

CANADA / JUDGMENT

Leibenzeder Estate v. MacIntyre

2023 BCSC 1422

COURT

Supreme Court of British Columbia

DECIDED

16 August 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 1422 Leibenzeder Estate v. MacIntyre

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Leibenzeder Estate v. MacIntyre,

2023 BCSC 1422

Date: 20230816

Docket: S223350

Registry: Vancouver

Between:

Estate of Georg Johann Louis Leibenzeder

Plaintiff

And

Glenda Ann MacIntyre, Derrick Piett, Adios Services,

Tara Lea Rose Cowie and Tyler Charles Cowie

Defendants

- and -

Docket: S2010645

Registry: Vancouver

Between:

Alison Robyn Bailey

Plaintiff

And

Glenda Ann MacIntyre as the Administrator of the Estate of Georg Johann Louis Leibenzeder,
Deceased, and Glenda Ann MacIntyre, in her personal capacity

Defendants

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the Estate of Georg Johann Louis Leibenzeder:

S. Batkin

A. Moore

Counsel for Glenda Ann MacIntyre and Derrick Piett:

E. Clavier

Counsel for Alison Robyn Bailey:

A. Jaffer-Jeraj

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 4-5, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 16, 2023

Table of Contents

Introduction.. 4

Conclusion.. 5

The History of the Actions.. 5

Ms. MacIntyre's Actions as Administrator 6

The Beneficiary Action.. 9

Consent Order 9

Removal Application.. 13

Removal Hearing and Order	16
The Estate Action..	24
Mareva Injunction..	24
Default Judgment	26
Proposed Response.	32
Ms. Bailey's Actions as Administrator	34
Tax Filings.	34
Storage Lockers.	35
Legal Fees.	37
Applicable Legal Tests..	37
Setting Aside the Removal Order	37
Willful Delay.	39
Application as Soon as Possible.	41
Meritorious Defence or Defence Worthy of Investigation..	42
Interests of Justice.	43
Setting Aside the Default Judgment	43
Willful Delay.	44
Application as Soon as Possible.	46
Meritorious Defence or Defence Worthy of Investigation..	47
Interests of Justice.	49

Introduction

- [1] On September 5, 2016, Georg Johann Louis Leibenzeder died intestate. He left an estate consisting of four real properties ("Estate"): three residential properties in Surrey, and a recreational vehicle park near Gibsons, British Columbia ("RV Park"). Mr. Leibenzeder was survived by his common law spouse, Glenda Anne MacIntyre, and two children, Alison Bailey and Ryan Leibenzeder. For clarity and meaning no disrespect in these reasons, I refer to Mr. Leibenzeder's son as Ryan Leibenzeder.
- [2] Rounded to the nearest dollar, the total assessed value of the real properties, net of the mortgages associated with them, was \$1,260,210. The Estate also consisted of personal property that, rounded to the nearest dollar, was valued at \$199,785.

- [3] Pursuant to her application, Ms. MacIntyre was appointed as the administrator of the Estate on November 29, 2016.
- [4] As Mr. Leibenzeder died intestate, pursuant to s. 21 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, Ms. MacIntyre is the primary beneficiary of the Estate. She receives a preferential share equalling \$150,000, all of Mr. Leibenzeder's household furnishings, and one half of the residue. Ms. Bailey and Ryan Leibenzeder share the remaining residue equally, amounting to a quarter share each.
- [5] Over six and a half years after the date of Mr. Leibenzeder's death, his estate has not been resolved. A number of court applications have been required.
- [6] There are two applications before me. Both seek to set aside two earlier orders of this Court. The first order was made by Justice Horsman on January 7, 2022, when a member of this Court, in action S2010645, removing Ms. MacIntyre as the administrator of the Estate and appointing Ms. Bailey in her stead ("Removal Order"). I will refer to that action as the "Beneficiary Action" as the parties did in their submissions.
- [7] The second is Master Robertson's June 16, 2022, default judgment in action S223350, an action commenced by the Estate on April 22, 2022, by a notice of civil claim ("Default Judgment"). I will refer to this action as the "Estate Action" as the parties did in their submissions. Ms. MacIntyre did not respond to the Estate Action despite being given an extension of time to do so.

Conclusion

- [8] For the reasons that follow, I have not exercised my discretion to set aside either the Removal Order or the Default Judgment. At the parties' request, I have not dealt with costs. With respect to the Estate Action, the Estate is seeking its special costs payable by Ms. MacIntyre. In the Beneficiary Action, Ms. Bailey is seeking special costs against Ms. MacIntyre. I urge the parties to try and resolve a consensual costs order. However, if the parties cannot agree on appropriate orders, they may provide written costs submissions not to exceed ten pages each.

The History of the Actions

- [9] The Estate applied for the Removal Order on December 7, 2022. In support, the Estate alleged that Ms. MacIntyre had breached her fiduciary duty as administrator of the Estate.
- [10] On these applications, the Estate filed three affidavits made by Ms. Bailey in the Beneficiary Action, on May 31, June 17, and November 15, 2021, respectively, and her first affidavit, made on April 27, 2022, filed in the Estate Action.
- [11] In the first three affidavits in the Beneficiary Action, Ms. Bailey details her communications with Ms. MacIntyre, and communications between their respective counsel, leading up to the Removal Order. From when Ms. Bailey first sought the assistance of this Court in dealing

with Ms. MacIntyre, to the date of Horsman J.'s Removal Order, there were six different court appearances. The application to remove Ms. MacIntyre was brought about a year after the first court appearance and after many requests for information and cooperation failed to move the administration of the Estate forward.

- [12] Since the Removal Order, there have been many other court appearances.
- [13] In her first affidavit filed in the Estate Action, Ms. Bailey outlines the steps she has taken, following the Removal Order and since being appointed as administrator of the Estate. In his submissions, counsel for Ms. MacIntyre did not dispute any of Ms. Bailey's factual assertions. As a result, I will not set out the specific affidavit references for the factual findings that follow.

Ms. MacIntyre's Actions as Administrator

- [14] On November 26, 2016, Ms. MacIntyre filed an affidavit of the Estate's assets and liabilities. She deposed that the Estate consisted of the four properties and the other assets set out above.
- [15] In 2017 and 2018, after preparing the real properties for sale, Ms. MacIntyre sold all four.
- [16] Between November 29, 2016, and October 2020, Ms. MacIntyre was asked to provide information about the Estate and to pass her accounts. She repeatedly made, but did not fulfill, promises to provide information and to pass her accounts. She represented that she was completing the Estate's tax filings although she never did so.
- [17] On June 29, 2018, through her then counsel, Kim Floeck of McQuarrie Hunter LLP ("McQuarrie"), Ms. MacIntyre advised Ms. Bailey that, once the RV Park sold, which she hoped to be soon, the Estate could file a final estate return and Ms. MacIntyre could "turn her mind" to presenting the Estate accounts to the beneficiaries and distributing the personal/household items.
- [18] The RV Park was sold on December 7, 2018. Ms. MacIntyre did not file the Estate's final tax return or returns in any other years. The only tax return filed by Ms. MacIntyre was the date of death return in 2017.
- [19] On February 2, 2019, Ms. MacIntyre advised the beneficiaries of the Estate's cash position. She said that she was awaiting updates from the accountants, lawyers, and appraisers and would then provide the beneficiaries with updates every other week, a budget for the remaining costs, the resulting residual value of the Estate, and scheduled distributions. She referred to the Estate being "brought to a closing".

[20] On March 1, 2019, Ms. MacIntyre again promised to present the Estate accounts by the end of that month, in a manner similar but less formal than that required by s. 1 of the Trustee Act, R.S.B.C. 1996, c. 464, essentially in the form prescribed in Form P40. She advised that the assets, with a few exceptions, had been settled, she did not expect any delays in completion of the Estate. She said:

The principle [sic] delay moving forward will predictably be the waiting period for CRA to provide a clearance certificate for the [E]state. We have been working with the [E]state accountants to minimize this period as much as possible, while diligently completing minor outstanding housekeeping items, which are unlikely to cause any delay to the completion of the [E]state.

[21] On September 28, 2019, Azool Jaffer-Jeraj, Ms. Bailey's lawyer, asked for the "budget of remaining costs as well as the resulting residual value of the Estate and schedule of distribution" as promised by Ms. MacIntyre. She did not respond.

[22] On November 5, 2019, Ms. MacIntyre advised of the updated cash position of the Estate and that she intended to provide an accounting before the end of the year. She wrote:

Whether it is an interim accounting or a final, will be determined within the next several weeks as the possible steps required to resolve the issues that may have been discovered regarding the reporting become clear to the interested parties of the [E]state. As I come to know, I will report to the beneficiaries, but regardless, it is my intention to report the accounts this year, mandatory waiting periods aside.

[23] The beneficiaries did not receive anything by the end of 2019.

[24] On May 15, 2020, Mr. Jaffer-Jeraj repeated his request for the status of the Estate and for the information Ms. MacIntyre had first promised in February 2019. She did not respond.

[25] On June 17 and 23, 2020, Ms. MacIntyre acknowledged her duty to pass accounts and promised more details "in the weeks ahead". She said that she was working daily on the accounts and promised to provide regular updates. She did not explain her failure to provide information or pass her accounts as she had repeatedly promised to do.

[26] Mr. Jaffer-Jeraj followed up on June 29 and July 29, 2020. He asked for information about the steps already taken, and remaining to be taken, for the passing of Ms. MacIntyre's accounts and for when the Estate would be complete. Ms. MacIntyre did not respond.

[27] On September 2, 2020, Ms. MacIntyre was served with a notice to pass accounts from September 5, 2016, to September 5, 2020. On September 16, and again on October 5, 2020, Ms. MacIntyre promised to provide a detailed response. She did not do so.

- [28] As a result of Ms. MacIntyre's failure to provide information to the beneficiaries or to pass her accounts, on October 22, 2020, Ms. Bailey commenced the Beneficiary Action, seeking, among other orders, the removal of Ms. MacIntyre as the administrator and the appointment of Ms. Bailey, or a corporate trustee, as the administrator of the Estate. Ms. MacIntyre was named as a defendant in the Beneficiary Action in both her capacity as administrator and in her personal capacity.
- [29] Ms. MacIntyre did not respond to the notice of civil claim in the time allowed for doing so, and counsel for Ms. Bailey requested a case planning conference. The parties appeared on January 4, 2021, before Justice Kent who ordered Ms. MacIntyre to file a response by January 29, 2021.
- [30] On January 6, 2021, Ms. MacIntyre retained Ken Vimalasan, a partner at Legacy Tax + Trust Lawyers ("Legacy"), and on the deadline of January 29, he filed a pro forma response to civil claim on Ms. MacIntyre's behalf in both capacities. The response did not set out an alternative version of facts or plead a legal defence.
- [31] As the administrator's accounts were not passed, on June 3, 2021, Ms. Bailey applied in the Beneficiary Action to have Ms. MacIntyre removed and for an order for the passing of accounts.
- [32] On June 17, 2021, Mr. Vimalasan filed an application response and an assistant's affidavit attaching a "Provisional Statement of Accounts" up to April 16, 2021. The provisional accounts raised a number of concerns for Ms. Bailey, including:
- a) payments of approximately \$310,000 made by Ms. MacIntyre to an unknown entity called Adios Services ("Adios"), Derrick Pielt, and to Ms. MacIntyre's personal Desjardins Visa card;
 - b) an unexplained \$78,000 reduction in the Estate's cash position;
 - c) a proposed administration fee of \$243,843; and
 - d) a proposed holdback of approximately \$500,000 for "final income tax, accounting and legal costs".
- [33] As the provisional accounts were not attached to an affidavit from Ms. MacIntyre as administrator, she did not depose that they were accurate and complete. There were not supporting documents attached to the provisional accounts.

The Beneficiary Action

Consent Order

- [34] On June 22, 2021, Ms. Bailey's application was resolved by way of a consent order signed by Master Dick ("Consent Order"), requiring, in part, that Ms. MacIntyre:

- a) make best efforts to provide the family albums, and other items to be agreed to by the parties, to Ms. Bailey and Ryan Leibenzeder by July 30, 2021;
 - b) provide Ms. Bailey with copies of the statements of adjustments and orders to pay for each Estate real property sale, the Adios invoices, and Ms. MacIntyre's Desjardins Visa statements for the accounting period by July 30, 2021;
 - c) not take any remuneration until her accounts were approved by the beneficiaries or passed by the Court; and
 - d) in the event the Ms. MacIntyre is removed by the Court, all parties consent to the appointment of a corporate trustee.
- [35] Although raised in Ms. MacIntyre's response to Ms. Bailey's application, counsel for Ms. MacIntyre did not pursue an argument that the application was irregular in that the relief sought could not be granted in an application as it was final relief. She was ably represented before Master Dick, she filed an application response, and the terms of the Consent Order were on consent of her counsel. In my view, in light of the Consent Order, it is not now open to Ms. MacIntyre to argue that there was an irregularity in proceeding by way of application.
- [36] At the hearing before me, counsel for Ms. MacIntyre argued that para. 8 of the Consent Order precluded Ms. Bailey from seeking, or the Court from granting, relief other than the appointment of a corporate trustee in the event that Ms. MacIntyre was removed by the Court. I do not agree. The Consent Order did not provide that there must be a corporate trustee on the removal of Ms. MacIntyre. It precluded Ms. MacIntyre from objecting in the future to the appointment of a corporate trustee. In any event, the parties by their consent, and Master Dick in endorsing their Consent Order, did not have the ability to bind a judge of the Court as to the appropriate remedy on deciding to remove Ms. MacIntyre.
- [37] Ms. MacIntyre breached the Consent Order, including by repeatedly failing to provide information, documents, and personal items as ordered. The documents she provided, including a collection of Adios invoices, raised questions about the payments she made to Adios. In particular:
- a) the phone number listed on the invoices was not in service, and the address did not belong to Adios;
 - b) on a search for information about Adios, Ms. Bailey's lawyers found a Facebook page that had not been updated since September 2016. It listed the phone number that was not in service, and a website that was not in service;
 - c) each invoice contained only a single line item with either a brief or non-existent description of the services rendered; and
 - d) the invoices purported to charge GST at 7%, but there was no GST number on them, and the invoices were paid from the Estate without GST.

- [38] Some of the Adios invoices refer to progress payments and materials, suggesting they are scheduled payments under a fixed-price contract. If a contract exists, it was not produced.
- [39] On July 29, 2021, Mr. Vimalasan filed an appointment for passing of accounts, attaching the provisional accounts, returnable October 8, 2021. Despite demands, Ms. MacIntyre did not file, as required by Supreme Court Civil Rules, R. 25-13(2)-(6), an Affidavit in Support of Application to Pass Accounts (Form P38) and the Statement of Account Affidavit (Form P40).
- [40] On August 5, 2021, Mr. Vimalasan advised Ms. MacIntyre that because he was not receiving instructions, he could not longer act for her. On August 17, he filed and served a notice of intention to withdraw as counsel. On August 18 and 24, Ms. MacIntyre and counsel for Ms. Bailey served objections to the notice.
- [41] Ms. MacIntyre and Legacy have a dispute over outstanding fees. In an affidavit filed with respect to that dispute, Mr. Vimalasan deposes:
13. Between February 18, 2021, and June 3, 2021, [Rachel] Breeze and I followed up with Ms. MacIntyre regularly and with increasing urgency to request the documents and information we needed to prepare her accounts as administrator (the "Estate Accounts") in court form.
80. A significant amount of the fees incurred were incurred between June 3 and June 17, 2021, owing to urgency as a result of Ms. MacIntyre's failure to provide us with completed accounts and supporting documents in a timely manner. Ultimately, she advised us that she would be unable to do so, leaving us with only a few days to prepare the accounts.
- [42] In the same dispute, Rachel Breeze deposes:
8. From early-February 2021 to June 7, 2021, Ms. MacIntyre repeatedly advised us that she would produce completed accounts and convert those accounts into court form. Ms. MacIntyre (or Mr. Piett on her behalf) reported her progress to us, or advised that she would provide the accounts or other information requested, on the following occasions:
- February 10, 22 and 25, 2021;
 - March 2, 4, 5, 8, 9, 19 and 29, 2021;
 - April 23, 28, 29, 30, 2021;
 - May 5 and 11, 2021; and
 - June 7, 2021.
9. During this time, Ms. MacIntyre provided some information relevant to the Estate accounts, but also indicated repeatedly that these documents did not contain all of the relevant transactions or contained inconsistencies which she intended to address, or that she expected to provide Estate accounts in the court prescribed P40 form in the near future.
10. On June 7, 2021, Ms. MacIntyre produced a transaction list (the "Transaction List").

11. Although the Transaction List contained much of the information required to produce Estate accounts, in my view the Transaction List by itself did not constitute an adequate accounting. It did not include assets as at the date of death or as at the end date of the accounting and there was no attempt to reconcile the transactions with the assets on hand. It did not include significant pieces of information that are produced in the court form P40.
- [43] At an October 8, 2021, hearing before Master Vos, counsel for Ms. Bailey requested, and Ms. MacIntyre agreed to provide, by November 5, 2021, further information and documents concerning the Estate, including documents concerning payments to Mr. Piett and Adios ("October Agreement"). Ms. MacIntyre did not comply with the October Agreement.

Removal Application

- [44] Given Ms. MacIntyre's continued breach of the Consent Order and the October Agreement, on December 7, 2021, Ms. Bailey served Ms. MacIntyre with a new application, returnable December 17, 2022, seeking additional relief including: Ms. MacIntyre's removal as the administrator; a transfer of all Estate funds and assets to Mr. Jaffer-Jeraj (Ms. Bailey's counsel) in trust; a passing of accounts; and an order restraining Ms. MacIntyre from further dealing with Estate assets.
- [45] Ms. MacIntyre did not respond to Ms. Bailey's application or file any evidence in response.
- [46] Ms. Bailey's application was heard by Justice Baker on December 17, 2021, together with Mr. Vimalasan's application to withdraw as counsel. Mr. Vimalasan explained that he was unable to obtain instructions and could no longer continue as counsel. As there were no objections, Baker J. granted his application to withdraw.
- [47] Mr. Jaffer-Jeraj outlined the background to the application and finished with a summary of what had happened to date with respect to Ms. MacIntyre's administration of the Estate:

So there is a pattern of asking for adjournments or more time, and three years after the last property has been dealt with -- and Ms. MacIntyre -- I submit Ms. MacIntyre has had more than enough time to deal with matters, along the way at some stage I understand there could be up to [\$]700,000 owing to the CRA. She -- though she's hired and paid many accountants along the way, I'm not sure why five years later, or at least three years after the last property was sold, CRA has still not been dealt with. And my client is very worried about the interest and penalties that are going to be owing to the CRA and there's just no end in sight. Everything has essentially been dealt with except taxes and distribution, and why it's taking this long makes no sense.

- [48] Ms. MacIntyre started to address the Court and asked if Mr. Piett could do so on her behalf. Mr. Piett submitted that "there's probably no one who knows more intimately the details of which have been spoken of here today". Mr. Jaffer-Jeraj objected to Mr. Piett making submissions, in part, because Ms. MacIntyre had not provided information about the funds that had been paid to him out of the Estate. Mr. Piett responded that his involvement in the Estate was such that he intended to apply to become a party. The basis for this suggestion

was unclear, and I know of no basis on which he could have become a party.

[49] After Baker J. did not allow Mr. Piett to make submissions, Ms. MacIntyre sought an adjournment to seek counsel. Her application was denied. Justice Baker said:

So you are saying that you need new counsel, even though you've known since August and September and October and November and December that your lawyer was withdrawing. You have had this application for two weeks but you haven't filed a response to it, and there are a lot of orders that are being sought in this application that I admit would prejudice you potentially.

[50] Due to the limited time then available, Baker J. allowed Mr. Jaffer-Jeraj to proceed with the urgent matters, including the: removal of Ms. MacIntyre as the administrator; transfer of the Estate funds to him in trust; provision of Estate information; and provision of a Canada Revenue Agency authorization. Justice Baker rejected Ms. MacIntyre's submission that doing so was a grave injustice. She confirmed that Ms. Bailey's application would proceed on a limited basis.

[51] As Mr. Jaffer-Jeraj started his submissions, Ms. MacIntyre said that she could not hear him, although she had no issue hearing him to that point. She said she would hang up and call back in. She did not call back, and could not be reached, despite attempts. Justice Baker expressed doubt about Ms. MacIntyre's inability to hear. Nonetheless, she suggested that Mr. Jaffer-Jeraj should proceed with the urgent matters during the week of January 4, 2022, and adjourn the remainder of the application generally, unless he wanted to set it down for a full day hearing. She said:

Well, Mr. Jaffer-Jeraj, we have a problem. And I -- I would like to let you proceed in the absence but I can't do that because of the reasons given, which was that she couldn't hear you. Now, whether that is the fact, I don't know, frankly, but that's what she said and I have to accept that, which means we can't complete today. So we have to adjourn.

I think you should still proceed with the four paragraphs that we've identified and adjourn the remaining parts of your claim, unless you want to set it down for a full day. But you can -- you should at least move forward with your application to change the administration of the estate. Can you do it in the week of January 4th?

[52] Justice Baker reset the application, peremptory on Ms. MacIntyre, and ordered that it be reset for a full day in the week of January 4, 2022. The transcript reads as follows:

THE COURT: -- So this will be reset for one day in the week of January 4 at [indiscernible/videoconference] your schedule, and the day you choose will be peremptory on Ms. MacIntyre who dropped off this call before this hearing was complete. That went un -- so that will be the order, but in terms of just your informing her, make sure she understands what that means, that it will --

CNSL A. JAFFER-JERAJ: Okay.

THE COURT: -- be proceeding and that she needs to show up either with her lawyer or by herself, but those -- and explain to her that it's simply those four paragraphs that the notice of application that are proceeding.

CNSL A. JAFFER-JERAJ: Okay.

[Emphasis added.]

[53] Justice Baker's closing words about "simply those four paragraphs proceeding" seem inconsistent with her direction that the application would be limited unless it was "set down for a full day", and neither Mr. Jaffer-Jeraj, nor the clerk's notes, recorded any limitation on what would proceed in the week of January 4, 2022. The clerk's notes of the order read as follows:

1. The order from the Notice of Application filed on December 6, 2021 by Legacy Tax + Trust Lawyers is signed in the form provided.
2. The Notice of Application filed on December 3, 2021 by the plaintiff is reset for 1 day in the week of January 4, 2022. The date chosen by plaintiff counsel will be [peremptory] on Ms. [MacIntyre].
3. Ms. MacIntyre's signature on the order is dispensed with.

[54] Mr. Jaffer-Jeraj took out the order, and on December 23, 2021, sent a letter to Ms. MacIntyre serving a copy of the order which provided:

The Notice of Application filed on 3-Dec-2021 by the Plaintiff Alison Robyn Bailey is reset for one day in the week of January 4, 2022. The date chosen by Plaintiff Counsel will be peremptory on the Defendant Glenda Anne MacIntyre.

[55] In Ms. MacIntyre's affidavit sworn December 15, 2022, she says that she "continuously checked the court website to see if anything was updated in the file to see if any orders were made by the judge". She knew how to access Court Services Online ("CSO") and check for clerk's notes.

[56] On January 3, 2022, Mr. Jaffer-Jeraj served Ms. MacIntyre with a requisition, resetting the hearing of the removal application to January 7, 2022, and provided her with an application record index. The requisition did not provide a time estimate, but expressly stated that it was "Pursuant to the Order of Justice Baker granted 17-Dec-2021". As set out, that order provided that the hearing was set for a full day.

[57] Ms. MacIntyre did not file any response materials and did not contact Mr. Jaffer-Jeraj's office despite having been in contact with him by phone and by email on prior occasions.

- [58] According to her affidavit, Ms. MacIntyre obtained a transcript of the December 17, 2021, hearing "to find out what orders were made", and she concedes that she "understood that the entire [removal application] that we had started on December 17 was now proceeding on January 7, 2022." The metadata for the transcript indicates that she obtained the transcript on January 4, 2022.
- [59] On December 18, 2021, Ms. MacIntyre attended at Vancity Savings Credit Union ("Vancity") and obtained ten separate bank drafts withdrawing \$1,400,000 from the Estate account.

Removal Hearing and Order

- [60] On January 6, 2022, the Supreme Court Registry sent an email to Ms. MacIntyre and Mr. Jaffer-Jeraj with the call-in information for the hearing. Out of an abundance of caution, Mr. Jaffer-Jeraj also forwarded the email to Ms. MacIntyre. The email advised both parties that the check-in for the hearing started at 9:15 a.m., they had to be checked-in by 9:50 a.m., and they had to remain reachable by email in the event that the matter was referred out and subsequent instructions would be provided. As written, with emphasis, it provided:

Please be advised that your chambers application will be heard on January 7th, 2022. The hearing will be conducted by way of MS Teams. Pre-court check-in for your hearing and others will start at 9:15am by the Court Clerk. Please be courteous and wait for the Court Clerk to admit you to the Team Virtual Courtroom. Alternatively, if you are appearing by MS Teams via Telephone, please wait to be called in for check-in purposes. Best efforts will be made to make sure you are checked in before the day starts. If you are not checked in before 9:50am, your matter will NOT be heard until the end of the court list.

It is vital that while you are waiting for your matter to be called in court, your phone and/or computer be on mute in order to avoid any excessive background noise. Please remain reachable by email in the event that the Court Clerk receives instructions that your matter has been referred to another adjudicator. If that is the case, you will be provided with subsequent instructions.

- [61] Again, Ms. MacIntyre did not file an application response, and did not contact Mr. Jaffer-Jeraj advising that she intended to appear or seeking copies of any materials in the application record.
- [62] In her first affidavit, Ms. MacIntyre deposes that, at 7:31 a.m. on January 7, 2022, she called a notary public "to notarize [a] document to submit to court". The document may have been an affidavit, but Ms. Bailey does not know because, despite demands, Ms. MacIntyre has not produced it.
- [63] Ms. MacIntyre had attended six earlier telephone hearings in the year preceding January 7, 2022.

[64] In support of this application to set aside the Removal Order granted on January 7, 2022, Ms. MacIntyre says that she did not attend the January 7 hearing because she called the wrong number and was waiting for her matter to be called. However, her own evidence calls that into question. In particular:

- a) instead of calling to check in, between 9:27 a.m. and 9:40 a.m., she called the "court registry" to confirm that the number she had was the correct one;
- b) having confirmed the number with the Court Registry, she still did not call to check in. Instead, between 9:46 a.m. and 9:58 a.m., she took another call;
- c) she says that she called in at 9:58 a.m., heard a case already in progress, and waited on the line until the morning break at 11:20 a.m. However, her call log, attached to her affidavit, shows that she called the chambers line five times between at 9:58 and 10:03 a.m., hung up after a few seconds every time, and did not actually call in until 10:03 a.m.;
- d) at 10:53 a.m., Mr. Piett called the Court Registry and was given the call-in number 604-691-0260. That is the same number that Mr. Jaffer-Jeraj sent to Ms. MacIntyre at 9:56 a.m.;
- e) despite the Registry and Mr. Jaffer-Jeraj providing her with the number, Ms. MacIntyre did not call in. Instead, she searched the internet and thought this number belonged to a U-Haul storage facility;
- f) Ms. MacIntyre did nothing from 11:30 a.m. to 11:57 a.m., at which time she had a 13-minute call with someone at Hamilton Duncan. She then did nothing between 12:10 p.m. and 12:40 p.m., claiming that she expected the Court to break for lunch at noon; and
- g) Ms. MacIntyre says that, at around 12:30 p.m., Mr. Piett advised her that the correct number was 604-581-0260, and she called that number, got a recording, and stayed on the line for 123 minutes waiting for someone to answer. There is no entry in her call log for any calls to the Registry at 12:30 p.m., but it does show that she called 604-681-0260 at 12:40 p.m.

[65] Ms. MacIntyre's evidence establishes that she:

- a) did not call to check in as instructed and did not call in until after 10:00 a.m., once regular chambers had begun. Had she checked in as instructed, she would have been on the line when the matter was referred out to Horsman J. and been given the new call-in number from the court clerk;
- b) was not reachable by email, as instructed. If she had been reachable, she would have received Mr. Jaffer-Jeraj's email at 9:56 a.m. with the new call-in number; and
- c) she was provided with the call-in number by 11 a.m., but did not call it until 12:40 p.m. Had she called the number before 11 a.m., or been on the line at noon, she would have joined the hearing before Horsman J.

[66] Ms. MacIntyre's affidavit does not explain why she:

- a) did not file an application response or any evidence in response;
- b) did not contact Mr. Jaffer-Jeraj in advance of the January 7 date, despite receiving his communications, a copy of the December 17 order, and materials for the hearing;
- c) did not call in to check in between 9:15 a.m.-9:50 a.m. as directed;
- d) was not reachable by email, including checking her emails before and at the start of the hearing date and time;
- e) did not call in to 604-681-0260 when the number was provided; and
- f) did not try to reach Mr. Jaffer-Jeraj on January 7 or ask Mr. Piett to call him.

[67] While Ms. MacIntyre says that Mr. Piett was with her, he has not provided an affidavit.

[68] The hearing before Horsman J. ran from 10:13 a.m. to 11:00 a.m. and, at noon, Horsman J. gave reasons for judgment. She granted all of the relief sought by Ms. Bailey, including:

- a) removing Ms. MacIntyre as the administrator and replacing her with Ms. Bailey;
- b) requiring Ms. MacIntyre to forthwith deliver all Estate funds from all accounts to Mr. Jaffer-Jeraj to be held in trust by him;
- c) requiring Ms. MacIntyre to deliver to Mr. Jaffer-Jeraj all records and accounts with respect to all transactions with respect to the Estate, to respond to any requests for documents and information within 72 hours from the date of the request, and to provide a signed authorization for the Canada Revenue Agency to release to Mr. Jaffer-Jeraj all tax information relating to the deceased and the Estate;
- d) requiring Ms. MacIntyre to deliver the keys to the storage locker(s) (containing the personal effects of the deceased, and assets of the Estate, to Mr. Jaffer-Jeraj);
- e) restraining, enjoining, and prohibiting Ms. MacIntyre from disposing of, encumbering, assigning, dissipating, or in any similar manner dealing with the Estate assets, or of any assets in which Ms. Bailey has, or may have an interest pending final determination of this action without consent in writing of Ms. Bailey or without further order of this Court; and
- f) ordering Ms. MacIntyre to pay special costs to Ms. Bailey.

[69] In her oral reasons, Horsman J. summarized the facts as follows:

[4] Ms. MacIntyre advised the plaintiff that she would provide an accounting, budget, and schedule of distribution. She did not do so and has not done so to date, despite numerous requests from plaintiff's counsel.

[5] On September 2, 2020, Ms. MacIntyre was served with a notice to pass accounts. She did not pass accounts.

- [6] The plaintiff filed this action in October 2020. The parties attended a case planning conference before Justice Kent on January 4, 2021. The defendant was then represented by counsel. Justice Kent ordered that the plaintiff was at liberty to take default judgment without further notice if the defendant did not file and serve a response to civil claim by January 29, 2021. The defendant filed a response to civil claim on the last day, January 29, 2021.
- [7] Ms. MacIntyre did not, in the ensuing months, provide an accounting of the estate assets.
- [8] The plaintiff filed a notice of application on June 3, 2021. In advance of the hearing of the application the defendant prepared a provisional statement of accounts and summary of realized assets that contained no supporting documentation. One entry in this provisional statement of accounts suggested that there was an estate tax of \$240,754 owing as of 2016. There were no further entries relating to the estate tax. It is unclear whether the tax debt remains unpaid.
- [14] Plaintiff's counsel advises me that he notified the defendant on December 23, 2021, that the application would be reset for January 7, 2022. He communicated by way of the email address that Ms. MacIntyre has routinely used for matters relating to the administration of the estate. Plaintiff's counsel also provided Ms. MacIntyre with the dial-in instructions in advance of today's hearing. She did not appear.
- [15] In the circumstances, I considered it appropriate to proceed in the defendant's absence. I am satisfied that plaintiff's counsel notified the defendant of the hearing date. The date is peremptory by order of Justice Baker.
- [70] Justice Horsman then made the orders sought by Ms. Bailey, writing:
- [16] The main relief sought by the plaintiff today is the removal of Ms. MacIntyre as administrator of Mr. Leibenzeder's estate and the appointment of the plaintiff in her place.
- [18] In my view, an order removing and replacing Ms. MacIntyre is clearly necessary in this case. She has persistently failed to comply with the plaintiff's repeated requests for the production of relevant estate information, not to mention court orders compelling production. She has deliberately failed to act in a manner consistent with her obligations, which includes fiduciary obligations, as the administrator of the estate. The plaintiff has been forced into expensive court proceedings in an effort, which has been unsuccessful to date, to obtain a basic accounting of the estate assets. Ms. MacIntyre has obstructed such efforts in a manner that can only be characterized as wilful. As matters stand, the plaintiff cannot even determine the status of the estate's tax liabilities, including potential penalties and interest.
- [20] Accordingly, in the circumstances, I consider it appropriate to grant the orders sought by the plaintiff in relation to the removal and replacement of Ms. MacIntyre as administrator and the consequential relief. I therefore grant the following orders sought by the plaintiff in Part 1 of her notice of application:

- [23] The plaintiff also seeks her costs of this application from the defendant as special costs. In my view, such an order is appropriate. This application was only necessitated by Ms. MacIntyre's persistent and deliberate failure to engage in the issues raised by the application, including her ongoing failure to provide the estate information requested by the plaintiff and, at least in relation to Master Dick's order, ordered by the court. The defendant put the plaintiff to the cost of two court appearances and failed to appear at all on the date that was peremptorily set by the court. In my view, the defendant's conduct is reprehensible within the meaning of the relevant authorities, and thus the plaintiff is entitled to her costs of this application as special costs.
- [24] The remaining relief in the plaintiff's notice of application is adjourned generally.
- [71] In this application, Ms. MacIntyre does not assert that Horsman J. made any factual or legal errors, or that the outcome of the hearing would have been any different if she had filed an application response and attended to make submissions. Indeed, without an application response and evidence, even if Ms. MacIntyre attended the hearing, she would have had nothing to present to the Court. The hearing date was peremptory to her, and it is not clear to what she would have been able to speak. Ms. MacIntyre's evidence about why she did not attend is not persuasive. At that point in the administration of the Estate, Ms. MacIntyre was an experienced litigant who knew how to check CSO for orders made at a hearing and how to request a transcript of the December 17, 2021, hearing. She knew that Ms. Bailey's application would be dealt with on January 7, 2022.
- [72] On the evidence, Ms. MacIntyre should have become aware of the Removal Order on January 8, by reviewing CSO, because she said she checked "continuously" and, in any event, she obtained a transcript of the hearing on January 11, 2022.
- [73] Ms. MacIntyre took no steps to comply with the terms of the Removal Order. Ms. Bailey also alleges that Ms. MacIntyre breached the restraining order by withdrawing \$22,000 from the Estate account on January 10, 2022.
- [74] Instead, on February 7, 2022, David Hunter of Hamilton Duncan, advised that he had been retained by Ms. MacIntyre and expected to receive instructions to apply "forthwith" to set aside the Removal Order, and that he had filed an appeal of the Removal Order.
- [75] While she was represented by Mr. Hunter, Ms. MacIntyre made no efforts to comply with the Removal Order.
- [76] On February 11, 2022, pursuant to the Removal Order, Ms. Bailey obtained copies of statements for the Estate's accounts at Vancity, which showed, among other things, that:
- a) on December 17 and 18, 2021, Ms. MacIntyre emptied the Estate's Vancity accounts by purchasing ten bank drafts totaling \$1,400,000; two totaling \$150,000 payable to herself, and eight totaling \$1,250,000 payable to the Estate;

- b) on December 18, 2021, and January 4 and 10, 2022, Ms. MacIntyre paid \$4,600 to her Desjardins Visa;
 - c) an Estate cheque for \$60,000 was issued to Mr. Piett on February 13, 2021. The cheque did not record the reason for the payment;
 - d) the sale proceeds from two of the real properties, totaling \$2,389,760.84, were not deposited into the Vancity accounts; and
 - e) Mr. MacIntyre's father issued and signed three cheques on the Estate's Vancity chequing account, totaling \$1,434.29. There was no reason for Mr. MacIntyre to have access to the Estate funds, and he did not have authority to issue cheques from that account.
- [77] On February 16, 2022, Mr. Hunter served a notice of appeal on Ms. MacIntyre's behalf and, on February 17, 2022, Ms. Bailey filed an appearance.
- [78] On April 26, 2022, a grant of probate was issued to Ms. Bailey, pursuant to the Removal Order.
- [79] On April 27, 2022, Mr. Jaffer-Jeraj wrote to Mr. Hunter to check on the status of the appeal. On April 28, 2022, Mr. Hunter served the appeal record, which had been filed on April 8, 2022. In light of the history of the proceedings and the progress with the Estate, Mr. Jaffer-Jeraj advised Mr. Hunter that the appeal record was served out of time.
- [80] On May 3, 2022, Chelsea Dubeau, Mr. Hunter's colleague, emailed Mr. Jaffer-Jeraj, following up on their phone call the day before and advising that they would be filing a motion to extend the time to serve the appeal record and other appeal deadlines. She also asked Mr. Jaffer-Jeraj to seek instructions to accept service of the materials and to consent to the extension of time for filing.
- [81] On May 6, 2022, Ms. Dubeau sent Mr. Jaffer-Jeraj a draft notice of application to set aside the Removal Order and transcripts of the December 17, 2021, and January 7, 2022, hearings. She confirmed that "at this time, our instructions are to proceed with an application to set aside the entirety of the [Removal] Order." This was the last communication that Mr. Jaffer-Jeraj received from Hamilton Duncan.
- [82] No further steps were taken in the appeal either by Mr. Hunter when he represented Ms. MacIntyre, or by her current counsel, Eric Clavier, and, on February 6, 2023, the appeal was placed on the inactive list by the Court of Appeal. Mr. Clavier did not file an application to set aside the Removal Order until December 15, 2022.

The Estate Action

Mareva Injunction

[83] Based on Ms. MacIntyre's misconduct as the administrator, her refusal to comply with the Removal Order, and newly discovered information about what appeared to be misappropriation of Estate funds, the Estate commenced the Estate Action on April 22, 2022. On April 29, 2022, the Estate applied for a without-notice Mareva injunction against Ms. MacIntyre. The injunction was granted on May 4, 2022, by Justice Riley. It was effective until July 4, 2022, and included the following terms:

- a) Ms. MacIntyre was restrained from dealing with any of her assets in British Columbia or any assets of the Estate in her possession or control, with the exception of spending reasonable amounts on ordinary living expenses or legal advice or representation, subject to a requirement to advise the Estate's lawyers of the source of the funds. The order specifically said at para. 4:

This Order does not prohibit [Ms.] MacIntyre from spending reasonable amounts on ordinary living expenses and reasonable amounts on legal advice and representation. Before spending any money on living expenses exceeding \$1,000 on any item, other than arm's length, market-rate housing, or expenditures exceeding \$2,500 in any calendar month, or any business or legal expenses, [Ms.] MacIntyre must advise the Estate's solicitor in writing of the intended source of the funds, provided that with respect to legal expenses, she need not advise of the amount or purpose, just the source of the funds.

- b) The injunction would cease to have effect if Ms. MacIntyre provided security by (i) paying the sum of \$1,650,000 into Court, (ii) returning the official cheques totaling \$1,400,000 to the Estate uncashed and paying \$250,000 into Court, or (iii) providing other security in a manner agreed to by the Estate.
- c) Ms. MacIntyre could apply to vary or discharge the injunction on 24 hours' notice.
- d) Any person with notice of the injunction was to provide to the Estate:
 - a. Information about any and all known assets of or held in the name of the Estate; and
 - b. If the Recipient has been or is currently engaged for or by the Estate, said Recipient must provide its complete, unredacted records and files regarding the services it performed for or in respect of the Estate, subject to a claim of privilege.

[84] The injunction was entered on May 5, 2022, and served on Mr. Hunter and Ms. Dubeau on May 6, 2022, together with the notice of civil claim.

[85] On May 9, 2022, Mr. Hunter advised that he had forwarded the materials to Ms. MacIntyre, and he told the Estate's lawyers that Ms. MacIntyre used Estate funds to purchase an official cheque for \$22,000 on January 10, 2022. That purchase was made after Horsman J.'s Removal Order and when Ms. MacIntyre had no authority over the Estate funds.

- [86] On May 11, 2022, Mr. Hunter accepted service of the notice of civil claim and the Mareva injunction on Ms. MacIntyre's behalf. On May 13, 2022, the Estate's lawyers brought to Mr. Hunter's attention that the terms of the injunction permitted Ms. MacIntyre to access funds for legal expenses and offered to cooperate in that regard. Mr. Hunter did not respond.
- [87] On May 18, 2022, Mr. Hunter returned the \$1,422,000 that Ms. MacIntyre had withdrawn from the Estate to the Estate's lawyers. Mr. Hunter did not explain why Ms. MacIntyre took the funds or why they were not returned sooner under the terms of the Removal Order.
- [88] Between May 11 and June 1, 2022, the Estate's lawyers repeatedly wrote to Mr. Hunter regarding Ms. MacIntyre's ongoing breaches of the Removal Order, asking him to convince her to cooperate. He did not respond.
- [89] Ms. MacIntyre did not take any other steps required under the Removal Order.

Default Judgment

- [90] On May 27, 2022, the Estate's lawyers advised Mr. Hunter that, absent an agreed-upon extension, default judgment would be taken if Ms. MacIntyre did not file her response to civil claim in the time provided by the Rules.
- [91] On June 1, 2022, Ms. MacIntyre advised that she was no longer represented by Mr. Hunter and requested an extension of the time for filing a response to civil claim. She proposed a date of June 3, 2022, and the Estate's lawyers agreed. She wrote that June 3 would allow her "the time to respond adequately and meet the logistical requirements of document delivery."
- [92] Ms. MacIntyre did not file a response by June 3, 2022. The Estate's lawyers advised her that if she did not file a response by the end of the day on June 6, 2022, the Estate would proceed to default judgment without further notice. In response, Ms. MacIntyre advised that she had "a draft of [her] Response to Notice of Civil Claim which is complete and ready to submit to court. Although you will only view the draft form, I stand behind its veracity, both in scope and detail". The Estate's lawyers confirmed by email that she must file and serve her response. Ms. MacIntyre did not do so.
- [93] On June 6, 2022, Mr. Hunter advised that his retainer in the Estate Action was limited to accepting service of the notice of civil claim.
- [94] On June 16, 2022, Master Robertson granted default judgment. It included a monetary award of \$251,774, categories of damages to be assessed, and disallowance of executor fees. In addition, Master Robertson repeated the terms of the Removal Order and required Ms. MacIntyre to provide all Estate information, documents, and authorizations. Master Robertson wrote:

- [18] In the circumstances of this case, in particular the lack of response that has been a frequent feature of not only the claims raised in this action but in the [Beneficiary Action] as referenced by Justice Horsman, I am satisfied that Ms. MacIntyre's failure to file a response was, if not deliberate, done while she was aware of the seriousness of the allegations being made against her and the risk of default proceedings being taken.
- [19] Counsel for the plaintiff provided notice in writing, with specific dates for her to comply, that she could not have misunderstood. She had sufficient notice that the consequences of not filing a response would be an order in default.
- [95] Master Robertson ordered that the Estate was entitled to its costs on a full indemnity basis to be assessed in the ordinary course of passing its accounts: para. 22.
- [96] On June 17, 2022, Ms. MacIntyre was served with the Default Judgment.
- [97] On June 21, 2022, the Estate applied, returnable July 5, 2022, for an order correcting a slip in para. 1(d) of the Default Judgment, which provides that Ms. MacIntyre is not entitled to any executor's fees or any other fees as a former administrator of the Estate. On June 22, 2022, the Estate's lawyers followed up and served the correction application on Ms. MacIntyre. They advised that if Ms. MacIntyre did not accept service by email or did not provide an address for service, the Estate would apply for an alternate service order. Ms. MacIntyre did not respond.
- [98] On July 4, 2022, Ms. MacIntyre filed a without-notice application to set aside the Default Judgment. Master Vos adjourned the application and directed Ms. MacIntyre to serve her application on the Estate. She was also directed to attend the July 5 hearing. Ms. MacIntyre did not follow either direction. In her affidavit, she does not provide an explanation for why she did not serve her application despite her retention of Mr. Clavier. On July 5, 2022, Master Harper corrected the error in Master Robertson's order.
- [99] On July 5 and 6, 2022, the Estate's lawyers attempted to serve Ms. MacIntyre by email, and at her last known residential address, with the Default Judgment, the correction order, a garnishing order pursuant to which \$64,523.90 had been garnished ("Garnished Funds"), and a notice of intention to apply for payment out of court. The process server was advised that Ms. MacIntyre did not live at the last known residential address, despite her vehicle being parked in the driveway.
- [100] On July 14, 2022, the Estate applied for an order permitting service on Ms. MacIntyre by email and by posting a copy of the documents to the door of her last known residential address.

[101] On July 15, 2022, as it became apparent that the Garnished Funds would be paid out of court, Ms. MacIntyre and Mr. Piett retained Mr. Clavier, who filed a notice of objection to the payment out of court. On July 19, 2022, Mr. Clavier advised that he was authorized to accept service of all materials filed in these proceedings on behalf of Ms. MacIntyre and Mr. Piett.

[102] The Estate's lawyers served him with all materials filed to that date, and wrote to him seeking Ms. MacIntyre's compliance with the Removal Order and the Default Judgment, particularly with respect to filing the long-outstanding tax returns. As the content of the letter is important, I set it out below:

When you have a chance to review the pleadings and get instructions, I suggest that we have a call to discuss next steps, hopefully with a view to minimizing the Estate's costs, which Ms. MacIntyre is responsible for, and which are secured by her share of the Estate.

From the Estate's perspective, the following matters and next steps are of particular importance:

1. The Administrator is focused on the administration of the Estate and, in particular, having tax returns prepared and filed. As Ms. MacIntyre had not filed any tax returns for the Estate or Hazelmere since the date of death tax return to date, including after the Estate's 4 real properties were sold, there will be a significant tax bill plus interest and penalties. The completion of tax returns has been made unnecessarily complicated and expensive by Ms. MacIntyre's failure to comply with the Order of Horsman J. made on January 7, 2022, and, more recently, section 1(f) of the Default Judgment, to deliver all of Estate's records to the Administrator and respond to queries. The Estate will look to Ms. MacIntyre for the tax interest and penalties, and for the extra costs incurred as a result of Ms. MacIntyre's non-compliance with these orders, as damages to be assessed.
2. While Ms. MacIntyre took possession of the deceased's company, Hazelmere Contracting Ltd., became its sole shareholder and director, and had a dividend of over \$180,000 declared as of August 31, 2016 (prior to the date of death), and paid on September 30, 2016 (after the date of death), neither the ownership of this company, nor the dividend, were reported by Ms. MacIntyre in the affidavit of assets and liabilities and in the provisional accounts. This raises very significant concerns. The shares of this company have now been transmitted to the Estate, and the Administrator has become its sole director, and the Estate is looking into this matter.
3. The Estate has sought the transfer of the Estate's files from Legacy and McQuarrie. Legacy has provided its complete file, subject to assertion of litigation privilege. McQuarrie, however, has provided virtually no documents due to Ms. MacIntyre's assertion of privilege over the entire file. This is very problematic, both for the Administration of the Estate - as McQuarrie had assisted Ms. MacIntyre with the administration of the Estate until 2019, and for our future application for damages to be assessed, specifically, sections 1(c) and 3(c)(ii). The Estate is entitled to McQuarrie's file and we intend to bring an application for disclosure of same.

As I said to Mr. Hunter, I really hope that Ms. MacIntyre, with the assistance of experienced counsel, will realize that the only way forward is cooperating with the Administrator and thus minimizing costs for the Estate and, necessarily, to herself.

[103] Despite further inquiries from the Estate's lawyers on July 27 and 28, August 2 and 16, and September 19 and 23, 2022, Mr. Clavier did not respond and did not address any of the issues raised, and Ms. MacIntyre took no steps to comply with the Removal Order or the Default Judgment or apply to set either aside. Ms. MacIntyre did not continue with her appeal of the Removal Order.

[104] On August 16, 2022, the Estate's lawyers advised Mr. Clavier that Mr. Piett's response to civil claim was overdue and had to be filed by August 23, 2022.

[105] On September 19, 2022, the Estate's lawyers wrote to Mr. Clavier, noting Ms. MacIntyre's continued refusal to cooperate and Mr. Piett's continued failure to file a response to civil claim.

[106] On September 23, 2022, Mr. Clavier wrote that his clients were "still working on the information I require to assist them in preparing and filing the necessary materials", including Mr. Piett's response to civil claim. He indicated that he would contact the Estate's lawyers on all matters as soon as possible. On the same day, the Estate's lawyers responded to Mr. Clavier, noting that there was no reason for the delay in the filing of Mr. Piett's response to civil claim, the Estate would proceed with the default judgment against Mr. Piett, and the Estate would seek payment of the Garnished Funds out of court. Mr. Clavier then advised that he "expect[ed] to file a comprehensive Response soon".

[107] On September 27, 2022, the Estate sought default judgment against Mr. Piett for \$60,000. The default judgment was rejected by the Registry on November 7 and 23, 2022.

[108] On October 31, 2022, the Estate applied for payment of the Garnished Funds out of court, returnable on November 14, 2022. At Mr. Clavier's request, the Estate rescheduled the application for December 1, 2022. Mr. Clavier promised to advise the Estate's lawyers of the basis for Ms. MacIntyre's opposition to the payment out of court.

[109] On November 29, 2022, the Estate applied, returnable December 2, 2022, for the Court to reconsider the Registry's rejection and grant a default judgment against Mr. Piett, who had not, to that date, filed or served a response to civil claim.

[110] Ms. MacIntyre did not file a response.

[111] On November 30, 2022, Mr. Clavier requested an adjournment of the application for payment out of court on the basis that Ms. MacIntyre still intended to apply to set aside the Default Judgment and was still assembling information and documents. Mr. Clavier wrote:

The preparation of Ms. MacIntyre's supporting affidavit is ongoing. It has taken a lot more time than anticipated to assemble the information and documentation required to prepare the supporting materials and an associated application response in the present proceeding. A personal tragedy in the interim has prolonged matters.

I had hoped to be in a position to file something by this week at the latest, but given that I had other court commitments and the timing of receipt of information and documentation required to prepare materials, this has not been possible.

[112] The Estate's lawyers responded later that day, advising Mr. Clavier that the Estate would oppose an adjournment, in part, because of Ms. MacIntyre's continued breaches of court orders.

[113] Mr. Clavier appeared on December 1 and sought to have the matter adjourned to December 15. Master Muir granted the adjournment, peremptory on Ms. MacIntyre.

[114] On December 2, 2022, Master Vos overruled the Registry's rejection of the default judgment and granted judgment against Mr. Piett for \$60,000.

Proposed Response

[115] On the evening of December 13, 2022, Mr. Clavier filed Ms. MacIntyre's response to the application for payment of the Garnished Funds out of court and the two applications before me. Ms. MacIntyre's unsworn affidavit was served on December 15, 2022.

[116] In Ms. MacIntyre's first affidavit and the attached proposed response to civil claim ("Proposed Response") in the Estate Action, she does not address the Estate's repeated concerns about her misconduct, including the issues raised by the Estate's lawyers with Mr. Clavier. She admits that she ceased being the administrator on January 7, 2022. She asserts in the Proposed Response that "Adios is a company that provided professional services to the [E]state, including acting as a consultant on real estate matters", but she provides no evidence for this in her affidavit, and does not explain, in either her affidavit or the Proposed Response: who or what Adios is and why it does not appear to exist as an entity; the numerous issues with Adios' invoices; what services, worth over \$200,000, Adios provided to the Estate, particularly as its invoices continued for months after the final Estate real property was sold; and the nature of her contractual arrangements with Adios. She also does not explain why she failed to provide the Adios service contracts, as she agreed to do in the October Agreement.

[117] In the Proposed Response, Ms. MacIntyre denies that "Adios had any knowledge of or involvement in any of the activities that the Plaintiff alleges were breaches of the Defendant's duties or obligations to the Estate".

- [118] Ms. MacIntyre says that she retained Mr. Vimalesan to represent her in the Beneficiary Action in her capacity as the administrator. Mr. Vimalesan filed a response to civil claim for Ms. MacIntyre in both her capacities. I understand from the submissions that Mr. Vimalesan has redacted portions of the Legacy file on the basis of litigation privilege for the benefit of Ms. MacIntyre.
- [119] Ms. MacIntyre does not say in her affidavit that she has a meritorious defence, and she provides no explanation for the \$60,000 payment to Mr. Piett. In fact, in the Proposed Response, she denies having made the payment to him. She describes him as a "close friend" who participated in the hearings in the Beneficiary Action. In her affidavit, she does not mention Mr. Piett by name. She refers to him as an unnamed "friend".
- [120] Ms. MacIntyre does not explain: the money paid from the Estate to her personal Visa account; her breaches of the Consent Order; or her failure to comply with the October Agreement. In her Proposed Response, she says that she "was represented by counsel at the time of the hearing and she was not advised of what information or specific documents she was being asked to provide". There is no evidence to support this in her affidavit. The transcript makes clear that she spoke on her own behalf and expressly agreed to provide the information and documents, set out in detail in Mr. Jaffer-Jeraj's letters and two pre-hearing briefs, by November 5, 2021. Even assuming that she was confused about what she needed to provide, she does not explain why she did not contact Mr. Jaffer-Jeraj to clarify.
- [121] Ms. MacIntyre also does not explain: withdrawing \$1,400,000 from the Estate on December 17 and 18, 2021; refusing to comply with the Removal Order; withdrawing \$22,000 from the Estate on January 10, 2022; not proceeding with her appeal of the Removal Order, both before and after retaining Mr. Clavier, and in fact, not doing so until December 12, 2022; failing to serve her application to set aside the Default Judgment she filed on July 4, and her failure to attend the hearing on July 5, 2022, both as directed by Master Vos; and not filing a response to civil claim in the Estate Action.
- [122] In the interim, along with dealing with the Estate's long overdue tax filings, Ms. Bailey:
- a) located storage lockers, on which the Estate had been paying rent since September 2017, and which Ms. MacIntyre advised contained Estate assets, but which she refused to disclose the location of or to provide keys for, in breach of the Removal Order and the Default Judgment. Ms. Bailey discovered that these storage lockers contained Ms. MacIntyre's household furnishings and trash, not Estate assets;
 - b) sought production of the files of McQuarrie and Legacy, former counsel for the Estate. Legacy has since provided a copy of its file to the Estate's lawyers, subject to some redactions for litigation privilege, for services provided to Ms. MacIntyre personally, but McQuarrie has refused to produce its file on the basis of objections from Ms. MacIntyre; and

- c) attempted, through inquiries made to McQuarrie, to determine what has become of a \$180,000 dividend declared by Hazelmere Contracting Ltd., a company owned by the Estate, which was purportedly paid on September 30, 2016. This issue remains outstanding.

Ms. Bailey's Actions as Administrator

- [123] Ms. Bailey's efforts to obtain information about the Estate and to administer it, with a view to winding it up and distributing the net proceeds to the beneficiaries, have been obstructed by Ms. MacIntyre's breaches of the Removal Order and the Default Judgment and her failure to provide information and documents concerning the Estate.

Tax Filings

- [124] One of Ms. Bailey's primary focuses has been dealing with the Estate's taxes. She learned that Ms. MacIntyre misled the beneficiaries about the steps she had taken in this regard.
- [125] Vohora LLP ("Vohora"), an accounting firm retained by Ms. MacIntyre as administrator, filed a preliminary date of death tax return for Mr. Leibenzeder in 2017. As I have said, this was the only tax return filed.
- [126] On May 9, 2022, Vohora's managing partner, Jeremy Pierce, explained that Ms. MacIntyre failed to provide required information to complete the Estate's tax filings. After reviewing Vohora's files, he wrote:

I can confirm that we have not done any work for the [E]state, apart from filing a preliminary date of death tax return. I say preliminary, because we were expecting to amend it to include additional information, but the information never came from [Ms. MacIntyre] and from that point we couldn't get a hold of her. Last September she suddenly reached out to me to pick up the outstanding work, which resulted in our office sending the attached email. I never received a reply to this email.

- [127] The attached email was sent on September 10, 2021, and it set out what had been done and what was required for the next steps. Ms. MacIntyre did not reply. There is no evidence that Ms. MacIntyre took any steps to deal with the Estate's outstanding tax filings and liabilities until her removal as the administrator, despite regular communications to Ms. Bailey that she was working on the Estate taxes.
- [128] After the Removal Order, Ms. Bailey retained Vohora to complete the Estate's tax filings and collected the information it required to do so. On October 5, 2022, the Estate filed tax returns for tax years ending December 31, 2016, through 2021, and paid outstanding taxes of \$265,317.73. As a result of Ms. MacIntyre's failure to file and pay taxes when due, the Estate was assessed and paid interest and penalties in the amount of \$110,613.65.
- [129] In its reporting letter to Ms. Bailey, Vohora wrote:

The interest and penalties could have been avoided if the returns were filed and paid by the relevant due dates. The due dates were 90 days after the December 31st for each year. Alison Bailey became the executor on February 22, 2022, and began gathering all of the relevant documents so she could get the returns filed and paid. Due to the nature of the transactions which included various sale of properties in the years above, it took some time for Alison to gather all of the documents and provide them to our office. She had to determine all rental income and expenses (mortgage interest, utilities, property taxes, etc.) incurred for the properties in all years to ensure all relevant information was reported.

At this time, a few of the returns were years late; specifically, 2016-2018 which had the most activity due to property sales and rental income. Due to this, a large amount of interest and penalties were charged ...

Storage Lockers

[130] Since September 2017, the Estate reimbursed Ms. MacIntyre at least \$29,162.32 for the rental of storage lockers that she said contained Estate assets. In breach of the Removal Order and Default Judgment, Ms. MacIntyre did not advise the Estate where the storage lockers were or provide keys.

[131] In May 2022, it was discovered that the storage lockers were at a Public Storage Canada ("PSC") facility in Surrey, British Columbia.

[132] On May 24, 2022, PSC notified the Estate that Ms. MacIntyre and Mr. Pielt advised them that it intended to access the storage lockers and move the items to another location. As Ms. Bailey was concerned that Ms. MacIntyre intended to remove Estate assets--a further breach of the Removal Order and the Mareva injunction--Mr. Jaffer-Jeraj attended at the storage lockers intending to change the locks. Due to the type of locks used by Ms. MacIntyre, he could not do so.

[133] On May 25, 2022, the Estate's lawyers wrote to Mr. Hunter, advising him of what happened, and suggesting that Ms. MacIntyre forthwith provide keys in compliance with the Removal Order and the Mareva injunction. Mr. Hunter did not respond.

[134] On May 28, 2022, Ms. Bailey drove from Kelowna to Surrey to open and access the storage lockers. According to her affidavit, Ms. Bailey found that they were not filled with Estate assets but with Ms. MacIntyre's household furnishings and trash, including pieces of wood and empty wine bottles. Ms. Bailey located and removed four sentimental items, left the remaining items in the lockers, and secured them with new locks.

[135] On June 1, 2022, the Estate's lawyers wrote to Mr. Hunter to advise:

- a) of the items that Ms. Bailey had removed from the lockers;
- b) that the contents were not Estate assets and the Estate should not have been incurring costs for renting the lockers;

- c) that the continued rental of the lockers, and their contents, were the responsibility and liability of Ms. MacIntyre; and
- d) that keys for the lockers could be picked up or couriered to Ms. MacIntyre.

[136] Ms. MacIntyre did not respond. As a result, on June 8, 2022, the keys were sent to PSC. The Estate intends to seek recovery of the rental costs from Ms. MacIntyre.

Legal Fees

[137] Paragraph 1(c) of the Default Judgment provides:

[Ms.] MacIntyre [shall] reimburse the Estate for the legal fees paid to McQuarrie Hunter LLP ("McQuarrie") and Legacy Tax + Trust Lawyers ("Legacy") for the legal services provided to the Estate, including in defending BCSC Action S2010645, Vancouver Registry, that would not have been necessary but for [Ms.] MacIntyre's breaches of her fiduciary, common law, and statutory duties to the Estate;

[138] Legacy provided a copy of its file to the Estate's lawyers, redacted for services provided to Ms. MacIntyre personally. Based on the produced documents, the Estate expects to seek a repayment of the majority of the fees that Ms. MacIntyre paid to Legacy from the Estate.

[139] Despite the Estate's lawyers' efforts, McQuarrie has not provided a copy of its file as Ms. MacIntyre objected to it being provided. A court application is likely to be necessary, and the Estate expects to seek a repayment of a portion of the fees that Ms. MacIntyre caused to be paid to McQuarrie from the Estate.

[140] Without a copy of McQuarrie's file, the Estate still does not know what has become of the \$180,000 dividend of Hazelmere Contracting Ltd., declared as of August 31, 2016, and paid on September 30, 2016, or why the dividend was not included in the affidavit of assets and liabilities sworn by Ms. MacIntyre. An application is likely to be required.

Applicable Legal Tests

Setting Aside the Removal Order

[141] As was clear from counsel's submissions on behalf of Ms. MacIntyre, she seeks to set aside Horsman J.'s Removal Order because she is exposed to liability under the Estate Action commenced by Ms. Bailey as the replacement administrator of the Estate.

[142] As I have said, on the evidentiary record before me, I have not exercised my discretion to set aside the Removal Order.

[143] Rules 22-1(2) and (3) provide as follows:

Failure of party to attend

- (2) If a party to a chambers proceeding fails to attend at the hearing of the chambers proceeding, the court may proceed if, considering the nature of the chambers proceeding, it considers it will further the object of these Supreme Court Civil Rules to do so, and may require evidence of service it considers appropriate.

Reconsideration of order

- (3) If the court makes an order in circumstances referred to in subrule (2), the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.
- [144] The effect of Rule 22-1(3), as an exception to the *functus officio* doctrine was explained by Justice Goepel in *Main Acquisitions Consultants Inc. v. Prior Properties Inc.*, 2022 BCCA 102:
- [20] In *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, the Supreme Court of Canada at para. 33 revisited the doctrine of *functus officio*. Pursuant to the doctrine, a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision. Under the doctrine, a court loses jurisdiction once the formal judgment has been entered. After this point, the court only has power to amend the judgment in very limited circumstances.
- [21] Rule 22-1(3) is an exception to *functus* doctrine. It specifically gives the court the power to reconsider an order if it is satisfied that a party to a chambers proceeding who fails to attend the chambers proceeding was not guilty of willful delay or default.
- [40] A reconsideration application under Rule 22-1(3) is a two-step process. The first step is for the court to determine whether the court has jurisdiction to reconsider. It can only do so if satisfied that the applicant was entitled to notice of the original application and the failure to appear was not as a result of willful delay or default.
- [41] If the court is satisfied that the matter can be reconsidered, the second stage of the process requires a rehearing of the application that led to the order which is being reconsidered.
- [145] Pursuant to Rule 8-1(9), a person who is served with a notice of application, and who wishes to respond, must file an application response. Rule 8-1(1) defines an "application respondent" as "a person who files an application response under subrule (9)."
- [146] Pursuant to Rule 8-1(17), an application respondent is entitled to be served with the application record index, and pursuant to Rule 8-1(21.1), is entitled be served with a requisition resetting a hearing date. A person who is served with a notice of application, but does not file an application response, is not entitled to receive notice of the hearing date, and is not entitled to participate in the hearing, absent the exercise of the court's discretion: *Altiveris Developments Inc. v. Sussex Retirement Living (2015) Inc.*, 2022 BCCA

209 at para. 14; *British Columbia (Director of Civil Forfeiture) v. Crowley*, 2013 BCCA 89 at para. 72.

[147] Despite the rules and the cases applying them, out of courtesy, Ms. Bailey's lawyer served Ms. MacIntyre with the application record index and notice of the first hearing date on December 17, 2021, and gave her notice of the rescheduled January 7, 2022, hearing.

[148] Ms. Bailey submits that as Ms. MacIntyre was not an application respondent, she was not entitled to participate in the hearing before Horsman J. and has no standing to apply for a reconsideration of the Removal Order. Therefore, she submits, the Court is *functus officio* with respect to it. I agree.

[149] I will go on to consider whether Ms. MacIntyre's materials satisfy me that the Removal Order made in her absence should be set aside. That requires me to be satisfied that Ms. MacIntyre was not guilty of willful delay or default: Rule 22-1(3).

Willful Delay

[150] As Justice Butler explained in *Lee v. Lee*, 2016 BCSC 2454:

[45] The phrase "not guilty of wilful delay or default" carries with it the concept of blameworthiness. If a party is blameworthy in their failure to attend, the order will not be set aside. This interpretation of the rule was set out in *Anderson v. Toronto-Dominion Bank* (1986), 70 B.C.L.R. 267 (C.A.) at 270:

In my opinion, the phrase "guilty of wilful delay or default" carries with it the sense of a blameworthy action. The word "guilty" likewise emphasizes that the person who delayed or defaulted or both must be one deserving of blame and of the consequent penalty of not being heard on the merits of the application. Among other things, if satisfactory explanations are given for the delay and the default, then it is open to the court to reconsider whether there is any merit in the defence. The failure may have been "purposeful, deliberate or intentional" but, depending on the circumstance, it may not be blameworthy.

[151] In *B2B Bank v. Sinnarajah*, 2021 BCSC 1475, I refused to reconsider a master's order approving sale of a property. I found that the respondent was blameworthy and guilty of willful default as he had attended prior hearings and knew of the hearing he was applying to set aside. The respondent relied on his lack of legal sophistication leading him to misunderstanding the importance of attending. However, he had attended earlier hearings, he was told the hearing time and was provided the MS-Teams information by email, and he was advised by counsel of the proceeding: paras. 52-54.

[152] Even if I accept everything Ms. MacIntyre says about what happened on December 17, 2021, and between that date and January 7, 2022, it is clear that Ms. MacIntyre knew that the Removal Order and the other relief in Ms. Bailey's application was being sought and was scheduled for hearing on January 7, 2022. By then, Ms. MacIntyre had removed \$1,400,000 from the Estate account. She never filed an application response despite the application

and supporting affidavit raising very serious concerns about her administration of the Estate. Further, Ms. MacIntyre:

- a) never indicated that she would participate in the January 7 hearing;
- b) did not check in as directed to do by the Registry;
- c) did not call in until after 10 a.m. when regular chambers had already begun;
- d) did not check her emails as directed to do by the Registry, and as a result, she did not receive Mr. Jaffer-Jeraj's email providing her with the update call-in information; and
- e) by 11:00 a.m., she was provided with the call-in information for the hearing before Horsman J. but did not call the number until 12:40 p.m., by which time Horsman J. had concluded giving her oral reasons.

Application as Soon as Possible

- [153] Even if Ms. MacIntyre had persuaded me that she was not guilty of willful delay or default, she must still demonstrate that: a) she brought the application to set aside the Removal Order as soon as reasonably possible; and b) she has a meritorious defence, or at least one worthy of investigation: *Northguard Mortgage Corp. v. Hamada*, 65 B.C.L.R. 60 at 68, 1985 CanLII 536 (C.A.).
- [154] The requirement for a person act "as soon as reasonably possible", in part, reflects the need for certainty and finality in court orders and the need for parties to arrange their affairs in reliance on court orders: *The Toronto-Dominion Bank v. Buchholz*, 2022 BCSC 313 at para. 25, citing *CHMC v. Bhalla*, 2008 BCSC 1352 at para. 43.
- [155] What amounts to as soon as reasonably possible is assessed in light of the circumstances in each case. In *Schindler v. Johnstone and Bank of Montreal*, 2005 BCSC 476 at para. 48, Justice Barrow wrote that one important consideration is the nature of the order the applicant seeks to have reconsidered.
- [156] In this case, the Removal Order was not procedural. It removed Ms. MacIntyre as the Estate's administrator for misconduct and replaced her with Ms. Bailey. It imposed obligations on Ms. MacIntyre to transfer Estate assets and records and awarded special costs.
- [157] After Ms. MacIntyre was served with the Removal Order on January 31, 2022, she retained Mr. Hunter. By February 7, 2022, Mr. Hunter advised Ms. Bailey's lawyer that he had filed a notice of appeal and was expecting to receive instructions to apply "forthwith" to set it aside. Nothing was done, even after Ms. Bailey obtained a new grant of probate and Mr. Hunter was served with the Estate Action. It was not until December 13, 2022, that Mr. Clavier applied on Ms. MacIntyre's behalf to set aside the Removal Order and then only when Ms. MacIntyre was faced with an application to pay the Garnished Funds out of court.

[158] By any standard, Ms. MacIntyre has not acted as soon as reasonably possible.

Meritorious Defence or Defence Worthy of Investigation

[159] At this stage of the test, Ms. MacIntyre must show facts disclosing a defence, but need not demonstrate that it will succeed: *Aggoune v. Maple Leaf Property Management*, 2020 BCSC 1546 at para. 58, citing *CHMC* at para. 28. It is not an onerous threshold to meet: *Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2020 BCCA 341 at paras. 29-30.

[160] As I have said, Ms. MacIntyre never filed a response to the removal application and does not propose to file one now.

[161] On the evidentiary record, Ms. MacIntyre demonstrated a pattern of not complying with Ms. Bailey's repeated requests for production of relevant Estate information. She did not fully comply with the Consent Order and did not comply with the October Agreement to provide information. She has never provided detailed Estate accounts or supporting documents. Her failure to file Estate tax returns resulted in the Estate paying over \$100,000 in interest and penalties. Finally, she has not justified or provided supporting documents for significant payments to Adios and Mr. Piett.

[162] Ms. Bailey and the Estate have been required to bring expensive court proceedings in an effort to obtain routine and basic accounting of Estate assets.

[163] In the result, Ms. MacIntyre has failed to meet the relatively low threshold required to establish a meritorious defence or a defence worthy of investigation.

Interests of Justice

[164] The court's residual power to set aside an order where it amounts to a miscarriage of justice is only invoked in respect of a result that would leave one party with such an unfair benefit or advantage at the expense of the other that a reasonable person would regard it as shocking and unconscionable. It involves much more than just a finding that a different result might have occurred: *Aquiline Resources Inc. et al. v. Wilson*, 2005 BCSC 1461 at paras. 11-12, citing *1307347 Ontario Inc. v. 1243058 Ontario Inc.*, 4 C.P.C. (5th) 153 at para. 9, [2001] O.J. No. 257 (S.C.J.).

[165] In this case, Ms. MacIntyre does not argue that a different result might have occurred, and she does not point to any advantage gained at her expense.

[166] In this case, setting aside the Removal Order would have the effect of reinstating Ms. MacIntyre as the Estate administrator: a result that, in light of the passage of time and Ms. MacIntyre's continued failure to cooperate in finalizing the Estate, would not be in the interests of justice.

[167] Considering the events following the Removal Order, it would not be in the interests of justice to set it aside.

Setting Aside the Default Judgment

- [168] There is some overlap between the analysis and factors considered with respect to setting aside the Removal Order and those in an application to set aside a default judgment.
- [169] The well-known test on such an application was set out in *Miracle Feeds v. D. & H. Enterprises Ltd.*, 10 B.C.L.R. 58 at 61, [1979] B.C.J. No. 1965 (Co. Ct. Chambers). The defaulter must establish through affidavit evidence that:
- a) they did not willfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;
 - b) they applied to set aside the default judgment as soon as reasonably possible after learning of it, or explain the delay in an application being brought; and
 - c) they have a meritorious defence or, at least, a defence worthy of investigation.
- [170] The *Miracle Feeds* factors are not exhaustive: *Forgotten Treasures International Inc.* at para. 17. They guide the analysis, but, as Chief Justice Hinkson said in *Robinson Estate v. Wolsey*, 2018 BCSC 2287 at para. 24, "in the final analysis, the interests of justice are the principal consideration to be addressed in determining whether or not to set aside a default judgment": see also *Ming Sun Benevolent Society v. Philippine Women Centre of B.C.*, 2021 BCCA 240 at para. 34, citing *Andrews v. Clay*, 2018 BCCA 50 at para. 29.
- [171] Ms. MacIntyre bears the burden of establishing the *Miracle Feeds* factors: *Lee v. Zhou*, 2022 BCSC 172 at para. 61; *Miracle Feeds* at 61.

Willful Delay

- [172] The fact that a defendant failed to file a response to civil claim, despite being properly served, generally gives rise to an inference that they have chosen to ignore the action, as Justice Barrow explained in *Daum v. Elko*, 2009 BCSC 349:
- [6] Inclusion of the words "wilfully" and "deliberately" in the first prong of the *Miracle Feeds* test imply that where a defendant has decided to either not defend an action or chosen to simply ignore it, then the test has not been satisfied. The fact that the defendant has not filed a statement of defence in compliance with the rules may, and perhaps often will, give rise to an inference that the defendant has, at least, chosen to ignore the action. If, however, there is evidence of steps taken by the defendant during the time limited for the filing of the statement of defence which are inconsistent with the inference that the defendant has simply chosen to ignore his or her obligations, then the inference need not be drawn.
- [173] A failure to explain the lack of a response will lead to an inference that the conduct was willful or deliberate. In *B. v. B.*, 2005 BCCA 407, Justice Low wrote:

- [12] The appellant offered no explanation as to why he did nothing in the lawsuit after receiving the draft statement of defence and entering an appearance. He did not disclose how it came about that he knew it was necessary to enter the appearance but was uninformed as to the requirement for filing a statement of defence. Nor did he say that he did not see the notation on the printed portion of the writ of summons clearly informing him that he had fourteen days in which to file a statement of defence. The appellant offered no explanation as to why he did nothing further in connection with the action, or whether he made any enquiries as to what steps he might have to take to defend, during the eleven month period until the plaintiff took default judgment on 29 September 1999. The respondent should not lose her judgment properly obtained because the appellant chose not to read the documents served on him and chose to remain ignorant of what he needed to do in order to defend.
- [13] It can only be inferred that the failure of the appellant to file a statement of defence was deliberate. The chambers judge made no error in the conclusion she reached on this factor.
- [174] Bad faith is not necessary to a finding that a delay was willful or deliberate. In *Harding v. Skidegate First Nation*, 2013 BCSC 1191 at para. 27, Justice N. Brown explains that it was sufficient if the served defendant deliberated on the matter and chose not to respond. Similarly, failing to "get around" to filing a defence or response, even when based on a mistaken assumption that there was no need to do anything, is insufficient to set aside a default judgment. Rather, it shows that the defendant considered the matter and still failed to respond: *Chelin v. Kudos Fashion Inc.*, [1991] B.C.J. No. 964 (S.C.).
- [175] Ms. MacIntyre knew that she was required to file a response to the notice of civil claim within a deadline. In the Beneficiary Action, on January 4, 2021, Kent J. ordered her to file and reserve a response to the notice of civil claim that had been filed two and a half months earlier.
- [176] In this case, Mr. Hunter accepted service of the notice of civil claim on Ms. MacIntyre's behalf on May 11, 2022. Mr. Hunter and, when he ceased to act, Ms. MacIntyre were repeatedly warned that default judgment would be sought if no response was filed. Ms. MacIntyre was fully aware of the situation, requested and obtained an extension of time, and even claimed that she had a draft ready to file. Inexplicably, she did not file a response.
- [177] Ms. MacIntyre has not provided any explanation for her failure to file a response. As Master Robertson found, Ms. MacIntyre was well aware of the deadlines and the consequences of not meeting them. Her failure to file any response, despite repeated warnings and communications from the Estate's lawyers, was not inadvertent. She had time to consider the matter and determined that she need not comply with counsel's demands or the Rules.
- [178] I find that Ms. MacIntyre's failure to file a response was willful and deliberate.

Application as Soon as Possible

- [179] What amounts to applying as soon as possible depends on the particular facts. In *Labadie v. Hegel*, 2017 BCSC 909, aff'd 2017 BCCA 446, Justice Church found that the defendant's six-month delay was "inordinate" and that his reasons for the delay were not credible, particularly considering his prior litigation experience: paras. 30, 39. His application was dismissed on that and other bases.
- [180] In this case, Ms. MacIntyre has not provided any explanation for the delay. Both before and after retaining Mr. Clavier, she did not serve the Estate with her July 4 application to set aside the default judgment and her supporting affidavit material, as she was directed to by Master Vos. She did not bring this application until December 13, 2022, and then only in response to the Estate's application to pay the Garnished Funds out of court.
- [181] Mr. Clavier wrote to the Estate's lawyers and said that the situation was complex and he was collecting evidence; the complexity and the evidence are not apparent in either the Proposed Response or Ms. MacIntyre's affidavit, which does not attach any documents or provide an explanation for her conduct or the material issues in dispute.
- [182] I conclude that Ms. MacIntyre has failed to establish she applied to set aside the default judgment in a reasonable time.

Meritorious Defence or Defence Worthy of Investigation

- [183] As explained in *Xie v. Lai*, 2021 BCSC 2128:
- [38] [T]he burden is on the defendant to present evidence of a meritorious defence and/or one that has a degree of plausibility. As set out in the jurisprudence, the defendant cannot establish a meritorious defence simply by asserting it. It must be more than a bare denial or assertion of facts. Furthermore, the material should buttress the assertions made by the defendant: *Burnco Rock Products Ltd. v Bear Creek Contracting Ltd.*, 2019 BCSC 1257 at para. 23.
- [42] Furthermore, this case runs afoul of the principle that the defence must be more than a bare denial or assertion of facts. There is simply no material whatsoever to buttress Ms. Cheah's assertions in this matter. A bare allegation is not sufficient to establish a meritorious defence. I therefore cannot conclude that Ms. Cheah has a meritorious defence or one worthy of investigation in this matter.
- [184] A defence worthy of investigation will not always entitle a party to have a default judgment set aside: *Tiamzon* at para. 24. In *North Vernon Properties Limited Partnership v. Astor & York Retail BC Ltd.*, 2015 BCSC 327, Justice Affleck refused to set aside a default judgment even where the defendants filed affidavit evidence disclosing defences that they submitted were worthy of investigation.

- [185] A review of the Proposed Response Ms. MacIntyre seeks to file reveals that it contains bald denials unsupported by her affidavit evidence. She did not defend or provide evidence with respect to the Estate's claims regarding the \$60,000 paid to Mr. Piett or the \$200,000 paid to Adios. In her Proposed Response, she says that Adios is an operating company, but her affidavit does not contain evidence about Adios. She does not explain the \$50,000 paid to her Desjardins Visa card and does not explain the \$1,422,000 she withdrew from the Estate and returned after the Mareva injunction was granted.
- [186] As an aside, in advance of the applications before me, and to ensure an orderly process, Justice Forth presided over a case planning conference on February 21, 2023. She made certain orders, consented to by counsel for Ms. MacIntyre. In particular, she ordered that counsel for Ms. MacIntyre "will, on or before March 15, 2023, provide reply materials with respect to both applications". At that time, Ms. MacIntyre had received Ms. Bailey's January 9, 2023, affidavit, and it was to that affidavit that she was to reply. Ms. MacIntyre did not comply with the order.
- [187] Instead, Mr. Clavier advised that Ms. MacIntyre would be unable to meet the court-ordered deadline, but would deliver the materials as soon as they were able. The Estate's lawyers followed up on March 27 and April 4. On April 5, Mr. Clavier said they would file as soon as they could. Counsel exchanged correspondence.
- [188] On May 2, 2023, Mr. Clavier served reply on behalf of Ms. MacIntyre and an unfiled copy of her second affidavit. He did not provide an explanation for the late filing. A review of its contents indicates that it did not include any information that was unavailable to her when she swore her first affidavit on December 14, 2022.
- [189] At the commencement of the applications before me, Mr. Clavier sought to have the new affidavit admitted despite acknowledging that it was filed in breach of Forth J.'s order. He submitted that without it, I would not have the full picture on these applications.
- [190] I declined to admit the affidavit, relying on *Tome v. Furtado*, 2018 BCSC 2280 at para. 30, and *Quigg v. Quigg*, 2019 BCSC 628 at paras. 20-21, 34. I explained that:
- a) Ms. MacIntyre was the applicant seeking an order to set aside final orders;
 - b) Ms. MacIntyre had known of Ms. Bailey's position since January 9, 2023, and had Ms. Bailey's first affidavit since April 29, 2022;
 - c) Justice Forth's order was clear, and Ms. MacIntyre's reply affidavit was due on March 15, 2023; and
 - d) Ms. MacIntyre sought to file late materials about matters that were known to her, and information that was available to her, before January 9, 2023.
- [191] I concluded that there is prejudice to the administration of justice when litigants did not comply with court orders that were not meant to be suggestions.

Interests of Justice

[192] Ms. MacIntyre is the former administrator of the Estate that she controlled for five years. Unlike the applicant in *Owen Bird Law Corporation v. Morgan*, 2014 BCSC 927, relied on by Ms. MacIntyre, she is not a self-represented litigant suffering from "physical and mental health problems", and the Estate did not obtain its default judgment by neglecting to provide that information to the court: paras. 53-56.

[193] When Ms. MacIntyre was served with the notice of civil claim, she had counsel and was aware that there was a time limit within which she would have to file a response.

[194] When she attempted to have the default judgment set aside on a without-notice basis, she was given direction as to what she needed to do by Master Vos. She did not comply.

[195] Ms. MacIntyre has a demonstrated history of not complying with her obligations in the litigation and otherwise, and of failing to engage with the issues raised against her.

[196] The interests of justice do not favour setting aside the Default Judgment.

"MacNaughton J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/14/2023BCSC1422.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/leibenzeder-estate-v-macintyre-2023>

Prepared on 25 October 2026 · Esheria