

**THE INTERFACE BETWEEN COMPANY LAW
AND FAMILY PROCEEDINGS**

**FAMILY LAW WEBINAR
Thursday 29th February 2024 from 3:00 p.m. to 5:00 p.m.**

SPEAKING NOTE FOR MR RONNIE BISSESSAR S.C.

1. I wish to thank Saira for so competently dealing with three (3) specific areas of the interface between company law and family proceedings, namely:-
 - (1) oppression and injunctive orders with respect to matrimonial companies based on one (1) party's conduct;
 - (2) the joinder of companies in matrimonial proceedings; and
 - (3) the insertion of a receiver for a matrimonial company when the company is being run down by one spouse.

2. I propose to deal with, fortunately for me, two (2) lighter issues which crystallise the interface:-
 - A. firstly, specific disclosure sought from matrimonial companies -v- the right to privacy and piercing the corporate veil; and
 - B. secondly, the valuation of matrimonial companies and expert evidence in matrimonial proceedings.

***A. SPECIFIC DISCLOSURE -V- RIGHT OF PRIVACY/PIERCING
THE CORPORATE VEIL***

Specific Disclosure

- A-1 The general principle is that in matrimonial proceedings, if a couple divorces, all assets which they own, whether jointly, on their own or with third parties, are considered relevant and, therefore, disclosable in property settlement.

- A-2 This means that specific disclosure can be applied for in relation to these assets pursuant to Part 20.8(1) of the Family Proceedings Rules (“FPR”) with or without an application at a directions hearing. One must note that specific disclosure is separate from the usual discovery requirements in matrimonial proceedings.
- A-3 Part 20.8(5), however, of the FPR requires that specific disclosure must be made of documents *which are directly relevant to one or more issues*.
- A-4 The Family Court will make the Order if it is satisfied on direct relevancy and that specific disclosure is necessary in order to fairly dispose of the matter or to save costs.
- A-5 It is necessary to discuss the *direct relevancy* test: at Part 20.8(5) the rule specifically says that *the rule in Peruvian Guano* shall not apply.
- A-6 This is a reference to the test of relevance in the Peruvian Guano Co. Case [1892] 1QB 55 which describes relevance in terms of materiality to the determination of the issues, so that a document is relevant and, therefore, disclosable, if it contains information enabling the requesting party to advance his own case or to damage his adversary’s.
- A-7 The direct relevancy threshold in Part 20.8(5) is, therefore, more demanding than the Peruvian Guano test and family lawyers must be careful, in settling their specific disclosure applications, to connect the missing documents/information directly to one or more of the issues in the Family Court.
- A-8 Often, however, the requesting party does not have the necessary information to overcome the direct relevancy test: a typical chicken or egg scenario, and the most obvious recourse is to make repeated enquires to the opposing party using the Request for Information Rules at Part 27 in an effort to ferret out information and documents which can then be relied upon in a specific disclosure application. This is fact driven and it is important that the narrative be put before the Court, so that the requesting party can overcome the *prima facie* test.

- A-9 Accordingly, a requesting party should pointedly ask whether the opposing party owns or has an interest in the matrimonial company or properties or assets in which the matrimonial company is named as owner, thereby compelling the opposing party to confirm or disclaim an interest or ownership.
- A-10 This is in the context that the opposing party is likely not to be candid, forthright or frank with his disclosures and through various legal manoeuvres, try to avoid disclosures, and *if* there is an admission of ownership or interest, to propose lower than market values for the asset.
- A-11 Assuming the evidence discloses an interest or ownership, a value must be ascribed to the asset which will assist the Family Court in property settlement.
- A-12 It is this notion of valuing the interest which, more than anything, causes divorce cases to be discussed by corporate lawyers as the asset being a limited liability company, is required to be valued. Indeed, as is often the case, the opposing party's interest may have been deliberately undervalued or made vague and obfuscatory, in order to defeat or frustrate this very same valuation exercise.
- A-13 For a family lawyer, the starting point of a valuation exercise, of course, is a careful review of the incorporation documents to determine whether the opposing party has any relationship with the company, namely, as incorporator, shareholder, employee, creditor or director and, if so, in what capacity. In HCA No. 1997/2003 between Eugene Lopez -v- TSTT and RBTT, Jamadar J (as he then was) explained that the capacity of the opposing party is critical to determining whether there is an interest and, if so, its value.
- A-14 Our Companies Act Chapter 81:01 defines an *incorporator* as the person who signs the articles of incorporation. Similarly, by section 107(1) *shareholders* are *members* and by section 349(3) a *member* means an incorporator and any other person who agrees to become a member and whose name is entered in the company's register.

- A-15 So, as is often the case, where company searches reveal that no shares have been issued, by section 349(3) an incorporator qualifies as a shareholder and in CV2020-00433 between Lennox Gift -v- Oswald Gift and Ors, the Hon. Madam Justice Judith Jones (as she then was) at para 12 underscored that if the opposing member is an incorporator, he may be deemed to be an owner or co-owner.
- A-16 In Gift supra at para 52, Jones J warned against an opposing party's *tendency to obfuscate and dissemble* and having carefully reviewed the direct and indirect contributions to the acquisition of the company assets in the matter before her, held that both the requesting and opposing parties had equal ownership.
- A-17 In order to make this finding, Jones J had to analyse the source of the start-up capital, dissect bank statements and financial statements, consider the intermingling of private and company funds and whether there existed proper accounting procedures.
- A-18 Even so, Jones J's finding of ownership was, as she said at para 59, based on reasonable inferences as she *did not engage in a computation of every cent spent* and she concluded that in the absence of the issue of shares, *what is relevant is the intention of the parties at the time of incorporation as disclosed by their actions*.

Piercing the Corporate Veil

- A-19 It may be necessary, in derivative proceedings, for the requesting party, pursuant to section 242 of the Companies Act to qualify as a *complainant* and to apply to pierce the corporate veil to determine whether the company's business and affairs have been carried out or conducted in an oppressive or unfairly prejudicial manner to the requesting party, so as to permit a court to make orders to rectify the matters complained off.
- A-20 A *derivative* action is what is often referred to as an oppression claim under section 242 of the Companies Act. Further, by section 250 the application is generally by Fixed Date Claim. In other words, the vehicle for bringing a derivative action may be different from what is customarily used in family proceedings.

- A-21 Having said that, in derivative proceedings, the Court generally adopts what Jones J at para 75 of Gift described as *a minimalist approach towards judicial intervention in the internal affairs of the company*. She said that the Court favours *the least meddlesome approach in the affairs of the company*.
- A-22 As Saira noted, Family Judges are not likely to make orders akin to derivative actions for oppression claims pursuant to section 242 of the Companies Act. This is principally because the Companies Act Chapter 81:01 is not included in those legislation at Part 2.2(2)(b) of the FPR which the Family Court may have regard to, when it deals with *Family Matters*.
- A-23 The Family Judge, however, provided that he or she is satisfied that the direct relevancy threshold has been met and that there is *prima facie* evidence of deception, fraud or dishonesty which is enabled by the business dealings of a company, has a vast armoury of weapons through the liberal use of specific disclosure remedies, witness summons and subpoenas to compel disclosures, for instance, of financial statements and bank statements, to assist it in conducting its balancing exercise in accordance with section 27(1)(a) of the MPPA which requires the Court to consider:-
- “The income earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future”.*
- A-24 The piercing of the corporate veil in matrimonial proceedings is therefore uncommon as it is usually confined to derivative actions. This is notwithstanding that we have the benefit of the judgment of the Supreme Court in Prest -v- Petrodal Resources Ltd [2013] UKSC 34, where it was held that piercing the corporate veil is permissible in family proceedings where a person under an existing legal obligation deliberately evades or frustrates its enforcement by interposing a company under his control.
- A-25 Prest was a big money case concerning the division of matrimonial assets worth approximately £35M. The Wife applied to have certain residential properties transferred to her which was robustly resisted by the Husband who refused disclosure on the basis that

they were owed by Company X. The trial judge concluded that Company X was operated and controlled by the Husband and ordered the transfer in accordance with section 24(1) of the UK's Matrimonial Causes Act 1973.

- A-26 The Court of Appeal reversed this decision holding that there were no legitimate grounds for piercing the corporate veil and the Supreme Court agreed, holding that the MCA did not provide a distinct power to disregard the corporate veil in matrimonial cases.
- A-27 The Supreme Court, however, unanimously found in favour of the Wife on the basis that the most plausible inference was that each of the properties were held on resulting trust by X for the Husband and since there was no reliable evidence to rebut that inference given the Husband's refusal to provide specific disclosure, the properties were transferred to the Wife.
- A-28 The Supreme Court also found that even though the Husband acted improperly by misapplying X's assets to his own benefit, he did not conceal or evade the law relating to any obligations owed to his Wife. It was also considered that the properties were vested in X long before the marriage broke up, so there was no evidence that the Husband was seeking to avoid any obligation which was relevant to piercing the corporate veil. The Supreme Court held that the Husband's actions were *wealth protection and the avoidance of tax*.
- A-29 Lord Sumption explained that references to a *façade* or a *sham* begged too many questions and he preferred the use of the *concealment principle* and the *evasion principle*. The *concealment principle* is legal and does not involve piercing the corporate veil. Rather, the Court looks behind the veil to discern who are the real actors.
- A-30 This must be contrasted with the *evasion principle* where the Court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate it.

- A-31 Thus an analogy may be made with tax avoidance which is lawful and tax evasion which is not. Even so, the law is not exactly settled in the UK because in Rosendale BC -v- Hurstwood Properties Ltd [2021] UKSC 16 Lord Briggs and Legatt cast doubt on the *evasion principle* and suggested a return to the purity of Saloman¹.
- A-32 This means, for family practitioners eager to pierce or raise the corporate veil to expose the real ownership of assets in matrimonial cases, they may concurrently file derivative proceedings but they must be prepared to frame their derivative case firstly in the Gift mold but to layer it as Lord Sumption described in Prest with the evasion principle but formulated as in Rosendale.
- A-33 Having said that, in the UK, the Supreme Court has restricted the circumstances in which piercing the corporate veil is appropriate to a fairly small class of family cases. Prest, therefore, represents the high watermark where the principle was applied quite broadly.
- A-34 While the UK legislation is different from ours, the restrictions have worked themselves in our most recent family caselaw, so that it may still be sensible for the requesting party to apply for relief in a derivative action and to then use the disclosures in the derivative action in the matrimonial proceedings. This will also overcome the potential section 2.2(2)(b) of the FPR obstacle where the Companies Act is not listed as legislation relating to the determination of a *Family Matter*.
- A-35 Family lawyers, however, must also be alive to the criticism of double-recovery. In Nurcombe -v- Nurcombe and Anor [1985] 1 All ER 65, the husband and the wife were respectively majority and minority shareholders and in divorce proceedings the Court took into account an improper profit made by the Husband and increased the monies payable to the Wife.

¹ Saloman -v- Saloman & Co. Ltd [1897] AC 22

A-36 The Wife then filed a derivative action which was blocked by the Court on the basis that it would be inequitable to permit the Wife to pursue this action when she had already received the amount of the improper profit in the matrimonial proceedings.

Breach of Confidentiality/Right of Privacy

A-37 Family lawyers who seek specific disclosures about the company's business and affairs in order to demonstrate the suppression of evidence of assets owned or controlled by the opposing party, may be met with an objection that the disclosure is unauthorised as the information is confidential to the company and it constitutes a breach of his fiduciary duties for a director to disclose confidential information about the company.

A-38 This is a non-point, however, because section 99(4)(b) of the Companies Act makes it plain that:-

“(4) No information about the business or affairs of a company shall be disclosed by a director or officer of the company except –

(b) for the purposes of any legal proceedings” (emphasis ours).

A-39 Moreover, while there is a constitutional right to respect for one's private and family life pursuant to section 4(c) of the Constitution, this cannot be conflated with a right to privacy which is not enshrined in our Constitution.

A-40 In any event, in matrimonial proceedings, claims that disclosure will offend privacy considerations, can be met with orders sealing the records or for proceedings to be held *in camera* or for the document to be redacted.

A-41 Family lawyers seeking specific disclosure may also be faced with the opposing party's claims of the right to withhold disclosure or inspection of documents, pursuant to Part 20.15 of the FPR. These objections are not based on confidentiality or privacy considerations but, rather, that disclosures would damage the public interest.

A-42 The threshold here for the opposing party is extremely high particularly since Part 20.15(6) permits the matrimonial court to personally review the document and assess the implications of its disclosure. In addition, the Court can redact sensitive parts or bind the parties to non-disclosure or order that proceedings be convened *in camera* or simply seal the records.

***B. THE VALUATION OF MATRIMONIAL COMPANIES AND EXPERT
EVIDENCE IN MATRIMONIAL PROCEEDINGS***

B-1 Part 25 of the FPR permits a party to apply to the Family Court for the appointment of an Expert and by Part 25.4, the Court must restrict the expert evidence to that which is reasonably required to resolve the proceedings justly.

B-2 Like a Part 33 Expert in non-matrimonial proceedings, an application may be made orally at a directions hearing.

B-3 Valuing a matrimonial company is an art not a science, so different accountants may attribute different values to the same business. Some accountants are more conservative and generally a party may cherry pick an accountant if they want a higher or lower value.

B-4 Generally companies are valued in one of two (2) ways:-

- (i) firstly, on a net asset basis; and
- (ii) secondly, on an earnings basis.

B-5 The net asset basis values all the assets owned by the company less all of the debts. Where the company owns properties, it may be necessary to get up to date valuations.

B-6 Conversely, the earnings basis is usually appropriate where a company is trading and generating a profit from that trade. Typically, this method requires the assessment of the likely level of future maintainable earnings and the application of an appropriate multiplier. To do this, recent trading performance is considered, usually over the last three (3) years.

- B-7 In practice the valuer usually undertakes both calculations and use the higher or figure depending on his instructions. Therefore, a trading company could be valued on a net asset basis, if its assets have a high value or alternatively if the recent trading performance has been poor and the future maintainable earnings found to be low.
- B-8 Matrimonial companies are generally valued on a *pro-rata* basis and a discount is applied if the spouse has a minority shareholding interest.
- B-9 Having said that, it is all very well valuing a spouse's interest in the matrimonial company, but the matrimonial company may not be able to pay out significant sums of money to fund a divorce settlement, even if the spouse's interest does not constitute a significant monetary value. The accountant therefore also needs to look at liquidity when he prepares the valuation report. This refers to the amount of money that can be taken out of the matrimonial company, without impacting its ability to function as a business. The tax consequences of taking this money out of the business must also be considered.
- B-10 Another factor that should be considered by an accountant when valuing a matrimonial company, is any Shareholder's Agreement that the matrimonial parties have and what it says, if anything, about how shares in the company should be valued if one of the shareholders wants to leave the company rather than the whole company being sold. A Shareholders Agreement can have a significant impact on the value of a divorcing spouse's shares in a company so that the requesting party should apply for it in a specific disclosure application.
- B-11 When faced with competing and duelling experts who have furnished valuations differing widely in quantum, methodology and forecast, it is open to the Family Court, pursuant to Part 25.11, to direct a meeting of the experts on a *without prejudice* basis to determine if they can agree any issues which the Family Court will then treat as an agreed issue. The Family Court will then be required to make findings on the unagreed issues.
- B-12 Another issue is who pays for the valuer if the parties agree to be bound by a single Expert valuer appointed by the Court. An impecunious spouse can request that his/her 50% of the

costs be paid by the other spouse on the basis that reimbursements can occur at the end of the property settlement exercise by conducting an adjustment exercise.

- B-13 The Family Court, by Part 25.13(1) also has the power to appoint assessors to assist it, but before doing so, it must state, with Counsel's assistance, the questions which it requires assistance on.
- B-14 It is important to note that in relation to closely held matrimonial companies, corporate lawyers are very adept at devising restrictive provisions in the articles or by laws stipulating that shares shall not be transferred without the consent of the board of directors. This may be, inadvertently, to protect the financial interest of the majority shareholder from the minority shareholder in the event of marital discord.
- B-15 In the leading case of Re: Smith & Fawcett Ltd [1942] Ch 304 it was held that a provision conferring on directors an *absolute and uncontrolled discretion to refuse to register any transfer of shares* was valid. It follows, therefore, that an aggrieved spouse in a property settlement application may have to, in a derivative action under section 242, apply to strike down such a provision on the basis that it was not or not intended to be used *bona fide* and only to protect the spouse with the majority interest.
- B-16 Similarly, it is open to a spouse to apply to set aside property settlement orders based on deliberately inaccurate or suppressed information. This is on the footing that the correct information is subsequently received in, for instance, unrelated proceedings or a derivative claim and the irresistible conclusion is that the inaccurate or non-information was peddled in an effort to undervalue family assets.
- B-17 In Livesey -v- Livesey and Anor [1985] AC 424, the House of Lords underscored that in property settlement cases, the parties have a duty to provide the Court with accurate, complete and up to date information and that orders may be re-opened in the face of the correct information.

- B-18 Having said that, not every failure of full and frank disclosure will justify a re-opening of the order and the test in Livesey still applies, namely, that it will only be in cases where the absence of full and frank disclosures has led the Family Court to make an order which is substantially different from the order which it would have made, if proper disclosure had been given.
- B-19 It follows, therefore, that family lawyers should make better use of Part 27 of the FPA which permits Requests for Information and Documents to be made; in relation to information, by Part 27.1 (1)(a), this is about any matter which is in dispute. In relation to documents, however, the threshold is higher, in that the requested document must be directly relevant to the proceedings which is the same test for a specific disclosure application.
- B-20 Significantly, by Part 27.1(4) a request for documents may be made instead of or in addition to a specific disclosure application under Part 20, although by Part 20.8(5) the specific disclosure application must show that disclosure is directly relevant to one or more issues, unlike the broader request for a Request, that is to say, that it be directly relevant to the proceedings.
- B-21 It must also be noted that a specific document disclosed pursuant to Part 20.8 (1), can only be used in those matrimonial proceedings in which it was disclosed. But Part 20.18(1)(a) allows it to be used in other proceedings (for instance a derivative action) if it has been read to or by the Family Court or referred to in open Court. Alternatively with the Family Court's consent.
- B-22 What this means is that family lawyers, with eyes on a future derivative claim under section 242 of the Companies Act, should not only make the specific disclosure application, but ensure that the documents produced are read into the Court's record which will permit its use in all future High Court proceedings. This does not apply to a document received under the Request for Information because Part 27.4 restricts its use only to the proceedings in which the request was made.

- B-23 Summarily, in speaking to the interface between company law and family proceedings, family lawyers must be alive to, in relation to matrimonial companies, the need to aggressively pursue every line of enquiry in order to obtain full and frank disclosure of the matrimonial company's assets as part of property settlement.
- B-24 This includes, where necessary, making an application in the family proceedings to join the matrimonial company as a party on the basis that it would assist the Court in resolving some of the issues as it relates to property settlement. This is notwithstanding that there is no provision in the FPR for joinder so that any application will be based on the CPR requirement that joinder would assist the Court in determining the family matters. Having said that, family lawyers must be alive to the Court of Appeal's decision in Johncilla -v- Johncilla which reversed a joinder order, on the basis of the trial judge's overreach. The Court of Appeal relied on the Prest decision which circumscribed the situations where the veil can be pierced.
- B-25 These lines of enquiry are not solely in relation to incorporation documents, by laws, shareholders agreements and annual returns, but must aggressively include financial and bank statements as well as making use of online search engines that disgorge public documents relating to deeds, discharges and indebtedness.
- B-26 These lines of enquiry should also include specific disclosure applications and requests for information pursuant to Parts 20 and 27 respectively and can be supported by Freedom of Information Requests, Requests to Regulatory Agencies such as the FIU, SEC, Companies Registry, the Board of Inland Revenue and Professional Bodies and as well as, if necessary, derivative proceedings provided that the complaining spouse qualifies as a complainant.
- B-27 The purpose is to rattle the objecting party and force him or her to consider the competing judicial risks, before coming down on the path of full and frank disclosure.

Mr. Ronnie Bissessar S.C.
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