**Finance Case Digest**

# OG v AG [2020] EWFC 52 Mostyn J

**Conduct – Costs sanction for failing to negotiate reasonably once financial landscape known - Discount to company valuation for Covid-19/Brexit uncertainties – Discount to company valuation based on spouse competing against company - whether appropriate to discount assets to reflect court’s indignation in respect of litigation behaviour**

**Background**

This was a big money, long marriage financial remedies cases where, conduct apart, the case was a paradigm case for the application of the equal sharing principle.

H and W owned shares in a holding company which owned X Limited (‘X’). H accepted X was matrimonial. A significant part of the business of X was with customers in the EU where business is transacted on a tariff free basis.

The parties also acquired a domestic and international property portfolio. The portfolio included a number of properties in Dubai. H’s disclosure of ownership and dealings in respect of the Dubai properties was piecemeal.

Post-separation AB LLP (‘AB’) was incorporated overseas. AB was in the same line of business as X. The shareholders were two close friends of H and the father of H. H sought to distance himself from AB. W asserted AB was a façade many months in the making by H as a way to compete against X.

W explicitly pleaded misconduct to include sustained non-disclosure in respect of the Dubai properties and transactions and the furtive establishment of AB to compete unfairly and unlawfully against X.

The non-business non-pension assets were valued at £3,680,449. The court declined to draw inferences that H had undisclosed assets despite H’s previous abysmal and dishonest presentation during the course of proceedings. The court was satisfied that by 12 June 2020 H had made a clean breast and disclosed all relevant assets (ownership of AB aside).

X was valued at c. £13,865,000. Of this figure c. £9.9m represented surplus assets. The trading element on a traditional multiplier multiplicand basis was £3.945m.

W argued that two discounts should be applied to the value of X. First, a discount to reflect the effects of the economic downturn caused by Covid and the likely future disruption on account of Brexit; particularly in circumstances where there appears to be appreciable risk that there will not be a trade agreement with the EU by the end of the year. The SJE agreed a discount was appropriate but declined to hazard a figure. A 10% discount was applied but only to the trading element of the valuation.

The court concluded that H was the real owner of AB and W argued for a 40% discount to the value of X to reflect the fact that H had set up a business in direct competition. The SJE thought a discount was appropriate and Mostyn J applied a discount of 30% to the trading element of the valuation. After the Covid/Brexit discount of 10% and the competitor discount of 30% was applied the gross value of X was £12.2m. After deduction of costs of sale of 2.5% and tax, the net value of the parties’ interest in X was £10,707,643.

The total sum for distribution was £16,371,669 (non-business non pension £3,680,449, X 10,707,643 and pension £1,983,57). W sought a 2/3:1/3 split of the discounted assets in her favour.

**Outcome**

Since the PTR on 12 June 2020 the financial landscape became sufficiently clear and W was in a position to negotiate reasonably. Her stance in arguing for a division of the heavily discounted assets 2/3:1/3 in her favour with an order for payment of 93% of her costs was found to be untenable. W’s position where she sought to take advantage of H’s delinquency to justify such an unequal division was not a reasonable way to conduct litigation. The costs order against H was reduced by £50,000 to reflect W’s unreasonable and untenable open negotiation stance.

The court rejected the submission that in addition to the competitor discount that H should solely bare and a penalty in costs, there should be an additional substantial discount to reflect the court’s indignation at the way H behaved during the litigation. The submission amounted to a request to impose a moral judgment and penalise H. It was memorably noted that ‘the financial remedy court is no longer a court of morals’. Conduct should be taken into account not only when it is inequitable to disregard but also only where its impact is financially measurable.

On distribution H was to be solely responsible for the competitor discount and additionally had to pay £278,020 by way of costs penalty. In assessing the costs penalty, it was ordered inter alia, that H should pay all W’s costs for the period post 12 June, even though H was not guilty of litigation misconduct in this period. The basis for such an order was that this period was contaminated by H’s earlier misconduct and H’s denial of ownership of AB.

H received 44.7% of the net assets. The departure from equality of £869,741 was the price H had to pay for his conduct in setting up a competitive business and conducting his litigation so abysmally.

**Comment**

The assets in this were over £16m. However, the reason that this case is destined to be ubiquitously cited for the foreseeable future is arguably due to the cost sanction imposed against W of £50,000 for failing to negotiate reasonably. The learned Judge’s stance was encapsulated in paragraph [31] in the following terms:

It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing.

What is likely to constitute a reasonable open position is clearly fact specific and the perimeters of reasonableness will likely be developed in case law. It would appear that an open position which does not fall within the ambit of the reasonable exercise of discretion runs a very real risk of leading to an adverse costs order. Clearly great care will need to be taken in constructing open positions post FDR. If you are representing a husband who seeks a clean break when such an outcome is unrealistic, or if you represent a wife who seeks an unrealistic needs-based order, then the writing may be already on the judicial wall.

Simon Sugar

1GC|Family Law

sugar@1gc.com