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BUT WHERE'S THE MONEY: BC COURT OF APPEAL ADDRESSES WHAT TO DO WHEN THERE IS NO EVIDENCE OF ASSETS TO RESTRAIN

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The Mareva injunction is a useful tool for victims of fraud. Ontario's Divisional Court has described it as "a vital arrow in the civil law's quiver to address serious fraud"¹. What happens, however, when there is no evidence of any significant assets in the defendant's hands for the injunction to restrain? That question was recently considered in [Wu v. Ma](#), where the British Columbia Court of Appeal provided useful guidance on what to do when the evidence of fraud is persuasive but the evidence of assets is not.

Background

In 2018, the appellant, Hong Fang Wu ("Wu"), sued the respondent, Zhiyong Ma ("Ma"), and his company, Superoptionforex Consulting Inc. ("SOF"), for damages flowing from the lost investment funds she had provided them. Wu alleged that Ma invested almost the entirety of her money into a single company which went bankrupt, ultimately losing all her funds (the "2018 Action"). Following a 15 day trial, Wu and SOF were found to have been negligent and to have breached the fiduciary duty they owed to Ma. Ma was awarded judgment in the amount of \$1,259,484.52 (the "Judgment").²

Following the Judgment, Ma's wife of 32 years, Ying Wang ("Wang"), filed for divorce. Wang and Ma quickly sold the property they jointly owned (the "Property"). Wang sought an unequal division of the family property, which Ma did not oppose. In response, Wu commenced a second action against Wang, Ma, and others, alleging that they conspired to effect fraudulent conveyances designed to frustrate her ability to collect on the Judgment (the "2022 Action").³

¹ 2092280 Ontario Inc v. Voralto Group Inc, 2018 ONSC 2305, [para. 28](#).

² [Wu v. Ma](#), 2024 BCCA 196 ("COA Decision"), [para. 4](#).

³ COA Decision, [paras. 5-6](#).

The Motion to Set Aside the Injunction

Wu sought and obtained a Mareva injunction without notice. In granting the injunction, the motion judge found that there was a “strong prima facie case that Ma, who [was] already a judgement debtor, [had] taken steps to dispose of real property and turn it into liquid assets before the judgement against [him] could be registered”. There was also a “strong prima facie case of an intention to transfer those assets to his wife, Wang”.⁴

Wu amended her claim after the Mareva was granted and subsequent evidence established that the purchasers of the Property were arm’s-length third parties. The amended claim focused on the fact that almost immediately after the Judgment was granted, Wang and Ma drew down their joint line of credit to its limit and withdrew hundreds of thousands of dollars from their joint and individual accounts.⁵

With respect to the claim against Ma, the motion judge concluded that there was a strong prima facie case that Ma had “attempted to put exigible assets out of [Wu’s] reach”. This was informed by evidence that Ma had “hastily divested himself of assets shortly after the decision in the original action [was made] and a lack of evidence that he received valuable consideration [in exchange]”.⁶ Notwithstanding these findings, the injunction was set aside because there “no evidence of any significant assets still in Ma’s hands for the injunction to restrain”. This “unfortunate fact” was, according to the motion judge, determinative of the issue before him.⁷

The Court of Appeal’s Decision

Wu appealed the decision with respect to Ma. Her main submission was that the motion judge erred in failing to appreciate that “it was open to him to draw an adverse inference against Ma for failing to provide any, or sufficient, evidence to credibly explain what he had done with the significant sums of cash he had withdrawn from various bank accounts in the month or two after the Judgment was awarded”.⁸

In describing the test for obtaining a Mareva injunction in BC, the Court of Appeal noted that, among other things, the “applicant must establish that the respondent has assets the injunction would cover or pertain to”.⁹ This same requirement exists under Ontario law, where an applicant must be able to show that there are grounds for believing that the respondent has assets in the jurisdiction.¹⁰ As the Court of Appeal explained, “it is antithetical to the core purpose of a Mareva injunction to seek such relief against a

⁴ COA Decision, [para. 7](#).

⁵ COA Decision, [para. 8](#).

⁶ COA Decision, [para. 16](#).

⁷ COA Decision, [para. 17](#).

⁸ COA Decision, [para. 19](#).

⁹ COA Decision, [para. 22](#).

¹⁰ *Meintjies v. John Doe*, 2024 ONSC 842, [para. 7](#).

defendant who has no assets. In such circumstances, there is nothing for the defendant to dissipate. There is no prospect of wrongful conduct that needs to be enjoined”.¹¹

Although Wu accepted that the burden of proof rested with her, she contended that she did “everything she could, through bank records and the examination of Ma, to establish that he had withdrawn and held significant sums of cash from his bank accounts”. According to Wu, “it then fell to Ma to explain with cogent and credible evidence what happened to that money”.¹²

The Court of Appeal acknowledged that “the failure of a defendant to respond with exculpatory evidence to evidence proffered by a plaintiff may have consequences”.¹³ This was one such case as, according to the Court, Wu “was able to establish that Ma had largely emptied his various bank accounts in a reasonably short time after the Judgment was awarded”. Wu “could do no more with the documents she had obtained” as only Ma “knew what he did with the cash he had withdrawn from his bank accounts and he gave evidence about that issue”. In the circumstances, the motion judge should have taken “into account the relative ability of each party to produce evidence”.¹⁴

In the end, the Court of Appeal held that the because of Wu’s ability to explain what had happened to the monies Ma withdrew from his accounts and the improbability of Ma’s account regarding those withdrawals, the motion judge erred by “not recognizing that it was open to him to draw an adverse inference against Ma”.¹⁵ As the balance of convenience clearly favoured Wu, the Court of Appeal restored the injunction.¹⁶

Key Takeaways

This decision offers welcome news for victims of fraud who would otherwise be prevented from successfully seeking injunctive relief. Although the burden to make out the requirements of the Mareva test continues to lie with the moving party, in the absence of sufficient evidence from a respondent, it is now open to the court to draw an adverse inference. This is particularly valuable in cases of fraud, where there often exists an “informational inequality” between the parties in relation to the transfer and disposition of funds.¹⁷

In this case, Ma’s evidence of what he said he did with the significant sums of cash he had removed from his various bank accounts in the month or two after the Judgment was awarded was seriously lacking. During his examination in aid of execution, Ma gave

¹¹ COA Decision, [para. 25](#).

¹² COA Decision, [para. 31](#).

¹³ COA Decision, [para. 34](#).

¹⁴ COA Decision, [para. 49](#).

¹⁵ COA Decision, [para. 50](#).

¹⁶ *Ibid.*

¹⁷ COA Decision, [para. 31](#).

evidence that he had borrowed various sums of money from at least four different individuals several years earlier. Curiously, he could not recall the names of the persons he had borrowed money from or the amounts of the loans. Despite this, he claimed that each individual appeared at his door step following the sale of the Property and demanded repayment. Unsurprisingly, no record existed of any such payments.¹⁸ Although the motion judge concluded that these “unexplained transfers to unknown parties” constituted “a badge of fraud” and “indicate[d] a strong prima facie case that Ma had attempted to put exigible assets out of Wu’s reach”, he set the injunction aside because there was no longer evidence of any significant assets in Ma’s hands.¹⁹

As these facts clearly show, once the assets have been disposed it is nearly impossible, in practical terms, for the victim of the fraud to establish what happened to them and where they went. Where that information is solely within the respondent’s knowledge (as is almost always the case), drawing an adverse inference that it has chosen not to respond because the evidence would not have been favourable to it means that victims of fraud who would not otherwise have been able to satisfy the Mareva test may now be able to secure injunctive relief. Although it remains to be seen how this adverse inference will be applied by future courts (in BC and beyond), for the time being it appears to have sharpened the “vital arrow in the civil law’s quiver”.

¹⁸ COA Decision, [paras. 27-28](#).

¹⁹ COA Decision, [para. 29](#).