

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

ACTION No. 3 of 2021

IN THE MATTER of an Application by Nellie Malic

AND

IN THE MATTER of an Application under Section 16 of the Married Women's Property Act, Chapter 176 of the laws of Belize, R.E. 2011

AND

IN THE MATTER of Sections 148A of the Supreme Court of Judicature Act, Chapter 91 of the Laws of Belize, R.E. 2011

BETWEEN:

NELLIE MALIC

Applicant/Respondent

and

HUGH CORNELL MALIC

Respondent/Applicant

Appearances:

Robertha Magnus-Usher, SC for the Applicant/Respondent

Audrey B. Matura for the Respondent/Applicant

2023: June 13

October 25

RULING ON SUMMONS FOR SPECIFIC DISCLOSURE

[1] **CHABOT, J.:** Ms. Malic filed an originating summons on 20th January 2021 seeking declarations as to her rights and interests in certain properties under section 16 of the Married Women's Property Act¹ and section 148A of the Supreme Court of Judicature Act.² On 15th July 2022, Mr. Malic filed a notice of application for the specific disclosure of certain documents. Mr. Malic applies for the following orders:

1. That the Applicant/Respondent discloses any or all accounts held in the name of the Applicant at any Bank or other financial institution between September 1997 to September 2019 and that the Applicant/Respondent disclose via supporting bank statements or other records the monthly activities of these accounts in respect of the relevant period.
2. That the Applicant/Respondent specifically discloses the Atlantic Bank CD account containing three hundred thousand dollars (\$300,000.00) held initially jointly and thereafter only in her name on trust for both her and the Respondent/Applicant.
3. That the Applicant/Respondent specifically discloses her Holy Redeemer Credit Union bank history, cover of which is shown as NM1-1 in the 3rd Affidavit of Nellie Malic dated 1st July 2021, for Account Number 15395 in the name of Nellie Malic for period 1997 to present.
4. That the Applicant/Respondent specifically discloses her Holy Redeemer Credit Union bank history, for share ledger 4342.43 in the name of Nellie Malic for period of 1999 to present, portion of which is only shown as the second page of NM1-1 in the 3rd Affidavit of Nellie Malic dated 1st July 2021.
5. That the Applicant/Respondent specifically discloses her loan agreement dated 27th June 2000 for loan she said she obtained from Holy Redeemer Credit Union in the sum of one hundred and fifty thousand (\$150,000.00) and discloses along with it any collateral offered up for said loan.
6. That the Applicant/Respondent specifically discloses the record of the joint account held between her and the Respondent/Applicant at Scotiabank, as mentioned at paragraph 7 in the 3rd Affidavit of Nellie Malic dated 1st July 2021.
7. That the Respondent/Applicant be at liberty to inspect and take copies of all entries in the books of all Banks and Financial Institutions relating to accounts of the Applicant for the period of September 1997 to September 2019.
8. That the Applicant/Respondent specifically discloses her loan agreement she purportedly made in November 2016 for the Respondent/Applicant's gifted to him by his father as she claims that loan was made by her at Holy Redeemer Credit Union and for the boat engine as stated at paragraph 97 of the 2nd Affidavit and repeated at paragraph 13 of her 3rd Affidavit.

¹ Cap. 176, Rev. Ed. 2020.

² Cap. 91, Rev. Ed. 2020.

9. That the Applicant/Respondent specifically discloses the rental agreement she has with Mr. Juny Ang Zhao of Belize City, from 2009 to present, along with receipts of rent income she earns from the properties since 2009 to present, for which she signed and collects rent for the Respondent/Applicant's property at 6898 Mahogany Street identified at the Land Registry as Parcel 45-40-917, Registration Section St. Martin de Porres.

10. That the Applicant/Respondent discloses receipt of payment received from the sale of the Respondent's gym equipment, which she sold without the Respondent's consent.

[2] Ms. Malic opposes the application on the basis that the information requested is irrelevant to the determination of this matter, and that the statutory basis relied upon by Mr. Malic does not apply to an action for division of matrimonial property.

Legal contentions

Mr. Malic's submissions

[3] Mr. Malic's application was originally grounded in section 14 of the Evidence Act,³ rules 58 and 59 of the Supreme Court Matrimonial Causes Rules (the "Matrimonial Causes Rules"), and the common law duty to disclose. In oral submissions, Mr. Malic's counsel conceded that rules 58 and 59 of the Matrimonial Causes Rules do not apply, and asked that rule 35(4) of the Matrimonial Causes Rules be substituted instead. Counsel for Ms. Malic objected to this ground being added without notice. The objection was upheld, and as such the parties were not permitted to make submissions under section 35(4) of the Matrimonial Causes Rules. In written submissions, Mr. Malic also relied on Part 28 of the Supreme Court (Civil Procedure) Rules ("CPR"). According to Mr. Malic, because specific disclosure is not addressed in the old rules governing matrimonial causes, the CPR can be relied upon to fill the gaps. Under CPR 28.4, a party must disclose all documents which are directly relevant to the matters in question in the proceedings. "Directly relevant" is defined in CPR 28.1(4) as including documents which a party has control of and intends to rely on.

[4] Mr. Malic alleges that the documents he seeks are directly relevant because Ms. Malic relies on them in her pleadings. Mr. Malic alleges that Ms. Malic made various bald assertions in her affidavits in support of the originating summons. These assertions can be proven or disproven if Ms. Malic presents the relevant documentary evidence in support. The affidavits also contain partial disclosure of documents which do not provide the full picture of what she claims. Because Ms. Malic relies on those

³ Cap. 95, Rev. Ed. 2020.

documents, full disclosure is necessary to determine the issues regarding the division of property. The documents requested should have been disclosed as part of the standard disclosure because Ms. Malic mentions them and relies on them to prove her case. It would be prudent for the court to conclude that Ms. Malic has not conducted a reasonable search for these documents.

[5] In response to Ms. Malic's contention that the documents are not relevant because this is not an application for maintenance and she does not have to prove her means, Mr. Malic notes that Ms. Malic's originating summons for the division of matrimonial property is made pursuant to section 148A of the Supreme Court of Judicature Act. Subsection 148A(5) requires that the court look into Ms. Malic's own financial means to determine each party's rights and interests with respect to the properties.

[6] Mr. Malic submits that the court must look at the pleadings to determine what must be disclosed. The test applicable to an application for specific disclosure is laid out in **Glenn and another v Watson and others; Kea Investments Ltd v Novatrust Ltd and another; Novatrust Ltd v Kea Investments Ltd and another**:⁴

2. The principles are not in dispute. By CPR r 31.12 the Court may make an order for specific disclosure. Before making such an order the Court will need to satisfy itself that the documents are or have been in the parties' control and that the documents are relevant to the issues pleaded in the proceedings, or at least that there is a prima facie case that these requirements will be met: see White Book at note 31.12.2. Relevance is judged by reference to the pleadings. If these requirements are satisfied the Court has a discretion whether to order disclosure, and will exercise such discretion by taking account of all the circumstances of the case and in particular of the overriding objective [emphasis added].

[7] In this case, Ms. Malic is pleading that she assisted by making a loan to purchase one of the properties, and another loan to buy a boat engine. She also pleads that she was a joint holder of a bank account with Mr. Malic and that she controlled the finances, but does not disclose the bank records nor accounts to prove so. She also pleads that she is collecting rent on one of the properties she is claiming. While she exhibits an old rental agreement and old receipts, she failed to exhibit the current rental agreement and recent receipts.

⁴ [2016] EWHC 3346 (Ch).

[8] Finally, Mr. Malic argues that the common law duty to disclose is continuous until the end of the proceedings. The court can exercise its inherent jurisdiction and grant an application for specific disclosure without the need to rely on any statutory provisions.

Ms. Malic's submissions

[9] As noted above, Mr. Malic conceded that rules 58 and 59 of the Matrimonial Causes Rules do not apply to this application. Ms. Malic's submissions on this point will therefore not be summarized and considered.

[10] Ms. Malic argues that section 14 of the Evidence Act does not apply to this application as it refers to "banker's books". Section 2 of the Evidence Act defines banker's books as including "any ledger, day book, cash book, account book and any other book used in the ordinary business of a bank". Banker's books are kept by the bank, and must therefore be obtained from the bank, not by specific disclosure against the wife.

[11] According to Ms. Malic, the test applicable to a request for specific disclosure is the one laid out by the learned authors of Commonwealth Caribbean Civil Procedure:

In deciding whether to order specific disclosure, the court must consider whether such disclosure is necessary in order to dispose of the claim fairly or to save costs, having regard to the likely benefits and costs of the disclosure, and whether the party against whom the order is proposed to be made has the financial resources to comply. If the answer to the latter question is in the negative, the court may make the order in terms that the Claimant pays the other party's cost in making disclosure.⁵

[12] In response to Mr. Malic's contention that subsection 148A(5) of the Supreme Court of Judicature Act requires that the court look into Ms. Malic's own financial means to determine each party's rights and interests with respect to the properties, Ms. Malic argues that the law only requires that she proves her contribution to the acquisition of the properties, not proof of means. There is, therefore, no reason to look into Ms. Malic's whole financial history.

⁵ Gilbert Kodilinye and Vanessa Kodilinye, Commonwealth Caribbean Civil Procedure, 2nd ed. at 303.

[13] Finally, Ms. Malic notes that the CPR do not apply to family proceedings. As a result, there is no right to specific disclosure and no presumption of continuous disclosure. The cases relied on by Mr. Malic are of no relevance in the circumstances.

Determination

[14] The CPR do not apply to family proceedings, including this originating summons for the division of matrimonial property.⁶ The old Supreme Court of Judicature Rules (“old Rules”) apply to this matter. Mr. Malic conceded that he grounded his application for specific disclosure in the wrong rules. Rules 58 and 59 of the Matrimonial Causes Rules apply where a wife seeks maintenance, not in matters related to the division of matrimonial property. Rule 35 of the Matrimonial Causes Rules applies where a party seeks specific disclosure of documents in a family matter.

[15] The Matrimonial Causes Rules grant a judge with wide discretion to order general or limited discovery where the judge deems it fit. Rule 35 of the Matrimonial Causes Rules specifies that an application for discovery of documents may be made without an affidavit:

35(4) A party may without affidavit apply for discovery of documents by an opposite party or parties and such opposite party or parties may be ordered to make such general or limited discovery as in the discretion of the judge or Registrar shall seem fit.

[16] The language in rule 35 signals the legislator’s intent that the discovery of documents be dealt with by the court expeditiously and without any unnecessary formalities. The rationale for this informality is likely grounded in the fact that, unlike Part 28 of the CPR, neither the Matrimonial Causes Rules, nor the old Rules more generally provide a mechanism for the standard disclosure of documents relevant to a matter. Order XXXIII of the old Rules deals with “discovery and inspection”. Rule 10 of Order XXXIII provides that the discovery of documents is ordered by the court on application:

10. Any party may, without filing an affidavit, apply to the Court for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been, in his possession or power, relating to any matter in question therein. On the hearing of such an application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order (Form No. 34, App. K.), either generally or limited to certain classes of documents as may in the discretion of the Court be thought fit:

⁶ CPR 2.2(3)(c). See also *Rutilla Olivia Supaul v Gulab Lalchand*, Action No. 17 of 2016 at para. 5.

Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

[17] Rule 13 of Order XXXIII provides that the court can order the production of documents on its own initiative and without the need for any application:

13. It shall be lawful for the Court at any time during the pendency of any cause or matter to order (Form No. 35, App. K.) the production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such cause or matter, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

[18] Under the old Rules, therefore, a party's application for discovery is considered informally, and ordered as the court deems fit. Production of the documents can be ordered by the court on its own initiative. Declining to rule on Mr. Malic's application because it is grounded in the wrong rule would insert unnecessary formalities into this application where the legislator did not see the need for such formalities. This is a matter where form must yield to substance, as intended by the old Rules. Both parties had a full opportunity to be heard on the merits of Mr. Malic's application, such that Ms. Malic would not be prejudiced by a ruling on the merits. I will, therefore, consider and rule on the merits of this application.

[19] Counsel for both parties disagree on the test applicable to this application for specific disclosure. I need not go any further than Rule 10 of Order XXXIII, which sets out the test I must apply. In ruling on this application, I must consider whether each category of documents requested by Mr. Malic is necessary. I can refuse disclosure of any document requested where the document is "not necessary either for disposing fairly of the cause or matter or for saving costs".

[20] Necessity is considered in light of the pleadings. It is also considered based on the nature of the matter at issue. Ms. Malic seeks declarations as to her entitlement to certain properties under section 16 of the Married Women's Property Act and section 148A of the Supreme Court of Judicature Act. Read together, subsections 148A(3) and (5) of the Supreme Court of Judicature Act make it clear that the court must consider both parties' financial contribution to the acquisition, conservation, or improvement of the properties:

148A.–(1) Notwithstanding anything contained in this Part or in any other interests in law, a husband or wife may during divorce proceedings make application to the court for a declaration of his or her title or rights in respect of property acquired by the husband and wife jointly during the subsistence of the marriage, or acquired by either of them during the subsistence of the marriage.

(2) In any proceedings under sub-section (1), the court may declare the title or rights, if any, that the husband or the wife has in respect of the property.

(3) In addition to making a declaration under sub-section (2), the court may also in such proceedings make such order as it thinks fit altering the interests and rights of either the husband or the wife in the property, including–

(a) an order for a settlement of some other property in substitution for any interest or right in the property; and

(b) an order requiring either the husband or the wife or both of them to make, for the benefit of one of them, such settlement or transfer of property as the court determines.

(4) The Court shall not make an order under sub-section (3), unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

(5) In considering whether it is just and equitable to make an order under sub-section (3), the court shall take into account the following–

(a) the financial contribution made directly or indirectly by or on behalf of either the husband or the wife in the acquisition, conservation or improvement of the property, or otherwise in relation to the property;

[...]

[21] With these principles in mind, I now consider each category of documents requested by Mr. Malic to determine whether their disclosure is necessary in light of the pleadings and the nature of the matter.

Any or all accounts held in the name of the Applicant at any Bank or other financial institution between September 1997 to September 2019 and supporting bank statements or other records showing the monthly activities of these accounts in respect of the relevant period

[22] This request is denied. Mr. Malic has not justified why this request is necessary for the fair disposition of this matter. As pointed out by Ms. Malic's counsel, Ms. Malic is not seeking maintenance and does not have to prove her means. Under section 148A of the Supreme Court of Judicature Act, Ms. Malic must only prove her financial contribution to the acquisition, conservation, or improvement of the properties she claims a right or interest in. It is not necessary for Ms. Malic to disclose her entire banking

history for the court to dispose of this matter fairly. This request is in the nature of a fishing expedition and will not be granted.

The Atlantic Bank CD account containing three hundred thousand dollars (\$300,000.00) held initially jointly and thereafter only in her name on trust for both her and the Respondent/Applicant

[23] Mr. Malic seeks the disclosure of Ms. Malic's Certificates of Deposits ("CD") account with the Atlantic Bank. In his submissions, Mr. Malic alleges that "this is money that would be jointly owned and entitled to by both parties, and [Ms. Malic] is to disclose how she was able to get it only in her name". In response, Ms. Malic argues that she does not know anything about this joint account. The existence of this joint account has not been established as a fact. In addition, because it is allegedly a joint account, Mr. Malic can request the statements from the Atlantic Bank himself.

[24] This request is denied. It is Mr. Malic who alleges the existence of the CD account at paragraphs 79 to 84 of his first affidavit (dated 29th April 2021) and it is his burden to prove its existence. Ms. Malic denies any knowledge of a CD for \$300,000.00 at paragraph 93 of her 2nd affidavit (dated 18th June 2021). There is nothing that would support a claim that she is in possession or has a right to possess the information in relation to this CD account. While she states that she recalls "\$124,000.00 being on a CD, which I used to pay the outstanding bills we had after closing the store", it is unclear whether this is the CD referred to by Mr. Malic or another.

Holy Redeemer Credit Union Bank history, cover of which is shown as NM1-1 in the 3rd Affidavit of Nellie Malic dated 1st July 2021, for Account Number 15395 in the name of Nelly Malic for period 1997 to present

Holy Redeemer Credit Union Bank history, for share ledge 4342.43 in the name of Nellie Malic for period of 1999 to present, portion of which is only shown as the second page of NM1-1 in the 3rd Affidavit of Nellie Malic dated 1st July 2021

Loan agreement dated 27th June 2000 for loan she said she obtained from Holy Redeemer Credit Union in the sum of one hundred and fifty thousand (\$150,000.00) and any collateral offered up for said loan

[25] These three requests for specific disclosure are considered together as they relate to the same Holy Redeemer Credit Union bank account and loan. Mr. Malic seeks the disclosure of Ms. Malic's entire Holy Redeemer Credit Union passbook for account number 15395, along with the share ledger 4342.43 in Ms. Malic's name, in order to get the full history of the loan of \$150,000.00 alleged to have been obtained by Ms. Malic on 27th June 2000. Mr. Malic also seeks the disclosure of the loan agreement

between Ms. Malic and the Holy Redeemer Credit Union. Mr. Malic notes that Ms. Malic only exhibits to her 3rd affidavit (dated 1st July 2021) the cover page and one page of the passbook which does not show the entire history of the loan, including whether it was paid off.

[26] These requests are granted in part. In paragraph 6 of her 3rd affidavit, Ms. Malic alleges that she obtained a loan of \$150,000.00 from the Holy Redeemer Credit Union which was used for the construction of an extension to the Boulevard Store on Vernon Street, on which she claims an interest. She exhibits one page of her passbook in support of her claim. I agree with Mr. Malic that disclosure of the loan agreement, and of the history of the loan, is necessary to determine Ms. Malic's contribution to the Boulevard Store on Vernon Street. The loan agreement would reveal the purpose as well as the terms and conditions of the loan which are necessary to support Ms. Malic's claim that the loan was obtained in her name and used to finance the construction of the extension. The fact that a loan agreement is not specifically mentioned in Ms. Malic's affidavit does not prevent this court from ordering its disclosure if it exists. The missing pages in the passbook are necessary to determine whether the loan has been paid back in full.

[27] I, however, decline to order the specific disclosure of Ms. Malic's entire banking history with the Holy Redeemer Credit Union from 1997 to present. The loan was obtained in 2000. It is not necessary to disclose Ms. Malic's banking history prior to 2000. There is no information in Ms. Malic's 3rd affidavit as to when the loan was repaid in full. The order will therefore be for the disclosure of Ms. Malic's banking history with the Holy Redeemer Credit Union from 2000 until such time as the loan was repaid in full.

Record of the joint account held between her and the Respondent/Applicant at Scotiabank, as mentioned at paragraph 7 in the 3rd Affidavit of Nellie Malic dated 1st July 2021

[28] Mr. Malic seeks the disclosure of the joint account mentioned by Ms. Malic at paragraph 7 of her 3rd affidavit. Ms. Malic exhibits at 'NM1-3' four handwritten pages stamped by the Scotiabank in 2012-2013. Ms. Malic states that she has produced what she had. The Scotiabank in Belize is now closed and she does not have any other records.

[29] This request is denied. Ms. Malic has stated that she has disclosed what she has in her possession. The Scotiabank is now closed in Belize. Ms. Malic cannot be ordered to disclose documents she does not have in her possession and is unable to obtain.

The Respondent/Applicant be at liberty to inspect and take copies of all entries in the books of all Banks and Financial Institutions relating to accounts of the Applicant for the period of September 1997 to September 2019

[30] This request is denied. This request is in the nature of a fishing expedition. As mentioned above, Ms. Malic is not seeking maintenance and does not have to prove her means. It is not necessary for Ms. Malic to disclose her entire financial history.

Loan agreement she purportedly made in November 2016 for the Respondent/Applicant's gifted to him by his father as she claims that loan was made by her at Holy Redeemer Credit Union and for the boat engine as stated at paragraph 97 of the 2nd Affidavit and repeated at paragraph 13 of her 3rd Affidavit

[31] Mr. Malic seeks the disclosure of a loan agreement Ms. Malic entered into in 2016 with the Holy Redeemer Credit Union for the purchase of a boat engine. This loan is referred to at paragraph 97 of Ms. Malic's 2nd affidavit and paragraph 13 of her 3rd affidavit. Ms. Malic objects to the request on the basis that no loan agreement has been proven to exist.

[32] This request is granted. Ms. Malic alleges the existence of a loan which she states was used to purchase matrimonial property without providing any supporting documentation to prove its existence. Disclosure of the loan agreement is necessary to dispose of this matter fairly.

Rental agreement she has with Mr. Juny Ang Zhao of Belize City, from 2009 to present, along with receipts of rent income she earns from the properties since 2009 to present, for which she signed and collects rent for the Respondent/Applicant's property at 6898 Mahogany Street identified at the Land Registry as Parcel 45-40-917, Registration Section St. Martin de Porres

[33] Mr. Malic seeks the disclosure of the current rental agreement between Ms. Malic and Mr. Zhao for the rental of the property on Mahogany Street. This request is denied as the rental agreement was disclosed by Ms. Malic at exhibit NM1-8 of her affidavit dated 11th November 2021.

[34] Mr. Malic also seeks the disclosure of receipts showing the rental income collected by Ms. Malic on the Mahogany Street property. This request is granted. Ms. Malic admits to collecting the rent for this property (see paragraph 77 of Ms. Malic's 2nd affidavit; paragraph 9 of Ms. Malic's 3rd affidavit; paragraph 18 of Ms. Malic's affidavit dated 11th November 2021). It is necessary for the fair disposition of this matter to determine the income Ms. Malic has derived from the rental of the property at Mahogany Street, on which she claims an interest. Ms. Malic must disclose any receipts in her

possession showing the rental payments she has collected on the Mahogany Street property from 2009 to present.

Receipt of payment received from the sale of the Respondent's gym equipment, which she sold without the Respondent's consent

[35] This request is denied. Mr. Malic alleges at paragraph 23 of his 1st affidavit (dated 29th April 2021) that Ms. Malic sold his gym equipment which was valued at about \$5,000.00. Ms. Malic denies selling the gym equipment, except for one item which was sold to pay for their daughter's medical expenses with Mr. Malic's consent. That Ms. Malic has sold the gym equipment and kept the profits have not been established as facts. The specific disclosure will not be granted.

IT IS HEREBY ORDERED THAT

- (1) Ms. Malic shall disclose to Mr. Malic the following documents within 14 days of the date of this ruling:
 - a. Loan agreement dated 27th June 2000 between Ms. Malic and the Holy Redeemer Credit Union for the loan of \$150,000.00;
 - b. Holy Redeemer Credit Union banking history for Account Number 15395 and share ledger 4342.43 in the name of Ms. Malic from 27th June 2000 up until the loan was repaid in full;
 - c. Loan agreement between Ms. Malic and the Holy Redeemer Credit Union for the boat engine referred to at paragraph 97 of Ms. Malic's 2nd affidavit and paragraph 13 of her 3rd affidavit;
 - d. Any receipts showing rent collected by Ms. Malic from Mr. Zhao for the rental of the property at 6898 Mahogany Street from 2009 to the present.
- (2) Costs in the cause.

Geneviève Chabot
High Court Judge