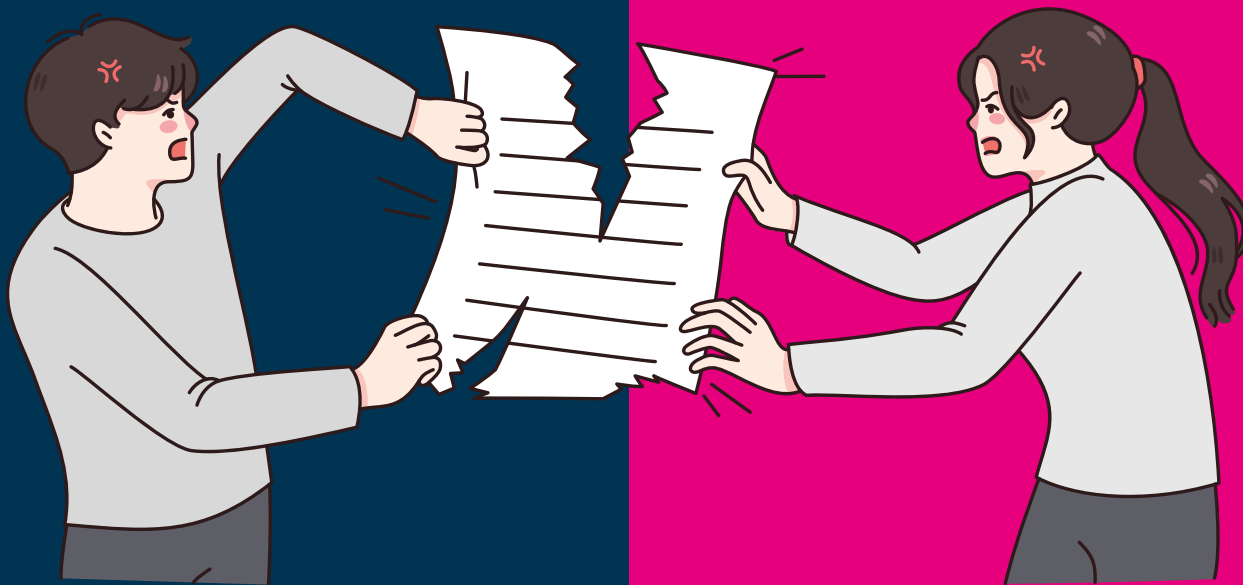


'IT'S NONE OF YOUR BUSINESS'



A REVIEW OF THE ISSUES AFFECTING A DIVORCE SETTLEMENT WHEN BUSINESS ASSETS ARE INVOLVED

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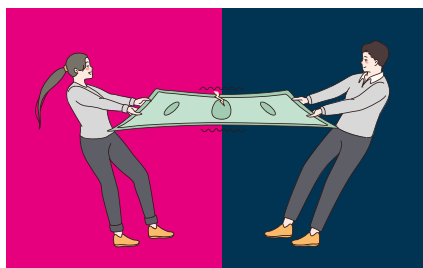
Negotiating a financial settlement on divorce can be complicated when one of the assets includes a business. There is usually a need for significant disclosure, expert valuation evidence and tax advice. Thought needs to be given to what documents need to be provided, whether these should be front loaded to enable parties to take early advice and the appropriate expert to provide the parties and the court with a valuation upon which negotiations and decisions can be made.

In the last 18 months, the process has been further complicated by the Covid 19 pandemic and the unknown impact this will have on a business valuation and the economy in general.

While some took a cautious approach and put off financial negotiations in the hope of seeing a more stable future economic climate within which to negotiate, many court proceedings continued. Business valuations which have been obtained during the pandemic have been more fragile than usual; having often been based on

different sets of assumptions and relied more heavily on information 'on the ground' provided by the business owner.

While some settlements have involved sharing the more risk laden assets in order to share the potential impact of uncertainty in the market, there are parties who have reached an agreement on the basis of one of them retaining the business assets which, as explored below, turned out to be a risky decision.



Barder and the ability to vary

We heard much speculation at the start of the pandemic about whether

Covid 19 could be considered a *Barder* (*Barder v Caluori* [1988] A.C. 20, [1987] 5 WLUK 188) event and, with the benefit of time and a number of reported decisions, the position is a little clearer.

FRB v DCA (No. 3) [2020] EWHC 3696 (Fam)

In March 2020 the husband was ordered to pay the wife £64 million; comprising the matrimonial home and a lump sum by instalments of £49 million. £30 million was payable within six months of the order and £19 million within 18 months. Before the first instalment was due, the husband applied to vary as to quantum and timing or, in the alternative, set aside on the basis that the pandemic was a *Barder* event.

The judge refused the husband's application on the basis that he had made only general statements about his assets and provided little evidence that his wealth had significantly reduced. The judge also took the view that major stock market indices had increased

and many commentators believed that the economy would return to its pre-pandemic position.

HW & WW [2021] EWFC B20

The parties had reached a settlement on 12 March 2020. The husband was the managing director of the family company which was involved in the wholesale distribution of commercial printers and software. The husband wished to retain the company, which was valued at over £3 million and represented the bulk of the family's assets. In accordance with the agreed settlement, the husband was to pay £1 million to the wife in three lump sum payments in lieu of her interest in the company. Prior to the first payment, in November 2020, the husband applied to set aside the order.

The judge, in refusing the husband's application, considered the conditions set out in *Barder* namely; (1) was there a new event since the making of the order which invalidated the basis on which the order was made; (2) a relatively short time between the order and the new event; (3) a reasonably prompt application. The court was satisfied that the pandemic was an extraordinary event taking place in close proximity to the consent order and that the husband made his application reasonably promptly.

The husband's claim failed, however, when considering the foreseeability test. The existence of the pandemic was known at the time the order was made and while the extent of the impact may not have been appreciated by the husband, it was foreseeable. Businesses were preparing for disruption, emergency economic measures were being taken and the stock market was falling. The husband had agreed to the order in any event.

“The court confirmed that the *Barder* threshold was deliberately high and there were sound public policy reasons why the finality of litigation was to be preserved, save in the most exceptional of circumstances.”

What is the valuation date for the purposes of determining an award?

Issues which have been explored further in the last year are the extent to which the increase in value of a business after the date of separation is considered non matrimonial (and therefore potentially not capable of division) and the date on which the value of the company should crystallise for the purposes of the court's determination.

G v T [2020] EWHC 1613 (fam)

The husband was one of the founding members and largest shareholder in a business in the financial sector. Due to the nature of the business the husband argued that the value could be identified at the end of each day and that this represented the sum of the accumulated profit held by the business. The husband further argued that the date for the valuation of his shareholding should be the date on which the parties separated, in October 2017. The wife argued that the value should be taken as at October 2019.

The judge acknowledged that there was a superficial attraction to fixing a value as at the date of separation but was concerned that to do so would produce an unfair outcome for the wife. This was because there was no evidence before the end of the year to June 2018 that the husband took any extraordinary post-separation steps in respect of the value of the business and, owing to the company's restrictive sale policy, he would not have been able to sell any of his shares until after June 2018.

In respect of the wife's suggested valuation date, the judge considered that it was too far from the ending of the marital partnership to be fair and that the husband had made significant interventions to protect and preserve the value of business from the autumn of 2018 onwards. The valuation was therefore taken at June 2018.

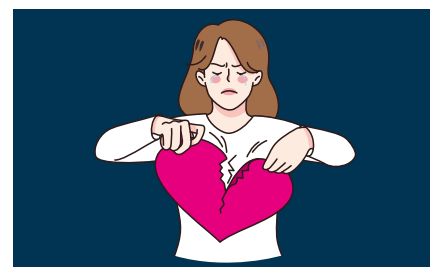
E v L [2021] EHF 60 (fam)

The parties began their relationship in 2015, starting cohabiting in 2016 and married in June 2017. They separated in 2019. The length of their relationship was disputed owing to disagreement about the cohabitation date and the date on which the marriage came to an end.

The husband was a successful production manager for live music events and had an interest in six businesses. Much of the disagreement between the

parties centred around the value of one of the companies and the disparity in the parties' proposals related to the dispute about how, and if at all, the sharing of marital acquest applied to short, childless marriages. A single joint expert was appointed to value the husband's business and each party also had permission to appoint their own expert.

The judge disagreed that the fact that this was a short marriage should prohibit the sharing of the marital acquest and limit the wife's award to very conservatively assessed needs. The start date for the purposes of calculating the acquest (which, after appropriate discounting in respect of the value of the husband's business was to be shared equally) was found to be January 2016 (by which point the parties were in a very serious and committed relationship). The end point the time of the trial.



And finally...

Irrespective of the pandemic, we have been warned again about the difficulties in respect of valuations generally with the High Court reminding practitioners in the above cases that:

“detailed accounting is expensive, often of doubtful utility and, certainly in respect of business valuations, will often result in divergent opinions each of which may be based on sound reasoning.”

“valuations of shares in private companies are among the most fragile valuations which can be obtained.”

“The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome.”

