

CANADA / JUDGMENT

Gaerber v. Gaerber

2020 BCSC 2080

COURT

Supreme Court of British Columbia

DECIDED

29 December 2020

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2020 BCSC 2080 Gaerber v. Gaerber

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gaerber v. Gaerber,

2020 BCSC 2080

Date: 20201229

Docket: E190601

Registry: Vancouver

Between:

Leana Elize Gaerber

Claimant

And

Morris Avrum Gaerber, Edge Holdings Inc., 315934 B.C. Ltd., Gaerber Ventures Ltd., TQ Holdings Ltd., Eddie's Hang-Up Display Ltd., Eddie's Holdings Ltd., SAMME Investments Inc., 1237384 B.C. Ltd., Stephen Gaerber in his capacity as trustee of the Gaerber Family 2004 Trust, Allen Gaerber in his capacity as trustee of the Gaerber Family 2004 Trust, Morris Gaerber in his capacity as trustee of the Gaerber Family 2004 Trust, Peter G. Oreck in his capacity as trustee of the Gaerber Family 2004 Trust, Stephen Gaerber in his capacity as trustee of the Marilyn and Edgar Gaerber Family Trust, Allen Gaerber in his capacity as trustee of the Marilyn and Edgar Gaerber Family Trust, Morris Gaerber in his capacity as trustee of the Marilyn and Edgar Gaerber Family Trust, Peter G. Oreck in his capacity as trustee of the Marilyn and Edgar Gaerber Family Trust, Stephen Gaerber in his capacity as trustee of the SGG Trust, Allen Gaerber in his capacity as trustee of the SGG Trust, Morris Gaerber in his capacity as trustee of the SGG Trust, Peter G. Oreck in his capacity as trustee of the SGG Trust, Stephen Gaerber in his capacity as trustee of the Gaerber

(2020) Family Trust, Allen Gaerber in his capacity as trustee of the Gaerber (2020) Family Trust, Morris Gaerber in his capacity as trustee of the Gaerber (2020) Family Trust, Peter G. Oreck in his capacity as trustee of the Gaerber (2020) Family Trust

Respondents

Before: The Honourable Mr. Justice Giaschi

Reasons

In Chambers

Counsel for the Claimant:

J.P. Sullivan

L.M. Newby

Counsel for the New Respondents:

R.M. Morse

R. Safartabar

Place and Date of Hearing:

Vancouver, B.C.

July 6-7, 2020

Place and Date of Ruling:

Vancouver, B.C.

December 29, 2020

- [1] By Notice of Application filed December 20, 2019 the claimant sought, inter alia, an order prohibiting the respondent Morris Gaerber from disposing of any property in issue and an order that the respondents other than Morris Gaerber (the "New Respondents") similarly not dispose of any property or alter the shareholdings of two of the corporate respondents.
- [2] The claimant's application was originally heard by Justice Silverman on March 4, 2020. As there was not sufficient time to hear the entire application, Justice Silverman ordered, inter alia:
 3. The property located at 60 West 3rd Avenue, Vancouver (the "Property") shall not be encumbered to any amount greater than \$10,080,500.
 4. If the Property is sold, \$6,000,000 from the net sale proceeds shall be held in trust by counsel for the New Respondents (the "Sale Proceeds").

5. Until further order of the Court or agreement of the parties, the Property or the Sale Proceeds shall stand as security for the Claimant's claims against the Gaerber Family 2004 Trust, the Gaerber (2020) Family Trust and Edge Holdings Inc.
- [3] On June 25, 2020, Justice Silverman clarified that his March 4, 2020 order was an interim order and intended to last only until the application could be fully heard.
- [4] Subsequent to the order of Justice Silverman, the claimant filed an amended notice of application on June 26, 2020. This is the application that I now address. In the amended notice of application, the claimant essentially seeks to extend the March 4, 2020 order until trial or, alternatively, seeks orders restraining the New Respondents from disposing, encumbering or converting Morris Gaerber's beneficial interest in various trusts and his shareholdings in three of the corporate respondents. The application is vigorously opposed.
- [5] For the reasons set out below, the application is dismissed.

Facts

- [6] To avoid confusion I will mostly refer to the parties by their first names in these reasons, as was done by counsel during their submissions before me. I intend no disrespect in so doing.
- [7] The claimant and Morris Gaerber were married in 1996 and separated in 2018. They have two children. It is alleged that the marriage was a traditional marriage with Morris working full time and the claimant primarily looking after the children and the household.

The Gaerber Family Enterprise

- [8] Morris is one of three sons born to Marilyn and Edgar Gaerber. The other two sons are the respondents, Stephen and Allen Gaerber. Marilyn and Edgar were successful and astute business people. Edgar was a manufacturer's representative for clothing lines and acquired various investment properties. Marilyn established the business Eddies Hang-Up Display Ltd. ("Eddies") which has annual sales exceeding \$10 million per year. Marilyn died in 2006 and Edgar died in 2012.
- [9] Prior to their deaths, Marilyn and Edgar engaged in sophisticated estate planning measures. They established two trusts to hold Eddies and the various investment properties Edgar had acquired: The original trusts were the Gaerber Family (2004) Trust (the "2004 Trust") and the Marilyn & Edgar Gaerber Family Trust (the "M&E Trust").
- [10] In January 2020, after the commencement of this action, the M&E Trust was distributed and a new trust, the Gaerber 2020 Family Trust (the "2020 Trust"), was established to hold some its assets. This was part of a series of transactions done in January 2020 (the "2020 transactions") which I address in further detail below.

- [11] Morris was one of eight named beneficiaries to the M&E Trust, and is one of eight named beneficiaries in the 2004 Trust and the 2020 Trust. Importantly, the M&E Trust, the 2004 Trust, and the 2020 Trust were/are all discretionary trusts.
- [12] The trustees of the M&E Trust, the 2004 Trust, and the 2020 Trust were/are Stephen, Allen, Morris and Peter Orick, a lawyer and long time family advisor.
- [13] There were two other trusts that were established and that are addressed in the materials before me. The SGG Trust was settled by Marilyn's brother in 1999 but, as it holds only one gold coin, it is of little relevance. The Gaerber Joint Spousal Trust was settled by Marilyn in 2005. Unlike the other trusts, this was not a discretionary trust. The beneficiaries of this trust were Marilyn and Edgar. Upon their death the trust was wound up and its assets were distributed, in accordance with the trust terms, to Stephen, Allen and Morris equally.
- [14] In addition to the trusts and Eddies, there are several other corporations that are controlled directly or indirectly by one of the trusts. Morris, Allen and Stephen also individually hold some shares of different classes in the corporations. The corporations as of the date of the commencement of this family law action were: Edge Holdings Inc. ("Edge"), 315934 B.C. Ltd. ("315 B.C. Ltd."), Gaerber Ventures Ltd. ("Ventures"), TQ Holdings Ltd. ("TQ"), Eddie's Holdings Ltd. ("Eddie's Holdings"), and Samme Investments Inc. ("Samme"). Another corporation, 1237384 B.C. Ltd. ("123 B.C. Ltd.") was established as part of the 2020 transactions.
- [15] There are several investment properties that are owned by the corporations. These are:
- a) 60 West 3rd Avenue, Vancouver, which is owned by Samme and leased to Eddies;
 - b) 21650 Fraser Highway, Langley, which is owned by TQ; and
 - c) 2515 Hemlock Street, Vancouver, which is owned by Ventures.
- [16] All of Stephen, Allen and Morris worked and work to some degree in the family businesses. Morris has worked for Eddies since approximately 1986 which would be his entire career. Morris designed custom products for Eddies and is the Manager of its distributor program. Stephen has worked in the family business since 1996 and is currently the President of Eddies. Allen has worked in the family business since 2001 and is primarily responsible for managing the corporate sales division.
- [17] The nature and extent of Morris' contributions to the family business, especially over the last 10 years, are disputed. The claimant says his contributions have increased whereas the New Respondents say his contributions have decreased.
- [18] The claimant also alleges that she contributed to the family businesses both directly and indirectly, through Morris.

The 2020 Transactions

- [19] As I have indicated, in January 2020, after the commencement of this action, the M&E Trust was replaced by the 2020 Trust and a new corporation, 123 BC Ltd. was incorporated. The reasons behind these transactions and the effects of the transactions are very much disputed.
- [20] The New Respondents submit that the 2020 transactions were done to avoid the consequences of the deemed distribution tax rule which would impact the M&E Trust on March 29, 2020, the 21st anniversary of the trust. They say that to avoid payment of approximately \$3.6 million in tax it was determined to establish a new company, 123 BC Ltd., and a new trust, the 2020 Trust.
- [21] The Claimant accepts that the 21st anniversary of the M&E Trust was approaching but submits that the transactions were done to imperil her claims.
- [22] Prior to the 2020 transactions, the assets of the M&E Trust were shares held by it in Samme which, in turn, owned the property located at 60 West 3rd Avenue, Vancouver. The assessed value of that property was slightly in excess of \$16 million in 2019. The shares held by the M&E Trust in Samme were 1 Class A share, 100 Class B shares, 100 Class C shares, 100 Class D shares, and 100 Class E shares.
- [23] As part of the 2020 transaction, 99 new Class A shares in Samme were allotted and the existing shares held by the M&E Trust were redistributed. Following the distributions, the shares in Samme were held as follows:
- a) 123 BC Ltd. - 100 Class A shares;
 - b) Stephen - 100 Class B shares and 50 Class E shares;
 - c) Allen - 100 Class C shares and 50 Class E shares; and
 - d) Morris - 100 Class D shares.
- [24] The Class A shares of Samme are the sole voting shares but are non-participating shares in the sense that they are not entitled to dividends and, upon liquidation are entitled to only the paid up value of the shares of \$0.05 per share. The Class B, C, D and E shares of Samme are non-voting shares but are participating shares in that they are entitled to dividends, as and when declared for shares of the class, and are entitled to be paid *pari passu* upon liquidation.
- [25] Upon the incorporation of 123 BC Ltd. there were three classes of shares issued which are held as follows:
- a) 2020 Trust - 100 Class A shares and 100 Class B shares;
 - b) Stephen - 50 Class G shares; and

c) Allen - 50 Class G shares.

[26] The Class A and Class B shares of 123 BC Ltd. have the same rights as the corresponding Class A and B shares of Samme, meaning Class A is voting but non-participating and Class B is non-voting but participating. The Class G shares of 123 BC Ltd. were issued for the purposes of s. 185 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

The Pleadings

[27] In the amended notice of family claim filed December 20, 2019, the claimant claims, inter alia, determinations of what constitutes family property and an unequal division of that property. The claimant specifically claims an interest in Morris' beneficial interest in the various trust properties and in whatever shares he holds in the various corporations on the basis that these are family property subject to division under the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). In respect of the trusts, she seeks a declaration that one third of the trust property is held for the benefit of Morris. In the alternative, the claimant claims an interest in the trusts on the basis of unjust enrichment. She alleges that she and Morris have contributed to the trusts over the years and that the trustees are impressed with a constructive trust over the assets of the trusts.

[28] The responses to the amended notice of family claim disagree with the orders requested by the claimant.

[29] I was advised during the course of the hearing that a further amended notice of family claim was in the process of being filed. I have not been provided with a copy of that pleading.

[30] Based on the materials filed in this application and the submissions of the parties, it is abundantly clear that a main issue in the action in relation to the division of family property will be whether Morris' interest in the 2004 Trust and the 2020 Trust is excluded from family property pursuant to s. 85(1)(f) of the FLA, which provides:

85 (1) The following is excluded from family property:

- (f) a spouse's beneficial interest in property held in a discretionary trust
- (i) to which the spouse did not contribute, and
- (ii) that is settled by a person other than the spouse

Analysis

[31] There has been a large volume of material filed in this application and much of it relates to the merits of the excluded property claim. I am mindful that, in an application of this sort for the preservation of property, I "must be cautious in entering into the enterprise of weighing competing evidence": *Laxton v. Coglon*, 2006 BCCA 178, at para. 23.

[32] The claimant brings this application pursuant to Rule 12-1(1) of the Supreme Court Family Rules, B.C. Reg. 169/2009 ("SCFR"), which is identical to Rule 10-1(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. Rule 12-1(1) of the SCFR provides:

- (1) The court may make an order for the detention, custody or preservation of any property that is the subject matter of a family law case or as to which a question may arise and, for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter on any land or building.

[33] Also relevant is s. 91 of the FLA, which provides:

91 (1) On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 [Pension Division] until or unless the other spouse establishes that a claim made under this Part or Part 6 will not be defeated or adversely affected by the disposal of the property.

- (2) The Supreme Court may make one or more of the following orders:

- (a) for the possession, delivery, safekeeping and preservation of property;
- (b) for the purpose of protecting the applicant's interest in property from being defeated or adversely affected,
 - (i) prohibiting the other spouse from disposing of, transferring, converting, or exchanging into another form, property in which the applicant may have an interest, or
 - (ii) vesting all or a portion of property in, or in trust for, the applicant.
- (3) The Supreme Court may make an order under this section before notice of the application is served on the other spouse, or may order that notice of the application be served on the other spouse.
- (4) Despite section 215 (2) [changing, suspending or terminating orders generally], the Supreme Court may change, suspend or terminate an order made under this section.

[34] It is to be noted that s. 91 of the FLA addresses restraining orders against a spouse and, subject to the qualification therein, makes such orders mandatory. This is a change from s. 67 of the former Family Relations Act, R.S.B.C. 1996, c. 128, which made restraining orders mandatory against all parties to the family action. This change means that restraining orders against non-spouses are not mandatory and are governed by the general law: *Tidy v Tidy*, 2014 BCSC 1445, at para. 28.

[35] The test for a preservation order under Rule 12-1(1) of the SCFR is the same as the test under Rule 10(1) of the SCCR. That test, as set out in *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420, at para. 21, is:

- a) Is there a claim on the evidence and not just the pleadings to a proprietary interest in property?

- b) Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?
 - c) Is there a substantial question to be decided as to the plaintiff's entitlement to the property?
 - d) Does the balance of convenience favour granting the order?
- [36] I note that the parties have also made submissions in relation to the general test for an injunction and to the test for a mareva injunction. The differences between the tests are addressed in *Kepis* where it was noted that the test for a mareva injunction was slightly more onerous than the test under Rule 12-1(1) of the SCFR. I intend to apply the slightly less onerous test under Rule 12-1(1).

Is there a claim on the evidence and not just the pleadings to a proprietary interest in property?

- [37] The requirement to prove a proprietary interest in the disputed property is said to be a threshold issue: *Kepis* at para. 22. It is therefore necessary to identify the specific property that is to be preserved. In the context of this application, that property is the 60 West 3rd Avenue property and, in the alternative, Morris' alleged beneficial interest in the trust properties generally. I shall address each in turn.

The 60 West 3rd Avenue property

- [38] In respect of the 60 West 3rd Avenue property, this property is and has always been owned by Samme and leased to Eddies. Prior to the 2020 transactions, Morris had no interest in this property other than arguably as a discretionary beneficiary of the M&E Trust which held all of the shares in Samme. Subsequent to the 2020 transactions, there were two paths by which Morris might be said to have an interest in the property. First, as the holder of 100 Class D shares of Samme, he had derivative interest in the property. Second, he arguably continued to have an indirect interest in the property by virtue of him being a discretionary beneficiary of the 2020 Trust which held 200 shares in 123 BC Ltd. which, in turn, held 100 Class A shares of Samme. Under either path, it is clear that Morris does not have a direct legal ownership interest in the 60 West 3rd Avenue property nor does he have a direct beneficial interest. His interest in the property, if any, is indirect and derivative.
- [39] The New Respondents submit that in these circumstances an injunction or preservation order cannot be issued. They rely on *Kirk v. Kirk*, 2006 BCSC 277, aff'd. 2007 BCCA 63, wherein an application to add corporations to a family law proceeding were dismissed on the basis that the assets of the corporations were not assets of the shareholders.
- [10] The plaintiff claims that White Dragon and Faronics hold corporate assets (namely, software) formerly held by Hyper Tech in trust for her. It is trite law, however, that shareholders own no interest in the assets of a corporation: *Macura v. Northern Assurance Co. Ltd.* [1925] A.C. 619 (H.L.) at p.626-27; *Army and Navy Department Store v. Minister of National Revenue*, 1953 CanLII 63 (SCC), [1953] 2 S.C.R. 496, at p.511. As the defendants quite rightly point out, as one of two shareholders of Hyper Tech, Mr. Kirk had no direct interest

in its corporate assets. It follows that Hyper Tech could not hold those assets in trust for Ms. Kirk due to her beneficial interest in the shares of Mr. Kirk.

- [11] This principle has been upheld in the family law context on a number of occasions in which courts have declined to either join corporations to matrimonial proceedings, or encumber the use and disposition of corporate assets in the ordinary course of business. In *Re Butzelaar*, 1978 CanLII 1756 (SK QB), [1978] 3 W.W.R. 435 (Sask. Q.B.), for example, the court declined to register a *lis pendens* against land owned by a corporation in which the husband had a 50% interest. In declining to grant the relief sought, Hughes J. stated at para.12:

I question the accuracy of saying that the [husband] has an interest in this land. What he has is a one-half interest in the corporate body owning it. In such a situation, surely it is the shareholdings of the [husband] which the [wife] seeks to have divided in her application

- [12] He went on to note at para.14 that "encumbering such a title with a certificate of *lis pendens* albeit for a temporary period only, while warring husband and wife make their way to a court settlement" would be "manifestly unjust and without basis in law."

See also: *Singer v. Singer et al.* (1979) 1979 CanLII 1998 (ON SC), 24 O.R. (2d) 14 (Ont. H.C.J.); *Davidson v. Davidson* [1983], B.C.J. No.646 (Q.L.) (C.A.); *Kurcz v. Kurcz* (1989) R.F.L. (3d) 206 (B.C.C.A.); and *Webber v. Webber* (No.2) (1989), 1989 CanLII 2939 (BC SC), 21 R.F.L. (3d) 29.

- [13] A more recent example of the general principle can be found in *Rohani v. Rohani* (2004) 34 B.C.L.R. 4th 62, 2004 BCCA 605. There, the Court of Appeal confirmed that company assets cannot be treated as those of a shareholder even where that shareholder effectively controls the company. In that case, the court found that the company in question was legitimately created and operated with benefits that accrued to both parties. As a result, it held that the wife could not look directly to the company's assets to satisfy her claim, despite the fact that the husband used the company as a personal "piggy-bank" for family expenses.

(emphasis added)

- [40] The claimant relies rather heavily on the decision of Justice Gray in *Tidy*, which the claimant says is "on all fours" with this matter. However, *Tidy* is not, in my view, helpful to the claimant. In *Tidy*, the issue before Justice Gray was whether an order obtained without notice restraining four corporations should be set aside. The order in issue restrained the corporations from disposing of, transferring, encumbering, converting or exchanging any asset "which is or may be a family asset". Justice Gray refused to set aside the order but she did modify it by limiting it to "any debt that they [the corporations] may owe to the respondent husband". The rationale for this change was explained at paras. 40-44:
- [40] It is important in this case, in my view, to look at the precise words of the Corporate Freezing Order. It is an order restraining the Corporate Respondents from disposing of or dealing in other ways with "any asset which is or may be a family asset and thereby subject to claims of interest therein by the claimant".

- [41] The position of the Corporate Respondents is that they do not know what is or may be a family asset, and that this could hamper them in dealing with the business. There is no evidence that they have been hampered, but the argument is made that they are in a difficult position when there is an order that is imprecise in this way.
- [42] The position of the claimant wife is that she has only very recently been able to learn about the shareholder's loan owing by Tidy Steel-Fab Ltd. to the respondent husband. She says she has not yet received certain financial information, being financial statements, income tax returns, and minute books for three companies, being Panridge, Regal U.S.A., and the non-party company, Tidy Industries Inc. She says that as a result, she is not in a position to know if one or more of those three companies owe any shareholder's loans to the husband.
- [43] In my view, it is appropriate to make it clear to the Corporate Respondents what is the property in question, rather than have an order which talks about "any asset which is or may be a family asset".
- [44] So what I am going to do is to vary the February McEwan Order in paragraph 2, and to provide that the four Corporate Respondents shall be restrained from disposing of, transferring, encumbering, converting, or exchanging into another form "any debt that they may owe to the respondent husband".
- [41] What Justice Gray did in Tidy is restrained the corporate respondents from dealing with assets of the respondent husband, namely, any debts owed to the husband. She did not restrain the corporations from dealing with their own assets. Hence, Tidy does not detract from the principles set out in Kirk to the effect that corporate assets are not the property of the shareholder spouse and cannot be encumbered in a family law action.
- [42] In my view, on the evidence before me, there can be no claim by the claimant to a proprietary interest in the 60 West 3rd Avenue property. Morris' highest interest in the property is as a shareholder of Samme, however, as set out in Kirk, shareholders have no ownership interest in corporate assets and the fact that a spouse is a shareholder does not give rise to a right to encumber corporate property in a family law matter.
- [43] The same considerations apply to Morris' alleged interest in the 60 West 3rd Avenue property by virtue of his being a discretionary beneficiary of the 2020 Trust. The 2020 Trust merely holds shares in 123 BC Ltd. which, in turn, has 100 Class A shares of Samme, the owner of the property. Hence, the 2020 Trust cannot have a proprietary interest in 60 West 3rd Avenue and, by extension, Morris can have no proprietary interest.

Morris' beneficial interest in the trust properties generally

- [44] The alternative relief claimed is a preservation order restraining the New Respondents from disposing, transferring, converting, encumbering or exchanging Morris' beneficial interest in the various trusts.

- [45] Whether Morris has a fixed beneficial interest in property held by the various trusts so as to render such interest "family property" is an issue that is hotly disputed. I address this issue below when discussing whether there is a substantial question to be tried.
- [46] There is, nevertheless, a fundamental difficulty with the claim for alternative relief, namely, the property that is the subject of the order is not sufficiently identified or identifiable. The order requested by the claimant is similar to the order that was refused in Tidy. In Tidy, Justice Gray refused to grant an order in respect of "any asset which is or may be a family asset". The alternative order requested here by the claimant is equally as broad and as objectionable as the order refused in Tidy. If the requested order was made, the New Respondents would be unable to determine what property they are enjoined from dealing with.

Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?

- [47] The claimant relies heavily upon the 2020 transactions as evidence of a reasonable belief that the property is threatened with disposition or transfer. She says that the New Respondents have disposed of property once and can do it again. She further submits that Morris was treated differently and unfairly from his siblings in the 2020 transactions and that the overall effect of the transactions is to the detriment of the claimant.
- [48] I do not accept the claimant's submissions.
- [49] I find as a fact that the 2020 transactions were effected for legitimate business reasons; to avoid a deemed distribution of the M&E Trust due to its upcoming 21st anniversary, and the negative tax consequences that would occur as a result. I further find that whatever interest Morris had in the 60 West 3rd Avenue property, has not been adversely affected by the 2020 transactions. Finally, there is no evidence that any property in which Morris might have an interest is threatened with disposition or transfer outside the jurisdiction.
- [50] I find as a fact that Morris' position was not negatively affected by the 2020 transactions. There are several factors that lead me to this conclusion. First, the trustees of the 2020 Trust are the same persons who acted as trustees of the M&E Trust. Second, the beneficiaries of the 2020 Trust are the same beneficiaries as under the M&E Trust. Third, prior to the 2020 transactions the 60 West 3rd Avenue property was owned by Samme which was owned by the M&E Trust. The only path that Morris had to an interest in the property was as a discretionary beneficiary of the M&E Trust, meaning he had to rely on the trustees to see any benefit. However, subsequent to the 2020 transactions, in addition to being a discretionary beneficiary of the 2020 Trust, Morris was a shareholder of Samme, with 100 Class D participating shares. His position has actually improved as a consequence of the 2020 transactions in the sense that he now has two pathways to an interest in the trust property, as a shareholder of Samme and as a discretionary beneficiary of the 2020 Trust. As a consequence, Morris' position has clearly not been negatively affected.

- [51] The claimant says that Morris was treated unfairly in these transactions in that Stephen and Allen were issued Class G shares in 123 BC Ltd. and Class E shares in Samme but Morris was not. With respect to the Class G shares, these are shares issued specifically to address s. 185 rollover issues that may or may not arise. I do not consider the fact that such shares were issued to Allen and Stephen to be at all meaningful.
- [52] There is some merit to the claimant's submission that Morris has been treated differently from Stephen and Allen in relation to the Class E shares in Samme which were issued only to them. With the Class E shares, upon the liquidation of Samme, Stephen and Allen would each be entitled to 37.5% of the equity whereas Morris would only be entitled to 25%. This, however, would only come into play if there was a liquidation of Samme and there is no evidence a liquidation is likely.
- [53] The claimant also submits that the structure, particularly the different share classes, has been engineered so that dividends can be channeled to avoid paying dividends to Morris. I accept that this is so but, Morris is in no worse a position after the 2020 transactions than he was before. Before the 2020 transactions Morris had to rely on the discretion of the trustees for distributions. After the 2020 transactions, distributions to Morris are similarly dependent upon the discretion of the directors of Samme or the trustees of the 2020 Trust. In other words, Morris' entitlement to distributions was and remains dependent upon the discretion of others. It is merely the mechanism by which those distributions might be made that has changed.
- [54] The claimant also refers to various changes in wording between the M&E Trust and the 2020 Trust as disclosing an intent to imperil her claims. I did not find these submissions compelling. The 2020 Trust is substantially the same as the M&E Trust in the sense that both are discretionary trusts that grant wide powers to the trustees. The fact that the wording is different is to be expected given over 20 years has elapsed since the M&E Trust was settled.
- [55] Finally, and perhaps most importantly, there is simply no basis for any belief that property will be disposed of or transferred outside the jurisdiction and beyond the reach of this court. All that has occurred is a re-organization of the trusts and corporate structures. No actual tangible property has been disposed of or transferred outside what the claimant calls the "Gaerber family enterprise". Moreover, there is no evidence that it is likely any property will be disposed of or transferred out of the jurisdiction or beyond the reach of the courts. The real properties are all located in British Columbia. The trusts and corporations are all located in British Columbia. The trustees of the trusts and the discretionary beneficiaries of the trusts are all located in British Columbia and have substantial ties to British Columbia.

Is there a substantial question to be decided as to the claimant's entitlement to the property?

- [56] The claimant claims an interest in the trust properties on the basis that Morris has a beneficial interest in such properties that constitutes family property and on the basis of unjust enrichment. I will first address whether there is a substantial question in relation to Morris having a beneficial interest that constitutes family property. I will then address

whether there is a substantial question in relation to unjust enrichment. With respect to both, however, I am cognizant that this is an application for a preservation order and that I am not to decide the merits of the claim. The issues of whether the trusts are truly discretionary or whether the requirements of unjust enrichment are met are matters to be decided by the trial judge after hearing all of the evidence. All that I am to determine is whether there is a substantial question to be decided.

Is there a substantial question in relation to Morris' beneficial interest?

- [57] Much of the argument before me concerned whether the claimant had established there was a substantial question to be decided as to her entitlement to the property on the basis of Morris' beneficial interest. The resolution of this issue involves the meaning and effect of s.85(1)(f) of the FLA which expressly excludes from family property a spouse's beneficial interest in property held in a discretionary trust to which the spouse did not contribute and that is settled by a person other than the spouse.
- [58] The claimant makes a preliminary submission that the requirements of s. 85(1)(f) are not met in this case. Specifically, the claimant submits that Morris has contributed to the trusts and, therefore, s. 85(1)(f) does not apply. In my view, this preliminary point is without merit. It is clear on the evidence that Morris did not contribute any property to any of the trusts. The contributions relied upon by the claimant are Morris' general contributions to the "Gaerber family enterprise" over the years. There are two difficulties with this submission. First, in my view, the contributions referred to in s. 85(1)(f)(i) are contributions of property to the trust not contributions of labour or other vaguely defined services. Second, Morris was at all material times employed by Eddies and received compensation for his labour and services. He did not "contribute" to the trusts within the meaning of s. 85(1)(f)(i) but provided labour and services to the "Gaerber family enterprise", for which he was paid.
- [59] The claimant's main argument is that the trusts, although expressed in discretionary terms, are truly fixed trusts because the brothers have always been treated equally and it is certain that Morris has and will receive an equal interest.
- [60] The New Respondents submit that it is clear the assets held by the various trusts are excluded property since the trusts are all discretionary, Morris did not contribute any property to them, and they were settled by persons other than Morris.
- [61] The law in relation to discretionary trusts and family property was recently reviewed and considered by the Court of Appeal in *H.S.S. v. S.H.D.*, 2018 BCCA 199, and by Justice Punnett in *Williamson v Williamson*, 2020 BCSC 108.
- [62] In *H.S.S.* the issue was whether there should be a re-apportionment of family property based, in part, on contingent interests. At para. 80, Justice Saunders wrote that such interests should generally not be considered.

[80] In my view, generally speaking, trust interests that are contingent and discretionary should not inform the analysis under s. 65(1)(e), though that analysis may admit of contingent trust interests that are not dependent on the exercise of another person's discretion. As I will explain, this distinction ensures the interests at issue are relevant because it avoids speculation and tracks the extent to which a party will actually derive or enjoy the benefit of those interests.

(emphasis in original)

[63] At para. 86, Justice Saunders recognized that the answer to the question of whether a trust is discretionary or fixed is one of substance not form and depends on an analysis of the possibility events will unfold as though the trust were fixed.

[86] I take from this discussion that whether an interest in a trust qualifies as a family asset turns on how the substance of that interest is appropriately characterized and, in particular, the extent to which that interest can be described as being "owned". Generally speaking, this may be determined by whether the trust is discretionary or fixed. However, as the question is one of substance and not form, sufficient certainty that the trust assets will be transferred to the purported owner can fulfill this criterion. The enquiry, in other words, does not end with the analysis of discretionary words in the trust deed, but rather requires consideration of the possibility events will unfold as if the trust were fixed.

[64] In *Williamson*, Justice Punnnett denied injunctive relief respecting a discretionary trust. In doing so, he noted that a beneficiary under a discretionary trust normally has no proprietary interest in the trust property. However, he also noted that a discretionary trust could be considered a fixed trust if there was sufficient certainty that a party would actually derive a benefit.

[32] The issue raised by the application is what deference the court should give to a discretionary trust in a family law proceeding. In *Gartside v. Inland Revenue Commissioners*, [1968] 1 All E.R. 121 (U.K.H.L.), the court found that a beneficiary under a purely discretionary trust had no proprietary interest in the trust property, hence any "interest" in it as beneficiary could not be quantified: also see *Purtzki v. Saunders*, 2016 BCCA 344. Such a beneficiary has only the hope that the trustee will exercise their discretion in his or her favour. Counsel for the claimant submits *Gartside* is the "high-water mark" of the court's deference to a discretionary trust in a family law context.

[33] Similarly, in *Delesalle v. Delesalle*, 2006 BCCA 445 at para. 12, the court found that s. 58(3)(a) (ii) of the Family Relations Act, R.S.B.C. 1996, c. 128 (FRA), had no application to a spouse's interest in a discretionary family trust where "nothing in the trust vested in any of the potential beneficiaries."

- [37] A party's interest in a discretionary trust can be vested and qualified as property to be divided in a family law proceeding. That however depends on "sufficient certainty" a party will "actually derive or enjoy the benefit" of those interests as if the trust were fixed. The facts then must move the potential interest from speculative to one that is more certain.
- [65] The claimant submits that there is sufficient certainty Morris will derive a benefit from the trusts and that this transforms the trusts from discretionary to fixed. She relies, in part, on an alleged agreement or pact within the Gaerber family that the brothers are to be treated equally and also relies on the history of the dealings between the brothers which, she submits, supports an agreement that they will be treated equally.
- [66] The claimant deposed in her affidavit that there was a family agreement or pact that the trust property would be divided equally between each of Morris, Stephen and Allen. At the hearing, in an oral ruling made on July 17, 2020, I struck those portions of her affidavit relating to the agreement or pact on the basis that her evidence was unattributed hearsay, vague and imprecise.
- [67] Notwithstanding that the claimant's assertions of a family agreement or pact have been struck from her affidavits, there is some evidence that is relevant to whether there is a sufficient certainty Morris will enjoy a benefit from the trusts. This evidence is:
- a) As conceded by the New Respondents, distributions from the 2004 Trust in 2011, 2012 and 2013 have been in equal amounts. In 2011 each brother received \$240,000. In 2012 each received \$240,000, although Stephen's share was split with his spouse. Similarly in 2013 each received \$180,000, although again Stephen's share was split with his spouse;
 - b) During the years 2010 through 2019 the brothers were all paid the same or similar base salaries by Eddies;
 - c) The three brothers are the officers and directors of the various corporations in the family enterprise;
 - d) The residue of their father's estate was distributed equally between Morris, Stephen and Allen; and
 - e) The Gaerber Joint Spousal Trust provided that upon the death of Marilyn and Edgar its assets were to be divided equally between Morris, Stephen and Allen and the assets were so divided.
- [68] The above evidence tends to suggest that the brothers have, in fact, been treated equally in relation to reaping the benefits of the family enterprise. In my view, this is sufficient to establish that there is a substantial question to be tried as to whether Morris' interest in the trust property is more than merely discretionary. In reaching this conclusion I am making no determination on whether this evidence is sufficient to establish that the trusts are fixed and not discretionary. That is a matter for the trial judge after consideration of all of the evidence.

Is there a substantial question in relation to unjust enrichment?

[69] The claimant also claims a constructive trust in the various assets of the trusts based on unjust enrichment. The unjust enrichment claim is based upon both Morris' contributions to the "Gaerber family enterprise" and upon the claimant's own alleged contributions. Having determined that the claimant has met the "substantial question" test in relation to the claim that Morris' interest in the trust property is fixed rather than discretionary, it is unnecessary for me to consider whether the test is also met in relation to the unjust enrichment claim. However, I would note that the merits of the unjust enrichment claim are questionable. First, insofar as the claim is based on the contributions made by Morris to the "Gaerber family enterprise", it is a derivative claim that is not supported by the authorities: *Douglas v. Douglas*, 2017 BCSC 921, at para. 111. Moreover, Morris was paid for his contributions. Insofar as the claim is based on the claimant's own direct contributions to the "Gaerber family enterprise", the evidence before is that such contributions are minimal and likely not sufficient to establish a claim in unjust enrichment: *Douglas* at para. 109.

Does the balance of convenience favour granting the order?

[70] The final aspect of the test under SCFR 12-1(1) is the balance of convenience.

[71] The claimant submits that the balance of convenience favours granting the order sought. She submits the respondents have put forward no evidence of prejudice to them if the order is granted. In contrast, she submits, she could suffer serious prejudice if the order is not granted as the property could be disposed of.

[72] The New Respondents submits that the balance of convenience favours dismissing the application. They submit that, if successful, the claimant will be entitled to damages and there is no evidence the trustees and corporations would refuse to pay her such damages. They say that, although the parties have been separated for two years, the trusts have done nothing to put the assets out of the reach of the claimant. Finally, they submit that the amount claimed by the claimant is small in comparison to the value of the assets held.

[73] I agree with the New Respondents that the balance of convenience favours dismissing the application for a preservation order.

[74] First, although I agree that the New Respondents have not put forward any direct evidence of actual prejudice to them if the preservation order is granted, this is not determinative. It is but a factor to consider in the overall analysis. Moreover, the fact the New Respondents have not identified a specific prejudice does not mean that there will be no prejudice. The order requested in the alternative is very broad and the property affected by the order would be very difficult, if not impossible, for the trustees to ascertain. The order requested would effectively prevent any dealings with any trust property until the court ascertains the extent, if any, of Morris' beneficial interest. This could be prejudicial to the ability of the trustees to administer the trusts for the benefit of the beneficiaries and it could be prejudicial to the beneficiaries.

- [75] Second, despite the claimant's submissions to the contrary, I am not satisfied that there is any prejudice to the claimant if the order is refused. The assets of the various trusts have not been disposed of or transferred except to address the 21st anniversary of the M&E Trust, which dispositions were necessary and did not negatively affect Morris' interest or the interest, if any, of the claimant. Additionally, as I have determined, there is no evidence that the trust assets are threatened with a future disposition or transfer outside the jurisdiction and beyond the reach of the courts.
- [76] Third, the claimant's interest, in the trust property, if any, is ultimately monetary. If she is successful at trial her claim can be satisfied by a compensation order or a monetary award of damages. There is no suggestion in the evidence that the trusts or corporations will be unable to satisfy any such award.
- [77] Fourth, although I have determined that there is a substantial question to be tried concerning whether Morris' beneficial interest is truly fixed rather than discretionary, at best, the claimant has an arguable case.
- [78] Finally, I am not satisfied that the trustees have or will exercise their discretion under the trusts for an improper purpose. In particular, I am not satisfied that the trustees will exercise their discretion to the detriment of the claimant's interest, if any. In this regard, I note that the trustees have not done so up to the present time. Additionally, I note that one of the trustees of the various trusts is Mr. Peter Oreck, a respected member of the bar and a long time solicitor for the Gaerber family.
- [79] Accordingly, I find that the balance of convenience is in favour of refusing the preservation order sought.

Order

- [80] The application of the claimant is dismissed. It follows that paras. 3, 4 and 5 of the interim order of Justice Silverman dated March 4, 2020 are spent and no longer operative.
- [81] The parties are at liberty to speak with me concerning the costs of this application, if necessary.

"Giaschi, J."

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