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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN

A P D

Petitioner

and

R D

Respondent

HORNER J

THE ISSUE

[1] The preliminary issue which this court is asked to decide is as follows:

> "Is the shareholding of the Respondent in GHL to be valued at a discount?"

I had given an ex tempore judgment immediately after this case concluded. I have been asked to provide a written one, which it is claimed will assist legal practitioners in the resolution of matrimonial disputes involving the valuation of minority shareholdings in SME's, that is Small Medium Enterprises. I agreed to do so because it was evident that Ms McBride QC and Ms Hayley Gregan BL for the petitioner and Mr Mark Orr QC and Ms Sarah Kinney BL for the respondent had put in a considerable effort on behalf of their respective clients, demonstrated by their detailed skeleton arguments and the comprehensive submissions each side made to the court.

BACKGROUND

[2] A P D ("the petitioner") married R D ("the respondent") on 12 September 1979. The petitioner is aged 58 years. The respondent is aged 60 years. There are two children of the family, a boy and a girl. The girl is studying medicine at

Newcastle and is in her final year. The boy is engaged in a course of business studies. The respondent has deposed that while he is a shareholder, the son will have a position in the company business. The respondent has deposed that it has always been his intention that:

"Our children would be well provided for in the future."

The petitioner and the respondent separated on 9 September 2009. A decree nisi was given by consent on 17 January 2012 on the grounds of irretrievable breakdown as evidenced by two years continuous separation, the respondent consenting to a decree nisi being granted.

[3] The respondent is a qualified certified accountant and has been employed by GHL from 1975. He is the Managing Director of GHL and also owns 10.79 per cent approximately of the issued share capital of GHL. This is a holding company which owns shares in a number of the trading subsidiaries. The respondent is the owner of C shares. The owner of A shares is PH and he owns 78.4% approximately. The B shareholder is SH and he owns a similar minority shareholding to that of the respondent, namely 10.79% approximately. All three classes of shares issued, that is A, B and C shares, rank pari passu in terms of voting rights and capital rights and carry significant protections. It is right to say that the respondent is a minority shareholder holding less than 25 per cent of the issued share capital of GHL. As a result he cannot defeat any resolution passed at any meeting of the members of the company whether by ordinary resolution or special resolution. There was no evidence to suggest the relationship among the three classes of shareholders was anything other than harmonious. I note that the business has operated successfully during the past number of years without apparent complaint from the respondent (or any member of the other classes of shareholdings). The success of the business is demonstrated by its profitability over the years. The respondent is obviously one of the main reasons for the continuing success of GHL.

[4] I am told that the respondent intends to retire when he reaches 70 years. He is actively involved in GHL and its subsidiaries. He is in receipt of a substantial income as Managing Director. He has other interests which are not relevant for the determination of the issue before this court.

[5] The issue which I have been asked to decide relates to whether the respondent's C shares should be valued on a heavily discounted basis as his forensic accountants, ASM, maintain to reflect that he is a minority shareholding, and furthermore, a minority shareholder owning less than 25% of GHL.

[6] Article 8 of the Articles of Association provides that the right of any member to dispose of his shareholding is governed by Article 9: see Article 8.1. Mr Orr QC in his skeleton argument has helpfully summarised the effect of the relevant parts of Article 9. He states:

"The position of the respondent, a shareholder, can be summarised as follows:

- He can agree a sale of to the 'A' shareholder at an agreed price.

- In default of agreement, the 'A' shareholder has an option to purchase the respondent's shares at the Transfer Price but the respondent has no contractual right to force the 'A' shareholder to purchase his shares.

- The other shareholders have an option to purchase his shares if the 'A' shareholder is unwilling to purchase, at the Transfer Price.

- The other shareholders, including the 'A' shareholder, have an option to nominate a third party to purchase the respondent's shares at the Transfer Price.

- In default of all of the above, the respondent has the right to sell his shares to a third party but he must sell all of his shares and at the Transfer Price."

Mr Orr QC then comments correctly that the effect of these provisions is to severely restrict the respondent's rights to sell or transfer his shares.

[7] I would however add the following:

(a) The Transfer Price as defined by 9.7 as the price, which in the event of disagreement, absence, death or otherwise, is to be determined by an independent chartered accountant as an expert and he is to make four assumptions. These are:

(i) It is to be an arm's length transaction between a willing vendor and a willing purchaser.

(ii) That the company is going to continue carrying on business as a going concern.

(iii) That the Transfer Shares are capable of being transferred without restriction.

(iv) The shares will be valued as a rateable proportion of the total value of all the issued shares of the company "**without any premium or discount being attributable to the class of Transfer Shares or the percentage of the issued share capital of the Company which they represent**".

(b) If the respondent intends to transfer his shares to his children during his lifetime (or if the transfers take place after his death) then the A shareholder (or the B shareholder if the A shareholder is not interested) may purchase those shares but only at the Transfer Price.

[8] It follows from the above that while the open market value of the C shareholding may well be substantially discounted to reflect the fact that it is a minority interest, the fact is that if the shares are transferred by the respondent to his children whether by way of a inter vivos transfer or on his death, they will either receive the shares or their full value. I also consider it is likely given the nature of the relationship between the parties that if the other classes of shareholders purchase the respondent's shares, they will do so at the Transfer Price.

[9] Ms McBride QC on behalf of the petitioner suggested that GHL operated as a quasi partnership and that assistance could be obtained from the fact that minority shareholders are afforded protection under Section 994 of the Companies Act 2006 and Section 102(g) of the Insolvency (NI) Order 1989. In general where a minority shareholder has been "unfairly prejudiced" the majority shareholder will be required to, inter alia, purchase his interest at the full value of the shares without discount for the fact that it is a minority interest: see Re Bird Precision Bellows [1984] CH 419 and Strahan v Wilcock [2006] (2 BCLC 555).

[10] Mr Orr QC stated that there was no evidence before the court to establish that GHL was a quasi partnership and the respondent disputed that it was. On the basis that there is no evidence before me which would allow me to determine whether or not GHL is a quasi partnership, I propose to deal with the issue before the court on the basis that GHL is not. However, I want to make it clear, I am not deciding this issue. Therefore it will be open to any A or B or C shareholder at a later date to present evidence on this issue for determination by the court. I do note that many of the authorities relating to the valuation of a minority shareholding relate to SME's that are quasi partnerships. I am mindful of this and I have not taken into account the rights which any of the minority shareholders in GHL might have under the Companies Act in deciding this preliminary issue.

DISCUSSION

[11] Article 27(2) of the Matrimonial Causes (NI) Order 1978 sets out the matters to which the court should have regard in trying to make a fair division of the matrimonial property between spouses who have divorced.

"… The courts shall in particular have regard to the following matters –

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it …"

This Article and the English equivalent has been the subject of careful and detailed consideration by the courts over the years and in particular by the House of Lords in White v White [2001] 1 AC 596 and Miller v Miller [2006] 2 AC 618. The position in respect of the interpretation of this Article is, I consider, clearly set out in Duckworth on Matrimonial Property and Finance at B3-2 which states:

"FAIRNESS

(1) The goal of financial provision is fairness.

(2) Fairness does not mean equality; it means an absence of discrimination between spouses and their respective roles. Thus the fact that one went out to work or ran a successful business while the other looked after the home and children is no reason to choose between them: both have made an equally valid contribution to the family within MCA 1973, s 25(2)(f).

(3) By way of exception to (2), in a rump of cases involving prodigious amounts of money or talent, there is room for a claim that, one party's special contribution to the marriage has been of such an outstanding nature that it would be unfair for that party to walk away with only half of the assets. The Court of Appeal has proposed a bracket of departure of between 55% and two-thirds.

EQUALITY

(4) The discretionary nature of MCA 1973, s 25 means that the outcome of a case will often be an unequal division of assets, even after a long marriage. But before making a decision, the judge should check his tentative views against the yardstick of equality. The yardstick is a cross-check, not a starting point or presumption.

(5) In some instances, however, equality moves from beyond a mere yardstick and becomes the starting point. This is true of matrimonial property. Such property, regardless of how the legal title is held and regardless of the length of the marriage, is divisible equally in the absence of rival factors such as 'need' or compensation.

(6) By contrast, 'non-matrimonial property' belongs in the first instance to the spouse who brought it into being, although the longer the marriage, the less this will be a decisive factor.

(7) In general terms, the existence of non-matrimonial property is a good reason for departing from equality."

[12] It is important to look at the approach that the courts have taken to the valuation of minority shareholdings in SME's when a marriage has broken down under the Matrimonial Causes Act and the Matrimonial Causes (NI) Order 1978. However many of these cases relate to SME's which are quasi partnerships and therefore need to be treated with some degree of caution.

[13] In A v A [2004] EWHC 2818 Charles J in considering the valuation of the minority shareholding in a private company said:

> "61. The business approach or a pragmatic approach by reference to the commercial reality would also highlight:
>
> (a) The point that the recognition of the diverse benefits which flow from a controlling interest in a private company lead a number of litigants to fight hard to keep the company, or a controlling interest therein, and thus what they regard as a goose that lays, or is capable of laying, golden eggs of income, benefits and capital rather than accept a capital sum based on a valuation of their interest in the company, this is because they are of the view that those benefits outweigh the risks and uncertainties associated with the relevant business;
>
> (b) The different advantages of greater certainty and immediate access to capital (together perhaps with a realisation that they can no longer work in the business or a different view of the prospects of the company) can be more attractive to some litigants if the price is acceptable to them;
>
> (c) The need to carefully consider non-competition provisions on the sale of the company as a whole or on a buyout of a shareholder;
>
> (d) The difficulties in predicting the future of the company and thus the need for up-to-date verified management information for the purposes of valuation and a consideration of liquidity and borrowing;

(e) The understandable reaction of a shareholder who is retaining shares, control of, and a management role in the company to emphasise the risks and problems relating to the future rather than the reasoning behind his, or her, decision to seek a result in which he, or she retains shares;

(f) The lack of an open market and a distinction between the value of shares;

(i) In the hands of a controlling shareholder; or

(ii) The value of a minority interest (unless a company is sold as a whole) and thus the potential for differences in value by references to the positions of the transfer or/and potential transferees;

(g) The problems relating to the raising of finance to buy out a shareholder."

He went on to say at paragraph [64]:

> "64. In an assessment of a fair division of assets under the MCA problems obviously arise in respect of "snap shot valuations". The greater the volatility in value, or the potential for a wide range of valuation, the greater the problem. In respect of private companies, and shareholdings therein, the difficulties and potential unfairness of a 'snap shot valuation' clearly arise and can do so in a stark form. Such valuations turn in large part upon opinions as to prospects, and what multiple and discount should be used in the valuation method adopted. They suffer from the background difficulty that there is generally no open market for the shares. This can regularly give rise to large differences between highly reputable valuers even when they are using the same methodology and these can be compounded by differing views on prospects and methodology. All this, and other problems, flow from the nature of the asset."

Finally he stated at [71]:

> "In the light of that broad approach decisions could be made as to whether an approach based on valuing all the relevant assets and making a division and capital award by reference to the those snap shot figures was likely to be capable of founding a fair result. If that approach shows that even absent disagreement between valuers there is likely to be a wide range of value between, for example, a disposal of the company as a whole (or it being floated), and sales of the shares as a minority interest, either to the company or the other shareholders who were keen to buy, or at a valuation in accordance with the pre-emption rights, or to an outsider, this is likely to trigger:
>
> (i) The question of whether and how a fair comparison based on snap shot valuations can be made between the shares and other assets for the purposes of an overall division of assets under the MCA 1973;
>
> (ii) Questions as to the bases upon which the valuations should be made."

I consider that Charles J was advocating a broad approach to be adopted so that the valuation of a shareholding in a SME would reflect the reality of the situation so as to try and achieve a fair division of the matrimonial property.

[14] In G v G [2002] EWHC 1339 Coleridge J said at paragraph [23]:

> "… I have no difficulty whatever in finding that this is, and always has been, a quasi-partnership and also in finding that it would be unthinkable that any sale of this shareholding would take place other than in concert with the other main shareholders in the company. That was the situation with the M offer and I am sure that it would be the situation if any such offer arose in the future. Here the shareholding will be sold at the same time as the other shareholdings or it will not be sold at all. I cannot seriously envisage a situation where the husband in this case would be forced to sell his interest in the company in the open market in circumstances in which a discount would be forced upon him. It is just

> conceivable that he might sell to a friendly purchaser but in those circumstances I am quite sure he would get full value. Accordingly I think it is artificial to apply any discount to the value of the husband's shares in his company or for that matter the wife's and I shall not do so. Liquidity, of course, is another matter which I will consider in a different context." (Emphasis added)

It is clear that in this case the judge was not going to allow a contrived set of circumstances, which did not reflect the reality of what was likely to happen, to dictate the way in which a minority shareholding was to be valued. In the instant case, I also have great difficulty in envisaging a situation where the respondent will be forced to sell his interest in GHL on the open market in circumstances in which a discount would be forced upon him. On the information before me he will not need to sell any shares on the open market to finance any settlement with the petitioner. He will keep the shares in the medium term.

[15] Master Redpath is the Master who has dealt with numerous ancillary relief applications in Northern Ireland over the past number of years. His judgments and rulings carry great weight. He has repeatedly taken the line that it would not be in accordance with Article 27 of the Matrimonial Causes (NI) Order 1978 to discount the valuation of minority shareholdings in SME's. In C v C (9/01/2006) which he followed in P v P (6/10/06), he said:

> "I am naturally inclined to disregard such a discount in this type of case for two reasons:-
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> 1. It is clear that I will not be ordering a forced sale in the shares of either of these companies. Accordingly I am of the view that the proper valuation exercise for the court to take is simply to value the holding on an open market basis. Where I to do otherwise, any respondent could remove the bulk of his estate from any Ancillary Relief by careful forwarding planning and by using the protection of the Articles of Association of a private limited company of which he was a shareholder.
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> 2. It is clear that following White v White [2001] AC 956 that the approach of the Matrimonial Court must do this fairness and avoidance of discrimination between husband and wife … I take notice of the fact that the vast majority of the parties that come before me holding shareholdings in private limited companies will be male and very much the minority

> female. Were I to allow the discount that has been suggested in this and indeed other cases for the purposes of a valuation of such an artificial nature it would undoubtedly impact to a much greater extent on females and could therefore be considered discriminatory." (Emphasis added)

[16] I agree with Master Redpath's decision, but I have a little difficulty with his reasoning. I do not consider that an open market valuation is discriminatory and/or offends the European Convention on Human Rights. An open market valuation is what it is, namely the value of those shares should they be sold on the open market. It applies equally to a shareholding whether it is held by a husband or a wife. In A v A it was the wife who held the minority shareholding in the company. I also do not accept that the valuation of the holding "on an open market basis" is different from discounting the full value of a minority shareholding to reflect the position of a minority shareholder in an SME. It seems the Master proceeded on the basis that such a valuation should not be discounted because it represented a minority interest in an SME. In fact the open market valuation of a minority shareholding may well include a discount because the purchaser who buys such a shareholding will be at the mercy of the majority shareholder(s). There may be some confusion as to what the Master was trying to say. It was not the "open market value" which was objectionable, but the fact that the valuation was discounted to reflect a hypothetical sale on the open market. The Master clearly thought that the valuation of the shareholding should reflect to the reality of the situation and should not be an artificial contrivance designed to achieve a lower value of this matrimonial asset.

[17] I also note that in Humphreys v Humphreys (unreported 1999) Coghlin J was asked by the surveyor on behalf of the husband to discount the value of the fractional shares owned by the husband in a number of properties. The judge was told that it was "generally appropriate to discount for fractional interests and that this was the approach adopted in the commercial world and accepted, for example, by the Inland Revenue and Estate Duty authorities". He declined to do so and commented that he did not "consider the use of discount to be appropriate in these proceedings".

CONCLUSION

[18] There is no conceivable risk of the respondent selling his minority interest in GHL in the short to medium term. He will, I find, continue to act as Managing Director and hold shares until he is at least 70 years. He will remain fully involved in GHL and continue to enjoy good relationships with the other classes of shareholders. The likelihood is that ultimately he will transfer his shareholding to his two children either by way of an inter vivos transfer or his shareholding will be transferred on his death under his Will. There is every reason to suppose that his son may at that stage be employed and involved in GHL. If for some reason either the A or B shareholder objects to the transfer, then they will have to pay the Transfer

Price as defined by the Articles of Association. In the unlikely event that the respondent seeks to transfer some of his shares, I consider that he will transfer them to either an A or B shareholder who will pay the Transfer Price. An exercise which values the shares on a heavily discounted basis because it reflects what will happen if the respondent sells his shares on the open market is grossly unfair to the petitioner because it is both contrived and artificial. To put it quite simply on the basis of the evidence before this court there is no realistic prospect of the respondent ever having to sell or wanting to sell his shares on the open market. Accordingly, there is no realistic prospect of the respondent receiving a consideration for those shares which will include a discount to reflect those shares' value on the open market.

[19] In answer to the question posed in this application, I conclude that the minority shareholding of the respondent in GHL should not be valued at a discount. It follows from my judgment that in circumstances where, for example, a minority shareholder will have to place his shares on the open market to fund the divorce settlement, then it will not be artificial or contrived to discount the value of his shareholding. In fact, in those particular circumstances, it will be fair to do so and in accordance with the Matrimonial Causes (NI) Order 1978. In all the circumstances the valuation should reflect the reality of the circumstances in which the divorcing spouses find themselves.