CLARA REBITAE v. FRANCIS CHOW, R.E.G. LIMITED, ONAGA CORPORATION LIMITED AND F. C. LIMITED.

HIGH COURT OF SOLOMON ISLANDS.
(KABUI, J).

Civil Case No. 108 of 1998.

Date of Hearing: 24th August 2004.
Date of Ruling: 27th August 2004.

Mrs. Tongarutu for the Plaintiff.
A. Nori for the 1st to 4th Defendants.

RULING

Kabui, J.: Two applications came before me for determination. The first one, filed by the Plaintiff, asked for interlocutory orders. The second one, filed by the Defendants, asked for the striking out of the Plaintiff's action. I dealt with the second and more recent one first because if I should strike out the Plaintiff's action as asked for, there would be no basis for the first application to stand on for obvious reason. That is, the application by the Defendants is substantive in nature whilst the application by the Plaintiff is interlocutory only in nature. Specifically, the application by the Defendants filed on 28th July 2004 is to strike out the Plaintiff's action for want of prosecution. The 2nd, 3rd and 4th Defendants are a group of family companies in which the 1st Defendant is the major shareholder and the Plaintiff being the former wife of the 1st Defendant. The dispute between the Plaintiff and the 1st Defendant is over the settlement of properties allegedly acquired during the marriage. There has been a long delay since the Plaintiff filed her action for relief in June, 1998.

This is the second time the Defendants have come to the Court for the same order this in this case. The first time was in March, 2001. I delivered the ruling on 24th April, 2001. I refused to grant the Defendants' application then for the reasons stated in that ruling. I subsequently ruled in my judgment delivered on 27th November 2001 that the marriage between the parties was a valid marriage under custom. That issue is now settled. The other issues in the Statement of Claim are still outstanding. The first orders for directions were made by consent of the parties on 22nd December 1998, following the Plaintiff's action. The Plaintiff filed her affidavit of her documents on 29th January1999. The 1st Defendant in his affidavit on behalf of the Defendants did likewise on 15th February 1999. The next steps of inspection, interrogatories and answers were never taken by the Defendants because the Plaintiff's documents were in the possession of the firm of SOL-LAW and could not be released to the Plaintiff's new Solicitor, ANT Legal Services, unless the Plaintiff paid off her bill to Sol-LAW to cover their professional costs and fees. There was then a lien over the Plaintiff's file in favour of SOL-LAW at that time. This difficulty was discussed in my ruling in favour of the Plaintiff referred to above on 24th April 2001. The Solicitor for the Plaintiff then filed a document on 15th August 2002 signed by herself which is not in affidavit form setting out the same documents the Plaintiff filed in affidavit form on 29th January1999. The list of documents was sent to the Defendant's Solicitor under cover of a letter dated 6th August 2002. This would obviously suggest that the Plaintiff's

documents held under lien by SOL-LAW had been released and then being kept in the custody of her Solicitor for inspection. The other suggestion is that fresh copies of those same documents had been obtained by the Plaintiff and are being kept for inspection by the Defendants. The Defendants did not file any more documents because they had already done it on 15th February 1998. Neither side had taken steps to inspect documents or administer interrogatories, if any, in accordance with paragraphs 2, 3 and 4 of the order for directions dated 22nd Decemberl 998. By Notice of Motion filed on 22nd April 2002, the Plaintiff sought further orders for directions. The Registrar, on 3rd July 2002, ordered that the consent order for directions made on 22nd Deember19 98 be repeated. By letter dated 8th September 2002, the Solicitor for the Plaintiff informed the Solicitor for the Defendants that she was intending to set the matter for trial. Nothing more happened. On 17th February 2004, the Plaintiff filed a summons, applying for certain interim orders, pending the trial of the Plaintiff's action, the first application at the hearing.

Clearly, the original consent order for directions dated 22nd December 1998 did envisage that there was a need for discovery procedure to take place but the process was not completed after a change of Solicitor. The matter was further complicated by the lien over the Plaintiff's file being withheld by SOL-LAW to secure the payment of their fees. This did not however prevent the Plaintiff from exercising her right of discovery as against the Defendants. The Defendants would have found that procedure difficult to apply to the Plaintiff at that time because of the lien over the Plaintiff's file in the possession of SOL-LAW. The need for discovery was more or less restated by the order for discovery made on 3rd July 2002 by the Registrar on the request of the Plaintiff. Clearly, both parties again defaulted in compliance the second time. I say both parties here because I assume that the list of documents filed by the Plaintiff on 15th August 2002 of which the Solicitor for the Defendants had been informed, contained documents actually in the possession of the Plaintiff, by which time, the Defendants would have been able to complete the discovery process. The lack of taking further steps in this regard would have been a failure on their part as well in this regard, apart from the fact that the document itself was not in the proper form. Assuming that the Solicitor for the Defendants, Mr. Nori, did know what to do and was able to do so but for the non-availability of the Plaintiff's documents to inspect etc., there was nothing much he could do than to ask for a hearing date as he did on 11th July 2002 by letter addressed to the Solicitor for the Plaintiff. There is however no evidence to show that attempts to discover had been made difficult by the non-availability of documents for the purpose of discovery. The Plaintiff's Solicitor never had the case set for trial as indicated by her in her letter to the Solicitor for the Defendants dated 8th September 2002. In any case, the Plaintiff had failed to comply with directions on 3rd July 2002 sought by her Solicitor on her own motion. There was nothing preventing her from completing the discovery process of the Defendants' case. On this matter, no blame can be attributed to the Solicitor for the Defendants. However, to be fair, I need therefore say again that there is no evidence to show that the Solicitor for the Defendants had in fact tried to complete the process of discovery on his part but was prevented by the non-availability of the Plaintiff's documents for the reason mentioned above. In the interest of justice, I would order that paragraphs 2, 3, 4 and 5 of the consent order for directions dated 22nd December 1998 and re-activated on 3rd July 2002 be re-activated for the last time with the exclusion of paragraph 1 of the original direction order. If no trial date is fixed within the total time-frame set out in those directions, the Plaintiff's action will stand dismissed. Both parties had already complied with paragraph 1 and there is no need for me to re-activate it. I refuse to make the

order sought by the Defendants in their summons. Their application is dismissed. I make no order for costs.

The Plaintiff's application.

The Plaintiff, by summons filed on 17th February 2004, asks for the following orders-

1. **The Plaintiff be given unlimited access to the sea-front properties owned by the 3rd Defendant, namely, Onaga Corporation Limited;**

2. **The 1st Defendant be restrained from removing any properties owned by the 3rd Defendant from its premises being fixed-term estate in Parcel Number 191-017-61 without the consent of the Plaintiff;**

3. **That the 1st Defendant account for the operation to date of the 3rd Defendant and to produce a financial report;**

4. **That the 1st Defendant to reinstate the Plaintiff's vehicle Number A0918 and to release it to the Plaintiff after due registration;**

5. **The 1st Defendant to account for the rental payments on the sea-front property adjacent to the Solomon Islands Marine Mammal Centre.**

The Plaintiff's summons is based on the alleged fact that she is a shareholder in the 3rd Defendant. This may well be the case as deposed to in her affidavit and agreed by the 1st Defendant's affidavit filed on 28th May 2004 but there needs to be documentary evidence of that fact. Exhibit "FC1" attached to his affidavit, being an annual return form for 2001, is not conclusive on this point. The Plaintiff is also an alleged director of the 3rd Defendant. However, legal standing is not the issue in this case although the 1st Defendant in his affidavit filed on 8th August 2001 said that the Plaintiff had not paid for her share but held it on call as a subscriber's share. The memorandum of association and the articles of association have not been produced. That being aside, what is important is the relationship between the Plaintiff as shareholder and director and the 3rd Defendant as a separate legal entity on incorporation. The properties and assets of the 3rd Defendant are not the properties and assets of the Plaintiff though she is a shareholder and director of the 3rd Defendant. This is the position at law. "...**A share is an item of property separate from the company's property. Neither at law or equity does a member of a registered company own any assets of the company...**" (See Principles of COMPANY LAW, by H.A.J. FORD, 3rd Edition, 1982 at 55). A company director is in the same position as a shareholder as regards the company's properties and assets. (See per L.J.Greer in **John Shaw & Sons (Salford) Ltd. v. Shaw** [1935] All E.R. Rep.456 at 464) cited at 523-524 in Pennington's Company Law, Fourth Edition, by Robert R. Pennington, LLD, 1979. A shareholder in or a director of a company does not have the power of ownership over its properties or assets. As stated in paragraph 1 of the Plaintiff's summons, the sea-front properties are the properties of the 3rd Defendant. I do not think I can make the order sought in paragraph 1 of the Plaintiff's summons and grant unlimited access without the consent of the 3rd Defendant, the owner of the properties.

Nor can I order that the 1st Defendant be restrained from removing the properties of the 3rd Defendant from Parcel Number 191-017-61 for the 1st Defendant, as I understand the position, the 1st Defendant is the Manager of the 3rd Defendant. This is confirmed by the Plaintiff herself in paragraph 3 of her affidavit filed on 20th August 2004. The matter of producing a financial report is the responsibility of the management, which in this case, falls upon the 1st Defendant being the managing director. I do not think I can make the order being sought in paragraph 3 of the summons. Accounts and audit are matters governed by sections 141-156 of the Companies Act, (Cap. 175) with penal penalties. The ownership of vehicle Number A0918 has not been established by evidence other than it had been allocated to the Plaintiff for her use but had been subsequently removed. The Plaintiff cannot force the 1st Defendant to reinstate the vehicle and hand it over to the Plaintiff unless such a request is an enforcement of a maintenance or settlement order made by the court. That is not the case here. I cannot make the order being sought in paragraph 4 of the summons for that reason. I cannot also force the 1st Defendant to account to the Plaintiff for the rental received for the sea-front property owned by the 3rd Defendant. The Plaintiff does not own that property. The 3rd Defendant does. That income rightly belongs to the 3rd Defendant. That income and where it goes will show in the balance sheet at a later date. The 3rd Defendant being a corporate entity does its business through its managing director and other employees. The managing director is not obliged to account to the Plaintiff for the rental it receives for its property each time the rental money comes into the company account. The Plaintiff, as a shareholder, will benefit in the profits of the company if dividends are declared and distributed to shareholders. The directorship she used to hold in the company may have lapsed and so any remuneration in that regard would also have ceased. She is not an employee of the company and so draws no wages from the company. Attempting to force the 1st Defendant to recognize her as part owner and to account for everything about the company is not the best shot in this situation where the marriage has broken up. She is no longer wanted in any of the family companies. It is obvious that her remedy lies elsewhere than in this application. The application is dismissed. I make no order as to costs as well as in the dismissal of the 1st Defendant's application above. The orders of the Court are therefore-

1. The Plaintiff's application is dismissed;

2. The Defendants' application is also dismissed;

3. Paragraphs 2, 3, 4 and 5 of the consent order for directions date 22nd December 1998 be re-activated and be applied accordingly;

4. If no trial date is fixed by the Plaintiff within the time frame envisaged in paragraphs 2, 3, 4, and 5 above, the Plaintiff's action will stand dismissed.

5. No order as to costs in each dismissal;

F.O.Kabui, J.