OUTER HOUSE, COURT OF SESSION

[2019] CSOH 102

F148/14

OPINION OF LORD BANNATYNE

In the cause

O B

Pursuer

against

A B AND ANOTHER

Defenders

Pursuer: Mr Beynon; Drummond Miller LLP
First Defender: Mr Aitken; Balfour + Manson LLP
Second Defender: Unrepresented

11 December 2019

Introduction

[1] This is an action of divorce in which the parties were married on 2 August 2007 having met in Samara, Russia in August 2006. They finally separated on 22 May 2010 which is the "relevant date" for the purposes of the Family Law (Scotland) Act 1985 ("the 1985 Act"). There is one child of the marriage born on 29 December 2007. The pursuer has always had the care of the said child since the parties separated. The first defender has not exercised contact with the child since in or about July 2014. In December 2014, the interlocutor of 15 April 2011 (which had awarded him certain contact) was varied *ad interim*

to reduce contact to nil. There are now no live child related issues in this or the remitted action.

[2] As respects the merits of the divorce, it was not a matter of dispute that decree of divorce should be granted. I am satisfied on the affidavit and documentary evidence before me that decree of divorce can properly be pronounced in terms of the first conclusion of the summons. So far as the conclusions which remain for consideration they are two in number: in terms of conclusion two the pursuer seeks a capital payment of £500,000 and in terms of conclusion 10 a declarator is sought that

> "since their incorporation and on an uninterrupted and continuing basis the second defenders have been, and remain, under the sole control of the first defender; that, as at the date of the first defender's sequestration, he was the sole true shareholder in the second defenders and that at the same time that property vested in the first defender's permanent trustee."

[3] The second defenders are a trust, namely: "S I C". The second defenders, although a party to the action were not represented at the proof. Prior to the proof they had advised the court that they would not be represented at the proof and were advised by the Lord Ordinary of the possible consequences of that decision.

Background

[4] The following background relative to the parties' financial positions was a matter of agreement:

- On 8 April 2002, a hotel company "C" was established. Production 7/58 comprises the Memorandum of Association of the company. A single share was issued in respect of the company. The single share was issued to the first defender. C was dissolved on 8 April 2014. Production 6/19 comprises Company

House documentation relative to C. Production 7/105 comprises a letter from Companies House to the Directors of C dated 25 March 2011.

- Productions 7/43, 7/42, 7/41, 7/40, 7/39, 7/38 and 7/37 are, respectively, the profit and loss accounts for C for years ending 31 July 2003, 31 July 2005, 31 July 2006, 31 July 2007, 31 July 2008, 31 July 2009 and 31 July 2010. A copy of the profit and loss account for year ending 31 July 2004 is not lodged but the profit and loss for that year is as set out in production 7/42 (year ending 31 July 2005 which contains the previous year's figures). Production 7/7 is an annual return relative to C dated 10 April 2011.
- Productions 7/44, 7/45, 7/46 and 7/47 are, respectively, notes to the financial statements for C for years ending 31 July 2004, 31 July 2005, 31 July 2008 and 31 July 2011.
- Prior to the pursuer and first defender's separation, the pursuer was employed by C. She was paid the sum of £1,000 for tax year 2007/08, £970.52 for tax year 2008/09 and £5,343.29 for tax year 2009/10. This was her sole income in those tax years. She paid no tax on these sums. Production 6/17, page 24 is a letter from HMRC dated 7 March 2012 confirming that their records of the pursuer's employment history record payments in these sums. Production 7/20 comprises receipts dated 27 April 2007, 29 May 2007 and 16 July 2007 in respect of payments made to the pursuer for work at the S Hotel. Productions 7/94 and 7/95 are copies of the pursuer's P60s for, respectively, tax years 2009/10 and 2008/09. During the period of the marriage, the first defender was not paid a salary by C or any other employer. Production 7/104 comprises a letter dated 21 June 2012 from C's accountants for the period from May 2008, Accounting

Freedom, confirming that in the period from when they assumed accountancy responsibilities, the first defender had not received any income from the company.

- In the year ending 31 July 2003, C purchased the R Hotel. In the year ending 31 July 2006, C sold the R Hotel. Production 7/25 comprises a statement from Johnston Carmichael, accountants referring to year ending 31 July 2006. The amount received by C upon the sale of the R Hotel during that year was £438,749.81.
- In the year ending 31 July 2007, C purchased the S Hotel. Production 7/60 is a letter dated 31 August 2006 from the solicitors, Brown and McRae who represented C in the purchase. The purchase price paid was £225,000 made up of a payment (to include outlays) by C in the sum of £68,000 and a business loan to C by Lloyds TSB in the sum of £158,000. Production 7/1 is a land certificate relative to title number ABN72631 relative to the S Hotel updated to 21 December 2006. Productions 6/5 and 7/2 are land certificates relative to title number ABN72631 relative to the S Hotel updated to 4 December 2012. Title to this property did not alter during the period after the marriage between the pursuer and the first defender and the relevant date. As at the relevant date, the sum outstanding in respect of the said business loan was £103,024.17. Production 7/55 comprises statements in respect of the said account between 12 July 2010 and 5 October 2010.
- In the year ending 31 July 2007, C purchased the S A Hotel. Production 7/107 comprises letters and a state for settlement dated 10 July 2007 and 31 July 2007 from the solicitors, Brown and McRae, who represented C in the purchase. The

purchase price (to include heritable property and fixtures and fittings) paid was £172,000. Title to this property did not alter during the period after the marriage between the pursuer and the first defender and the relevant date.

- On 17 June 2002, the first defender had an account with Egg. The credit balance of that account on the date was £275,000. On 8 August 2002 the first defender paid the sum of £195,000 from that account to purchase the R Hotel as an asset for C. On 12 August 2002, the first defender paid a further £25,000 from that account as operating capital for C in respect of the Hotel. Production 7/106 is a copy of the said Egg account statement for the period 17 June 2002 to 14 June 2003. Production 7/65 is correspondence from Donaldson and Co solicitors dated 11 August 2002 in respect of the purchase of the Hotel.
- On 9 February 2004, the first defender opened an account with ING Direct ("the First Defender's ING account"). On 1 March 2004, the first defender paid the sum of £194,086.70 into that account. On 3 February 2006 the sum of £483,749.82 was paid into that account resulting in a credit balance of £684,548.13 at that date. The £483,749.82 credited on 3 February 2006 came from the sale of C's asset, the R Hotel. Thereafter, further payments were made by the first defender into the first defender's ING account such that by 30 May 2006, the credit balance of the account was £741,078.20. Production 7/54 comprises copies of the account statements between 9 February 2004 and 30 May 2006.
- On 1 November 2006, the first defender received the sum of £209,004.04 as the surrender value of a Lincoln Financial Group policy. The sum was paid into the first defender's ING account. Production 7/14 is a copy of a letter from Lincoln confirming the payment.

- On 28 January 2007, the first defender received a payment from Aviva in respect of a matured policy; the maturity value of which was £1,170.25. On 14 October 2007, the first defender received a payment from Aviva in respect of a matured policy, the maturity value of which was £13,028.45. Production 7/48 is a letter dated 28 September 2011 from Aviva in respect of these payments.
- Between 10 April 2007 and 27 June 2007, AXA Insurance paid the sum total sum of £115,500 to C being £15,000 on 10 April 2007, £10,500 on 26 April 2007, £35,000 on 16 May 2007 and £55,000 on 27 June 2007. Production 7/15, page 1 is an email from AXA in respect of these payments. Production 7/15, pages 2 - 4 are copies of C's bank statements for 2 April - 30 May 2007 and for 2 to 19 July 2007.
- During the pursuer and first defender's marriage, they jointly operated a bank account with Royal Bank of Scotland ("the joint RBS account"). They operated this from 19 September 2007 and until 14 June 2010. Production 6/31 comprises statements from this account. As at the relevant date, the credit balance in the account was £101.99. On 24 May 2010, the pursuer withdrew £201.99 from the account. She further withdrew sums totalling £900 between 7 and 9 June 2010. Production 7/109 is a letter dated 12 October 2010 from the Royal Bank of Scotland concerning this account.
- With reference to statement 30 in Production 6/31, on 22 September 2009, the sum of £982,409.80 was paid into the joint RBS account by the first defender. On 25 September 2009, the sum of £995,020 was transferred out of the joint RBS account and paid into an account in the first defender's sole name.

- At the relevant date, the first defender held a First Direct account. The credit balance of this account at the relevant date was £31.88. Production 7/56 comprises a statement for this account as at 3 April 2010.
- At the relevant date, the first defender held a Citibank Flexible Saver account in his sole name ("the First Defender's Citibank account"). On 28 September 2009, the sum of £1 million was credited to this account. This was the same money as had been paid into and then withdrawn from the parties' joint RBS account on 22 and 25 September 2009. The credit balance of the first defender's Citibank account at the relevant date was £816.69. Production 7/27 comprises statements from Citibank for the first defender's Citibank account dated between 22 September 2009 and 28 February 2010. Production 7/26, page 2 comprises the statement of the first defender's Citibank account for the period 1 March 2010 to 31 March 2010. Production 7/57 comprises the statement of the first defender's Citibank account for the period 1 May 2010 to 31 May 2010.
- At the relevant date, the pursuer held a Citibank Citigold Flexible Saver account in her sole name ("the Pursuer's Citibank account"). The credit balance of the said account between October 2009 and March 2010 was nil. On 26 March 2010, the sum of £1 million was paid into the account. The credit balance of this account at the relevant date was £1 million. Production 6/21 comprises statements from Citibank for the pursuer's said account dated between October 2009 and September 2010 together with a covering letter of 11 January 2011 (erroneously dated 11 January 2010).
- The source of the £1 million transferred into the pursuer's Citibank account on 26 March 2010 was the first defender's Citibank account.

- On 19 July 2010, the sum of £1 million was transferred out of the pursuer's Citibank account and paid back into the first defender's Citibank account.
- On 30 July 2010, the first defender paid the sum of £1 million from his Citibank account to his daughter N M. She is the child of a previous marriage of the first defender. Production 7/26, page 1 comprises a letter from Citibank dated 2 August 2010 confirming that transfer. Production 7/26, page 5 comprises the account statement for the period 1 July 2010 to 31 July 2010 in respect of the first defender's Citibank account.
- The second defenders were incorporated on 8 August 2012 whose records show that their director and sole shareholder was K W who was resident in Thailand. Production 6/27 is a certificate of incumbency relative to the second defenders. (The pursuer not being in agreement that K W was the true director and shareholder.)

Submissions on behalf of the pursuer

[5] The formal motion made by Mr Beynon was: for decree in terms of conclusions 1, 2 and 10, to sustain the pursuer's relative pleas-in-law and repel those of the first defender and thereafter put the case out by order to enable the second defenders to make submissions as they may elect to do at that stage.

[6] In respect to the conclusions seeking the capital sum and declarator Mr Beynon accepted that these conclusions are interlinked.

[7] He submitted that the court should make three findings in respect of these conclusions:

- The hotel property business from the date of marriage until the relevant date was that of the first defender on a sole basis;
- Thus the RBS deposits were and remain matrimonial property, and
- The deposit of the £1 million into the pursuer's sole bank account at Citibank was a gift; prior to and remaining there at the relevant date. Removal or transfer, on the basis of the pursuer's affidavit, was wrongful and the first defender's affidavit confirms this. His assertions on the source of these funds should be rejected as incredible and unreliable.

[8] Mr Beynon contended that C, was at all times, a company owned and controlled solely by the first defender, ie prior to its dissolution. The purported gifts by the first defender of his substantial assets to his adult daughter N M, and the second defenders apparent status as the heritable proprietor of the S Hotel and the three flats in town F for the benefit of the discretionary trust in the Seychelles, were and remain sham transactions.

[9] He invited the court to "pierce the corporate veil" because "it is apt to pierce the corporate veil only where it is a mere façade concealing the true facts." In the present case it was clear that there was such a façade concealing the true facts.

[10] The first defender's affidavit confirms that a gift was intended and made by him so no presumption against a donation arises.

[11] Mr Beynon conceded that in terms of the issue of resources, the pursuer, if necessary, may have to bring further proceedings against the second defenders and the first defender's trustee. However it was his position that subject to such actions resources subsisted.

[12] Mr Beynon submitted that the pursuer's case should be preferred on credibility and reliability.

[13] The first matter of materiality in respect of credibility and reliability was he argued this: was the parties' marriage entered into on a genuine basis or was it done by the pursuer motivated solely or mainly by the prospect of benefiting from the first defender's wealth (the latter being the first defender's position)? He contended that the answer to the first part of the question was yes and the second part of the question no.

[14] In development of his position he argued first that the evidence establishes that the first defender was interested in pursuing a relationship with an English speaking person and that he met up with a number of much younger Russian women including the pursuer, on his 10 day trip to Samara in mid-2006. He elected to proceed with the pursuer at all stages. The court he submitted should hold that he presented as a strong and determined character whilst the pursuer was clearly the more timid and reserved party. The number of foreign holidays they spent together, including the Turkish one so soon after their first meeting he submitted established that the parties generally speaking, must have enjoyed and benefited from each other's company. He submitted that there was no basis for the argument that the pursuer was motivated solely or mainly by greed; and he submitted that this argument should be rejected. He in particular drew the court's attention to the fact that there was no evidence that the pursuer gained anything, in particular financially from the marriage for example cars, jewellery, clothes etc. Rather the opposite had been proved.

[15] He submitted that the next question was whether C and then S I C were truly the sole property of and under the sole control of the first defender. He submitted that the answer to this question should be in the affirmative.

[16] In development of this contention he advanced the following points:

- The first defender's chronology and account relative to both companies and the pursuer's UK immigration history is incredible and wholly implausible;

- His completion of the application 6/23 supports wholly the pursuer's argument to pierce the corporate veil;
- There is a total lack of explanation relative to the second defenders from either them or the first defender;
- There is a complete lack of vouching relative to any lease of the flat at the hotel by the second defenders to the first defender;
- The very high, unexplained administrative expenses in C's accounts (7/122) is highly suspicious relative to gross turnover.

[17] On the transfer by the first defender to the pursuer's sole name Citibank account, he submitted that the court should hold on the basis that (1) the first defender's affidavit that he made the transfer willingly and with the awareness that it would be under the sole control of the pursuer and (2) that the transfer was completed and that effectively any presumption against donation did not arise or separately, is rebutted.

[18] Turning to the credibility and reliability of the pursuer Mr Beynon submitted that she was a wholly satisfactory and straightforward witness. The first defender he simply described as being exactly the opposite.

[19] He submitted that the failure by the first defender to vouch his asserted material disabilities was worthy of negative comment.

[20] For the foregoing reasons he submitted that I should reject all of the defenders' arguments.

Reply on behalf of the first defender

[21] Mr Aitken's formal motion in respect of the matters which were in issue was: to repel the pursuer's second plea-in-law, uphold the first defender's first plea-in-law and

therefore dismiss the pursuer's conclusion for financial provision on divorce and to repel the pursuer's fifth plea-in-law, uphold the first defender's third, fourth and fifth pleas-in-law and accordingly dismiss the pursuer's tenth conclusion for declarator in respect of S I C.

[22] Mr Aitken commenced his submissions by advancing a series of propositions which he then sought to develop in separate chapters.

[23] His first proposition was this: the conduct of the parties towards each other during the course of the marriage is of limited relevance and of no direct relevance to the two conclusions which are in dispute. I have no difficulty in accepting this broad proposition as it clearly reflects the terms of section 11(7) of the 1985 Act. No claim is made by the pursuer based on either section 9(1)(d) or (e).

[24] Mr Aitken's second proposition was this: an assessment of the first defender's current resources, in itself, provides a complete answer to the issue of financial provision on divorce. It was Mr Aitken's position that the first defender had no resources to pay a capital sum. Accordingly no award could be made.

[25] He began his detailed submission in support of the above by referring to section 8(2) of the 1985 Act which provides:

> "(2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—
> (a) justified by the principles set out in section 9 of this Act; and
> (b) reasonable having regard to the resources of the parties."

[26] He submitted that sections 12 to 15 do not change the import of section 8(2)(b) of the 1985 Act regarding the relevance of the resources of the parties. Irrespective of what order may be justified by the principles in section 9, the resources of the parties act as a limitation preventing the making of an order which is not reasonable having regard to the resources of the parties.

[27] Turning to the evidence regarding the first defender's resources he referred to the following: the first defender gave evidence that he has no capital assets, and had only limited income. He addressed this issue further in his affidavit dated 12 September 2018, part 87 of process at paragraph 72. As addressed in that paragraph of the affidavit, production 7/52 being a schedule of income and production 7/53 and 7/112 being bank statements and correspondences in respect of income are relevant. He also directed the courts' attention to the first defender's affidavit dated 25 July 2019 part 97 of process at paragraph 9 in respect of outgoings for lease payments and paragraph 15 in respect of his income on an up-to-date basis. The associated documentation identified in the paragraphs of the affidavits is supportive of this position. He pointed out that other than in respect of potential ownership of S I C, his evidence in respect of this was unchallenged.

[28] In respect to the declarator sought by the pursuer he noted that given the terms of it if the declarator was granted, the capital asset in the form of S I C would not now vest in the first defender. Accordingly S I C's capital is not a resource available to the first defender from which he can pay a capital sum. Either, it is not his property and never has been or it is to be vested in his permanent trustee. In any event, even if S I C was an asset which could be considered as a resource, the pursuer has not led any evidence of the current value of that asset. The court does not know the value, if any, of S I C's assets or, even, the current extent of these. Mr Aitken pointed out that the pursuer has not sought to set aside any transaction made by the first defender or engage the anti-avoidance provisions of section 18 of the 1985 Act.

[29] In conclusion under this head he submitted that the import of section 8(2)(b) of the 1985 Act could not be overlooked. Irrespective of what order may otherwise be justified by the principles of section 9, if the first defender does not have the resources to pay a capital

sum, it cannot be reasonable to order that he do so. The resources issue he submitted provided a complete answer to the issue of financial provision on divorce.

[30] The next proposition advanced by Mr Aitken was this: in the event that the court considers it necessary to consider whether a capital sum should be paid, the pursuer's case rests entirely on the section 9(1)(a) principle. The other principles in section 9(1) are not relied upon by her. This was clear from the pursuer's first plea-in-law. There is as I understand it no dispute in respect of this submission. This he said was consistent with the terms of her affidavits which made clear that she was seeking a fair sharing of matrimonial property as opposed to a payment under any wider principle. This submission was made under reference to paragraphs 6 and 7 of her affidavit dated 23 November 2017, part 66 of process and paragraphs 11 and 12 of her affidavit dated 11 September 2017, part 85 of process.

[31] It follows from the above that the court's task is therefore limited to assessing the section 9(1)(a) principle. The factors in section 11(2) to (6) of the 1985 Act, which applied to the section 9(1)(b) to (e) principles are not engaged in respect of her pursuing her claim. Her claim was therefore based upon an equal sharing of the £1 million in the pursuer's Citibank account.

[32] The next proposition advanced by Mr Aitken was this: The court should establish whether the £1 million in the pursuer's Citibank account at the relevant date belonged to either one of the parties or whether it belonged to C. He then proceeded to advance detailed submissions setting out what the court should hold on the basis of the evidence regarding the above issue.

[33] He began this part of his submissions by directing the court's attention to what he submitted the section 9(1)(a) principle concerned: fair sharing of the net value of the

matrimonial property. He then went on to argue that the court does not have free rein when determining what is fair. The provisions in section 10 of the 1985 Act direct the court in its determination of what is fair. From a proper understanding of this provision the court requires to:

a. Establish the "relevant date", being the date in terms of section 10(3), upon which the parties' ceased to cohabit and

b. Establish the extent of "the net matrimonial property" at the relevant date. This is done under reference to the definition of "matrimonial property" in section 10(4) and having regard to the amount of debt in terms of section 10(2). In particular section 10(4) provides:

> "'the matrimonial property' means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—
>
> (a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or
>
> (b) during the marriage but before the relevant date."

[34] Turning to the evidence in this case he noted that the relevant date is agreed to be 22 May 2010. Given that date irrespective of whether C belonged to the first defender or not, it and its capital assets were acquired by the owner of that business prior to the marriage. This is conceded by the pursuer in respect of the S Hotel and the flats in town F, her affidavit dated 23 November 2017, part 66 of process at paragraph 6. Despite the pursuer's protestations in her evidence, it is also the evident position in respect of the S A Hotel and associated buildings which were acquired on 20 July 2007 being two weeks prior to marriage. See production 6/6 being the land registration document and production 7/107 being the solicitors' correspondence at paragraph 13 of the joint minute of agreement.

[35] Turning to the pursuer's case he described it as relatively straightforward. Her position is that there was £1 million of net matrimonial property at the relevant date being the sum at credit in her Citibank account. She seeks equal sharing of that.

[36] As a starting point, the first defender's response is that the £1m did not belong to either party. It belonged to C. As it did not belong to either party, it was not matrimonial property. In support of this position, the first defender relies upon the following:

a. C was established on 8 April 2002 (JMA, paragraph 7), four years prior to the parties meeting. Having been set up via an internet company, within a week the sole share was transferred from the first defender's name to N M; see the eighth - tenth pages of production 6/19 being Companies' House records and agreed to be those records in paragraph 32 of the JMA. Neither the date of the transfer of the sole share nor the validity of the document transferring the share was challenged in the evidence and no such suggestion was put to the first defender in cross examination.

b. With the sole share being held by N M, C is not the property of either party. Given that this state of affairs came into being four years before the parties met, it is not something which the first defender did to alienate assets to put them beyond the reach of the pursuer.

c. A Deed of Trust was entered into between N M and the first defender on 8 February 2002 (the date of the establishment of the company), production 7/13. It was not suggested in cross examination of the first defender that this was anything other than a true document entered into on that date. In terms of that Deed of Trust, the first defender was empowered to act on C's behalf to maintain

C's assets and money in bank accounts and to move it around in his discretion (see paragraph A of the Deed of Trust).

d. In exercise of those powers the first defender moved C's money around bank accounts. The pursuer herself gave evidence that the takings from C were paid into the parties' joint bank account.

e. The first defender provides a detailed explanation of how the fund of money was created in paragraph 11 to 24 of his affidavit dated 12 September 2018, part 87 of process. His detailed position is supported by the documents referred to in those paragraphs. Further this explanation was not challenged in cross examination and is consistent with paragraphs 14 to 18 of the JMA. The estimated balance at the time of marriage was £847,837.

f. There is no suggestion from either party that either of them came into any capital during the marriage which would have created this fund. Neither party had sufficient other income to create it. The pursuer's limited income is set out in paragraph 10 of the JMA. As confirmed in that paragraph, the first defender had no salary from C. His income was limited to his pension, disability benefits and war payment (see paragraph [4.2] above).

g. In all the circumstances, this fund was C's asset. Although the first defender transferred it into the pursuer's Citibank account, he was not transferring property which belonged to him, he was transferring property which truly belonged to C and was doing so in accordance with the powers in the Deed of Trust. Transferring it in this way to the pursuer did not change ownership of it.

h. The money was paid to N M shortly after it was transferred out of the pursuer's account, see paragraph 26 of the JMA and the documentation referred to therein.

i. If the court accepts that the money belonged to C as opposed to it being the first defender's personal asset, then the pursuer has no claim to share in its value. She seeks a fair sharing of the matrimonial property and the asset is not matrimonial property.

j. It is instructive to note that this analysis does not depend upon C being owned by N M. Even if the court was to find that the first defender owned C despite the unchallenged existence of a share transfer document from 2002, if the £1m belonged to C and not to the first defender as an individual, it is not matrimonial property. The first defender's acquisition of C would have pre-dated the marriage by at least five years. Property acquired pre-marriage is not matrimonial property.

[37] The next section of Mr Aitken's submissions related to the necessity for the court to establish the extent of the net matrimonial property. I did not understand it to be a matter of contention that if the £1 million did not belong to either party and on a proper legal analysis was not matrimonial property then the first defender owed £94,000 to C and accordingly the net matrimonial property figure would be a negative one. The pursuer would accordingly not have any claim.

[38] On the other hand if the court concluded that the £1 million did belong to one of the parties at the relevant date and was acquired by that party during the marriage thus rendering it matrimonial property then the net matrimonial property would be £906,950.56. I do not understand that this figure is disputed by the pursuer.

[39] The second broad chapter of Mr Aitken's submissions, put forward a series of alternative arguments and dealt with the situation where the court found contrary to the

first defender's primary submission that the £1 million is matrimonial property, namely: it belonged to one or other of the parties and not C.

[40] Mr Aitken's first proposition in this section was this: the court requires to consider whether any special circumstances apply which justify the net matrimonial property being divided in other than equal proportions. He went on to develop his argument as follows: in terms of section 10(6) of the 1985 Act, net matrimonial property may be divided in other than equal proportions if "special circumstances" apply. One of the identified special circumstances in the non-exhaustive list is that "the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the income or efforts of the persons during the marriage". Turning to the situation in the present case he submitted that, if the £1 million is to be considered to be matrimonial property, it should not be divided equally as it, or at least the vast majority of it, existed pre-marriage, indeed, it existed before the parties even met. In cross-examination the pursuer conceded that £846,000 existed pre-marriage, that this formed part of the £1 million and that this was not created by the income or efforts of the parties during the marriage. This concession confirmed the existence of the first defender's "special circumstances" argument.

[41] There was no material dispute as to the sum that existed at the date of marriage. The pursuer had put this figure at £846,000. The first named defender calculated it at £847,837.

[42] Mr Aitken conceded that the existence of such a special circumstance did not automatically lead to an unequal division but, he submitted that it must be taken into account by the court in order for the court to consider whether, in the whole circumstances of the case, the special circumstance justifies unequal division.

[43] Each case in respect to the issue of special circumstances turns on its own facts, however, he submitted that there was a useful discussion of the principles to be considered by Sheriff Morrison in *Harris* v *Harris* 2013 Fam LR 122 at paragraph 33.

[44] Mr Aitken then turned to advance a number of factors which he submitted were relevant in this case when considering the issue of special circumstances.

- It is wholly accepted by the pursuer that the fund was not acquired due to the income or efforts of the parties during the marriage. She took no part in its creation and it was entirely in existence before the parties even met.
- If the £1 million had not been transferred to the pursuer eight weeks before separation, it would not have constituted matrimonial property and the pursuer would not have had any claim upon it at all. It is only the transfer into the pursuer's name (and hence acquisition by her) which results in an acquisition of the property to make it matrimonial. Had it remained in the name of the first defender, his acquisition of it would have been pre-marriage. All he did subsequently was move it about. That does not change the time of acquisition, extrapolating the "continuity of the shareholder's position" in Lord Osborne's decision in *Whittome* v *Whittome (No 1*), 1994 SLT 114 at 125 A - E.
- The marriage was of short duration.
- As per Sheriff Morrison's sixth proposition, "the justification for an unequal division will be very strong where the matrimonial property is to a large or substantial extent derived from the funds of one party before marriage". In the present case, if the £1 million is considered to be matrimonial property, given the otherwise negative value of the matrimonial property, the entire matrimonial property would have been created by pre-marriage assets, and

- Although it is not an essential element of the argument, the marriage was a sham in which the pursuer set out to secure funds from the first defender, separating from him within weeks of doing so and then seeking a substantial share in his pre-marriage wealth.

[45] Mr Aitken's position having regard to the above factors was that any matrimonial property should be divided in an unequal manner, so that the result was that there was no award made to the pursuer.

[46] Mr Aitken's next proposition was this: the court must also consider whether the pursuer has been economically advantaged by a contribution from the first defender and conversely if the first defender has been economically disadvantaged in the interest of the pursuer. Then the question was, if so, what account should be taken of that?

[47] This submission was made under reference to section 9(1)(b) of the 1985 Act. This provides:

> "fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family".

It includes gains in capital, any income and any earning capacity.

[48] In respect to the present case Mr Aitken submitted that if the pursuer is awarded a capital sum based on the existence of the £1 million fund then this would have occurred due to a reduction in the first defender's capital and an increase in the pursuer's capital due to that contribution.

[49] He accepted that there was a clear overlap between the considerations in terms of this section of the act and the source of funds argument which he had just advanced. However, having regard to both it made the position even more stark. It strongly supported the view that no capital award should be made to the pursuer.

[50] Mr Aitken then turned to consider the issue of whether the marriage was part of a scam perpetrated by the pursuer. It was his position that the first defender's argument in terms of the last two chapters would be materially strengthened were the court to find that such a scam had been perpetrated. He submitted that the court should hold that a scam had been perpetrated for the following reasons:

- In the pursuer's evidence, she asserts that the parties met by chance on a river embankment in Russia when the pursuer, a foreign man, approached her. She was aged 22. He was aged 47. She gave him her contact details and went for coffee with him the next day. She then agreed to go to Turkey for a two week holiday six weeks or so later. She accepted a proposal in marriage on the second day of that holiday being the fourth day of being in the company of the first defender. While not impossible, this is incredible and sits unfavourably compared with the first defender's version of events which is supported by documentation.
- The first defender asserts that the parties made contact through an online introduction agency for Russian women seeking foreign men for marriage. The pursuer denies this but required to accept in cross examination that she made representations to the Home Office that she had met the first defender through the internet. See production 6/17 at pages 84 and 85. She also advised the court that she had previously used such a website (when she met an Australian man with whom she travelled to Thailand) and that her details were on the website that the first defender was talking about albeit these contained false details about her and she had not put herself on the site. She also confirmed an intention to travel to the United States with another man (albeit she disputes she was refused

a visa rather than just not progressing with her plans). Particularly given that it is supported by the Home Office documentation confirming the pursuer's own previous version of events, the first defender's version of how the parties met should be preferred.

- If it is preferred, this raises the significant question of why the pursuer has lied to the court about the circumstances of the parties meeting. If she has nothing to hide, why lie?
- Steps were taken at an early stage to come to Scotland (November 2006, 3 months after meeting) with visas then renewed repeatedly through to August 2007 latterly as a fiancé visa.
- The pursuer fell pregnant in August 2007 despite otherwise using contraception. The pregnancy was not planned.
- The wedding was a "shotgun" wedding arranged at short notice to comply with visa requirements.
- In August 2007, in consequence of the marriage, she was permitted to reside in the UK for a two year period but only if she remained resident with the first defender, see production 7/139.
- Although she claims that she was the victim of ongoing abuse at the hands of the first defender from December 2007, she did not end their relationship. She asserts she left him four times prior to May 2010 but "had no money and nowhere to go" so came back.
- During the marriage, she obtained formal documentation in the UK in her maiden name (driving license, professional qualifications, her visa).

- The relationship deteriorated significantly in December 2009/January 2010 resulting in the pursuer being charged with an offence (see paragraph 68 of the first defender's affidavit dated 12 September 2018, part 87 of process and the correspondence referred to therein at production 7/19). This was not progressed after the first defender wrote to the procurator fiscal upon the parties reconciling temporarily.
- Upon reconciling in early 2010, she accepted that she had a suitcase packed with clothing, put under the bed, with her passport and their daughter's passport in it.
- In March 2010, £1 million was transferred into her bank account. She permanently left the first defender within 2 months with that money still in her account.

[51] In conclusion Mr Aitken submitted that the whole circumstances are such that the court should conclude that the pursuer has carried out a plan intended to marry a wealthy foreign man, secure residence outwith Russia and then to divorce that man seeking money from him.

[52] The next matter dealt with by Mr Aitken related to the issue of looking behind the ownership of C or S I C. His broad position was that this was of limited importance in resolving the matters in dispute.

[53] He commenced his detailed submissions in respect of this matter by looking at C. It is not in dispute that C came into existence in April 2002. Even if truly owned by the first defender, which is disputed he reiterated that it is a pre-marriage asset and, thus, not matrimonial property. Either on the basis that the company's assets belonged to N M or that they belonged to the first defender pre-marriage, they are not matrimonial property and are irrelevant to any claim under section 9(1)(a) of the 1985 Act. The important issue is not who

owned C but whether the £1 million was C's asset. If it was, it is not matrimonial property as either it belonged to a third party or acquisition of ownership in C by the first defender pre-dated marriage. If it was not, namely: the court concludes that the £1 million was the first defender's personal asset and not that of C, then, due to the transfer into the pursuer's name, it is "matrimonial property" but the special circumstances and disadvantage arguments become relevant.

[54] Turning to S I C it is further not in dispute that S I C was incorporated on 8 August 2012. That company and its assets cannot be matrimonial property as it was acquired by whoever is the owner after the relevant date. No claim can be made in respect of the value of any of its assets as part of a section 9(1)(a) claim. That is the position even if the first defender is its true owner.

[55] The only relevant reason to consider looking behind the ownership of S I C would be to alter the assessment of the first defender's resources. It is the only route around the difficulties for the pursuer presented by section 8(2)(b) as he had argued above. However, that would be to ignore the first defender's sequestration. In consequence of that, as concluded for by the pursuer, title to S I C would vest in the permanent trustee. That would not alter the first defender's resources now and it is now, and not at some later or earlier date, that section 8(2)(b) is applied. In short, the first defender has no resources and irrespective of what decision is made in respect of the tenth conclusion, he will have no resources. Section 8(2)(b) effectively prevents the court from making a capital sum award.

[56] Moreover, in respect to the argument that the court should pierce the corporate veil the defender took no issue with the authority *Woolfson* v *Strathclyde Regional Council* 1978 SC (HL) 90 and the opinion, albeit obiter, of Lord Keith that "it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade

concealing the true facts" which was relied upon by the pursuer. However, Mr Aitken directed the court to the lengthy discussion by the UKSC of the general principles regarding the piercing of the corporate veil and how they apply in divorce actions, albeit in English law, in *Prest* v *Petrodel Resources Limited* 2013 UKSC 34, as informed, in part, by *Woolfson*. In particular he drew the court's attention to paragraphs 35 to 37 in the judgment of Lord Sumption, whose reasoning was agreed with by Lord Neuberger at paragraph 81, by Lady Hale and Lord Wilson at paragraph 96 and Lord Mance at paragraph 97. He submitted that what could be taken from the foregoing decision was that the court should only look behind the corporate veil where

> "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".

[57] Applying the above to the present case he submitted that this paragraph cannot apply. Ownership of C was transferred to N M in 2002. The first defender gave an explanation for this: namely family reasons. Whether this is reasonable or not is unimportant. Individuals are generally entitled to organise their assets and personal affairs as they see fit and many do so passing on ownership of assets to others for reasons such as tax planning, inheritance planning and family security. Other than in the limited circumstances identified in the above authorities, a court should not look behind this to reconsider *prima facie* ownership.

[58] In particular he emphasised the following: the transfer of C's shares to N M was not to avoid legal action or liability. The parties did not even meet for another four years. The court has not been given any evidence to suggest that there was a wider legal liability which was being circumvented at that time. There are no circumstances which allow the court to look behind the clear terms of the share transfer which occurred before C started to either

trade or to acquire the hotels. Thereafter, C's assets were transferred after separation ultimately to S I C. C's assets were N M's to transfer. They did not belong to the first defender. That transfer was made by her and not by the first defender.

[59] Finally he submitted that in order to look behind the corporate veil the pursuer required to produce persuasive evidence. It was his position that she had not done so. Her own evidence does not address the matter to any proper extent. In her affidavit dated 11 September 2018 part 85 of process at paragraph 113 she assets that she "believes all of these documents are a sham". She does not provide any evidence which supports her belief or allows the court to consider if that is a reasonable one based on fact. Her later affidavits do not address any such evidence. With respect to the pursuer, her belief does not amount to evidence on which the court can rely. In addition in cross-examination the pursuer advised that any knowledge she has concerning S I C comes from D W and is not first-hand. This combination of the evidence from the pursuer herself and D W falls far short of evidence which should persuade the court to make the declaration sought. The pursuer's counsel indicated that he may rely on the affidavit of D W despite D W not attending court, no soul and conscience certificate being provided for his claimed illness, no opportunity then being given to cross-examine D W and the pursuer herself accepting in cross-examination that D W was a perjurer who could not be trusted. Had D W attended he would have been subjected to significant cross-examination as to his credibility and reliability. The court should attach no weight at all to his affidavit or to things he has said to the pursuer on which she relies. In these circumstances, the court is not left with any evidence on which to rely in respect of the tenth conclusion.

[60] Finally, while not bound by the findings of third parties this court should not ignore the evidence of the first defender in respect of the investigations conducted by the

Accountant in Bankruptcy. The accountant specifically considered the possibility of S I C's assets being part of the first defender's sequestration, the accountant received intimation of these proceedings. Having investigated matters the AIB's file has been closed, see the recent letter dated 20 June 2019 production 7/128. The outcome of that investigation should not be overlooked without significant, reliable evidence being put forward before the court.

[61] For all of the above reasons the tenth conclusion should not be granted.

[62] Lastly Mr Aitken turned to the issue of credibility and reliability and began by looking at two matters in respect of the first defender's credibility and reliability. The pursuer takes issue with the first defender's assertion that he is disabled. On a *prima facie* basis, the question of whether the first defender is disabled or not is of no relevance to the matters at issue. It is clearly not relevant to ownership of S I C. The disability or otherwise is not relevant to the existence of and division of matrimonial property. The first defender has been criticised in cross examination for not producing medical reports. With reference to the matters before the court, the question of disability is irrelevant and, thus, securing those (at cost to the public purse) and lodging them would serve no purpose. That said there is a medical statement concerning the first defender's disabilities at page 3 of production 134 being a record of the Service, Personnel and Veterans Agency dated 5 January 2017.

[63] He did, however, accept that faking a disability could be relevant to credibility. It may be that this is the pursuer's reason for raising the matter. If so, the first defender should not be criticised or his veracity be doubted because he has not produced an otherwise irrelevant medical report. The pursuer has not, in any event, provided any evidence to suggest that the disability is faked. She has not had contact with the first defender for over nine years and cannot speak to his present health. No wider evidence doubting the veracity

of his condition is before the court. The court is entitled, and should, take account of the fact that the first defender receives Personal Independent Payment including a daily living amount and a mobility amount (see production 7/134 at page 2). The first defender requires to satisfy examinations in order to qualify for this. The court is not in a position to doubt the assessment based on the pursuer's assertion which is absent any supporting evidence. Insofar as this issue may concern credibility and reliability, the pursuer's unfounded allegation should impact adversely on the court's view of the pursuer.

[64] He then turned to address the second matter which was this: he appreciated that the court may have concerns about aspects of the first defender's evidence. However, the following specific matters should be taken into account and the court should find that the first defender was credible and reliable in respect of the critical issues relevant to the matters in dispute in the case:

a. In place of what would have been extensive oral evidence, the first defender lodged affidavits, one of which set out in detail a full explanation of the background to the financial position. This evidence was supported by the documentation lodged and referred to in the affidavit. Insofar as there is an external check on the credibility and reliability of the evidence, the consistency between the first defender's position and the productions enhances his credibility.

b. In large part, the detailed evidence in the first defender's affidavits concerning the financial background was not challenged either in the pursuer's own evidence or in cross examination of the first defender himself. This relates to detailed explanations of complex matters of central importance to the matters at issue, as examples in the affidavit dated 12 September 2018, part 87 of process.

- The explanation of how C came into being at paragraphs 1 to 8
- The financing of C and the development of its assets through to the time of the parties' marriage, at paragraphs 9 to 24
- The operation of C during the marriage, at paragraph 25 to 28 and
- The circumstances leading to his sequestration, at paragraphs 47 to 54

Insofar as an absence of cross examination on these significant issues suggests that the matters are not challenged, the court should not overlook that the pursuer appears to accept the first defender's evidence on these matters as being true.

c. The first defender has shown particular candour in respect of certain matters. It may be thought he has been overly candid in answering questions despite a warning from the bench. This is wholly demonstrable of his intention to be entirely honest with the court.

[65] Turning to the pursuer's credibility and reliability he submitted that the following factors should be taken into account:

a. Her affidavit of 23 November 2017, part 66 of process is demonstrably incorrect at paragraph 6 where it indicates that the first defender has been using S I C as "a vehicle" since separation. S I C did not come into existence until 8 August 2012 (paragraph 27 of the JMA). The pursuer's refusal, in cross examination, to accept her error harms her credibility.

b. Her refusal to back down in respect of the purchase date of the S A was surprising given the documentation put to her. Her allegations that solicitors had falsified dates on letters and accountants had falsified deeds registered in the Registers of Scotland were without foundation. Her position in respect of the S A was contrary to the terms of paragraph 13 of the JMA. Maintaining her position

in two affidavits (the first dated 23 November 2017, part 66 of process, paragraph 6 and the second dated 11 September 2018, part 85 of process, paragraph 11) that the S A was bought post-marriage in the face of clear documentation that this was not the case raises significant concern. It is notable that her position concerning the falsification of solicitors' correspondence and backdating of deeds was not put to the first defender in cross examination.

c. Her affidavit dated 11 September 2017, part 85 of process, paragraph 11 is misleading to the court insofar as it states that she "never received any wages". This is directly contrary to the term of paragraph 10 of the JMA and the documentation referred to therein.

d. As is set out in part [10] above, her version of how the parties' relationship commenced is incredible and is contrary to the terms of Home Office documentation at pages 84 and 85 of production 6/17 where she clearly stated the parties met on the internet. Either she is lying to the court both in her oral evidence and in her affidavit dated 26 October 2018, part 99 of process at paragraph 1.4(6) or she lied to the Home Office to secure entry to the country. If she is lying about a matter as fundamental as how the parties met, the court requires to be sceptical about her wider evidence.

Discussion

[66] I think it is appropriate to consider at the outset the issue of credibility and reliability.

[67] The evidence in the case consisted of oral and affidavit evidence. Affidavits have been lodged on behalf of the pursuer, the first defender and a D W. However, other than the

pursuer and defender no oral evidence was led. No good reason was given as to why D W did not give oral evidence. No medical certificate was provided in support of his alleged illness. Nothing of materiality in his affidavit was agreed. It is correct as was submitted by Mr Aitken that the pursuer herself accepted that D W at some earlier stage had been untruthful in respect to a material issue. Accordingly in the absence of his giving oral evidence and being subject to cross-examination it is impossible to give any weight to anything said in his affidavit. I therefore put his affidavit to one side and gave it no further consideration.

[68] In respect to the evidence of the pursuer and first defender I overall found the pursuer to be credible and reliable. Generally I thought her an impressive witness. Mr Aitken sought to persuade me I should hold her to be incredible. In support of this he referred in particular to two matters. Neither of these caused me to doubt the credibility of the pursuer. I thought they were simply matters the pursuer had got wrong. She maintained her position in respect of these as she genuinely thought she was correct.

[69] As regards the first defender I found him to be a wholly unimpressive witness. I felt throughout his evidence that the picture he was seeking to present of himself in court was false and that he was to some extent putting on an act. I accept that the first defender has material medical difficulties that is clear from the medical documents which had been lodged. However, I thought the overall picture he sought to present in court of someone who was hesitant, timid, unsure of himself and had genuine difficulty in explaining his position on certain matters upon which he was cross-examined was false. It was a picture which ran counter, on any view, to the way he had dealt with his financial affairs from the date of incorporation of C onwards. I felt that the picture the first defender was seeking to present was to seek to support his position that he had been duped into marriage by the

pursuer. I do not believe that the first defender was the type of person to be duped into marriage. I believe Mr Beynon's characterisation of him as a strong and determined character is correct.

[70] I feel that the overall picture presented regarding the first defender's dealings with his financial affairs showed someone with a keen business sense and who had a detailed understanding of how to organise his financial affairs in his best interest with a full understanding of his financial position and how he wished to deal with that financial position. Moreover all his actings following the separation of the parties showed a determination at all cost to fight the pursuer in respect of all matters arising from the marriage and in particular in respect to issues of a financial nature.

[71] Further, throughout his evidence I do not believe that I was being told the whole truth. The first defender sought to evade answering proper questions which were put to him in the course of cross-examination. I think that Mr Beynon's description of him as someone who was generally uncooperative and was seeking to avoid answering difficult questions is an accurate one. He did not answer difficult questions in a straightforward manner.

[72] A good example of the above behaviour related to 6/23 of process. Beginning at page 5 of this production is a financial statement, prepared by the first defender, in his own handwriting and signed by him. It is a document of substance and importance in that it is a declaration in order to obtain a US visa. It is dated 12 March 2009. The first defender's position in evidence was that at that date he had no capital assets. However in that document he gives a detailed list of his assets which is as follows:

Cash in hands and in banks $12,000

Savings accounts $1,300,000

Real estate $2,250,000

Automobile present value $40,000

Finally he gives a figure for net worth of $3,387,000.

[73] The first defender was wholly unable to give a plausible explanation as to why if he had no capital assets this form stated that he had substantial capital assets.

[74] The contents of this form showed either (a) he was lying to the US authorities as to his financial position as at that date or (b) that he was lying to this court about his financial position as at that date. Whatever way one looks at this document it shows that in respect of his financial position (the primary issue in this case) the first defender is someone who is prepared to lie.

[75] In the whole circumstances I am not prepared to accept any evidence given by the first defender unless this evidence is unchallenged by the pursuer or is independently supported by documentary evidence.

[76] A further factor which caused me to have concerns about the defender's position regarding his financial affairs was the failure to lead evidence from either of his daughters and in particular from N M. N M was the person to whom the single share in C was transferred. According to the first defender she was the true owner of that share and therefore she would have knowledge regarding the setting up of this company, its operation and thereafter the setting up of S I C all of which were matters in issue. There is no doubt that she would have been in a position to give evidence of a material nature regarding these matters. However, she was not led and no adequate reason was given for this failure to lead her. This further factor contributed to my unwillingness to accept the first defender's

evidence unless that evidence was unchallenged or there was some form of independent corroboration of it.

[77] Lastly it is noteworthy that no evidence was led from the second defenders. Once more I would have thought that the first named defender would have wished a representative of the second named defender to give evidence regarding the trust. However, once more no such evidence was led. Accordingly I was left with no witnesses being led on behalf of the first defender regarding the issues surrounding his financial position although I believe such evidence could have been led on his behalf.

[78] It is also convenient while looking at the issue of credibility and reliability to consider the first defender's position that he had been the victim of a sham, namely: that the pursuer had tricked him into marriage; where her aim was not to have a proper marital relationship with the first named defender, but to obtain UK citizenship and thereafter divorce the first named defender and obtain a substantial financial settlement from him, she being under the misapprehension that he was a wealthy man. I reject this argument. I find that this position entirely lacked any plausibility. As argued by Mr Beynon the evidence showed that the first defender was in Russia looking for a relationship with a younger Russian woman. In addition it is I think correct to say that he was the strong and determined party in seeking to move forward his relationship with the pursuer. This can be seen quite clearly in his actions when there appeared to be difficulties in the pursuer obtaining a visa to enter this country. Mr Aitken relied on a number of factors to support his argument that this was a sham marriage, and that the first named defender was taken in by the pursuer. First I would say there did not appear to be anything implausible about the story put forward by the pursuer in her evidence regarding how they met and how their relationship thereafter progressed. Further the factors relied upon by Mr Aitken when taken

together I do not believe are of any materiality in undermining the pursuer's position. The first named defender I do not believe would have been taken in by the type of scam which is now suggested by him to have taken place. For reasons I have already set out I found him to be a careful and astute individual who would not have been taken in as he now contends.

[79] I now turn to deal with the detailed legal submissions advanced by Mr Aitken.

[80] It appears to me that logically the first of these submissions to consider is this: What is the net matrimonial property at the relevant date? There is an agreed relevant date, namely: 22 May 2010. Matrimonial property is defined in terms of section 10(4) of the 1985 Act (earlier set out in full). In light of that provision it is critical to note that the capital assets of C were acquired by the owner of that business before the date of marriage. Thus no matter what conclusion the court arrives at as to whether C belonged to the first defender its capital assets could not be matrimonial property. As to what those assets consisted of I accept the arguments advanced by Mr Aitken that first in respect of the S Hotel and the flats in town F it is conceded by the pursuer that these were acquired pre-marriage and second that having regard to the productions 6/6 and 7/107 the S A Hotel was also acquired prior to the marriage. Accordingly as I understand it the entire assets of C was property acquired pre-marriage and therefore the assets of C do not fall within the definition of matrimonial property. This I believe creates an insuperable problem in respect of the pursuer's claim for a capital sum which is contended by Mr Aitken is based upon her being entitled to a fair share of the £1 million fund (being the sum at credit in her Citibank account at the relevant date). I can see no evidence that the £1 million fund could have any other source than the assets of C. As put forward by Mr Aitken no evidence has been advanced that either party came into funds in the course of the marriage which could have been the basis for this fund. In addition the first defender in his affidavit (paragraphs 11-24) and in the documents

therein referred to (which evidence was unchallenged) supports the position that the fund had as its basis those assets and that its value at the date of marriage was £847,837. Thus on the basis of unchallenged evidence, independent documentation and the application of the above provisions of the 1985 Act the pursuer's capital claim must fail. This conclusion is not dependent on accepting any unsupported and challenged evidence of the first defender.

[81] The next issue is I believe logically this: to whom did the assets of C belong?

[82] I first observe that there is no attempt by the pursuer to challenge the transfer of the single share in C to N M. I believe that Mr Aitken is correct in arguing that given that the transfer of the share happened four years prior to the first defender even meeting the pursuer it is very difficult to see how this could be challenged. It cannot be argued that this acting by the first defender was for the purpose of alienating assets to put them beyond the reach of the pursuer or to avoid any legal obligation existing at that time.

[83] Beyond the above the Deed of Trust allowing the first defender to act on C's behalf was not challenged and I consider therefore has to be treated as a true document. This document explains how the first defender was able to move sums belonging to C at his discretion. It accordingly gives an explanation as to how he was able to move the £1 million fund although the money did not belong to him but to C.

[84] Against the above uncontested background of documentation in respect of C it follows that the £1 million fund belonged to C and not to the first defender and thus for this further reason the fund is not matrimonial property. I am able to make this finding on the basis of evidence of the first defender which is unchallenged; unchallenged documentation; and independent documentation.

[85] On the above analysis, namely the £1 million fund is not matrimonial property then it was not disputed that the first defender owed £94,000 to C and accordingly the net matrimonial figure is a negative one. The pursuer accordingly does not have a capital claim.

[86] The next chapter of the submissions of Mr Aitken which arises for consideration is the issue of the first defender's present resources. I am persuaded by the argument advanced by Mr Aitken under reference to section 8(2) of the 1985 Act that any order pronounced requires to be "reasonable having regard to the resources of the parties".

[87] It seems to me that in order for the first defender to have the resources to make a capital award the pursuer requires to be successful in her argument that the court should look behind the ownership of S I C. In the absence of the pursuer being successful in terms of this argument then an additional difficulty for the pursuer's position is that the first defender does not have the resources to meet any award of a capital sum.

[88] As earlier noted C was as a matter of agreement incorporated on 8 April 2002, a date which is more than four years prior to the parties meeting. Further, as I have observed, neither the date of transfer nor the validity of the document transferring the share was challenged in evidence.

[89] I recognise that the discussion in *Prest* to which I was referred by Mr Aitken is one in terms of English law. However, the reasoning of Lord Sumption which was agreed with by all of the justices is highly persuasive and the conclusion which he reaches is I believe likely to be one which will be followed by higher courts in Scotland. I am satisfied that the correct approach to the question before me is that identified by Lord Sumption. It appears to me correct in principle that the corporate veil in the circumstances of a financial dispute in terms of a divorce should only be breached in circumstances as identified in *Prest*. I do not believe

that the reasoning of Lord Sumption in any way contradicts the obiter opinion of Lord Keith in *Woolfson*.

[90] Therefore on the above legal analysis I can see no ground upon which the corporate veil can be lifted in relation to C. At the date of the transfer of the single share to N M the first defender was under no "existing obligation or liability or subject to any existing legal restriction" which by making this transfer he sought to evade. He cannot have been under any such obligation or restriction in respect of the pursuer. There was no evidence to suggest that he was under any such obligation to anyone else.

[91] If the corporate veil cannot be lifted relative to C then the assets when transferred to S I C were the assets of C and thus the assets of N M. She was entitled to transfer them. They were not the assets of the first defender.

[92] Accordingly the corporate veil cannot be lifted in such a way as to effect the resources of the first defender.

[93] Further and in any event there is I believe force in the first defender's argument that to lift the corporate veil there requires to be persuasive evidence and that has not been provided in the present case. The evidence of the pursuer does not go beyond raising certain suspicions regarding the actings of the pursuer in respect of his capital assets. In respect to this matter she is relying largely on the evidence of D W. For reasons I have already given I am unable to attach any weight to his evidence. Thus in essence all that the court was left with was the pursuer's general understanding that the first defender is a wealthy man and a belief that his dealings in respect to his financial affairs are a sham. This is not enough to breach the corporate veil.

[94] In conclusion on the evidence as a whole the situation is that the first defender disposed of his capital assets well before his marriage. As argued by Mr Aitken there are

many good and proper reasons for arranging one's financial affairs in such a way as to pass ownership of property to other members of the family. Thus the mere transfer of the share in C to his daughter and accordingly transfer of all of his capital assets to his daughter does not of itself give rise to an inference that the transaction was a sham. This is particularly so where he did not even know the pursuer at that time. Thereafter his dealing with the assets of C is consistent with the trust deed entered into.

[95] As to the transfer to S I C, in the circumstances that was of no assistance to the pursuer, whatever the reason for it, given she cannot challenge the position in respect to C.

[96] Finally in respect to the evidence on this issue, I note the findings of the Accountant in Bankruptcy to the effect that S I C assets were not held to be part of the first defender's estate. This is another factor which points towards not lifting the corporate veil. For the above reasons I am not prepared to lift the corporate veil.

[97] Lastly in passing I observe in respect of S I C and C and lifting the corporate veil that the anti-avoidance provisions in section 18 of the 1985 Act have not been relied upon by the pursuer. I note that Lady Clark of Calton in *M* v *M, W Estate Trustees Limited and another* 2011 Fam LR 24 held as follows:

> "section 18 was directed towards transfers or transactions that had the effect of, or were likely to have the effect of defeating a claim for financial provision, in whole or in part, the pursuer did not require to prove intention to avoid such a claim, nor did she have to show that there was this effect at the date on which the transaction or transferred occurred …"

[98] I now turn to a discrete issue in respect of the question of resources even had I been willing to look behind the corporate veil and hold that S I C's assets were "under the sole control of the first defender" and therefore that "property vested in the first defender's permanent trustee" (conclusion 10) this creates a further difficulty for the pursuer highlighted by Mr Aitken, namely: the resources would not be the first defender's they

would vest in his permanent trustee. Mr Beynon's position was that this did not cause any difficulties and could be left over to some future hearing which would be intimated to the permanent trustee.

[99] I am not satisfied that the position is as straightforward as Mr Beynon submits. However, had I been with him in respect of the issues which I have opined on to this point: (a) I would not have been in a position to award a capital sum at this stage in that even if I had pronounced a declarator in terms of conclusion 10, the first defender still has no resources; (b) in any event I have no information regarding the value of the assets of S I C and for this further reason could not pronounce a decree for any particular sum of capital; (c) I have no idea what the position of the permanent trustee would be. Thus I could not make any order for a capital payment at this stage. Had I been thinking of making any such order I would have required to hear further evidence and submissions on these issues.

[100] For all of the foregoing reasons I am not prepared to award the pursuer a capital sum or to grant declarator as tenth concluded for.

[101] I now turn briefly to consider the position had I been satisfied that I should make an award of capital sum in favour of the pursuer. I would in terms of section 10(6) of the 1985 Act have had to have regard to the defined "special circumstances" one of which is the source of funds. The factors relied on by Mr Aitken in the course of his submissions other than his reliance on the marriage being a sham give substantial support to the view that a substantially unequal sharing should be made.

[102] So far as the argument regarding economic advantage/economic disadvantage as is accepted by Mr Aitken this overlaps with the source of funds argument.

[103] Taking both of these together would not I believe have resulted in the defender not having to make a payment to the pursuer as contended for by Mr Aitken. Rather I would

have thought that a fair sharing would have been one third to the pursuer and two thirds to the defender.

Disposal

[104] I accordingly refuse the second and tenth conclusions for the pursuer. I sustain the pursuer's first plea-in-law and grant decree of divorce.

[105] I have reserved the issues of expenses.