IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Harder v. InCor Holdings Limited,*
2024 BCSC 2285

Date: 20241213
Docket: S237204
Registry: Vancouver

Between:

Lorne Harder, Springhill Investments Ltd. and Harder Investments Ltd.

Plaintiffs

And

InCor Holdings Limited, George Molyviatis, Jocelyn Bennett, Pangaea Resources Limited, InCor Energy Minerals Limited, InCor LeadFX Limited Partnership, LeadFX Inc., InCor Holdings PLC and InCor Services Limited

Defendants

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiffs: P.J. Sullivan
P. Parihar

No other appearances

Place and Dates of Hearing: Vancouver, B.C.
October 24-25, 2024

Place and Date of Judgment: Vancouver, B.C.
December 13, 2024

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I. Introduction

[1] This is an application for judgment by summary trial to enforce payments on two loans that are among several other claims advanced in a notice of civil claim. This application also seeks a declaration that certain of the defendants are in contempt of court for failing to comply with a disclosure order made in connection with a *Mareva* injunction granted by Justice Milman against those defendants. The plaintiff also now seek to expand that *Mareva* injunction and some procedural orders that will apply to the remainder of the claim after this summary trial application.

[2] The plaintiff, Lorne Harder, though his companies Springhill Investments Ltd. and Harder Investments Ltd., invested some $7 million in companies owned by or associated with the defendants Jocelyn Bennett and George Molyviatis. He has also loaned some $11.35 million to those companies in multiple transactions. In the notice of civil claim, he and his investment companies seek to recover both the investments and the loans with promised interest. The claims are founded in fraudulent misrepresentation, negligence, unlawful means conspiracy, breach of contract, and unjust enrichment. On this application, the plaintiffs seek judgment by summary trial on two of the loans only and intend to pursue the balance of the claims in a trial or through future applications.

[3] When the plaintiffs filed the notice of civil claim, they also applied for the *Mareva* injunction and disclosure orders. Justice Milman granted the injunction but on terms more limited than those sought by the plaintiffs. He found there was a strong *prima facie* claim for those parts of the action related to the loans but not for claims relating to the investments. He ordered that certain securities or the proceeds of the sale of those securities owned directly or indirectly by the defendants InCor Holdings Ltd., Pangaea Resources Ltd., Ms. Bennett, and Mr. Molyviatis be frozen. In his reasons for judgment, he found that the interests of justice support granting an injunction to freeze “at a minimum” $8,858,050 of InCor Holdings’ assets and $2,050,000 of Pangaea’s assets in the event InCor’s assets prove to be insufficient to satisfy a judgment: *Harder v. InCor Holdings Limited*, 2023 BCSC 2021 at para. 70. He also found that Ms. Bennett’s and Mr. Molyviatis’ interests in those securities

should be frozen “for the time being” due to concerns about InCor and Pangaea potentially dissipating their assets under Ms. Bennett and Mr. Molyviatis’ direction as the directing minds of those companies.

[4] Justice Milman also ordered that each of InCor Holdings, Pangaea Resources, Ms. Bennett, and Mr. Molyviatis produce an affidavit listing their assets so the plaintiffs would know what was frozen by the terms of the injunction. He said once a defendant complies with the disclosure order, it would be open to that defendant to apply to vary his freeze order.

[5] The disclosure order was stayed on December 22, 2022 pending an appeal but that stay came to an end when the appeal was dismissed on August 7, 2024: *Pangaea Resources Limited v. Harder*, 2024 BCCA 286. To date, only InCor Holdings has complied with the disclosure order. The plaintiffs now seek a finding that the three non-complying defendants be held in contempt and penalized with an order that they post security for good behavior in an amount equal to what Milman J. found should be frozen by the *Mareva* injunction. The defendants seek an expanded *Mareva* injunction to secure that amount pending the posting of security.

[6] The defendants did not respond to these applications or attend the hearing. They retained counsel and responded to the *Mareva* injunction application, including with their own evidence that addressed the merits of the plaintiffs’ claims. However, their counsel withdrew in September 2024 and neither Mr. Harder nor his counsel has heard from the defendants since. The notice of application for summary trial was served on the defendants at the email addresses given for service and, as I describe later, they acknowledged personal service of the contempt application. I am satisfied the defendants have been duly served, are aware of these proceedings, and have elected not to attend or otherwise participate. However, since I have the benefit of the evidence they led in response to the *Mareva* injunction application, I will consider that evidence in deciding the issues before me.

II. Background

[7] In February 2019, Mr. Harder retired from more than 30 years in the insurance industry. He sold his major shareholdings in a large regional brokerage and pursued various investments to further build his retirement funds and an inheritance for his children. He is the sole shareholder, officer, and director of the plaintiffs Springhill Investments Ltd. and Harder Investments Ltd. through which he has made these investments.

[8] The defendant, InCor Holdings Limited was incorporated in England and Wales by Ms. Bennett and Mr. Molyviatis who control it. It is a holding company which owns shares and invests in subsidiary companies, primarily in the business of mineral and gold mining.

[9] The defendant, Pangaea Resources Limited, is a company also wholly-owned or controlled by Ms. Bennett and Mr. Molyviatis, or at least was at the material times.

[10] The individual defendants, Mr. Molyviatis and Ms. Bennett, are business partners and directors/shareholders of InCor Holdings and Pangaea Resources. They are based oversees, primarily it seems in Greece. They are involved in high-stakes investment in the mining industry. Ms. Bennett manages investment funds for high net worth clients and for InCor Holdings.

[11] In May 2019, Mr. Harder met Ms. Bennett and Mr. Molyviatis. At the time both Mr. Harder and Mr. Molyviatis were investors in a company called Cascadero Copper Corporation. Mr. Harder quickly developed a rapport with Mr. Molyviatis and Ms. Bennett, and came to trust them. They represented themselves to Mr. Harder as having significant experience in public markets and the expansion of mining companies. Mr. Harder understood they were on the boards of the various companies that he would later loan money to or invest in. He understood Mr. Molyviatis was an experienced and educated international financier with over 25 years of investment and banking project investment and financing experience. Mr. Molyviatis and Ms. Bennett represented themselves to Mr. Harder as a very high

net-worth individuals. While Mr. Harder's introduction to the defendants came through Mr. Molyviatis, Ms. Bennett would come to be his main contact with them.

[12] Between October 2019 and March 2020, Mr. Harder invested some $7 million in companies controlled by or associated with Ms. Bennett and Mr. Molyviatis. Those investments are not the subject of this summary trial application but they are part of the notice of civil claim.

[13] Mr. Harder also loaned some $11.35 million to companies controlled by or associated with Ms. Bennett and Mr. Molyviatis, including InCor Holdings and, at least indirectly, Pangaea Resources. The first of these loans was in May 2021 for $6,308,050 and the second was in June 2021 for $4 million. Both loans were made to InCor Holdings but the second was for the benefit of Pangaea Resources. Ms. Bennett, who was a director and shareholder of Pangaea, committed that company to providing security for and repaying the second loan. Both loans are the subject of this summary trial application and I will discuss them in detail later. The plaintiffs made further loans totalling $1.05 million to a company called LeadFX, which is also associated with Ms. Bennett and Mr. Molyviatis. The LeadFX loans are not the subject of this summary trial application but they are included within the broader action.

III. The Summary Trial Application

A. Suitability for Summary Trial

[14] I will first address the suitability of a summary trial for the claims respecting the two loans.

[15] Judgment may be granted by way of summary trial, either generally or on one or more issues, unless the court is unable on the whole of the evidence before it to find all the facts necessary to decide the issue(s) or if it would be unjust to do so: Rule 9-7(15). Where, as here, judgment on part of a claim is sought by summary trial, the court must also consider whether severance of that issue is appropriate having regard to the objective of securing the just, speedy, and inexpensive

resolution of every proceeding and factors such as duplication of proceedings and the risk of inconsistent findings of fact or multiple appeals: *White v. Glossop*, 2019 BCSC 1044 at para. 88; *Hryniak v. Mauldin*, 2014 SCC 7 at para. 60.

[16] Where there are conflicts in the affidavits, the court cannot decide the issue summarily by simply preferring one version of the evidence over the other. However, the court may resolve such conflicts by referring to other evidence such as documents, discovery testimony, or undisputed facts: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 211 (C.A.), *Cory v. Cory*, 2016 BCCA 409 at para. 10; *Newhouse v. Garland*, 2022 BCCA 276 at para. 87. In *Inspiration Management*, Chief Justice McEachern listed a number of factors that may be relevant to consider when deciding if a summary trial proceeding is suitable. Almost all of those factors relate to the proportionality principle that is now entrenched in Rule 1-3(2) as a central objective of the *Supreme Court Civil Rules*.

[17] As will be seen, the parties disagree over the terms of the loans. The plaintiffs say both were short-terms loans that are now overdue. They also say Pangaea was a party to at least the second loan and potentially the first. The defendants, in the material filed in response to the *Mareva* injunction, say the first loan was an open-ended credit facility that is not yet due despite the wording of the promissory note that supports it. They acknowledge the second loan is due but deny Pangaea is a party to it.

[18] To a large extent, these conflicts can be resolved by reference to other evidence as I will describe in these reasons. However, insofar as some material conflicts might remain, I find the circumstances of this case call for determination of the loan disputes by summary trial for at least two related reasons.

[19] First, the defendants have elected not to respond to the summary trial application or appear at the hearing. It is settled law that a party who is served with a summary trial application must take every reasonable step to put themselves in the best position possible to respond to that application on its merits: *Everest Canadian*

Properties Ltd. v. Mallmann, 2008 BCCA 275 at para. 34. That obviously begins with responding to the application and attending the hearing. A party who has chosen not to respond, even though they have filed a response to civil claim and filed affidavits in other applications, has given up the opportunity to assert the summary procedure is unsuitable for the final determination of the issue. While the court always has the final say on suitability regardless of the parties' preference, I find the fact that the defendants have not responded to the application weighs heavily in favour of a summary trial.

[20] Second, the fact the defendants have not responded suggests there is reason for the plaintiffs to be concerned that a final judgment on some or all the issues could be difficult to enforce or collect upon, especially as time passes. The plaintiffs are in a difficult position in that there is a real risk (noted by Milman J. and the Court of Appeal) that the defendants may be dissipating assets. A delay in obtaining judgment even on just part of the claim might prejudice the plaintiffs' ability to collect on any successful judgment. That is why they now seek to judgment by summary trial only the debt claim while continuing to build an evidentiary record that might support the other claims in future proceedings. They fear waiting until they are in a position to try all their claims at once puts them at risk of a dry judgment. In these circumstances, a speedy and cost-effective resolution of the issues that can now be determined is of paramount importance to the plaintiffs.

[21] There is some concern in this case about litigating in slices given that substantive issues will remain open for determination even after this summary trial. However, the facts respecting the two loans are relatively discrete and the transactions are sufficiently different in nature to the investments that I am confident the risk of inconsistent findings is low. Further, the risk of multiple appeals also appears low given the defendants' failure to respond to the summary trial application. Ordinarily, it may be preferable to leave all matters to trial if a trial is going to be necessary anyway: *Hryniak* at para. 60. However, I find this consideration should not overwhelm the analysis in the present case given the

plaintiffs' legitimate concern for securing judgment on some aspects of the claim sooner rather than later to best protect their prospects for recovery.

[22] Having regard to all these circumstances, I am satisfied that the plaintiffs' claim for the loan monies is suitable for a summary trial and it is in the interests of justice to decide those issues on a summary trial application.

B. The May 2021 Cascadero Loan

[23] In May 2021, Mr. Harder, through Springhill, loaned InCor Holdings $6,538,000 to finance the purchase of shares in Cascadero Copper (the "Cascadero Loan"). Ms. Bennett and Mr. Molyviatis represented to Mr. Harder that the loan would be secured by shares that InCor Holdings owned or would acquire in four other companies. The value of this security was said to be approximately $8.5 million. They also represented they were seeking a short-term loan and would pay "interest" to Mr. Harder in the form of 500,000 shares of InCor Holdings with a value of €0.10 per share.

[24] These terms were largely set out in an email dated May 17, 2021 from Ms. Bennett to Mr. Harder which reads in part:

> George [Molyviatis] and I would once again like to thank you for your continued support of lnCor and its projects. I hope that it is obvious that we are both very pleased that you have taken such a significant role in the Company.
>
> In order to facilitate the lending facility you have discussed with George, I would like to suggest that we issue a promissory note in the form attached which will encompass and supersede the promissory note issued to you on 4 March 2021.
>
> lnCor will engage Kyler separately to draft a letter of undertaking relative to the security for the loan as follows:
>
> - the GWR shares to be purchased,
> - the Cascadero Copper listed shares (which lnCor holds in DRS)
> - 280 CCM shares;
> - 10 million shares of Search Minerals (which lnCor also holds in DRS).
>
> Estimated value of security to be offered: C$8.5million
>
> Please let me know if you have any comments or questions.

[25] Mr. Harder responded that he was pleased to be participating with InCor and to be working with Ms. Bennett and Mr. Molyviatis. He also said he was "pleased with the security." Ms. Bennett then replied:

> Are you also happy with using a promissory note as the primary instrument as I have proposed? With an additional security document to be put in place once the transactions have been completed? I propose a general undertaking that will only be released upon full repayment.

[26] Mr. Harder said he was happy with that arrangement. Ms. Bennett then emailed an execution copy of the promissory note along with InCor Holdings' instructions for wiring the loan money. The promissory note was signed by Ms. Bennett on behalf of InCor Holdings. Mr. Harder, through Springhill, advanced $3 million of the loan funds by wire transfer to a company called InCor Services Ltd., as Ms. Bennett directed. He advanced the balance of the loan monies to a number of different entities to acquire shares in Cascadero Copper on InCor Holdings' behalf, plus a further advance of $780,000 to InCor Holdings to allow it to participate in an anticipated Cascadero rights issuance. In total, Mr. Harder advanced $6,538,000 under this loan arrangement, almost $300,000 more than is stated in the promissory note.

[27] The promissory note states expressly that InCor Holdings promises to pay Springhill the principal sum of $6,308,050 on or before 31 December, 2021. Thus, on the face of note, this was to be a short-term loan and InCor Holdings committed itself to repaying the loan before the end of the year. The note also states that Springhill will receive "500,000 ordinary shares of lnCor Holdings Limited with a par value of Eur 0.10 per share as full payment of interest on the Principal."

[28] At the *Mareva* injunction hearing in November 2023, the defendants claimed the promissory note did not reflect the agreement struck between the parties. Ms. Bennett deposed that, despite the note's wording, the agreement she made with Mr. Harder did not require payment before December 31, 2021 or the interest as stipulated in the note. Rather, she said they agreed to an open-ended credit facility with a maximum available credit of $6,308,050, part of which was drawn down in

May 2021 with more to be drawn over time. She said the advances would only be repayable from available surplus cash as and when that cash became available to InCor Holdings.

[29] In his reasons for judgment on the *Mareva* injunction, Milman J. commented at para. 62 that this position is difficult to reconcile with the fact that Ms. Bennett herself drafted the promissory note. He also observed that "both parties were sloppy with the documentation of these loans". The plaintiffs concede this is correct but submit the promissory note is clearly the documentation of the agreement.

[30] Although the defendants did not respond to or attend this summary trial application, there is some support for their position that the promissory note does not reflect the true agreement. For example, Ms. Bennett's May 17, 2021 email to Mr. Harder proposing the loan refers the loan as a "credit facility". Further, Mr. Harder did not advance some of the loan monies until after the December 31, 2021 deadline for repayment stated in the promissory note. As Milman J. observed at para. 63, this latter point "undermines the plaintiffs' suggestion that the entire advance was supposed to have been repaid in full by December 31, 2021."

[31] However, I attribute this to the "sloppy" documentation. By Ms. Bennett's own design, the promissory note governs the loan. The note clearly makes this a short-term loan with security. Permitting the December 31, 2021 deadline to pass or even advancing part of the funds after that date does not change the fundamental character of this being a short-term loan rather than an open-ended credit facility. While the December 31, 2021 deadline was not adhered to, I find that the loan became repayable on demand after December 31, 2021 on reasonable notice: *Glacier Creek Development Corporation v. Pemberton Benchlands Housing Corporation*, 2007 BCSC 286; *Marsuba Holdings Ltd. (Re) (Trustee of)*, 1998 CanLII 6586 (B.C.S.C.). As this was clearly intended as a short-term loan, a reasonable period of notice could be quite brief.

[32] InCor Holdings also took the position in the *Mareva* injunction application that it only had to repay the loan once its investment in Cascadero provided a sufficient

return to allow repayment. Apart from that not being reflected in the correspondence or the promissory note, this does not make sense. If the plaintiffs' right to recover the principal depended on how Cascadero shares performed, Mr. Harder could simply have invested in Cascadero himself. Moreover, as held in *Glacier Creek* and *Marsuba Holdings,* an expectation that a loan will only become due when the borrower becomes profitable is not an enforceable term such that loan agreements that adopt such language become repayable on demand.

[33] I therefore find that the Cascadero Loan was a short-term loan with an originally prescribed deadline for repayment of December 31, 2021. That deadline was extended by the parties' conduct but this did not change the fundamental character of the short-term loan. Mr. Harder, on behalf of Springhill, has made numerous demands for repayment and InCor Holdings has breached the agreement by failing to repay within a reasonable period after the demands were made. InCor Holdings also breached the agreement by failing to provide the promised security and interest.

[34] I find the plaintiffs are entitled to judgment against InCor Holdings for the Cascadero Loan with the "interest" to be assessed plus interest under the *Court Order Interest Act*.

C. The June 2021 Pangaea Loan

1. The Loan Agreement

[35] In June 2021, Ms. Bennett approached Mr. Harder for a second loan to assist a Malaysian gold exploration company called Besra Gold Inc. transition to a public company on the Australian Securities Exchange (ASX). Ms. Bennett proposed the loan in a June 21, 2021 email to Mr. Harder that was copied to Mr. Molyviatis. She said InCor Holdings and Pangaea Resources, which were both owned by Ms. Bennett and Mr. Molyviatis, had invested millions of dollars in Besra Gold and they were trying to take that company public on the ASX. However, they had run into difficulties with another investor who was owed $7 million by Besra and insisted on a $4 million payment before consenting to Besra's initial public offering (IPO).

Ms. Bennett asked Mr. Harder if he would be willing to lend InCor and Pangaea the $4 million on a short-term basis. She said they had commitments from investors to buy up Pangaea's interests in Besra once there was conditional approval from the ASX. The conditional approval was expected to generate enough money to repay not only the immediate $4 million loan but also the Cascadero Loan. She also stated that Pangaea would provide security to Mr. Harder for the loan in the form of assignments of payments that would come due under existing and future agreements to buy Pangaea's Besra shares. With that context, Ms. Bennett made the following request of Mr. Harder:

> Thus, we would like to ask if you would consider making a short-term loan of A$4million for a maximum of 3 months in order to get the Besra IPO closed; we expect the repayment term to be much shorter but want to err on the side of caution. We would like to suggest, if you are willing to do so, that you are paid a fee of 1 million Besra CDI's (IPO price is A$0.20).

[36] Ms. Bennett further explained the plan to repay Mr. Harder in her evidence given on the *Mareva* injunction application:

> As detailed in my email to Mr. Harder dated June 21, 2021, the repayment strategy for the June 2021 Note was that Pangaea would raise sufficient cash to repay the June 21 Note from realizing upon some of its shares after the closing of the Besra IPO.

[37] Mr. Harder agreed to loan the money and advanced the $4 million through Springhill (the "Pangaea Loan"). He said in doing so he relied on Ms. Bennett's representations that the loan was short term and that a promissory note would be finalized swiftly with security and interest. Ms. Bennett confirmed receipt of the $4 million loan advance in an email dated June 23, 2021 to which she attached a promissory note from InCor Holdings dated June 21, 2021 promising to repay the $4 million by December 31, 2021 (not the three months represented in her emails). The promissory note provided for "interest" in the amount of one million ordinary shares of Besra Gold with a par value of AU$0.20. Ms. Bennett's email also referred to the promised security:

> We are also preparing the promissory note/loan agreement between Incor Holdings and Pangaea which will grant the specific security as we discussed over the assets of Pangaea.

[38] I observe that Ms. Bennett's June 21, 2022 email states that InCor and Pangaea hold convertible *debentures* over Besra but the promissory note committed InCor Holdings to pay "interest" in the form of Besra *shares*. In the Court of Appeal's reasons for judgment on the appeal of Milman J.'s order, Newbury J.A. noted this apparent inconsistency at para. 10 but suggested it would be resolved at trial as necessary. Since the defendants have transferred neither shares in nor debentures over Besra to the plaintiffs, it is not necessary, at least at this stage, to resolve that question. InCor Holdings has breached the loan agreement by failing to pay the "interest" whether it be in the form of shares or debentures. However, if it were necessary to decide, I would find that the commitment was to deliver shares with the promised value rather than debentures since that is the commitment found in the promissory note.

2. Failure to Repay and Acknowledgment of the Debt

[39] The Besra Gold IPO completed in October 2021 and apparently raised approximately $10 million. However, the defendants did not repay any amount of the loan or provide the promised security or interest before the December 31, 2021 deadline. They later repaid $2 million but the balance, interest, and security remain outstanding.

[40] Mr. Harder pressed Ms. Bennett and Mr. Molyviatis for repayment and in August 2021, Mr. Molyviatis assured Mr. Harder that things were progressing positively with Besra's IPO. On July 27, 2022, Ms. Bennett and Mr. Molyviatis caused InCor repay $1 million to Springhill and another $1 million on October 12, 2022. The evidence does not specify which loan these were to repay, although from the chain of correspondence and the litigation history it is evident that the defendants considered this to be a repayment of the Pangaea Loan. That was also Justice Milman's understanding: *Harder,* para. 59. Throughout 2022 and 2023, Ms. Bennett and Mr. Molyviatis repeatedly suggested to Mr. Harder that repayment in full was imminent but, apart from these two payments, nothing ever materialized. Justice Milman found the defendants' promises of imminent repayment were

repeatedly proven not to be credible. I agree and note that there is no additional evidence before me that might lead to a different conclusion.

[41] In April 2023, Pangaea started a sale of its shares in Besra. Based on Mr. Harder's research of insider reports filed by Ms. Bennett (who was a director of Besra until August 2023), Pangaea sold 23,776,598 shares in Besra in 35 different transactions between April and October 2023 generating $4,629,341.57 for Pangaea. Despite the promise to repay the Pangaea Loan from the proceeds of sale of Pangaea's Besra shares, none of this money was paid to Mr. Harder.

[42] Around October 11, 2023, Mr. Harder messaged Ms. Bennett and Mr. Molyviatis about the sale of Pangaea's shares in Besra and why the loan – now almost two years overdue – had not ben repaid from those proceeds. He wrote:

> According to the insider reports that you have filed with Besra, you have now sold about $2,000,000 worth of Besra shares. I trust that you will now send me the proceeds from selling the shares; Part of the funds that I lent were for Pangaea to purchase the IPO of Besra shares; the funds were being lent on a very short term basis which has long past. Please deposit the funds into my Springhill account.

[43] Ms. Bennett responded the following day confirming that the Pangaea was selling the shares to repay Mr. Harder but the share price was not where they hoped it would be so they were not yet in a position to repay:

> Hello Lorne - you are quite correct that we have been liquidating the Besra position as promised in order to effect repayment to you. It's taken some time as the price is not where we had hoped it would. That's said we are continuing to sell. We are repatriating funds from the broker and then will pay them over to Incor so we can make your payment. We will keep you posted on progress. With warm regards.

[44] Mr. Harder has had no correspondence with Ms. Bennett or Mr. Molyviatis since this exchange. Apart from the $2 million repaid in 2022, the principal and interest remain outstanding and, like the Cascadero Loan, the promised security for the Pangaea Loan was never provided.

[45] In an affidavit filed in response to the *Mareva* injunction application, Ms. Bennett acknowledged the Pangaea Loan is due and said InCor Holdings is

attempting to repay it. However, she said Besra's share price has not done as well as expected and InCor Holdings was waiting for the share price to gradually improve so that its Besra shares could be liquidated at a price that allows for repayment. She claimed that "[e]very penny increase in the price of Besra's shares equates to a CAD$450,000 increase in the value of Pangaea's Besra holdings."

[46] I find that the Pangaea Loan was a "short-term" loan and that payment was due no later than December 31, 2021. Ms. Bennett on behalf of InCor Holdings has acknowledged that the debt is owing. The matter is suitable for summary trial disposition and I would grant judgment against InCor for this debt with the "interest" to be assessed plus interest under the *Court Order Interest Act*.

D. Pangaea's Liability

[47] Pangaea is not named in the promissory note for the Pangaea Loan. However, the plaintiffs argue it is nevertheless a party to the loan agreement and is liable for the loan amount. Alternatively, the plaintiffs argue Pangaea was unjustly enriched at Mr. Harder's expense by receiving the benefits of the loan. The plaintiffs also argue that Pangaea is liable, along with InCor Holdings, for the Cascadero Loan because of Ms. Bennett's promise to repay that loan, as well as the Pangaea Loan, from the proceeds of the sale of Pangaea's shares in Besra.

1. The Pangaea Loan

[48] At the material times, Ms. Bennett and Mr. Molyviatis were the majority owners of Pangaea and authorized to speak for it. Ms. Bennett is a director of Pangaea and twice deposed that she was authorized to make an affidavit on behalf of Pangaea. On an examination for discovery, she confirmed that she was the primary contact for Pangaea. She clearly spoke for it.

[49] The plaintiffs argue Ms. Bennett made statements and representations that bound Pangaea to the certain obligations under the Pangaea Loan, thus making it a party to it. Specifically, she pledged assets owned by Pangaea as security for the loan and outlined the repayment strategy that was dependent on Pangaea liquidating its shares in Besra to effect repayment to the plaintiffs.

[50] I agree with the plaintiffs and find that Pangaea was a party to the loan agreement. I find that Ms. Bennett made the commitments in her capacity as an authorized representative of Pangaea and it is difficult to conceive of how those commitments could be effected without Pangaea being a party to the loan agreement. Moreover, it was Pangaea that received the primary benefit of the loan in that the loan monies were used to take Besra public on the ASX and this in turn was expected to increase the value of Pangaea's shares in Besra.

[51] Moreover, in the injunction application Ms. Bennett deposed that one of the reasons the loan had not been repaid was the lower-than-anticipated price for Besra shares "prevented Pangaea from liquidating its shares as quickly as it would have liked to repay that [June 21, 2021 promissory] note" (my emphasis). This indicates that Pangaea itself wanted to (and purported to make efforts to) repay the plaintiffs.

[52] As mentioned, the parties were not careful in documenting their transactions and, as Newbury J.A. observed at para. 10, Ms. Bennett and Mr. Molyviatis apparently treated their various companies "almost interchangeably and without explanation." That is evident in the Pangaea Loan.

[53] In the *Mareva* injunction proceedings, including the appeal, the defendants maintained that Pangaea was not a party to the Pangaea Loan, although this was the initial intent. Ms. Bennett deposed as follows in those proceedings:

> Originally, the June 2021 Note was to be a loan provided by Mr. Harder, through one of his holding companies, to Pangaea directly. However, Mr. Harder required that the June 2021 Note be structured as a loan to InCor for his own tax planning purposes.

[54] Mr. Harder has not denied this in his evidence. However, I am not persuaded this fact changes Pangaea's status as a party to the overall loan agreement. Even if InCor Holdings is the party responsible under the promissory note, Pangaea was still obligated to give the promised security which bound it to the overall agreement. It failed to do so and as a result the plaintiffs have been unable to call on that security to satisfy the debt in the face of InCor Holdings' failure to pay. I also find that Pangaea was obligated under the terms of the agreement outlined by Ms. Bennett to

repay the plaintiffs, via InCor Holdings, from the proceeds of selling its shares in Besra. While it paid the plaintiffs $2 million evidently from the proceeds of sale of some of the shares, the balance and the interest was never remitted.

[55] Thus, I find that Pangaea was a party to the loan agreement. It breached that agreement by failing to post the promised security and by failing to repay the plaintiffs, via InCor Holdings, from the sale of its securities in Besra. I find it is jointly and severally liable for the outstanding loan plus the promised interest.

[56] Having concluded that Pangaea is a party to the Pangaea Loan agreement, it is not necessary to address the issue of unjust enrichment in the context of that loan.

2. The Cascadero Loan

[57] The plaintiffs also claim Pangaea is liable for the Cascadero Loan based on Ms. Bennett's representation that Pangaea's sale of its Besra shares was expected to raise enough money for InCor Holdings to repay both the Pangaea and Cascadero Loans. I am not persuaded by that argument. The agreement for the Cascadero Loan was concluded before the Pangaea Loan was proposed and most of the funds had been advanced by then. I view Ms. Bennett's representation as an inducement to persuade Mr. Harder to make the Pangaea Loan but I do not consider the statement to go so far as to make Pangaea a guarantor of or a party to the Cascadero Loan.

[58] Nor do I find that the principles of unjust enrichment assist the plaintiffs in imposing liability on Pangaea for the Cascadero Loan for the simple reason that Pangaea did not benefit from that loan. The evidence is the Cascadero Loan was used by InCor Holdings to acquire a greater interest in Cascadero. There is no evidence that Pangaea benefited from this.

[59] Thus, I find Pangaea is liable as a party to the Pangaea Loan but not for the Cascadero Loan.

3. The $2 Million Repayment

[60] As mentioned, the defendants repaid a total of $2 million to the plaintiffs in two separate payments of $1 million each on July 27, 2022 and October 12, 2022. Milman J. found (or perhaps assumed) these payments were made on the Pangaea loan. The plaintiffs argue the evidence does not specify which loan these payments applied to and, since Ms. Bennett represented that the sale of Pangaea's shares in Besra was expected to generate enough money to repay both loans, these payments could apply to either loan. Since the Cascadero Loan was made first, it may be inferred that it was also repaid (in part) first, leaving the full amount of the Pangaea Loan unpaid. The point is significant since it dictates whether Pangaea remains liable for the full Pangaea Loan or just $2 million of it plus interest.

[61] On my view of the evidence, I find that the parties understood the two $1 million payments were on the Pangaea Loan. I say that for several reasons. First, it appears that the $2 million came from the sale of Besra shares which was the agreed-upon scheme for repayment of the Pangaea Loan.

[62] Second, Ms. Bennett's representation that both loans could be repaid from those funds does not reach the level of a full commitment to repay both loans from that source.

[63] Third, the evidence of the parties' WeChat messages indicates that Mr. Harder understood these payments to be on the Pangaea Loan. In a message dated May 27, 2022, in which the expected payments were discussed, Mr. Harder stated: "This loan is over 6 months due." Here he refers to a single loan, not to both loans. Moreover, while both loans were overdue by May 27, 2022 according to their respective promissory notes, only the Pangaea Loan could be said to be "over 6 months due" by then. Both promissory notes set December 31, 2021 as the due date but in June 2021 the parties had discussed a three-month repayment period for the Pangaea Loan. A reference to a loan being more than six months overdue as of May 27, 2022 could only refer to the Pangaea Loan.

[64] I therefore conclude, as did Milman J., that the two $1 million repayments were on the Pangaea Loan.

E. Conclusion on the Summary Trial Application

[65] I find the claims for these two loans are suitable for summary trial. I grant judgment for the plaintiffs on the Cascadero Loan as against InCor Holdings in the amount of $6,308,050 plus additional damages to be assessed for the value of 500,000 shares of InCor Holdings being the “interest” on the Cascadero Loan. I grant judgment against InCor Holdings and Pangaea, jointly and severally, for $2 million plus the equivalent of AU$200,000, being the stated par value of one million shares of Besra Gold at AU$0.20. Interest under the *Court Order Interest Act* will be applicable to all amounts.

IV. Contempt Application

A. Background to the Contempt Application

[66] The plaintiffs seek a declaration that Ms. Bennett, Mr. Molyviatis, and Pangaea are in contempt of Milman J.’s order for failing or refusing to comply with the disclosure portion of the order. As a penalty for that alleged contempt, they seek an order that these defendants post security for good behavior in an amount equal to value of the assets that Milman J. ordered frozen by the *Mareva* injunction. They argue this sanction best promotes the primary objective of penalties for contempt which is to foster compliance with the court order.

[67] The *Mareva* injunction application was heard on November 7, 2023 and Milman J. granted a limited injunction with oral reasons on November 14, 2023. The order itself is dated December 22, 2023 as additional submissions were apparently made before the order was concluded. This is the order that is the subject of the contempt application.

[68] As a threshold for obtaining a *Mareva* injunction, an applicant must show it has a strong *prima facie* case for the relief it seeks in the action that underlies the proposed injunction: *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018

BCCA 420 at para. 18. Justice Milman was not persuaded that that plaintiffs met that standard for their claims to the investment funds but he was satisfied it was met it for the loans. He found at para. 70 that an injunction should be granted to freeze "at a minimum":

> a) [InCor Holdings'] assets, to the extent necessary to secure the amounts owing under the May 17, 2021 Promissory Note ($6,308,050, plus "interest" of approximately $50,000), the June 21, 2021 Promissory Note ($2 million, plus "interest" of approximately $50,000), and another loan of $450,000 made on December 13, 2021 (which is not the subject of this summary trial application), for a total of $8,858,050; and
>
> b) Pangaea's assets, to the extent necessary to secure the amount owing under the June 21, 2021 Promissory Note ($2 million, plus "interest" of approximately $50,000) for a total of $2,050,000, if [InCor Holdings'] assets prove insufficient for this purpose.

[69] Justice Milman also granted a concomitant disclosure order which is necessary to "breath life" into a *Mareva* injunction so the plaintiffs know what assets are to be frozen and where they might be found: *Sekisui House Kabushiki Kaisha (Sekisui House Co. Ltd.) v. Nagashima*, 1982 CanLII 800 (B.C.C.A.) at para. 10; *Vidcom Communications Ltd v. Rattan*, 2022 BCSC 1379 at para. 47. The disclosure order required each of InCor Holdings, Ms. Bennett, Mr. Molyviatis, and Pangaea to:

a) within ten days of service of the Order, provide the plaintiff's solicitor with a list, verified by affidavit, setting out all of their worldwide assets; and

b) provide copies of all their brokerage account statement and bank account statements from August 2021 to present, including the names of the brokerage, account numbers, and contact information for their account representative.

[70] On November 28, 2023, Ms. Bennett provided the required affidavit on behalf of InCor Holdings. However, Pangaea, Mr. Molyviatis, and Ms. Bennett did not provide the required disclosure. Rather, they appealed Milman J.'s order and were granted a stay of the disclosure order pending appeal. In his reasons for judgment on the stay application, Milman J. confirmed that if the appeal fails, "then the

Appellants' obligation to disclose their assets will come back into effect": *Harder v. InCor Holdings Limited,* 2023 BCSC 2279 at para. 28 ["*Harder* Stay Judgment").

[71] On June 3, 2024, the plaintiffs filed and served a summary trial application against InCor Holdings. The defendants applied for and were granted an adjournment of that application pending a jurisdictional challenge to the proceeding.

[72] The appeal was heard on June 14, 2024 and dismissed on August 7, 2024. That brought an end to the stay of the disclosure order. Two days later, on August 9, 2024, Justice Morley dismissed the jurisdictional challenges. To date, however, neither Ms. Bennett, Mr. Molyviatis, nor Pangaea has provided the required disclosure.

[73] The plaintiffs filed their application for contempt on September 11, 2024 with a hearing date of September 26, 2024. They served it on the defendants' lawyer at the time. Five days later, that lawyer filed a notice of intention to withdraw and provided email addresses for service for each defendant. On September 25, 2024, the day before the contempt application had been set down, counsel for the plaintiffs heard from another lawyer who was in the process of being retained by the defendants. The plaintiffs agreed to adjourn the contempt application on conditions I will describe later.

[74] By October 3, 2024, counsel for the plaintiffs learned that the new lawyer would not be retained and the contempt hearing was then reset for hearing on October 8, 2024. The matter came before Justice Walker on that date who ordered that Ms. Bennett, Mr. Molyviatis, and Pangaea provide the plaintiffs with an updated list of assets verified by affidavit and each of the defendants provide the plaintiffs with a list of documents by October 18, 2024. Justice Walker otherwise adjourned the contempt proceedings to October 24 and 25, 2024 which is when the application came before me. The defendants did not appear at the hearing before Walker J.

[75] On October 9, 2024, counsel for the plaintiffs served the Walker J. disclosure order on the defendants at the email addresses given for delivery. On or about

October 16, 2024, counsel for the plaintiffs reminded the defendants of the deadline to comply with the Walker J. disclosure order but, as of the hearing of this application, they have not done so. While the defendants are in breach of the Walker J. disclosure order, only the Milman J. disclosure order is the subject of the current contempt application.

B. Legal Principles for Contempt

[76] The court's power to find a party in contempt is part of the its inherent jurisdiction to uphold its dignity and process: *Workers' Compensation Board of British Columbia v. Skylite Building Maintenance Ltd.,* 2019 BCSC 231. A court order must be obeyed unless and until it is set aside or varied. A willful or deliberate refusal to comply with a court order strikes at the heart of the rule of law: *Carey v. Laiken*, 2015 SCC 17 para. 30; *Larkin v. Glase*, 2009 BCCA 321 at para. 7.

[77] The *Supreme Court Civil Rules* and the court's inherent jurisdiction permit the court to control its process and to sanction non-compliance with its orders to ensure that the rule of law is not undermined: *Great Canadian Railtour Company Ltd. v. Teamsters Union, Local 31*, 2012 BCSC 632 at para. 9. Those affected by a court order must do all that they can to carry out its terms: *Glazer v. Union Contractors Ltd. and Thornton*, 1960 CanLII 306 (B.C.C.A.).

[78] Where a corporation is bound by a court order, a duty is imposed on its directors to do everything that is reasonable to ensure the corporation's compliance with the order: *Axion Ventures Inc. v. Bonner*, 2023 BCSC 213 at para. 17. Rule 22-8(2) of the *Supreme Court Civil Rules* enables a court to find contempt against a director or officer personally if a corporation wilfully disobeys a court order against the corporation: *Skylite* at para. 119.

[79] The actions and intentions of a director or officer, as a directing mind of a corporation, may be attributed to the will of the corporation in determining whether it had the required intention to commit contemptuous acts. The actions must have been taken within the field of operation assigned to the director or officer not totally

in fraud of the corporation; and by design or result partly for the benefit of the company: *Skylite* at para. 119-120.

[80] Civil contempt has three elements, each of which must be established beyond a reasonable doubt:

a) The order alleged to have been breached must state clearly and unequivocally what should and should not be done;

b) The party alleged to be in breach of the order must have had actual knowledge of the order;

c) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do what the order compels.

C. Application to this Case

1. Clear and Unequivocal Order

[81] Justice Milman's disclosure order is clear and unequivocal. Pangaea, Ms. Bennett, and Mr. Molyviatis were each obligated to provide an affidavit listing their assets both in and outside of British Columbia, together with brokerage and bank account statements. The fact that Ms. Bennett provided that disclosure on behalf of InCor Holdings shows she understood the terms of the order and this further supports a finding that the order is clear and unequivocal. I am satisfied the first element of contempt is proven beyond a reasonable doubt.

2. Actual knowledge of the Order

[82] Ms. Bennett, Mr. Molyviatis, and Pangaea have knowledge of the order. Knowledge can be presumed when the order is entered into by consent or otherwise settled in court by the parties: *Skylite* at para. 106. Justice Milman gave his reasons for judgment orally in court and the form of his order was signed by the defendants' counsel. The defendants applied for a stay of that order and appealed it to the Court of Appeal. They had to know of the order to give their counsel instructions to take these steps. Further, Ms. Bennett swore affidavit on November 22, 2023 in which

she quotes from the order in the text of her affidavit. As mentioned, she also caused InCor Holdings to comply with the disclosure provisions of the order. This is overwhelming evidence that she knew and understood the terms of the order.

[83] Additionally, during examinations for discovery on September 16 and 20, 2024, counsel for the plaintiffs expressly reminded each of Ms. Bennett and Mr. Molyviatis of the order, of the plaintiffs' position that they were in contempt of that order, and of these contempt proceedings. Both Ms. Bennett and Mr. Molyviatis acknowledged they were aware of the contempt proceedings. Ms. Bennett suggested in response that the disclosure order was stayed because of the appal but counsel made it clear on the record of the discovery that the stay was lifted as a result of the Court of Appeal dismissing the appeal. Ms. Bennet confirmed she knew that the order was made against her and Pangaea and that it required them to produce a list of assets. Mr. Molyviatis said he did not agree with what counsel told him and asserted that he was being bullied. However, counsel's statement on the record of the plaintiffs' position is unambiguous.

[84] Further, on September 25, 2024, the day before the originally-scheduled contempt hearing, counsel for the plaintiffs was contacted by a senior and experienced Vancouver litigation lawyer with a national law firm who said he was in the process of being retained by the defendants. At that lawyer's request, the plaintiffs agreed to adjourn the contempt application while the lawyer sought to finalize the retainer but only on the following conditions which were set out in an email to the lawyer:

> 1. You confirm which defendants you would be engaged on behalf of by Friday September 27, 2024 at 1PM PST;
>
> 2. You confirm, by 8AM PST tomorrow morning (September 26), that you have provided to the Defendants (1) a copy of Justice Milman's order dated December 22nd 2023; (2) the reasons for judgment of the Court of Appeal (indexed at 2024 BCCA 286) and the order arising from that decision, (all of which are attached to his e-mail), by October 1, 2024;
>
> 3. You or the Defendants confirm they are agreeable to the enclosed order, which we would present to the court tomorrow morning.

[85] The recital in the enclosed form of order stated that the defendants confirm they were personally served with the Notice of Application dated September 11, 2024 (the contempt application). The lawyer responded by email that evening as follows:

> We are advised that these terms are agreeable to the injunction respondents. I will be on a plane tomorrow morning but my partner … can attend to matters if needed.

[86] The lawyer's partner confirmed by email on September 26, 2024:

> …recognizing we are in the process of being retained, our office has provided the documents to the two individual defendants and to the individuals we are advised are authorized to receive the documents on behalf of the corporate defendants.

[87] The adjournment order was granted by Justice Baker with the recital as proposed. On that basis, I am satisfied the defendants have acknowledged personal service of the contempt application. At a minimum, and in light of all I have just outlined, I am satisfied the defendants have "reasonable notice of the contempt application and of the material to be used in support thereof" which is sufficient notice: *LLS America LLC (Trustee of) v. Dill,* 2018 BCSC 2316 at paras. 52-56.

[88] I find that the plaintiffs have proven beyond a reasonable doubt that Ms. Bennett and Mr. Molyviatis, both personally and on behalf of Pangaea, each had actual knowledge of the order and what it required.

3. Intentional Failure to do what the Order Compels

[89] The third element of contempt requires proof beyond a reasonable doubt that the alleged contemnor deliberately failed or refused to carry out the act that the order required of that person or that the person intended to do the act that is prohibited by the order. It is not necessary to prove the contemnor intended to disobey the order itself: *Carey* at para. 38. Intention may be inferred from the circumstances of a given case: *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316.

[90] Here, Ms. Bennett, Mr. Molyviatis, and Pangaea each knew about the order and what was required of them to comply with it. They also knew about these contempt proceedings. The only inference to be drawn from these circumstances is they intend not to provide the disclosure required by the order. I also find that it was within Ms. Bennett's field of operation as a director of Pangaea to ensure its compliance with the order and that she intended that Pangaea not provide the required disclosure. I find the third element of contempt has been proven beyond a reasonable doubt for each of Ms. Bennett, Mr. Molyviatis and Pangaea.

[91] As the three elements of contempt have been proven beyond a reasonable doubt for each of Ms. Bennett, Mr. Molyviatis, and Pangaea, I will make the declaration that each is in contempt of court for failing to comply with Milman J.'s disclosure order of December 22, 2023 and I will move to consider the appropriate sanction.

D. Sanctions for Contempt

[92] Ordinarily, I would be inclined to deal separately with sanctioning contempt to give the contemnors an opportunity to purge their contempt and make submissions on the appropriate sanction after having been found in contempt. However, since the defendants have not responded to this application and have not communicated with or been responsive to the plaintiffs for some months, I have concluded that it is appropriate to move directly to a sanction. Moreover, as will be seen, I will give the defendants a limited opportunity to apply to vary the sanction I impose such that they will have an opportunity to make a submission if they re-engage in this court process.

[93] The primary purpose of a sanction for civil contempt is to secure the contemnor's compliance with a court order. Another purpose is to punish the contemnor for breach of the court's order: *Carey* at paras. 31, 40-41. The conduct being sanctioned in contempt proceedings is the wilful disregard of the authority of the court. In this respect, it is the seriousness of the contemnor's failure to respect the court's process, not the severity of harm the contemnor's acts or omissions may

have caused: *College of Physicians and Surgeons of British Columbia v. Ezzati*, 2021 BCCA 422, at para. 61. The sanction should be proportional to the gravity of the conduct and degree of responsibility of contemnor: *College of Physicians* at para. 59.

[94] One available sanction is to require the contemnor to give security for good behavior. Rule 22-8(3) provides:

> (3) Instead of or in addition to making an order of committal or imposing a fine, the court may order a person to give security for the person's good behaviour.

[95] A rationale for an order for security is that it relieves the party to whom the obligation is owed under the court order from the continued expense and inconvenience to pursue compliance: *Axion Ventures Inc. v. Bonner*, 2023 BCSC 978 at para. 35.

[96] The plaintiffs seek an order that Ms. Bennett, Mr. Molyviatis, and Pangaea post security for good behavior in the amount of $8,858,050, which is equal to the value of the assets that Milman J. ordered be frozen by the *Mareva* injunction. This is an extraordinarily large amount of security and the proposal carries some ring of a "remedial surrogate for a civil action" which is not the function of civil contempt: *College of Physicians*, para. 61. Despite that concern, I find considerable logic in the plaintiffs' submission.

[97] The purpose of Milman J.'s order was to preserve the defendants' assets to secure a potential judgment in the amount of $8,858,050 or more. The related disclosure order was to "breath life" into that preservation order by informing plaintiff of the assets that are to be frozen. The defendants (contemptuous) failure to comply with the disclosure order frustrates that purpose and denies the plaintiffs the protections intended by Milman J.'s order. Requiring the defendants to post security for good behavior in an amount equivalent to what Milman J. found should be frozen by his order fosters compliance with the order and its intended purpose. While posting the proposed security is a much more drastic way of achieving the order's

objective than is freezing assets and requiring disclosure, that outcome has been brought about by the defendants' failure or refusal to abide by the less severe (but still extraordinary) terms of the order.

[98] There is some authority supporting the plaintiffs' proposed sanction. In *XY, LLC v. Canadian Topsires Selection Inc.*, 2014 BCSC 2629, two defendants withdrew $312,975 from a bank account contrary to a *Mareva* injunction. They only replenished the funds when they were put on notice that the plaintiff would apply to have them held in contempt. Justice Fitzpatrick found they were in contempt for having withdrawn the money even though it was later replenished. She held that the appropriate sanction was to order the defendants post security for good behavior in the amount they had withdrawn and repaid. Of course the amount of security in *XY, LLC* is substantially smaller than what is proposed here but the underlying rationale of fostering compliance with the order is similar.

[99] That said, I have some hesitation in imposing the sanction of security for good behavior in the amount proposed, particularly on the personal defendants. The basis for the preservation order was the plaintiffs' strong *prima facie* case for the loans. I have now found in favour of the plaintiffs on that claim. However, there was no finding and no allegation that Ms. Bennett or Mr. Molyviatis gave personal guarantees for the loans. The *Mareva* injunction and disclosure orders extended to them personally only out of Milman J.'s concern that InCor Holdings or Pangaea may be dissipating assets under Ms. Bennett and Mr. Molyviatis' direction. The Court of Appeal upheld the order as it relates to Ms. Bennett and Mr. Molyviatis, noting at para. 36 that they were "clearly acting together in directing, or perhaps seeming to direct, the various corporate entities that benefited from the plaintiffs' funds" and that Milman J. had expressed concern they may have diverted InCor Holdings' or Pangaea's assets for extraneous purposes and were still in a position to do so. Those concerns remain valid as is evident from the following exchange that took place at Ms. Bennett's examination for discovery on September 16, 2024:

> Q. Has Pangaea transferred assets out of its brokerage account in Australia since November 2023?

A. Pangaea has maintained its assets, as it agreed to do.

Q. Has Pangaea –

A. Where those are located is not germane.

[100] Of course the location of Pangaea's assets is highly germane as tracking the location of its assets is one of the purposes of the disclosure order. Later in the discovery, this exchange occurred which reinforces concerns that Ms. Bennett, on behalf of Pangaea, is refusing to provide the information required by the disclosure order:

Q. So I take it from your answer that Pangaea has transferred assets from the sale of securities to other places other than its brokerage accounts.

A. That is a statement that you have made. That is not a statement that I have made.

Q. I'm asking for an answer. That's a question, actually.

A. I have told you that I am not going to answer that question.

[101] However, the fact remains that Milman J. imposed the *Mareva* injunction and disclosure order on the two personal defendants not because of their own potential liability for the claims advanced in the notice of civil claim but rather because of their potential role in dissipating assets of the defendant companies. For that reason, Milman J. ordered that any defendant could apply to vary the terms of the *Mareva* injunction once they had complied with the disclosure order.

[102] In my view, to now compel the personal defendants to *unconditionally* post security for good behavior in an amount that essentially covers the now proven debts of InCor Holdings and Pangaea seems inconsistent with the basic principle of law that shareholders are not liable for the debts of the company and with the principle that contempt proceedings are not a surrogate for a civil claim.

[103] That said, the posting of security is not payment to the plaintiffs. It may be open to the plaintiffs to apply to have the security paid out to them at some point to satisfy the judgment I have now given on the loans. At that point, the court will presumably be asked to determine whether there has been an improper dissipation

of assets and whether the personal defendants bear any responsibility for that such that the security they have posted should be forfeited to satisfy the judgment against InCor Holdings or Pangaea. In this regard, the order to post security is consistent with Milman J.'s purpose in extending the order to the personal defendants. However, as I discuss in a moment, I find it necessary to place some further qualifications on the order to give effect to Milman J.'s order that a defendant could apply to vary the freeze order after complying with the disclosure obligation.

[104] I am also concerned about ordering all three defendants to post such a large amount of security without knowing if they are capable of doing so. I am reluctant to make an order that might be impossible to comply with. Moreover, while Milman J. determined that a *Mareva* injunction should secure "at a minimum" $8,858,050 in assets, his order was no guarantee that the defendants had assets of that value at the time. Of course, it is the defendants' failure or refusal to comply with the disclosure order that impairs the court's ability to assess whether they have those assets and are capable of posting to security. Ultimately, though, I consider this to be a matter that should be addressed with qualifications on an order to post security.

[105] Thus, despite some hesitation with the amount of security and the limits of the personal defendants' liability, I find the sanction for contempt proposed by the plaintiffs is an appropriate one to foster compliance with Milman J.'s order and achieve its objective. To address the concerns I have outlined, I would add a term to the order that allows Ms. Bennett or Mr. Molyviatis to apply to the court to vary or set aside the order for posting security on two different bases:

a) that the applying defendant has not been responsible for or participated in any unlawful dissipation of InCor Holdings' or Pangaea's assets, including any dissipation that is contrary to the Milman J. order; or

b) that compliance with the order for security is impossible.

In either case, the applying party must propose other measures that would suitably sanction and purge the contempt, having regard to the purpose of the Milman J.

order. If an application to vary the amount of security is based on the second ground (compliance being impossible), evidence respecting the first ground (participation in dissipating assets) will still be relevant to deciding whether or to what extent the amount of security should be adjusted. Further, and this goes without saying, any application must be preceded by full compliance with Milman J.'s disclosure order.

[106] Finally, I note that Milman J.'s reasons for judgment indicate that Pangaea's assets should be frozen only to the extent of $2,050,000. This is close to the extent of the liability I have found on the summary trial application. (The difference is Milman J. estimated the value of the promised "interest" at $50,000 whereas I have now found it should be valued at AU$200,000.) I would limit the order against Pangaea to post security for good behavior in the amount of $2,050,000 as that maintains the rationale of sanctioning the contempt of the order in question rather than collecting on a judgment I have now given.

[107] I therefore order that Ms. Bennett, Mr. Molyviatis, and Pangaea post security for good behavior. The total amount of the security to be posted is $8,858,050 with Pangaea's obligation capped at the $2,050,000 in accordance with Milman J.'s reasons for judgment. The security is to be posted within 60 days of this order (unless counsel for the plaintiffs wishes to propose another timeframe prior to this order being entered). Any of the defendants may apply within that timeframe to vary the amount of security they must post in accordance with para. 105 of these reasons. I would also order that any person affected by the order may apply after the posting of the security to vary the order.

V. Expanded *Mareva* Injunction

[108] Next the plaintiffs seek an order expanding the *Mareva* injunction previously granted by Milman J. in the following two ways:

a) to increase the freeze order against Pangaea to match the amount frozen in respect of InCor holdings; and

b) to make preservation orders against Ms. Bennett and Mr. Molyviatis personally.

[109] Counsel for the plaintiffs explained that the purpose of this expanded *Mareva* injunction is to secure the amount ordered to be posted as security for good behavior in the event that the defendants fail to comply with the order to post the security or to cover a gap in time between my order to post security and the date on which it might actually be posted. He further suggested that the preservation order against Ms. Bennett and Mr. Molyviatis is necessary because at present there is no such order made against them.

[110] I decline to grant the first proposed expansion. Earlier I found that Pangaea's liability, at least for the loans, is capped at the $2 million that remains outstanding on the Pangaea loan plus the value of the promised "interest" along with interest under the *Court Order Interest Act*. To the extent Pangaea might be liable for other matters raised in the notice of civil claim, Milman J. has found those other matters do not meet the strong *prima facie* case threshold. I also note that while Milman J.'s reasons for judgment indicate a monetary amount that supports a *Mareva* injunction, the order itself does not specify a monetary cap. I find there is no basis to increase the freeze order against Pangaea.

[111] With respect to second proposed expansion, I struggle to understand the basis for it. First, contrary to counsel's suggestion, Milman J.'s freeze order applies to the two personal defendants to the same extent that it presently applies to InCor Holdings and to Pangaea.

[112] Second, the proposed terms of the expanded *Mareva* injunction as the plaintiffs would now have them apply to Ms. Bennett, Mr. Molyviatis, and Pangaea are more expansive than those that apply to InCor Holdings. For example, the Milman J. order requires the defendants to:

> maintain the disposition from the proceeds (the "Proceeds") from any sale of any securities of Besra Gold Inc., Cascadero Copper, Western Gold Ltd. or LeadFX Inc. (collectively the "Issuers") in their respective brokerage accounts until further order of the court or written agreement…

[113] The order the plaintiffs now proposed for Ms. Bennett, Mr. Molyviatis and Pangaea (but not InCor Holdings) would freeze all of their worldwide assets, whether they are in or outside British Columbia. The plaintiffs have not explained why a more expansive freeze order is required or appropriate as against Ms. Bennett, Ms. Molyviatis, and Pangaea than the one that would continue to apply to InCor Holdings.

[114] Third, to the extent that the expanded *Mareva* injunction against the personal defendants and Pangaea is intended to freeze assets for the purposes of collecting the security I have ordered be posted for good behavior, this seems to uncomfortably blur the purpose of that security with being a "surrogate for a civil action". Counsel's submissions on the expanded *Mareva* injunction focused on its function to preserve the plaintiffs' ability to realize on its judgment. I did not receive submissions on the use of a *Mareva* injunction to enforce security for good behavior as a sanction for contempt.

[115] For those reasons, I decline at this stage to expand the *Mareva* injunction as proposed. However, with judgment now being given on the two loans, the dynamic of this proceeding has changed as the plaintiffs will likely now move to collect on that aspect of the claim. That may involve different procedures to enforce the judgment, including applications to execute on other assets beyond those frozen by Milman J.'s order. There may also be further proceedings required if security for good behavior is not posted. Thus, the plaintiffs will be at liberty to reapply for the expanded injunctive relief including to address the concerns and uncertainties I have outlined here.

VI. Procedural Orders

[116] Finally, I will address the procedural orders the plaintiffs seek.

[117] First the plaintiffs seek an order that John Terry attend an examination for discovery on behalf of InCor Services Limited. InCor Services is the company to which Mr. Harder wired the funds for both loans as directed by Ms. Bennett. He believed it was owned and controlled by Ms. Bennett and Mr. Molyviatis but learned

after the start of this litigation that neither are directors or shareholders of that company. The plaintiffs then sought to examine John Terry, a corporate representative of InCor Services, for discovery but he failed or refused to appear at the appointed time and place.

[118] Initially the plaintiffs sought an order on this application that Mr. Terry is in contempt of court for disobeying a direction to attend the discovery. However, at the hearing they (rightly) only pursued an order that he be required to attend the discovery. As with the other defendants, InCor Services did not file a response to the application. I will make the order that Mr. Terry attend an examination for discovery at a time and place determined by the plaintiffs and at Mr. Terry's sole expense. As counsel suggested, I will also order that Mr. Terry, who is based on London, England, may attend the discovery by video conference.

[119] Second, the plaintiffs seek an order compelling the defendants to produce a list of documents, including several specific categories of documents. However, counsel appears to have overlooked the fact that Justice Walker already made that order at the appearance on October 8, 2024 and thus it is not necessary for me to make it again.

VII. Summary and Costs

[120] In summary, I find the plaintiffs' claims respecting the May 2021 Cascadero Loan and the June 2021 Pangaea Loan are suitable for summary trial disposition. I grant judgment for the plaintiffs on the Cascadero Loan as against InCor Holdings in the amount of $6,308,050 plus additional damages to be assessed for the value of 500,000 shares of InCor Holdings being the "interest" on the Cascadero Loan. I grant judgment against InCor Holdings and Pangaea, jointly and severally, for $2 million plus the equivalent of AU$200,000, being the stated par value of one million shares of Besra Gold at AU$0.20. Interest under the *Court Order Interest Act* will be applicable to both sets of damages.

[121] I find that Pangaea is not liable under contract or unjust enrichment for any portion of the Cascadero Loan. Pangaea's liability, together in InCor Holdings, for

the Pangaea Loan is capped at $2 million plus the interest damages because I find the two payments of $1 million each to the plaintiffs in 2022 was a repayment of a portion of the Pangaea Loan.

[122] There will be a declaration that Ms. Bennett, Mr. Molyviatis, and Pangaea are in contempt of court for failing or refusing to comply with Milman J.'s disclosure orders found in paragraphs 3 and 4 of his order made December 22, 2023. As a sanction for that contempt, there will be an order that those defendants post security for good behavior in the amount that Milman J. intended to secure by way of the *Mareva* injunction in his December 22, 2023 order. That amount is $8,858,050 but Pangaea's liability for this is capped at $2,050,000. Counsel did not suggest a date by which security must be posted. He may do so in submitting a form of order but in the absence of doing so I will order that the security be posted within 60 days of this judgment.

[123] Ms. Bennett or Mr. Molyviatis may apply to the court within the 60-day (or other) period to vary or set aside the order as to the amount of security to be posted by addressing the points in para. 105 of these reasons. Any person affected by the order for security may apply to vary it after the security is posted.

[124] The application to vary or extend the *Mareva* injunction is dismissed with liberty to the plaintiffs to reapply as necessary.

[125] There will be an order that John Terry will attend for an examination for discovery on behalf of InCor Services at his own expense on a date and time determined by the plaintiffs acting reasonably. Mr. Terry may attend the discovery by video conference.

[126] The plaintiffs will be entitled to their costs of this application. Given the centrality of the contempt proceedings to this application and the fact that contemptuous conduct is inherently reprehensible behavior in the litigation, those costs shall be assessed as special costs.

"Kirchner J."