All is Not Well - Has the Capital Clean Break Caught a cold?

Deferral of Capital Claims in Times of Economic Uncertainly

By Michael George

The pandemic has inflicted significant damage on our society and economic activity. This has caused significant difficulties in valuing companies and assessing their liquidity.

Some experts sidestep the Covid 19 issue by simply pointing out that the current economic uncertainty increases the uncertainty inherent in any business valuation[1] and others attempt to be helpful by applying Covid 19 discounts to the business valuations but are unable to point to any standard practice or forensic rationale behind discounts which may vary from 10% to 30%.

The so called ancient Chinese curse of "May you live in interesting times" (actually coined by an American lawyer[2]) seems apposite when tackling the very real problems and assessing what is a fair outcome for the parties in the context of uncertain values of business assets within the context of financial remedy proceedings.

Those who attended the recent 3PB interactive FDR may recall one of the issues examined was whether or not it was appropriate to defer capital claims until the effects of the pandemic on a business had worked themselves out to the extent that a more robust valuation could be obtained.

It is against this background that two recent "eyebrow raising" authorities deferring capital outcomes may seem an attractive solution. This article will consider these recent cases and their impact on the advice that we should be giving our clients.

By way of historical context practitioners will be familiar with Wells v Wells [2002] 2 FLR 97 where the Court of Appeal had to wrestle with the issue of the husband's business which, at the time of trial, was running at a loss and it was not possible to put a value on the shares due to its precarious trading position. The court of appeal concluded that the separation of the family should not have terminated the sharing of the results of the company's performance

[1] See for instance the standard RICS valuation uncertainly clause appearing in many property valuations.
[2] Frederic R Coudert - Proceedings of the Academy of Political Science, 1939

and that such sharing could have been achieved by fair division of both the copper bottomed assets and the illiquid and risk-laden assets. As a consequence the Court of Appeal reduced wife's capital provision of £1.26 M on a capital clean break basis by £190,000 and as a quid pro quo enabled wife to apply in the event of the sale of husband's shareholding within 5 years so as "*to bring about a proper sharing of both the readily disposable assets and also the assets that are currently more and less unsaleable, namely the shareholding in Soundtracs*".

In the years that followed a Wells v Wells order was only made in exceptional circumstances when in reality there was no other alternative. '*[w]hile generally capital claims should not be left indeterminately unresolved, there were hard cases such as this where fairness and justice must prevail over the normal desirability of the finality of litigation'* per *Quan v Bray & Others* [2018] EWHC 3558 (Fam).

However, in the earlier part of this year there were two cases within two months of each other where the capital claims were deferred. The first is Haskell v Haskell[3] [2020] 2 FCR 389. This was a big-money case in which Mostyn J delivered an excoriating judgment on the behaviour of husband and his brazen nondisclosure. Husband claimed he owed some £50 million whereas wife produced an Immerman document suggesting he was worth $185 million.

A Wells v Wells order was considered in relation to which Mostyn J commented "*So far as I am aware there is no reported case of a claimant successfully later reviving capital claims that were adjourned at the final hearing*[4]". Rather than adjourn wife's claims Mostyn J concluded *"Although I cannot put even an imprecise figure on the husband's likely future wealth after the expiry of the two-year breathing period, I am satisfied that it is more likely than not that very substantial resources will be available to him in the reasonably foreseeable future*." And awarded a further lump sum of £15.181 million payable in a little over 2 years' time.

It should be noted that this was an application under Part III of the Matrimonial and Family Proceedings Act 1984 and was therefore a needs-based analysis rather than a sharing one.

Some two months after Haskell v Haskell Roberts J handed down her judgment in AW v AH [2020] EWFC 22. This case is notable for the fact that husband had succeeded in losing £86 million in 13 years. '*despite the imperative to achieve a clean break between parties involved in this type of litigation insofar as it [is] possible following divorce, this is not a case where I can achieve a fair outcome other than by adjourning this wife's claims for lump sum and property adjustment orders*'. Both parties needed '*a secure home and an appropriate income*

[3] [2020] EWFC 9
[4] §7

on which to run their respective domestic economies', but there were '*no visible liquid resources with which to meet those claims*'. Roberts J was '*entirely satisfied*' that the husband would wish to '*claw his way back from his present predicament*' and would '*do whatever he can to re-establish his financial base*', although she had '*no expectation that he will secure in future a return to the scale of wealth he has previously enjoyed*' (see paragraph 120). It was upon this basis that the court adjourned wife's capital claims for up to 7 years at which point husband would reach 70.

As Henrietta Boyle[5] comments "There is therefore a pattern of arguments from parties claiming they have no money and cannot afford to pay a penny to their ex-spouse, falling on deaf ears. *Haskell* and *AW v AH* provide recent, clear authority for a judge either to make an award based on a future probability rather than the present financial situation, or to adjourn a claim until the parties' finances have improved. The fact that there are no funds with which to pay an award at the time of a hearing is no guarantee that the paying party will get off scot-free."

Returning to Wells v Wells some 18 years on it appears from the records at Companies House that Mr Wells never did sell the company and that, unless some arrangement was made outside the court arena, Mrs Wells got no recompense for the £190,000 reduction in her first instance award. This is consistent with Mostyn J's observation that he was unaware of any cases where capital claims were restored many years later.

On first blush two cases in quick succession where the capital claims were left unresolved at the final hearing could be viewed as the dawn of a change in judicial attitudes on the issue of determining capital claims at trial. As Aristotle commented "One swallow does not a summer make, nor one fine day". Whilst we may have not one but two swallows it seems to the writer that whilst on first blush this may appear to be a change Haskell and AW v HW are confined to their extreme facts and are of very limited application to current difficulties.

Haskell was a case constrained by part III to provision for needs which enabled Mostyn J to arrive at a needs figure which he concluded could be met in time. In AW v HW the sharing principal applied requiring a further appraisal of the assets at a future date. However, both cases concerned significant non-disclosure and a scenario where the one party was saying that they had no monies to make any award. Whilst the courts were unable to quantify the assets the reasons for the uncertainly did not have Covid 19 at its heart. The unknowns in those cases were different in nature to the unknowns that we more commonly encounter in

[5] How to lose £86 million in 13 years: AW v AH & ors - Class Legal

these difficult economic times. At the risk of sounding Rumsfeldesque these were unknown unknowns whereas Covid 19 is a known unknown.

When the scenario of a business which proved impossible to value due to Covid 19 was put before the recent 3PB interactive FDR none of the panel and virtually none of the 300 odd delegates favoured adjourning claims. It seems to the writer that this consensus is the correct approach even where there are significant difficulties in valuing assets be due to the pandemic.

Deferring outcome so as to avoid having to make a difficult judgment call may be tempting but is unlikely to succeed. Both the policy and practical (see Mrs Wells) considerations militate strongly against deferring capital claims. In our day-to-day cases we, assisted by our experts, are going to have to make judgment calls in relation to valuation businesses and where possible balance the sharing of copper bottomed and risky assets.

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