COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Su v. Atom Holdings,* 2025 BCCA 199

Date: 20250616
Dockets: CA50108; CA50109

Docket: CA50108

Between:

Weiyi Su also known as Victor Su

Appellant
(Defendant)

And

Atom Holdings (In Official Liquidation Under the Cayman Islands Companies Act, 2023 Revision)

Respondent
(Plaintiff)

- and -

Docket: CA50109

Between:

Weiyi Su also known as Victor Su

Appellant
(Respondent)

And

Atom Holdings (In Official Liquidation Under the Cayman Islands Companies Act, 2023 Revision)

Respondent
(Respondent)

And

George Kimberley Leck, in his capacity as joint liquidator of Atom Holdings

Respondent
(Petitioner)

FILES SEALED (IN PART)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Butler
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated August 1, 2024 (*Atom Holdings (Re)*, 2024 BCSC 1397, Vancouver Dockets S242230; S242143).

Counsel for the Appellant:	D.R. McGowan S.M. Gallagher A. Flipse
Counsel for the Respondent, Atom Holdings (In Official Liquidation Under the Cayman Islands Companies Act, 2023 Revision):	C.P. Dennis, K.C. R. Power
Place and Date of Hearing:	Vancouver, British Columbia April 14, 2025
Place and Date of Judgment:	Vancouver, British Columbia June 16, 2025

Written Reasons by:
The Honourable Chief Justice Marchand

Concurred in by:
The Honourable Mr. Justice Butler
The Honourable Justice Mayer

Summary:

The appellant claims the judge erred in: (1) his application of the test for determining material non-disclosure at ex parte hearings; and (2) his exercise of discretion in determining that, even if non-disclosure were material, the orders should nonetheless be maintained. Held: Appeal dismissed. The chambers judge's reasons, when read functionally, contextually and as a whole, reveal he understood and applied the relevant legal principles governing material disclosure. The threshold for materiality is low—a material fact is one that may or might affect the outcome of an application. But considering the full context and the applicable legal standard, it was open to the judge to conclude the non-disclosed evidence was immaterial. Further, his discretionary decision to maintain the ex parte orders is owed deference. The appellant has not pointed to any legal error, misapplication of principle or misconception of evidence warranting intervention by this Court. Rather, the appellant asks us to reweigh the evidence and come to a different conclusion.

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Introduction

[1] The respondent, Atom Holdings, is a Cayman Islands-based cryptocurrency holding company for a number of internationally incorporated subsidiary companies, known collectively as the AAX Group (or "the Group"). The AAX Group operated a cryptocurrency exchange platform known as the AAX Platform. In November 2022, the AAX Group collapsed, leaving users unable to withdraw substantial assets from the AAX Platform. Since its collapse, the directors, officers, and management of the AAX Group have resigned or gone into hiding. Several have been arrested.

[2] Atom Holdings is being liquidated. By order of the Grand Court of the Cayman Islands, the respondent, George Kimberley Leck, is the official liquidator.

[3] The appellant, Weiyi Su (also known as Victor Su), is a former director of Atom Holdings. At the material times, Mr. Su resided in West Vancouver. Atom Holdings alleges Mr. Su diverted cryptocurrencies worth millions of dollars from the AAX Group. On July 18, 2024, Mr. Su was arrested in Hong Kong on charges alleging theft of cryptocurrencies valued at approximately US$16.74 million.

[4] The respondents have initiated court proceedings in various jurisdictions to recover assets of the AAX Group. In British Columbia, the respondents filed a petition under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] ("Bankruptcy Proceeding"). On April 8, 2024, the respondents also commenced a civil action against Mr. Su ("Civil Action"). As part of these proceedings, the respondents secured several orders *ex parte*, including an order under s. 272 of the *BIA* to search for, seize, examine and preserve certain evidence and digital assets, and an injunction freezing Mr. Su's assets (commonly referred to as a *Mareva* injunction).

[5] Mr. Su later applied to set aside both orders. The chambers judge dismissed Mr. Su's applications: *Atom Holdings (Re)*, 2024 BCSC 1397 [*RFJ*]. Mr. Su appeals by right in the Civil Action. He was granted leave to appeal the orders made in the Bankruptcy Proceeding: *Su v. Atom Holdings*, 2024 BCCA 386.

[6] A range of issues were raised before the chambers judge. This appeal, however, is limited to concerns about how the judge applied the legal framework for determining whether *ex parte* orders should be set aside at a subsequent *inter partes* hearing. Specifically, Mr. Su claims the judge erred in: (1) his application of the test for determining material non-disclosure at *ex parte* hearings; and (2) his exercise of discretion in determining that, even if non-disclosure were material, the orders should nonetheless be maintained.

[7] For the reasons below, I would dismiss the appeal. Mr. Su has not identified any extricable error of law or principle. The chambers judge's reasons, when read functionally, contextually and as a whole, reveal he understood and applied the relevant legal standard for determining materiality. Further, his discretionary decision to maintain the *ex parte* orders is owed deference.

Background

The *ex parte* orders

[8] On April 4, 2024, the respondents appeared *ex parte* before the chambers judge in the Bankruptcy Proceeding. They sought several orders, including an order under s. 272 of the *BIA*. Although granted under s. 272, the order was akin to, and I will refer to it as, an *Anton Piller* order. The order authorized the respondents to search Mr. Su's West Vancouver residence and seize, examine,

and preserve evidence and digital assets suspected of being diverted from Atom Holdings.

[9] In support of their application, the respondents submitted considerable evidence of Mr. Su's involvement in the AAX Group. Some of this evidence was provided by Mr. Leck in an affidavit, including evidence Mr. Su was a key figure in the AAX Group and an authorized signatory of the Atom Holdings bank account.

[10] Extensive evidence was also provided by Matthew Devost, a cybersecurity expert hired by the respondents to assist in their investigation.

[11] Most of the information presented in Mr. Devost's affidavit was based on his review of AAX Group company records and materials. This included evidence indicating Mr. Su had access to, and control over, significant assets held by the Group. It also included evidence that a significant portion of those assets had been dispersed, and that some had been moved from AAX-controlled 'wallets' (effectively accounts through which users access their cryptocurrencies) to unknown wallet addresses.

[12] As part of his investigation, Mr. Devost interviewed Lin (Peter) Lin—the founder and a former executive of the AAX Group—on February 26, 2024. Mr. Devost's affidavit included excerpts of the Lin interview in which Mr. Lin accused Mr. Su of being 100% responsible for taking the missing assets and claimed Mr. Su had the requisite knowledge of, and control over, the relevant cryptocurrency wallets to do so.

[13] The chambers judge granted the relief sought by the respondents, including the *Anton Piller* order. On April 5, 2024, the respondents executed the order.

[14] On April 8, 2024, the respondents again appeared *ex parte* before the chambers judge. They sought an order for leave to commence the Civil Action. They also sought a *Mareva* injunction in the Civil Action freezing Mr. Su's assets.

[15] At the April 8 hearing, the respondents submitted a second affidavit of Mr. Devost. This affidavit summarized additional evidence discovered while executing the *Anton Piller* order, including:

- transaction records from Mr. Su's personal laptop indicating involvement in the transfer of AAX Group assets;
- evidence that, since the appointment of the liquidator, US$2.8 million worth of cryptocurrency had been transferred from AAX Group wallets to a wallet likely controlled by Mr. Su; and
- a cellphone that, according to Mr. Devost's testimony, had a very high likelihood of holding a significant portion of the AAX Group's cryptocurrency.

[16] Mr. Devost's second affidavit also noted roughly US$16 million was transferred from an AAX Group wallet to a new wallet address a few hours after the execution of the *Anton Piller* order.

[17] The chambers judge granted the application and issued the requested *Mareva* injunction.

The *inter partes* hearing

[18] Mr. Su later retained counsel and applied to set aside the *Anton Piller* order and *Mareva* injunction. The respondents applied to extend the *Mareva* injunction. The applications were heard together on June 20–21, 2024.

[19] New information came to light at the *inter partes* hearing. The respondents introduced evidence of Mr. Su's evasive behaviour during the investigation, such as:

- failing to provide full access to digital assets as required by the *Anton Piller* order;
- swearing false affidavits of assets that omitted certain bank accounts; and
- refusing to answer questions during a court-ordered examination.

[20] For his part, Mr. Su focused on information about the Lin interview the respondents had failed to disclose at the *ex parte* hearings.

[21] First, Mr. Su submitted Mr. Devost used extortionate and dishonest means to coerce Mr. Lin to attend the interview. Mr. Devost had claimed Mr. Su was cooperating with the investigation. Mr. Devost had also claimed the investigation had overwhelming evidence linking Mr. Lin to the asset theft and would bring international charges against him unless he cooperated. He told Mr. Lin he could choose between facing criminal charges and cooperating with the investigation in exchange for financial compensation.

[22] Similarly, Mr. Su alleged Mr. Devost had been deceptive during the interview. This included telling Mr. Lin he was “suspect number one” but may be able to avoid criminal prosecution if he provided statements incriminating Mr. Su.

[23] Second, Mr. Su brought certain exculpatory statements made by Mr. Lin to the attention of the Court. This included statements that many people, including Mr. Lin himself, would have had access to the AAX Group wallets and it was therefore possible he or others could have been responsible for the cryptocurrency transfers.

[24] According to Mr. Su, the respondents’ failure to disclose both the full transcript of the Lin interview, and Mr. Devost’s tactics surrounding the interview, constituted material non-disclosure and should have resulted in the two orders being set aside.

The chambers judge’s reasons for judgment

[25] The chambers judge rejected Mr. Su’s arguments on two grounds.

[26] First, he concluded the omission of the full transcript and surrounding circumstances of the Lin interview did not constitute material non-disclosure. Given the “compelling totality” of the evidence against Mr. Su, he concluded the impugned evidence of Mr. Lin was “merely icing on the cake … Had the Lin evidence never been presented to the Court, the Court would still have issued the orders”: *RFJ* at para. 46.

[27] The chambers judge acknowledged it was a “close call”, and disclosure would have been “prudent and preferable”. But he also found counsel’s overall presentation at the *ex parte* hearing was balanced and concluded the failure to disclose was inadvertent, rather than deliberate. Despite some misgivings about the failure to disclose, the judge ultimately concluded the information was immaterial and its non-disclosure did not justify setting aside the orders: *RFJ* at paras. 47–50, 55, 58.

[28] Second, even if his conclusions on materiality were incorrect, the judge determined he would nonetheless exercise his discretion to maintain the orders or issue them afresh. He noted the case for the orders at the *ex parte* hearings had only been strengthened by post-order evidence indicating Mr. Su had dissipated his assets in breach of a court order, as well as by Mr. Su’s obfuscatory actions in relation to the ongoing investigation: *RFJ* at paras. 89–95.

Issues

[29] In my view, there are two principal issues on appeal:

1. Did the chambers judge err by finding there was no material non-disclosure at the *ex parte* hearings?

2. Are there grounds for interfering with the chambers judge’s decision to maintain the orders at the *inter partes* hearing?

Standard of review

[30] The decision to grant a *Mareva* injunction or *Anton Piller* order is discretionary: *Wu v. Ma*, 2024 BCCA 196 at para. 18; *Girocredit Bank Aktiengesellshaft Der Sparkassen v. Bader*, 110 B.C.A.C. 19 at paras. 27, 46–47, 1998 CanLII 5573 (C.A.). Decisions to do so are owed significant deference: *First Majestic Silver Corp. v. Santos*, 2009 BCCA 71 at para. 16. This Court will not interfere “unless the judge erred in principle, clearly and demonstrably misconceived the evidence, or made an order that has resulted in a clear injustice”: *Wu* at para. 18.

Mr. Su's position on appeal

[31] On Issue 1 (material non-disclosure), Mr. Su maintains the judge erred in three respects. In his submission, these amount to extricable errors of law, reviewable on a standard of correctness.

[32] Mr. Su's principal argument is the judge, by focusing on whether the non-disclosed facts were "necessary" or "critical" to the outcome, applied the incorrect test for determining materiality. Mr. Su argues the threshold for materiality when considering a set-aside application is lower: so long as a non-disclosed fact might have influenced the court's decision, it is material.

[33] Second, Mr. Su argues the judge then failed to apply the principle that *ex parte* applicants are obliged to disclose all material information. He says the judge overlooked how Mr. Devost's conduct might have impacted the assessment of Mr. Devost's own credibility and reliability, particularly given the amount of evidence provided by Mr. Devost in support of both *ex parte* applications.

[34] Third, Mr. Su argues the judge failed to apply the principle that *ex parte* applicants should be deprived of any advantage gained by a breach of the duty to disclose. When the respondents applied for the *Mareva* injunction, they relied on information Mr. Devost gathered while executing the *Anton Piller* order. Given the *Anton Piller* order arose out of an *ex parte* hearing at which there was material non-disclosure, according to Mr. Su, it follows the respondents should not have benefited from evidence obtained while executing that order in securing the *Mareva* injunction.

[35] On Issue 2 (maintaining the orders or issuing them afresh), Mr. Su claims the judge failed to give any weight to the fact certain evidence—including evidence of Mr. Su's arrest and his dishonesty in parallel proceedings—was improper and unreliable. Mr. Su submits the judge was "clearly wrong" to exercise his discretion on the basis of improper and unreliable evidence, and appellate intervention is therefore justified to set aside the order below as well as the two *ex parte* orders.

Legal framework

[36] When a party appears *ex parte* before the court, they are under a strict duty to disclose all material facts.

[37] This principle readily applies in the case of *Anton Piller* and *Mareva* orders: *Girocredit* at para. 45; *Evans v. Umbrella Capital LLC*, 2004 BCCA 149 at para. 35. Both are intrusive remedies. *Anton Piller* orders allow a plaintiff to search a defendant's home or business to seize and preserve evidence and property, while *Mareva* injunctions prevent a defendant from disposing of their assets: *Girocredit* at paras. 16–28. Both are also typically sought *ex parte* without notice, so as not to alert the defendant to the potential search, seizure and/or freezing of assets.

[38] Full and fair disclosure by the applicant is therefore necessary to protect against potential misuse or abuse of these orders against defendants who are not in court to defend their interests. A party seeking such an order *ex parte* is required to disclose any and all information "which might have influenced the court's decision": *Evans* at para. 33. Full disclosure also requires the applicant to conduct reasonable inquiries "to ascertain whether additional material facts exist" and to disclose "any defence which the applicant has reason to anticipate": *Girocredit* at para. 45.

[39] The failure to make full and fair disclosure weighs heavily in any subsequent application to set aside the orders. If material non-disclosure is established, it is open to the reviewing judge to set aside the order without regard to the merits of the application: *Evans* at para. 33; *Gulf Islands Navigation Ltd. v. Seafarers' International Union*, 18 D.L.R. (2d) 625, 1959 CanLII 272 (B.C.C.A.).

[40] Ultimately, however, the decision as to whether an order should be set aside without consideration of the merits remains discretionary: *Girocredit* at para. 47; *Bank of Credit and Commerce International (Overseas) Ltd. v. Akbar,* 2001 BCCA 204 at para. 39. If the judge does consider the merits, they do so *de novo*, and it is open to them to consider fresh evidence: *Bank of Credit* at paras. 30–33, 47–43.

[41] And, even in instances where the court decides to set aside the order without consideration of the merits, it still retains discretion to issue the order anew where a party brings a fresh *Mareva* injunction application: *MacLachlan v. Nadeau*, 2017 BCCA 326 at paras. 31–32.

[42] In *MacLachlan*, this Court neatly summarized the relevant considerations when exercising this discretion:

> [37] In my view, the following key principles emerge from the foregoing authorities:
>
> i. on an application, *inter partes*, for a Mareva injunction following the grant of an *ex parte* injunction, the judge is to proceed with a *de novo* hearing;
>
> ii. on the *de novo* hearing, the whole of the facts, including any incorrect or incomplete facts upon which the *ex parte* injunction was based, are to be taken into account;
>
> iii. if the applicant failed to comply with the duty to make full and frank disclosure on the *ex parte* application, the nature of the failure and the degree and extent of the applicant's culpability are highly material factors for consideration;
>
> iv. the degree and extent of the applicant's culpability may range from innocent non-disclosure to bad faith, which may include deliberate misstatements;
>
> v. where material non-disclosure is established, the applicant should be deprived of any advantage derived by the breach of duty on the *ex parte* application;
>
> vi. in every case, the judge has a discretion in determining, on the whole of the facts, whether, and, if so, on what terms to grant a new *Mareva* injunction; and
>
> vii. the discretion is to be exercised judicially, in accordance with established principles, including those outlined in *Brinks-MAT*.

[43] The principles in *Brinks-MAT Ltd. v. Elcombe*, [1988] 3 All E.R. 188 (C.A.) at 192, clarify that the court retains discretion to either continue an order, or issue it afresh, despite a finding of material non-disclosure:

> In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.
>
> (i) The duty of the applicant is to make 'a full and fair disclosure of all the material facts'.
>
> (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.
>
> (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a)

> the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of inquiries.
>
> (v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains . . . an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty . . .'
>
> (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
>
> (vii) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded'. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:
>
> > '. . . when the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'
>
> [List reformatted, internal citations omitted.]

[44] This Court has confirmed the discretionary power of a reviewing judge to reinstate an order where material non-disclosure was innocent: *Girocredit* at para. 46.

Analysis

Issue 1: Did the chambers judge err by finding there was no material non-disclosure at the *ex parte* hearings?

[45] The judge began his analysis of whether there was material non-disclosure by referencing the principles (and many of the same authorities) cited above. In doing so, he emphasized "***the duty of disclosure is onerous, particularly when seeking the draconian nature of Anton Piller relief***", and "***a material fact is one that may affect the outcome of the application***": *RFJ* at paras. 38–40 (emphasis in original).

[46] However, Mr. Su contends the judge then fell into error in his application of the test for determining materiality. Mr. Su points to two different statements he claims are indicative of the judge's error. At para. 47 of the *RFJ*, the judge concluded the non-disclosed information was not material "in the sense of being necessary" for the outcome. Then again, at para. 88, the judge found the non-disclosed facts were not material "in the sense of being critical to the decision to be made, or the decision that was made".

[47] According to Mr. Su, the judge was wrong to frame the test in terms of the non-disclosed facts being "necessary" or "critical" to the outcome. Rather, in accordance with *Evans*, the proper test is merely whether the non-disclosed facts "might have" influenced the court's decision.

[48] Further, Mr. Su claims the chambers judge, as a result of his erroneous application of the materiality test, made inconsistent and contradictory findings. Mr. Su points to para. 48 of the *RFJ*, where the judge held "it would have been preferable and prudent for the applicants to have provided the entire Lin transcript and communications". According to Mr. Su, "If certain pieces of information ought to have been disclosed, that information was material, regardless of whether that information would have in fact influenced the result".

[49] Mr. Su is correct in stating the threshold for materiality in the context of an *ex parte* hearing is not whether the information was necessary to the outcome—this would set the bar too high and frustrate the remedial purpose of requiring full and fair disclosure. As *Evans* makes clear, the threshold is lower: "a material fact is one that may or might affect the outcome of an application": at para. 33 (emphasis in original, internal citation omitted).

[50] Leading authorities in this court, including *Evans*, *Girocredit* and *MacLachlan*, rely heavily on principles enunciated by the UK Court of Appeal. As that court has stated, "it is no answer that if full and frank disclosure had been made you might have arrived at the same answer and obtained the same benefit". Rather, the disclosure requirement encompasses any information that would have been relevant to the judge's determination, even if it would not have been dispositive: *Lloyd's Bowmaker Ltd v. Britannia Arrow Holdings plc,* [1988] 3 All E.R. 178 (C.A.) at 181–183 (emphasis added, internal citation omitted); see also

Columbia Picture Industries Inc v. Robinson, [1986] 3 All E.R. 338 (Ch.) at 372, 377.

[51] The case law in both British Columbia and elsewhere in Canada is replete with examples of judges adopting and applying this same standard: see e.g., *Max Power Security Services Ltd. v. Canadian K9 Detection Security & Investigations Ltd.*, 2022 BCSC 234 at para. 42; *S.J. v. S.D.*, 2014 BCSC 2277 at paras. 11, 19–21; *Stans Energy Corp. v. Kyrgyz Republic*, 2015 ONSC 3236 at para. 41; *Pulse Microsystems Ltd. v. Safesoft Systems Inc.*, 134 D.L.R. (4th) 701 at 708–709, 1996 CanLII 7295 (M.B.C.A.); *Fine Gold Resources, Ltd. v. 46205 Yukon Inc*, 2016 YKSC 21 at para. 15.

[52] Read in isolation, aspects of the judge's reasons may therefore suggest error. But reasons must be read functionally and as a whole. They must be properly situated in the context of both the live issues and the parties' positions at the hearing: *R. v. G.F.*, 2021 SCC 20 at para. 69; *R. v. Pastro*, 2021 BCCA 149 at para. 53. They also must be read generously, not parsed for error: *Spark Event Rentals Ltd. v. Google LLC*, 2024 BCCA 148 at para. 54. Where they are ambiguous, interpretations consistent with a correct application of the law are to be preferred: *G.F.* at paras. 78–79.

[53] Paragraphs 46 and 47 are critical to the judge's analysis and conclusion:

> [46] The Court declines to give force to the defendant's submissions. As set out in the recitation above of the evidence before the Court in the *ex parte* applications, the impugned Lin evidence was merely icing on the cake. The orders were issued based on the compelling totality of the evidence against the defendant. Again, public searches already established the defendant's important role in the AAX Group: the defendant has since confirmed those directorships in his examination. The applicants also presented compelling, if circumstantial, evidence linking the defendant to AAX digital assets and wallets, and the transfers of assets. Even more compelling was the dishonesty of the defendant's sworn assertion that he was not involved in the Atom group of companies as anything but an investor. Had the Lin evidence never been presented to the Court, the Court would still have issued the orders. In short, any imperfections in the Lin evidence — either in its acquisition or presentation — were immaterial to the final result: it would have made no difference.
>
> [47] To paraphrase *Brinks-MAT Ltd.,* the circumstances of its acquisition were not of "sufficient materiality to justify or require immediate discharge of the order without examination of the merits"; that fact was not of sufficient importance to the issues decided by the Court. Ultimately, the subjects of the alleged non-disclosure were not material facts, in the sense of being necessary for the consideration and the outcome. Had the

> applicants never cited the Lin interview, the order would still have been issued on the compelling evidence before the Court.
>
> [Emphasis added.]

[54] Read generously and in context, the judge was not merely saying the impugned evidence would not have changed the outcome. Rather, in light of the other evidence available at the *ex parte* hearings, he determined Mr. Devost's conduct in relation to the Lin interview, and the interview itself, would not have been a consideration. It was superfluous, "merely icing on the cake".

[55] The respondents essentially conceded the information from Mr. Lin was neither reliable nor important. At the *Anton Piller* hearing, they emphasized Mr. Lin's evidence was "all hearsay" and acknowledged the court may be inclined to afford it limited weight.

[56] While the test for determining materiality is broad, it is not without limits. The approach taken by the UK courts is again instructive. At para. 36 of its decision in *Kazakhstan Kagazy plc v. Arip*, [2014] EWCA Civ 381, the UK Court of Appeal cited with approval the following for determining materiality:

> … where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion…
>
> I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees…
>
> In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion.
>
> [Emphasis added.]

[57] The chambers judge was well-placed to draw such "sensible limits". He was the very judge who heard the initial *ex parte* applications, and was therefore aware of the evidence presented at both *ex parte* hearings. Considering the full context and the applicable legal standard, it was open to him to conclude the non-disclosed evidence was immaterial.

[58] Importantly, there was no inconsistency between the judge's finding "it would have been preferable and prudent for the applicants to have provided the entire Lin transcript and communications" and his finding there was no material

non-disclosure. As noted above, and as the judge correctly pointed out at para. 40 of the *RFJ*, materiality is to be decided by the court, not the applicant or their counsel. This exhortation to applicants to make full and frank disclosure means, sometimes, applicants will "over-disclose". In other words, sometimes an applicant will disclose information that, in the judge's view, was not required to be disclosed. With all the information available, the judge and the applicant may well have different views about what is material at the application stage. When in doubt, the applicant should opt for disclosure: *Columbia Picture Industries* at 372.

[59] Because it was a "close call", it would therefore have been prudent for the respondents to have disclosed the entire Lin transcript and associated communications. But that is not to say the non-disclosure was necessarily material. Rather, it merely indicates adherence to the principle that it should be left to judges, not applicants, to determine what is or is not material.

[60] There was no legal or principled error in the judge's understanding or application of the test for determining materiality. As the respondents, citing *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, correctly point out,

> [45] … Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome.

[61] Far from identifying an extricable error of law or principle, Mr. Su merely challenges the judge's application of the law to the facts before him.

[62] Having failed to establish an error in the judge's understanding of materiality, Mr. Su's two other alleged errors of law fall away.

[63] First, Mr. Su claims the judge erred in law by failing to apply the principle that an applicant must disclose all material facts at an *ex parte* hearing. He argues "[t]here can be little doubt" disclosure of Mr. Devost's investigatory techniques "would have given the judge pause at the *ex parte* hearing and might have influenced his decision to issue the [*Anton Piller*] Order."

[64] But this is not the conclusion the judge reached. The judge did not err by declining to apply a legal principle—he merely found Mr. Devost's investigatory techniques did not rise to the level of a material fact requiring disclosure.

[65] Nevertheless, Mr. Su insists the judge overlooked how Mr. Devost's willingness to suppress certain evidence might have impacted the reliability and credibility of his own evidence generally.

[66] Again, reasons must be read functionally, contextually and as a whole. The judge first identified Mr. Su's position that full disclosure was necessary to enable the judge to assess "both the reliability of Mr Lin's hearsay evidence and of Mr Devost himself as a source of evidence": *RFJ* at para. 42 (emphasis added).

[67] The judge then went on to respond to Mr. Su's claim that Mr. Devost's investigatory techniques were "dishonest and extortive": *RFJ* at para. 51. As the judge put it:

> [55] Turning to the present case, while Mr Devost's techniques and statements skate close to, and indeed, at times, may skate past, the lines of good sportsmanship and honesty, they do not affront the Court so far as to set aside the orders, or to decline to continue those orders, especially given the seriousness of the allegations and the strength of the evidence.
>
> [56] As a preliminary observation, it is not clear how much, if at all, Mr Devost's statements to Mr Lin deviated from the truth. Mr Devost may well have connections to the Chinese government. It is not controversial that all high-ranking members of the Atom Group face potential prosecution: indeed, two figures (and now three) have already been arrested in Hong Kong. Mr Lin is or was almost certainly a target of the Liquidators or prosecutors: perhaps not "suspect number one", but likely high on the list given his centrality to the AAX. At the time of the interview, at an earlier stage of the investigation, Mr Lin may have been "suspect number one". The defendant did in fact swear an affidavit identifying Mr Lin as the CEO and founder of Atom. In any case, it is hardly a rare, novel or shocking technique for an investigator to seek to elicit evidence from one suspect by suggesting that another suspect has turned against them.
>
> [Emphasis added.]

[68] It was open to the judge to find that Mr. Devost's distasteful, unnecessary and unhelpful conduct did not undermine his credibility and reliability on the matters of importance. This is particularly so given the substantial objective (albeit circumstantial) evidence linking Mr. Su to missing assets. Although much of this evidence was provided by Mr. Devost, it was backed up by documentation.

[69] Having recognized the issues raised by Mr. Su, and having considered both Mr. Devost's investigatory techniques and the exculpatory portions of the Lin interview, the judge ultimately concluded "the omitted facts were not material": *RFJ* at para. 88 (emphasis added).

[70] In the course of his discussion of Mr. Devost's tactics, the judge remarked that, "Excessive judicial pearl-clutching at how the sausage gets made and how evidence is gathered would undermine the ability of any party to obtain such orders": *RFJ* at para. 54.

[71] In my respectful view, minimizing concerns about the gathering of evidence via threats and promises is unhelpful. The point of gathering evidence is to assist the court. Care should therefore always be taken. Here, Mr. Devost's actions undermined the reliability of Mr. Lin's statements, rendering them potentially useless to all concerned, including the court. In this case, Mr. Devost's actions did not impact the result, given that Mr. Lin's statements were found to be immaterial. In different circumstances, such techniques run the unnecessary risk of undermining the gathered evidence to the point the applications fail.

[72] But, what is important here is the judge did not overlook how non-disclosure impacted Mr. Devost's credibility—he just decided it didn't. This is not a basis on which this Court can intervene. Issues of credibility attract a high degree of deference on appeal*: R v. Li*, 2023 BCCA 47 at para. 81.

[73] Mr. Su's other alleged error of law also collapses when one recognizes the judge did not err in his understanding of materiality. Despite Mr. Su's able arguments to the contrary, the chambers judge did not fail to apply the principle that *ex parte* applicants should be deprived of any advantage gained by a breach of the duty to disclose. On the findings of the judge, there was no breach of the duty to begin with. Therefore, the *Anton Piller* order stood, and the respondents were within their rights to execute it. There was no basis to deprive them of the evidence gathered in the process.

[74] The judge understood the principles governing material disclosure, properly applied them, and determined there had not been material non-disclosure during the *ex parte* hearings. On that basis, he declined to set aside the *Anton Piller* and *Mareva* orders. I see no basis for intervening in this exercise of discretion.

Issue 2: Are there grounds for interfering with the chambers judge's decision to maintain the orders at the *inter partes* hearing?

[75] As I noted when summarizing the applicable legal principles, even where the court finds there has been material non-disclosure, it still retains considerable

discretion to maintain or re-issue the orders in question.

[76] In exercising his discretion, the judge was alive to the relevant considerations. These include whether the non-disclosure was innocent or done in bad faith, as well as the importance of the non-disclosed information to the actual issues to be decided: *MacLachlan* at para. 37; *Brinks-MAT Ltd.* at 192.

[77] Citing the applicable test in *Brinks-MAT Ltd.*, he concluded the circumstances of how the Lin testimony was acquired was not of "sufficient importance to the issues decided by the Court" to justify immediate discharge of the orders: *RFJ* at para. 47.

[78] Similarly, in considering Mr. Devost's investigatory techniques, the judge concluded that although these "skate close to, and indeed, at times, may skate past, the lines of good sportsmanship and honesty, they do not affront the Court so far as to set aside the orders, or to decline to continue those orders, especially given the seriousness of the allegations and the strength of the evidence": *RFJ* at para. 55 (emphasis added).

[79] He also found the failure to disclose was inadvertent, rather than deliberate or in bad faith: *RFJ* at para. 49.

[80] Ultimately, the judge recognized the materiality issue was a "close call": *RFJ* at para. 48. But even if he were technically wrong in determining the non-disclosed information was not material, he found this was not a situation in which a determination of materiality would, on its own, justify setting the orders aside. In light of these considerations, he concluded, "Alternatively, even [if] any of [the] alleged non-disclosure surrounding the Lin interview were material, this Court would exercise its discretion on this *de novo* hearing not to dissolve the orders, and to reissue the orders on the present and updated evidentiary foundation": *RFJ* at paras. 58, 89–90.

[81] Although Mr. Su recognizes this was a discretionary decision, he claims the judge "gave no weight to the fact that certain pieces of evidence before him were improper or unreliable". He notes three concerns:

1. the judge relied on the fact Mr. Su was arrested in Hong Kong despite this evidence allegedly not being properly before the court;

2. the judge relied on Mr. Devost's affidavit without accounting for how Mr. Devost's improper tactics and dishonesty infected the accuracy, completeness and reliability of his evidence; and

3. the judge incorrectly concluded Mr. Su had lied in an affidavit in a parallel proceeding and then relied on this fact in renewing the orders.

[82] Respectfully, none of the issues raised by Mr. Su amount to reviewable errors warranting intervention by this Court. Rather, I agree with the respondents that Mr. Su is merely asking us to reweigh the evidence and come to a different conclusion.

[83] First, it is not clear the judge relied on the fact of Mr. Su's arrest when concluding the orders should be maintained. From paras. 91–98, the judge recounted various pieces of "post-order" evidence supporting the maintenance of the orders. The judge did not mention Mr. Su's arrest. Instead, he focused on Mr. Su's obfuscatory actions in relation to the investigation, including his misleading affidavit of assets, his non-compliance with court orders, and his unwillingness to answer questions during a court-ordered examination. The judge also noted the transfer of US$16 million immediately following the execution of the *Anton Piller* order, which he concluded was indicative of Mr. Su dissipating his assets in breach of a court order.

[84] Ultimately, the judge's mention of Mr. Su's arrest elsewhere in his reasons (mainly, paras. 3 and 35) does not give rise to any error that could warrant setting aside his decision to maintain (or, alternatively, to issue afresh) the *Anton Piller* and *Mareva* orders: paras. 88–98.

[85] As for Mr. Devost's credibility and reliability: as I have already discussed at length, the judge considered Mr. Su's concerns in this regard. His findings as to the credibility of Mr. Devost's evidence are owed deference.

[86] So too is his factual finding that Mr. Su's affidavit in a parallel proceeding was false. That conclusion was open to the judge on the evidence at the *inter partes* hearing. There, the judge was able to contrast Mr. Su's affidavit evidence that he was only an investor in the AAX Group with contrary evidence from both Mr. Devost and Mr. Leck about the extent of Mr. Su's involvement with the Group.

Conclusion and Disposition

[87] Mr. Su has not pointed to any legal error, misapplication of principle or misconception of evidence by the chambers judge. Instead, he asks this Court to reweigh the evidence and reach different conclusions.

[88] An appellate court will not interfere with a discretionary decision on the basis it would have exercised the discretion differently: *Law Society of British Columbia v. Canada (Attorney General)*, 2002 BCCA 49 at para. 7. Rather, intervention is only justified when a judge has fallen into error. So long as the judge at first instance has given sufficient weight to the relevant considerations, an appellate Court reviewing their exercise of discretion will not intervene to second guess their final judgment: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 43; *Dhillon v. Pannu*, 2008 BCCA 514 at para. 28.

[89] Having found the judge applied the correct legal tests and gave weight to the relevant considerations, I would dismiss the appeal.

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Justice Mayer"