

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: D108 OF 2007



021-2-09
18

BETWEEN CAREN SUE WIGHT PETITIONER
AND STANLEY PETER WIGHT RESPONDENT

IN CHAMBERS
THE 11TH FEBRUARY 2009
BEFORE THE HON. CHIEF JUSTICE

Appearances: Ms. Georgina Clarke of Samson & McGrath for the petitioner
 Ms. Angelyn Hernandez of Bodden & Bodden for the respondent

RULING

1. Since the filing of her petition for divorce on 7th June 2007, the petitioner and the respondent have separated under the terms of two Deeds of Separation executed by them.
2. The petition has been found by the Court to be proved but no final order for ancillary relief has yet been made.
3. In the meantime, some provisions of the Deeds of Separation have been carried into effect. These include provisions of the first Deed for the transfer of the matrimonial home into the sole name of the petitioner along with the encumbrance upon it of a bank loan. Provisions of the second Deed for monthly payments to her by the respondent of maintenance for the two children of the

marriage have also been observed. The children continue to reside in the matrimonial home with the petitioner also in keeping with the terms of the arrangement between the parties.

4. Thus, in substantial part, the obligations under the Deeds of Separation have been carried into effect and are being performed.
5. There are, however, important aspects of the second Deed that are outstanding and the Court may yet have to decide whether to insist upon its terms or to make other provisions as between the parties. The question may yet arise therefore whether, upon the Court's final determination of the ancillary issues between the parties; the jurisdiction of the Court and the exercise of its discretion have been in any way fettered by the terms of the Deeds of Separation.
6. It is important that this question is answered now in the event any aspects of the Deeds of Separation have to be unravelled or set aside by the Court because it proves to be unworkable or unfair.
7. I have no hesitation in holding that the answer to this question is that the jurisdiction of the Court as described in section 3 of the Matrimonial Causes Law (2005 Revision) ("the Law"); which includes the power and duty to provide relief not only for the parties themselves but also for children of the family, may not be fettered by agreement between the parties. Any such fetter would be void on grounds of public policy. In my view, this is also implicit in section 19 of the Law:

"In dealing with all ancillary matters arising under this Law, the Court shall have regard first of all to the best interests of any

children of a marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and deserts of the parties.”

8. It must follow that no agreement between the parties could preclude the Court's exercise of jurisdiction towards the fulfilment of that statutory mandate.
9. This is notwithstanding that by Section 14 of the Law, it is specifically provided that it is lawful for the parties to a marriage, for the purposes of facilitating proceedings under the Law, to enter into an agreement of the kind contained in the Deeds of Separation; including such provisions as for the settlement of matrimonial property and maintenance obligations.
10. On the face of them, the present Deeds of Separation give rise as yet to no jurisdictional or public policy concerns of the kind discussed above. Rather, both parties seek to rely upon them and ultimately to ask the Court to incorporate their terms in the final order for ancillary relief. That might yet prove to be the just and equitable thing to do.
11. As an important aspect of the second Deed of Separation (“the second Deed”), the respondent is required by clause m although ambiguous in its terms, to transfer one-half of his shareholdings in General Traders Ltd. (t/a Schellections) (“the Company”), to the petitioner. Reasonably and sensibly construed, clause m must be regarded as providing that until the time of that transfer, the respondent is required to pay (and I am told, has been paying) one-half of his dividends from his shares to the petitioner.

12. The agreement for the transfer of the shares, has, however, become frustrated by the refusal of the directors of the Company to allow the transfer to take place. I am not required to examine their reasons as the parties both accept that the directors have the right and power under the Articles to refuse.
13. The consequence is that instead of transferring one-half of his shares, the respondent must now pay the value of that one-half to the petitioner.
14. The exercise before me this morning involves me having to determine that value.
15. To that end, I have heard the competing expert evidence of Mr. Theo Bullmore and Mr. Alex Bodden. Both experts are experienced chartered public accountants having, in the case of Mr. Bullmore, extensive and, in the case of Mr. Bodden, significant, local experience in the valuation of businesses.
16. While the experts agree that the appropriate valuation methodology is the multiple of annual sustainable earnings, they disagree on what that multiple should be.
17. However, the difference between them as to the annual sustainable earnings of the Company is not very significant – with Mr. Bullmore arriving at USD450,000 and Mr. Bodden at USD432,000 – a difference of only USD18,000. I consider that it would be quite appropriate to take the median figure of USD441,000; as the difference of USD18,000 is described by Mr. Bullmore as being well within the range of reasonable disagreement between experts. Mr. Bodden did not disagree with that proposition.
18. The problem remains what multiple to take. Based on his acknowledged experience in Cayman, including as an expert witness before the Courts; Mr. Bullmore adopts a range of multipliers from 3 to 7 from within which he chose

- 3.5. He thus arrived at a valuation for the Company of \$1,575,000 (that is, \$450,000 x 3.5).
19. The shareholding in issue is 16.5% of the Company which would produce a value of \$259,875 if one takes the view, as I do in these circumstances, that there should be no discount referable to the fact that a minority interest is involved. I take that view primarily because no transfer will take place. In reality, the petitioner is not to be treated as would a purchaser who seeks to acquire a minority interest upon which would be attendant all the risks of minority ownership and which would ordinarily inform the application of a discount. Rather, here in effect, the respondent is paying cash in order to keep his well established 33% interest intact, an interest which he and his other shareholders must be deemed to regard as being in their best interest to keep intact.
20. Mr. Bodden's valuation would advise the application of a significantly lower multiple – that of 2.36 – derived from the application of his more conservative range of multiples of 1-5 and by the application of points from within that range being specifically applied to each of another range of 7 criteria which he identified as suitable for application to the valuation of a local business.
21. While Mr. Bodden's 7 criteria may be as a whole unobjectionable (so seen by Mr. Bullmore, although also as “not exhaustive”), I am not persuaded by Mr. Bodden's adoption of the range of multiples of 1-5.
22. Mr. Bullmore describes that range as flawed in a number of respects. For one thing, it would result in a maximum valuation of only 5 times annual earnings for any business, whereas experience has shown that proper valuations (including as

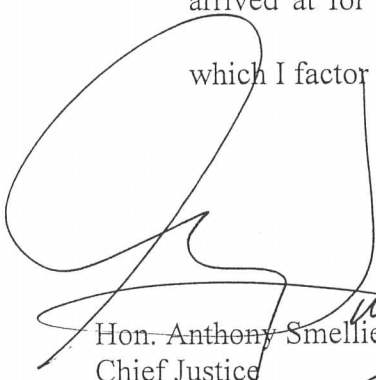
accepted by this Court) have been based on multiples as high as 7 times annual earnings. At the other end of Mr. Bodden's range, 1 times annual earnings must be too low for any well established business which will undoubtedly continue as a going concern. In other words, any such business would deserve the application of a multiple of more than 1.

23. I accept these criticisms. Moreover, I am concerned that in addition to that very conservative approach to the identification of his range of multiples, Mr. Bodden adopted an even more conservative approach to its application to the 7 criteria which he used in arriving at his multiple of 2.36.
24. For instance, to criterion #6 – “Revenue and Net Profit trending” – he applied a multiple of only 2, because he described revenues of the Company as “softening/flat” by reference to the past two years’ performance.
25. To my mind, an obvious flaw with that approach is that it renders moot the primary step of the methodology of the multiple of sustainable annual earnings which step is to arrive at the annual revenue or multiplicand. As the multiplicand is the actual annual revenue figure to which one must apply the multiple to arrive at the valuation, it seems illogical, to say the least, to adopt a merely adjectival assessment of revenue as one of 7 bases for arriving at what the multiple itself should be. After all, the methodology reflects the reasonable expectation that, if the business continues as a going concern, it should continue to yield or sustain the projected level of revenue.
26. That criticism aside, I found Mr. Bodden's approach to be altogether too conservative. While there must be allowed a reasonable margin of appreciation

for the subjective difference of approaches between valuers, I am not persuaded of the correctness of taking an already conservative range of multiples of 1-5 and then applying, as Mr. Bodden did, the consistently lower points from within that range to his 7 criteria for arriving at the multiple of 2.36.

27. Having already reduced the range to between 1 and 5 (instead of the more optimistic 3-7 or higher which local experience would suggest); to then apply the consistently lower points from within his already reduced range seems, to my mind, to be unjustifiable.
28. This is a business that – taking just the last six years since 2002 – has produced average annual net income of well of \$500,000. Mr. Bullmore's use of \$450,000 annual earnings is therefore already discounted to, among other things, reflect the declining trend in actual annual revenues from \$455,000 in 2007, (the second lowest), to the lowest of \$289,000 in 2008.
29. This single steep drop is not to be taken however, as defining the prospects for the future and indeed, Mr. Bodden's figure of \$432,000 for annual sustainable earnings, would not suggest that outcome either.
30. It seems to be agreed between himself and Mr. Bullmore that another way of testing the correctness of valuations is to look at them as annual returns on investment, taking the notional investment to be the sum arrived at as the valuation of the Company overall.
31. Taking that approach, an annual investment return of \$432,000 from a business valued at 2.36 times that amount (that is: \$1,019,520) would suggest a return on investment as high as 42%.

32. By contrast, an annual investment return of \$450,000 from a business valued at 3.5 times that amount (that is: \$1,575,000) would suggest an annual return of a more realistic 28.5%.
33. For all the foregoing reasons, I find the valuation of 16.5% of the Company as being USD254,677 [that is: $\text{USD}441,000 \times 3.5 = \text{USD}1,543,500 \times 16.5\% = \text{USD}254,677$].
34. I must note here, however – for the benefit of the parties considering whether the petitioner should be regarded as having suffered a loss from being required to take cash now instead of her 16.5% minority interest – that this valuation of \$254,677 has built into it, for the reasons already explained, the fact that there is no discount referable to the minority nature of the interest. Also, the sum of annual earnings and the reasons for arriving at it as also already explained, do not reflect the fact that those who remain the shareholders of the Company will continue to assume all the risks of declining revenues if the market continues to decline. By adopting Mr. Bullmore’s more optimistic approach, the result is that the value arrived at for the petitioner’s shares assumes very little of such potential risks, which I factor in, remote though they may be.


Hon. Anthony Smellie
Chief Justice

February 18 2009

