

CANADA / JUDGMENT

Blumenschein v. Seel

2025 BCSC 1582

COURT

Supreme Court of British Columbia

DECIDED

15 August 2025

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2025 BCSC 1582 Blumenschein v. Seel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Blumenschein v. Seel,

2025 BCSC 1582

Date: 20250815

Docket: S200862

Registry: Victoria

Between:

Eric Blumenschein

Plaintiff

And:

Annemarie Seel, Jacob Enterprises Ltd,

Joan Crescent Manor Holdings Inc., and

Windell Homes Ltd., and Peter Blumenschein

and Kelly Blumenschein

Defendants

- and -

Docket: S234481

Registry: Victoria

Between:

Eric Blumenschein

Plaintiff

And:

Peter Blumenschein and Alex Blumenschein and

Annemarie Seel and Jacob Enterprises Ltd. and

Joan Crescent Manor Holdings Inc.

Defendants

Before: The Honourable Justice Young

Reasons for Judgment

The Plaintiff, Appearing on His Own Behalf:

E. Blumenschein

Counsel for Annemarie Seel, Jacob Enterprises Ltd. Joan Crescent Manor Holdings Inc. and
Windell Homes Ltd.:

C. A. Siver

S. Constantine

Place and Date of Hearing:

Victoria, B.C.

May 28 - 30 2025

Place and Date of Judgment:

Victoria, B.C.

August 15, 2025

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Overview

- [1] The plaintiff, Eric Blumenschein, alleges that he has a beneficial interest in the shares of his mother's (Annemarie Seel's) companies. He provided financial contribution and services with the expectation that his mother would reward him with partial ownership of the companies. She did not. He says that she holds the shares of the companies in trust for him and that she owes him fiduciary duties which she breached.
- [2] The plaintiff has started two actions and two petitions related to this claim.
- [3] The defendants Annemarie Seel, Jacob Enterprises, Joan Crescent Manor Holdings, and Windell Homes Ltd. seek orders dismissing the plaintiff's claims against them by way of summary judgment pursuant to Supreme Court Civil Rules, R. 9-6.
- [4] In the alternative, they seek orders dismissing the plaintiff's claims against them pursuant to Supreme Court Civil Rules, R. 9-5(1)(a), (b), (c), or (d).
- [5] In the further alternative, they seek an order that discrete issues be determined by way of Supreme Court Civil Rules, R. 9-7(2) asking that this Court declares:
 - a) no trust exists in favour of the plaintiff;
 - b) the plaintiff does not have standing to bring his trust claims; and
 - c) the plaintiff is not an "appropriate person" within the meaning of the British Columbia Business Corporations Act such that he would have standing to bring an oppression claim under that Act.
- [6] The applicants seek special costs forthwith, or alternatively costs forthwith, and in the further alternative costs.
- [7] Before me are three applications. The first two identical applications are filed in two separate actions and are to dismiss the plaintiff's claims under R. 9-6 of the Supreme Court Civil Rules. The third application which I will deal with at the end of these reasons is to have the plaintiff declared a vexatious litigant.
- [8] I deny all three applications because there is a reasonable issue to be tried, and I do not find the plaintiff to be vexatious.

The Actions

- [9] In the 2020 Action (Court File No. VI S200862) (the "First Action"), the parties are: Eric Blumenschein (the "plaintiff"), Annemarie Seel ("Seel"), Jacob Enterprises Ltd. ("Jacob"), Joan Crescent Manor Holdings Inc. ("JCM"), Windell Homes Ltd. ("Windell"), and Peter Blumenschein and Kelly Blumenschein (the plaintiff's brother and sister-in-law). Annemarie

Seel changed her name in or about 1993; her former married name was Blumenschein. In this action, the plaintiff alleges that he has a beneficial interest in the shares of the defendant companies and that the defendant Seel owes him a fiduciary duty which she has breached. The plaintiff seeks:

- a) a declaration that Seel holds 100% of the issued shares of the defendant companies pursuant to an express or implied trust in favour of the plaintiff dated February 7, 1991. The plaintiff refers to this as the "Jacob Trust".
- b) in the alternative, a declaration that Seel holds 50% of the issued shares of Jacob (arising from 50% of the issued shares of JCM and 50% of the issues shares of Windell) pursuant to a partnership obligation in favour of the plaintiff dated December 6, 1990.
- c) relief under the oppression remedy under s. 227(1) of the BC Business Corporations Act.
- d) a finding that Peter Blumenschein and Seel are personally liable to him for breach of trust as trustees or constructive trustees.
- e) damages for his unjust constructive dismissal and a finding that Seel, Peter and Kelly Blumenschein are jointly and severally liable.
- f) an order that the defendant corporations be wound up under s. 324 of the BC Business Corporations Act.
- g) an injunction restraining the defendants from transferring shares of the defendant corporations.
- h) certificates of pending litigation, aggravated and punitive damages, general damages, and costs.

[10] On December 29, 2023, the plaintiff filed another notice of civil claim (Court File No. VI S234481) (the "Second Action"). The focus of this notice of civil claim is misappropriation of trust monies. He brings this action on behalf of JCM and alleges that Seel has allowed Peter Blumenschein to knowingly assist his son Alex Blumenschein's conversion of JCM property assets and business opportunities. He alleges constructive and equitable fraud on behalf of Seel. He alleges Peter Blumenschein is trespassing.

[11] The plaintiff seeks the following declarations in the Second Action:

- a) that Peter Blumenschein is constructive trustee of \$470,846 of JCM trust monies and that JCM is entitled to a constructive trust over JCM trust monies.
- b) a declaration that Peter Blumenschein and Alex Blumenschein are constructive trustees for \$192,123 of JCM property, assets and lost business opportunities and that JCM is entitled to a constructive trust over the JCM properties.
- c) a declaration that Peter Blumenschein breached his fiduciary duty to the Jacob group of companies JCM and Windell.

- d) a declaration that Annemarie Seel breached her fiduciary duty to the Jacob group of companies JCM and Windell and to Eric Blumenschein (i.e., the plaintiff).
 - e) various orders for judgment of accounting damages, and of punitive, exemplary and aggravated damages.
- [12] The plaintiff has commenced two petitions in addition to the two actions. There is no application before me to dismiss the petitions, but they are relevant to the vexatious litigant application. I will discuss them later under the application to have the plaintiff declared a vexatious litigant.
- [13] The defendants Peter, Kelly and Alex Blumenschein have not joined in these applications to dismiss the claims against them, and so I will only decide whether to dismiss the claims against the applicants Seel, Jacob, JCM and Windell, which I collectively refer to as the applicants.

Summary Dismissal Legal Test

Rule 9-6 Summary Judgment

- [14] The dismissal applications are brought under Supreme Court Civil Rules, R. 9-6(4) and (5) which reads:

Application by answering party

- (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

- (5) On hearing an application under subrule (2) or (4), the court,
- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
 - (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
 - (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
 - (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

- [15] In order to succeed, the defendants must demonstrate that the plaintiff's case is unsound or must adduce evidence that provides a complete answer to the plaintiff's case. I can consider but not weigh evidence beyond consideration of whether it is uncontradicted evidence: *Sakwi Creek Hydro Limited Partnership v. Dickin*, 2023 BCCA 188 at para 25.
- [16] If the court is satisfied that it is manifestly clear (or beyond doubt) that the plaintiff is bound to lose, the defendant must succeed on the Rule 9-6 application: *Beach Estate v. Beach*, 2019 BCCA 277 at paras. 48-49 [*Beach Estate*].
- [17] A factual dispute does not preclude determination under this Rule. I am permitted to make inferences of fact based on undisputed facts as long as the inferences are strongly supported by the facts. I must be certain "beyond a reasonable doubt" that there is no genuine issue for trial. As explained by Justice Voith in *Rahman v. Windermere Valley Property Management Ltd.*, 2022 BCCA 258 at para. 27 [*Rahman*], citing *Beach Estate* at para. 65 with approval:
- [27] In *Beach Estate*, this Court said:
- [65] In my view, the judge on this record simply could not conclude "beyond a reasonable doubt" that there was here "no genuine issue for trial" in respect of the allegations impugning the Settlement Agreement. "Beyond a reasonable doubt" is the high bar set by Justice Esson (then of the Supreme Court) in *Progressive Construction Ltd.*, quoted with approval by this Court in *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137. There the court (per Lambert J.A.) adopted this summary of the law stated by Esson J. in *Progressive Construction Ltd.*:

The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.

[Underline emphasis in original.]

- [18] As the Court explained in *Beach Estate* at para. 62, a court should not lose sight of the party's right to a trial on the merits of their dispute if they meet the thresholds set by Rules 9-5 and 9-6.
- [19] Caution must be exercised with self-represented litigants to ensure that any result is just when it is recognized that their limited familiarity with court proceedings and the rules of evidence imposes a duty upon judges to assist self-represented litigants to present their case properly.

- [20] I am mindful of the caution set out in *Brown v. Brown*, 2020 BCCA 53 at para. 30 [Brown], when dealing with self-represented litigants:
- [30] Self-represented litigants with limited familiarity with court procedures and with the rules of evidence are particularly likely to arrive in court without having a complete evidentiary foundation for their arguments in their affidavit material. Judges should proceed cautiously in such situations, attempting to ensure that the litigant has a full opportunity to present their case, but also taking care to ensure that indulgences offered to a self-represented party do not make the proceedings unfair to others. Commendably, most chambers judges do their best to ensure that the rules of procedure and evidence do not serve as traps for self-represented litigants, while at the same time taking steps to ensure that any relaxations of the strict rules do not operate unfairly to the other parties.
- [21] As Voith J. pointed out in *Rahman* at para. 32, the above quoted statements from *Brown* align with the guidance set out in *Pintea v. Johns*, 2017 SCC 23 where the Supreme Court of Canada endorsed the Statement of Principles on Self-Represented Litigants and Accused Persons (2006) authored by the Canadian Judicial Council.

Limitation Defence

- [22] The second basis for applying for dismissal of the claim is that the applicants allege that the plaintiff's claim is statute barred. A limitation period is an affirmative defence that must be pleaded: *Chouinard v. Army & Navy Dept. Store Ltd.*, 2008 BCCA 353 at para. 5.
- [23] I can dispose of this basis summarily because the applicants did not plead a limitations defence and raised it for the first time in their application to dismiss the claim summarily. I find it would be unfair to the plaintiff to permit the applicants to rely on an unpleaded defence as the plaintiff has not had an opportunity to turn his mind to which Limitation Act might apply, when his cause of action arose, and whether the commencement of the limitation period is postponed until a breach is discovered. These are matters for trial once the defence is properly pleaded.
- [24] The only authority relied on by the applicants is *Grosz v. Royal Trust Corporation of Canada*, 2021 BCSC 1313 at paras. 105-106, which states that an application to dismiss the claim, as time barred by operation of a statutory limitation period, is properly brought under Rule 9-6(5)(a). If an action is clearly statute barred, it can be struck under this Rule. That decision did not decide whether it would be appropriate to do so in the event that the defence was not pleaded, and it is not clear to me that the breach of the trust claim is statute barred.
- [25] Accordingly, I will consider whether there is before me a bona fide triable issue by reviewing the evidence presented by the plaintiff and the applicants.

Issues To Be Tried

[26] The plaintiff has used a scattergun approach and alleged numerous causes of action. The main issues are whether Seel held shares in the defendant companies in trust for the plaintiff, whether Seel and the plaintiff were in a partnership arrangement, and whether Seel owed the plaintiff a fiduciary duty and breached that duty. I summarize the issues to be tried as follows:

- 1) Is there a trust?
 - a) Express trust?
 - b) Implied trust (or a constructive trust)?
- 2) If so, was it created by the loan or investment of \$20,000 in 1983?
- 3) Was a trust created by the 1991 power of attorney?
- 4) Were Seel and the plaintiff in a partnership?
- 5) Does Seel owe a fiduciary duty to the plaintiff?
- 6) Does the plaintiff have standing to bring a derivative action or an oppression claim on behalf of JCM?
- 7) Has there been some conduct that could be considered oppressive?

Is There A Trust?

Express Trust

[27] The applicants argue that the "Jacob Trust" does not exist. Seel did not execute a deed of trust in favour of the plaintiff. I believe that this issue can be dispensed of immediately. There is no evidence that Seel executed a deed of trust and therefore there is no express trust. In a previous ruling in the First Action, Justice Wolfe ordered that the style of cause be amended to remove reference to the plaintiff "Jacob Trust" because no such legal entity exists.

Implied Trust

[28] Whether or not there is an implied or constructive trust is not as easy to determine. The applicants submit that the plaintiff has no legal or beneficial interest in any of the corporations or the JCM property. He is neither a director nor an officer of any of the corporations.

[29] The plaintiff provides a detailed history of his business dealings with Seel, some of which is relevant to the issue of whether there may be an implied trust.

- [30] In 1981, Seel owned a multi-unit rental property at 230 Jamison Avenue in Winnipeg where she operated a senior care facility. The plaintiff was working two jobs and was building up his savings. Seel told the plaintiff that the property at 240 Jamison Avenue, which was another multi-unit rental property, would be a good investment for him to buy. She negotiated the deal and the plaintiff bought the property. She reviewed and approved the paperwork. The plaintiff said her assurances that this was a good deal was enough for him and he accepted her direction automatically. He had complete trust in her. The plaintiff was in his early 20s with no credit history. As he could not get a mortgage on his own, his older brother Gordon agreed to a 50-50 partnership with the plaintiff and secured a mortgage for the purchase.
- [31] The plaintiff managed the property at 240 Jamison Avenue while his older brother Gordon played hockey in Germany.
- [32] The plaintiff describes Seel as his business mentor and he completely relied upon her experience knowledge and judgement. He submits that Seel undertook a fiduciary duty as the plaintiff's business mentor upon his entry into the business world. She found the property, negotiated the terms and arranged a partnership with Gordon to secure the mortgage. At no time was the plaintiff directed to seek legal representation. There are no suggestions that this was a bad investment for the plaintiff, and so, this evidence is background to describe his business relationship with Seel.
- [33] Seel and the plaintiff's properties were side by side and they integrated their businesses to support each other.
- [34] The plaintiff was regularly onsite managing his property with 11 rental units.
- [35] In the 1980s, the Federal Government of Canada initiated an inner-city housing revitalization grant program to provide funding through CMHC for 50% of the finding to rehabilitate properties. This program was called the Residential Rehabilitation Assistance Program or RRAP grant. As a term of the grant, CMHC placed a mortgage against the property being rehabilitated and that mortgage was forgiven over 5 years on a set formula.
- [36] Property owner applicants had to provide the first 50% of funding on completed work and the RRAP program provided the next 50%.
- [37] The plaintiff discovered the program and applied for a RRAP grant for his property at 240 Jamison Avenue. His brother Gordon agreed and applied for a second mortgage to fund it. The plaintiff was the general contractor on the revitalization of his property.
- [38] The plaintiff then applied for a RRAP grant for 230 Jamison Avenue, which was owned by Seel's company, Windell, and the plaintiff became the general contractor for the rehabilitation of 230 Jamison Avenue. Seel agreed to pay the plaintiff for his services as the general contractor for the rehabilitation of Windell's property at 230 Jamison Avenue. The plaintiff deposes that he was to receive \$20,000 from Windell for the work on a \$58,000 renovation for doing the renovation work on 230 Jamison Avenue. There was no written

contract. Seel does not deny this.

- [39] Seel and the plaintiff integrated the renovations on both buildings to save costs. The plaintiff provides a detailed description of the substantial work done on 230 Jamison Avenue, which I do not need to itemize here.
- [40] Seel was operating a residential care facility at 230 Jamison Avenue. As a term of refinancing, AVCO Financing requested a copy of her license. Initially, the licensing board refused to approve the licenses.
- [41] The plaintiff met with representatives from the City of Winnipeg's fire department and building department, and negotiated an agreement on what work was required to meet building and fire safety compliance. The plaintiff upgraded the building fire safety system and the licensing was granted to Windell.

The 1983 \$20,000 Contribution

- [42] The building compliance measures doubled the cost of the renovation. The plaintiff met with Seel and proposed that he would apply the \$20,000 that Windell owed to him for the original work already completed to make up the owner's financial contribution as required to obtain the RRAP grant. Seel agreed. The plaintiff then applied for the remaining 50% of the RRAP grant and was approved. This 1983 oral agreement was made at the kitchen table with nothing in writing. The plaintiff submits that it was based on mutual trust and confidence inherent in familial relations without legal counsel. Seel represented to him that their interests were the same. The plaintiff says he had begun to conduct himself as a partner in the business.
- [43] The plaintiff has provided a photocopy of the development application for 230 Jamison Avenue, and there is a reference to a \$20,000 contribution. The document is signed by the plaintiff.
- [44] The plaintiff deposes that he made additional investments of sweat equity management and property maintenance for the benefit of Windell. He became involved in all aspects Windell's senior care operations.
- [45] The plaintiff submits that he crossed over from a creditor of Windell to an investor of Windell by rolling into Windell the forgiveness of the \$20,000 debt owed to him for renovation work so that the RRAP grant could be obtained. This was not documented because they were family. Their focus was the survival of Windell as a going concern.
- [46] Seel deposes that she does not recall the plaintiff investing \$20,000 into Windell in 1982 or any other year. She does recall that the plaintiff was appointed contractor for renovation work done to Windell's property to convert the existing building into an assisted living facility. He prepared a budget with compensation for himself. The government provided a substantial subsidy for this work.

- [47] It took two years to complete the renovations according to the agreement with the City of Winnipeg. The plaintiff continued to work full time outside the business as he was not taking a salary from the Windell.
- [48] In 1986, the Province of Manitoba placed a ban on referrals to Windell's facility at 230 Jamison Avenue from hospitals because of Windell's slow implementation of new care facility requirements. Fourteen residents received relocation notices. The plaintiff was instrumental in negotiating an agreement with the licensing body so that the 14 residents could stay.
- [49] When Windell faced several business crises between 1983 and 1986 that threatened its survival, as a going concern, the plaintiff and Seel worked together to stabilize the business operation by the end of 1986.
- [50] The plaintiff produced a cancelled cheque showing that he had signing authority on Windell's account. In 1988, he completed the Windell monthly admission and discharge records in his handwriting. He was involved in collecting payments in 1988 and 1989 from the residents of Windell.
- [51] On November 16, 1988, the plaintiff attended CIBC with Seel to execute the CIBC mortgage. He signed on behalf of Windell as treasurer.
- [52] By 1989, Windell was refinanced to raise cash required to purchase another venture.
- [53] On or about May 1989, Seel made an offer to purchase the shares of Joan Crescent Manor Adult Care Home in Victoria, British Columbia. She made a \$10,000 cash deposit using Windell's money. The plaintiff travelled to Victoria to complete the purchase while Seel remained in Winnipeg. The plaintiff took control of the nursing home business in Victoria. To fund the purchase, Windell increased its mortgage from \$114,799 to \$249,000, and \$132,451 was used as a down payment for the purchase of Joan Crescent Manor.
- [54] Windell provided all the cash required for the purchase of the JCM shares. The plaintiff submits that since Seel and the plaintiff were in a 50-50 partnership in Windell or alternatively Seel held Windell shares in trust for him, he (notionally) contributed to the purchase of the shares of JCM.
- [55] Once JCM's license to run a senior care facility in Victoria was approved the plaintiff relocated from Winnipeg to Victoria. The plaintiff attended the law offices of Noel Paget, counsel for the vendors, and executed the JCM share purchase and did assume control of the JCM senior care business operations and oversaw the transition in ownership.
- [56] Seel stayed in Winnipeg to place Peter Blumenschein as manager of Windell's care facility before she came to Victoria. On her arrival in Victoria, she and the plaintiff managed the JCM care facility.

- [57] The plaintiff says that if he did not have an ownership interest in the JCM business he would not have relocated to Victoria, moving to a small city where he had no friends or business contacts.
- [58] The plaintiff says that initially, the shares of JCM went into Annemarie Blumenschein's name because "[w]e had not decided the corporate vehicle the shares would be held in." At all times Seel represented to him that their interests were one and the same. When Seel arrived in Victoria, she and the plaintiff signed new annual general meeting minutes of JCM confirming that they were shareholders of all the issued and outstanding shares of JCM.
- [59] On August 1, 1989 the shareholder's resolution of JCM was signed by Seel and the plaintiff which said:

JOAN CRESCENT MANOR HOLDINGS INC.

The undersigned below, being the holder of all the issued and outstanding shares in the capital of the above Company, hereby give the Company notice in writing waiving the notice of the calling and the requirement to hold the Company's Annual General Meeting and consent to and adopt in writing the following resolutions:

1. THAT the following persons, having first consented in writing to act as Directors of the Company be and are hereby appointed Directors of the Company to hold office until the next Annual General Meeting until their successors are duly elected or appointed:

Annemarie Blumenschein

Eric Blumenschein

and that the number of Directors be and is hereby determined at two.

2. THAT the Directors be and they are hereby authorized to fix their own remuneration for the ensuing year.
3. THAT the requirement to appoint an auditor of the Company for the ensuing fiscal year be and is hereby waived.
4. THAT the required financial statements made up to the date of the Company's last completed year-end laid before the members be approved and adopted.
5. THAT all acts and proceedings of the Directors of the Company, done and taken since the date of the last Annual General Meeting be and are hereby ratified and confirmed.
6. THAT the foregoing resolutions shall be deemed to have constituted and completed the business and proceedings of the Annual General Meeting for the year 1989, which may be deemed to have been held as of the 8th day of July, 1989.

AS WITNESS our signatures hereto as of the 1st day of August, A.D. 1989.

Annemarie Blumenschein Eric Blumenschein

- [60] In her response to the notice of civil claim, Seel admitted that the plaintiff had her authority to sign documents on her behalf. She said his role played in the acquisition of JCM was minimal consisting of signing the documents on her behalf.
- [61] Peter Blumenschein deposed in his fourth affidavit that it was his idea for Seel to bring Eric, the plaintiff, to Victoria as Eric was floundering and unemployed at the time.
- [62] It is not disputed that Seel never did transfer the shares to the plaintiff, but he contends that Seel held shares in JCM in trust for him. By signing the shareholder's resolution, the plaintiff submits that Seel acknowledged:
- a) the existing business partnership in the guise of a corporation between himself and his mother and the business mentor at Windell continued onto JCM;
 - b) 50% of the Windell monies used in the JCM share purchase were used for himself to purchase 50% of the JCM shares;
 - c) he held an equal vote and equal right to exercise a shareholder power and legal rights;
 - d) he was exercising his voting right as shareholder;
 - e) Seel was holding his 50% of JCM shares in trust for him; and
 - f) 50% of the JCM shares were delivered as per s. 68 of the Securities Transfer Act of British Columbia.
- [63] Seel has no recollection of signing these documents and deposes that she would not have signed them if she had been aware of their contents as she was the sole shareholder of JCM.
- [64] Seel and the plaintiff also signed the register and records agreement with the law firm Achtem Alexander dated July 31, 1990 in their capacity as directors of JCM. A further shareholder's resolution was signed by Annemarie Blumenschein and the plaintiff on July 9, 1990.
- [65] On September 20, 1990, Seel's accountant reported a tax issue with JCM share purchase going into Seel's personal name using Windell corporate monies. He recommended that Seel sell the JCM shares back to Windell at cost.
- [66] Jacob Enterprises Ltd. ("Jacob") was incorporated on December 6, 1991. Jacob took 100% of the JCM shares and Seel took 100% of the Jacob shares in her name personally.
- [67] The plaintiff did not object. He said he acted as director of JCM and he acted along with Seel to transfer the JCM shares into the newly incorporated Jacob.

The 1991 Power of Attorney Coupled With An Interest

[68] The plaintiff submits that after the December 1990 rollover, he began agitating to move from an informal mother-son 50-50 business partnership in the guise of a corporation with all the legal shares in his mother's name to a formal corporate management structure of equal shareholders. He was seeking security.

[69] The plaintiff alleges that on February 7, 1991 Seel executed a power of attorney in handwriting at the plaintiff's repeated requests. The document reads as follows:

I Annemarie Blumenschein hereby give my consent and full power of attorney to my son Eric Blumenschein should through unforeseen events I should not be able to carry on in my functioning as director of my companies or in the case of my death.

[70] Although the applicants allege that the plaintiff witnessed the power of attorney himself, the plaintiff said during the hearing that the power of attorney was witnessed by a third party, Mr. Bob Tower, Retired Captain of the Canadian Armed Forces now deceased.

[71] The plaintiff submits that this handwritten document creates an express or implied trust. The shares of Jacob are the subject and the plaintiff is the object, and Seel intended to give him control of Jacob in the event of her incapacity or death.

[72] No legal counsel was consulted in the preparation of this document.

[73] Seel deposes that:

On February 7th, 1991, I provided, at Eric's repeated requests, a handwritten power of attorney to be operative if I were no longer capable of managing my financial affairs. I intended the words of that document to be understood by their ordinary meaning, as that document would be read by people doing business with JCM. I did not write them as an attempt to convey any legal or beneficial interest in any property of mine to Eric. Had I wanted to do so, I would have written such rights plainly and directly.

Acknowledgements by Seel

[74] The plaintiff submits that at all material times Seel acknowledged she was holding legal title to the shares, the control of the company, and the underlying assets that give value to the shares for the plaintiff's ultimate benefit.

[75] On August 4, 2017, Seel wrote by email to the plaintiff and Peter and Kelly Blumenschein at their shared email address:

Re: Eric emailing [sic] the tenants that he is now the manager

Eric please don't do this-I hope Peter is lying-because this would take our dysfunction to a nother level-our business is still our bread and butter-at least yours and mine and I hope I don't have to worry about loosing all for nobility and doing the right thing-all I care for is to complete my life-and it is okay with me if you want to keep beating me into the ground-just allow me to complete-Thank you A

[Emphasis added.]

[76] On August 6, 2017, Seel wrote by email to the plaintiff:

Eric the business is really not mine-as you know I will be more than happy to distance myself then you can compensate yourself A

[Emphasis added.]

[77] On November 15, 2018, the plaintiff wrote by email to Seel and complained about how Peter is managing the property owned by JCM. Seel responded to the plaintiff's email on the same day saying:

Eric shut up-I am sick of your bull shitt-just remember your lack of contribution is being deducted from your assets in this company-I don't know how long your going to play this sick game A

[Emphasis added.]

[78] These emails suggest that Seel was aware that the business was partially the plaintiff's asset. The plaintiff submits Seel was holding company assets for his ultimate benefit and she threatened to draw down on the assets to silence is dissension.

[79] Seel sent the plaintiff an email on February 14, 2019 that included the following:

There fore it looks as if we have no choice outside of selling your business and pay the taxes as will be due and everyone can go their own way-and the actual funds left over will not be enough to be having these unnecessary interactions/conversations/accusations.

[Emphasis added.]

[80] It is noteworthy that she refers to "your business".

[81] On January 22, 2019, by email, accountant Nathan Waldman confirms the Seel statement directing him to make a corporate adjustment stating "Eric is owed from when WH was developed-a loan of \$19,800.00 has never been identified in the books ..." (emphasis added).

[82] This is an acknowledgment of the plaintiff's contribution of \$20,000.

[83] In January 2020, Seel wrote to the family group email after receiving an article about parenting from Kelly which appears to be directed at Seel's parenting of the plaintiff:

I don't think for a minute my child is a loser-My child is disappointed because he thought and had control in our company-- which was removed from him due to your lack of generosity and fair play--you know this is our family business and my child contributed his whole life --to this company-- and your opinion does not make it right with me-I am disappointed because I didn't know that characteristic of you-and yes the place is full but at what cost? no one knows what could have been no one has any idea because you don't have the courage to be transparent done better because no one had access-still waiting for access to the wave! That is my take A

[Emphasis added.]

[84] This may be interpreted as a recognition of the plaintiff's contributions and expectations by Seel.

[85] On January 12, 2020, in an email from Seel to Kelly, Seel acknowledges the plaintiff's contributions to the business:

hi Kelly-Happy New year !and thank you for your message-

Eric has been involved in this business his whole life-all I want is for him to be heard and have a say-it is my idea of respect being shown-I don't hold anyone responsible for things that could have been done differently because I know everyone did the best with what we had-but it is not right for one person to have no supervision and the situation is very different now and has to be done right-

[Emphasis added.]

[86] Seel acknowledges that the plaintiff began telling her in and around Christmas 2018 or early 2019 that he was the true owner of JCM, Windell and Jacob and she told him that it was never the case.

Applicants' Submission On The Existence Of A Trust

[87] The applicants submit that a power of attorney in itself does not create a trust but merely an agency with an associated fiduciary duty: *Mollot v. Mollot*, 2006 ABQB 249 at para. 146.

[88] The plaintiff's trust claim is bound to fail for failure to plead facts capable of satisfying the requirements of a valid trust. In order to be valid, "trusts must comply with the three certainties at the time of settlement - intention, objects and subject matter": *Lessor v. Toll Estate*, 2015 BCSC 427 at para. 39 [Toll Estate], citing *Mordo v. Nitting et al*, 2006 BCSC 1761 at para. 292 [Mordo].

[89] To meet the first certainty of intention, there must be an intention on the part of the settlor to impose enforceable trust obligations on the trustee. To establish certainty of intention, "the language used by the settlor is critical and must show a clear intention that the recipient of the trust property holds that property on trust": *Toll Estate* at para. 40, citing *Mordo* at para. 293.

- [90] Certainty of object requires that the group of persons intended to benefit from the trust are clearly identifiable: Mordo at para. 306.
- [91] There are two elements of certainty of subject matter: first, the property which is subject of the trust must be clear; and second, the nature of the interest due to each beneficiary must be clear: Mordo at para. 309.
- [92] The settlor of the trust must have done everything, which according to the nature of the property comprised in the settlement, was necessary to be done to transfer it and render the settlement binding on the settlor: Mordo at para. 266, citing *Milroy v. Lord* (1862), 45 E.R. 1184 (C.A.) at 1189.
- [93] For a constructive trust claim (which the plaintiff does not claim), "material facts regarding an enrichment, a corresponding deprivation, and the absence of a juristic reason for the enrichment would have to be pleaded": *Toll Estate* at para. 32, citing *Kerr v. Baranow*, 2011 SCC 10.
- [94] The applicants submit that the plaintiff lacked standing to bring any trust claims because any trust allegedly created by the power of attorney, which the plaintiff claims created the Jacob Trust, fails to meet the three certainties or the criteria for a constructive trust.
- [95] There is no clear intention that the recipient of the trust property holds a property and trust; there is no document or other instrument indicating any intention to create a trust: see *Toll Estate* at para. 40, citing Mordo at para. 293.
- [96] Seel herself provided an affidavit that she never intended the power of attorney to create a trust.
- [97] Certainty of subject matter is not met. The property subject to the alleged trust is not clear as there is no trust language whatsoever. Further, the nature of the interest due to the alleged beneficiary is not clear for the same reason.
- [98] The plaintiff lacks standing because as he admits, he is neither a director nor shareholder of the corporations over which he seeks control. Despite not being a shareholder, the plaintiff makes the unsupported claim that he is asserting his beneficial ownership of shares in the corporations. He has never been a shareholder nor has he held any rights or obligations akin to those of a shareholder.
- [99] Since there is no trust, which all of plaintiff's claims are based on, the action is bound to fail.

Plaintiff's Submission On The Existence Of A Trust

- [100] The plaintiff's interpretation of the power of attorney is that it was security for perfection of his existing beneficial ownership thus was "coupled with an interest". Seel exchanged 50% beneficial equity ownership to retain full corporate control and the right to be paid first, and the plaintiff held the full or 50% beneficial equity ownership. The terms drafted by Seel in the power of attorney are restrictions on the timing that the plaintiff could take

corporate control and perfect his ownership. Seel has control and legal title for as long as she properly manages the corporations and business or until her death. Upon the terms of unforeseen events regarding her ability to function as a director, the plaintiff submits that the consideration for her removal as a director are open and unrestricted. The plaintiff submits this was Seel's pledge of fidelity to properly manage and protect the companies and underlying assets that give value to the shares and her agreement to be removed and have the plaintiff take corporate control. Upon Seel's death, the plaintiff submits he would be entitled to take corporate control and the shares of the company would bypass probate by transfer of legal title from his existing beneficial title without regard to any other person. The term "or in case of my death" meant that the powers and authority for the plaintiff's personal benefit are declared to survive Seel's death.

- [101] The plaintiff submits that upon the irrevocable authority, Seel was holding the shares, the senior care business that JCM and Windell operated at that time, and the underlying assets that gave value to the shares for the plaintiff's ultimate benefit. The plaintiff further submits that Seel was "holding on trust" and is compelled in equity to "hold on trust".
- [102] The plaintiff submits that the Court in *Larochelle v. Soucie Estate*, 2019 BCSC 1329 [Larochelle] stated that a court's task in determining the existence of a trust agreement is to construe the agreement against the background facts to determine objectively the "aim" of the transaction: at para. 193. In doing so, a court is to look at all the circumstances, not just the words of the trust instrument: *Larochelle* at para. 193.
- [103] The plaintiff relies on *Tozer v. Bank of Nova Scotia and Atcon Group Inc. et al.*, 2012 NBCA 57 [Tozer] where the New Brunswick Court of Appeal described the distinction between an express trust and an implied trust. Where the intention to create a trust has to be discovered from indirect and ambiguous language this distinguishes an implied trust from an express trust: *Tozer* at para. 10.
- [104] The plaintiff submits that there is no need for any technical words or expression for the creation of a trust. The plaintiff submits that Seel drafted and executed an irrevocable enduring power of attorney coupled with an interest expressed to survive her death with the subject and purpose being the control and ownership of the companies: Jacob, JCM and Windell. He submits this is determinative of an intention to hold shares in senior care businesses JCM and Windell at that time and the underlying assets that give value to the shares for the plaintiff's ultimate benefit.
- [105] The relevant timeframe when analyzing intention is at the time of the transaction: *Virk v. Singh*, 2022 BCCA 153 at para. 51.
- [106] The plaintiff submits that the subject matter of the trust is clear. Seel drafted on February 7, 1991 a power of attorney coupled with an interest that the subject matter comprised of "my companies". "My companies" at the time were ascertainable as Jacob, JCM and Windell. This is conceptually certain and ascertainable.

[107] The plaintiff submits that Seel clothed him with all the power and authority to take control of "my companies" regardless of whether she was alive or deceased. The plaintiff is the object of the trust relationship.

[108] The plaintiff relies on *Re Van-Tel T.V. Ltd.*, 44 D.L.R. (3d) 146 at 149, 1974 CanLII 1219 (B.C.S.C.), where Justice MacDonald quotes with approval the following statement from *Heartley v. Nicholson* (1875), L.R. 19 Eq. 233 at 242 regarding the constitution of a trust by self declaration of a trustee:

It is not necessary that the declaration of a trust should be in terms explicit. But what I take the law to require, is that the donor should have evinced by acts which admit of no other interpretation, that he himself had ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer, and that such legal right to it, if any, as he retained was held by him in trust for the donee.

Analysis

[109] The three certainties apply regardless of whether one is considering an express or implied trust: see *Highland Nursing Home Pension Plan v. Aldridge*, 2004 CanLII 8375 (O.N.C.A.) at para. 6, 46 C.B.R. (4th) 298; and *Tran v. Aujla*, 2008 BCCA 115 at para. 11.

[110] In *Elliott Estate (Re)*, 2008 CanLII 63993 (O.N.S.C.), 45 E.T.R. (3d) 84, the Court explained:

[26] Certainty of intention to create a trust is to be "inferred from the nature and manner of the disposition considered as a whole": *Oosterhoff*, supra, at 167. When there is no clear trust documentation, *Byers v. Foley* (1994), 16 O.R. (3d) 641 at 645 (Ct. (Gen. Div.)) (QL) provides the following guidance:

In the absence of formal trust documentation, the court must look at the surrounding circumstances and the evidence as to what the parties intended, as to what was actually agreed and as to how the parties conducted themselves to determine whether there was "certainty of intention": see *Lev v. Lev* (1992), 40 R.F.L. (3d) 404 (Man. C.A.); *McEachren v. Royal Bank of Canada* (1990), 78 Alta.L.R. (2d) 158, 111 A.R. 188, 2 C.B.R. (3d) 29, [1991] 2 W.W.R. 702 (Q.B.); and *Fraser v. Minister of National Revenue* (1991), 91 D.T.C. 5123, 41 F.T.R. 255.

...

[29] Certainty of intention is a question of fact, and, in making this determination, the Court may examine what a deceased settlor said prior to his or her death: *Jones v. Lock* (1865), 1 Ch. App. 25 (QL); *Paul v. Constance*, [1977] 1 All E.R. 195 (C.A.) (QL).

...

- [38] There is often difficulty in determining whether or not the owner actually intended to become a trustee. According to Waters, *supra*, at 192, "[t]he burden of proof that the donor intended to make himself a trustee is on those who allege such a trust and many factors may reveal the true intent. The cases often arise in circumstances where the alleged donor is deceased and is thus no longer available to corroborate the evidence" [footnotes omitted].
- [39] The case of Paul v. Constance, *supra*, is helpful. It stands for the proposition that, for a declaration of self as trustee, there must be sufficient evidence of a manifestation of the intention to become a trustee, but no technical words are required. In this case, a man received damage payments and went with his girlfriend, with whom he was living with, to deposit the money into the bank. After discussions with the bank manager, they decided to open the account in the man's name only. However, the man told the girlfriend on many occasions that "[t]his money is as much yours as mine." Further amounts were deposited into the account, including some joint bingo winnings of the man and his girlfriend. There was one withdrawal from the account before the man died, which was shared by the man and his girlfriend. The trial judge agreed with the girlfriend that an express trust was created. He found that the words of the man conveyed a present declaration that the fund was as much the girlfriend's as the man's funds. The Court of Appeal, Civil Division found that the trial judge was justified and correct in making this finding.
- [111] In this case, there is no clear document setting out trust obligations. Failure to properly document transactions is not unusual in this family business. The handwritten power of attorney written by Seel is an example of that. It appears that much of their business was conducted on the basis of verbal agreements and email exchanges. The \$20,000 loan/business contribution is also not documented. Years later, Seel tried to recharacterize the \$20,000 as a loan, and the company accountant noted that there was no record of a loan and it was likely a shareholder contribution.
- [112] Seel held the plaintiff out as a shareholder of JCM in two consecutive annual shareholder resolutions. Whether or not she knew what she was signing is a matter for trial.
- [113] The plaintiff signed financing documents and share purchase agreements. He says he was involved in high level management of the companies, whereas Seel says he was just a "go between myself in Winnipeg and the lawyers and accountants in Victoria". The characterization of the plaintiff's role is a matter for trial.
- [114] The plaintiff says that Seel told him that their interests were the same. Seel does not respond to this. Whether this is a representation of a trust intention is a matter for trial.
- [115] There may be certainty of subject matter and object, but there is no clear statement of trust intent.
- [116] Although I have found that there is no express trust, I will not dismiss the plaintiff's claim for an implied trust. It is apparent on the evidence that the plaintiff contributed substantially to the development of Windell's business both financially, through his sweat

equity and his management. He negotiated license conditions to keep Windell operating as an adult care facility. Rather than collecting on a debt owed to him by Windell in the amount of \$20,000, he agreed to invest that money in Windell. He did not take wages from Windell for a number of years in the 1980s. He signed a mortgage application for JCM. He moved to Victoria and helped operate the adult care facility owned by JCM. He signed shareholder's resolutions for JCM. All of this was done on faith that Seel would act in his best interests. These facts are not controverted.

- [117] The 1991 power of attorney did not create an express trust. Whether it supports a finding of an implied trust is a triable issue. It was a statement of intention to rely on the plaintiff to manage the companies if Seel was no longer able to, but it is not clear that this was a transfer of ownership. It is unusual as a power of attorney because it expressly says it is to continue after her death. I would say that it is at best evidence that Seel had faith in the plaintiff's ability to continue to manage the businesses in her absence. No steps were ever taken to revoke this power. Seel does acknowledge that she created it in response to the plaintiff's repeated requests. The plaintiff says he was looking for some kind of security, and in response, Seel created this document. What was intended at the time of its creation is a triable issue.
- [118] Investigation into intention will raise issues of credibility about intention at the time. Seel makes some acknowledgments over the years that the business was theirs but now makes a blanket denial of any intent to share the business with the plaintiff. It appears her current stance may be contradicted by her prior communications which were in her own words and not crafted by legal counsel.
- [119] In the event that the plaintiff cannot establish implied intent on the evidence, the plaintiff may also be able to establish that Seel was unjustly enriched by his investment of \$20,000 and his under-compensation for the services that he provided. There is no evidence before me of how much the plaintiff was paid and whether it was commensurate to the services he provided.
- [120] For a constructive trust, there must be a pleading of unjust enrichment to support a claim for a remedy of constructive trust. The plaintiff's unpaid or underpaid work and financial contributions likely did enrich Seel and deprived the plaintiff who thought he was earning an interest in the companies. The enrichment and corresponding deprivation in the absence of a juristic reason for the enrichment would have to be pleaded: *Toll Estate* at para. 32, citing *Kerr v. Baranow*, 2011 SCC 10.
- [121] Although it is not clear to me that these claims will succeed, I see some merit in the plaintiff's claim. I conclude that it is not clear and obvious to me that the entirety of his claims will fail. He should be allowed to amend his pleadings and proceed to trial on the issue of whether Seel holds all or a portion of the shares of Jacob, JCM and Windell in trust for him.

Partnership

Plaintiff's Submission

- [122] The plaintiff claims that in the alternative to any declaration that Seel owns/holds 50% of the issued shares of JCM and 50% of the issued shares of Windell, that he and Seel were in an equal partnership arrangement.
- [123] The plaintiff cites *Alers-Hankey v. Solomon et al*, 2000 BCCA 196 [Alers-Hankey], where the British Columbia Court of Appeal upheld the lower court's finding that there was a business partnership based on the evidence surrounding the plaintiff having full authority to execute any documents necessary for the sale business property.
- [124] The plaintiff highlights the following portion of *Alers-Hankey*:
- [28] The trial judge found that, at some point after the initial discussions between the plaintiff and the Solomons, Teixeira became a partner. The appellants challenge this finding, arguing that there was no evidence to infer that Teixeira was a partner in the business. However, after a review of the evidence presented at trial, I am satisfied that this finding can be supported. Of significance is the following fax, sent on July 24, 1987, from Teixeira to the Solomons:

I GRAEME F. TEIXEIRA HEREBY GIVE DOUG & MARY SOLOMON THE AUTHORITY TO SIGN ON THE BEHALF OF GRAEME & JUNDRE TEIXEIRA ANY DOCUMENTS NECESSARY FOR THE SALE OF THE BEADWORKS STORES.

The trial judge found that this fax was clear evidence of an ownership interest on the part of Teixeira. In my view, this inference was open to the judge to make and can not be successfully attacked in this Court. I need not dwell further on this point because, as will be seen later in these reasons, the significant fact is Teixeira's knowledge of the relationship between the Solomons and the plaintiff.

Applicants' Submission

- [125] The applicants submit that a partnership is an agreement and there is no such agreement in evidence. They submit that the plaintiff was paid for his labour. As I noted above, there is no specific evidence about how much pay the plaintiff received and whether it adequately compensated him for the work he was doing.
- [126] The applicants rely on the *Surerus v. Rudiger*, 2000 BCSC 1746 [Surerus], where Justice Wilson said that the definition of a partnership is the relation which exists between persons carrying on business with a view to profit: at para. 8. Section 4 of the British Columbia Partnership Act, R.S.B.C. 1996, c. 348, sets out the rules which must be considered in determining whether a partnership does or does not exist.

[127] In *Surerus*, Wilson J. at para. 8 relied on passages in *Lindley & Banks on Partnership*, Seventeenth Edition:

In determining the existence of a partnership ... regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case. (at page 73)

...

If the agreement is not in writing the intention of the parties must naturally be ascertained from their words and conduct.

Analysis

[128] To determine whether the plaintiff and Seel were in partnership together again requires an evaluation of the evidence of both parties by a trial judge. There are certain indicators on the affidavit material that Seel and the plaintiff were involved in a joint business venture with a view to making a profit. There is some evidence from the plaintiff that he made contributions to the common fund. What needs to be determined in the face of conflicting evidence is what the intention of the parties really was.

[129] Whether a partnership existed is a triable issue. I will not dismiss this claim.

Fiduciary Duty

Plaintiff's Submission

[130] The plaintiff asserts that at all times Seel acted as a fiduciary in her business relationship with him. He relies on *Waxman v. Waxman*, 2002 CanLII 49644 (O.N.S.C.), [2002] O.T.C. 443 [Waxman], where the Court applied the test for an advisory relationship in a family situation where one brother was dependent upon the other brother and relied on him. In that case, the brother Chester tricked his brother Morris into signing over his shares in the family company. Morris had no idea what he was signing. The Court stated that based on one brother's conduct towards the other, one could reasonably expect the other to act in his best interests with respect to the subject matter. The plaintiff quotes paras. 1325 and 1329:

[1325] Far from being an arm's length commercial negotiator, who should have been expected to warily protect his own interest, Morris was dependent upon Chester and relied upon him.

...

[1329] Applying the words of LaForest J. in *Hodgkinson*, at p. 176, quoted earlier, in all the circumstances here, based on Chester's conduct and words, Morris could reasonably expect that Chester would act in his best interests with respect to the subject matter at issue.

[131] Fiduciary obligations will arise in the context of certain classes of partnerships: *Waxman* at para. 1296.

[132] In *Waxman*, Justice Sanderson considered Justice Sopinka's comments in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 1989 CanLII 34 [*Lac Minerals*], when confronted with a relationship that does not fall within one of the traditional fiduciary categories. In *Lac Minerals*, Sopinka J. (dissenting in part) said at 598-599:

When the Court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. In special circumstances, if they are shown to be absent, the relationship itself will not suffice. Conversely, when confronted with a relationship that does not fall within one of the traditional categories, it is essential that the Court consider: what are the essential ingredients of a fiduciary relationship and are they present? While no ironclad formula supplies the answer to this question, certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide. I agree with the enumeration of these features made by Wilson J. in dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99. The majority, although disagreeing in the result, did not disapprove of the following statement, at pp. 135-36:

...

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[133] Similar to the plaintiff, in *Waxman*, Morris Waxman was not a party to open, arm's length negotiations. He was asked to sign documents in the absence of any negotiation and without the benefit of any advice. He was not aware that the brother Chester was taking steps to acquire his shares.

[134] Similarly, the plaintiff submits that in this case he was not aware when Seel transferred all the shares of JCM and later Jacob into her name that she was or would be denying his beneficial interest.

[135] The plaintiff also cites the Supreme Court of Canada in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 1994 CanLII 70. In that case, four of the seven justices allowed the appeal and described the fiduciary duty between a client and a tax accountant. The client relied heavily on the tax accountant's advice. The relationship was such that the client did not really question the tax accountant about the reasons underlying the advice given. The four justices described the fiduciary duty as a law that seeks to protect vulnerable people in transactions with others: at 405. The fiduciary obligation carries with it not only a duty of skill and competence but special elements of trust, loyalty and confidentiality that give rise

to a corresponding duty of loyalty: at 405.

[136] Where the elements of trust and confidence in reliance on skill and knowledge and advice are present the relationship is fiduciary.

[137] The plaintiff submits that Seel was known to have the expertise and business acumen and acted not as a parent but a financial advisor to the plaintiff and told him rather than asked him that this is how you should invest your money. There is evidence that he completely relied on her to have his best interests in mind when giving him business advice.

Applicants' Submission

[138] The applicants do not address this argument.

Analysis

[139] It is possible that Seel was a fiduciary in her business relations with the plaintiff. She did act as his financial advisor. As such, she had scope for the exercise of some discretionary power. The plaintiff had little or no business experience and did rely on her to have his best interests in mind. He was vulnerable in that he did not question her actions or seek legal advice. There is no suggestion that Seel's recommendation that the plaintiff purchase 240 Jamison Avenue was bad advice or that he suffered damages from that purchase. He did however suffer a loss when Seel put all the shares of JCM into her personal name and later into Jacob without accounting for his interest and then later denied he ever had any interest.

[140] The question of whether Seel was a fiduciary, similar to Chester Waxman in the Waxman case, is a triable issue.

Oppression Remedy

[141] The plaintiff also relies on the oppression provisions of the British Columbia Business Corporations Act, S.B.C. 2002, c. 57, s. 227 [BCA].

[142] There are two issues here: firstly, does the plaintiff have standing to bring an oppressive action?; and secondly, has there been oppressive conduct?

[143] Since this is an application to dismiss, all I have to find is that there is a triable issue.

[144] The relevant portions of s. 227 read as follows:

Complaints by shareholder

227(1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A shareholder may apply to the court for an order under this section on the ground

- (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
- (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

[145] Section 227(1) extends the meaning of shareholder beyond the definition in s. 1(1): shareholder includes a beneficial owner of a share and any other person whom the court thinks is an appropriate person to make an application under this section.

Plaintiff's Submission

- [146] The plaintiff submits that based on oral agreements he was more than an employee. He managed Windell from 1983 until relocating to manage a greater asset in 1989. He was held out to be a shareholder of the companies as evidenced by the shareholder's resolutions. He exercised his shareholder's legal power to vote. He did have an equal vote with Seel. He was appointed as a director of the company; he managed the corporate accounting; and he relocated from Winnipeg to Victoria with Seel's legal authority to execute the JCM share agreement. He took control of the JCM senior care operations. He participated in the financing of the companies.
- [147] The plaintiff cites the following passages from *Safarik v. Ocean Fisheries Ltd.*, 12 B.C.L.R. (3d) 342, 1995 CanLII 6269 (C.A.), where Madam Justice Southin says in an oppression remedy case:
- [98] What then is left? The father wanted the respondent, as well as his other sons, in the business. He assured the respondent to induce him to join the family business that he would be treated fairly and equitably. The company prospered for many years. To that prosperity, the respondent made a substantial contribution.
- [99] In the matter of shareholdings, the father did treat the respondent fairly and equitably. But in a company with no history of paying dividends, shares are in reality worthless unless they can be realized.
- [100] Family companies are very different from non-family companies. They are different because, usually when a young man joins his father in the business, he does so trusting his father to do right by him and the father intends to do right. Thus no contracts are drawn up. It is not unusual for differences to arise as they did here, not because either father or son is dishonourable but because each sees the world through different eyes.

- [101] If this were not a family company, but a company in which the respondent had simply bought his common shares and in buying them had decided not to be a director for whatever reason, there would be no case for an order under s. 295(3).
- [102] But, in my opinion, it is not erroneous to take a more liberal approach to the words "just and equitable" in the case of a family company in which one of the family after many years of service is no longer permitted to participate in the business.
- [148] The plaintiff submits that Seel by her conduct represented to him that he would not need legal advice or to draw up a shareholder's agreement between them.
- [149] The plaintiff also relies on *Fedel v. Tan*, 2010 ONCA 473, which is another oppression remedy case, where the Ontario Court of Appeal allowed the applicant, who made significant contributions to a corporation and had a contractual right to become a shareholder, to qualify as a complainant under the Ontario Business Corporations Act even though he was not actually a shareholder. He had an oral agreement that he would have an ownership interest in the business they were carrying on together.
- [150] The plaintiff further relies on *Basha c. Singh*, 2016 QCCS 1564 [Basha], where the Superior Court of Quebec considered whether the plaintiff qualified as a complainant under ss. 238 and 241 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 [CBCA]. Section 238 of the CBCA defines a complainant as follows:

Definitions

238 In this Part,

...

complainant means

- (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
- (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
- (c) the Director, or
- (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part. (plaignant)

[151] The CBCA in s. 241 refers to a "complainant" whereas the BCA in s. 227(1) refers to a "shareholder".

[152] At para. 43 of *Basha*, the Superior Court of Quebec considered *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 45 [BCE Inc.], where the Supreme Court of Canada described the oppression remedy as one focusing on:

... harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders - security holders, creditors, directors and officers.

[153] In *BCE Inc.*, the Supreme Court of Canada held that in considering a claim for oppression, the court should consider conduct following a two-pronged inquiry:

[68] In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[154] At para. 62 of *BCE Inc.*, the Supreme Court of Canada elaborated on the concept of reasonable expectations and said:

As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

[155] In *Basha*, the Court held that an applicant who is a recipient of an oral promise that he would receive a 25% shareholder interest in the company and who acted upon that promise to the benefit of that company, is a proper person to make an application as a "complainant": at paras. 51-52. The Court went on to note that:

[53] In addition, the parties acted, as we will see below, as if *Basha* was already a shareholder. The fact that the steps to finalize the shareholders' agreement had been suspended should not prevent *Bashat* [sic] to exercise his rights as a "complainant".

[54] In any event, it is admitted that *Basha* was a director of *Pro Global* at the time and, therefore, that he qualifies as a "complainant" under paragraph (c) of the definition of that term in s. 238.

[156] The plaintiff also relies on *Csak v. Aumon*, 69 D.L.R. (4th) 567, 1990 CanLII 8070 (O.N.S.C.), where the Court allowed an oppression claim and held that the applicants fell within in the phrase "beneficial owner" as it is used in s. 238 of the CBCA: at 570. The Court held that it was apparent from the language of the statute that it contemplates a class of complainant without registered ownership. At 570, the Court said:

In my view, the applicants do fall within the phrase "beneficial owner" as it is used in s. 238. A beneficial owner is one who is the real owner of property even though it is in someone else's name. The nominal owner has legal title to the property but the real owner can require the nominal owner to convey the property to him and transfer legal title to him: see: *MacKeen Estate v. Nova Scotia* (1978), 28 N.S.R. (2d) 3, [1978] C.T.C. 557 (App. Div.). This is the very situation in

which the applicants say they find themselves. The respondent Aumon is the registered owner of 100% of the issued shares of Excel and the applicants say he holds two-thirds of them in trust for them or that he is contractually bound to cause the company to issue to each of them the same number of shares as are held by him.

[157] The Court held at 571 that the CBCA is remedial legislation and contemplates a large and somewhat sweeping jurisdiction.

Applicants' Submission

[158] The applicants submit that the plaintiffs' oppression claims are similarly bound to fail. They submit the plaintiff is not an appropriate person under s. 227 of the BCA to bring an oppression action. He is not someone who has an interest in the company similar to that of a shareholder. He has no legal right to be a shareholder.

[159] The applicants rely on 1168556 B.C. Ltd. v. 1164429 B.C. Ltd., 2024 BCSC 1727, where Mr. Zhang sought an oppression remedy in his own name even though he was not a shareholder. There is no evidence he had a beneficial ownership in shares. He was a director of the defendant company.

[160] Justice Shergill cited various cases interpreting s. 227 of the BCA:

[71] In *Cote v. Milltown Marina & Boatyard Ltd.*, 2015 BCSC 2033 at paras. 57-58, the Court defined an "appropriate person" as someone who has an interest in the company similar to that of a shareholder, such as the corporate parent of a corporate shareholder or partners in a limited partnership ...

[72] In *Lee v. International Consort Industries Inc.*, [1992] 3 W.W.R. 298, 1992 CanLII 1076 (B.C.C.A.) the petitioner was one of the company's managing directors but he did not hold any shares. The Court held he was not an appropriate person to claim the oppression remedy as he did not have a direct financial interest in the company's affairs, nor was he in an analogous situation to that of a minority shareholder. Similarly, in *Benarroch v. City Resources (Canada) Ltd.*, 54 BCLR (2d) 373, 1991 CanLII 896 (B.C.C.A.), the Court held that a director who only held an option to acquire shares in the company, and also claimed to represent certain minority shareholders, was not an appropriate person.

[161] In the absence of evidence that Mr. Zhang had a financial interest in the company or being otherwise similar to a shareholder, Justice Shergill found no basis to conclude that he was an appropriate person under s. 227(1) of the BCA: at para. 73.

[162] A putative complainant must have a legal right to become a shareholder before it can be asserted that the person is a "beneficial owner". Reasonable expectations must be tied to a legal or equitable right as a security holder, whether as a registered owner or beneficial owner. It is not enough to simply have reasonable expectations to become a shareholder based on a general sense of fairness: *Joncas v. Spruce Falls Power & Paper Co.*, 48 O.R. (3d) 179 at para. 36, 2000 CanLII 22359 (S.C.J.), *aff'd* 2001 CanLII 6156 (O.N.C.A.), 144 O.A.C. 289.

Analysis

[163] If the plaintiff succeeds in establishing some form of trust interest so that he had reasonable expectations of becoming a shareholder, then I find he may be an appropriate person to make an application under s. 227 of the BCA. The first step is for him to establish that he held a beneficial interest and that will require a trial. Of course, if he is not able to establish that trust relationship, he will not be an appropriate person to bring an oppression case. He should be given that chance. I will not dismiss this claim.

Oppressive Conduct

Plaintiff's Submission

[164] The plaintiff submits that between 2017 and the commencement of these proceedings there is an apparent breakdown in the family relationships. The plaintiff accuses Seel of colluding with Peter Blumenschein to use the corporate resources to rebuild Peter and Kelly Blumenschein's personal wealth to the detriment of his interest in the companies. During this same time frame, Seel accused Peter of misappropriating rent monies.

[165] On or about September 2017 without notice or agreement resolution, Peter removed Gordon, Karen and the plaintiff as corporate directors through the British Columbia registry leaving himself and Seel as directors of Jacob and JCM. On October 4, 2017, Peter Blumenschein wrote to the CMHC, the representative for Western Canada, and told him that the plaintiff had no authority to be contacting him. He also wrote to the mortgage manager at Integra Credit Union, who is the holder of the Windell mortgage, and told him that the plaintiff had no authority to contact him.

[166] In the spring of 2018, Peter Blumenschein wrote to appraisers and insurance agents regarding insurance coverage for Joan Crescent Manor advising them that they were to deal strictly with him and that the plaintiff had no authority. Seel gave direction that only the defendant Peter Blumenschein could consult with tax lawyers and any questions had to be addressed through Peter. The plaintiff objected in a letter dated November 22, 2019.

[167] In 2018, it appears on the corporate records produced that Peter removed the other directors and replaced himself and Seel as directors of the company in 2018. Seel wrote to Peter on May 11, 2019 saying:

Peter,

Please remove your name from the Corporation as an officer and CEO. You have added your name at least 5 times to the corporation registry after all other names have been removed-you have never been given the authority to do the income tax/year end without any audit from myself or anyone else-I don't accept your entries without having seen them prior to knowing what your [illegible] are based on. I have now been prohibited from access to the accountant and the lawyer de Pella and the Corporation. You can no longer be active in this company unless you remove your name from the registry-your title is property manager-we have a family business

Annemarie Seel

[168] In 2018, Peter held control over the collection of and in the accounting for JCM and Windell's income revenue and expenses. The plaintiff submits that Peter embezzled \$28,210 from JCM in 2018. Seel also had rent coming from the penthouse going directly into her personal bank account. Peter did not account for the rental of nine garages.

[169] Dissention mounted in 2018 as Peter blocked the plaintiff's access to corporate records.

[170] Peter wrote an email to Seel on December 13, 2018:

You seem to feel that Eric is part of this business when all he is is a cancer. You let him do whatever he wants ... he lies about whatever he wants ... he has no boundaries. He is an anchor in his business.

I have no problem opening the wave to you and gord. I wont be providing eric with the same consideration until I see that he becomes responsible to the greater good.

[Emphasis added.]

[171] In January 2019, the plaintiff flew to Winnipeg, Manitoba to meet with Seel at her residence. In the fall of 2018, Seel had expressed that if he could show her proof that Peter Blumenschein was embezzling company monies that she would terminate Peter's employment. The plaintiff presented the evidence to Seel and Gordon Blumenschein and they agreed to terminate Peter Blumenschein's employment from the Jacob group of companies, JCM and Windell. Gordon Blumenschein was to manage Windell. On his return to Victoria the plaintiff realized that not only would Seel never fire Peter Blumenschein but that she had concealed for years her intention to give him control over the companies and that he, the plaintiff, had been intentionally misled by her for years.

[172] The plaintiff alleges that Seel was aware that Peter was embezzling monies out of JCM. He raised this with her in March 2019, and she questioned Peter who denied it. Seel admits that she is aware of this in her second affidavit.

[173] In January 2019, Seel and Peter Blumenschein attempted to reclassify the plaintiff's 1983 equity investment into Windell into an alleged loan 36 years after the fact. They then attempted to reclassify his monthly wages earned over the course of the years into a monthly loan repayment. The plaintiff alleges that Seel and Peter Blumenschein conspired

to write his 1983 equity investment out of Windell with ex post facto accounting. They then reclassified the balance of the plaintiff's wages earned over 2018 into a loan from the company to him to amass debt against his name in the corporate financials.

[174] By email on January 23, 2019, Nathan Waldman identifies the monies would have come into Windell through a shareholder contribution by the plaintiff.

[175] The plaintiff alleges that while Seel agreed to terminate Peter Blumenschein's employment, she was secretly colluding with Peter Blumenschein to use corporate accounting to write the plaintiff's 1983 equity investment out of Windell along with his beneficial ownership in the company.

[176] Seel threatened to sell off the plaintiff's assets to quiet him. She sent him an email on February 14, 2019 that included the following:

There fore it looks as if we have no choice outside of selling your business and pay the taxes as will be due and every one can go their own way-and the actual funds left over will not be enough to be having these unnecessary interactions/conversations/accusations.

[Emphasis added.]

[177] Between 2018 and 2019, the plaintiff's participation in the companies was never terminated. Rather piecemeal by piecemeal his access to corporate documentation was reduced more and more and he says he was simply squeezed out and frozen out.

[178] The plaintiff submits that the final act was in the spring of 2019 on April 23, 2019 when Seel in a telephone conversation denied his beneficial equity ownership in the Jacob group of companies stating that he had run out of time and that denying his beneficial equity ownership after their 36-year business relationship was not personal just business.

[179] The plaintiff cites Hayat v. Raja, 2016 ONSC 6805 where the Court found the plaintiff's reasonable expectations were violated when, through fraudulent conduct, the defendant excluded the plaintiff from ownership and control. Hayat was a shareholder and a director of the company. He ceased to be a director when he was fraudulently induced to resign that position. He ceased to be a shareholder when he was fraudulently induced to sign a loan agreement. By reason of these two actions both induced by fraud, Hayat lost the ordinary means available to protect his interests as a shareholder investor. The loan agreement had the effect of converting Hayat's 50% equity interest in the company into an unsecured loan to another company. The Court found Hayat's signature on the loan agreement was procured by Raja's fraudulent conduct. The Court concluded that Hayat had reason to expect that he was to be a 50% shareholder in the company in accordance with the terms of the parties' shareholders agreements: at para. 130. The evidence supported Hayat's expectation to be equal partners participants and investors in the companies. The Court stated:

- [131] Turning to the second aspect of the enquiry, the evidence establishes that Hayat's reasonable expectation was violated when, through fraudulent conduct, Raja successfully excluded Hayat from the ownership and control of Maryat by having him resign as a director and surrender his shares. It is difficult to imagine more oppressive or unfair conduct in a corporate context than where one of two supposedly equal co-owners deprives the other of his entire interest in the corporation by means of fraud, while using funds supplied by the innocent party to capitalize the corporation and its business.
- [180] The plaintiff submits that his case is similar. Seel used her son's money, time and energy to finance Windell and secure Windell's senior care facility license and to stabilize Windell as a going concern. That business was used to raise all of the cash for JCM's purchase and the plaintiff participated in a high-level management position in cooperation with Seel with the reasonable expectation to financially benefit from the companies, the businesses, and the underlying assets for his personal financial benefit.
- [181] The plaintiff submits that Peter Blumenschein knowingly assisted Seel in excluding the plaintiff from ownership and control of the companies and knowingly assisted Seel to deprive the plaintiff of his entire interest in the corporations.

Applicants' Submission

- [182] The applicants do not challenge the conduct, but rely on their standing argument to oppose the oppression proceeding.

Analysis

- [183] If the plaintiff is found to have standing, the evidence shows that he was excluded from business decisions and information was blocked from him. The existing directors tried to reclassify his financial investment as a loan.
- [184] In BCE Inc., the Court at para. 68 set out a two-part test for a finding of oppressive conduct:
- 1) Does the evidence support the reasonable expectation asserted by the claimant?
 - 2) If so, does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?
- [185] Reasonable expectations are the "cornerstone of the oppression remedy": BCE Inc. at para. 61. Those expectations must be realistic: Radford v. MacMillan, 2017 BCSC 1168 at para. 119. These are questions of fact, making the oppression remedy fact-specific. What is oppressive in one case may not be oppressive in another. These are to be assessed in accordance with "business realities", not "narrow legalities" (BCE Inc. at para. 58), meaning it extends beyond what the parties have put into agreements.

[186] It appears on the evidence before me that the plaintiff has an argument worth pursuing that he had a reasonable expectation that his beneficial interest in the company would remain intact and would not be reclassified so as to erase it. He had a reasonable expectation that all the revenue in the company would be properly accounted for as income and any salary or dividends would be properly accounted for.

[187] The plaintiff also had a reasonable expectation that he would remain in a managerial position in the companies he helped to build. The gradual removal of his access to financial statements and to service providers such as insurance companies was unfairly prejudicial to his interest.

[188] Once an eligible complainant demonstrates that his reasonable expectations were breached, the complainant must show:

- a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
- b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

See s. 227(2) of the BCA.

[189] The rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (UK Ch.), provides that a corporation has a separate legal personality and that it must sue on its own behalf when it is wronged.

[190] Therefore, a shareholder may only bring an action for oppression where the shareholder has suffered particular prejudice or damage apart from the prejudice suffered by all shareholders. Where the shareholder's damage is the same as that suffered by all shareholders, the action must be brought on behalf of the company, as a derivative action: *Dubois v. Milne*, 2020 BCCA 216 at para. 106.

[191] Some of the claims that the plaintiff has made in Action No. VI S234481 (i.e., the Second Action) against Peter and Alex Blumenschein, and against Seel and Jacob and JCM are derivative actions claiming misappropriation of trust monies by Peter Blumenschein which Seel allowed to happen. Because Peter Blumenschein has not applied to dismiss this action and the action against Seel and the companies is closely linked to the misappropriation claim, I have not evaluated it. The wrongs appear to be wrongs suffered by all shareholders and not just the plaintiff. No one has argued whether the plaintiff has status to bring a derivative action, and so I will leave that for another day.

[192] Whether the facts as alleged by the plaintiff are true and if so whether they caused him to suffer prejudice or damage are triable issues which I do not have to determine here. I do not find that these issues of oppressive conduct are bound to fail, and so, I will not dismiss this part of the plaintiff's claim.

Conclusion

[193] This case is not suitable for summary judgment. I will not dismiss the plaintiff's actions. The applicants have sought an alternative order that I dismiss the plaintiff's claims against them pursuant to Supreme Court Civil Rules, R. 9-5(1)(a), (b), (c), or (d). I decline to do that.

[194] In the further alternative, they seek an order that discrete issues be determined by way of Supreme Court Civil Rules, R. 9-7(2) asking that this Court declares:

- a) no trust exists in favour of the plaintiff;
- b) the plaintiff does not have standing to bring his trust claims; and
- c) the plaintiff is not an "appropriate person" within the meaning of the BC Business Corporations Act such that he would have standing to bring an oppression claim under that act.

[195] I have addressed those arguments in my decision above and I dismiss those alternative applications.

[196] The plaintiff has succeeded. He will be entitled to his costs for this part of the application and so I need not consider the applicants' special costs application.

[197] I will now address their vexatious litigant application.

Vexatious Litigant

[198] The applicants have applied for an order under s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443 [Supreme Court Act], declaring that the plaintiff/petitioner is a vexatious litigant. They also seek special costs forthwith or alternatively costs.

[199] The applicants set out the history of proceedings in support of their submission that they depict a pattern of vexatious proceedings.

[200] On February 25, 2020, the plaintiff commenced Action No. VI S200862 (i.e., the First Action) by way of notice of civil claim filed in the Victoria Registry. I have dealt extensively with this action and the Second Action commenced on December 29, 2023, above. It is true that the plaintiff rolls forward claims and issues from the First Action into the Second Action and adds allegations of misappropriation of corporate funds by Peter and Alex Blumenschein. The orders sought are somewhat overlapping with those in the First Action and the claims are predicate on the existence of the alleged "trust", which I have decided is a triable issue.

- [201] On March 28, 2024, this Court ordered the First Action and the Second Action "to be heard together and the matters be consolidated." I have subsequently learned that an action brought by Lisa Blumenschein against Seel and JMC in Action No. VI S220919 is also to be tried at the same time.
- [202] Since then, the plaintiff has also filed two petitions seeking relief arising from the alleged Jacob Trust. In Court File No. VI S245508, Victoria Registry, he filed a petition on March 15, 2024, as amended on April 2, 2024 (the "Third Action").
- [203] In that petition, the petitioner (Eric Blumenschein) seeks orders to terminate Peter Blumenschein's tenancy at Joan Crescent Manor and to invalidate any lease between him and Seel (or JCM). He seeks damages for Peter Blumenschein's unlawful occupancy of that residence. He alleges that Seel and Peter and Kelly Blumenschein conspired to defraud him of his beneficial ownership in Jacob, JCM and Windell to which he asserts as the "Jacob Trust". It is not clear to me what status the petitioner has to bring this action. If the tenancy is unlawful then it should be JCM making the claim, not the petitioner.
- [204] The petitioner also seeks to terminate Peter Blumenschein's employment in the Jacob group of companies and a restraining order against Peter Blumenschein and his removal from the JCM properties located in Victoria, British Columbia. He asserts that Peter and Kelly Blumenschein had knowledge of the trust relationship between Seel and himself in regard to his beneficial ownership in JCM and Windell. Therefore, he asserts that any property of JCM and Windell that Peter Blumenschein takes into his control clothes Peter Blumenschein as a trustee de son tort and attaches all the liabilities of a trustee or fiduciary.
- [205] In this Third Action, the plaintiff again rolls forward claims from the First Action and the Second Action and seeks an order to which he is not yet entitled. I say not "yet" entitled because he has not yet established that he is a beneficial owner of shares in the companies.
- [206] The applicants submit that the petition in the Third Action is 12 pages long. It is prolix and unclear. The facts appear to concern alleged breaches of what the applicants call the nonexistent "trust" purportedly justifying court intervention in the living arrangements of Peter and Annemarie, who, along with the plaintiff, all live on the Joan Crescent Manor Property. The filed petition in the Third Proceeding seeks an order that would oust the Residential Tenancy Branch's jurisdiction in favour of the British Columbia Supreme Court with regard to Peter and Kelly's alleged tenancies at the Joan Crescent Manor Property.
- [207] The petition in Court File No. VI S319485, filed on December 31, 2024 (the "Fourth Action") is brought by Eric Blumenschein against Jacob and JCM and it seeks leave of the court to bring a derivative action against Infinity Law Corp. and several lawyers in that law firm.
- [208] The applicants describe the filed petition in the Fourth Action, as again rolling forward claims from the First Action, Second Action, and Third Action and seeking orders to which he is not entitled (or, in my words, not yet entitled to).

- [209] Infinity Law Corp. formerly acted for Jacob and JCM. The petitioner is seeking punitive, exemplary and aggravated damages against individual lawyers in the law firm which he personally would not be entitled to. Of note, the petition seeks leave to bring a derivative action on behalf of the defendant corporations and an order giving the plaintiff sole authorization to control the defendant corporations "for the conduct of the legal proceeding substantially". Clearly, the plaintiff has the cart before the horse. He has not established a beneficial ownership yet and is trying to bring an action on behalf of a corporation that he has not established that he owns.
- [210] The plaintiff makes repeated and grave allegations of fraud and misconduct.
- [211] I think it is fair to say that all the pleadings are prolix and unclear. The plaintiff is self-represented and has used a scattergun approach to his pleadings. They are repetitive, replete with evidence and include any possible cause of action that he has researched. Little judgment has been exercised in prioritizing his claims.
- [212] The applicants have provided a chart listing all of the interlocutory applications brought by the plaintiff and the page counts for the material. I am aware of the volume of the material. For the three-day hearing that is the subject of this judgment there were nine binders of material filed. Six of those binders contained the plaintiff's materials enclosing voluminous affidavits some overlapping and three on behalf of the applicants containing the pleadings, notice of application and essential affidavits. It has taken many days to read through all of this material to parse out legal principles that may be applicable. I will say that the plaintiff was very well-organized and provided me with written submissions on each point with case law hyperlinked and all evidentiary references were page referenced. He also provided his material in a thumb drive as did the applicants. He was respectful in his presentation and stuck to the time estimates imposed upon him. There was nothing vexatious about his court room conduct.

Is The Plaintiff A Vexatious Litigant?

- [213] Section 18 of the Supreme Court Act permits this Court to make an order restricting a vexatious litigant from instituting proceedings in any court:

Vexatious proceedings

18 If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving the person an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

[214] As Justice Tucker stated in *Universe v. Forslund*, 2021 BCSC 812 [Universe], "there is a duty to make such an order [under s. 18] where appropriate ...": at para. 98, quoting and following *Household Trust Co. v. Golden Horse Farms Inc.*, 65 B.C.L.R. (2d) 355, 1992 CanLII 420 (C.A.).

[215] Section 18 "requir[es] two elements to be established. First, there must be proceedings that are vexatious in the sense of being annoying, irritating, distressing, or harassing, and brought without reasonable grounds. Second, there must be a knowing and deliberate repetition or continuation of vexatious conduct": Universe at para. 89.

[216] Justice Tucker explained that "[t]he second element is objective. The litigant need not have appreciated that the conduct was vexatious, so long as a reasonable person in the same position would have ...": Universe at para. 90.

[217] Justice Tucker stated:

[98] As observed by Justice Southin in *Household Trust Co. v. Golden Horse Farms Inc.*, 1992 CanLII 420 (B.C.C.A.), there is a duty to make such an order where appropriate:

In my opinion, the Supreme Court of British Columbia has an inherent jurisdiction and a corresponding duty to exercise that jurisdiction to protect [an applicant] who seeks relief in that Court from proceedings by [an opposing party] who is vexatiously abusing the process of the court. That it is a jurisdiction to be exercised with great caution, I have no doubt. But not to exercise it where there is no other way to bring reason into proceedings is, in effect, to deprive the [applicant] of justice according to law. The court if it fails to act becomes but a paper tiger.

[218] In *Gichuru v. Purewal*, 2023 BCCA 345 at para. 21, the BC Court of Appeal discussed when the court will exercise its discretion and find a litigant vexatious:

[21] This Court, similarly, recognizes that a wide variety of factors can be considered in determining whether a litigant is vexatious. In *Dawson v. Dawson*, 2014 BCCA 44, the Court noted:

[16] This Court has regularly adverted to and endorsed the following non-exhaustive factors that should be considered in an application to declare a person a vexatious litigant enumerated in *Re Lang Michener and Fabian* (1987), 37 D.L.R. (4th) 685 (Ont. H.C.J., per Henry J. at para. 19):

- (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

- (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
- (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
- (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

See, for example, *Attorney General of B.C. v. Lindsay*, 2007 BCCA 165 at para. 27, Huddart J.A., leave to appeal ref'd [2007] S.C.C.A. No. 359; *Holland v. Marshall*, [2010 BCCA 243, aff'd 2010 BCCA 56], at para. 13; *Pearlman v. Insurance Corporation of British Columbia*, 2010 BCCA 362 at para. 5, Low J.A. (Chambers), aff'd 2010 BCCA 568, leave to appeal ref'd [2011] S.C.C.A. No. 39.

[219] As pointed out by the BC Court of Appeal at para. 22, vexatious litigant orders are discretionary and are granted sparingly.

[220] Further, in *Lindsay v. Canada (Attorney General)*, 2005 BCCA 594 [Lindsay], Justice Donald commented that it was not an error in principle for a judge to be cautious in his application of s. 18: at para. 24. Even when all the hallmarks of vexatious litigation listed in *Re Lang Michener et al.* and *Fabian et al.*, 37 D.L.R. (4th) 685, 1987 CanLII 172 (O.N.S.C.) are present, the ultimate question is whether the litigant has taken himself over the line: *Lindsay* at paras. 25-26.

[221] I have considered the factors listed in *Re Lang Michener et al.* and *Fabian et al.* and have determined that although some of the hallmarks are present, the plaintiff has not yet taken himself over the line.

[222] He has brought more than one action to determine the same issue, but that issue has not yet been determined by a court of competent jurisdiction.

[223] I have found with respect to the first two actions that it is not plain and obvious that the actions cannot succeed.

- [224] I find that the actions are not brought for an improper purpose. The plaintiff believes that he has a trust interest in the companies and that he has been wronged by Seel and his brother and sister-in-law. He may be able to establish some form of trust. His bringing of the Third Proceeding is bordering on harassment of his brother.
- [225] The characteristic of rolling forward grounds and issues into subsequent actions repetitively has occurred.
- [226] I have looked at the whole history of the matter and not just whether there was originally a good cause of action.
- [227] I am not certain whether the plaintiff has paid the costs assessed against him by Justice Wolfe. That was alleged by the applicants, but I am not aware of the fact. The costs were fairly minor set at \$500.
- [228] To my knowledge, the plaintiff has only filed one notice of appeal.
- [229] Because I find some merit in the first two actions, which have not proceeded to trial yet, I do not find the plaintiff to be a vexatious litigant. Rather, he is a self-represented litigant who needs the benefit of legal advice and some case management to streamline his pleadings and to stage the hearing of his actions.

Conclusion

- [230] I have not dismissed the plaintiff's first two actions. I have recommended that the plaintiff may consider a pleadings amendment to include a claim of unjust enrichment and constructive trust.
- [231] A notice of trial in the First Action has been set down for 20 days in Victoria commencing January 5, 2026. On May 21, 2024, an order was made to have those two matters tried together. After some considerable digging, I located an order in the action commenced by Lisa Blumenschein against Seel and JCM, which is Action No. VI S220919 in the Victoria Registry, that it is also to be tried together with the first two actions. This order should also be filed in the court files in Action Nos. VI S200862 and VI S234481.
- [232] I order that no hearing on the two petitions should be set down until the outcome of the trial in the first two actions is known.
- [233] The plaintiff has an outstanding application for interim distribution of monies which should proceed as soon as possible. Justice Wolfe had ordered that application could proceed on the assize of April 7, 2025 together with the three applications I have just heard. The hearing was adjourned to the May 26, 2025 assize and I adjourned the interim funding application pending the outcome of this hearing which took three days to hear.
- [234] The plaintiff has been successful in his defence of all three applications and is entitled to his costs at Scale B.

"B. M. Young, J."

The Honourable Madam Justice Young

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