

IN THE GRANT COURT OF THE CAYMAN ISLANDS

CAUSE NO: 593 OF 2009



**IN THE MATTER OF PARCELS 126, 196, 200, 201h1 AND 201h2 OF BLOCK 5C
OF THE WEST BAY SOUTH REGISTRATION SECTION**

**BETWEEN NEW ENGLAND MORTGAGE
 INVESTMENT LTD.**

AND WESTVIEW LIMITED PLAINTIFFS

AND ANNALISA BUTLER DEFENDANT

**IN CHAMBERS AS OPEN COURT ON
6th to 8th and 16th and 27th August 2013, 15th November 2013 and 3rd October 2014
BEFORE THE HON. CHIEF JUSTICE**

Appearances: Mr. George Giglioli of Giglioli & Co. for the Plaintiffs
 Ms. Sheridan Brooks of Brooks & Brooks for the Defendant

Property transferred beneficially to adult daughter of respondent – whether transfer intended to defeat petitioner’s claim to matrimonial property – whether transfer to be declared a “sham” – whether the corporate veil of the company holding the legal title to the property should be lifted.

JUDGMENT

1. This dispute relates to a beachfront property, comprising an elaborate house and gardens, located at 2245 West Bay Road, Grand Cayman, along Seven Mile Beach (“the Property”).
2. The Plaintiff companies together hold the legal titles to the Property in which the Defendant Annalisa Butler, claims a beneficial interest. This is an interest she claims as arising from her marriage to Brian Butler who, until he transferred his shareholding in the Plaintiffs to his daughter Michelle Butler on 24 July 2004,

was beneficially the owner of the Plaintiffs and, through them, the beneficial owner of the Property.

3. I will refer to individuals, for sake of convenience and without intending any discourtesy or disrespect, by their first names throughout this judgment.
4. The Plaintiffs seek to recover possession of the Property which has been occupied exclusively by Annalisa since the summer of 2009 (under circumstances to be explained below) and for damages and costs said to have arisen from her occupation.
5. Annalisa invites the Court to declare to be a sham, the transaction by which the shares in the Plaintiffs and by that means, the beneficial interest in the Property, were transferred to Michelle - and to find that she has a beneficial interest in the property as a matrimonial asset of her marriage to Brian.
6. Before turning to examine the Plaintiffs' claim and Annalisa's defence and counterclaim, I must set out the history both of the Property and of the relationship between Annalisa and Brian.
7. The titles to the Property in its original state, had been held by the Plaintiffs on behalf of Brian and his family for many years prior to his marriage to Annalisa in November 2004.
8. The two beachfront parcels were purchased by Brian's parents Ernest and Louise in 1981. They built a duplex on those parcels in which Brian, his then wife and their daughter Michelle, lived in one unit and Ernest and Louise lived in the other



unit whenever they were in Cayman. Ernest and Louise often commuted in those days to Cayman from their native Canada.

9. The beachfront parcels (and with them the duplex) were gifted to Brian by Ernest shortly after Louise died. The other three parcels of the Property (now comprising the gardens) were acquired by the first Plaintiff, New England Mortgage Investments Ltd. ("New England") between 1986 and 1996. New England was then beneficially owned by Brian.
10. After Ernest gifted the duplex and beachfront parcels to Brian, Brian removed the dividing wall to create a single dwelling house where he lived with his family including his daughter Michelle, for many years. Michelle went to Canada to attend college but returned home for holidays.
11. It appears from the documentary evidence in the case and as explained by witnesses, that around 2002, a number of events were at play and which came to be of importance in this case.
12. Brian having been divorced from Michelle's mother and married to Cindy Butler his second wife, was then in the closing stages of divorce from Cindy. Brian and Cindy were discussing the needs of their son Scott, in which regard they entered into a parenting agreement and a deed of separation on 8th October 2002.
13. Of passing relevance to the present dispute, the deed of separation provided, among other things, for a residential property located at Villa #4 Crescent Point, Seven Mile Beach, Grand Cayman, to be transferred to Cindy as part of the



settlement with Brian and to be used as a residence for herself and Scott; “*passing relevance*” because #4 Crescent Point is not a subject of the present dispute.

14. That transfer took place, not directly from Brian as might have been expected, but from Michelle who had accepted title from him to be held merely as an intermediary, before transfer to Cindy. This is a factor relied upon by Annalisa now in her allegations that the beneficial ownership of the Property being vested in Michelle, is a sham. Michelle, she asserts, is an all too willing facilitator of her father’s attempts to defeat the interests of his estranged spouses. I will come to address this allegation below.

15. It was around the same time in late 2002 that Brian and Annalisa commenced their relationship. Michelle was about then completing her graduate studies in architecture in Canada. Michelle’s evidence is that this was with a view to returning to live and work in Cayman with her father in his established business as a property developer.

16. Around the end of November 2003, the documentary evidence in the case reveals that Brian then gave his attorneys Campbells (acting through Mr. John Broadbent), instructions to transfer the beachfront parcels and the duplex (which were then in his personal name) to a new company to be formed (and which became Westview, the second Plaintiff); and then to transfer the beneficial ownership in Westview and in New England to Michelle.

17. Thus the Property in its entirety was transferred into the corporate legal ownerships in which it now stands, with Michelle as the beneficial owner. It is



important as already noted, that these transfers were effected prior to Brian's later marriage to Annalisa, which took place in November 2004.

18. According to Michelle relying upon documentary evidence in the case, these instructions were also given (i) as the result of advice obtained by Brian from then leading matrimonial counsel Nicholas Mostyn QC (now a High Court judge in England and Wales) in the course of the dissolution of Brian's marriage to Cindy; (ii) in anticipation of Brian spending half the year in Miami co-parenting Scott who had by then relocated there with Cindy and (iii) in anticipation of Michelle's return to the Islands and becoming involved in Brian's property development business as an interior designer and landscape consultant.
19. The instructions first given to Mr. Broadbent in November 2003 were not given effect until in July 2004 when the Campbells Companies (Campbells Directors Ltd., Campbells Nominees Ltd. and Campbells Secretaries Ltd.) – which held the entire issued share capital of New England and Westview subject to nominee agreements, at that time in favour of Brian; transferred the entire beneficial ownership of New England and Westview to be held in favour of Michelle.
20. The Plaintiffs' case is that Michelle thus became simply the recipient of a gift, nothing more or less. They assert that the transfer of shares as a gift fell well within the scope of a gratuitous transfer between parent and child and so lawfully attracted the abatement of stamp duty afforded by the Landholding Company Share Transfer Tax Law. Accordingly, no consideration was paid in respect of the gift neither was any landholding share transfer tax paid in respect of the transfer of the shares.



21. Annalisa says, nonetheless, that the transfers to Michelle were a sham, aimed at defeating the beneficial and overriding interest she had already acquired or would come to acquire in the Property as the matrimonial home of herself and Brian. She asserts that the beneficial interest in the Property is in reality retained by Brian who continues to have effective control of the Plaintiffs.
22. The Plaintiffs' case is that in light of Brian no longer having any beneficial ownership or other interest in New England or Westview, he was granted licences by Westview and New England to occupy and permission to refurbish the duplex (together "the Licence"). They also assert that Brian was engaged by, among other companies, Westview and New England, subject to a number of management agreements and Brian was paid a fee for his "*substantial and real functions*" carried out on behalf of the Companies. That "*fee*", significant in amount and of relevance in this context to be discussed below, is said to have been USD375,000.00 per annum. I will come below to examine the evidence relating to discussions between Brian and Annalisa, in which this fee is shown to have been recognised by them as Brian's expected annual income.
23. In September 2004, Hurricane Ivan struck Grand Cayman. The Property, which was then under renovation, sustained damage and the renovations were impeded and delayed. They were eventually completed and the Property, in its present and more elaborate emanation, became occupied by Annalisa, her daughter Alessandra and Brian, in May 2007.



24. They had been earlier in occupation of the Property for a period of but a few months in 2002-2003. This was before they vacated to allow for the extensive renovations work to be undertaken. During the renovations, herself, Brian and her daughter Alessandra, resided in rented accommodation, initially in Miami, then later at three different condominiums along Seven Mile Beach
25. Annalisa's and Brian's marriage was short-lived. By mid-2009 they had separated and she issued a divorce petition on 15 September 2009.
26. Thus, as a married couple during their short marriage, Annalisa and Brian occupied the Property for a period of only two years, although she also invites the court to have regard to the period of occupancy before the marriage, for the few months in 2002-2003.
27. The gravamen of her claim is based on the fact that the extensive renovations to the Property took approximately three years (early 2004 to May 2007) and large amounts of funding, to be completed.
28. At the commencement of the renovations, Michelle was still a student in Canada and Annalisa points to the fact that there is no evidence of Michelle contributing in any way to the costs of renovation of the Property. It is Annalisa's position that it was initially Brian's funds which were used and that subsequent to Hurricane Ivan and after their marriage, it was matrimonial funds that were used extensively to complete the renovations.
29. She claims to have had no knowledge of the instructions given by Brian to Campbells in November 2003 to transfer the beneficial interest in the Property to



Michelle and that she was always led by Brian to believe that the Property was their matrimonial home.

30. Whilst she accepts that Westview and New England are indeed the legal owners of the Property, she asserts her belief that the transfers to them comprise an arrangement that was set up to *“create paperwork which would mask the fact that Brian continued to have full control of the Property as well as other assets.”*

31. She claims to have known nothing of the Licence by which the Plaintiffs claim to have granted Brian the right to occupy the Property on 24 July 2004, commencing August 2004 for a period of 60 months. Indeed, she claims to have known nothing of the existence of the Licence until after the breakdown of the marriage in the summer of 2009. She points to the following as revealing the true nature of the arrangement:

(1) By a management agreement between Brian and a company named BDP Group Ltd. acting through Michelle as director and sole shareholder, Brian was engaged as managing director on 31st December 2005, at the aforementioned salary of USD375,000 per annum. The agreement lists in a schedule, the companies controlled by Michelle which shall be the subject of the agreement. These include New England and Westview.

The agreement contains provisions granting Brian wide discretion over the affairs and assets of the companies. They point to an extraordinary degree of discretionary control in Brian. [I interject here that such control would be unusual in the commercial context, although it must be recognised, not



necessarily so in the context of a family arrangement. Annalisa argues to the contrary].

Under the agreement, Brian is retained for the purposes of refurbishing and renovating the Property. Part A Clause 2 allows him as the Managing Director to sell the real estate owned by the Companies at a price and terms based on his “*sole discretion*”. Clause 4, provides that the Managing Director shall operate all banking accounts of BPD and the Companies “*as he best sees fit*”. Clause 6 allows him to “*invest all cash assets in such non-real estate liquid entities as he shall deem fit.*”

On the other hand, it is to be noted, that the Managing Director “*shall not charge, otherwise encumber or alienate the assets of BPD or the companies without the approval of the Shareholder, and may not make any loans to himself or related parties exceeding an aggregate of USD100,000.*” Moreover, he is required “*upon receipt of written notice, forthwith to repay such sums for the accounts of DPD or the Companies as may be directed by the Shareholder*” (i.e.: Michelle).

The impressions to be taken from this agreement on its face, is that while Brian retains virtually *carte blanche* powers for investment purposes, his personal access to and use of the Companies’ assets were to be confined as set out in the agreement.

Of some further significance is the provision in Part B Clause I which provides that “*...the Managing Director shall reside in and operate the activities of the business of BPD on Grand Cayman, Cayman Islands*”.

Annalisa describes this provision as a plain contradiction of one of Brian’s main stated reasons for having transferred the beneficial ownership of the



Property to Michelle – that he had to relocate to live in Miami to allow for Scott’s schooling there and wished to avoid the U.S. tax consequences of his move for the Companies (including the Plaintiffs) which would become liable to U.S. tax on account of his interest in them as a U.S. resident.

It however, became apparent from other evidence in the case, that that stated intention on the part of Brian may not have been inconsistent with a mutual intention held by himself and Annalisa that they would reside both in Florida and in Grand Cayman.

(2) The Licence purportedly granted to Brian to occupy the Property is also criticised by Annalisa in a number of respects. She points for instance, to the fact that the Licence was granted on 24 July 2004, one day after the transfer of the shares in Westview and New England to Michelle on the 23rd July 2004.

32. Annalisa also invites the court to note that although she was then residing in the Property with Brian, she was not included in the Licence, did not sign it and insists that she knew nothing about it.

33. The Licence provides that Brian and his “invitees” were allowed to stay in the Property for a period of 60 months (5 years), commencing 1st August 2004, initially paying “a peppercorn” for the first 24 months of the Licence period and thereafter a combined amount of USD7,000 per month. In addition, Brian was required to pay “an agreed sum for electricity and water used in the improvements of the Premises and the full amount of all telephone and



cablevision charges, such charges to commence twenty-four months from the date of the execution of the Licence”.

34. Annalisa, through Ms. Brooks, argues that no proof has been provided that Brian ever paid the rent of USD7,000 per month, nor payments specifically related to the electricity charges. This, she asserts, is further indication that the Licence is but a part of a sham structure put in place to defeat Annalisa’s interests in the Property as a matrimonial asset.

35. Whatever view one takes of the transfers of beneficial ownership to Michelle, the Management Agreement and the Licence, there is a further and significant evidential hurdle that Annalisa must overcome in her quest to establish a beneficial interest in the Property in herself.

36. This arises from a draft agreement, first intended as a pre-nuptial agreement and later – as the result of Hurricane Ivan intervening to postpone the wedding – as a post-nuptial agreement, between herself and Brian.

37. It is apparent from the evidence, that prior to their marriage and on the basis of the advice he had earlier received, Brian and Annalisa had discussed entering a pre-nuptial agreement to deal with, among other things, a distribution of assets in the event of either Brian being no longer able to work; divorce; or his death.

38. As events transpired, the documents were not executed until Annalisa signed them on or about 23rd May 2005. She was then in Miami, Florida and the documentary evidence includes a letter from her lawyer Harold Bluestein, dated 23 May 2005;



by which he conveyed the “*Post-Nuptial Agreement*” as having been “*signed by my client and referenced in handwriting with the text of the Agreement where applicable*”.

39. The letter, addressed to Gregory Anderson of Stack Fernandez, Anderson & Harris P.A. as Brian’s lawyers, continued: “*Please have Mr. Butler come in to your office to execute all four originals of the Postnuptial Agreement and the Addendum before a notary public.*”

40. Brian never did sign these documents and so Annalisa now asserts correctly, that the Pre-Post-Nuptial “Agreement” can have no binding contractual effect (even, if which is doubtful, as a matter of Cayman law, it otherwise could).

41. It’s evidential value as to her understanding of the true ownership of the Property and her claim to an interest in it cannot however, be overlooked.

42. While she claims not to have fully understood or appreciated the contents of the document in these and other respects, that claim in my view, is untenable.

43. It is plain that she had the benefit of independent legal advice. She asserts that Harold Bluestein was selected by Brian, had his fees paid by him and was under his control but that cannot gainsay the fact, as evidenced by the Bluestein letter of 23 May 2005; that she was taken in detail through the document, accepted manuscript changes to it, initialled each page and signed the document in the presence of independent witnesses with whom she was acquainted. Clause 5 expressly records that the parties have taken independent legal advice before signing and Harold Bluestein is named as Annalisa’s legal adviser. Clause 34



also expresses Annalisa's warranties and representations as to her full understanding of the document and her voluntary execution of it.

44. Annalisa in her evidence seems an articulate person, and although a native Italian, is obviously quite fluent in the English language. There is no basis for accepting as she now contends, that she did not fully understand the contents of the document when she signed it.

45. Her seeking to deny the document now can only in my view be to distance herself from its provisions which undermine her case, of which several are telling.

46. Clause 4 deals with financial disclosure and refers to attachments (Exhibits A and B) which respectively contain lists of Annalisa's pre-marital assets and of Brian's pre-marital assets. In neither Exhibit is there any reference to the Property.

47. Most important for present purposes, in Clause 21 under the heading "PARTIES' INITIAL RESIDENCES", it is recognized that as at the date of the "Agreement", the parties were residing at London House, West Bay Road, Grand Cayman but *"they intend to later reside together in a residence located at 2245 West Bay Road, Grand Cayman, Cayman Islands, leased on a year to year basis in both their names from Brian's children"*. This is a clear and indisputable reference to the Property.

48. This Clause 21 cross-references the provision in Clause 15 which describes a *"Housing Fund"* to be established in the *"value range of USD1,000,000"* for



“the purchase of the parties’ own residential property to be held in their joint names,” with any mortgage financing to be cleared off within five years.

49. Clause 21.C goes further to provide inter alia, that in the event Brian (who is considerably older) should predecease Annalisa *“while they are still residing at the Property,”* a fund is to be provided from Brian’s assets to allow Annalisa to acquire different leased premises.

50. Finally, as to the evidential significance of the so-called *“Post-Nuptial Agreement”*, Clause 13 deals with *“anticipated sources of income for the parties during their marriage”*. Clause 13.A is expressed as follows:

“It is understood by Annalisa that Brian currently receives income through a management fee or salary for Brian’s management of real estate and development projects (both underway and in pre-development stages) owned by Brian’s children...Upon completion of such projects, Brian intends to negotiate and enter into a subsequent management agreement with his children to manage the then current assets of his children for a yearly management fee or salary as a source of income.”



51. Clause 13.B goes on to deal with Butler Properties Limited (said to be an important Butler company) and recognises that Annalisa will, in keeping with further provisions in Clause 17, become entitled to 50% of the shares and the income from that company.

52. Further documentation disclosed in the evidence and spoken to by Mr. Broadbent in his testimony, confirm that a company named Puno Investments Limited (“Puno”) was established on 1 May 2006 by Brian for the sole benefit of Annalisa and shares in two other Butler companies (Columbus Investments Ltd. and Beachcomber Developments Ltd.) either transferred or were instructed to be transferred to Puno for the benefit of Annalisa.
53. Just what value or potential value Brother Properties Ltd or Puno has, is not an issue before me now but would arise for examination later at the ancillary divorce proceedings; there for the division of such assets as are properly to be regarded as the matrimonial assets of Brian and Annalisa.
54. The essential question to be answered now is whether the Property belongs legally to the Plaintiffs who hold it beneficially for Michelle, or whether they still hold it beneficially for Brian such that a beneficial interest in it may be declared in favour of Annalisa.
55. Before turning to the analysis of the facts and the relevant law, there is still some further documentary evidence to be noted.
56. These are variations of charges in respect of the five parcels which comprise the Property and which evidence the existence of liens charged against the Property, first in favour of Dunmore Properties Limited as chargee (and as assignee of Ansbacher Bank) dated 8th July 2005, for a pre-existing loan in the amount of USD1,700,000.



57. Later, on 19 February 2009, a “*variation of collateral first charge*” shows that this charged loan was increased by a further loan of USD3,396,904 (for a total loan of USD5 million) secured against the Property but then in favour of Cayman National Bank.

58. Michelle’s evidence is that those loans (or at any rate the bulk of them) were taken to fund the renovations to the Property and Westview, in particular, as the registered owner of the parcels against which the loans are secured, has been and remains liable for their repayment. By reference to this evidence in particular, Michelle rejects Annalisa’s assertions that the money used to fund the renovations of the Property were provided by Brian from his own income - income which Annalisa says should be regarded as the joint income of Brian and herself insofar as it was generated during the currency of their marriage.

59. Whatever its source, the money spent on renovations was well spent as it was disclosed in evidence, that the Property is now listed and marketed for sale at USD15,000,000. It is Annalisa’s continued and exclusive occupation of the Property that the Plaintiffs say has impeded their ability to show the Property for sale to prospective purchasers and the immediate reason why it is important that they should be granted the right to vacant possession of the Property that they claim.



Analysis

60. Annalisa disputes the Plaintiffs’ claim because, among other things as she asserts, “*Brian always referred to the house as our home. I never asked, I was always*

told by my husband that it was his house and our home. That was why in July 2003 we demolished the house and rebuilt it. It was only since the breakdown of the marriage that I learnt that the home is legally owned by Westview”.

61. To support her contention in this regard, she adduced the affidavits of Carol Bourke-Ambekar and Sharon Lexa Lamb as witnesses. These ladies attest to a close social relationship with Annalisa and Brian – one which had them visiting at the Property on a frequent basis. Never, during any of those visits, these ladies attest, did Brian Butler ever suggest that the Property was not the matrimonial home. He rather always referred to it as his and Annalisa’s home. They were “shocked” or “very surprised” to learn that Brian was claiming that the parties did not own the Property, but that it was owned by someone else and that he and Annalisa were merely tenants and/or licencees.

62. Speaking for herself, Annalisa was adamant in cross-examination that she was always made to believe by Brian that the Property was their matrimonial home. Why else – she insisted - would she have spent countless hours giving advice and travelling as far away as to Italy to select materials, for the renovation of the Property?

63. She asserts that she was primarily responsible for the selection of materials for the refurbishing of the house and that her contribution to the project was significant in terms both of time and effort, although she had no money of her own to contribute to the funding.



64. Thus, in essence, her case, in this respect, is based upon the representations she claims were made to her before and throughout the course of the marriage by Brian, that the Property should be regarded as their matrimonial home.
65. I do not doubt that such representations were made.
66. The same impression was taken by others, as suggested by the affidavit evidence of Annalisa's witnesses Lamb and Bourke-Ambekar.
67. I accept that the Property was probably referred to by Brian in the everyday sense as "*our home*" or "*our house*" and this would also have encouraged in Annalisa the sense of affinity and attachment that she claims to have developed.
68. It would not be unreasonable to deduce that the Property was also regarded by Brian himself as the matrimonial home and intended to be so, indefinitely. While there was that reference to an intention to acquire another matrimonial property in the Pre-Post-nuptial "Agreement", there was no evidence of a plan for its realisation in the foreseeable future. While the marriage subsisted, the Property was the matrimonial home and it is reasonable to assume that the underlying legal and beneficial entitlements were not held constantly in mind. The circumstances were such that an expression of "*ownership*" of the Property by Brian in the informal sense, would not have been aberrant.
- As Munby J. observed in a similar context¹:



¹ Faiza Ben Hashem v Abdulhadi Ali Shayif and Radfan Limited [2008] EWHC 2380 (FAM) [131]

“... one has to have regard to the context in which such expressions are being used. Often one can refer to something as "mine" even though one knows very well, and does not intend to suggest anything different, that it actually belongs to someone else. One can invite relatives or friends down to stay at 'my house in the country' even though, as they may or may not be aware, the title to the property is actually vested in some family company or trust in which others also have interests. If a rambler walking across the grounds of a stately home comes across the Tenth Duke of Loamshire and asks 'Are you the owner, do you mind if I walk across your land', he is likely to be given the answer 'yes' to both questions rather than being referred to the trustees of the settlement created by the Ninth Duke.”

69. Brian may well have expressed such sentiments out of a similar sense of patrimony.

70. But if on account of the expression of such sentiments, Annalisa came to the belief that Brian retained and through him that she had acquired a legal or beneficial interest in the Property, she was sadly mistaken.

71. She could have come to that state of mind only in wilful disregard of the contents of the - Pre-Post-nuptial “Agreement”. Nor could she have been in doubt about the history of the Property and its special significance as the Butler family home. The Pre-Post-nuptial “Agreement” is redolent of that history of inheritance and carries the clear implication that the Property was not to be encumbered on account of any matrimonial interests to arise from Brian’s subsequent marriage.



72. Annalisa seeks to diminish these considerations by her further assertion that the duplex had been completely demolished and the Property developed as an entirely new structure, – as if, figuratively, to wipe away the Property’s history.
73. But this too was effectively refuted by Michelle who, in the course of her evidence, was able to show from photographs that the current structure is in reality an expansion of the duplex, occupying not just the footprint of the old foundation, but also the framework of much of the original external walls and of the original roof-line as well.
74. For reasons of the law to be considered below, on the basis of the foregoing findings alone, Annalisa’s claim is bound to fail. She is unable to show any basis for a conclusion that the transfers of the beneficial interests in the Plaintiffs to Michelle - on all accounts effected prior to her marriage to Brian - and with them the beneficial ownership of the Property, was a sham. There simply is no basis for a conclusion that there was anything untoward about the transfers of the shares in the Plaintiffs by her father to Michelle, well before his marriage to Annalisa. These were his assets to dispose of as he pleased – a fact acknowledged by Annalisa herself at paragraph 22 of her first affidavit where she states “*I recognize that Brian can transfer his shares to his daughter*” and at paragraph 20 where she states: “*I have been told by Brian that he rearranged his assets on advice so as to divest himself of his assets in case any further dispute took place over his wealth*” (following his divorce from Cindy Butler.)



75. The statements contained in the Pre-Post-nuptial “Agreement” all of which I find were understood and acknowledged by Annalisa, are, as Mr. Giglioli submits “*on all fours*” with the arrangements that had been put in place by Brian in the middle of 2004 and prior to his marriage to Annalisa.
76. Consistent with those arrangements and the agreement reached with Annalisa, Brian and Annalisa moved into the Property shortly after the renovations were substantially completed in May 2007. This was some 2 ½ years after they were married and after they had already undergone a significant period of separation in what had already promised to be a tumultuous relationship.
77. As part of their reconciliation (both then being mindful of Brian’s commitment to fostering Scott’s education in Florida) it is apparent also from the evidence, that Annalisa and Brian had it in mind to purchase a residence in Miami. Michelle exhibited in this regard, an itinerary of property viewings prepared for the couple by Carole Smith, a Florida realtor.
78. In connection with this, Annalisa and Brian were also working on their financial position in anticipation of their move to Miami while maintaining residency in Grand Cayman. Michelle also exhibited a spreadsheet reflecting their anticipated cost of living, expenses, current income, potential income of Brian to retirement age and taxation and so on; with notes in manuscript on the spreadsheet attributed to Annalisa (but which she denies). The spreadsheet does however, include the projected annual salary for Brian of USD375,000 mentioned in the Management



Agreements. Given its contents, there is in my view, every reason to accept that Annalisa was privy to the discussions evidenced by the spreadsheet.

79. Annalisa and Brian were separated in June 2009, a brief two years after they moved into the renovated Property.

80. When they separated in June 2009, Brian purported to vacate the Property having “requested” an extension of the Licence to allow Annalisa and Alessandra to remain in the house until they both travelled to England, where Alessandra was to be placed into boarding school. Annalisa has since remained in occupation and refused to vacate when the Licence expired on 21 September 2009. The Plaintiffs commenced these proceedings as a result and an application for a vacant possession order was heard and refused by Foster J. in March 2010. Foster J then directed that the possession action be stayed pending the outcome of the divorce action. With leave of the Court, these proceedings were converted to a writ action and the Plaintiffs included a damages claim in connection with Annalisa’s continued occupation of the Property. The directions for hearing were reconsidered and it was determined that these proceedings should be taken and resolved prior to the resolution of the divorce ancillary issues. The outcome now will therefore determine the rights of possession to and beneficial ownership of the Property.



The Law

81. It must be stated that the legal basis upon which Annalisa presents her case is unclear.

82. At the close of her written submissions, Ms. Brooks states that in view of the evidence in the case, *“it is the Defendant’s (Annalisa’s) position that the documentation generated by Mr. Brian Butler to let it appear that he no longer owns the Plaintiffs, and therefore the Property, are sham transactions and that as such, the Property is a matrimonial property and that Ms. Michelle Butler holds the shares in the Plaintiffs as constructive trustees for her father and stepmother, Mr. Brian and Mrs. Annalisa Butler.”*

83. In the Defence and Counterclaim, it is asserted that the beneficial ownerships of the Plaintiffs were transferred to Michelle for no consideration and that Michelle is therefore not a *bona fide* purchaser for value without notice of Annalisa’s asserted beneficial interests in the Property. What is not pleaded however, is the basis upon which it might be said that Brian was not entitled to transfer the beneficial interests to Michelle as he did, prior to the marriage and therefore prior to any possible matrimonial interest accruing in the Property.

84. I have already expressed my conclusion that there is no evidential basis for the finding of a sham transaction in this case.

85. By way of legal emphasis, there simply is no evidential basis for a conclusion that *“all the parties to (the impugned transactions in this case) must have had a common intention that the acts and documents are not to create the legal rights and obligations which they give the appearance of creating.”*



86. Yet that briefly stated, is the test to be satisfied² before a court will be moved to apply the highly pejorative label of “sham” to transactions which appear otherwise to be regular and proper – in this case transactions involving not only Brian Butler and his daughter Michelle as his natural beneficiary - but also an independent lawyer from a reputable law firm giving effect to instructions by a client who had earlier received advice from another independent and highly reputable lawyer.
87. From the available research, it appears that the most recent general analysis of the doctrine of sham was undertaken by the English Court of Appeal in *Hitch v Stone* [2001] EWCA Civ 63. The judgment was delivered by Lady Justice Arden who emphasised at [63] – [69] that the enquiry requires careful analysis and that

“[65] First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of parties.”

Moreover, the test requires an examination of the respondents' intention (in this case Brian's and the Plaintiffs' intention as parties to the transfer of beneficial ownership to Michelle; and Michelle's as the recipient)

And further by Lady Justice Arden:



² See *Snook v London and West Riding Inv. Ltd.* [1967] 2QB 786 per Lord Diplock at 802 C - F

“[66] Second, as the passage from *Snook* makes clear³, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.”

88. Here Annalisa would invite the Court to declare that Brian’s open treatment of and an expressed regard for the Property as their matrimonial home, albeit arising entirely *ex-post facto* the transfer of beneficial ownership to Michelle, reveals the intention to create different rights and obligations from those appearing in the transactional documents and exposes the transfer to Michelle as a sham.

89. In my view, that argument invites the Court to take all too facile an approach to the matter. This approach would not only disregard the transactional documents the legality of which is apparent on the face of them, it would also require a disregard of the plain objective of the transaction - and reportedly so openly stated by Brian - which was to prevent the Property from coming to be regarded in the event of his later remarriage, as a matrimonial asset.

90. There is also precedent for examining whether the ownership of shares in a company represents a sham arrangement.

91. In *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 897, shares in a company were registered in the name of nominees. A director, Mr. Goodman, as

³ That passage partially extracted above at paragraph 85.



the beneficial owner of the shares, executed a deed of gift purporting to give the shares to his cohabitee, Mrs. Fitzgerald. An issue subsequently arose as to whether the gift was a sham. Applying the principles from Snook (above) Knox J. said at page 921:

"Immediately before the deed of gift was executed Mr Goodman was the beneficial owner in equity, subject to the rights of Nat West Bank by way of charge, of the shares in question ... On its face the transaction effected by the deed of gift was an outright gift to Mrs Fitzgerald of that beneficial interest. The deed of gift can only be a sham in my judgment if it is shown that the parties to it intended that Mr Goodman should remain the beneficial owner of the shares comprised in it. That result could theoretically be achieved in two ways. The first would be by showing that the deed of gift was not intended to have any effect at all and the second would be by showing that the deed of gift was intended to effect an assignment of Mr. Goodman's equitable interest and that Mrs. Fitzgerald should hold it upon trust for him."

92. Having noted that the motive of a party to the impugned transaction, or a community of motive of both parties, would be irrelevant; Knox J. also went on to declare that the conduct of the parties subsequent to the transaction can nonetheless be evidence of their true nature (at page 923):

"I return therefore to the question whether the deed of gift was indeed a sham in the sense that neither Mr Goodman nor Mrs Fitzgerald intended it to deprive Mr Goodman of beneficial ownership or confer it upon Mrs



Fitzgerald. How the parties acted after it was executed is relevant to this inquiry although it would not be relevant to any question of construction."

93. An examination of the subsequent conduct of the parties to the impugned transaction here takes Annalisa's case no further.
94. Apart from her and Brian's treatment of and affinity for the property as their matrimonial home (which it was intended to be for at least the 5 year term of the Licence), little else supports her claim.
95. All the formal arrangements are to the contrary – flowing from the transfer itself of beneficial interest to Michelle; the Licence, the Management Agreements and the Pre-Post-nuptial "Agreement"; all are consistent with Brian's efforts and intention to insulate the Property from becoming a matrimonial asset or becoming liable to US tax. The very fact that he was entitled to enter into these arrangements and did so openly, belies the allegation of sham.
96. In the face of those formal or legal arrangements, Annalisa nonetheless invites the Court to find that the artificial nature of the relationship created by them is evident from the following:
- (i) That the Licence was concluded in circumstances where there was no bargain or consideration which would explain why Brian as Licensee would agree to it;
 - (ii) None of the arrangements were commercial or concluded at arm's length;



- (iii) Michelle is someone with whom Brian does have and would be presumed to have a close relationship of trust and confidence which would render the subterfuge of a sham viable;
- (iv) The absence of any consideration supporting Michelle's acquisition of her purported beneficial interest in the Property;
- (v) The subsequent increase of the loan secured by way of charge as Annalisa alleges, against the Property to benefit not only the chargors themselves but, Brian's other companies as well; and
- (vi) Michelle's previously demonstrated willingness to assist Brian in his earlier divorce proceedings in transferring his property.

97. As to the first five of these concerns, the short answer is the same as that already recognised: there is nothing untoward or surprising about a father wishing to preserve a long-standing family asset by transferring the beneficial interest in it to his daughter even if, thereafter, the asset is to be regarded by them as available as leverage for financing for the commercial undertakings of the family business. Here there is every good reason for recognising a presumption of advancement in favour of Michelle as the daughter of her father – the transferor. In my view, this would be so notwithstanding any subsequent mutual dealings with the asset, involving father and daughter, aimed at enhancing the family's financial position as a whole, including the daughter's. See, for an authoritative explanation of the workings of the presumption, *Shephard v Cartwright* [1955] AC 431. And while the presumption is capable of being "*readily rebutted by comparatively slight evidence*" to reflect the practical forensic realities of today's world (per Lord



Upjohn in *Pettitt v Pettitt* [1970] AC 777 at 814) – the presumption will carry the day where, on the totality of the evidence, there is no real basis for doubting it.

98. No such basis, in my view, has been shown by Annalisa in this case. On the contrary, the very nature of the relationship between father and daughter and the history of the Property as family inheritance support the applicability of the presumption of advancement.

99. As to the sixth consideration – in the final analysis, Michelle’s role as intermediary in the transfer to Cindy Butler has not been impugned as being improper in anyway. Apart from mere conjecture in arguments, there was no evidence about it. Neither Brian nor Cindy Butler was summoned to give evidence about it (as they could have been by Annalisa, if she so wished).

100. For the present purposes of determining the genuineness or otherwise of the transfer of beneficial ownership in the Property to Michelle, that earlier transaction is simply irrelevant.

101. In arriving at my decision in the matter, I recognise of course, that attempts by husbands to distance themselves from their assets for the purposes of making themselves judgment-proof in divorce proceedings are an all too frequent phenomenon in the Courts. Such concerns – which reflect the practical forensic realities of modern litigation mentioned above – have elicited the opprobrium of experienced judges, expressed in clear and strident terms. In *A v A* [2007] EWHC



99 (FAM) Munby J. said at para 18 (repeating words earlier expressed by him in Re W (Ex Parte Orders) 2000 2 FLR 927 at 938:

"the court will not allow itself to be bamboozled by husbands who put their property in the names of close relations in circumstances where, taking a realistic and fair view, it is apparent that the recipient is a bare trustee and where the answer to the real question – Whose property is it? – is that it remains the husband's property."

He went on to refer to:

"the robustness with which the Family Division ought to deal in appropriate cases with husbands who seek to obfuscate or to hide or mask the reality behind shams, artificial devices and similar contrivances. Nor do I doubt for a moment the propriety and utility of treating as one and the same a husband and some corporate or trust structure which it is apparent is simply the alter ego or creature of the husband."

102. But this does not mean, as the Learned Judge went on there (at para 19) still further to acknowledge, that the court can *"simply ride roughshod over established principles, or clear legally established rights, least of all where there are, or appear to be, third party interests involved"* – such as the case here with Michelle's claim to being the beneficial owner of the Property.



103. Nor is there any basis for *"piercing the corporate veil"* of the Plaintiffs (in the sense of disregarding their separate legal personalities) as if they remained

beneficially vested in Brian and had been used as a façade or as his alter ego for the perpetration of an impropriety. See again, for an application of this doctrine in the matrimonial context *Faiza Ben Hashem v Abdulhadi Ali Shayif and Radfan Limited* (above) and approved, most authoritatively by the Supreme Court in *Prest v Petrodel Resources Limited and others* [2013] UKSC 34 per Lord Sumption at [27] and [35] and per Lord Clarke at [103]. At [35] Lord Sumption concluded that:

“... there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.”

104. Annalisa’s case is premised upon no “*legal obligations or liability or legal restriction*” that pre-existed the transfer of the shares in the Plaintiffs and with them, the beneficial ownership of the Property to Michelle. Her subsequent marriage to Brian established no such thing.

105. There is therefore, no basis for disregarding the separate legal personalities of the Plaintiffs, so as to regard them for these purposes, as Brian’s alter egos.



106. Those being my conclusions, there is no basis either for Annalisa's claim to a "common intention constructive trust" over the Property, in the sense explained in *Lloyds Bank v Rosset* [1991] 1 AC 107 and in *Stack v Dowden* [2007] 2 AC 432; and as applied by this Court in *CIBC v Christiansen* [2008] CIRC 103 and most recently in *Sainz-Ebanks v Ebanks, Cruz (Intervening)* GC Cause: FAM 2 of 2012; unreported judgment delivered 4th September 2014.

107. There can be no common intention constructive trust imputed as between herself and Brian and attaching to the Property in favour of Annalisa, in circumstances where, as I have found; the beneficial entitlements to the Property had been transferred to Michelle well prior to the marriage.

108. The conclusion can only be that Annalisa has no beneficial interest in the Property. The Plaintiffs are found to have established their right to possession of the Property being immediately surrendered by Annalisa and it is so declared.

109. In light however, of her occupation of the Property as Brian's wife and "invitee" carried over to conclusion of the divorce and now instead to the conclusion of these proceedings by virtue of the order of Foster J; I do not find that Annalisa is liable for "mesne profits" as claimed by the Plaintiffs in respect of licence fees.

110. I am not persuaded that the Plaintiffs would in actuality pursue any such claim as against Brian himself. As his invitee holding over by virtue of an order of the Court, Annalisa can have no separate liability either in contract or tort. In light of Foster J's order, nor may she be treated as a mere trespasser.



111. I make no findings as regards the damage claimed in respect of the swimming pool said to have been the result of electricity being disconnected while Annalisa was in occupation. This is said to have cost some six thousand dollars to restore. The enquiry before me simply did not allow for any clear conclusions on this issue.
112. I also consider given all the circumstances, that the parties should bear their own costs of these proceedings.
113. Having come to these conclusions in this matter, it is to be emphasized however, that the task of the Judge who will determine the remaining dispute between Annalisa and Brian as to what comprises matrimonial assets and their fair disposition, will be very different in nature from the task undertaken by me here.
114. Here I have made no determination for instance, as to the extent to which the assets of the Butler family companies might be available to Brian for the purposes of determining the disposition of matrimonial assets as between himself and Annalisa. Nor have I determined any question as to the extent to which the monies used for the renovation and refurbishing of the Property might have included Brian's income generated during the short course of the marriage, as distinct from monies loaned by the bank(s). Or whether, in the same vein, matrimonial income might have been paid or may be due to Brian on account of his management services provided to the Plaintiffs (or other interests in Butler companies). Such matters will have to be determined, in which context the Court will no doubt be guided among other factors, by the principles of the Matrimonial



Causes Law, as explained as being applicable to corporate entities, most authoritatively in *Prest v Petrodel* (above).

Dated 3rd day of October 2014


Hon. Anthony Smellie
Chief Justice

