

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS]

**NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980,
ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C
AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER
INFORMATION, PLEASE SEE**

<https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>

**NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT
1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B,
11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER
INFORMATION, PLEASE SEE**

<https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>

**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2020-004-000573
FAM-2019-004-001222
[2022] NZFC 4043**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS ACT 1976
AND	
IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	NAYANA MASTERS Applicant
AND	SANJAY ARVIND MASTERS Respondent

Hearing: 2, 3, 4 May 2022

Appearances: J Noble for the Applicant
Respondent in Person
Ms M McNab for parties given notice pursuant to Section 37
Mr M Whale for the liquidator of Arrowmasters Limited
(in liquidation)

Judgment: 12 May 2022

RESERVED JUDGMENT JUDGE L J RYAN
[Transfer of Proceedings to the High Court]

[1] At the commencement of the hearing the parties consented to the evidence of Iain McLennan being adduced by way of an affidavit sworn on 21 April 2022 for the purpose of the hearing. That was, as I indicated to counsel, a necessary and sensible approach to take given the paucity of financial documentation available to enable either counsel or I to understand the complex series of transactions occurring between the respondent, his parents and various corporate and trust entities, both during the marriage and following the parties' separation in February 2017.

[2] Mr McLennan was cross-examined for almost two days. Most of the cross-examination was by Mr Noble for the applicant. Whilst I was critical of some of Mr Noble's methodology around his cross examination of Mr McLennan, I understood the need for Mr Noble to closely examine the witness's evidence, given its late introduction and of course the significance of much of that evidence in relation to values of shares, current accounts and the interest of the two trusts that are under examination.

[3] Given the thrust of Mr McLennan's evidence and the clarification gained during cross-examination, when the hearing commenced on day three, Mr Noble signalled he wished me to consider transferring these proceedings to the High Court. Such a move was opposed by Ms McNab who represented Mr Arvind Masters. Mr Whale representing the liquidator of Arrowmasters Limited (in liquidation) also opposed the transfer application.

[4] I heard submissions from all counsel and at the end of the day I indicated that I would reserve my judgment on the application for transfer and I directed that the applicant's lawyer file the anticipated proceedings under the Trusts Act 2019 and the Companies Act 1993 no later than 25 May 2022.

[5] Mr McLennan's evidence raised a number of significant issues which I will endeavour to summarise, which highlighted the need for proceedings to be issued under the Trusts Act 2019 and the Companies Act in relation to the actions of the trustees of both the Ennismore Trust and the Sylvania Trust. The evidence also disclosed that a company C. & E. Limmer Holdings Limited of which the respondent is a director, is and has been "seriously insolvent". It is clear from the parties' evidence that this company continues to trade, notwithstanding it is insolvent. There have been transfers of assets to and from the Ennismore Trust and the Sylvania Trust and another company, Masters Enterprise Limited. Arvind Masters is a substantial creditor of some of these entities as is the respondent. There appear to be unsecured advances by the trusts in respect of the sale of some assets. Some of the financial statements made available to Mr McLennan appeared to only be drafts. Shareholders current accounts had unexplained transactions and specific shareholders were often not identified.

[6] As Mr Whale pointed out the liquidator of Arrowmasters Limited (in liquidation) is unable to complete his statutory duty to liquidate the company in order to meet the company's liabilities to its creditors due to the sale proceeds of items of real estate being held in solicitors' trust accounts, pending agreement or court order.

[7] The applicant's proceedings to be filed in the High Court under the Trusts Act 2019 will seek, inter alia, a range of orders to enable the two trusts to be wound up, for the removal of trustees and for the appointment of a receiver. It is clear from the provisions of that Act that only the High Court has the jurisdiction to, for example, appoint a receiver.¹

[8] Section 141(3) Trusts Act does provide the Family Court with limited jurisdiction if the parties to the proceeding consent. In this particular instance no consent is given. Section 141(6) provides the Family Court with jurisdiction to transfer proceedings to the High Court on an application by a party.

[9] The Family Court has no jurisdiction to make orders under the Companies Act which means that insofar as the actions of the directors of Masters Enterprise Limited and C. & E. Limmer Holdings Limited are concerned, notwithstanding findings of fact

¹ Section 141(4).

that I may make, I would be powerless to order any steps to be taken in respect of the liquidation of either company or the actions of a director of any of the companies.

[10] Both Ms McNab and Mr Whale identified the desirability of continuing with the hearing and making orders as best I could within my jurisdiction to avoid ongoing delay to the liquidation process and exacerbating the tenuous circumstances of Arvind Masters and his wife who reside in a trust property at [address deleted] (risk of mortgagee sale due to ongoing default by the mortgagors).

[11] However, both Ms McNab and Mr Whale did concede that in a number of respects the Family Court had no jurisdiction to make some of orders the applicant would be needing.

[12] Ms McNab submitted that on more than one occasion she had raised the issue of jurisdiction during the case management process and interlocutory hearings that had taken place earlier in the Family Court. She was very critical of the fact that notwithstanding her submissions as to jurisdiction, the Family Court continued to case manage the matter through to a hearing.

[13] I have had regard to a number of judgments issued by various Family Court Judges during the case management process. At the conference held before Judge de Jong on 4 August 2021 he has this to say at paragraph [17]:

“[17] The intention of the liquidators is to undertake their role and to apply whatever funds can be realised in accordance with their role. It is acknowledged by the liquidator that role would be impacted by any Court Orders made. Mr Pronk identifies the same issue raised by Ms McNab today. That is, whether the Court has jurisdiction to do what Ms Masters wants.”

[14] The Judge in fact records raising with counsel for the applicant whether the proceedings were more appropriately dealt with in the High Court. He had this to say at paragraph [19]:

“[19] He assured me that the strongest aspect of his client’s claim relates to claims relying on s 44 and s 182.”

[15] Ms McNab submits that because counsel for the applicant insisted on proceeding to a hearing in the Family Court, it is now too late for him to seek a transfer to the High Court.

[16] That on the face of it appears to be a compelling argument, but what it overlooks is the substantial body of financial information that became available some 10 days prior to the commencement of this hearing (the McLennan affidavit). That evidence plus Mr McLennan's oral evidence in Court has clearly changed the whole landscape of this litigation and I understand why, due to that very late disclosure, counsel for the applicant has found it necessary to review his earlier position concerning the High Court's jurisdiction.

[17] I have to say that given the limitations on the orders that I can make in relation to the trusts and the companies, and given the fact that there will be proceedings filed in the High Court by 25 May 2022 addressing matters under those two Acts, it would be foolhardy of me to continue the proceedings in this Court. It would be imposing costs on the parties by unnecessarily continuing litigation which would be unable to achieve full resolution.

[18] I refer to the Court of Appeal judgment in *Booth v Booth*:²

“There is a clear policy concern underlying family law legislation that related proceedings should be managed and determined together ... as it is only in that way the court could have a complete and clear view of the litigation landscape affecting a particular family – and only then can the court properly calibrate [any] property distribution.”

[19] Section 1M(c) specifies that one of the purposes of the Property (Relationships) Act is “to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation ...”.

[20] The applicant should not find herself shut out of a fair and just result due to the combination of corporate and trust entities intermingled with assets and liabilities created during some 26 years of marriage, simply due to the wrong choice of forum, especially when that choice was made with little, if any, disclosure of the complex

² *Booth v Booth* [2020] NZCA 451 at [33].

structures and dealings that went on between the respondent, the companies, the Trusts and the respondent's parents.

[21] Subject to the proceedings flagged by counsel for the applicant being filed in the High Court no later than 25 May 2022, I hereby order these proceedings be transferred to the High Court. To clarify, the s 182 Family Proceedings Act application was earlier consolidated with the proceedings under the Property (Relationships) Act. It is the consolidated proceedings that are transferred to the High Court.

[22] The jurisdiction to transfer the Property (Relationships) Act proceedings can be found in s 38A of that Act and in particular s 38A(2)(b). In respect of the application under s 182 Family Proceedings Act, s 14 Family Court Act provides jurisdiction to transfer proceedings to the High Court:

“Subject to the Act under which any proceedings are brought, the Family Court may, on the application of any party to the proceedings, or of its own motion, order that the proceedings be transferred to the High Court if it is satisfied that, because of the complexity of the proceedings or of any question in issue in the proceedings, it is expedient that the proceedings be dealt with by the High Court; and in any such case the High Court shall have the same power to adjudicate on the proceedings as the Family Court had.”

[23] Insofar as the issue of costs is concerned, both Mr Whale and Ms McNab sought leave to file written submissions in respect of the costs incurred to date. I am reluctant to embark upon an examination of fault and/or merits at such an early stage of what will be lengthy litigation in the High Court. The findings of fact and the orders made by the High Court will have a significant bearing on any application for costs relating to the proceedings in this Court and the conduct of the hearing so far.

[24] Therefore, I reserve the issue of costs, which can be raised again once the outcome of the proceedings in the High Court is known.

Signed at Auckland this 12th day of May 2022 at 11.00 am

L J Ryan
Family Court Judge