Court of Appeal for Saskatchewan
Docket: CACV3782

Citation: *616471 Saskatchewan Ltd. (Aalbers Agro) v Aalbers*, 2024 SKCA 60
Date: 2024-06-12

Between:

616471 Saskatchewan Ltd. and 616472 Saskatchewan Ltd. (carrying on business as "Aalbers Agro"), Adam Aalbers, executor of the Estate of Patrick Aalbers, and Johnny Aalbers

Appellants
(Plaintiffs/Defendants on Counterclaim)

And

Armand John Aalbers, Aalbers Acres Inc., and Angela Aalbers

Respondents
(Defendants)

And

John Aalbers and Helena Aalbers

Respondents
(Plaintiffs on Counterclaim)

Before:	Caldwell, Schwann and Barrington-Foote JJ.A.
Disposition:	Appeal allowed in part
Written reasons by:	The Court
On appeal from:	QBG 1243 of 2019 (Sask QB), Regina
Appeal heard:	December 6, 2022, and February 6, 2023
Counsel:	Timothy Stodalka for the Appellants Randy Sandbeck, K.C., and Tanner Tytlandsvik for Armand Aalbers, Aalbers Acres Inc., and Angela Aalbers Scott Hopley and Kathleen Peterson for John Aalbers and Helena Aalbers

The Court

I. INTRODUCTION

[1] This appeal involves the legal repercussions flowing from the dissolution of an intergenerational, large-scale, family farming operation in Saskatchewan. Pending trial, a Court of Queen's Bench judge was asked to address issues pertaining to ownership of land, farm machinery, equipment, harvested crops and personal property so that the parties could continue farming. Pursuant to an order made under Rule 7-1 of *The Queen's Bench Rules*, a ten-day viva voce hearing took place to address five specific issues relating to those matters, leaving the questions of financial adjustments, unjust enrichment, other equitable considerations and legal issues for the trial proper. As part of this pretrial proceeding, the judge also considered an application for an interim preservation order with respect to grain sale proceeds: *616471 Saskatchewan Ltd. (Aalbers Agro) v Aalbers* (8 February 2021) Regina, QBG 1243 of 2019 (Sask QB) [*Viva Voce Decision*].

[2] 616471 Saskatchewan Ltd. and 616472 Saskatchewan Ltd. (carrying on business as Aalbers Agro), Adam Aalbers (as the executor of the estate of Patrick Aalbers) and Johnny Aalbers [collectively, appellants] appeal from the *Viva Voce Decision*. They advance seven core grounds of appeal, each containing numerous subsidiary grounds. At root, they assert that the judge decided matters that exceeded the bounds of the five questions that were to be determined by the Rule 7-1 process and made errors of fact and law. They contend that the various determinations made by the judge were interim orders only, which can all be revisited at trial.

[3] The appeal is vigorously opposed by Armand Aalbers, Angela Aalbers and Aalbers Acres Inc. [collectively, Armand parties] and John and Helena Aalbers [parents].

[4] Given the shared last names of the individuals involved in this appeal, we will refer to the parties by their given names when dealing with them individually.

[5] For the reasons that follow, the appeal is allowed with respect to the order conferring ownership of the balance of the miscellaneous property on NW 15-7-1 W2 [NW 15] and SW 15-7-1 W2 [SW 15] on the parents and the interim preservation order. In all other respects, the appeal is dismissed.

II. BACKGROUND

A. General Backdrop

[6] This dispute involves a family farm operation in southern Saskatchewan. The parents began farming in the 1960s. They built a home and continue to reside on SE 15-7-1 W2 [SE 15]. Over time, and with much hard work and effort, their farm grew in both size and value. At their zenith in the 2000s, the parents owned 12.5 quarter sections of land and had leased another 13 quarters.

[7] The parents had two sons, Johnny and Patrick. They are also grandparents to Johnny's adult children, who include Armand, Adam and Angela.

[8] Following high school, both Johnny and Patrick joined the parents in the family farm operation. In the initial years of their involvement, the parents owned all of the land and equipment, but, over time, Johnny and Patrick bought land and equipment of their own. The sons farmed the parents' land under what the parties loosely described as a "gentlemen's agreement", whereby, as alleged by Johnny, he and Patrick used their parents' land and equipment and kept the revenue derived from the crops grown on those lands. Johnny and Patrick paid the land taxes, and their parents retained the revenue from oil and gas leases on their property. The judge recounted John's description of this unwritten arrangement in this way (*Viva Voce Decision*):

> [76] John testified that before 2006, he claimed enough in income and expenses to Revenue Canada to "net out", so that he paid very little income tax. He said that most of his income was claimed "by them", meaning Johnny and Patrick and/or their companies. He said he, Johnny and Patrick had an agreement that "they" paid the corporate tax on the income. While he retained the land, the boys paid the land taxes. John said he and Helena agreed to this arrangement so that Johnny and Patrick could build equity. This practice ended in 2006.

[9] Eventually, Patrick formed 616471 Saskatchewan Inc. [471], from which he ran his part of the farm business. Johnny did likewise by incorporating 616472 Saskatchewan Inc. [472]. Together, they carried on their side of the family farm operation under the name of Aalbers Agro.

[10] In 2006, Johnny and his first wife separated. In an attempt to protect himself from the financial ramifications of marriage dissolution, Johnny tried to shelter his assets and income flow in several ways. The judge made a finding that he had taken steps to "rid himself of assets and emptied [472's] bank account" (at para 162). Importantly, she also found that the unwritten arrangement, referred to by the parties as a gentlemen's agreement, had ended in 2006.

[11] There was evidence led at the viva voce hearing, which the judge accepted, that John had returned to active farming in 2006 to accommodate Johnny's marriage-dissolution adjustments and that the parents' gross farm income had substantially increased after that date.

[12] John also testified about an arrangement to shelter Johnny's income, whereby Johnny sold grain grown on the Aalbers's family farm through a friend, Brian Logan. Mr. Logan sold the grain in Manitoba and then paid the parents the proceeds, less a 25% deduction [Logan arrangement]. John claimed the arrangement had been conceived by Johnny. Johnny's testimony did not substantially differ from that of his parents on this issue. The judge described the arrangement in these terms:

> [93] Johnny testified that he did not know where the grain sold by Brian [Logan] came from, although he later asserted that it was grain belonging to [Aalbers] Agro. Their arrangement was as follows: he sold grain to Brian. Brian testified he deducted 16% for the Manitoba Small Business Sales Tax and sent the balance of proceeds to John and Helena. The purpose of this arrangement was to make it look like John had more of a role in the farm.
>
> …
>
> [95] Johnny agreed that grain production sold by Brian was never recorded in the Agro financial statements as a sale. He said that he intended to reduce income to Agro. He acknowledged also that the scheme with Brian permitted Agro to pay less income tax.

[13] According to Johnny, the revenue from those sales went into a special account managed by Helena but was not recorded as Aalbers Agro income. Helena disputed the existence of a special account, although she acknowledged there were changes brought about by the Logan arrangement. She assumed tax was paid on the income generated by the grain sales.

[14] Johnny and Mr. Logan prepared a one-page document that characterized the payments made to the parents as advances on a loan from Mr. Logan to them. Mr. Logan conceded that he did not actually loan money to the parents and that he had agreed with Johnny that he would "forgive" the notional loans after Johnny's marital issues were resolved. The parents testified that their signatures on the document were forged.

[15] Armand and Angela are Johnny's adult son and daughter, respectively. They, too, joined the collective family farming operation, as did Johnny's other son, Adam. In 2010, Armand incorporated his own farming company called Aalbers Acres Inc. In spite of the separate corporate structures, John, Johnny, Patrick, Armand, Adam and Angela all worked the family land under the

aegis of an intergenerational farming operation, albeit Johnny disputed how much farm work John had actually done over the years.

[16] In 2013, the parents added Patrick as joint tenant–owner on several parcels of land that they owned. The parents testified that the transfer was for estate-planning purposes. They also amended their wills to bequeath everything to Patrick, Armand and Angela. Johnny was excluded from their proposed estate distribution.

[17] Patrick died by suicide in December of 2018. In 2019, the parents transferred eight quarter sections of land to Armand, including NW 15 and SE 15 and four and one-half sections to Angela.

[18] The grain sales scheme with Mr. Logan created divisions within the family. Johnny also had issues with his son, Armand, which became a source of friction. Matters eventually came to a head in late October of 2018 when John decided that Johnny could no longer use his land and that he would "take his land back" (at para 109). John asserted that the crops grown on his land belonged to him. From that time forward, Johnny was no longer permitted use of any of the parents' land and was physically removed from NW 15, where his house was located. Thereafter, Johnny and Patrick farmed on their own.

[19] The breakdown of this intergenerational family farm arrangement led to bitter disputes and a sharp disagreement as to how the parties should divide the land, harvested crops, equipment and other assets. Unsurprisingly, that led to the litigation described below.

B. The Lower-Court Pleadings

[20] In May of 2019, the appellants commenced an action against the Armand parties (QBG 1243 of 2019). The pleadings in that action assert various contractual and equitable claims related to real and personal property connected with the farming operations of the many Aalbers family members. Among other things, the appellants allege that Armand and Angela have been unjustly enriched by the parents' transfer of land to them in 2019 because Johnny was supposed to have inherited NW 15 and because the parents held NW 8-7-1 W2 [NW 8] in trust for Johnny, returnable to him upon request, as Johnny had transferred NW 8 to his parents in 2016 "after they paid a debt owed by Johnny to [his former spouse]" (at para 43).

[21] The appellants also contend that Patrick's will names Johnny as the residual beneficiary, thus providing him with a one-half interest in the parents' property. The appellants go on to assert that Armand and Angela are not bona fide purchasers for value. They also claim damages for the wrongful use and detention of certain farm equipment and for the conversion of funds, among other things.

[22] As against Armand and Angela, the appellants seek general damages, enforcement of the alleged oral-trust contract and vesting of title to certain lands in their names. They also claim the following remedy as against Armand:

> 48. Therefore the plaintiffs claim as against Armand:
>
> …
>
> (b) An order determining that he has been unjustly enriched or enforcing the said oral agreement and thereby vesting title to the Paragraph 10 lands in the Plaintiffs' names in whole or in part;
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> (c) An order determining that the $100,000 held by Ceres Global is the sole property of the Plaintiffs;
>
> (d) An order giving the Plaintiffs and/or their representatives unhindered access to the SE 15 and the NW 15 so they can retrieve all of Aalbers Agro's Equipment and farm supplies and all of their grain bins;
>
> …
>
> (g) An order determining the ownership of the grain produced in 2017 and 2018 and held pursuant to the standstill agreement … .

Regarding Angela, the appellants repeat similar complaints, giving rise, they say, to the right to the following relief:

> 49. Therefore the plaintiffs claim as against Angela:
>
> (a) An order determining that she has been unjustly enriched or enforcing the said oral agreement and thereby vesting title to the Paragraph 10 lands in the Plaintiffs' names in whole or in part;
>
> (b) Further or in the alternative, an order that she holds the NW 8-1-7-W2 in trust for Johnny … .

[23] Armand and Aalbers Acres Inc. not only filed a statement of defence but also initiated a counterclaim in which they seek, among other remedies, general damages, an order providing Aalbers Acres Inc. with the monies held in trust by Ceres Global Ag Corp. [Ceres Global], and an order determining the ownership of the harvested grain and other crops produced in 2017, 2018 and 2019. Armand also sought an order granting him sole possession of NW 15.

[24] A separate statement of claim was filed by the parents on June 26, 2019, naming Johnny, 471 and 472 as defendants (QBG 1659 of 2019). In it, the parents allege that they had loaned a significant amount of money to Johnny over the years, which he refuses to repay. They also assert that Johnny has been unjustly enriched by their largesse and seek disgorgement of all profits.

C. Interlocutory Applications

[25] The parties' various causes of action immediately spawned two applications. The first, brought by the appellants, was a request for a preservation of property order pursuant to Rules 6-41 and 6-42 of *The Queen's Bench Rules*, granting them interim possession of specified farm equipment and personal property listed in a document entitled, "Aalbers Agro Asset Continuity Report", and for an order determining "that the $100,000 held by Ceres Global is the sole property" of Aalbers Agro and directing Armand to pay the same to it. That application was met by one brought by the Armand parties for the following order:

(a) declaring that they own some of the (specified) harvested grains in storage;

(b) authorizing them to transport and sell the harvested grains; and

(c) directing that the money held in trust by Ceres Global be released to either Armand or Aalbers Acres Inc. or, in the alternative, be paid into court.

[26] The judge dealt with the crossing applications in a fiat: *616471 Saskatchewan Ltd. (Aalbers Agro) v Aalbers* (31 May 2019) Regina, QBG 1243 of 2019 (Sask QB) [*May 31 Fiat*]. Contrary to the position taken by the appellants when the matter was first heard in Chambers, the judge found the parties' materials to be "rife with matters of conflict" and commented on the palpable strife among them (at 1). This led her to conclude that the concerns raised by both applications were not conducive to summary determination, which we take her to mean that they could not be determined by affidavit evidence and oral argument. In fact, as she noted in her fiat, "Both parties agree that a viva voce hearing is necessary to resolve the issues between the parties" (at 2).

[27] Not only did the parties agree that a viva voce hearing was necessary to address their respective applications, it appears from the record that they may have suggested the use of the Rule 7-1 procedure for that purpose. In any event, the judge chose that route, writing as follows (at 2):

> Rule 7-1 of *The Queen's Bench Rules* permits a summary trial on stated issues. The defendants suggest the parties attempt to determine the issues, within time limits set by the court. Thereafter, the parties will disclose documents and engage in oral questioning, as required, and a trial on the issues identified by the parties will follow.

[28] The judge also directed each of the parties to submit a list of questions for her consideration. As filed in the court record, the appellants' proposed eight questions were as follows:

> 1. What personal property, which was in existence as of October 31, 2018 and located on either the NW 15-7-1-W2 and/or the SE 15-7-1-W2, is owned by the Plaintiffs and what personal property is owned by the Defendants, Aalbers Acres Inc. or Armand John Aalbers? For the purposes of this question, "personal property" is defined to include the items listed in Aalbers Agro's MNP Asset Continuity List, the Plaintiffs' and the Defendants' Capital Cost Allowance Schedules and includes farm equipment, farm automotive equipment, supplies, replacement and equipment parts, small tools, fertilizer, pesticides and herbicides, grain bins and moveable buildings?
>
> 2. Who is entitled to the money due and owing by Ceres Global Ag Company pursuant to Canola Contract No B58255 dated June 20, 2018 which is currently being held in trust by the said Company?
>
> 3. Who is the owner of the grain described in Schedule "A" which is a March 29, 2019 list prepared by the Plaintiff, Johnny Aalbers and/or Schedule "B" which is a list prepared by the Defendant, Armand Aalbers on May 17, 2019?
>
> 4. Who is the owner of the grain bins identified in Schedules "A" and "B" which are not located on either the SE 15 or the NW 15?
>
> 5. Does Aalbers Acres Inc. owe any money to the Plaintiff for the 2017 and 2018 crop years for seed grain, fertilizer, pesticides, herbicides, fuel, equipment usage or any other farm related expenses?
>
> 6. Does the Plaintiff owe any money to Aalbers Acres Inc. for the 2017 and 2018 crop years for seed grain, fertilizer, pesticides, herbicides, equipment usage and/or any other farm related expenses?
>
> 7. Was any Aalbers Agro equipment damaged by the Aalbers Acres Inc. and/or Armand John Aalbers and if so what are the monetary damages resulting therefrom?
>
> 8. Such further and other questions or issues as ordered … .

[29] The Armand parties proposed the following four questions:

> 1. Harvested grains and crops are in storage on the NW-15-7-1 W2, SE-15-7-1 W2, SW-6-8-1 W2, SW-2-7-1 W2 and NW-10-8-1 W2. The ownership interest in the harvested grains and crops is to be decided.
>
> 2. The ownership interest of funds held in trust with Ceres Global Ag. Corp., resulting from the sale of canola, is to be decided.
>
> 3. The ownership interest claimed by the Plaintiffs in equipment to be identified, alleged to be in the possession of the Defendant, Armand Aalbers, is to be decided.
>
> 4. Whether an exclusive possession order in relation to the NW-15-7-1 W2, should be granted to Armand Aalbers.

[30] Having considered the parties' submissions, the judge issued a fiat on June 24, 2019, in which she framed the issues for the hearing (*616471 Saskatchewan Ltd. (Aalbers Agro) v Aalbers* (24 June 2019) Regina, QBG 1243 of 2019 (Sask QB) at 1 [*Rule 7-1 Fiat*]):

> The parties filed a list of issues to be determined at a viva voce hearing, pursuant to my fiat of May 31, 2019. The issues in common are:
>
> 1. The ownership interest in harvested grains and crops;
>
> 2. Ownership of funds held in trust with Ceres Ag Corp;
>
> 3. Ownership interest in equipment with the list of equipment, for which ownership is contested, to be provided by the parties 14 days prior to the hearing;
>
> 4. Ownership interest in personal property, excluding equipment covered in three above, located on NW 15-7-1-W2 and SE 15-7-1-W2;
>
> 5. Ownership interest in NW 15-7-1-W2.
>
> These issues are of immediate concern and will be decided by a viva voce hearing. The plaintiffs raise other issues, which are not of immediate concern and may be decided in the normal course of the action.
>
> The parties are to complete and serve on an opposite party an Affidavit of Documents by July 12, 2019. Oral questioning is to be completed by August 9, 2019. If any issues arise out of this fiat, the parties may arrange a conference call with me, through the Local Registrar, after July 19, 2019.

[31] In fact, not all of these were "issues in common". In their submissions, the appellants had asked the judge to determine ownership of items 1, 3 and 4 of the quoted-above *Rule 7-1 Fiat* and declare who was entitled to the Ceres Global funds. For their part, the Armand parties had proposed that the judge decide the ownership interest in items 1 to 3 and whether Armand should have possession of NW 15. None of the parties had asked the judge to decide anything about the ownership of NW 15. However, no appeal was taken from the *Rule 7-1 Fiat*.

[32] The only other order of consequence prior to the viva voce hearing is a consent order granted on September 6, 2019, consolidating the parents' action (QBG 1659 of 2019) with the main action (QBG 1243 of 2019). The terms of that order provided that the actions "will be conducted concurrently and evidence *arising at trial* will be applicable to all matters in the Consolidated Action" (emphasis added, at para 7) and that the parents were to be added "as parties to the Viva Voce Hearing ordered on June 24, 2019 … which is scheduled to start on September 23, 2019" (at para 8).

D. The *Viva Voce Decision*

[33] The judge heard ten days of evidence at the viva voce hearing, which proceeded intermittently, beginning on September 23, 2019, and concluding on August 7, 2020.

[34] The judge issued a written decision on February 8, 2021. She began by restating the five issues in dispute that had been set for determination pursuant to the *Rule 7-1 Fiat*, qualifying the scope of the matter through this important procedural observation: "The plaintiffs' main action concerns a claim of undue hardship. That litigation will determine the equities between the parties following the reorganization of the Aalbers' Family Farm. *This viva voce hearing was designed to allow the parties to continue to farm and earn income*" (emphasis added, *Viva Voce Decision* at 8). The reference to the reorganization of the farming business is to the changes that were first implemented in 2006 to shelter Johnny's assets and hide his income and to any changes that occurred thereafter.

[35] The judge went on to clarify what she thought the viva voce hearing was intended to achieve by stating, "Consequently, while I will decide on legal ownership of land, equipment and crop, *when the evidence allows me to do so*, any beneficial ownership is a matter for determination after trial on the main action" (emphasis added, at para 8).

[36] Before recounting the parties' evidence, the judge addressed the issue of Johnny's credibility by chronicling how he had been dishonest with the courts in his previous family law matters, citing the following in particular: *Aalbers v Aalbers*, 2010 SKQB 318, 360 Sask R 26, aff'd 2013 SKCA 64 [*Aalbers-QB 2010*], and *Aalbers v Aalbers*, 2014 SKQB 387, 461 Sask R 118, aff'd 2017 SKCA 43. She referred to those decisions in some detail to illustrate "the extent to which Johnny will adapt his evidence to fit his argument. This uncommon history of deception before the courts cannot be ignored. Consequently, at this viva voce hearing, I will not accept Johnny's evidence, unless corroborated by another, independent source" (*Viva Voce Decision* at para 62).

[37] At paragraph 66, the judge summarized her findings in answer to the five questions:

> [66] I have determined on the evidence before me as follows:
>
> > 1. The ownership of harvested grains and crops should be determined by the ownership of the land on which the crop was grown;

> 2. Armand is entitled to the funds held in trust with Ceres Global because the crop sold was grown on his land;
>
> 3. The ownership of equipment is determined according to the available documentary evidence;
>
> 4. The ownership of personal property, excluding equipment covered in para. 3, located on NW 15 and SE 15, is to be determined according to the ownership of the quarter sections as of the application date, May 16, 2019; and
>
> 5. The ownership of NW 15 is determined by the name on title for that quarter section as of the application date, May 16, 2019.

[38] The *Viva Voce Decision* also addressed the parents' application for an order directing the parties to pay the proceeds from the sale of the harvested crops into court as a hedge against potential liability arising from the non-payment of income tax on the 2010 to 2016 grain sales (i.e., those made under the Logan arrangement). After recounting the evidence about Johnny's arrangement with Mr. Logan, the judge wrote, "I must conclude that there will be a reckoning with the Canada Revenue Agency in relation to grain sales between 2006 and 2016. Consequently, the interim preservation order is confirmed and will remain in force until further order of the court" (at para 22).

[39] The judge concluded with the following findings or determinations that are relevant to this appeal:

(a) after 2006, the Aalbers's family farm reorganized how its crop production would be allocated, such that the parents would receive all of the production from their land, except as agreed between themselves and Armand;

(b) the method of crop allocation that existed before 2006 was not reinstated;

(c) the gentlemen's agreement between the parents, Johnny and Patrick ended in 2006 with the break-up of Johnny's marriage, and, as mentioned, "Johnny rid himself of assets and emptied 6164272's bank account. He relied on the family continuing to follow his directions" (at para 162);

(d) between 2010 and 2016, Mr. Logan sold grain and other crops for the family farm – the proceeds from those sales were paid to the parents, and, from time to time, Helena transferred proceeds to Johnny and Patrick – no one was clear about any arrangements for transferring the proceeds – "John and Helena distributed proceeds according to land ownership. I do not find any other agreement was reached" (at para 163);

(e) the parents owned the land on which the Aalbers's family farm operated until they transferred it to Armand and Angela; and

(f) Patrick had divested himself of his large assets.

III. ISSUES

[40] The appellants' notice of appeal itemizes 24 separate grounds of appeal, which can be addressed by answering the following questions:

(a) Is the *Viva Voce Decision* a final or interim decision?

(b) Did the judge err in determining that Armand was the owner of NW 15 and that Angela was the owner of NW 8?

(c) Did the judge err in determining that Armand was entitled to the funds held by Ceres Global?

(d) Did the judge err in determining ownership of the New Holland CR9090 Combine with header [CR9090 combine] and four Twister bins?

(e) Did the judge err in her determination of which party owned the harvested grains and crops, including the canary seed that was grown in 2006?

(f) Did the judge err by failing to resolve ownership of the vast bulk of the disputed personal property?

(g) Did the judge err in granting an interim preservation order?

IV. STANDARD OF REVIEW

[41] To begin, it is useful to remind the parties that the function of an appellate court is to review the decisions of lower courts and tribunals for error. Put another way, it is not the function of an appellate court to retry a case from the ground up and substitute its view for that of the judge or other decision-maker. The role, rather, is to review the reasons given for the decision in light of the record and the parties' submissions and to determine the appeal based on the applicable standard of review: *Housen v Nikolaisen*, 2002 SCC 33 at para 4, [2002] 2 SCR 235 [*Housen*]. The standard by which a particular finding or determination is assessed on appeal depends on the issue at play: *Stromberg v Olafson*, 2023 SKCA 67 at para 120, 45 BLR (6th) 171 [*Stromberg*].

[42] Where a ground of appeal alleges an error of law, the standard of review is correctness: *Housen* at para 8. An appellate court may intervene if a finding of fact is the product of a palpable and overriding error: see *Housen* at para 10; *Hryniak v Mauldin*, 2014 SCC 7 at para 81, [2014] 1 SCR 87; *Deren v SaskPower*, 2017 SKCA 104 at para 41; *Yorkton (City) v Mi-Sask Industries Ltd.*, 2021 SKCA 43 at paras 22–25, [2021] 6 WWR 18; and *Stromberg* at para 121. Palpable means "'plainly seen', 'plainly identified', or 'obvious'" (*R v Kruk*, 2024 SCC 7 at para 97, 489 DLR (4th) 385); overriding means "shown to have affected the result" (*R v Clark*, 2005 SCC 2 at para 9, [2005] 1 SCR 6): see *Housen* at para 10 and *R v Le*, 2019 SCC 34 at para 206, [2019] 2 SCR 692.

[43] Intervention is also permitted where a finding of fact is grounded in an error of law, which includes a finding of fact "(i) based on no evidence, (ii) made on the basis of irrelevant evidence, in disregard of relevant evidence, or upon a mischaracterization of relevant evidence, or (iii) based on an unfounded or irrational inference of fact" (*Lonsdale v Evans*, 2020 SKCA 30 at para 31, 37 RFL (8th) 251): similarly, see *P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149 at para 68, [2008] 5 WWR 440, leave to appeal to SCC refused, 2008 CanLII 32715.

[44] The appellants' notice of appeal lists a myriad of grounds. Many, if not most, of their arguments challenge the judge's assessment of the credibility of the witnesses and the weight she assigned to various pieces of evidence. Credibility is a question of fact, and weight is the province of the trier of fact (see *Housen* at paras 23 and 24); for that reason, an "appellate court is not free

to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts" (at para 23). These matters engage questions of fact, not law: *McCabe v Kowalyshyn*, 2022 SKCA 56 at para 24, and *Housen* at paras 23 and 25. It is well-established that "it is not the role of an appellate court to second-guess the weighing of the evidence by a trier of fact or to substitute its conclusion for that of the trial judge" (*Slater v Pedigree Poultry Ltd.*, 2022 SKCA 113 at para 235, [2022] 12 WWR 622, leave to appeal to SCC refused, 2023 CanLII 39569, 2023 CanLII 39592 and 2023 CanLII 39595), absent palpable and overriding error.

V. ANALYSIS

A. Final or Interim Decision

[45] As an overarching issue, the appellants advance the position that the judge's decision on the five-stated questions was simply an interim ruling and nothing more. They submit that the judge committed a jurisdictional error if she granted final judgment on those matters because the purpose of the viva voce hearing was to obtain an interim ruling to hold the parties over until trial. The appellants ask this Court to order a rehearing on the five issues or to set aside the *Viva Voce Decision*, directing that the issues be reargued and determined at trial "from the ground up".

[46] We do not agree that such a remedy is necessary or appropriate. It is our view that the answers the judge gave to those questions in the *Viva Voce Decision* were not intended to and did not purport to finally resolve any of the appellants' claims, whether as to ownership of the listed assets or as to the important findings of fact and mixed fact and law on which she based her answers. Our reasons for these conclusions follow.

1. Rule 7-1 and procedural dissonance

[47] To begin, it must be kept in mind that there were no written agreements among the family members as to the initial business arrangements between the parents, Johnny and Patrick: i.e., the so-called gentlemen's agreement. Nor was there a written agreement as to how that arrangement would evolve as Adam and Armand played an increasing role, how things would change in 2006 or how the parties would disentangle the intergenerational farming enterprise following the

collapse of their relationship in 2018. Further, the parties do not agree as to what was promised or agreed to verbally or by implication or as to what occurred in the course of key transactions, which would help to clarify their mutual arrangements and legal obligations.

[48] Importantly, however, the viva voce hearing was not intended to determine the nature of these arrangements or to answer the questions they raise in the context of the consolidated action. Rather, it was the culmination of the procedural journey that began when the appellants, and then the Armand parties, filed competing applications under Rules 6-41 and 6-42 – which related to various forms of *interim* relief. That relief was intended to enable all concerned to continue with their respective farming operations until trial. The nature of the parties' evolving (or devolving) arrangement – as to the operation of the family farm, on the one hand, and the claims of the various parties to land and other farm assets, on the other – were to be finally determined only after the trial of the consolidated action. This was one of the reasons that there were significant and important gaps in the evidence available to the judge; that is, quite apart from the fact that Patrick had died in late 2018 and Aalbers Agro records had been destroyed in a fire, the parties did not set out to lead all relevant evidence and thus to create a complete record bearing on these issues.

[49] In our view, the unusual challenges presented by the *Viva Voce Decision*, and this appeal from it, result in no small measure from the failure of the parties and the judge to more clearly define and deal with the issues to be addressed in that proceeding in a manner that was consistent with the limited scope and purpose of their applications. With respect, the choice to use Rule 7-1 demonstrates that fact in and of itself. That rule does not relate to interim orders. It is to be used for the purpose of answering specified questions so as to dispose of aspects of a claim, shorten the trial or save expense. It bifurcates the trial. As such, it allows the judge who hears the matter to make a final and conclusive decision for the purposes of streamlining the trial. All of this is explicitly provided for in Rule 7-1, as follows:

> **Application to resolve particular questions or issues**
>
> **7-1**(1) On application, the Court may:
>
> (a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of:
>
> (i) disposing of all or part of a claim;
>
> (ii) substantially shortening a trial; or
>
> (iii) saving expense;

> (b) in the order mentioned in clause (a) or in a subsequent order:
>
> > (i) define the question or issue or, in the case of a question of law, approve or modify the issue agreed to by the parties;
> >
> > (ii) fix time limits for the filing and service of briefs, an agreed statement of facts or any other materials required for the hearing; and
> >
> > (iii) set out any other direction to organize the hearing;
>
> (c) stay any other application or proceeding until the question or issue has been decided; or
>
> (d) direct that different questions of fact in an action be tried by different modes.
>
> …
>
> (3) If the Court is satisfied that its determination of a question or issue substantially disposes of a claim or makes the trial of an issue unnecessary, it may:
>
> > (a) strike out a claim or order a pleading to be amended;
> >
> > (b) give judgment on all or part of a claim and make any order it considers necessary;
> >
> > (c) make a determination on a question of law; and
> >
> > (d) make a finding of fact.
>
> …
>
> (5) A determination of a question or issue mentioned in subrule (1) is final and conclusive for the purposes of the action, subject to the determination being varied on appeal.

[50] Having agreed to engage in a Rule 7-1 hearing process, despite that their purpose was to obtain relief that would enable them to continue farming in the interim, the appellants and the Armand parties asked the judge to decide questions about *ownership* of various assets. At that point, the judge should have resolved whether the proposed questions were appropriate ones for a determination under Rule 7-1. As Popescul C.J.Q.B. put the matter in *Reed v Dobson*, 2017 SKQB 273, "In deciding … whether the question or issue is appropriate for determination under this Rule, the court must perform a preliminary assessment as to whether separating an issue or issues from the main trial is just and would perform a useful purpose" (at para 20). He also said that the question to be asked reduces to this: "is it more likely than not that having the discreet issues determined in advance of the trial would save time and expense, be more convenient and not compromise fairness?" (at para 23) – see also *Star Processing Ltd. v Canadian National Railway Company*, 2020 SKQB 9 at para 17.

[51] It does not appear that the judge undertook this analysis. Rather, she followed the parties' lead in setting the Rule 7-1 questions. Indeed, she went further by adding the question as to the ownership of NW 15, which had not been proposed by either party. The parties did not object to her order, but, as is evident from this appeal, this created issues. How, for example, could the *ownership* of crop produced in 2018 be determined without deciding how the family farm had been financed and operated in that and prior years? or How did that relate to the gentlemen's agreement and any other relevant arrangements made from time to time, including those concerning Armand's participation? These are questions, to mention a few, that will be front and center at the trial but are not yet determined. Similarly, How could the appellants' asserted interest in NW 15 be determined without answering questions of this kind? As is evident, it was not appropriate for these questions to be determined under Rule 7-1 because they required the judge to find, among other things, that the gentlemen's agreement had ended in 2006 and that there had been an agreement that the allocation of crops was to follow ownership of land.

[52] This dissonance between the interim purpose for the questions, the nature of those questions and the final nature of orders contemplated by Rule 7-1 has resulted in differing opinions between the appellants, the Armand parties and the parents as to what the judge decided, whether her answers to the five questions and the findings of fact on which she based those answers are interim or final, and, as a result, what was properly left to be at issue at the trial. As noted, the appellants assert that the judge erred by giving final and conclusive answers to the five questions that she had posed in her *Rule 7-1 Fiat*. The Armand parties, on the other hand, contend that she properly made a final ruling on four discreet matters:

(a) the ownership of the harvested grains in storage;

(b) the ownership of the CR9090 combine;

(c) the ownership of the four Twister bins; and

(d) the ownership of the funds retained in trust by Ceres Global.

That is consistent with the language found in Rule 7-1(5).

[53] The appellants and the Armand parties agree that a trial is necessary to resolve the appellants' claims with regard to NW 15. The Armand parties also concede that the judge did not resolve ownership of the various items of personal property and equipment on a line-by-line basis and say that this, too, can be dealt with later.

[54] The parents' position could be said to combine features of that taken by each of the other sets of parties. They submit that there is much room for resolution of issues at trial. As it pertains to issues of concern to them, they say the *Viva Voce Decision* is only interim. They underscore the point that the purpose of the hearing was to allow the parties to sell their crops, with equitable claims and adjustments to be sorted out later at trial. Indeed, they affirmed at the hearing of this appeal that even the issue of the ownership of the New Holland 2007 CR9070 Combine [CR9070 combine], which the judge found to be John's property because he had paid for it, would remain in play. In their view, it would be open for Johnny to prove that John had used Patrick and Johnny's money to pay for the combine, despite the fact that the judge had rejected Johnny's testimony to that effect. Similarly, they concede that the appellants' arguments about the 2019 land transfers by them to Armand and Angela remain an open issue and is not foreclosed by the *Viva Voce Decision*. Further, they agree that title to NW 8 remains in play, given the appellants' allegation that it is subject to a trust in Johnny's favour.

[55] Having laid this groundwork, we turn to the interpretation of the *Viva Voce Decision* as it relates to the issue of finality.

2. Interpretation of the *Viva Voce Decision*

[56] The judge's reasons must be "read as a whole, in the context of the evidence, the issues and the arguments at trial, together with 'an appreciation of the purposes or functions for which they are delivered'" (*R v Laboucan*, 2010 SCC 12 at para 16, [2010] 1 SCR 397, quoting *R v R.E.M.*, 2008 SCC 51 at para 16, [2008] 3 SCR 3): similarly, see *R v Villaroman*, 2016 SCC 33 at para 15, [2016] 1 SCR 1000. Thus, we have approached the interpretation of the *Viva Voce Decision* – in particular, whether and to what extent final orders were intended – with those principles in mind.

[57] To begin, the pleadings and proceedings that resulted in the viva voce hearing provide important context. As we have discussed, the *May 31 Fiat*, directing that a viva voce hearing be scheduled, resulted from the application for *interim* relief by the appellants. The judge concluded, at that time, that the criteria to grant an interim preservation order had not been met and that the payment of proceeds from the Ceres Global account was not conducive to summary determination due to the conflicts in the evidence. As noted, the parties had agreed that a viva voce hearing was necessary, and the judge understood that Rule 7-1 permitted a summary form of trial. In the result, she ordered that the appellants and the Armand parties file a list of questions. She stated that she would then make an order under Rule 7-1(1)(b).

[58] Not only did the parties agree that a viva voce hearing was necessary, it appears that *they* may have suggested the use of the Rule 7-1 procedure. It is noteworthy that neither of the lists they provided used language that suggested that the answers to the questions would have effect only pending a later and final determination at trial. Having received the parties' lists, the judge issued the *Rule 7-1 Fiat* that framed the questions, which we repeat here for ease of reference (at 1):

> The parties filed a list of issues to be determined at a viva voce hearing, pursuant to my fiat of May 31, 2019. The issues in common are:
>
> 1. The ownership interest in harvested grains and crops;
>
> 2. Ownership of funds held in trust with Ceres Ag Corp;
>
> 3. Ownership interest in equipment with the list of equipment, for which ownership is contested, to be provided by the parties 14 days prior to the hearing;
>
> 4. Ownership interest in personal property, excluding equipment covered in three above, located on NW 15-7-1-W2 and SE 15-7-1-W2;
>
> 5. Ownership interest in NW 15-7-1-W2.
>
> These issues are of immediate concern and will be decided by a viva voce hearing. The plaintiffs raise other issues, which are not of immediate concern and may be decided in the normal course of the action.

[59] There is nothing in the *May 31 Fiat* or the *Rule 7-1 Fiat* to suggest that the judge intended the resolution of these issues was only destined to be an interim ruling. Indeed, the repeated use of the word *ownership*, as opposed to, for example, *interim possession* or the *right to use or occupy*, would tend to suggest anything but finality. However, the same cannot be said for the *Viva Voce Decision*.

[60] While the judge never explicitly stated whether her determinations on the five questions were meant to be interim or final, her thinking on the matter is embedded in the part of the judgment entitled, "Issues in Dispute", which frames and explains her reasons. The following paragraphs are of critical importance:

> [8] The plaintiffs' main action concerns a claim of undue hardship. That litigation will determine the equities between the parties following the reorganization of the Aalbers' Family Farm. This viva voce hearing was designed to allow the parties to continue to farm and earn income. *Consequently, while I will decide on legal ownership of land, equipment and crop, when the evidence allows me to do so, any beneficial ownership is a matter for determination after trial on the main action*.
>
> [9] Further, Patrick died in late 2018. His estate is a plaintiff in the main action. At the time of his death, Patrick was a joint tenant with John and Helena of 15 quarters of land, pursuant to an Agreement of Joint Tenants [T-1, tab 59]. Helen testified, and the Agreement states, that Patrick received no beneficial interest in the land. Therefore, *any interest Patrick's estate might have in the production from that land will be dealt with in the main action, and not in this decision*.
>
> (Emphasis added)

[61] In these paragraphs, the judge defines the purpose of the *Viva Voce Decision* as enabling the parties to carry on farming, pending the trial of the consolidated action. Further, as is clear from the emphasized passages, she concluded that she could achieve separation between what could properly be decided for that limited purpose and the matters that had to be decided at trial by distinguishing between what she called *legal ownership* and *equities*. As we understand it, the reference to *equities* is to the comprehensive melange of legal and equitable claims advanced by the appellants in their statement of claim, and the facts that are relevant to those claims. It is for that reason the judge directed herself to decide only the "legal ownership of land, equipment and crop, *when the evidence allows me to do so*" (emphasis added), leaving the substance of the parties' competing claims to be decided at the trial of the consolidated action. As reflected in paragraph 9 of her reasons, this included the issue of whether Patrick's estate had a beneficial interest in the crops that had been harvested from the land that had been transferred to Armand.

[62] As we have indicated, the decision to conduct the viva voce hearing under Rule 7-1 on the questions posed was inappropriate from the outset. For the sake of clarity, and by way of example, the third stated question related to ownership of equipment. The appellants' statement of claim asserts their ownership of all equipment used on the family farm (other than one combine) and included a claim for the following relief: "An order giving the Plaintiffs and/or their representatives unhindered access to the SE 15 and the NW 15 so they can retrieve all of Aalbers Agro's Equipment and farm supplies and all of their grain bins".

[63] This aspect of the appellants' claim, which pleads contract, unjust enrichment and proprietary *estoppel*, was based on the gentlemen's agreement, including any amendments to that agreement, and the manner in which the farm was financed and operated from 1996 to 2018. The third question answered by the judge, as to the ownership of equipment, dealt with the same issue and, accordingly, could not be separated from those foundational issues. That is why the judge, in answering both this and the other questions she had set, dealt with matters such as whether the gentlemen's agreement had been abandoned in 2006, whether John had returned to active involvement in farming, and the mechanics of the operations and financial affairs of the farm after 2006. She made findings about those issues, even though they would be central issues at the trial that, as she well-recognized, was yet to come.

[64] The parties – including the appellants – were willing participants in all of this. In his closing statement at the viva voce hearing, counsel for the appellants began his submissions by expressing his understanding, which was that the judge was only called upon to determine which party would have interim exclusive possession of NW 15. He said the appellants had proceeded on that assumption because legal counsel for the Armand parties had framed their proposed question in that fashion. He urged the judge to refrain from making a final order with respect to NW 15 because, as he said, it would result in deciding "a huge part" of the claim without an appraisal of value. He submitted that, if the judge was going to make a binding determination about ownership, she should order an appraisal of the land and the buildings and fixtures on it.

[65] However, also in his closing submissions, the appellants' legal counsel did not explicitly address whether the remainder of the questions were to be treated as interim or final orders. The appellants, like the other parties, led evidence and made arguments in a manner that responded to the questions posed in the *Rule 7-1 Fiat*. They did not appeal, object to or seek clarification of the meaning of those questions. We conclude that the appellants did not fully recognize the potential implications of proceeding in this way until they received the *Viva Voce Decision*.

[66] The judge adverted to this problem before she issued her reasons, which demonstrated that she recognized that, having considered the record and submissions as a whole, she could not give final and conclusive answers to the questions about ownership of and entitlement to land and other farm assets, as that was the purpose of the trial. It is not necessary to decide whether she fully

understood this when she set the questions or in the course of the viva voce hearing; the issue put to us by the appellants on appeal is the interpretation of the *Viva Voce Decision*. In our view, our interpretation of the judgment must be informed by the judge's overarching description of her approach, as laid out in paragraphs 8 and 9 of the decision.

[67] The question at issue in this part of our decision is whether the *Viva Voce Decision* was final or interim. For the reasons we have expressed, the answer is that the judge answered the five questions in a way that was intended to be definitive only in the sense that it would allow the parties (and third parties) to rely on the answers to the extent necessary to permit the continued operation of the family farm, pending the trial. Those findings were, however, interim *in relation to the matters at issue in the consolidated action*. The judge achieved this by making findings only as to the registered ownership of the land – which we take to mean nothing more than who had legal title. She made no decisions as to beneficial ownership of land or other assets or as to the significance of how the farm was financed and operated. Those issues, among others, were deferred to trial. As such, all of the potential bases for the claims that the parties have asserted in relation to beneficial ownership, vesting orders, damages and other relief, including as to the assets listed in the five questions, remain in play.

[68] As we see it, this interpretation necessarily means that findings of fact and mixed fact and law that were made by the judge in answering the five questions as she did – as opposed to the answers she gave to those questions – are not final and conclusive for purposes of the action. This approach echoes the proposition advanced by counsel for the parents at the hearing of this appeal and resolves what might otherwise be seen as contradictory findings by the judge. We note that if those findings were found to be final, the judge would not only have gone beyond the limited purpose of the application before her but would have decided issues in a manner that would have had broad implications for the trial.

[69] The correctness of this approach can be aptly illustrated in relation to the decisions made as to the ownership of the CR9090 and CR9070 combines. The judge found the documentary evidence showed that Armand had paid for the CR9090 combine and that the parents had paid for the CR9070 combine, with the result that they were the respective legal owners. She rejected Johnny's evidence as to his financial and other contributions in relation to this equipment. (We

review her reasoning on this point more fully bellow and find no palpable and overriding error based on the record before her.) At trial, however, it will, nonetheless, be open to the appellants to lead evidence and to argue that different findings should be made as to who contributed what to the purchase and maintenance of the CR9090 and the CR9070 combines and as to how those and any other relevant facts bear on the questions of beneficial entitlement. Other findings of note, which would once again be at issue at trial, include the following:

(a) the gentlemen's agreement between the parents, Johnny and Patrick ended in 2006 with the dissolution of Johnny's marriage;

(b) after 2006, the Aalbers family farm "reorganized how its crop production would be allocated", such that the parents "would receive all the production from their land, except as agreed between themselves and Armand" (at para 160);

(c) "the method of crop allocation followed before 2006 was not reinstated" (at para 161);

(d) between 2010 and 2016, Mr. Logan "sold grain and other crops for the family farm" (at para 163) – no agreement was reached as to the distribution of the proceeds from those sales, which were transferred by Helena to Johnny and Patrick from time to time;

(e) that Johnny's testimony lacked credibility, and his evidence would only be accepted if it were "corroborated by another, independent source" (at para 62);

(f) the parents owned NW 8, and the declaration of trust, relating to the transfer from Johnny to them, was not accepted as effective; and

(g) the Ceres Global crops were grown on land leased or owned by Armand.

[70] In the result, we find that, as a general matter, the *Viva Voce Decision* was an interim decision. To reiterate, the answers that the judge gave were interim; that is, they were definitive answers but were not intended to, and did not, finally and conclusively, resolve the parties' claims to ownership of the listed assets or the important findings of fact and mixed fact and law on which the judge had based her interim answers. To this extent, the judge's approach might be said to be inconsistent with Rule 7-1(5). However, that is how she chose to proceed, and none of the parties suggested that she could not do so.

[71] The question remains as to whether the judge erred, as alleged, in making the findings that she did – not because she made a final determination, but because she committed some other error based on the applicable standard of review. We will now turn to those issues.

B. Ownership of NW 15 and NW 8

1. NW 15

[72] John purchased NW 15 in 1985. After Patrick died in 2018, the parents transferred eight quarter sections of land to Armand, one of which was NW 15. The certificate of title for this land was filed as an exhibit at the hearing. It confirmed that Armand was the registered owner. As such, the judge had no difficulty concluding that Armand was the owner of that quarter section of land.

[73] On appeal, the appellants do not challenge the judge's finding that Armand was the registered owner of NW 15 at the time of the viva voce hearing. They recognize that reality. Instead, they argued then, as they do now on appeal, that the judge exceeded the mandate she was given, which they say was limited to deciding the question of interim possession of this land, pending trial. They are adamant that she was not to resolve the broader questions of ownership and beneficial claims and interests.

[74] We cannot agree that the judge was limited to determining the question of interim possession of the land. The issue relating to NW 15 referred expressly to "ownership interest in NW 15". As we have noted, the appellants did not appeal, object to or seek clarification of the meaning of the reference to *ownership* in this or any of the other questions posed by the judge. Indeed, in his opening statement, the appellants' counsel repeatedly referred to the issue of ownership.

[75] As we have discussed, the judge determined no more than who is the registered owner on the title to the property in question. She did not purport to decide the questions raised in the appellants' pleadings concerning their legal and equitable claims to the land, including that based on the parents' alleged promise to transfer the lands to Johnny and Patrick.

[76] The appellants also assert that, since they had advanced a claim grounded in proprietary *estoppel*, by declaring Armand to be the registered owner of this property, the vesting order remedy is no longer available to them. No legal support was provided for that proposition. Moreover, given that the judge meant nothing more than that Armand was the registered owner, we do not agree with it. The appellants can pursue that remedy at trial.

[77] We note, in this context, that the judge did not discuss or purport to decide anything about indefeasibility of title, the effect of registration under *The Land Titles Act, 2000*, SS 2000, c L-5.1, or the exceptions to conclusive title set out under s. 15 of *The Land Titles Act, 2000*. She did not do so due to the very limited answers she gave to the five questions. To the extent the appellants wish to engage in a debate about those issues at trial, we do not see it as being foreclosed by her decision.

[78] In addition, the appellants claim that the judge failed to address their allegation that there had been a wrongful transfer from the parents to Armand. They contend Armand cannot rely on the principle of indefeasibility of title because of the following:

(a) their claim for proprietary *estoppel*, if successful, could result in a vesting order in their favour;

(b) title was only in the joint names of the parents and Patrick for estate-planning purposes, and Patrick did not hold a beneficial interest in the property capable of being conveyed to Armand;

(c) a 2016 agreement among the parents and Patrick provided that the interest each had in the land would not devolve to the survivor upon the death of any party;

(d) Johnny was named as a residual beneficiary in Patrick's estate, which would have included an interest in NW 15;

(e) Armand allegedly acquired the land through fraud; and

(f) John only intended to sell the cultivated portion of NW 15.

[79] We do not agree that the decision not to address these issues constitutes error. Those allegations, like all of the claims relating to what the judge called the equities, remain open for resolution at trial. To reiterate, the judge's use of the word *ownership* was not intended to and did not foreclose any of the claims raised in the appellants' action; that point was not disputed on appeal by the responding parties. In saying this, we should not be taken as holding that any of the arguments suggested to us on appeal have merit but only that this decision does not limit or affect the right to advance them or a court's ability to grant consequential relief in any way. All we have done here is answer the questions that were presented to us.

[80] Even though the judge characterized the issue about NW 15 to be about equities and "production from that land", reading the *Viva Voce Decision* as whole, we interpret her to have held that the bundle of issues in connection with Patrick's estate, the transfer of land from the parents to Armand, the impact, if any, it had on Armand's ownership of NW 15, and Johnny's unjust enrichment claim would be addressed at trial. Plainly, the judge did not resolve any of those issues. To repeat, her use of the word *ownership* was not intended to foreclose the appellants from making the various claims raised in their action: a point not disputed on appeal by the responding parties. Whether or not such claims can be made out is another matter.

[81] To conclude, we see no error with the judge's discreet determination that, as of May 16, 2019 (the application date), Armand was the registered owner of NW 15. An appeal is from the result, and that result is not wrong. Nor did the judge err in failing to address the numerous arguments the appellants had raised in relation to the conclusiveness of Armand's title and the related allegations made in their statement of claim. The finding by the judge as to who is the registered owner of NW 15 amounts to nothing more than confirmation of a fact that is not in dispute and does not limit the ability of the appellants to seek the relief identified in their statement of claim.

2. NW 8

[82] The appellants advance two arguments in relation to NW 8. First, they assert that a ruling on the ownership of this land was not one of the five issues directed for determination under the *Rule 7-1 Fiat*. Second, they reinvigorate the same sorts of arguments that were raised in relation to NW 15 and point, once again, to what they characterize as the judge's failure to dig into the complex web of legal and equitable issues that they had advanced in their claims.

[83] The appellants' argument on this point is based on Johnny's assertion that, at the viva voce hearing, while he had transferred NW 8 to his parents and Patrick in 2016 for $166,000, the transferees held that land in trust for him pursuant to the terms of a trust agreement dated July 7, 2017. To substantiate this allegation, Johnny sought to introduce a "badly photocopied copy" of a declaration of trust (at para 155), which was allegedly signed by the parties a year following the transfer. The appellants take issue with the judge's refusal to accept the photocopy as proof of their assertion.

[84] John testified that, although a document was sent to him and Helena, they refused to sign it and that their purported signatures on the photocopy had been forged. Alana Aalbers was a witness to the execution of the trust. She was not called to testify for Johnny, and, in consequence, the judge ruled the document could not be authenticated. That was the sum of the evidence before the court regarding NW 8. The judge rejected Johnny's evidence and accepted John's on this issue. This was an interim finding of fact based, largely, on her assessment of the parties' credibility. Simply put, she did not believe Johnny.

[85] We would make two points in this context. First, the fact that the judge did not accept Johnny's evidence due to, among other things, a lack of corroboration, including as to the declaration of trust, does not mean that those questions of fact have been finally decided. As we have noted, the parents' counsel conceded that point. Indeed, he commented that he expected this issue would be hotly contested at trial and that it remained open to Johnny to attempt to establish ownership. For the reasons expressed, we agree.

[86] Second, we note that, to the extent the judge considered Johnny's claim to beneficial ownership of NW 8, based on his allegations as to the true purpose of transferring title to his parents, she strayed from the path she had decided to take. As in relation to NW 15, the issue, as she had defined it, was title to NW 8, not whether the claims asserted by Johnny were valid. The question of ownership turned only on who the registered owner of that land was. In the final analysis, however, this broadening of the question was a harmless misstep – as Johnny's credibility and the weight to be accorded to any evidence led by him and other parties at trial in relation to this and similar issues are and remain matters for the judge who hears the trial.

[87] In the result, we conclude that there is no merit to this ground of appeal. The judge did not commit a palpable and overriding error in making this finding of mixed fact and law.

C. Ownership of the Ceres Global Funds

[88] This issue required the judge to address the ownership of funds held in trust by Ceres Global. These funds relate to eight loads of canola that were delivered to Ceres Global in 2018. The parties were of one mind that the canola in question came from Twister bins 8 and 9 and that it was produced in the 2018 crop year. They disagreed about the land on which the crop was grown.

[89] Armand testified that Johnny stole grain that he had stored in Twister bins 8 and 9. Armand realized this occurred when he noticed that the load slips on the tickets were no longer in his name. Tendered at the hearing was an elevator receipt from Ceres Global establishing that it had received 1,265 bushels of canola on October 22, 2018, with the producer initially identified as "Aalbers Agro c/o Armand Aalbers". Interestingly, Armand's name is crossed off and the name "John" was written in hand in its place. (It appears to be accepted that John is in reference to Johnny and not his father, John). Johnny's alleged actions caused Armand to place locks on his bins.

[90] Armand testified that the canola in question was produced on land that he either owned or leased. To support his position, he tendered a document entitled, "August 2018–November 2018 – Hand Written Notes of Harvest (Brittany Aalbers)" (entered as D-1 Tab 90). This is a handwritten log completed by Armand's wife that itemizes the crops he had in storage from the 2018 production year. The information is broken down by date, crop, parcel of land where the crop was grown, and the name or number of the bin where it was stored. That document shows a canola crop stored in Twister bins 8 and 9 and that it had originated from NW 1-8-2 W2 and NW 12-8-2 W2. This is land that Armand either owned or leased. Twister bin 10 also contained some canola, but, according to Armand, it had been emptied when the written log was completed and now contains wheat.

[91] At the hearing, Johnny testified about a contract between Aalbers Agro and Ceres Global whereby his company was to deliver 10,000 bushels of canola to it in 2018. He, too, filed the elevator receipt referred to above. When asked about the name change, Johnny testified that it had been made by a Ceres Global employee, who then signed his name at the bottom. No explanation was offered as to why it would have been changed nor did the appellants call that employee as a witness to corroborate Johnny's testimony.

[92] Given the absence of confirmatory evidence from Ceres Global, and the judge's credibility concerns regarding Johnny, she declined to give that document any weight. As this argument turned on the judge's credibility finding, based on the evidence that she did accept, it is a complete answer to the position advanced by the appellants. Apart from rehashing the same argument and evidence Johnny made at the viva voce hearing, these findings are not challenged on appeal.

[93] Johnny also argued – but called no evidence on this point – that, because Armand farmed in a black soil zone, he could not possibly have produced as much canola per acre as he had claimed. The judge concluded that Johnny's testimony was an obvious attempt to provide opinion evidence about crop production in that part of Saskatchewan, which he was not qualified to express and declined to accept his evidence.

[94] On appeal, the appellants repeat the arguments they made at the hearing, namely that Armand's evidence about the amount of canola he grew was inflated, it did not stand up to close scrutiny and that it was simply not possible for the 1,265 bushels to have been produced by him. The judge found Johnny's testimony to be riddled with hearsay, speculation and unsupported by a clear and cogent documentary trail. The appellants do not point to any error of fact or law in the judge's ruling on this issue, and they even concede that they are largely rearguing the facts on appeal. To repeat, absent an error of fact or law, there is no basis for appellate intervention in relation to this finding. None was identified.

[95] Lastly, the appellants ask this Court to confirm their entitlement to $70,000 of proceeds derived from the sale of wheat to Ceres Global in the 2018 sale. They say Ceres Global refuses to pay them because of this appeal. There are numerous reasons why we cannot give effect to this request: most notably, that the judge did not rule on this issue, and, as such, the appellants are requesting first-instance relief. That is not the function of this Court. Second, the appellants have not pointed to any hearing evidence nor did they apply to adduce fresh evidence sufficient to ground the sought-after relief.

[96] In the result, there is no merit to this ground of appeal. The judge found the necessary facts to answer the limited question of the legal ownership of these funds. We are not persuaded that she committed any palpable and overriding error in doing so. It remains open to the appellants to ask the judge who hears the trial to reach a different conclusion, including in relation to the credibility findings on which they are based, grounded on the evidence admitted at trial.

D. Ownership of the CR9090 Combine, Header and Four Twister Bins

[97] The parties disputed ownership of the CR9090 combine and four Twister bins. As stated above, it will be open to the appellants to lead additional evidence at trial, and to argue that different findings should be made as to who contributed what to the purchase and maintenance of the CR9090 combine, and how those and any other relevant facts bear on the question of who owns these items.

[98] At the viva voce hearing, the evidence relating to the CR9090 combine was as follows. In 2015, Patrick bought that combine from Ritchie Bros. Auctioneers for $205,950, using his personal funds. Armand produced an invoice from the auctioneers, dated December 4, 2015, which reflects Patrick's transaction. Armand testified that, one year later, he bought the CR9090 combine from Patrick for $175,856, having paid for it by selling grain to Ceres Global with a direction for it to transfer the sale funds to Patrick. Patrick's company's bank statement (i.e., 471) shows a deposit of $175,856 made on November 15, 2016. When asked about how the parties arrived at a lower purchase price, Armand simply stated, "One year of use". Armand's wife, Brittany, who reportedly attended the transaction, confirmed Armand's account of things.

[99] Johnny also claimed to own the CR9090 combine. He testified that he was with Patrick during the online bidding and confirmed that Patrick had paid for it with his personal funds. Johnny said that, in 2018, Aalbers Agro had reimbursed Patrick the amount of $100,000 for its half share in the CR9090 combine. Johnny attempted to buttress his testimony by pointing to an entry recorded in the Aalbers Agro general ledger on October 10, 2018, to that effect. Johnny also testified that, over the years, he and Patrick had paid for many repairs and accessories for this combine and that Armand was not allowed to use it.

[100] Under cross-examination, Johnny conceded that the CR9090 combine was not listed in the Aalbers Agro Asset Continuity Report or on its balance sheet. He attributes this omission to the fact that it had been purchased by Patrick directly. He acknowledged that it was not until 2018 that he realized this equipment was not on the Aalbers Agro balance sheet, which, in turn, prompted him to transfer $100,000 to 471 that same year. (Johnny testified that the Aalbers Agro business was conducted through the 471 bank account at that point in time.) Under cross-examination, Johnny also conceded that the $100,000 was recorded as a "debt repayment" and that he owed

Patrick a significant sum of money from funds he had borrowed from Patrick over the years to satisfy his family law obligations.

[101] The judge accepted Armand's testimonial and documentary evidence on the CR9090 combine. In contrast, she rejected Johnny's testimony, finding it vague and lacking corroboration from an independent source. Those are findings of fact that, once again, turned largely on the judge's assessment of Johnny's credibility. We see no palpable and overriding error in her assessment.

[102] Regarding the header, Armand tendered an April 9, 2018, invoice from Ritchie Bros. Auctioneers, wherein he is shown to be the purchaser of a 2011 Case IH 2162 Flex Draper Header for $41,290. Armand testified that Patrick had gifted him $20,000, which he applied toward the cost of the header. While his testimony was supported up by a copy of a cheque that had been written on the 471 bank account in that amount, the judge rejected Armand's testimony that the $20,000 was a gift, concluding that "Patrick's estate maintains a half share in the header" (*Viva Voce Decision* at para 135). No appeal is taken from that finding.

[103] The appellants also take issue with the judge's finding that Armand was the owner of four Twister bins. At the hearing, Armand had produced an invoice purportedly issued by Aalbers Agro, dated October 2, 2016, pursuant to which Aalbers Acres Inc. is shown as the purchaser of four Twister hopper bins and four Flaman fans for a total sale price of $114,079.84. Armand testified that, while Aalbers Agro had initially purchased these items, he subsequently purchased them from that corporation, funding the purchase from grain sales. He produced a purchase settlement sheet from Ceres Global, dated November 16, 2016, to back up his testimony.

[104] On appeal, the appellants craft a very elaborate argument, which is built on the theory that Armand's crop production in 2016, as disclosed by him in his AgriStability statement, suggests that he had experienced a very poor growing year. This meant, the appellants postulate, that if Armand had a crop failure so bad as to entitle him to an AgriStability payment for the 2016 growing year, it stands to reason that he would not have had the financial wherewithal to purchase these items. The appellants go on to argue that the transaction made no financial sense from Patrick's point of view because it required Patrick to engage in a questionable and disadvantageous tax scheme to benefit Armand. The appellants' position is summarized in their factum in this way:

"by accepting Armand's evidence, it is effectively accepting the legitimacy of a transaction which resulted in an improper receipt of Agri-Stability payments plus it assumes that the late Patrick Aalbers would engage in a questionable transaction which is completely contrary to the description of him being a complete straight-shooter".

[105] This is the same theory the appellants had put to the judge in their oral submissions at the time of the viva voce hearing. In it, the appellants thread together a string of allegations, including the following:

(a) Armand had a net income of $56,000 in 2016;

(b) his financial statements are fictional and do not reflect the true reality of his farming operation;

(c) the canola sold to Ceres Global in 2016 belonged to Aalbers Agro, with Armand's name improperly shown on the sale document; and

(d) the invoice disclosing Patrick's sale of the CR9090 combine to Armand was falsified.

[106] Using those allegations as the foundation for their argument, the appellants asked the judge to draw an inference, based on innuendo and speculation, that, despite the third-party invoices and other documentary evidence that Armand had produced to corroborate his testimony, he had been dishonest with the court and should not be believed. The judge did not accept that argument.

[107] As to the allegation that Armand had filed a misleading AgriStability statement, the judge was of the view that she could not draw a reliable conclusion from the tendered documents without evidence from a witness with the AgriStability program. None was called.

[108] In their effort to set aside the judge's credibility ruling, the appellants repeat that argument on appeal. However, because credibility is a finding of fact, the appellants' position bumps up against the palpable and overriding error standard of review for such matters. While the appellants have gone to great lengths to thread a needle through snippets of exhibits to make the same arguments as were advanced in the court below, they have not persuaded us that the judge's finding was the product of palpable and overriding error or that she somehow misunderstood the evidence.

[109] The appellants go so far as to argue that, if this Court revisits the totality of the evidence, it would take a different view of it and come to realize that, if indeed Armand had bought the equipment, it was purchased through ill-gotten gains. There are many reasons to reject this argument, not the least of which is that, even if Armand had misled AgriStability and had purchased the equipment with dishonest gains, the fact remains that he still owns the equipment. In other words, the allegation that Armand misled AgriStability is collateral to the issue of ownership and does not undermine the documentary evidence that supported the judge's conclusion that Armand owned it.

[110] In summary, the judge concluded that she was able to make a finding about the ownership of the CR9090 combine and the four Twister bins because she had sufficient evidence to do so. While the appellants agree there was sufficient evidence to make those findings, they contend that she should have reached a different conclusion. In doing so, they allege errors of fact and mixed fact and law, which are reviewable on the palpable and overriding standard. We are not persuaded that the judge committed any such error. As we have indicated, it will be open to the appellants to lead more or better evidence and to argue that different findings should be made at trial in relation to the CR9090 combine, and how those and any other relevant facts bear on the question of beneficial ownership of these assets.

E. Miscellaneous Machinery, Equipment, Personal Property and Grain Bins

[111] The judge was asked to determine the ownership of various items of farm machinery, assorted equipment, grain bins and personal property.

1. Machinery and equipment

[112] At the judge's request, the parties were asked to provide an asset continuity list, outlining their respective purchases since 2000.

[113] The appellants relied on the unaudited Aalbers Agro Asset Continuity Report, which was prepared by their accountants, based on unverified information that had been provided to them by Johnny. The appellants' position at the hearing was that *all* of the equipment on that list belonged to Aalbers Agro, unless proven otherwise.

[114] As noted by the judge, “John acknowledged that the list of equipment at P-1, tab 14 belongs to [Aalbers] Agro” but testified that he had purchased eight other items (at para 136): also see paragraph 138. Of those items, the judge accepted that John had purchased the Degelman 40-foot land roller, the TRX 300 ATV and that he had a half interest in the 2005 IH 4300 truck. For his part, Johnny acknowledged that Armand owned the Polaris side-by-side utility task vehicle. We do not understand the appellants to appeal those findings.

[115] Johnny claimed ownership of numerous other pieces of equipment. In the absence of evidence from either side, the judge directed that the items remain on NW 15 or SW 15 “as the property of John and Helena”, writing as follows: “Johnny claimed ownership of, but did not produce documentation for, several other pieces of equipment. These items will remain on NW 15, or SW 15, as the property of John and Helena because there is insufficient documentary evidence to assign these items to anyone else” (at para 141).

[116] The appellants assert the judge erred because she (a) conferred ownership over these items on the parents, even though they had not sought it, and (b) dismissed Johnny’s claim because he had adduced insufficient documentary evidence. We find merit to this argument.

[117] The parties were asked to provide a list of their respective properties. The appellants were handicapped in this regard because, pursuant to prior court orders, they were barred from attending the buildings located on NW 15 where the equipment was stored. Further, as the items had been accumulated over 30 years for use in a joint family farm operation, there was no way for them to know if their lists were complete.

[118] Since a determination of ownership of machinery and equipment was one of the stated purposes of the viva voce hearing, it fell to the parties to make their case on a balance of probabilities. As mentioned, the judge was not satisfied the appellants had done so. We see no error in that finding. That said, simply because the appellants failed to establish their case for ownership, it does not logically follow that ownership accrued to the parents by default or because, as the judge said, “there is insufficient documentary evidence to assign these items to anyone else”.

[119] This reasoning reflects error. Like the appellants, if the parents – or, for that matter, Armand – claimed an ownership interest in those items, they, too, had to establish their entitlement on a balance of probabilities. The appellants' failure to meet the burden of proof did not mean that ownership automatically accrued to the parents. We would therefore set aside this aspect of the *Viva Voce Decision* and remit those items for resolution at trial.

2. Grain bins

[120] The parties disputed ownership of several grain bins. The judge accepted Armand's assertion that he owned those labelled Chief 1, Grain Max 3, Twisters 13–16, Westeel 1, Westeel 2 and Meridian 4 because his testimony was substantiated by documentary evidence. Other than Johnny's argument about the four Twister bins discussed above, the appellants do not assert any legal or factual error in relation to the judge's decision with respect to these items. It will be for the appellants to decide if they wish to advance arguments in this respect at the trial.

[121] The judge also accepted, as fact, that the parents owned numerous contested bins, which she grounded in this line of reasoning: "I accept their ownership of these bins, due to their ownership of S[E] 15 and past ownership of NW 15" (at para 148). However, as the judge went on to say, "All bins, not attributed above, will remain on S[E] 15 or NW 15, as they are affixed in concrete. These bins will be dealt with as part of the main action" (at para 150).

[122] With respect, that finding is inconsistent with John's testimony. He testified that he was not the owner of the Westeel or Roscoe bins located on NW 15 and was certain that Johnny owned the hog barns and feed mill. At most, he thought Armand owned some of those bins, but said he was unsure. Thus, the judge's findings about John's bin ownership on that property is inconsistent with John's own evidence and must be set aside for this reason. Issues relating to the ownership of these assets will be determined at trial.

[123] On balance, we accept that – apart from the judge's determination that Armand is the owner of the Chief 1, the Grain Max 3, the Twisters 13–16, the Westeel 1, the Westeel 2 and the Meridian 4 bins – ownership of the remaining bins located on SE 15 and NW 15 must be dealt with as part of the consolidated action.

[124] On a final note, although the judge appears to make a finding that some of those bins were "affixed in concrete", we do not take her to have definitively ruled on the question of whether they became a fixture and, thus, part of the land or remained a chattel. The reasons simply do not reveal that she engaged with this argument. The fixture issue can be addressed at the time of trial, as well.

3. Miscellaneous personal property

[125] The appellants' lists also contain numerous small-value items (e.g., chisels, hammers, bags of cement, etc.). The judge refused to go through this list on a line-by-line basis and, in the end, made no decision respecting ownership. This matter must, therefore, be decided at trial. Having said that, we have difficulty seeing how a detailed judicial examination of this long list, accompanied by lengthy evidence and argument about these items, would be beneficial to any of the parties or to the administration of justice, generally. We would hope that the parties can come to some resolution on this matter without the need for disproportionately costly and piecemeal adjudication.

F. Ownership of Harvested Grain and Crops

[126] The parties had resolved ownership of some of the 2018 harvested crop through a September 26, 2019, consent order, but the balance of it remained in dispute. One of the purposes of the viva voce hearing was to address this question in a manner that would enable the parties to continue farming. The parties advocated different ways to sort out this complicated, evidence-based issue.

[127] The appellants took the position that grain harvested from the parents' land had been produced through the effort and at the expense of Aalbers Agro. Accordingly, they said that, pursuant to the gentlemen's agreement, they owned the crops. In support of their position, they referred to a white board that purported to record the crops that were grown, the bin in which they are stored and a handwritten list that sets out the lands from which they were harvested.

[128] Armand proposed to have the ownership issue addressed based on the alleged understanding among the parties that the harvested product accrued to the party or person who owned or leased the land on which it was grown. The appellants challenged that assertion by going through a list of inputs and tax returns in an effort to demonstrate that Armand lacked a sufficient land base to grow the crops or earn the needed income to pay for the inputs.

a. Land ownership determined crop ownership

[129] The judge rejected the appellants' input approach, stating as follows: "Overall, I am satisfied that the payment of inputs does not assist me in determining the ownership of the crop. Each party testified to paying for inputs. However, I cannot determine their share of inputs from the evidence, and how that share relates to the crop" (*Viva Voce Decision* at para 117).

[130] To assist in determining ownership, the judge relied on exhibit D-4 that showed which crops were in dispute and the bins where they are stored. Using this information as the backbone for her decision, she formulated a table with respect to the 38 disputed crops, depicting the following:

(a) the bin in which the crop was stored;

(b) the type of crop at issue;

(c) where it was grown;

(d) her conclusion on ownership; and

(e) an abbreviated reason for her determination.

[131] In concrete terms, the judge concluded that Armand owned 14 of the disputed crops and the parents owned 21. She found Johnny owned the yellow peas grown on NE 34-6-2 W2 and the canary seed grown on NE 34-6-2 W2 (albeit subject to the note, "Johnny claims"). No determination was made respecting the seed peas in the South Lode King bin.

[132] It is impossible to address this ground of appeal without commenting on the obvious. The judge was left with the monumental task of sorting out ownership of the 2018 harvested grain in the face of no coherent, let alone agreed to and integrated, record as to who owned what and where those harvested crops were stored. She was asked to make rulings in the absence of any written agreement among the parties and in the face of the following:

(a) mountains of evidence (much of which was self-serving);

(b) a high degree of animosity and conflict that prevented agreement or meaningful dialogue;

(c) allegations of grain theft; and

(d) a lack of consensus as to the framework for use in answering this thorny question.

[133] Apart from Armand's organizational chart, which comprehensively set out which crops were in dispute and which were not (exhibit D-1 Tab 89), the hearing was marked by an absence of anything resembling organization or thoughtful approach, particularly so by the appellant. The appellants aptly captured the herculean challenge they foisted on the judge with this observation: "This case exemplifies the inherent difficulty in trying to determine which farm unit receives what when you have a two or three generation family farm operation which goes sideways at the end of the crop year".

[134] On appeal, the appellants' principal argument is that the judge erred by adopting Armand's land ownership approach over their input approach. This, they say, resulted in a significant financial windfall for Armand, without any consideration given to his use of the Aalbers Agro's equipment, the repair costs absorbed by Aalbers Agro and Armand's inexplicably low fuel expenses. The appellants say that, in view of the family acrimony that existed in 2018, it was inconceivable that they would have been so cooperative and generous with him. In sum, the judge's decision to analyze crop ownership in this way, they say, amounts to a palpable and overriding error. A similar argument is advanced regarding the parents. This meant, the appellants submit, that the judge's determination of grain ownership was not grounded in principles of fairness or equity. They advocate for, what they term, "a global approach" because it purportedly embraces an element of fairness. They suggest that the "fair resolution would be to determine that John is entitled to a rental payment of $86,000, with Aalbers Agro being responsible for 80% of all expenses and Armand being responsible for 20% of the expenses. A similar ratio would apply to the profits attributable to the 2018 crop production, i.e., 80% to Aalbers Agro and 20% to Armand".

[135] The appellants urge this Court to either adopt and apply their so-called fair approach or direct the matter to trial where everything can be revisited. If neither approach is adopted by this Court, the appellants point to a litany of alleged factual errors, primarily focussing on the crops grown on the leased lands. Much of their argument in this regard hinges on an email exchange between Johnny and Patrick, which they say substantiates that, as late as October of 2018, Johnny and Patrick were unaware that Armand had taken over some or all of the leases.

[136] There are several problems with the appellants' arguments. First, they have not pointed to any error of law, error of fact or of mixed fact and law, other than the bald assertion that the judge's findings are tainted by palpable and overriding error. We cannot agree that an alleged lack of fairness based on the judge's error-free preference for the other side's evidence somehow could itself constitute an error sufficient to justify appellate intervention. This is particularly so given what was before her and the fact that the equities were left to trial.

[137] At root, the appellants' argument misconstrues what the *Viva Voce Decision* was intended to achieve. For the reasons we have discussed, it is difficult to fault them on that count. To reiterate, the purpose was to find a stopgap means to enable the parties to continue farming, including the important issue of selling harvested grain and accessing the proceeds from those sales.

[138] The issues of fairness and equity raised by the appellants (e.g., their claim for equipment repair and fuel and input costs), and the larger question of what, if any, understanding the parties had following the dissolution of the joint family farm operation in 2018, are all matters for trial. That includes the final decision as to whether the parties had agreed that entitlement to the proceeds from the sale of crops was to be based on who held title to the land on which they were produced, what was produced and where it was produced.

[139] The appellants also assert that the judge erred by attributing the entire crop production from the Akins and Lemieux leases to Armand, in spite of evidence that Aalbers Agro had made lease payments directly to those landlords in 2017 and 2018. Armand testified that he signed cash leases for eight quarter sections of Akins land and six quarters of Lemieux land. His evidence was corroborated by copies of lease agreements that corresponded with the lands he claimed to have leased and farmed, along with proof of payment. It was not in dispute that Johnny had farmed some of these lands in previous years.

[140] Other evidence, which bore on this issue, included Johnny's testimony that he did not realize until October of 2018 that Aalbers Agro no longer held lease arrangements with those landlords and his concession that Armand had been farming some of the Akins and Lemieux lands for several years prior to that date. Johnny also acknowledged that landlords can lease land to whomever they want. Finally, Johnny only produced one written lease, wherein Aalbers Agro was named as the lessee, but it was dated May of 2006.

[141] At the viva voce hearing Johnny asserted that – in a sleight of hand type of move – Armand had substituted his name for that of Aalbers Agro as lessee. He also argued that Aalbers Agro had paid half of the 2018 rent owing to Ms. Lemieux and, therefore, should be entitled to half of the crop produced on that land.

[142] The judge found Armand credible and accepted his position. No palpable and overriding error has been identified by the appellants. The judge did no more than determine, based on the evidence that was adduced at the hearing, who held the lease on the land on which the crop at issue was grown. She made no findings respecting the allegation that Armand had improperly replaced himself on the leases or that Aalbers Agro had paid Ms. Lemieux by mistake. Assuming those allegations are properly pleaded, they can be sorted out at trial.

[143] Finally, the appellants argue that the judge failed to determine ownership of 6,000 bushels of grain sitting in the Chief #4 bin, which was produced from NE 2-7-1 W2. If the ownership of that grain was not determined (as it would seem to appear), the parties can either resolve this issue by agreement, court application or at trial.

b. The canary seed

[144] One of the disputed crops was canary seed that had been grown in 2005 yet, oddly, had not been sold over the years. John claimed it was his crop because it was grown on his land. The judge took the same approach to ownership of the canary seed as she did with the 2018 harvested crop, i.e., ownership of a crop would be based on the party who owned or leased the land on which it was grown.

[145] The appellants make three arguments on appeal.

[146] The appellants first assert that ownership of the canary seed had already been decided in Johnny's 2010 family-property trial, which, they contend, is determinative of the issue currently before the Court. In *Aalbers-QB 2010*, Sandomirsky J. concluded that the canary seed was family property and, therefore, subject to division. This ruling resulted in Johnny's former wife receiving 25% of its value. The appellants say the judge erred in this matter by not respecting that earlier finding: i.e., that Johnny owned the canary seed. (We would be remiss if we failed to mention that, at trial in *Aalbers-QB 2010*, Johnny had argued that the canary seed was not his, but John's, property).

[147] There are several reasons why this submission must be rejected.

[148] The findings made in *Aalbers-QB 2010* were based on the evidence before the trial judge at that time; moreover, the parents were not parties to that action nor was John called to testify. In the matter at hand, Johnny acknowledged that he had lied in his previous court matters, including *Aalbers-QB 2010*, but submitted that he should be believed now. This argument goes to credibility, which was for the judge to decide. Absent palpable and overriding error, of which we can see none, there is no basis for intervention.

[149] Further, the details as to the total amount of canary seed and the land on which it was grown were not disclosed in the *Aalbers-QB 2010* decision. That left the judge in the present matter, as it does this Court, wondering if Johnny had adduce enough evidence to properly engage with his argument.

[150] Finally, the appellants cite no legal authority for their submission and have taken no steps to develop their argument, which is presumably premised on the doctrine of issue *estoppel*. We remind the appellants that it is not the function of this Court to do the research and critical thinking necessary to flesh out an argument that a party wishes to advance on appeal.

[151] In their second core argument, the appellants submit that, in 2005, the family farm operation was governed by the unwritten arrangement, whereby Aalbers Agro did the hands-on farming on the parents' land and took the fruits of its labours. The question as to whether that was so, and what it meant in relation to the allocation of proceeds from this particular crop, in light of the changes that occurred in 2006 and the fact that the crop remained in the bin for many years thereafter, is to be determined at trial. We note, in this context, that the judge concluded that the gentlemen's agreement had come to an end in 2006 (*Viva Voce Decision*):

> [160] I agree with John and Helena that after 2006, the Aalbers' Family Farm reorganized how its crop production would be allocated. In particular, I agree that John and Helena decided they would receive all the production from their land, except as agreed to between themselves and Armand.
>
> …
>
> [162] The stress in the family, perhaps caused by Johnny's manipulations, perhaps for other reasons, ended the "Gentlemen's Agreement" in 2006. The break-up of Johnny's marriage … in late 2006 changed the operation of the farm. Johnny rid himself of assets and emptied 616472's bank account. He relied on the family continuing to follow his directions.

[152] The appellants also take issue with the aforesaid conclusion. We understand him to contend that, as a matter of substance, the gentlemen's agreement continued after 2006, which explains why the proceeds paid to the parents from 2006 onwards were, in turn, paid to Patrick and Johnny or their companies. Once again, this issue can be revisited at trial.

[153] In their third argument, the appellants point to an inconsistency in John's evidence. On the one hand, John testified that he was only farming canary seed from NW 15 by the 2000s, but, in his evidence-in-chief, he claimed ownership of the canary seed grown on W 1-7-1 W2. This appears to be an inconsistency that was not resolved by the judge. However, we are not persuaded she committed a palpable and overriding error in relation to the canary seed. As the parents acknowledge, this issue will be fair game at the trial of the consolidated actions.

c. Conclusion on grain and crop ownership

[154] For all of the reasons set out above, we conclude that the judge did not err as alleged by the appellants in determining the legal ownership of the harvested crops and the corresponding right to sell them and receive the proceeds. The findings of fact that resulted in her conclusion on these issues, including that the gentlemen's agreement ended in 2006, that crops were to be allocated thereafter based on who had legal ownership of the land on which they were produced, as to what crops were produced where, and as to how the operation of the farm affected the allocation of crops, are for the judge that hears the trial of the consolidated action to finally decide, based on the evidence admitted and arguments presented then. Of course, the judge's conclusion is subject to the appellants' various causes of action set out in their pleadings.

G. The Preservation Order

[155] The appellants contend that the judge erred in granting an interim preservation order in relation to the proceeds from the sale of the grain. The judge did not devote much analysis to this issue, providing the following, largely conclusory, decision: "I must conclude that there will be a reckoning with the Canada Revenue Agency in relation to grain sales between 2006 and 2016. Consequently, the interim preservation order is confirmed and will remain in force until further order of the court" (at para 22).

[156] Before assessing the appellants' arguments, it needs to be emphasized that the judge did no more than *confirm* an existing order, which had been made pursuant to the parents' application in QBG 1659 of 2019 on May 7, 2020. The content of that order provides as follows (*Re Aalbers* (7 May 2020) Regina, QBG 1243 of 2019 (Sask QB) [preservation order]):

> On the application of Scott Hopley lawyer on behalf of the Plaintiffs by Counterclaim, John Aalbers and Helena Aalbers and on hearing Scott Hopley, lawyer on behalf of the Plaintiffs by Counterclaim John Aalbers and Helena Aalbers and on hearing Timothy Stodalka, lawyer on behalf of 616471 SASKATCHEWAN LTD. & 616472 SASKATCHEWAN LTD. (carrying on business as "AALBERS AGRO"), ADAM AALBERS, Executor of the Estate of PATRICK AALBERS, and JOHNNY AALBERS, and upon hearing the evidence of the witnesses testifying in the within viva voce hearing to date
>
> IT IS HEREBY ORDERED THAT:
>
> 1. With the exception of crops belonging to Armand Aalbers / Aalbers Acres Inc. which can be sold pursuant to an earlier Order of this Court issued October 2, 2019, *no crops subject of this Action grown or produced in the 2018, 2017, and earlier crop years regardless of which party asserts ownership which are stored on the NW 15-7-1-W2 or the SE 15-7-1-W2 or the SW-6-8-1-W2, are to be delivered or sold until argument of this application and further order of this Court*.
>
> 2. This Order does not restrict the ability of any party to deliver or sell grain produced in the 2019 crop year.
>
> 3. The application is adjourned to a date to be fixed. This order is without prejudice to any subsequent order made by this Honourable Court.
>
> (Emphasis added)

[157] The backdrop to this order is grounded in the parents' concern over their probable (but unknown) tax liability from the non-payment of income tax on grain sales that took place between 2010 and 2016, pursuant to the Logan arrangement. The judge framed the basis for their concern in this way: "Johnny testified that he knew the money John received from [the Logan arrangement] was not included in John's income tax return. Moreover, Johnny acknowledges that he paid no income tax on grain sales between 2010 and 2013" (*Viva Voce Decision* at para 20).

[158] The appellants advance three arguments on appeal with a view to having this Court set aside the interim preservation order. First, they contend that the judge lacked the authority to grant a preservation order under Rule 6-42 and Rule 6-44 of *The King's Bench Rules* (formerly *The Queen's Bench Rules*) in light of the regime for orders of that nature established by *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22 [*EMJA*]. Second, they assert that, if there were a legal basis to make the order, the judge erred by failing to require the parents to post an undertaking as to damages. The third alleged error is that the judge failed to address the *balance of convenience* test.

[159] As discussed below, we find this ground of appeal can be resolved under the appellants' third argument. Accordingly, the *EMJA* and undertaking issues are best left for another day, when this Court has the benefit of a fully developed argument.

[160] We start by pointing to the purpose said to underpin the interim preservation order. As framed by the judge, the parents sought an order requiring all parties to pay their respective proceeds from the sale of grain into court. As their legal counsel pointed out, the genesis of their request stems from the non-reporting of income from grain sales and the probable tax consequences (including interest and penalties) that might befall them and Johnny. This potential liability, they say, is linked to their claim against Johnny for unjust enrichment. This is how their legal counsel expressed it at the viva voce hearing:

> Inevitably, I mean, the evidence was also clear that eventually the money all made it back -- its way back to Johnny Aalbers' hands, and that would seem to me to be a complete unjust enrichment, that if Johnny not only is able to successfully launder his money, and he leaves his parents paying the tax consequences to CRA, that -- that seems to be -- it would be a prototype of an unjust enrichment.

[161] Although the preservation order was made by oral application during the course of submissions, the parents and the Armand parties approached it as a request for interim injunctive relief governed by the framework articulated in *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc.*, 2011 SKCA 120, 341 DLR (4th) 407 [*Mosaic*]. To that end, the judge heard submissions from the parents framed around the three prongs of the *Mosaic* test, namely seriousness of the issue, irreparable harm and the balance of convenience. Armand's legal counsel made similar submissions. Both argued that the situation weighed in favor of maintaining or granting the order.

[162] As he did at the viva voce hearing, legal counsel for the appellants argues that the order could only be made under the *EMJA* and that, because the parents' application was not framed as such, the appellants were not prepared or were not able to properly respond. During the course of the viva voce hearing, and after an adjournment, legal counsel renewed his position that the *EMJA* regime governed the analysis, albeit he was questioned on and provided answers to how his clients would be prejudiced by the order being made, the balance of convenience and the irreparable harm prongs of the *Mosaic* test (the following has been excerpted from 36 pages of transcripts):

> THE COURT: … I'm prepared to hear if there is a prejudice, but -- but I keep telling you, right now he doesn't have access to those grain sales, so it doesn't do me any good for you to tell me that not having access to the grain sales is a prejudice when he doesn't have it right now. So what is the actual prejudice of selling the grain from the 2017/2018 crop, putting the proceeds into court, where they are not going to disappear? They are going to be available to whoever is entitled to them down the road.
>
> …
>
> [Appellants' counsel]: -- with respect to the preservation order … [E]ffectively, my client has been unable to sell anything. … [P]aying the money in the Court. At the end of the day, that's what it is. It's a preservation order. … [H]is prejudice is, number one, like, obviously, when we made the application in May of last year … We had no idea that it was going to take this long … And in this situation, not only are John and Helena refusing to -- to provide security, they're refusing to even sign an undertaking as to damages. … If you don't provide security, it's got to prove that you got undue hardship. … And at -- at the end of the day, even if you -- you balance -- you balance the, sort of, the old style of the root of injunction, and you balance the equities in this case … I respectfully submit that that's -- that's -- there has been non-compliance with the provisions of *The Enforcement of Money Judgements Act*, and the -- the Court should not grant it, and -- and even on the balancing of the equitable interests here, it's significant prejudice to my client to go ahead and allow this type of order to be -- to be made by this Court, and those are my submissions on that particular point, My Lady.

As noted, Armand supported the parents' application, but the appellants did not. The appellants' opposition to the order was rooted in four concerns:

(a) the parents' failure to file an undertaking as to damages;

(b) the need for the application to be considered under the *EMJA* framework and that the judge was without jurisdiction to entertain the application under the rules;

(c) that they would be prejudiced because the order would tie up the proceeds from the sale of their grain and, thus, impair their ability to continue to farm; and

(d) the balance of convenience did not favour the parents because the appellants had sufficient assets to satisfy any judgment that may be made against them.

[163] Unfortunately, the judge did not engage with or analyze the *EMJA* issue. That being said, while she did not specifically identify the *Mosaic* framework, the parties' submissions and her interactions with their legal counsel would suggest that she approached the application with the *Mosaic* test in mind. For instance, the parents' concern with their potential tax liability, arising from the non-payment of taxes on the 2010 to 2016 grain sales, was found to give rise to a serious issue. Without commenting on the correctness of her analysis, she can be taken to have been alert to that part of the test.

[164] However, even if the judge properly addressed the first prong of the *Mosaic* test, she offered no analysis of whether the parents had identified a meaningful risk of irreparable harm, i.e., "whether the loss he or she might suffer before trial if an injunction is not granted can be compensated for, or adequately compensated for, in damages" (*Mosaic* at para 113(b)). Nor, in our view, did she assess the balance of convenience. This part of the test required her to "weigh the risk of the irreparable harm the plaintiff is likely to suffer before trial if the injunction is not granted, and he or she succeeds at trial, against the risk of the irreparable harm the defendant is likely to suffer if the injunction is granted and he or she prevails at trial" (at para 113(c)).

[165] In summary, even if this were an application for interim injunctive relief under the *Mosaic* framework, we are not satisfied that the judge addressed the balance of the *Mosaic* factors beyond her brief analysis of the seriousness of the issue to be tried. While we recognize that the *Mosaic* framework is not rigid and that it contemplates a degree of flexibility as to how the factors are applied in any give situation, the absence of any analysis on the irreparable harm and balance of convenience prongs of the test is an error of law that justifies appellate intervention. Accordingly, we would set aside the interim preservation order.

VI. CONCLUSION

[166] The appeal is allowed to the limited extent of the following:

(a) setting aside the order that the balance of the miscellaneous property on NW 15 and SW 15 belongs to the parents; and

(b) setting aside the interim preservation order.

[167] In all other respects, the appeal is dismissed.

[168] As a rule, costs follow the event. However, it is our view, in this case, that each of the parties should bear their own costs. That is so for two reasons.

[169] First, it is of benefit to all parties to receive clarification on the meaning and effect of the *Viva Voce Decision*, and, thus, what will be properly at issue at the trial of the consolidated actions before the trial takes place. Failing that, these issues would have had to be addressed either prior to or at trial, resulting in additional confusion and wasting the resources of the parties and the courts.

[170] Second, although the appeal stands dismissed in most respects, the result, as a matter of substance, vindicates key aspects of the appellants' argument. They argued that the judge was not entitled to make final decisions and erred if she did so. Our finding that she did not do so, and that the conclusions she reached can be challenged and revisited at trial, has largely the same effect.

"Caldwell J.A."

Caldwell J.A.

"Schwann J.A."

Schwann J.A.

"Barrington-Foote J.A."

Barrington-Foote J.A.