

GOOSE v EGG

Some pointers in dealing with businesses during ancillary relief proceedings

Pre *White v White* the approach Courts took to businesses was to go through a balancing exercise:

- W's reasonable needs
- Business' ability to pay/ lack of disruption to be caused to H's business

However post *White v White* it's a different matter:

N v N [2001] 2 FLR 69 Coleridge J "Those old taboos against selling the goose that lays the golden egg have been laid to rest"

That said: *Av A* [2006] 2 FLR 115 Charles J

In a post *White v White* world we are to be looking at fairness and in cases where there is a private company involved "The requirement of fairness may mean that when private companies are involved one of the parties should be permitted to continue running the company"

Most recent case on the point of ancillary relief in matters where there is a private company: *D v D* [2007] EWHC 278 Charles J sets out a checklist of information that a judge is likely to need if he is going to fairly deal with the matter (it's a lot!) (and it requires a super honest husband!):

- Brief history of the companies and the benefits derived from them during the marriage
- Description of the business
- Audited accounts for a reasonable period, Charles J suggests the last 5 sets of accounts
- Up to date accounts so far as they exist in the form in which they are normally produced to the auditors
- Up to date managements accounts or if they do not exist an up to date assessment by H backed by records

- Up to date account from H of the prospects of the companies accompanied by records
- Up to date accounts from H of his plans for to companies in the short, medium and long term
- Whether or not those plans include a sale the identity of persons and companies who might be interested in buying all or parts of the company

Another checklist of points that a judge may find relevant, and a lot of this has to be satisfied with expert evidence:

- Is there a market for the shares or any of the assets of the companies
- If shares were to be sold what would be the sale strategy
- How should companies be valued (age old question), which inevitably leads on to...
- Tax consequences!!! (here it must be remembered that the monies may very well be taxed twice once when they get released into the business and then again when they end up in the hand of the husband, it is essential that early comprehensive tax advice is taken and the expense will simply have to be swallowed)
- Likely effect on business/ company if monies were raised and paid out, look at timing of paying out because “fairness” would be for the Court to give H a chance and so we are often looking at lump sum by installments over a **medium** term period (see below)
- What corporate structures could be put in place between H and W by way of dividend or by other methods to enable H to have day to day control whilst protecting the wife

One the problems that would immediately occur to a practitioner is quite how much cooperation this checklist requires of the husband. The second it highlights is the need for expert advice, valuing experts, experts in the market, tax experts and even lawyers with other areas of expertise.

Also from D v D. Clean breaks and private companies.

- Dangers of a snap shot valuation
- These dangers render a clean break unfair in principle. (too uncertain)
- I “ repeat my urging not to confine the approach to be based on valuation and liquidity. And to use expert legal advice”

Transfer of shares

You can get round the valuation problems to a certain extent only with the issue of shares, hence clean break not always best solution. See G v G [2002] 2 FLR 1143 (Coleridge J)

Remember the following:

- Be careful about the size of the shareholding, in this case it was 15% not enough for the wife to cause trouble (not expressed in those terms in the judgement!)
- Also note that in this case W was contending that she wanted to retain a share of the company and wanted to be involved! And she still got her shares
- The case still aimed at a 50/50 division of assets, so look to see if you can balance a 50/50 division whilst retaining the company and not giving the opportunity for W to make mischief on an ongoing basis

Look therefore at the business as a matter of priority, are there articles of association or covenants restricting the transfer of shares. You may even find covenants preventing the transfer to spouses. These are beginning to be used alongside prenups. Note to everyone consider this when someone comes to you for pre-nup advice although you may have to get expert company law advice on it.

Taylor v Taylor [2004] EWCA 1022

Applications in relation to the company are still made to the relevant family judge. No passing the buck to other courts

Lump sums by installments

R v R [2005] 2 FLR 365

- Discounts for early payments (and consider a cap on the discounts)

- Discounts for risk of illiquidity can be negated by the “reward factor”. The judge should look at track record and nature of business. Therefore if you wish to get a higher percentage for H for the illiquidity/ liquidity argument you will need to be specific in terms of your risk arguments
- Can the payments be made in a reasonable period or does the goose need to be sold (period in this case is 5 years)
- Safeguards for W are needed, so there needs to be an injunction preventing H from disposing of shares without written consent of W or leave of Court, recognition that H may be disposing of shares to pay lump sums, reasonable consent needs to be assured. Share certificates should be deposited with the solicitors

Business: capital value or merely income stream

V v V [2005] 2 FLR 697

Optician husband, W sought to argue that there was a capital value capable of being attributed to a secure income stream. (Price/ earnings/ ratio x maintainable income stream see table 17 of At A Glance)

However Colridge J said no “In theory there was a capital value capable of being attributed to any secure income stream [but] to include a capital value to a business which really is just an income stream means one is running the risk of double accounting”.

N v N [2001] 2 FLR 69

Older case mentioned for the following principles, is it a little out of date, not specifically disapproved so worth a shot? H accountant

- Is the cost of equality too high and therefore not in the family’s overall best interests?
- Theory of White v the practicality in valuing, dividing up and realizing certain types of assets.
- Bringing down the financial edifice could be contrary to children’s best interests
- Lack of liquidity a factor

- Court should have an eye to the valuation at the date of separation if it is very significantly lower than valuation at the date of hearing (provided that its not due to just inflation or deflation or say the movement of house prices) date of valuation should still be date of hearing but you can make contributions arguments
- Reasonable periods for H to pay to enable best price to be obtained
- Coleridge and his geese:

Full quote: “I think it must now be taken that those old taboos against selling the goose that lays the golden egg have largely been laid to rest; some would say not before time. Nowadays the goose may well have to go to market to sale, but if it is necessary to sell her it is essential that her condition be such that her egg laying abilities are damaged as little as possible in the process. Otherwise there is a danger that the full value of the goose will not be achieved and the underlying basis of any order will turn out to be flawed.”

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