
CANADA / JUDGMENT

Takhar v. Takhar

2020 BCSC 2049

COURT

Supreme Court of British Columbia

DECIDED

22 December 2020

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2020 BCSC 2049 Takhar v. Takhar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Takhar v. Takhar,

2020 BCSC 2049

Date: 20201222

Docket: S2010681

Registry: Vancouver

Between:

Darshan Kaur Takhar

Plaintiff

And

Jugdeep Singh Takhar, Vanessa Dawn Takhar

and JVHAG Holdings Inc.

Defendants

Before: The Honourable Mr. Justice Milman

(via teleconference)

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

December 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 22, 2020

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I. Introduction

- [1] At issue on this application is the fate of a preservation order under Rule 10-1 of the Supreme Court Civil Rules that I made on October 30, 2020 in favour of the plaintiff, Darshan Kaur Takhar ("Darshan"), to prevent certain funds in which she claims an interest, currently held in a law firm's trust account, from being paid out to the defendants (the "Preservation Order").
- [2] The first defendant, Jugdeep Singh Takhar ("Judd"), is Darshan's son. The second, Vanessa Dawn Takhar ("Vanessa"), is Judd's wife. Because the individual parties all have the same last name, I will refer to them for the sake of convenience by their first names as counsel did in argument. I mean no disrespect in doing so.

- [3] The third defendant, JVHAG Holdings Inc. ("JVHAG") is a family company jointly owned by Judd and Vanessa.
- [4] Judd and Vanessa separated in February 2020. On August 11, 2020, Vanessa commenced an action in this Court (Vancouver Registry Action No. E201385, which I will call the "Matrimonial Action"), against Judd and JVHAG seeking a divorce and various corollary relief, including, among other things, a division of family assets pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [5] One of the assets in which Vanessa claimed a spousal interest was the former family home at 1526 Nanton Avenue in Vancouver (the "Nanton Property"). The Nanton Property was, until recently, held in Judd's name alone but on August 19, 2020, he sold it to a third party. The net proceeds of sale were, by agreement between Judd and Vanessa, retained in trust by Judd's solicitors. Since then, Judd and Vanessa have agreed to a number of consent orders in the Matrimonial Action permitting some of those funds to be paid out to each of them for various purposes.
- [6] In the meantime, Darshan learned of the sale. She contends that Judd held title to the Nanton Property in trust for her, because, among other things, she was the one who had originally paid for it when it was purchased in 2000. On October 23, 2020, she commenced this action seeking, among other things, to assert a beneficial interest in the remaining proceeds of sale. On October 30, 2020 she obtained the Preservation Order that is the subject of this application, without notice to Judd or Vanessa. The effect of the Preservation Order is to prohibit any further payments out of trust pending trial of this action, written agreement of the parties or further order of the Court in this action.
- [7] Vanessa now applies to set aside the Preservation Order, as it applies to her, on the following grounds:
- a) Darshan does not have a legally viable claim against Vanessa's interest in the funds;
 - b) Darshan did not make full and frank disclosure to the Court in obtaining it; and
 - c) Darshan has not satisfied the test for a preservation order, in light of the more complete evidentiary record that the parties have now placed before me.
- [8] Judd takes no position on Vanessa's application, although he argues that if I find that the Preservation Order was improperly obtained, it should be set aside in its entirety and not just as against Vanessa.
- [9] Darshan responds that the Preservation Order was properly obtained, continues to be justified and therefore should remain in place.
- [10] For the reasons that follow, I have concluded that Vanessa's application to set aside the Preservation Order should be dismissed.

II. The Facts

- [11] Darshan is currently 79. She and her husband, Mohinder Singh Takhar ("Moe") came to Canada together from India in 1960. Her first language is Punjabi. She has difficulty communicating in English because it is her second language. Both she and Moe have had their share of health problems, particularly in recent years. Moe currently suffers from dementia. In April 2015, he was diagnosed with Alzheimer's disease, but his symptoms were, according to Darshan, apparent before then. They have two children, a daughter named Kulbinder and a son, Judd.
- [12] When Darshan and Moe first arrived in Canada, they settled in Prince Rupert but later moved to Terrace, where they built a successful trucking and logging business. Darshan says that in May 2000, she and Moe decided to purchase an investment property in Vancouver, which is how they first found the Nanton Property. They negotiated with the former owner to purchase it for \$650,000. Before the sale was scheduled to close in September of that year, she says, Judd asked them to let him take title in his name, in exchange for a promise to pay them the purchase price on demand. According to Darshan, she and Moe agreed to do so provided that Judd would hold title in trust for them, and that if he failed to keep his promise, he would convey title to them. With that arrangement in place, Darshan and Moe paid for the Nanton Property themselves and Judd took title to it solely in his name but in trust for them.
- [13] Darshan says that she and Moe also agreed to let Judd live in the home. In lieu of rent, he was to maintain the property, renovate it and pay expenses. He was to give them possession whenever they asked for it. She says that although she did demand that Judd repay the purchase price on a number of occasions in subsequent years, he never did so. In 2003, she says, she demanded that he transfer title into her name and he agreed to do so. Nevertheless, he continued to live in the home. Vanessa joined him there when they began cohabitating in 2002.
- [14] Vanessa has presented a very different version of these events in her affidavits. According to her, she and Judd began living in a marriage-like relationship in 2002. They were married in 2005. She says that while they were married, Judd told her that he was the one who had originally bought the Nanton Property but he decided to transfer it into Darshan's name in 2003 for the purpose of putting it out of reach of his former spouse, who was threatening to sue him for a division of property at the time. Regardless of that transfer, she says, Judd remained the beneficial owner. With the help of their financial advisors, she says, Judd had Darshan transfer title back to him in 2019. She says that she always believed during the 18 years of their marriage that the Nanton Property belonged to them. Had it not, she says, she would never have agreed to carry out the many renovations that they did while living there.
- [15] Vanessa deposes that in the summer of 2016, she and Judd formed JVHAG as a vehicle to invest in real estate using funds drawn from a line of credit secured against the Nanton Property. The line of credit agreement appears to have been formally taken out by Darshan,

with Judd and Vanessa having to sign as guarantors because they were earning a sufficient income but Darshan was not. With funds drawn from the line of credit, they caused JVHAG to purchase two investment properties in Whistler, the first for \$771,000 and the second for \$1,080,000 (the "Whistler Properties"). JVHAG continues to hold them today. One of them is vacant but the other is currently bringing in \$5,700 per month in rent. They have recently been appraised at \$876,100 and \$1,167,000 respectively, for a combined value of \$2,043,100.

- [16] Darshan has a different memory of how the Whistler Properties came to be purchased. She says that in July 2016, Judd asked her for permission to take out a \$1.3 million line of credit secured against the Nanton Property so that he could invest in real estate. She agreed to this, provided that he made those investments only in his own name, that he made all of the interest payments himself and that he held whatever investment properties he purchased in trust for her until he repaid the outstanding balance on the line of credit. According to Darshan, Judd agreed to all of those conditions as well.
- [17] In late 2018, Darshan and Moe moved from Terrace to Surrey. Soon after that, Darshan developed necrotizing pancreatitis. She was told that her condition was terminal and was moved to the palliative care ward. Nevertheless, she recovered after a few months and went home again in March 2019. It was while she was in the hospital that Judd arranged for her to execute the forms transferring title to the Nanton Property back to him. Darshan has deposed that she has no memory of doing so. Judd alleges in his response to Darshan's claim that Darshan agreed to transfer title back to him because she did not expect to survive much longer.
- [18] Vanessa has adduced contemporaneous emails sent between 2016 and 2019 that tend to support her version of events, at least to some extent, insofar as they show that:
- a) Judd was stating that he purchased the Nanton Property in September 2000;
 - b) Judd was stating that he transferred title to Darshan in November 2003 "for protection";
 - c) in July 2016, Judd wanted to have Darshan sign "'some sort' of bare trust, trust declaration, etc.";
 - d) in December 2017, Judd was expecting, the following month, to sell a property in Whistler and to use the funds to pay off the line of credit, following which title could be gratuitously transferred back to him more easily;
 - e) although Darshan never lived there, she was claiming the home owner grant in relation to the Nanton Property by representing that it was her principal residence;
 - f) on January 16, 2019, the date title was transferred back to Judd, Judd sent an email to Moe, Vanessa and various legal and financial advisers, to notify them that Darshan had signed the Form A transfer and adding that:
 - i. he had "lived in the house from day 1";

- ii. he had paid all of the utilities and property taxes since day 1";
 - iii. he has spent his monies on extensive renovations over the years; and
 - iv. he "bought the property back in 1999/2000, transferred it to my mom for \$1 in 2003/ due to personal security reasons;" and
- g) on January 17, 2019, the following day, the parents' financial adviser told the other recipients of Judd's email that neither Moe nor Darshan would be claiming the principal residence exemption on their 2018 tax returns given that Moe had told him that there was no capital gain on the sale of their Terrace home in 2018 because the cost of building it exceeded the sale price.
- [19] Darshan has deposed that she had not seen those emails before they were produced in the context of this litigation.
- [20] During the year after the transfer of title back to Judd, Vanessa and Judd's relationship appears to have fallen apart. Vanessa has deposed that they separated in February 2020. She commenced the Matrimonial Action on August 11, 2020. She and Judd agreed to sell the Nanton Property and to keep the proceeds of sale in trust with Judd's lawyers, to be distributed by further agreement or court order.
- [21] The Nanton Property sold for \$3,698,000. After paying out the line of credit charging the property (\$1,335,258.05) and other adjustments, the remaining net proceeds of \$2,226,287.18 were retained in trust. The parties have since agreed to consent orders allowing them to take interim distributions of \$86,492.64 from trust, leaving approximately \$2.14 million still in trust. Further provision was made for payment of the children's private school tuition fees from that account. Vanessa has more recently applied for a further distribution to pay legal fees of \$225,000, but that application was adjourned pending the outcome of this one.
- [22] Vanessa has deposed that she needs ongoing access to those funds to make ends meet. She is currently working three days a week as a dental hygienist, earning approximately \$22,000 on an annualized basis. She is renting a two-bedroom condominium, paying \$3,000 per month in rent. She shares a bed with one of the children when they are with her. She has had to borrow from her own parents. She hopes to be able to use her share of the trust funds to purchase a new home for herself in Vancouver.
- [23] Darshan has deposed that she first learned in February 2020 that Judd and Vanessa had separated. In August 2020, she learned, to her surprise, that the Nanton Property had recently been sold. When she inquired about how that could have happened without her knowledge or approval, she learned that she had executed the documents transferring title back to Judd while in the hospital the year before. Shocked to learn that this had occurred, Darshan hired a lawyer to help her set it right.

- [24] Darshan's newly retained counsel contacted counsel for Judd and Vanessa to learn about the status of the trust funds. They took the position that Darshan had no interest in them and therefore no right to know of their plans for interim distributions. In response, Darshan commenced this action on October 23, 2020. She then caused certificates of pending litigation to be filed on title to the Whistler Properties, on the basis that they were purchased using the line of credit charging the Nanton Property.
- [25] Expecting that another distribution from trust was imminent, Darshan obtained the Preservation Order that is the subject of this application on October 30, 2020, without notice to Judd or Vanessa. This application followed.

III. Discussion

A. Does Darshan have a legally viable claim to Vanessa's share of the trust funds?

- [26] Vanessa's first argument is that Darshan's claim to Vanessa's share of the trust funds is fatally flawed as a matter of law, which means that the Preservation Order lacks a sound legal footing and must be set aside as against Vanessa for that reason.
- [27] That conclusion is said to flow from the combined effect of ss. 23(2) and 29(2) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA] and ss. 81, 84 and 103(2) of the FLA.
- [28] The LTA provisions state in relevant part as follows:

Effect of indefeasible title

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- (2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:
- (i) the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree;

Effect of notice of unregistered interest

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- (2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner
- (a) a transfer of land, or
- (b) a charge on land, or a transfer or assignment or subcharge of the charge,

is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge

[29] The FLA provisions state in relevant part as follows:

Equal entitlement and responsibility

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

Family property

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;

Enforceability of interest in property

103 (1) In this section, "spouse's interest" means the interest of a spouse arising under section 81 [equal entitlement and responsibility], a property agreement or an order respecting property division.

- (2) Section 29 of the Land Title Act applies to a spouse's interest in land.
- (3) If, on acquiring property other than land, a person does not have actual notice of a spouse's interest in the property, the spouse's interest is not enforceable against that person.
- (4) Despite subsections (2) and (3), a spouse's interest is enforceable against the other spouse from the date of separation, unless a property agreement between the spouses, or an order, provides otherwise.

[30] Vanessa argues that, as a spouse claiming a spousal interest in the Nanton Property under ss. 81 and 84 of the FLA, she is deemed by operation of s. 103(2) of the FLA to be "a person taking from a registered owner" (namely, Judd) a charge on the land within the meaning of s. 29(2) of the LTA. As such, Vanessa can only be affected by Darshan's claim to a beneficial interest in the Nanton Property in the case of a fraud in which Vanessa herself has participated. Because there is no suggestion in the evidence before me that Vanessa herself participated in whatever fraud Darshan may be alleging against Judd, it is argued, Darshan can assert no valid claim to Vanessa's interest in the Nanton Property, and hence to the proceeds of its sale.

- [31] I am not persuaded that Darshan's claim to an interest in the trust funds is bound to fail on that basis. Vanessa's argument appears to be founded on a misapprehension of the effect of s. 103(2) of the FLA. That provision operates to make s. 29 of the LTA applicable to a "spouse's interest" in land. What that means is that the claim of an innocent third party based on dealings with the registered owner is not affected by that of a spouse created by ss. 81 and 84 of the FLA. The provision does not operate, as Vanessa argues, to prioritize spousal claims like Vanessa's over claims to an unregistered beneficial interest in the land asserted by third parties like Darshan.
- [32] That is apparent, first, by comparing it with the next subsection, 103(3), which treats third party claims to personal property in a similar way. Under that provision, a spousal interest created by ss. 81 and 84 in personal property is stated not to be enforceable against the interest of a third party who does not have actual notice of it. A similar policy is reflected in s. 97(3) of the FLA, which states that, "[a]n order in relation to family debt applies only as between the spouses and does not affect an agreement between a spouse and any other person." The intended effect of these provisions is to limit the enforceability of the spousal interest created by ss. 81 and 84 of the FLA vis-à-vis innocent third parties, not to prioritize it.
- [33] In any event, Darshan's interpretation of these provisions is, unlike Vanessa's, supported by ample authority.
- [34] For example, in *M.J. v. M.W.*, 2016 BCSC 856, title to contested property was held in joint tenancy by the respondent wife and her mother. The husband claimed a constructive trust in the property by virtue of contributions he made to the purchase price, mortgage payments, maintenance and improvements. In those circumstances, Grist J. accepted that legal title was held subject to a constructive trust, with the beneficial interest divided in equal thirds to reflect the husband's contributions. He explained his conclusion in that regard as follows at paras. 30-34:
- [30] Section 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250, provides that an indefeasible title is conclusive evidence that the person named on title is indefeasibly entitled to an estate in fee simple to the specified land. In this case, the 'persons' on title are [the wife] and [the mother], as joint tenants.
- [31] This is a statutory presumption which may be displaced by equitable principles. Two principles often listed are: (1) the presumption of advancement; and (2) the enforcement of an agreement between the parties in order to prevent an unjust enrichment should the face of a title be upheld.
- [32] The second of these exceptions can sustain an action for an equitable remedy where it is shown that the parties' intentions were that a person on title was never intended to hold a beneficial interest (or perhaps the particular percentage interest indicated on title): *Henderson v. Henderson*, (7 October 2011), New Westminster E32579 (B.C.S.C.); *Skender v. Skender*, 2005 BCSC 418, aff'd 2006 BCCA 162. Reliance on this equitable consideration has

resulted in the reordering of beneficial interests from those to be presumed from the title where a person came on title to assist with financing the property, but was not to have been beneficially entitled to the listed interest: *Engelage v. Engelage*, [1994] B.C.J. No. 3036 (S.C.); *Martiniak v. Riley*, [1988] B.C.J. No. 642 (S.C.).

- [33] At the same time, there is value to such a person's contribution and the position on title may be justified, or at least the presumption in favour of the person holding the listed interest may be sustained, in any individual case. The issue, when the interest is challenged, is whether the evidence is capable of rebutting the presumption in favour of the registered interest: *Virk v. Pannu*, 2006 BCSC 921, *aff'd sub nom Bajwa v. Pannu*, 2007 BCCA 260.
- [34] In addition to the authorities recognizing the equities that might displace the statutory presumption equating the beneficial interest to the listing on the title, perhaps beginning with *Pettkus v. Becker*, [1980] 2 S.C.R. 834 and *Peter v. Beblow*, [1993] 1 S.C.R. 980; and more recently refined in *Kerr v. Baranow*, 2011 SCC 10, listed owners can be held to be constructive trustees for a claimant as a remedy granted to prevent an unjust enrichment. These are cases where the claiming party has made substantial contributions to the acquisition, preservation, maintenance or improvement of the property: *Kerr* at para. 50. They are generally cases where the parties have a familial relationship, often as spouses; but the remedy can also be appropriate where their relationship is not of this nature.
- [35] Similarly, in *J.D.G. v. J.J.V.*, 2016 BCSC 2389, the respondent wife shared legal title to her mother's home with her mother as joint tenants as a result of a gratuitous transfer by the mother to her years before. The claimant husband argued that he was entitled under ss. 81 and 84 of the FLA to his half of his wife's half interest in the mother's home as family property. Fleming J. rejected that claim on the basis that the wife's legal interest was found to be held on a resulting trust for the mother and was therefore not family property divisible between the spouses under the FLA.
- [36] The decision of Fleming J. in *J.D.G.* was cited with approval by Dardi J. in *M.C.V. v. F.V.*, 2018 BCSC 96, where she wrote as follows at paras. 78-79:
- [78] I turn first to Ms. C.'s argument regarding the legal title of the Squamish Property. Mr. V. remains the registered owner of the Squamish property. Under the Land Title Act, R.S.B.C. 1996, c. 250, s. 23(2) and subject to the statutory exceptions, there is a statutory presumption that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the title. It is well-settled, however, that the statutory presumption is further subject to equitable principles and may, in certain circumstances, be displaced to recognize another party's beneficial interest in the property: *Dhaliwal v. Ollek*, 2012 BCCA 86 at para. 6; *Modonese v. Delac Estate*, 2011 BCSC 82 at para. 138, *aff'd* at 2011 BCCA 501; *Bajwa v. Pannu*, 2007 BCCA 260 at para. 23.

[79] Madam Justice Fleming in *J.D.G.* interpreted property that is "owned by" a spouse in s. 84(1)(a)(i) to mean property that is legally and beneficially owned: at para. 178. I agree that the legal interest in property that a spouse holds for others has no value as family property. Accordingly, the fact that Mr. V. is the registered owner of the Squamish Property does not render it family property. To conclude otherwise would effect a result not intended by the Legislature.

[37] In summary, I am not persuaded that Vanessa's interest in the trust funds is necessarily immune to Darshan's claim on the grounds alleged by Vanessa.

B. Should the Preservation Order be set aside due to Darshan's failure to make full and frank disclosure in obtaining it?

[38] In *MacLachlan v. Nadeau*, 2017 BCCA 326, Dickson J.A., writing for the Court, had occasion to consider the circumstances in which a failure to disclose material information to the court on an ex parte Mareva injunction application, a similar kind of order, may justify setting aside the resulting order at a subsequent hearing. After canvassing a number of authorities addressing that issue, she summarised the relevant principles to be applied in such circumstances as follows at para. 37:

[37] In my view, the following key principles emerge from the foregoing authorities:

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

[39] It has also been held that an applicant seeking relief in those circumstances has a duty to disclose not only the material facts that are within her direct knowledge, but also those "that ought to have been known had proper inquiries been made": *Pierce v. Jivraj*, 2013 BCSC 1850, at para. 37.

- [40] Nevertheless, the applicant is not required to achieve a standard of perfection. Not every detail will be equally important. In *Regal Ideas Inc. v. Haus Innovations Inc.*, 2018 BCSC 136, for example, Warren J. noted the need for the court to assess the importance of the withheld information in deciding whether the applicant's failure to disclose it justifies setting aside the ex parte order, stating as follows at paras. 30-31:
- [30] It is trite and fundamental that an applicant for an ex parte order must make full, fair and frank disclosure of all material facts and potential defences, and if the court subsequently concludes that the applicant failed to do so the court may set aside the order without regard to the merits of the application: *Evans v. Umbrella Capital LLC*, 2004 BCCA 149 at paras. 32-34; *Pierce v. Jivraj*, 2013 BCSC 1850 at paras. 36-38.
- [31] However, not every omission necessarily results in an ex parte order being set aside. The full, frank and fair disclosure requirement is not a standard of perfection and it is impractical to expect every nuance of the situation to be brought to the attention of the court: *K.P.I.N. v. K.N.N.*, 2005 BCSC 1259 at para. 14. The materiality of any alleged non-disclosure must be assessed by considering the importance of the alleged non-disclosure to the issues decided at the ex parte hearing: *Pierce* at para. 37.
- [41] Vanessa argues that when one applies those principles to this case, it becomes clear that the Preservation Order should be set aside due to Darshan's failure to disclose material information in obtaining it. What Darshan is said to have improperly failed to mention is the involvement of Moe and the family's professional advisors in the transfer of title back to Judd on January 16, 2019, as reflected in the emails attached to Vanessa's affidavit. Even if Darshan was not personally privy to that email chain herself, she should have made "proper inquiries" of those individuals. Had she done so and disclosed to the court what she learned as required, the court would have been told that Moe was aware of and involved in the transfer. Because Moe would appear to be entitled to a beneficial interest in the Nanton Property along with Darshan according to her version of events, the fact that the transfer occurred with his knowledge and apparent approval may, had it been known to the court, have led to a different result.
- [42] Darshan responds that any non-disclosure in that regard was innocent. She says that she did not see the email chain in question before receiving Vanessa's affidavit attaching it. She adds that she did not hold the views that are attributed to her in that email chain. She explains that she does not speak English well. Until recently, she relied primarily on Judd to communicate on her behalf with her professional advisors. She does not use email without assistance from others. Moe was diagnosed with Alzheimer's disease in 2015 and has dementia. According to Darshan, he does not use email either but, like Darshan, requires assistance from others, assistance which had until recently been provided usually by Judd. Moreover, when Darshan swore her affidavit in support of the original application, she was herself in hospital and therefore not in a position to make the inquiries that Vanessa says she should have made. That affidavit was prepared in a rush, she says, in light of what she believed to be exigent circumstances that necessitated an urgent application to the court.

- [43] There are a number of reasons that lead me to conclude that Darshan's failure to inquire, as Vanessa says she should have, has not been shown to be sufficiently culpable to justify setting aside the order on that ground.
- [44] First, Darshan has offered a reasonable explanation for not having done so. While Darshan's credibility is open to question in many respects, I have seen no compelling reason to reject her evidence in that regard.
- [45] Second, even if those inquiries had been made and the court duly informed of the result, it is not clear that the additional information would have changed anything. The email chain supports Vanessa's version of events primarily because of the statements that Judd is recorded to have made at the time about the parties' respective interests in the Nanton Property and the historical background to them. Darshan obviously does not agree with Judd's perspective and cannot be faulted for not having sought it out before bringing her application.
- [46] While I accept that Darshan could reasonably be expected to have inquired of Moe as to his understanding of the matter before bringing the application, I am not persuaded that such an inquiry would necessarily have yielded the kind of information that Vanessa says the court needed to have.
- [47] Although Moe appears to have been copied on the email conversation throughout, he does not appear to have initiated any of the emails himself. While one might readily infer that a person who receives emails of this kind will read them and understand them (or seek clarification if he does not), I am not prepared to draw that inference here in light of the other evidence before me as to the state of Moe's mental health. The January 17, 2019 email from Moe's financial advisor, Mr. Dusdall, contains a suggestion that Moe had recently instructed Mr. Dusdall about Moe's capital gains tax liability exposure in relation to the sale of their former home in Terrace, but this is hardly proof that Moe was actively engaged in the discussion that Vanessa relies on. Vanessa has reproduced another email that she received from Moe on June 1, 2018, attaching a signed contract pertaining to another real estate transaction. Vanessa is unable to say that it was in fact Moe who sent her that email, however. All she can say is that it was not Judd (because Judd was with her in Vancouver at the time, rather than in Terrace).
- [48] Even assuming Moe was shown to have been aware of the transfer of title back to Judd on January 16, 2019, that fact, although admittedly material to the application for the Preservation Order, would not have been likely to affect the outcome. Moe does not necessarily speak for Darshan. It follows that he could not have acquiesced on her behalf to any disposition of her interest without her consent, if that is what occurred. In any event, his awareness of the transfer would not necessarily be inconsistent with a belief that he or Darshan continued to retain beneficial ownership, regardless of the transfer, particularly if it was understood to be purely tax-driven.

[49] In summary, I am not persuaded that the Preservation Order should be set aside on this ground.

C. Has Darshan otherwise met the test for a preservation order?

[50] Finally, Vanessa argues that Darshan has not met the test for a preservation order under Rule 10-1, in light of the more complete evidentiary record that has now been placed before me.

[51] The test to be applied in determining whether a preservation order is appropriately granted under that Rule was conveniently summarised by D. Smith J.A., writing for the Court in *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 at paras. 20-24 as follows:

[20] The legal test for a preservation order is set out in R. 10-1 of the SCCR:

Property that is the subject matter of a proceeding

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

Fund that is the subject matter of a proceeding

- 2) If the right of a party to a specific fund is in dispute in a proceeding, the court may order the fund to be paid into court or otherwise secured.
- [21] The requirements of Rule 10-1 (formerly Rule 46) were summarized by Justice Grey in *Osooli-Talesh v. Emani*, 2003 BCSC 1924:
- [43] Rule 46 provides that the court may make an order for the preservation of any property that is the subject matter of a proceeding. The court has the discretion whether to make an order under Rule 46. The considerations for the court are as follows (see *Kashani v. Dhalla*, [2002] B.C.J. No. 2201, 2002 BCSC 1353, *Chiu v. Jao*, [1998] B.C.J. No. 2360 (S.C.), *Kongrecki v. Rafael*, [1993] B.C.J. No. 1631 (C.A)):
- a) Is there a claim on the evidence and not just the pleadings to a propriety interest in property?
 - b) Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?
 - c) Is there a substantial question to be decided as to the plaintiff's entitlement to the property?
 - d) Does the balance of convenience favour granting the order?

- [22] The threshold issue is whether the applicant has established a proprietary interest in the disputed property. In the case of disputed property that involves a fund, the applicant must establish that a right to a specific fund is in question. The court may order the fund be paid into court or otherwise secured. This form of preservation order is typically referred to as an impound order.
- [23] The second requirement concerns the risk of dissipation or disposal of the property. It is similar to the element of a real or genuine risk of disposal or dissipation of assets with respect to a Mareva injunction. A preservation order requires some evidence to support a "reasonable belief" that the property is at risk of dissipation or disposal; in contrast, an application for a Mareva injunction considers evidence of a "real or genuine risk" of disposal or dissipation of assets as part of the balance of convenience analysis. The standards are slightly different. However, the practical effect in applying each of these elements of the respective tests, particularly with respect to the evidence required to demonstrate a risk of dissipation or disposal of the property in question, in many instances will be indistinguishable.
- [24] The requirement that the applicant must demonstrate a substantial question to be tried appears to be a less onerous standard than the strong prima facie or good arguable case for a Mareva injunction and more akin to the "serious question to be tried" for a conventional interlocutory injunction.
- [52] I have already addressed most of Vanessa's arguments under parts (a) and (c) of that test. Vanessa also argues that Darshan's claim is deficient because she has adduced no original documentation to support her version of events. I am satisfied that the evidence before me, particularly Darshan's own evidence and the email chain attached to Vanessa's affidavit, suffices to demonstrate that there is at least a "serious question to be tried" with respect to Darshan's beneficial interest in the trust funds.
- [53] With respect to part (b) of the test, Vanessa argues that Darshan has adduced no evidence to show that, in the absence of the Preservation Order, the trust funds are at risk of being dissipated or disposed of. I am satisfied that continued distribution of the trust funds to Vanessa and Judd, a likely prospect in the absence of the Preservation Order, would have the effect of putting the distributed funds out of Darshan's reach. The likelihood of that prospect satisfies this part of the test.
- [54] The more difficult issue arises under part (d) of the test, namely whether the balance of convenience lies in favour of continuing the Preservation Order.
- [55] In *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992) 64 B.C.L.R. (2d) 96 (C.A.), Lambert J.A., writing for the Court, listed the following factors as relevant to the analysis in assessing the balance of convenience:

in assessing the balance of convenience a judge should consider these points: - the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

[56] Vanessa argues that the balance of convenience lies in her favour for the following reasons:

- a) Darshan advances a very weak claim that is all too convenient for Judd; in particular, Vanessa suspects that Judd is using Darshan's claim as a ruse to shield what is really family property from her, just as he did in 2003 to defeat the claim of his previous spouse;
- b) Darshan relies on an alleged advance of \$650,000 in purchase money 20 years ago to tie up over \$4 million in family property, which is disproportionate;
- c) Vanessa badly needs access to the trust funds to make ends meet, whereas Darshan does not;
- d) Vanessa is not alleged to have done anything wrong and therefore should not be burdened with the Preservation Order;
- e) Darshan can be compensated adequately with an award of damages and therefore does not need the Preservation Order; and
- f) Darshan's claim is adequately secured by the existing charges on the Whistler Properties.

[57] Darshan responds as follows:

- a) Darshan advances a meritorious claim;
- b) if the Preservation Order is set aside, the harm to Darshan would be irreparable because neither Vanessa nor Judd have sufficient exigible assets to compensate her completely (particularly if her charges on the Whistler Properties secure only the \$1.3 million taken from the line of credit);
- c) the status quo before Judd improperly took title back from her and sold the Nanton Property was that he had no access to the equity; and
- d) Judd and Vanessa have had access to funds from other sources, including:
 - i. JVHAG's ongoing rental revenue stream, from which Judd has withdrawn \$68,000 and Vanessa has withdrawn \$65,000;
 - ii. corporate accounts, from which they have each withdrawn \$25,000, for a total of \$50,000;

iii. funds that have already been paid from trust in the amount of \$86,492.64 plus tuition fees in the amount of \$15,265.50 thus far; and

iv. the possibility of selling one of the Whistler Properties.

[58] Although I have found that Darshan's claim raises a fair question to be tried, I agree with Vanessa that it does not appear at this stage to be a particularly strong one. Darshan does not explain satisfactorily how it came to be that Judd originally took title to the Nanton Property in his name in 2000. There is no explanation of what advantage there was to any of the parties in that arrangement, as Darshan has described it. Moreover, Judd himself has adduced no evidence on this application. The evidence from him that is before me indirectly through his emails tends to support Vanessa's version of events. I agree with Vanessa that the circumstances are suspicious, particularly in view of the reason that Judd himself gave in his emails for the transfer of title to Darshan in 2003. If Vanessa's version of events is accepted, it suggests a willingness at least on Judd's part to manipulate the title with a view to defeating spousal claims.

[59] Nevertheless, I am satisfied that Vanessa and Judd have access to other sources of funds, particularly the \$5,700 per month of rental revenue coming into JVHAG from one of the Whistler Properties and the prospect of selling the other one, despite the charge that Darshan has placed on title to it. Darshan's counsel confirmed in oral argument before me that she does not claim all of the equity in the Whistler Properties, which means that the vacant one can be sold and sufficient funds freed up for the parties to live on in the meantime, pending final resolution of these issues.

[60] Finally, I am not persuaded that I can properly make an order under Rule 10-1 to preserve the trust funds only in relation to the interest of one of the parties claiming an interest in them, as Vanessa has asked. The Preservation Order is an in rem order that applies to the account as a whole. The extent of the parties' respective interests in those funds is not something that can be resolved on the application before me.

[61] Overall, I have concluded that the balance of convenience lies in favour of maintaining the Preservation Order in its current form.

IV. Conclusion

[62] Vanessa's application to set aside the Preservation Order is dismissed.

[63] Although Darshan has been successful on this application, it is far from clear that her claim will ultimately succeed on the merits. In light of that uncertainty, I am ordering that the costs of the application be payable in the cause.

"Milman J."

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Prepared on 29 October 2026 · Esheria