NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT HAMILTON

FAM-2014-019-000424
[2016] NZFC 1041

IN THE MATTER OF	Family Court Rules 2002
BETWEEN	DARREL CROFT Applicant
AND	RAYA BAKALOV Respondent

Hearing:	3 November 2015
Appearances:	E Dawe for Applicant Respondent in person C M Earl for the company
Judgment:	9 March 2016

RESERVED JUDGMENT OF JUDGE I M MALOSI
[Application to strike out proceedings]

Introduction

[1] This is an interlocutory application by Mr Croft to strike out, or otherwise stay or dismiss, proceedings commenced against him by Ms Bakalov on 17 April 2014, under the Property (Relationships) Act 1976.

[2] Costs are also sought against Ms Bakalov.

Background

[3] For want of more detail in respect of Mr Croft's ethnicity, he is a New Zealander. Ms Bakalov is [ethnicity deleted]. They met on the internet around the middle of 2006. The relationship developed at a rapid pace, with each party visiting one another's country before Ms Bakalov relocated to New Zealand in time for their marriage in Hamilton on [marriage date deleted] 2007. By the beginning of 2010 however, the parties were no longer living together and their marriage was eventually dissolved on 18 April 2013.

[4] During their relationship the parties lived together at [address deleted], a farm property Mr Croft managed on behalf of the owner, [name of company deleted] ('the company') which had been incorporated by his parents in 1972. Of the 10,000 shares, 9898 are held by the [name of trust deleted] (which was established at the same time as the company), 100 shares held by the Estate of Mr Croft's father, and just one share each held by Mr Croft and his brother.

[5] On 24 July 2015, Ms Bakalov finally conceded that their family home on the farm was not relationship property, but that was only after her discovery application, and applications to join firstly the shareholders of the company then the company itself, all of which necessitated the company having to instruct Counsel. As a matter of law, I find there was never any reasonable prospect of Ms Bakalov's claim against the company succeeding in this jurisdiction.

[6] Unsurprisingly, full Solicitor/Client costs are now sought on behalf of the company. Costs are also sought on a 2B basis by Mr Croft.

[7] It is now the agreed position of the parties that the only relationship property which existed as at separation was household chattels and two motor vehicles. There were also some debts, but they are at odds at to what those were and whether or not they were relationship property.

Preliminary matters

[8] Before going any further the following matters need to be acknowledged:

(i) The day before this hearing, Ms Bakalov's Counsel, Mr Jerram was declared as no longer acting for her pursuant to r.88 of the Family Court Rules 2002 ('FCRs') as at that time he was without instructions and no arrangements were in place for his outstanding fees;

(ii) Regrettably, Ms Bakalov was only served with a copy of the submissions filed on behalf of Mr Croft for this hearing when she arrived at Court in the morning. Although she understandably protested about that, I was satisfied that her position had already been clearly put in her affidavit sworn 24 July 2015, which was prepared by Mr Jerram on her behalf in response to the strike out application;

(iii) Furthermore, I was satisfied that her comprehension of the English language was sufficient to represent herself, having regard to the fact that she had undertaken tertiary studies in New Zealand and obtained certain business qualifications, and participated in earlier dissolution proceedings in the Family Court without an interpreter;

(iv) On 29 June 2015, Judge Collin made timetabling directions in respect of all of the outstanding interlocutory applications, including this one. Notwithstanding, at this hearing Ms Bakalov urged the Court to take into account her affidavit

dated 10 August 2015, but which was only sworn on 30 October 2015 and filed with the Court the following day. Given that this matter was to proceed on a submissions only basis, coupled with the inability of Mr Croft to respond in any meaningful way without the matter being adjourned, I rejected the further affidavit from Ms Bakalov and her criticism that Mr Jerram had not properly put her case or fully informed her of the steps he was taking on her behalf.

Legal principles

[9] Mr Croft's application is made in the alternative under r193 and 194 of the FCRs which provide as follows:

> **193 Striking out pleading**
>
> (1) The court may order that all or part of an application or defence or other pleading be struck out if the pleading or part of it—
> (a) discloses no reasonable basis for the application or defence or other pleading; or
> (b) is likely to cause prejudice, embarrassment, or delay in the proceedings; or
> (c) is otherwise an abuse of the court's process.
>
> (2) An order under subclause (1) may be made by the court—
> (a) on its own initiative or on an interlocutory application for the purpose:
> (b) at any stage of the proceedings:
> (c) on any terms it thinks fit.
>
> **194 Stay or dismissal**
>
> The court may order that proceedings be stayed or dismissed, either generally or in relation to a particular application by which an order or declaration is sought, if the court considers, in relation to the proceedings or to the application, that—
> (a) there is no reasonable basis for the proceedings or application; or
> (b) the proceedings are frivolous or vexatious; or
> (c) the proceedings are an abuse of the court's process.

[10] In determining these applications I adopt, with respect, the following principles identified by Judge Twaddle in *JPR v BTR* (FC NSD FAM-2009-044-002295, 28 November 2010) at paragraphs [5] and [6], which I consider apply equally to applications under r193 and 194:

'[5] ...

a) Striking out has been described as a draconian step and therefore the threshold for strike out is high. The Court must be satisfied that the cause of action advanced is so clearly untenable that it could not possible (sic) succeed: Attorney-General v Prince and Gardner [1998] 1 NZLR 262,267;

b) The power to strike out is to be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite evidential material: Gartside v Sheffield Young & Ellis [1983] NZLR 37,45;

c) In considering strike out applications, the Court generally proceeds on the basis that factual allegations contained in the pleadings of the party opposing - in this case Mr RJ – are assumed to be true: Attorney-General v Prince and Gardner, at 262.

[6] To these principles I add the principle that if a claim depends on a question of law capable of decision on the material before it, the Court should determine that question even though extensive argument may be necessary to resolve it: Gartside v Sheffield Young & Ellis at 45'.

Discussion

[11] Ms Bakalov argues that in order to achieve an equal division of relationship property (including relationship debts) Mr Croft should pay to her the sum of $21,850.00 broken down as follows:

(a) $6,250.00 - household chattels and effects;
(b) $7,100.00 - motor vehicles;
(c) $4,000.00 - miscellaneous items still in the family home;
(d) $4,000.00 - funds due to her from Mr Croft; and
(e) $ 500.00 - student loan.

[12] In short, Mr Croft's position is that although there was no formal agreement between them, all of their property has long since been divided and in fact there is no relationship property in respect of which Ms Bakalov can now make a claim. Upon separation, he claims that she took sufficient chattels to enable her to set up her own household, and one of the two motor vehicles they owned.

[13] He puts the value of property he retained or disposed of at $5,970.15 comprised as follows:

(a) $1,870.15 – chattels sold at auction
(b) $1,650.00 – other household chattels
(c) $2,450.00 – motor vehicle

[14] Furthermore, he claims the parties had relationship debts totalling $5,689.70 ($1,884.24, BNZ Visa and $3,805.46, Q Card) which he took responsibility for even though he could have insisted Ms Bakalov pay for half of that amount, and overall that resulted in him receiving less than his fair share of relationship property.

[15] There are a number of difficulties in respect of Ms Bakalov's account of the relationship property pool:

(a) In respect of the household chattels she has not provided any independent valuation. So far as at least one chattel is concerned, namely the barbeque, she has significantly inflated the value of that to $2,200.00 when it is apparent from the invoice produced by Mr Croft that it was purchased for only $1,500.00. I consider that casts doubt on the other values attributed by Ms Bakalov to their chattels;

(b) Ms Bakalov's claim for half of the value of the items purchased during the relationship but which remained in the family home includes things such as wallpaper, chandeliers and door knobs. This claim is completely misguided and doomed to fail;

(c) Upon separation each party retained a motor vehicle which they subsequently sold. Ms Bakalov's evidence that the Citreon retained by Mr Croft was worth $18,000.00 was way off the mark given that it was purchased on 28 December 2007 for $16,500.00, then sold at auction for $2,700.00 (less charges Mr Croft received $2,245.00). Her vehicle, a Renault was sold for $3,800.00. Mr Croft takes no issue with the difference which is to Ms Bakalov's advantage;

(d) In respect of relationship debts, Ms Bakalov claims that the company paid $300.00 a week to Mr Croft to pay to her and he failed to do so in 2008 between July to September, and part of October. She also maintains that Mr Croft should reimburse her for half of a student loan she incurred during the relationship. As a matter of law it is

difficult to see how Ms Bakalov could succeed in respect of either of these claims against Mr Croft.

[16] Even though Ms Bakalov would have the Court believe otherwise, the evidence points to very little separate property brought into the relationship by either party, and only modest assets and debts being acquired during it.

[17] Having regard to all of the evidence before the Court at this time, I find that Ms Bakalov's substantive application for division of relationship property has failed to disclose a reasonable basis for it.

[18] Mr Croft's position that all relationship property has already been divided, and in such a way that favours Ms Bakalov, is preferred over hers.

[19] Whilst mindful of the need for careful consideration before striking out proceedings, to allow Ms Bakalov's application to proceed any further would be an expensive exercise in futility. Far too much time and money has been wasted already.

Result

[20] For all of the above reasons, Ms Bakalov's application under the Property (Relationships) Act is struck out pursuant to r.193 of the Family Court Rules.

[21] I turn then to the issue of costs, having regard to Ms Bakalov's evidence that to date she has paid $10,000.00 in legal fees for these proceedings, which in my view is indicative of a reasonable stream of income from some source(s).

[22] Given the outcome of this interlocutory application, Mr Croft is entitled to costs and those are awarded on a 2B basis.

[23] As signalled earlier, the company also seek costs, but on a Solicitor/Client basis. It is difficult to reject Mr Earl's submission that Ms Bakalov's attempts to join the company as a party to these proceedings was a back door way to obtain third party discovery, and had such an application been made his client would have been

entitled to Solicitor/Client costs. As put succinctly by Mr Earl, Ms Bakalov got it wrong in respect of his client and she should have to pay for that mistake. The costs incurred by the company in respect of the applications ultimately discontinued by Ms Bakalov amounted to $4,000.00. I do not consider that sum to be unreasonable in the circumstances.

[24] Accordingly, Ms Bakalov is also ordered to pay costs to the company in the sum of $4,000.00.

[25] All costs are to be paid within 60 days.

I M Malosi
Family Court Judge