence it had alleged. There were two days of meetings in British Columbia in April, 2015, from which the Plaintiff derives its primary allegation of fraudulent misrepresentation. As my earlier reasons show, neither the facts, nor the law, supporting that ground of territorial competence are clear. The case has very little to do with British Columbia.

[34] The two individuals behind the Plaintiff, Mr. Arora and Mr. Bhangu, have connections to the Plaintiff, but it is an overstatement to describe them as the principals of the Plaintiff, as they were described in the *ex parte* hearing. Their link to this province is accordingly less important. The Plaintiff in the *ex parte* hearing referred to a call centre in Langley as "the plaintiff's call centre" when, instead, it was an independent contractor. The Plaintiff is a Panama company, based in Panama, with its management in Barbados and Vietnam.

[35] As noted in *Pierce*, cited above at para. [16] of these reasons, a material fact is one that may affect the outcome of the application. In my view, I should have been given a fuller understanding of how limited the connection is between the facts of this case and the province of British Columbia. It is difficult, even with hindsight, to view this point in isolation. Again, however, it clearly would have formed part of the "mix" in deciding whether to employ the powers of this Court to grant *Mareva* relief to this Plaintiff.

[36] To summarize with respect to material non-disclosure, the centrally-important non-disclosure is discussed above at paras. [21]–[25] of these reasons. Other instances of material non-disclosure or irregularity have also been considered above. Clearly, in my view, the material non-disclosure was such that the *ex parte Mareva* order needs to be set aside. I would have reached that conclusion even if the only non-disclosure had been as discussed in paras. [21]–[25] above, but the other instances should not be ignored.

SHOULD A NEW *MAREVA* INJUNCTION BE GRANTED?

[37] Above, at para. [18] of these reasons, is reference to the law that material non-disclosure can be taken into account not only in the "set-aside" analysis, but also in deciding whether a new *Mareva* injunction will be granted.

[38] In this case, the first of the non-disclosures, that is, the Plaintiff's receipt of over $4 million after the Omega contract was signed, is, in my view, of such importance that it weighs against a new *Mareva* order being granted.

[39] However, there are also additional factors against a new *Mareva* order at this stage.

[40] While it is perhaps the law now that risk of assets being dissipated or removed is no longer an essential criterion to satisfy in order to obtain *Mareva* relief (see para. [12] above), it remains an

important factor to be taken into account. On the facts of this case, there is no evidence whatever of assets being at risk from dissipation or removal. The dispute between the parties crystalized in the early fall of 2015. *Ex parte* relief was not requested for slightly more than a year after that. In that time, there were no indications of mischief regarding assets under the Defendants' control. For example, no facts arose which would support an allegation of fraudulent preference or fraudulent conveyance. The *status quo* as to assets was maintained.

[41] When the substantial intrusion on a defendant from a *Mareva* order is kept in mind, there must be something more to support the order than can be found on the facts here. The absence of evidence that there is a risk of assets being dissipated or removed weighs heavily against the Plaintiff.

[42] There is a further factor against maintaining the *Mareva* order in this province. None of the Defendants are in British Columbia. Nor are any of their assets. The Plaintiff has obtained a *Mareva* order in Ontario. In the course of these applications, the Plaintiff repeatedly maintained its position that the Ontario order stands alone, meaning that it remains in place even if the *Mareva* order is removed in this Court. Most of the personal Defendants are in Ontario, and most of their assets are there. The Plaintiff has certificates of pending litigation in Ontario against properties of the Defendants. If the Plaintiff is deserving of *Mareva* protection anywhere in Canada, a point I do not address, it is in Ontario, not British Columbia.

[43] In my view, it would not be just or convenient to permit the *Mareva* order to stand. Accordingly, the Defendants' applications are allowed and the Plaintiff's application is dismissed.

[44] Costs can be spoken to.

"MACINTOSH J."