IN THE SUPREME COURT OF BELIZE, A.D. 2016

ACTION NO. 17 of 2016

IN THE MATTER OF An Application by Rutilia Olivia Supaul under Sections 148E and 148H of the Supreme Court of Judicature Act (Cap. 91) of the Laws of Belize.

BETWEEN

RUTILIA OLIVIA SUPAUL	**APPLICANT**
AND	
GULAB LALCHAND	**1st RESPONDENT**
BENZER INTERNATIONAL CO. LTD.	**2nd RESPONDENT**
NIMMI LALCHAND	**1st Interested Party**
MIRIANY LALCHAND	**2nd Interested Party**
DEMI LALCHAND	**3rd Interested Party**
DEMI LALCHAND (As Trustee for HITESH LALCHAND	**4th Interested Party**

Before: **The Hon. Mde. Justice Griffith**
Dates of Hearing: **By Written Submissions; Oral Ruling on 19th September, 2017.**
Appearances: **Mrs. DeShawn Arzu-Torres and Mrs. Julie Ann Ellis-Bradley for the Applicant; Mrs. Magali Marin-Young S.C. and Mr. Allister Jenkins for the 1st Respondent; and Mrs. Yogini Lochan-Cave for the 2nd Respondent and Interested Parties.**

RULING

Introduction

1. This matter concerns an originating summons filed in April, 2016 for division of property arising from a common law union between the Applicant and 1st Respondent. The Court's jurisdiction to hear the originating summons was initially challenged by the 1st Respondent who disputed that the parties had been involved in a common law union as defined by section 148D of the Supreme Court of Judicature Act, Cap. 91. By way of trial as a preliminary issue, the Court disposed of this challenge and in March, 2017 ruled in favour of the existence of a common law union between the Applicant and 1st Respondent. The application for division of property has however been subject to additional challenges which now form the subject matter of this Ruling.

2. In the case of the 1st Respondent, permission was granted to file an application to strike out certain relief claimed by the originating summons, whilst the 2nd Respondent, had filed an application to be struck out as a party to the action on the basis of there being no cause of action established against it. Yet to be ventilated, is an existing application for discovery of documents, filed by the Applicants in October, 2016. The Court has deferred hearing of that application for reason that the scope of any discovery, (if granted), ought to be predicated on the range of issues remaining after determination of all matters properly disposed of as preliminary issues.

The Applications

3. The 1st Respondent's application is to strike out portions of the Originating Summons is as follows:-

   (i) Paragraphs 2(b), 2(c), 3 and 8, insofar as they pertain to the transfer of shares by the 1st Respondent to his three adult children and one minor child (in trust). The 1st Respondent contends that the Applicant will be unable to establish pursuant to section 148H of Cap. 91, that the transfer of his in total 9000 shares in the 2nd Respondent to his four children, was done so as to defeat any existing or anticipated court order for division of property, thus this aspect of the originating summons ought to be struck out; and

   (ii) Paragraph 8 which seeks an order for maintenance – on the basis that the Applicant's prayer for maintenance fails to comply with the necessary procedural requirement to be filed by way of a separate petition within one month of the termination of the common law union, or in any event within a reasonable time thereafter.

   The 2nd Respondent's application is to be struck out as a party altogether, on the basis that the originating summons fails to establish any cause of action against it.

The Court's Consideration

The 1st Respondent's application to strike out the claim to entitlement to shares of the 2nd Respondent

Submissions

4. The first limb of the 1st Respondent's application contends that the facts illustrate that there is no basis upon which the Court would be able to set aside the transfers of the shares. It is contended that the Applicant was aware of the 2nd Respondent's incorporation and the appointment of its shareholders and directors. Additionally, that the Applicant never requested to be either shareholder or director of the 2nd Respondent and was content to work for the company and receive a salary for so doing (it is said that the July, 2011 agreement supports this contention). The 1st Respondent also contends that the Applicant was aware of his intention to eventually transfer his 9000 shares in the company to his children. In fact, in July, 2012 when the first 1000 of the company's 10,000 shares then owned by a 3rd party, were transferred to the 1st Respondent's eldest child, Nimmi Lalchand (Interested Party No. 1), it is said that this transfer was effected with the knowledge of and without objection by the Applicant. Finally, the 1st Respondent contends that when the remaining 9000 shares of the company were transferred to his children in May, 2015, the Applicant was still cohabiting with him, she was aware of and had no objection to the transfers. In these circumstances, the 1st Respondent contends that the Applicant would be unable to establish in accordance with section 148H of the Act that the transfer of shares to the interested parties was either intended to defeat (i) any existing court order or (ii) any anticipated court order, as at the time of the transfers in May, 2015 there was neither a court order nor court proceedings in existence or even imminent.

Analysis

5. In dealing with this issue, one must first appreciate the scope of an application to strike out as it arises in relation to the proceedings before the Court. As is the case with matrimonial proceedings this action has been commenced by originating summons and as such these proceedings is governed by the old Rules of the Supreme Court and not the Civil Procedure Rules, 2005.

By RSC O.28 r. 4, the Applicant's case can be struck out on the basis that (i) it discloses no reasonable cause of action or answer or (ii) it is frivolous or vexatious. According to judicial interpretations[1], the standard applied in establishing these grounds - is that if in a case, the facts as pleaded are assumed to be true regardless of however unlikely they might appear to be – the case ought to be struck out if the case nonetheless fails to establish a reasonable cause of action or is so frivolous or vexatious that it is bound to fail[2]. The Rule is also expressed to be applicable only in the most plain and obvious cases.[3] This is the question that is to be determined on these applications but there is a two dimensional aspect to its consideration. The first requires the Court to look at the facts as they have been presented thus far and in effect taking them at their highest, assess whether the case is bound to fail. The second dimension, requires the Court to be cognizant of a particular disadvantage which the Court has identified as arising by virtue of the proceedings having been begun by originating summons.

6. The second dimension is firstly examined with some references to the old UK rules from which our rules and procedure here in Belize is based in any event. Under the old RSC, an action in the high court was generally commenced by writ of summons[4] and in the UK by either writ or originating summons. In the UK, the procedure by writ of summons was required for actions based primarily upon a dispute of fact. The rules required facts in support of respective cases to be set out in comprehensively particularized pleadings and evidence at trial was eventually given viva voce (not by witness statements in the practice of civil procedure today). In addition to the heavily particularized pleadings, the trial process was aided by tools such as requests for further and better particulars, interrogatories or discovery on the pleadings. A claim poorly pleaded could result in a successful application to strike out on the grounds of being frivolous or vexatious or under the court's inherent jurisdiction, being in some other way an abuse of the Court's process.

[1] This rule is the equivalent to the old UK O. 25 r 4 thereafter succeeded by O. 18 r. 19 but the same principles apply.
[2] **Hubbuck & Sons, limited v. Wilkinson, Heywood & Clark Ltd. - [1899] 1 QB 86;**
[3] **Kemsley v. Foot et al. [1951] 2 K.B. 34**
[4] RSC O. 1 r. 1 & O 3 r. 1.

The process of bringing an action begun by writ of summons to trial under the old procedure was a lengthy and somewhat cumbersome one.

7. Under the old English RSC[5], proceedings begun by originating summons were intended to be much shorter and more economical than those begun by writ of summons. In this regard, its use was restricted to only certain subject matter or types of actions and would be determined with reference to such evidence on affidavit deemed fit by the judge. By the old English rules, the originating summons procedure was limited to matters concerning primarily issues of law. Particularly, to questions of construction arising under deeds, wills and other written instruments; the determination of entitlement of rights under statute, trusts, administration of estates or mortgages; and in relation to proceedings under certain enactments (companies, insolvency), these were required by statute to be commenced by originating summons. It was always the case however, that proceedings involving substantially a dispute on the facts, were required to be commenced via writ of summons and if commenced by originating summons, would be either struck out or ordered by the court to be continued as if begun by writ.
8. This rule of procedure was evident in numerous authorities, for example in **Lewis v Green,**[6] Warrington J. stated that the use of the originating summons was appropriate only when the question of construction submitted for determination by the court would dispose of the matter between the parties. Where it would do so only if decided in a particular way, but if decided another way, there would be further dispute - the originating summons procedure was not appropriate[7]. This case also illustrated that the only relief afforded upon the determination of a question of construction brought forth by originating summons, was a declaration of rights under the instrument and not any other relief.

[5] RSC O.54A
[6] [1905] 2. Ch 340
[7] Ibid @ pg 343; cf **Re Sir Lindsay Parkinson & Co Ltd's Trust Deed; Bishop et al v Smith et anor**, where having concluded that proceedings instituted by beneficiaries to a trust had improperly been commenced by originating summons due to the contentious subject matter therein, Buckley J remarked that as regards the defendants (the trustees) – "*it is right that they should have available to them the full machinery which exists in the case of proceedings instituted by writ and conducted on pleadings, to discover pr ecisely what the charges are that are levelled against them…*"

In general procedure therefore unless the question of construction would finally determine the issue between the parties, the use of the originating summons would result in unnecessary expense because of the continued litigation that would ensue. Still with respect to the two procedures, where it is a mixed question of fact and law so that the issue of construction would not settle the litigation between the parties, Warrington J's decision also illustrates that the use of the originating summons is still seen as improper and the correct way to proceed is to continue the proceedings as if begun by writ of summons.

9. The old UK rules[8] in fact provided the means by which to continue procedures unsuitably or improperly commenced by originating summons to the more appropriate procedure of the writ of summons. This procedure can be illustrated as explained in **Melville et al v Melville**[9] where the Jamaica Court of Appeal considered a challenge to an action begun by originating summons relating to the dismissal of an employee. The procedure for bringing an originating summons was governed by sections 531 and 531(A-D) of the Jamaica Civil Procedure Code. Section 531 corresponded to the UK RSC O54A regarding use of the originating summons being confined to questions of construction arising under deeds, wills or other written instruments. Sections 531A through 531D corresponding in like manner also to Order 54A, to the additional uses and the manner of determination by the Court. The Court of Appeal affirmed the restrictive use of the originating summons in terms of only determining questions of construction under laws or written instruments, and the ability of the Court to grant declaratory orders and no other relief. It was acknowledged that a claim requiring substantially resolution of disputes of fact, would improperly be commenced by way of originating summons and that the English position enabled such proceedings to be continued as though begun by writ.[10]

[8] Order 28 r. 8
[9] (1996) 52 WIR 335
[10] Ibid @ 338-39

10. The English rule by which proceedings commenced by originating summons were found to be more suited to be dealt with by writ of summons was therein identified as RSC Order 28 R.8 as illustrated in **Cadogan v Cadogan.**[11] In this case, proceedings for declarations of interest in matrimonial property which were begun by originating summons were ordered to continue as though begun by writ of summons by filing of a statement of claim and subsequent exchanges of pleadings. The Jamaica Court of Appeal[12] also referred to the words of Templeman LJ in **Eldemire v Eldemire[13]** for illustration of the conversion of proceedings improperly begun by originating summons in following terms:-

> *As a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts. The modern practice varies. Sometimes when disputed facts appear in an originating summons proceedings, the court will direct the deponents who have given conflicting evidence by affidavit to be examined and cross-examined orally and will then decide the disputed facts. Sometimes the court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim. Sometimes, in order to ensure that the issues are properly deployed, the court will dismiss the originating summons proceedings and leave the applicant to bring a fresh proceeding by writ. In general, the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification.*

11. This extract by Templeman LJ above, is the ideal juncture at which to contextualize the above discussion with reference to the case at bar. The point of application to the instant case is not whether the proceedings were properly begun by originating summons or not; nor that having been begun by originating summons, whether they should have been ordered to have continued by way of procedure applicable to writ of summons. These questions are irrelevant, as the originating summons is the designated and established mode by which to commence the action for division of property between the parties to a marriage or common law union. The genesis of the originating summons procedure to these section 148A applications, is presumed to have arisen in the context of the determination of rights and remedies under statute (section 148A having been introduced as amendment to Cap. 91 in 2001) and thereafter to have been retained by

[11] [1977] 1 WLR 1041
[12] ***Melville v Melville*** supra
[13] (1990) 38 WIR 234,

virtue of the inapplicability of the CPR 2005 to matrimonial proceedings. Albeit via a somewhat scenic route, the point sought to be established here, is that the originating summons procedure as originally intended (as illustrated above), ie – never meant to apply to proceedings involving substantially disputes of fact – is actually improperly suited to the section 148A applications, which almost invariably are heavily if not entirely disputed on fact.

12. The resulting reality, in the view of the Court, is that these property matters, being substantially disputes of fact, have by long practice, morphed into a hybrid creature, with features sometimes of processes applicable to proceedings begun by writ (for example discovery and viva voce evidence), whilst maintaining some aspects of an originating summons, (such as the affidavit in support and subsequent answers and replies). However, as was required for actions involving disputes of fact begun by writ, the particularized method of pleading has not been reproduced into these matrimonial property proceedings begun by originating summons, and the affidavits in support thereof, often times do not reflect the full particulars of a case as would have been pleaded by statement of claim in an action begun by writ. The hybrid creature that has developed, is mostly similar to what was described (inter alia) by Templeman LJ in ***Eldemire*** above as the modern practice – i.e. directions by the court for filing of further evidence by affidavits, applications and orders for discovery, directions for trial and thereafter a full blown trial involving cross examination of deponents, and thereupon a determination of the disputed facts on their merits.

13. Isolating this distinction in the processes is important, because whilst the procedure of striking out an originating summons was always available on the same grounds as that of a writ of summons, the striking out of the writ of summons, would have been qualitatively different from the striking out of an originating summons. Given the differences identified in the two procedures which are predicated upon the existence or not of a dispute on facts - upon an application to strike out, the Court has to bear in mind that on an originating summons, the material available for assessment relative to the stage at which the proceedings are, will be comparatively different from material which would be

available on a writ of summons. The situation is, that by the practice that has evolved in Belize, the previously narrow parameters of proceedings begun by originating summons has in the case of the section 148A applications, given way to almost a full and lengthy trial process on the merits of disputed facts. Because the action in question is still in the early stages of the originating summons procedure, an application to strike out cannot properly be granted where there are sufficient facts raised and there is still an entitlement to file further evidence which will then be concluded by a trial of disputed facts on the merits. It is against this consideration, that the 1st Respondent's application to strike out is viewed.

14. With respect to the 1st Respondent's application to strike out those several parts of the Applicant's originating summons, the question is not only whether there is a sufficient cause of action raised and supported by the accompanying affidavit, but also due regard must be paid to the stage at which the proceedings have progressed, relative to the extent of evidence before the Court. In this case, the originating summons seeks an interest to be granted to the Applicant in the shares of the 2nd Respondent company, which she claims were wrongfully transferred to his children, who are named as interested parties. In paragraphs 82 to 99 of her first affidavit and paragraphs 13 to 22 of her second affidavit, the Applicant has set out the bases of her claim to entitlement of the shares of the 2nd Respondent company. The 1st Respondent's submissions on the application to strike out, call upon the Court to presume the existence of facts (briefly set out in paragraph 3 herein), which at this stage amount to sufficiently disputed facts which the Court is required to determine. In this regard, it is properly inferred given the Applicant's summons for disclosure (which predates this application to strike out), that all of the evidence is not before the Court. The additional affidavit evidence besides the initial supporting affidavits which have been filed were so filed pursuant to the trial (now concluded), of the preliminary issue of the existence or not of a common law union between the parties.
15. In relation to the remaining relief sought by the originating summons, there has not yet been directions for trial thus all of the evidence is not before the Court.

The Applicant's summons for discovery in relation to relief claimed in respect of the transfer of shares remains to be heard and determined. Learned senior counsel sought and was granted permission to file the application to strike out, but that application to strike out, could only ever be granted on appropriate objections that arise on the face of the originating summons and not, as it has transpired, on facts disputed, in respect of which there must be a determination of the merits. It is not considered, that the state of the originating summons as supported by its affidavits, is as such that the Applicant's case is necessarily doomed to fail. The Applicant is entitled to the opportunity to adduce further evidence by way of affidavit on the issues properly raised or sustainable on the face of the originating summons. It may very well be, that at the end of the day the Applicant's case is not successful, but at this juncture, the Court cannot be called upon to dismiss what at the lowest might be a weak case, the case would have to be hopeless, even if accepting all the evidence available to be true. The Court is not in a position to make such a determination, there must be a trial on the merits. In this regard therefore, the 1st Respondent's application to strike out paras 2(b), 2(c), 3 and 8 of the originating summons is dismissed.

The application to strike out the prayer for maintenance

Submissions

16. The second limb of the 1st Respondent's application to strike out concerns the prayer for maintenance contained in the Applicant's originating summons. This application to strike out is submitted as based on the effect of section 148I of Cap. 91, insofar as it bestows not only the same rights of maintenance to common law parties as to spouses, but also extends application of that same law, with such modifications as may be necessary. Consequently, it was submitted, the same procedure applicable to applications for maintenance by parties to a marriage, applies to parties to a common law union. In terms of procedure, the applicable law is Rule 65 of the Matrimonial Causes Rules, which firstly requires an application for maintenance to be brought by way of separate petition. Additionally, as submitted, Rule 65 places a time limit on the presentation of the separate petition, as not later than one month after the grant of the decree absolute.

Learned senior counsel for the Applicant submits that with the necessary modifications, the application for maintenance herein ought to have been brought by way of the separate petition, which was not done. The case of **Alcoser v Alcoser** [14]was cited as authority for the requirement to file a separate petition for maintenance, in the absence of which the Court would lack jurisdiction to entertain same.

17. More so however, it was submitted that the petition would have been limited to presentation within one month of the termination of the union, which by prior ruling of this Court, was found to be October, 2015. Therefore the Applicant's claim for maintenance, having been filed some six months after the termination of the union as per the date declared by the Court, was out of time. Additionally, in further conformity with Rule 65, the Applicant would have had to have obtained the leave of the Court to file her separate petition for maintenance out of time and such leave was not obtained. Learned senior counsel for the 1st Respondent acknowledged that in **Samuels v Bucknor**[15], Olivetti J found that there was no specific time prescribed within which a party to a common law union was obliged to apply for maintenance, but that the application must in any event be made within a reasonable time. It was submitted that in this case, the expiration of six months from the date of termination of the union could not be considered a reasonable time. It is based upon these submissions that the application to strike out the Applicant's prayer for maintenance has been urged upon the Court.

18. On the contrary, counsel for the Applicant made some forceful arguments in response to the application to strike out the prayer for maintenance. In the first place, counsel for the Applicant pointed out that the legislature failed to specify what the necessary modifications to be made are, when applying the law of maintenance as between spouses to a marriage, to parties to a union. That being said, counsel for the Applicant cited the very **Samuels v Bucknor**[16] as authority for the manner of application of the law relating to maintenance on divorce, to common law spouses upon separation under section 148I of the Act.

[14] Belize Supreme Court Action No. 12. Of 2015
[15] Belize Supreme Court Action No. 24 of 2010
[16] *Supra*.

With respect to the question of the need for separate petition, Olivetti J observed[17] that unlike parties to a marriage, there was no need to take proceedings to end a common law union, thus in effect there was no reason, to undergo any duality of proceedings, especially where this would mean additional time and expense. Counsel for the Applicant further relying on ***Bucknor*** submitted, as found by Olivetti J, that with respect to the time within which to present the claim for maintenance, because there was no issue of a decree upon termination of a union, the time limit of one month within the decree absolute could not arise. The appropriate adaption, was found to be for presentation of the claim within a reasonable time after separation of the parties.

Analysis

19. In rationalizing support for this approach, the point was well made by Counsel for the Applicant that upon true consideration of a divorce, the parties' separation often times may occur months if not years before the formal proceedings to dissolve the marriage and ultimately, the grant of a decree absolute. Therefore, with no corresponding trigger of the decree absolute, the imposition of a one month time limit upon parties to a common law union, could not be a realistic or reasonable modification to make in applying the law as provided. In the circumstances, the approach of Olivetti J above, was entirely urged upon the court. In this regard it was submitted on behalf of the Applicant, that her application for maintenance having been made within six months of the termination of the parties' union qualifies as well within a reasonable time. As far as the Court is concerned, the responses on behalf of the Applicant, as supported to an extent by the decision of ***Samuels v Bucknor***, are almost entirely in line with the Court's approach on the issue of the strike out of the prayer for maintenance.
20. As a general starting consideration, the Court notes that the use of the term '*with such necessary modifications*' in section 148I of Cap. 91, is a tool of legislative drafting, the aim of which is not for specificity (the absence of which Counsel for the Applicant bemoans), but for flexibility, the very purpose of which is to allow whatever adaptation may be required, to give effect to the intended objects of the legislation.

[17] ***Bucknor,*** supra @ para 81

Once one identifies the intended object or purport of the legislation, one must also identify and be aware of the appropriate contexts of application. Both the decision of ***Bucknor*** and Counsel for the Applicant's arguments, effectively articulate the practical considerations that logically and appropriately arise when considering the differences in circumstances applicable to dissolution of marriage and termination of the common law union. With reference to the legal context underpinning the two, reference is made to the decision of **Ernest Arnold Siebs v Evelyn Willis Siebs**[18] in which the Court of Appeal of Guyana, considered the issue of the requirement for maintenance to be brought by way of separate petition.

21. This decision of course concerned maintenance on divorce, but the context derived from the decision allows the consideration of the application for maintenance, to be properly distinguished with reference to the termination of a common law union. The Guyana Court of Appeal affirmed as an absolute requirement the need for a separate petition to be presented not before issue of the decree nisi but within one month of the decree absolute, and outside of that period with the leave of the court for good and proper reason. The Court in that case referred to the following excerpt from ***Sidney v Sidney***[19] per Lord Cranworth, which is considered instructive in appreciating the context of the separate petition for maintenance upon dissolution (emphasis mine):-

> *"the jurisdiction in respect of applications for permanent maintenance is a `discretionary jurisdiction, which is to be governed in its exercise altogether by the consideration of a variety of circumstances forming matters of allegations and, if need be, matters of evidence, wholly and entirely apart and different from that which is to obtain in a petition for dissolution of marriage'. It can therefore very well be understood why a petition for permanent maintenance must be a `separate' petition from the petition for dissolution, even where the petitioner in both matters is one and the same person.'*

This excerpt is in the Court's view quite self-explanatory insofar as it establishes that the processes of divorce and maintenance entail different considerations of fact and law.

[18] (1969) 14 WIR 72
[19] (1867) 36 LJP & M 75)

When one considers that unlike the exercise of judicial power based upon legal grounds which result in the alteration to a party's legal status from married to divorced, the termination of a common law union need only be established upon findings of fact and has no effect on the parties' respective status.

22. The need to distinguish the facts and circumstances upon which a divorce can be pronounced in law from the facts and circumstances which would inform the exercise of the court's discretion in considering the totally separate issue of maintenance, is within the context of the long past rigidity of matrimonial causes, understandable, but the same does not arise in relation to a common law union. The issues before the court upon this originating summons concern the financial position, property acquisition and applicable legal principles in respect of division of property between the parties. The basis upon which the separate petition for maintenance in divorce proceedings has been explained is simply not applicable to the issues of property division now raised between the former parties to a common law union. In fact, the issue of maintenance raises the interconnected considerations of the parties' respective financial contributions, needs and positions. The need for a separate petition for maintenance is not found to be applicable to a claim for such by a spouse or former spouse to a common law union.
23. The issue of the time within which the application should be presented remains for consideration. Senior Counsel for the 1st Respondent urges that the six months which has elapsed from the date of termination of the parties' union is to be regarded as unreasonable. Counsel for the Applicant again refers to ***Samuels v Bucknor*** in which the application for maintenance was entertained four years after the cessation of the union therein. When dealing with what is to be considered reasonable, the Court need not look to authorities as the question of reasonableness always has to be considered within the particular circumstances of any given case. If for example a spouse seeking maintenance is the one who it can definitively be said terminated the union by moving out or on with another partner, or going overseas to intended greener pastures and was then forced for whatever ever reason to seek maintenance, for that party to seek maintenance even three months after exercising deliberate choices might not be reasonable.

As was alluded to by Counsel for the Applicant, the breakdown of a relationship within a marriage often times occurs months, sometimes years before the final dissolution proceedings and decree absolute. The one month limitation for the filing of a petition for maintenance upon issue of decree absolute is not comparable with the circumstances of the common law union where there is not that final legal stroke which definitively ends the relationship. Within the context of parties having to make life altering decisions and having to come to terms with new circumstances, the period will differ and within the circumstances of the cessation of this union, the period of six months elapsed is not found to be unreasonable. The 1st Respondent's application to strike out the Applicant's prayer for maintenance is dismissed.

Application by 2nd Respondent to be struck out as a party to the action.

24. Counsel on behalf of the 2nd Respondent asserted that the originating summons neither alleged any cause of action against the company nor in the supporting affidavit provided any factual basis which could give rise to any such cause of action. Asserting the principle of the separate legal personality of the company, counsel for the 2nd respondent pointed out that the property owned by the company was not property owned by the 1st respondent, who in any event was no longer even a shareholder or officer of the company. The only way it was submitted, that the property of the company could be attributed to the 1st Respondent, was by lifting the corporate veil to establish that he was solely beneficially entitled to and in control of the company's assets. In respect of this principle, it was contended that the Applicant had neither pleaded anything about lifting the corporate veil, nor led any evidence in support of so doing. Counsel for the 2nd Respondent cited (inter alia), **Ben Hashem v Al Shayif[20]**, as authority for the fact that the principle of the separate legal personality of the company was fully applicable to family proceedings. In particular, counsel relied on ***Ben Hashem*** insofar as it lay down a number of principles regarding what factors need to be present in order for a court to lift a corporate veil[21].

[20] (2008) EWHC 2380
[21] Ben Hashem supra paras 159 et seq

These factors include as a must, the presence of fraud or impropriety linked to the use of the company structure to avoid or conceal liability.

25. Counsel for the 2nd Respondent contends that none of the factors identified in Ben Hashem, or certainly none that speak to fraud or impropriety on the part of the company is raised on the originating summons and as such there is no basis for the 2nd Respondent to have been brought before the court as a party to the claim. Additionally, counsel for the 2nd Respondent states that it was not proper for the Applicant to attempt to claim proprietary rights in the company's property (as a third party) within a matrimonial claim. It was said that the statutory framework of section 148, being that of declaration of beneficial rights already existing and alteration of property rights in favour or against respective spouses – allowed for third party rights to be affected only by means of a set aside of a disposition of property pursuant to section 148H of Cap. 91. In this regard it was submitted, even if the transfer of company's shares by the 1st Respondent to his children could be set aside, there was still no cause of action against the company itself. The position would then be that the reverted shares to the 1st Respondent would stand to be treated as his assets within the pool of matrimonial property available for distribution and the company did not need to be joined as a party in order for the execution of any possible order in respect of its shares.
26. The Applicant's case is that she intends to show that the 2nd Respondent company is the alter ego of the 1st Respondent so that he is beneficially entitled to the company's property. In answer to the submission that there is no cause of action established against the company itself, the Applicant's case is that the originating summons clearly sets out the relief claimed against the company and that the 1st and 2nd affidavits extensively set out the allegations in support of her claim. Further, that having filed a summons for discovery prior to the application to strike out the 2nd Respondent as a party, the Applicant is entitled appropriate orders for discovery in aid of adducing more evidence in this regard. It is also alleged that there is a valid claim against the company that the properties it owns are held on a resulting or constructive trust in favour of the Applicant or the 1st Respondent.

Counsel for the Applicant relies inter alia, upon the decision of **Prest v Petrodel Resources et al**[22]as illustration for her submission that the company is properly joined as a party to the action and that the relief sought is entirely possible. The decision is also relied upon as authority for the fact that the Applicant is entitled to seek discovery against the company in aid of the facts necessary to establish this claim. This decision of **Prest** is informative in many regards. It contains a celebrated exposition by Lord Sumption on the application of the principle of piercing the corporate veil with particular reference to the court's jurisdiction in determining financial relief under the UK Matrimonial Causes Act. There is no question that a company the beneficial ownership of which is attributed to a respondent in financial provision proceedings can properly be made a party to those proceedings. There is no question that the court where it can be appropriately held, is entitled to make orders against a company by means of piercing the corporate veil.

27. As Counsel for the Applicant herself points out however, any question of whether and what relief may properly issue against a company within matrimonial proceedings such as in the instant case, is to be decided on a case by case basis. The Court has no difficulty with such an approach and has considered the instant case with reference to its own circumstances. Counsel for the 2nd Respondent points out the following circumstances as being material in the failure of the originating summons to establish a cause of action against the company:-

    (i) The 1st Respondent at the time of institution of the claim held no shares in the 2nd Respondent company;

    (ii) The originating summons includes no prayer to pierce the corporate veil;

    (iii) There is no allegation of fraud or impropriety pleaded in respect of the company or the interested parties;

    (iv) The transfer of shares by the 1st Respondent to the interested parties occurred prior to the end of the parties' relationship.

[22] [2012] EWCA Civ 1395

Counsel for the 2nd Respondent contends that the only way that any liability could be attributed to the 2nd Respondent is by the corporate veil being pierced. Against these circumstances it is contended that according to the applicable principles, there is no basis upon which such an order could be made.

28. The Court agrees that the only basis upon which liability can be attributed to the company by means of any orders attaching to the shares or property of the company is by piercing the corporate veil. In both ***Ben Hashem*** and ***Prest*** the critical point that informs the Court's consideration on piercing the corporate veil is a broad principle that eschews the retention of the benefit of an absolute legal principle (such as the separate legal personality of a company) by means of dishonesty. The examination of authorities by Lord Sumption in ***Prest*** concluded with the proposition that the essential purpose of the company must be to conceal or evade a legal liability of a defendant, or as one of the six principles in ***Ben Hashem*** states – the use of the company must be linked to relevant wrongdoing. It is not sufficient that a defendant benefits from the corporate structure, the company itself must be a vehicle for the particular fraud or wrongdoing identified.
29. There is no such implication of fraud or wrong doing in terms of the existence or activities of the company being designed or intended to evade a legal liability of the 1st Respondent. The Applicant's own evidence thus far is that the company was legitimately established for trading purposes and continues to carry out that business. If the 1st Respondent still retains a hand in the company's business or profits, the Applicant's remedies remain against the 1st Respondent. It will be for the Applicant to establish whatever available remedies as are capable of arising from the evidence in relation to the shares of the company. It is not possible on the facts of this case for the Applicant to be able to affect actual ownership of the company's property. It is possible for the Applicant to have declarations and orders made against the 1st Respondent, that take into account any interest she may have been entitled to, as it pertains to the company's property, but her claims remain against the 1st Respondent and not the company itself.

It is therefore determined that the Applicant has established no cause of action against the company itself and the 2nd Respondent is to be struck as a party to the action. The 2nd Respondent however would remain properly named as an interested party.

30. One final issue which arises subsequent to the Court's oral ruling is that the recent CCJ decision of **Ramdehol v Ramdehol**[23] was brought to the Court's attention by learned Senior Counsel for the 1st Respondent. The Court was invited to have reference to this decision with a view to reconsidering any aspect of its oral ruling given that the latter had not yet been reduced into writing or perfected by court order. The Court has reviewed this decision and appreciates that it is a binding authority on an issue which arises in the instant case insofar as there is an existing agreement between the Applicant and 1st Respondent for distribution of certain assets which form part of the subject matter of the action. The CCJ's decision affirms the position that parties may by general contractual agreement, opt out of the legislative scheme for division of matrimonial assets unless it can be shown that the agreement was in breach of general principles of contract law.[24]It is not found that this decision creates any need for the Court to revisit any aspect of this ruling. In the first place the Applicant herein has never sought to challenge the validity of the parties' agreement of July 4th, 2011, but her position as far as the Court understands it is that there are assets to be considered which fall outside of the subject matter of that agreement and that the Court's final decision on any appropriate orders to be made upon the property division may be influenced in some way by the existence of that agreement. This decision does not in any way change the Court's oral ruling which was delivered on 17th September, 2017, but the Court is grateful for the diligence and alertness of learned Senior Counsel in drawing the decision to the attention of the Court.

[23] [2017] CCJ 14 (AJ)
[24] Ibid @ paras 48 et seq.

Disposition

31. The 1st Respondent's application to strike out paragraphs 2, 3 and 9 of the Originating Summons and the 2nd Respondent's application to strike out the 2nd Respondent as a party to the action are disposed of by the following orders:-

    (i) The 1st Respondent's application to strike out is dismissed in its entirety;

    (ii) Costs are awarded in favour of the Applicant against the 1st Respondent upon the dismissal of the Application;

    (iii) The 2nd Respondent's application to strike out the 2nd Respondent as a party to the action is granted. The 2nd Respondent shall remain named as an interested party to the action;

    (iv) Costs are awarded in favour of the 2nd Respondent against the Applicant;

    (v) The parties all agree that the quantum of costs to which they are respectively entitled shall await the final disposition of the action, unless sooner agreed.

Dated this 29th day of January, 2018.

_____

Shona O. Griffith
Supreme Court Judge.