

# 1GC | Family Law

## The Courts' Approach to Companies in Financial Remedy Proceedings

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# *Prest v Petrodel*

- Ordinarily, the Family Court can only order the transfer of assets which belong to the parties (such as shares in a company).
- A company is a separate legal entity and the general rule is that the court cannot transfer the assets owned by a company to a spouse.
- The exceptions identified in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34:
  - The company holds assets on trust for one of the parties; and
  - Where the corporate veil can be pierced (see *Akhmedova v Akhmedov* [2018] EWFC 23).

# Options

- The court has three broad options when dealing with companies (as identified by Lewison LJ in *Versteegh v Versteegh* [2018] EWCA Civ 1050)
  - The court can order the shares in the company to be sold;
  - The court can divide the asset in specie (“*Wells* sharing”); or
  - The court can “fix” a value to the shareholding (to be applied when off-setting or ordering a lump sum).

# Minority Discounts

- A discount may be applied to the value of shares where the shareholder owns less than 50% of the total shareholding.
- A discount will not apply where the company is a “quasi partnership” (as defined in *Ebrahimi v Westbourne Galleries* [1972] 2 WLR 1289).
- See *G v G (Financial Provision: Equal Division)* [2002] 2 FLR 1143



# The Problem With Valuations....

- Moylan J in *H v H* [2008] 2 FLR 2092 “*In my experience, valuations of shares in private companies are among the most fragile valuations which can be obtained.*”
- *Martin v Martin* [2018] EWCA Civ 2866 (Moylan LJ),
- The court has to assess the weight which can be placed on the value even when using a fixed value.
- This applies both to the amount and to the structure of the award.
- The aim is to effect a fair balance of risk and illiquidity between the parties.
- Mostyn J in *WM v HM* [2017] EWFC 25, warned of double accounting:
  - (i) to discount an asset to reflect illiquidity; and
  - (ii) to move from an equal division.

# Downturn in Business

- A valuation is a “snap shot” at a particular valuation date which may give an unfair picture (Lewison in *Versteegh*).
- *Haskell v Haskell* [2020] EWFC 9 (Mostyn J). It was unrealistic to approach the case on a “snapshot”. Wife awarded capital sums to meet her needs, but the husband was granted time to pay with liberty to apply for an extension of time.
- *AW v AH* [2020] EWFC 22. Lump sum claims were adjourned (no other means of achieving a fair outcome).



# Non-Matrimonial Contributions

- In *K v L* [2011] 2 FLR 980 the wife's shares had increased in value from £300,000 to £57.4 million over the course of the marriage. Held that the husband had no entitlement on a sharing basis (but had a claim on a needs basis).
- *Hart v Hart* [2017] EWCA Civ 1306 (Moylan LJ) "*the court is not required to adopt a formulaic approach .....It is, perhaps, worth reflecting that the concept of property being either matrimonial or non-matrimonial property is a legal construct. Moreover, it is a construct which is not always capable of clear identification*".
- *IX v IY* [2018] EWHC 3053, (Williams J) The court should identify any latent potential a business had when brought into the marriage and give an allowance for passive growth. A broad brush approach was taken.

# Post Separation Contributions

- *SK v WL* [2010] EWHC 3768 (Moylan J). The sale price reflected the development of the company during the 3 ½ years after separation. Proceeds divided 60/40 to reflect that contribution.
- *G v T* [2020] EWHC 1613 (Cusworth QC) progress of the company in the 9 months since separation was regarded as matrimonial, but not thereafter.
- In *Sharland v Sharland* [2015] UKSC 60, the trial judge ruled that where a matrimonial asset remained in the hands of one of the parties, it would become “less and less of a matrimonial asset”. In the Supreme Court, Baroness Hale commented that “*there is obviously room for more than one view on this and so it would be inappropriate to comment further*”.



# Extracting Cash From Company

- Dividend payment:
  - From cash reserves;
  - From the sale of non-essential company assets;
  - NB: The tax on dividends will be 38.1% (which is higher than CGT at 20% or 10%).
- Partial sale of shares to a third party;
- Company buy back of a portion of the shares;
- Company demerger and sale of part of the company (*specialist advice is required*).

# Wells sharing

- In *Wells v Wells* [2002] EWCA Civ 476 the judge at first instance found the shareholding to be impossible to value.
- Thorpe LJ “*sharing is achieved by a fair division of both the copper-bottomed assets and the illiquid and risk-laden assets*”. The husband and wife continued to hold shares in the company after the final order.
- Followed in *Versteegh v Versteegh* [2018] EWCA Civ 1050 Lewison LJ: “*Unattractive as a Wells order is as an outcome for both the wife and the husband, it is hard to know what else the judge could have done given the impossibility of valuing the shares or in estimating future liquidity*”.

# “Copper Bottomed”

- Can a company be “copper bottomed”?
- In *P v P (Financial Relief: Illiquid Assets)* [2004] EWHC 2277 (Fam), Baron J found that the husband could extract £430,000 in cash from the business, which would be treated as “copper bottomed”.
- Examples:
  - Property Investment businesses;
  - Companies which have been valued on a net asset basis.

# Sale of the Company

- In *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69 Coleridge J:

*"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 for sale."*



# Q&A

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