

CANADA / JUDGMENT

## Blumenschein v. Seel

2020 BCCA 296

### COURT

British Columbia Court of Appeal

### DECIDED

19 October 2020

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2020 BCCA 296 Blumenschein v. Seel

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Blumenschein v. Seel,

2020 BCCA 296

Date: 20201019

Docket: CA46928

Between:

Eric Blumenschein and Jacob Trust

Appellants

(Plaintiffs)

And

Annemarie Seel, Jacob Enterprise Ltd., Joan Crescent Manor Holdings Inc., Winndell Homes Ltd., Peter Blumenschein and Kelly Blumenschein

Respondents

(Defendants)

Before:

The Honourable Madam Justice Griffin

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated June 19, 2020 (Blumenschein v. Seel, Victoria Docket S200862).

## Oral Reasons for Judgment

The Appellant Eric Blumenschein, appearing in person (via teleconference):

E. Blumenschein

Counsel for the Respondents (via teleconference):

A. Rafuse

Place and Date of Hearing:

Vancouver, British Columbia

October 19, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 19, 2020

## Summary:

Application for leave to appeal, and injunctive relief, from an order dismissing an application for an order restraining the respondent Ms. Seel from dealing with her shares of Jacob Enterprises Ltd. Held: Applications dismissed. The applicant has not shown that the proposed appeal is *prima facie* meritorious. There is no point of general importance requiring clarification on appeal as to the differences between a preservation order and an injunction restraining dealings with property in dispute. The respondent Ms. Seel, who is the applicant's mother, is elderly and not physically healthy and the applicant's desired relief could have the effect of permanently thwarting her wish to get on with her estate planning. The judge took into account the applicant's claim to a beneficial interest in the shares and concluded that damages or a tracing remedy would be available to him if the interim relief was not granted.

GRIFFIN J.A.:

## Introduction

- [1] The applicant, Eric Blumenschein, seeks leave to appeal an order made June 19, 2020, dismissing his application for various forms of relief seeking to prevent his mother, the respondent Annemarie Seel, from dealing with her shares of Jacob Enterprise Ltd. ["JEL"].
- [2] He also seeks what he describes as a stay order pending appeal, but in reality this is in the form of a positive injunction order restraining the respondents from in any way dealing with the shares of JEL and shares of two other companies, Joan Crescent Manor Holdings Inc. ("Joan Crescent") and Winndell Homes Ltd. ("Winndell Homes").
- [3] The applicant's Notice of Motion in this court states:

TAKE NOTICE THAT AN APPLICATION will be made by Eric Blumenschein to the presiding justice at 850 Burdett Avenue, Victoria British Columbia, at 9:30 a.m. on Monday 19/OCT/2020, for an order pursuant to Section 18 Court of Appeal Act that the appellant seeks that the Court of Appeal order a stay pending appeal and that the respondents and their servants, agents or otherwise, are restrained from transferring, conveying, assigning, charging, encumbering or otherwise dealing with the Subject Property being shares of Jacob Enterprise Ltd. and Joan Crescent Manor Holdings Inc. and Winndell Homes Ltd., pending outcome of the appeal in this matter and the appellant seeks an order granting leave to appeal the order of the Honourable Justice Funt of the British Columbia Supreme Court pronounced on June 19, 2020 and the appellant seeks direction on the conduct of the appeal.

## Background

- [4] Ms. Seel is the sole shareholder of JEL, which in turn holds 100% of the shares of Joan Crescent and Winndell Homes. The other two companies own various assets, including real property and businesses.
- [5] Ms. Seel has six children, some of whom who have conflicts between them, including the applicant and his brother, the respondent Peter Blumenschein ("Peter"). The final respondent is Peter's wife, Kelly Blumenschein.
- [6] Ms. Seel is in her late eighties and is in poor physical health. Despite her poor physical health, the uncontested evidence is that she is mentally competent.
- [7] Since 2015, Ms. Seel has been contemplating taking estate planning steps, in part to deal with the conflicts between her children and in part to minimize the income tax payable upon her death. She met with a lawyer for advice in this regard in July 2015 but did not take any immediate steps. Again in June 2017, she decided to pursue the estate planning and discussed it with some of her children, including the applicant and his brother Peter, as well as another one of the siblings, Gordon. The applicant and the other two named brothers, together with Ms. Seel, met with a lawyer in this regard in 2017. There was also a telephone conference between that lawyer, Ms. Seel and the applicant in February 2018.
- [8] Another lawyer, Mr. Ali Dadkhah, is now involved in Ms. Seel's estate planning. He was retained in January 2020. He provided an affidavit to the court below regarding Ms. Seel's wishes to engage in tax-efficient estate planning and to provide for all of her children in ways that respect their varying contributions to the family and its enterprises over the years. His affidavit discloses the estate planning advice he has given to Ms. Seel. If this advice is followed, it could result in a transfer of shares or assets to a trust.
- [9] The applicant commenced a claim by Notice of Civil Claim filed February 25, 2020. His 53-page pleading is in my view unnecessarily long and confusing. In summary, the theme of the claim seems to be that he provided some services to his mother in relation to the assets owned by the respondent companies with an expectation of reward and that he did not get any or sufficient reward, with the result that she owed him fiduciary duties, which she

breached. He claims that because of this he is entitled to "equitable remedies", and in that regard, he alleges that he has a beneficial interest in some of the shares of the respondent companies, and he seeks to have the legal ownership of shares transferred into his name. He seeks a declaration that Ms. Seel holds the shares of the respondent companies pursuant to an express or implied trust in favour of him. He also appears to base his claim on a power of attorney Ms. Seel gave him in February 1991. The applicant also claims he is entitled to trace funds that were wrongfully misappropriated from the respondent companies into assets owned by Peter and Kelly Blumenschein or other corporate entities allegedly owned or controlled by them.

- [10] The applicant's claims are denied by the respondents. They allege that the applicant was properly paid for any work he did and has resided rent-free in one of the properties owned by Joan Crescent since 2016. They say the power of attorney was expressly subject to the condition that it would only be operative if Ms. Seel was no longer capable of managing her affairs and did not create any sort of equitable or trust obligation by Ms. Seel to the applicant.
- [11] On June 12, 2020, the applicant filed the notice of application ["NOA"] that was the subject of the hearing below. Under Part 2, Order Sought, he stated that he sought two orders (the reference to "AMS" is to Ms. Seel):
1. Preservation order for the status quo of the share holdings of AMS being Jacob Enterprise Ltd. pending a prohibitory interim injunction hearing or as otherwise deemed proper by the court.
  2. Plaintiff has sixty days to bring proper application for prohibitory interim injunction to restrain AMS from transferring, conveying, assigning, charging, encumbering, or otherwise dealing with the subject property being the shares of Jacob Enterprises Ltd.
- [12] Under Part 2, Factual Basis, of the NOA, the applicant's allegations continued to be confusing, but suffice to say they continued to advance the theme that he was not fairly rewarded for his work for his mother or her companies.
- [13] Under Part 3, Legal Basis, of the NOA, the applicant stated as follows:
25. The Plaintiff is a proper person who had reasonable expectation about the manner in which the companies Jacob Ent., Joan Crescent Inc. and Winndell Ltd. would be managed and overseen with reasonable and prudent care for the benefit of the Plaintiff as beneficial shareholder.
  26. The Plaintiff has a standing to bring a claim on behalf of a trust for, inter alia, the following exceptions:
    - a. AMS is committing conversion of trust property and in collusion with Peter and Kelly Blumenschein in their conversion of trust property.

- b. AMS is in a conflict of interest and duty where it is impossible for her to sue those whom she is in collusion with namely Peter and Kelly Blumenschein. AMS herself committed a breach in her duty of care in the loss of the Joan Crescent Inc. care license and thus she would be suing herself.
  - c. AMS as trustee in performing her duties as trustee has failed to protect the trust estate or to protect the interests of the beneficiary in the trust estate.
  - d. The Plaintiff as beneficiary is suing to recover trust property.
  - e. Statutory exceptions such as those in the BCA allowing a beneficial owner of securities of a corporation to bring actions for oppression and dissolution and are not subject to the common law procedural rules against a beneficiary of a trust advancing claims against non-trustees.
  - f. AMS as trustee is named in the Notice of Civil Claim.
27. The Plaintiff seeks a preservation order for a pre-trial injunction holding the status quo of the share holdings of AMS being Jacob Enterprise Ltd. pending a prohibitory interim injunction hearing pursuant to s. 10-4(1) and 10-4(4) and 10-1(1) of the Supreme Court Civil Rules.
- [14] It is clear that the overarching purpose of the orders sought by the applicant was to prevent the respondent from undertaking her estate plan by preventing her from dealing with any of her shares of JEL.
- [15] The specific Rules of Court relied on by the applicant below were R10-4(1) and (4), and 10-1(1).
- [16] Rule 10-4(1)-(5) deals with applications for pre-trial injunctions. It provides:
- (1) An application for a pre-trial injunction may be made by a party whether or not a claim for an injunction is included in the relief claimed.
  - (2) An application for a pre-trial injunction may be made before the start of a proceeding and the injunction may be granted on terms providing for the start of the proceeding.
  - (3) If an application for a pre-trial injunction is made without notice, the court may grant an interim injunction.
  - (4) An injunction must be imposed by order of the court.
  - (5) Unless the court otherwise orders, an order for a pre-trial or interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages.
- [17] Rule 10-1 deals with detention and preservation of property. It provides:

- (1) The court may make an order for the detention, custody or preservation of any property that is the subject matter of a proceeding or as to which a question may arise and, for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter on any land or building.
- (2) If the right of a party to a specific fund is in dispute in a proceeding, the court may order the fund to be paid into court or otherwise secured.
- (3) If property is the subject matter of a proceeding and the court is satisfied that the property will be more than sufficient to answer all claims on it, the court at any time
  - (a) may allow the whole or part of the income of the property to be paid, during such period as the court may direct, to a party who has an interest in it, or
  - (b) in the case of personal property, may order that part of the personal property be delivered or transferred to a party.
- (4) If a party claims the recovery of specific property other than land, the court may order that the property claimed be given up to the party, pending the outcome of the proceeding, either unconditionally or on terms and conditions, if any, relating to giving security, time, mode of trial or otherwise.
- (5) Unless the court otherwise orders, if an order is made under subrule (4) in favour of a party, the order must contain the party's undertaking to abide by any order that the court may make as to damages arising out of delivery of the property to the party or compliance with any other order.

## Judgment Below

- [18] The judge described the applicant's application as an "injunction to prohibit his mother from undertaking an estate plan". The judge noted that Ms. Seel was elderly, had physical ailments, but still enjoyed good mental faculties.
- [19] In considering the applicant's application, the judge stated the test for granting the order as follows:
- [3] In all of the circumstances, I must consider what is just and equitable. Three factors in particular warrant consideration:
- 1) Is there a serious issue to be tried?
  - 2) Will the applicant suffer irreparable harm absent the injunction? and,
  - 3) Does the balance of convenience favour granting the injunction?

The authorities for those factors are *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 and *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5.

- [20] The respondents conceded that it could not be said that the applicant's claim was frivolous and vexatious, and in that light, the test for a serious issue to be tried was met.
- [21] On the second factor, the judge found that the applicant would not suffer irreparable harm if his mother was allowed to proceed with her estate plan. He found that damages could adequately redress any harm suffered by the applicant and that the risk of not collecting a possible judgment was substantially reduced because the real estate assets were located in Canada, including assets at an estimated value of over \$4 million in British Columbia. Additionally, the judge found it was likely that tracing remedies would be available to the applicant against the defendants and others that would be aware of the applicant's claims.
- [22] In assessing the balance of convenience, the judge weighed not only the adequacy of damages and availability of substantial assets, but also the circumstances of Ms. Seel, namely her age and serious health concerns and her wish to put her affairs in order. He noted that Ms. Seel will receive independent legal advice on her estate planning.
- [23] Considering the matter as a whole, the judge concluded that an injunction should not be granted and dismissed the application.
- [24] The applicant now seeks leave to appeal the dismissal of his application. As mentioned, in addition, he wishes to stay the order dismissing his application pending appeal, and in doing so requests I grant him a preservation order pending the outcome of the appeal. For the reasons that follow, I would deny these applications.

## Discussion

### Requirements and Test for Leave to Appeal

- [25] Rule 2.1(a)(iv) of the Court of Appeal Rules, B.C. Reg. 297/2001, provides that orders made under Part 10 are "limited appeal orders" and thus leave to appeal is required.
- [26] The applicant relies on *Vesuna v. Ashworth*, 2020 BCCA 154, for the test for granting leave to appeal. That case dealt with an application for leave to appeal a discretionary order refusing to grant an injunction, as well as an application for an injunction pending appeal. Summarizing established authority, it held:
- [28] The test for leave to appeal was summarized by Justice Saunders in *Landmark Solutions Ltd. v. 1082532 B.C. Ltd.*, 2020 BCCA 74 (Chambers), a case in which leave to appeal from an injunction order was sought. She held at paras. 2-3:
- [2] ... On a leave application, this court generally looks at four issues, all under the rubric of the interests of justice: the apparent merits of the proposed appeal; is it *prima facie* meritorious or on the other hand frivolous; the significance, if any, of the point on appeal to the practice or the public; the significance of the point raised to the action itself; and whether the appeal will unduly hinder the progress of the action. The answer on a leave application is not dictated by the answer to any single one of these issues and it is an overall assessment that

must be made. I refer to *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 in turn referring to *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.); *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 293.

- [3] It is to be remembered that if the order appealed is one made in the exercise of judicial discretion, the degree of merit of the proposed appeal is affected by the standard of review applied by this court to orders made in the exercise of judicial discretion: *Pacifica Mortgage Investment Corporation v. Laus Holdings Ltd.*, 2011 BCCA 317.
- [29] The question of whether there is some merit to an appeal of a discretionary order requires assessment of whether there is an arguable case that the judge erred in principle, made an order that is not supported by the evidence, or whether the order appealed from will work an injustice. The applicant for leave must establish a reasonable possibility that a division of the Court would grant the appeal on the merits: *MacRae v. Woermke*, 2019 BCCA 355 at paras. 4-5 (Fenlon J.A. in Chambers).
- [30] As for the authority of this Court to issue an interim injunction, s. 10(2)(b) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, provides a broad power to a justice in chambers to "make an interim order to prevent prejudice to any person".
- [31] This provision authorizes a justice to issue an injunction, but only in the "rarest of cases": *Berthin v. British Columbia (Registrar of Land Titles)*, 2016 BCCA 255 at para. 35 (Goepel J.A. in Chambers), citing *Brown v. Anderson*, 1999 BCCA 372 at para. 32 (Esson J.A. in Chambers); *Hawkeye Power Corporation v. Sigma Engineering Ltd.*, 2014 BCCA 427 at para. 21 (Donald J.A. in Chambers).
- [32] The test in this Court, as in the court below, for the granting of an injunction order is the well-known three-part test involving consideration of the merits, irreparable harm, and balance of convenience. As Goepel J.A. stated in *Berthin*:
- [36] The test for granting injunctive relief under s. 10(2)(b) is similar to the test for granting a stay under s. 18(1) of the Court of Appeal Act: *Hawkeye* at para. 22, citing *Northwood Inc. v. Forest Practices Board*, 2000 BCCA 7 at para. 8 (Mackenzie J.A. in Chambers). There must be a serious issue to be tried, the applicant must risk irreparable harm if the application is refused, and the balance of convenience must favour the applicant: *Northwood Inc.* at para. 8, referring to the test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.
- [37] An injunction may be granted in circumstances where the order is necessary to preserve the appellant's rights and prevent frustration of the appeal: *Coast Hotels Ltd. v. Northwest Hotels Inc.*, 2001 BCCA 481 at para. 17 (Saunders J.A. in Chambers); *Enns (Guardian ad Litem) v. Voice of Peace Foundation*, 2004 BCCA 13 at para. 18 (Donald J.A. in Chambers).

### Alleged Errors

- [27] The applicant submits that the chambers judge erred in the following three ways:

- a) In law in failing to address the applicant's request for a preservation order and applying the incorrect legal test for such an order;
- b) In principle and fact by making a decision contrary to the evidence of fraud and undue influence and by failing to give that evidence weight in his analysis;
- c) In law by concluding that there are significant assets in Canada and in concluding that damages would be an adequate remedy at trial.

[28] The applicant submits that his argument that the judge made these errors is *prima facie* meritorious.

[29] The respondents oppose the applications, taking the position that there is no issue of significance to the practice raised by the applicant, nor did the judge make any final orders going to the merits of the parties' disputes. The respondents submit that the judge made no error in principle. The respondents also argue that any injunction against Ms. Seel could have lasting harm, as if she passes away before completing her estate planning, the estate could suffer significant income tax repercussions. In this regard, the applicant has provided no undertaking as to damages.

#### Did the Trial Judge Err by Failing to Consider Granting a Preservation Order?

[30] The applicant suggests that the judge did not address the request for a preservation order, and thus failed to consider the important differences between the test for a preservation order and the test for interlocutory injunctions. In particular, the applicant suggests that the judge failed to consider his claim to a "proprietary interest in the shares" and failed to evaluate irreparable harm in this context.

[31] I am not persuaded that the judge failed to consider an important difference between the test for a preservation order and the test for an injunction.

[32] It has been said that the test for a preservation order is as set out by Justice Gray in *Osooli-Talesh v. Emami*, 2003 BCSC 1924, and approved by this Court in *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 at para. 21:

- a) Is there a claim on the evidence and not just the pleadings to a propriet[ar]y interest in property?
- b) Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?
- c) Is there a substantial question to be decided as to the plaintiff's entitlement to the property?
- d) Does the balance of convenience favour granting the order?

[33] However, the above articulation of the test for a preservation order lists factors that are all aspects of the three-part test for an injunction, through the additional lens of the plaintiff's claim to an interest in property that is the subject of the application.

- [34] The applicant was seeking the exercise of the court's discretion to restrain Ms. Seel from dealing with her shares in JEL, shares in which he claimed to have a beneficial interest.
- [35] In the circumstances here and given the form of relief sought, so long as the judge took into account the fact that the applicant was advancing a claim to a beneficial interest in the shares that were the subject of his application, there was no difference in substance or practical effect as between the test for a preservation order preserving the shares and the test for a traditional injunction restraining the disposition of the shares. This conclusion is similar to the observations made in *Osooli-Talesh* at paras. 49-52 and in *Kepis & Pobe* at paras. 22-24.
- [36] While the judge's reasons are brief, the judge did not need to examine all of the applicant's claims in detail because the respondents conceded there was a serious issue to be tried.
- [37] As I read the judge's reasons, accepting that the applicant had shown a serious question to be tried, the judge likewise accepted that there was some evidence to support the conclusion that the applicant had a claim to a proprietary interest in the shares.
- [38] That the judge clearly understood that one aspect of the claim was a claim to a proprietary interest in the shares is evidenced by the judge's reference to the availability of tracing remedies as against all parties who might have notice of the applicant's claims, should the applicant be ultimately successful after trial.
- [39] It appears therefore that the fact that the applicant was claiming a proprietary interest in the shares of JEL, amongst other claims, was a factor informing the context of the three-part injunction test set out by the judge, in considering whether the applicant had shown a serious question to be tried, whether the applicant would suffer irreparable harm absent the order sought, and the balance of convenience.
- [40] For these reasons, I see little merit to the argument that the judge failed to consider the fact that the applicant was claiming a proprietary interest in the shares. I also do not agree with the submission that this appeal is of significance to the practice as an opportunity to clarify the test for preservation orders.
- [41] I would not grant leave to appeal on this ground.

Did the Trial Judge Err in Failing to Give Sufficient Weight to the Allegations of Fraud and Undue Influence?

- [42] The applicant submits that the judge failed to give sufficient weight to the applicant's allegations of fraud and undue influence over Ms. Seel by the other personal defendants, Peter and Kelly Blumenschein.
- [43] It is true that the judge did not address the allegations of fraud in his reasons. However, I cannot see how it would be relevant to the applicant's claim to enjoin Ms. Seel from taking any steps in relation to her shares of JEL.

- [44] The conduct alleged to form the basis of the claims against Peter and Kelly Blumenschein are wrongs against Ms. Seel or the respondent companies. Importantly, there seems to be no basis for assuming that the alleged misconduct would provide any basis for a proprietary remedy in favour of the applicant, as against the shares of JEL or otherwise.
- [45] This aspect of the applicant's argument seems to be premised on the theory that pre-emptive injunctive relief was needed to prevent Peter and Kelly Blumenschein from exercising undue influence on Ms. Seel and wrongly influencing her decisions in respect of estate planning. The applicant's case in this regard fell short. The applicant failed to show any legal theory supporting the court issuing a "protective" order to protect Ms. Seel from the exercise of her own free will.
- [46] The judge was alive to the applicant's concerns about undue influence. Again, he noted that no one claimed that Ms. Seel was not mentally competent. She had been considering organizing her affairs for some years. He further noted that prior to Ms. Seel implementing her estate planning, she would be receiving her own, separate, independent legal advice (para. 9).
- [47] The applicant criticizes those observations, suggesting that the legal advice Ms. Seel would be receiving would not be independent of Peter and Kelly Blumenschein. However, this is speculative. I cannot see how the judge could have properly ignored the evidence of Ms. Seel and her estate planning lawyer as to Ms. Seel's wishes and the advice she was receiving. The judge was entitled to consider that evidence. I do not see that this Court would interfere on the basis that the judge erred in not giving sufficient weight to the applicant's concerns there might be undue influence over Ms. Seel's future decisions.
- [48] The other factors relevant on a leave to appeal application do not favour granting leave on this ground. Whether or not the judge failed to consider the allegations of fraud and undue influence is clearly not of general importance. It is difficult to see how this is of importance to the action itself, since the judge made no final findings or orders.
- [49] For these reasons, I would not grant leave to appeal on this ground.

Did the Trial Judge Err in Finding that there are Significant Assets in Canada and that Damages would be Sufficient?

- [50] The final suggested ground of appeal is the alleged error in finding that there are significant assets in Canada and that damages would be a sufficient remedy, in light of the applicant's proprietary claim.
- [51] The judge commented that the applicant's claims could be quantified in monetary terms, and with the real estate assets in Canada, the risk he would fail to collect upon a successful judgment is greatly reduced: para. 6.

- [52] The applicant suggests that the judge considered only gross asset values when he considered the value of the British Columbia real estate in the range of \$4.6 million. The applicant suggests that if the shares are not preserved, there will be a devaluation of this amount by just over \$1 million due to tax consequences. He also claims he could suffer negative income tax consequences from Ms. Seel's estate planning and treatment of the shares in her name. He adds that he will suffer additional consequential damages.
- [53] In response to this, I note that even on the applicant's own submissions, there are likely real estate assets in British Columbia valued at \$3 million. There is no threat of transferring assets out of the province. The confusing nature of the applicant's claim makes it very difficult to conclude that damages would not be an adequate remedy should he succeed at trial and for some reason be unable to recover his claim to a proprietary interest in some or all of the shares in JEL. His claim to a beneficial interest in the shares of JEL appears to be based on a quantum meruit type of argument, and that should be quantifiable in damages.
- [54] Furthermore, in considering the balance of convenience, the judge was required to consider not just the potential for the applicant to suffer irreparable harm, but the potential harm to Ms. Seel if she was prevented from dealing with her shares in JEL as she wished. On any balancing it is clear that the potential harm to Ms. Seel that would flow from granting the order preventing her from dealing with her shares in JEL is much greater than any potential harm to the applicant if the order was not granted. This is because of Ms. Seel's advanced age and poor physical health. There is a real possibility that if she is prevented now by court order from doing as she likes with her property, she might never be able to take the steps she wishes to take.
- [55] In short, the applicant is seeking to have the court interfere with the ability of an elderly person to engage in estate planning in relation to assets over which the elderly person has legal title. Simply put, I see no possibility that if leave was granted, this Court would interfere with the judge's discretion to refuse to interfere with Ms. Seel's right to deal with her shares of JEL.
- [56] Although the merits threshold in granting leave to appeal is generally not onerous, it is relevant to consider the standard of review on appeal: *Landmark Solutions Ltd. v. 1082534 B.C. Ltd.*, 2020 BCCA 74 at para. 10.
- [57] In this case, the applicant seeks to appeal a discretionary order, and on this ground he seeks to challenge several factual findings of the judge below.
- [58] To succeed, the applicant would have to show palpable and overriding errors in the judge's findings and that refusing to grant the order was not a reasonable exercise of the judge's discretion. I am of the view that this ground of appeal is not *prima facie* meritorious.

[59] This ground is also of relatively little significance to the action itself, particularly since the judge found that a tracing remedy may be available if damages proved insufficient at trial. In order to help protect such a tracing remedy, the judge ordered that full particulars of any transfer of shares be disclosed to the applicant.

[60] It is clear that this ground of appeal does not raise any questions of general significance.

[61] For these reasons, I would not grant leave to appeal on this ground.

### Stay Pending Appeal and Granting of an Interlocutory Injunction

[62] Having found that leave to appeal should not be granted on any of the grounds put forth by the applicant, it is unnecessary for me to consider the other relief sought on this application. However, I have noted that the relief sought by the applicant in this Court is wider injunctive relief than what was sought in the Court below. In this Court the respondent seeks to restrain not only Ms. Seel from dealing with her shares in JEL, but all the respondents from dealing with shares in JEL, Joan Crescent, and Winndell. I see no basis for entertaining an application for this wider injunctive relief at first instance in this Court.

### Disposition

[63] For these reasons, I would dismiss the applications.

"The Honourable Madam Justice Griffin"

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