

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT**

**Family Division**

[Unreported]

Suit No: FL 0070 of 2009

**BETWEEN**

**VALERIE ANNE MACKENZIE**

**APPLICANT/WIFE**

**AND**

**JOHN DAVID STRAGHAN MACKENZIE**

**RESPONDENT/HUSBAND**

**DALNEY LIMITED**

**INTERVENER**

**Before The Honourable Madam Justice Maureen Crane-Scott, Judge of the High Court**

**2011: June 14, 15, 17**

**2012: February 21**

**Mr. Randall Belgrave, Q.C. for the Applicant/Wife; Mrs. Beverley Walrond, Q.C. for the Respondent/Husband and Mrs. Marguerite Woodstock-Riley, Q.C. for the Intervener.**

**DECISION**

[1] **Background to the Application:** On the 9<sup>th</sup> day of February 2010, the Applicant/Wife filed proceedings (hereinafter called “the substantive proceedings”) under sections 56 and 57 of the *Family Law Act, Cap. 214* seeking a declaration and/or alteration of the Applicant/Wife’s interest in:

- (i) “the matrimonial home situate at Bartlett’s Tenantry, in the parish of Christ Church in this Island;

(ii) “Any and all the assets and income of Dalney Limited, a company incorporated and registered under the *Companies Act, Cap. 308* of the Laws of Barbados; and

(iii) Further and/or alternatively, any and all shares in the said Dalney Limited held by the Respondent/Husband upon trust.”

[2] In paragraphs 22 and 23 of her affidavit filed on the 9<sup>th</sup> February, 2010 in support of the substantive proceedings, the Applicant/Wife made, *inter alia*, the following allegations:

“22. ....the Respondent/Husband has also accumulated substantial holdings in a financial investment vehicle or company named *DALNEY LIMITED* in which he owns controlling preference shares...”

23. ...most of the Respondent/Husband’s assets have been invested in *DALNEY LIMITED* and its shareholding has been so structured as to shield same from any claim by me to a share and/or interest therein.”

[3] In his affidavit in response filed on the 10<sup>th</sup> May, 2010, the Respondent/Husband denied the Applicant/Wife’s allegations in relation to Dalney Limited. He specifically denied having any beneficial holdings in Dalney Limited or that most of his assets were invested in the company or that its shareholding had been so structured as to shield them from her.

[4] The Applicant/Wife filed an affidavit in reply on September 10<sup>th</sup>, 2010. At paragraphs 40 to 41 she joined issue with the Respondent/Husband on the issue of the ownership and/or control of Dalney Limited. She alleged that the Respondent/Husband had “*full and direct control*” of Dalney Limited during all the years of their marriage up to the date of their separation in January 2008.

[5] In support of her contention, the Applicant/Wife exhibited copies of the Directors' Reports contained in the published McEneaney Alstons (Barbados) Limited Annual Reports for the years 1998 to 2002 ("**Exhibit VAM 4 (1-6)**") showing what she says is the nature and extent of the Respondent/Husband's shareholding interest in the said McEneaney Alstons (Barbados) Limited.

[6] On the 27<sup>th</sup> day of September 2010, a Consent Order was approved by **Cornelius, J.** granting leave to Dalney Limited (hereinafter sometimes called the "Company") to intervene in the substantive proceedings and to file an affidavit. Both parties to the substantive proceedings were also given leave to file affidavits in response.

[7] **The Application:** On the 19<sup>th</sup> day of October 2010, pursuant to the Consent Order, the Company, as Intervener, filed an application pursuant to section 71 of the **Family Law Act, Cap. 214**, seeking the following orders:

- (i) A declaration that the shares, assets and income of the Company is not matrimonial property for the purposes of a determination under Section 56 and 57 of the *Family Law Act, Cap. 214* of the Laws of Barbados;
- (ii) That the Applicant/Wife has no right to any share or interest in the said Company;
- (iii) That the Respondent/ Husband has no right to any share or interest in the said Company, other than a preference share with a redemption value of \$1.00.

[8] Section 71 of the **Family Law Act, Cap. 214** provides, *inter alia*, as follows:

*"(1) In proceedings other than proceedings for principal relief, any person may apply for leave to intervene in the proceedings, and the court may make an order entitling that person to intervene in the proceedings..."*

(3) *Where a person intervenes in any proceedings by leave of the court, he shall, unless the court otherwise orders, be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.*”

[9] In support of its application, the Company filed an affidavit on October 11<sup>th</sup>, 2011 sworn to by Harry Straghan MacKenzie in his capacity as a director and shareholder of Dalney Limited.

[10] **The matters in dispute:** The Company expressly joined issue with the Applicant/Wife’s allegations in the substantive proceedings that: (i) the Respondent/Husband had accumulated substantial holdings in a financial investment vehicle or company named Dalney Limited in which he held controlling preference shares; (ii) the Respondent/Husband had invested most of his assets in Dalney Limited; and that (iii) its shareholding had been so structured as to shield his assets from any claim by her to a share and/or interest therein.

[11] In the Company’s affidavit filed on October 11<sup>th</sup> 2011, Harry MacKenzie essentially corroborated the Respondent/Husband’s case with respect to the incorporation history of Dalney Limited and exhibited additional documentation for the purpose of establishing that the Company had been incorporated during the life of the Respondent /Husband’s former wife, Anne MacKenzie, and that trusts had been put in place for the benefit of their 2 children, Susan and Harry MacKenzie who were then minors.

[12] At the hearing, the witnesses, Harry Straghan MacKenzie, Valerie MacKenzie and John MacKenzie respectively were each cross-examined in relation to their affidavits and with respect to the matters in dispute.

[13] **The Legal Submissions for and against the Application:** At the request of the Court, Counsel for the respective parties produced written pre-trial submissions. At the close of the hearing, they made brief oral submissions for and against the relief sought on the

Company's application. The respective arguments for each of the parties are summarized below.

- [14] *The case for the Applicant/Wife*: Counsel for the Applicant/Wife, Mr. Belgrave, Q.C. amplified his written submissions and submitted at the outset that the Applicant/Wife was contending that Dalney Limited is an investment vehicle structured by the Respondent/Husband to hide his beneficial or other interest therein and was in reality a "sham" in that the interests therein expressed, are in reality, not real interests.
- [15] Alternatively, the Applicant/Wife says that Dalney Limited is in reality, a "puppet company" designed and/or structured by the Respondent/Husband such that it is capable of being manipulated by him to hide his beneficial or other interest therein.
- [16] Mr. Belgrave contended that at the heart of the Applicant/Wife's case is the fact that throughout the marriage and up to the date of their separation, the Respondent/Husband had exercised "*factual or actual control*" of the Company as its Managing Director and as the registered holder of one (1) redeemable preference share.
- [17] Counsel for the Applicant/Wife cited *Kelly and Kelly (No 2) FLC 91-108*; *Tiley v. Tiley (1980) FLC 90-898*; *Buckeridge v. Buckeridge (No 2) FLC 91-114* and *Stowe v. Stowe (1980) FLC 90* which, he submitted, established that notwithstanding that assets were legally owned and controlled by a company, Courts were quite prepared to hold that the company and its assets could be treated as a "*financial resource*" of one party to a marriage provided that that party was found to be in "*factual or effectual control*" of the company.
- [18] Mr. Belgrave submitted that following and applying the approach taken in the cases which he cited, the assets of Dalney Limited should be regarded as a "*financial resource*" of the Respondent/Husband under section 53(2)(b) of the *Family Law Act*, by virtue of the Respondent/Husband's "factual or effective control" of the Company.

- [19] *The case for the Intervener:* Counsel for the Company, Mrs. Woodstock-Riley, Q.C. pointed out that the facts and circumstances surrounding how Dalney Limited came to be incorporated by the Respondent/Husband and his late wife Anne MacKenzie and trusts created for the benefit of their children, Susan and Harry had not been disputed by the Applicant/Wife.
- [20] She submitted that the evidence established that the Respondent/Husband had been appointed the Company's Managing Director on November 14<sup>th</sup>, 1985 at a time when Susan and Harry were both studying overseas. According to Mrs. Woodstock-Riley, the undisputed evidence also is that Susan MacKenzie still lives overseas, while Harry MacKenzie had spent the majority of his life overseas and had only returned to Barbados just over 2 years ago. She submitted that the management of business affairs for relatives or friends is not unusual and should not be viewed as a circumstance denoting sinister or sham motives.
- [21] Mrs. Woodstock-Riley sought to distinguish the legal authorities cited by Counsel for the Applicant/Wife in his written submissions. She submitted that far from supporting the case for the Applicant/Wife, the authorities actually supported the Company's case that Dalney Limited was neither the property nor a "financial resource" of the Respondent/Husband within the meaning of the *Family Law Act, Cap. 214*.
- [22] *The case for the Respondent/Husband:* Counsel for the Respondent/Husband, Mrs. Walrond, Q.C. contended that the Applicant/Wife has no interest in any shares in Dalney Limited while the Respondent/Husband had no interest in the Company other than one redeemable preference share in the Company redeemable at the price of \$1.00.
- [23] She submitted that the Applicant/Wife's assertions to the effect that the Company had been structured by the Respondent/Husband to hide his beneficial or other interest in Dalney Limited from his wife was irrational and could not stand up to scrutiny since the facts showed that the Company had been set up prior to the Respondent/Husband's

marriage to the Applicant/Wife and at a time when, according to the evidence, they had not yet met.

[24] Mrs. Walrond adopted the submissions of counsel for the Intervener, Mrs. Woodstock-Riley, and cited the case of *Faiza Ben Hashem v Abdulhadi Ali Shayif and Radfan Limited [2008] EWHC 2380 (Fam)* which, she submitted, mirrored the position of the Applicant/Wife in the instant case.

[25] **Findings of mixed fact and law:** The evidence clearly establishes, and the Court makes the following findings of fact and law:

- (i) Dalney Limited is not a “puppet company” designed and/or structured by the Respondent/Husband such that it is capable of being manipulated by him to hide his beneficial or other interest therein. Dalney Limited was incorporated by the Respondent/Husband and his former wife, the late Anne MacKenzie on October 4<sup>th</sup>, 1979 approximately 6 years prior to his marriage to the Applicant/Wife;
- (ii) the Company was incorporated for tax planning purposes and specifically to benefit the Respondent/Husband and Anne MacKenzie’s children, Susan and Harry MacKenzie who were still minors;
- (iii) In furtherance of the Respondent/Husband and Anne MacKenzie’s intention to benefit their children, a portfolio of shares owned by the Respondent/Husband in a number of local enterprises was sold to Dalney Limited for the price of \$354,617.25 pursuant to an Agreement for Sale entered into on October 8<sup>th</sup>, 1979;

- (iv) The purchase price for the shares was secured by an interest-free loan to the Company which was satisfied upon the subsequent allotment to the Husband and the late Anne MacKenzie of a total of 98 ordinary shares in the capital of the company credited as fully paid;
- (v) the subscription page of the Company's Memorandum of Association ("**HSM 3**") filed with the Registrar of Companies in October 1979, together with the Return to Allotment ("**HSM 5**") filed at the Registrar of Companies in 1980 establish that between them, the Respondent/Husband and the late Anne MacKenzie subscribed for and were allotted a total of 100 ordinary shares in the capital of the company;
- (vi) In accordance with the Declarations of Trust, ("**HSM 6**") and ("**HSM 7**") the Respondent/Husband's 50 ordinary shares and the late Anne MacKenzie's 50 ordinary shares in Dalney Limited were held upon trust for the benefit of their minor children, Susan and Harry;
- (vii) The ordinary shares were subsequently transferred to the children in 1980 and 1981 respectively, after their 18<sup>th</sup> birthdays, prior to the death of Anne MacKenzie and in any event, several years before the Respondent/Husband married, or even knew, the Applicant/Wife.

[26] With respect to the Applicant/Wife's assertion at paragraph 23 of her affidavit of February 9<sup>th</sup> 2010 that "*most of the Respondent/Husband's assets have been invested in Dalney Limited and its shareholding so structured as to shield same from any claim by [her] to a share and/or interest therein*", the Court finds no merit in this allegation for the reason that the Applicant/Wife, under cross-examination admitted that in 1979 she was not married to the Respondent/Husband and was aware that Dalney Limited was incorporated in 1979 and that trusts had been set up in 1980 for the benefit of the Respondent/Husband's children.

- [27] The Applicant/Wife contended that the Respondent/Husband up to January 5<sup>th</sup> 2008, had *full and direct* control of Dalney Limited and that the Respondent/Husband holds a controlling preference share in the said Dalney Limited. The Court however, finds that during his marriage to his former wife, Anne MacKenzie, a transfer of various shares held by the Respondent/Husband was used to capitalize Dalney Limited. These shares were transferred pursuant to an Agreement for Sale. Thus, the Court finds that the shares which the Respondent/Husband transferred to Dalney Limited in 1985 are the Company's "property" and cannot be regarded as matrimonial property.
- [28] At paragraph 44 of her affidavit of September 10<sup>th</sup>, 2010 the Applicant/Wife deposed, *inter alia*, that "*what needs to be provided is documentation of what was paid INTO Dalney Ltd and how that company grew from assets of \$380,000.00 in 1985 to assets of approximately \$9 million during the 22 years of our marriage during which time the Respondent/Husband controlled and managed it, and was a preference shareholder.*"
- [29] The issue raised at paragraph 44 of her affidavit and the inference which the Applicant/Wife invites the Court to draw from the increase in value of the Company since 1985 is that during the 22 years of her marriage to the Respondent/Husband, he made further payments and/or investments into Dalney Limited.
- [30] The Court accepts the evidence (unchallenged) of Harry Straghan MacKenzie at paragraphs 18 and 19 of his affidavit filed on October 11<sup>th</sup>, 2010 and finds that since the initial loan which the Respondent/Husband made to the Company, he did not inject further sums into the Company and received no interest on the loan when it was repaid to him.
- [31] This fact is confirmed in the report of the audit conducted by PricewaterhouseCoopers attached to Harry MacKenzie's affidavit as ("**Exhibit HSM 16**") which the Court accepts.

- [32] In the result, the Court holds that the shares, assets and income of Dalney Limited cannot be regarded as matrimonial property attributable to the marriage between the Applicant/Wife and the Respondent/Husband.
- [33] The Court is satisfied that the Articles of Continuance provide, *inter alia*, that the holders of the redeemable preference shares shall be entitled to a fixed preferential dividend at the rate of 6% per annum on the capital for the time being paid up thereon as regards each financial year out of the profits of such year available for dividend but with no right in case of deficiency to resort to the profits of subsequent financial years and the right in a winding up to repayment of capital in priority to the common shares. The Articles of Continuance of Dalney Limited also expressly state that the holders of the redeemable preference shares have no further right to participate in profits or assets.
- [34] Counsel for the Wife submitted that payments/dividends coming into Dalney Ltd have been designated in such a way as to represent, what he termed, “an accrual to the fund and an accrual to the children and not to the Wife or the Husband”. He also submitted that “what would ordinarily have been, and is, an investment deriving income during the currency of the marriage, has been structured and treated as something else”.
- [35] The Court is satisfied that the Respondent/Husband has no right to any share or interest in Dalney Limited, other than a single preference share with a redemption value of \$1.00. While it appears from the Articles of Continuance that the Husband as the holder of a single \$1.00 preference share may (at the discretion of the Company’s directors) have been entitled to a 6% fixed preferential dividend on the paid up capital as regards each financial year, there is no evidence that a fixed preferential dividend was ever declared by the Company in respect of the \$1.00 preference share held by him.
- [36] The Court is satisfied that the question whether dividends are to be declared in relation to any class of shares in a company, is a matter which lies exclusively within the discretion of the directors of a company. It is settled that Courts will not readily override the directors’ discretion in relation to the question whether a company has profits available

for distribution to its shareholders. Further, such a question must be answered according to the circumstances of each particular case, the nature of the company, and the evidence of competent witnesses. See *Bond v. Barrow Haematite Steel Company [1902] 1 Ch. 353*

[37] In the circumstances, the Court finds no merit in Mr. Belgrave's arguments that the Company constitutes a "financial resource" of the Respondent/Husband within the meaning of section 53(2)(b) of the Act. In particular, the Court is satisfied that while the Respondent/Husband continues to function as the Managing Director of the Company, the shares, assets and income of Dalney Limited do not constitute "*a financial stock or reserve over which the Respondent/Husband has sufficient control as a matter of fact to draw upon when necessary towards supplying some financial want or deficiency*". In short, the Respondent/Husband has no right to any share or interest in Dalney Limited, other than a preference share with a redemption value of \$1.00.

[38] **Disposal and Order:** In the result, I find for the Intervener on this application and declare that:

- (i) The shares, assets and income of Dalney Limited are not matrimonial property for the purposes of a determination under **Section 56 and 57** of the **Family Law Act Cap 214** of the **Laws of Barbados**;
- (ii) The Applicant/Wife has no right to any share or interest in Dalney Limited;
- (iii) The Respondent/Husband has no right to any share or interest in Dalney Limited, other than a preference share with a redemption value of \$1.00.

- (iv) In particular, the shares, assets and income of Dalney Limited are not a 'financial resource' of the Respondent/Husband within the meaning of section 53(2)(b) of the Act for the purposes of a determination under **section 56 and 57 of the Family Law Act Cap 214 of the Laws of Barbados.**

**Maureen Crane-Scott**  
**Judge of the High Court**