

JERSEY / JUDGMENT

P-S v C [2009] JRC 119A (16 June 2009)

[2009] JRC 119A

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judgment

the bailiff:

Background

1. A number of judgments and rulings have been given during the course of this long running and tortuous saga, and the reader of this latest (and hopefully last) judgment is invited to refer to them for the detailed history of this ancillary dispute. We do not propose to repeat much of that history. Suffice it to say that on 9th July 2003 the Court delivered its first substantive judgment (

[2003] JRC 116) ("the 2003 judgment"). We there referred to the petitioner as "the wife" and to the respondent as "the husband" and we will continue for convenience to use those designations. The 2003 judgment assessed the total net assets of the parties at £8,875,655, and awarded approximately 55% (£4,855,921) to the wife. That included a lump sum cash adjustment of £2,200,000. The husband was ordered to pay this sum within five years, and in the meantime to pay interest on it at the rate of 6% per annum. Neither party appealed the judgment. 2. Subsequently it was ascertained that there had been a material non-disclosure on the part of the husband in that the true value of the assets in Switzerland had been obscured. After another hearing the Court delivered its second substantive judgment on 9th October 2006 (

[2006] JRC 139A) ("the 2006 judgment") setting aside in part the award contained in the 2003 judgment. The Court declared at paragraph 38:- "For all these reasons we set aside that part of the award ordering a lump sum payment of £2.2 million in favour of the wife. We will hear argument, in default of agreement between the parties, as to the figure which should be substituted". 3. Further skirmishes took place. On 8th August 2007 the Bailiff delivered his reasons for a ruling made on 25th July 2007 that:- "the valuation of the [husband's] interest in the Caversham Group required to be carried out for the purpose of re-determining the amount of any lump sum award in favour of the [wife] (the Original Award by this Court in her favour dated 9th July 2003 having been set aside by this Court for lack of full and frank disclosure by the [husband], be conducted on the basis of valuation evidence as at the original date of trial which commenced on 28th April 2003". At

paragraphs 12-13 of that judgment the Bailiff stated:- "I reached my decision to grant the relief sought by the wife in her summons for two reasons. First, the Court set aside only that part of the award which related to the lump sum payment and that decision was not appealed. Counsel for the husband appeared to submit that the order made by the Court in the 2006 judgment should be ignored or alternatively interpreted in such a way as to require a complete reassessment of all the assets of both parties at the current time. I cannot accept that submission. What the Court ordered was that the lump sum order should be reconsidered in the light of the true value of the CCB Group and, by implication, the true value at the time of the original order. Secondly, a reassessment of all the assets of both parties would be a much more significant, expensive and time consuming task than that originally envisaged by the Court. I was told that part of the husband's interest in the CCB Group had been sold. Presumably, the proceeds of that sale have been reinvested elsewhere, possibly in Switzerland. Given the findings made by the Court at paragraph 37 of the 2006 judgment cited above, it is likely that an assessment of the value of the husband's current assets would not be an easy task. If it is the case that the husband's assets have declined considerably in value, as suggested by his counsel, and that it would no longer be fair to order a lump sum payment to the wife on the basis of the value of the CCB Group as at April 2003, it will of course be open to the husband to file evidence to that effect which will have to be taken into account by the Court in exercising its discretion. As Lord Nicholls stated in *White v White*, and this Court endorsed in its judgment in this case on 9th July 2003, "the touchstone in all cases involving a division of matrimonial assets is fairness". 4. On 1st November 2007 the Bailiff gave a further ruling at a directions' hearing in the following terms:- "The third submission, made by counsel for the Respondent, was that each party should provide an up to date list of assets and liabilities as at present. Counsel submitted that if the court was to reach a fair determination, it was essential that the court should have particulars of the assets of both parties. I also reject that submission; the nature of the enquiry at this stage is a relatively restricted one. The court is endeavouring to ascertain the true and fair value of the CCB Group in 2003 and in particular the value of the Respondent's share in that group, at that time. The court is not concerned with any other assets of the parties, whether they be assets of the Petitioner or of the Respondent. The court indicated in its judgment of July 2007, that if it were to be the case that the Respondent was unable, by reason of a collapse in the value of his assets, to pay what might otherwise be awarded to the Petitioner, then that would be a matter for specific submission supported by evidence as to the overall value of the husband's estate. For my part I regard that outcome as probably unlikely, but clearly one must keep an open mind in case some catastrophic mischance befalls the husband's fortunes". 5. The final piece of material background history is that the wife, in order to secure her lump sum award, sought and obtained injunctions by an Order of Justice signed on 5th April 2005 preventing the husband from disposing of any of his assets in the CCB Group without her consent or further Order of the Court. Those injunctions were discharged by agreement between the parties which was filed with the Court on 22nd December 2006. By the terms of that agreement, £3 million was paid into an escrow account held in the names of the

husband's former legal adviser and the wife's legal advisers. The Court's Approach 6. During his opening submissions, Mr Robinson for the wife contended that the Court was engaged in a restricted exercise, namely:- (i) to ascertain the value of the husband's interest in the CCB Group in April 2003 and to determine what effect, if any, that should have upon the lump sum award contained in the 2003 judgment; and (ii) to determine whether the husband could fairly afford to pay it. We agree, and we have approached the matter in that way. 7. We have also determined to disturb as little as possible the findings made in the 2003

judgment.

In particular we will approach the valuation of the CCB Group, and the husband's interest in it by adopting the Dividend Yield Method ("DYM") rather than the Price/Earnings Ratio ("PER"). We appreciate that it might be more usual to use the PER in relation to a majority shareholding but both experts presented their evidence, inter alia, by reference to the DYM. The DYM was used in the 2003 judgment, and, as we have said, that judgment was not appealed. One of the advantages of using the same methodology is that direct comparisons can be made with the valuations of the CCB Group put forward by the two experts in 2003. We have noted carefully the view of the husband's expert, Mr Andrew Dann, that the PER would be the more appropriate way of conducting the valuation, and we have had regard to the alternative calculations of both experts using that method. The expert evidence in 2009 8. The Court heard evidence from two expert valuers, namely Ms Julia Wallace-Walker of FTI Forensic Accounting Limited (to whom we shall refer as "JWW") and Mr Andrew Dann of Ernst and Young (to whom we shall refer as "AD"). Both are very experienced and competent chartered accountants. Both declared that they understood the duties of an expert witness and their overriding duty to assist the Court. We are satisfied that their evidence was given honestly and within the parameters of their duties. They differed in certain respects in their conclusions, but those differences can be attributed to the subjective elements of the task of valuation and to the natural and proper desire to assist the party for whom they appeared. Notwithstanding our reservations about one aspect of AD's evidence, to which we will return below, we found the evidence of both expert witnesses to be helpful in arriving at our conclusions. In accordance with directions from the Bailiff, they produced a Joint Statement on 30th December 2008 with a view to identifying the differences between them. 9. In valuing the CCB Group there are three elements to be considered. The first is the value of CFSL which was essentially the Jersey business conducted by the Group. The second is CSA/Mayo which was the Swiss branch of the Group's business. The third is Just Wills, which was an enterprise essentially unrelated to the first two and was based in London. In 2003 the expert witnesses concentrated upon the value of CFSL. The husband had not instructed his expert to assess the value of CSA, and the wife's expert had been persuaded to value CSA at cost. Just Wills was ignored by both witnesses as having no value. 10. The DYM involves the assessment of an average annual dividend receivable from a business over a period of years, adjusted for any extraordinary or non-recurring items, multiplied by a factor to yield a particular rate of return on capital. The theory is that the investor knows what rate of return he requires and is able to

calculate the value of his investment from the average dividends receivable on that investment. The rate of return is relative to the stability of the business. If the business is in the premier league, and little risk is involved, the rate of return can be expected to be lower; if the business is in the second or third divisions, and the risk is correspondingly greater, the rate of return can be expected to be much higher. The lower the rate of return, the greater is the value of the investment. The first issue for the experts was therefore what was the appropriate rate of return for an investment in the CCB Group in April 2003. JWW, like the wife's expert in 2003, thought that the appropriate rate of return would be between 7% and 9%, although she increased the range after her discussions with AD to between 7% and 10%. She considered the 10% was the maximum to which she could go. She appreciated that in 2003 the Court's assessment had worked out at a rate of 10 ½ % although it had not been expressed in that way. Mr Beamish, the wife's expert witness in 2003, had reduced his valuation of the CCB Group just before the hearing but in JWW's view this reduction would not have taken place had Mr Beamish been fully informed about CSA/Mayo and the spreading of the risk by moving business abroad to Switzerland. Taking account of the strength of the management, the market conditions in 2003 and the 2003 accounts for the business, JWW said that she would not be comfortable going as far as 10 ½ %. 11. AD's range lay between 10% and 12%. The CCB Group was not, in his view, in the premier league. He also found it significant that the husband's interest was only 63%; an investor seeking a controlling interest would want at least 75% of the company. He had pitched his range at between 10% and 12% on account of his knowledge of the underlying client base. He also took the view that the general state of the market for trust companies in 2003 was uncertain. AD was cross examined closely as to whether his assessment of the risk in 2003 included elements which could not have been known at that time, e.g. the interest taken by the Jersey Financial Services Commission in the affairs of CFSC in 2005 and a subsequent prosecution for money laundering offences. AD denied that he had taken such factors into account. Counsel for the wife drew attention to statements in his report of 17th October 2008 where AD had referred to post-2003 information as to the profitability of the CCB Group and the negative effect upon its reputation of the money laundering prosecution. AD had referred at paragraph 5.21 to the increased costs and diversion of management time to deal with regulatory obligations, and the negative effect upon the CCB Group's reputation amongst existing and potential clients. At paragraph 5.22 AD had concluded that "this dual impact would significantly increase the risk associated with the Caversham Group and that the rate of return should be further increased from the July 2003 judgment level, to reflect the increased risk." At paragraph 5.25 AD recorded his opinion at a range of between 10% and 12% more properly reflected the risk associated with the dividend stream of the CCB Group. 12. AD accepted in evidence that this part of his report was not as clear as it could be, and even misleading. We think it is difficult to read paragraphs 5.12 to 5.25 of the report as doing anything other than accord some weight to post-2003 events in assessing risk; AD accepted in cross-examination that these were not relevant considerations. 13. On the other hand, we accept that AD has a greater experience of the local market than JWW, whose firm is based in London and who has not advised or been concerned in the sale of any Jersey trust companies. Furthermore AD has a certain amount of inside knowledge of CFSC arising from the fact that his firm was the company's auditor until 2005. 14. We agree that the CCB Group was not

in the premier league, but we would have placed it in the first division. Our conclusion is that the appropriate rate of return to be applied in the context of a notional sale of the husband's interest in the CCB Group is 10%. We reached that conclusion on the basis of a consideration of all the evidence placed before us; as it happens, it is also the point at which the opinions of the two experts touch. 15. We turn to the question of the dividend stream. The experts agreed the adjusted dividend stream for the CCB Group between 1998 and 2002. There was disagreement as to the adjusted dividend stream for 2003, as to the value of CSA and Mayo, and as to the appropriate treatment of the losses sustained by Just Wills. We take each of these areas of disagreement in turn. 16. The dividend actually paid by CFSL in 2003 was £220,000, and in the view of AD that ought to be the baseline for the purpose of averaging the dividend stream for the years 1998 to 2003. JWW disagreed, and followed the methodology used by Mr Beamish in 2003 by making a notional dividend adjustment of £596,000 by reference to what had historically been paid as a percentage of the retained profits. She also added back extraordinary and non-recurring items relating to inter alia, the acquisition of Just Wills in 2002 to arrive at an adjusted 2003 dividend of £1,036,000. Both experts had agreed a commercial remuneration adjustment in relation to directors' fees of -£101,000. AD therefore arrived at an adjusted 2003 dividend of £119,000 compared with JWW's figure of £1,036,000. We prefer the evidence of JWW, subject to one reservation. We think that the methodology adopted by Mr Beamish, which the Court accepted in 2003, is to be preferred. Mr Beamish had arrived at a notional adjusted figure of £500,000 but he was not in possession of the information now available to the experts. Our reservation relates to the notional payment back of extraordinary and non-recurring items which seems to us to be ignoring the rough but taking the smooth. According to note 2 on Attachment 1 to the joint statement by the experts, the extraordinary and non-recurring items comprised:-
Provision on loans from group companies £230,174
Loss on disposal of investments £ 32,000
Relocation and removal costs £ 59,000
£321,178
The reality was that in April 2003 an investment had been made in Just Wills. It may (or may not) have been a bad investment, but it was an investment nonetheless. It seems to us that the notional purchaser would have been bound to accept that position. Whether he would have acquired the loss making business of Just Wills is another matter to which we shall come in due course. 17. The experts also disagreed as to the value to be placed on the CSA/Mayo business in Switzerland. AD effectively placed a nil value on these businesses on the basis that they were embraced by the consolidated accounts for the CCB Group which he had prepared. AD prepared consolidated group accounts for the years 2003, 2004 and 2005. It was not the policy of the CCB Group to prepare consolidated accounts; they were prepared by AD in the context of this hearing. According to AD they had been prepared on the basis of the best information available. He was reasonably confident about their accuracy for 2004 and 2005, but he conceded that the 2003 accounts had been prepared in an accounting rôle and not in an auditing rôle. He had not felt able to prepare consolidated accounts for 2002 because key staff who could have shed light on certain transactions had left. JWW offered two methods for valuing the Swiss assets. The first method was to take the consideration which was actually paid for the transfer of certain client businesses from CFSC to CSA and Mayo (£1,443,000) and to apply a discount to that figure to arrive at £1,000,000. The second method involved calculating the attributable profit to be derived from this transferred business, using a profit

margin calculated by reference to the accounts of each year, which is then added back into the calculation to arrive at the adjusted dividend stream. 18. While in certain scenarios the use of consolidated group accounts is the best way to arrive at a fair valuation of different businesses under the same overarching control, we do not think that the consolidated accounts prepared by AD are helpful in this case. The accounts for 2004 and 2005 fall outside the period with which we are concerned. They are not audited accounts. The time and money expended on their preparation indicates to us that it must have been a very difficult task. AD did not feel able to produce consolidated accounts for 2002, but even for 2003 there appear to be some question marks as to their accuracy. Most importantly, the client business that had been transferred to Switzerland was not showing any significant profit in 2003. We are satisfied that the fairer approach to the valuation of CSA and Mayo is that adopted by JWW and we adopt it. We agree with JWW that the business transferred to Switzerland must have had a value over and above the value of CFSL. It would not have been transferred if it did not have a continuity value from recurring fees. To persuade clients to move, to carry out all the procedural requirements for re-location, and to set up all the necessary processes in a foreign jurisdiction, is a major undertaking. It would only be viable if they were likely to constitute a loyal client base for years to come. We have adopted the second method of valuation referred to in paragraph 17 above for the purpose of calculating the value of the business transferred to Switzerland. 19. We turn to the final area of disagreement which involves Just Wills. The Just Wills Group was acquired by the CCB Group in June 2002 for £500,000. It made a loss of £488,484 in the year to 31st May 2003 and continuing losses in the following years. In 2003 the husband indicated that it had no value and should be ignored for the purpose of computing the worth of his interest in the CCB Group. JWW gave evidence that this was the appropriate approach in 2009, because a prospective purchaser in 2003 would either have been unwilling to acquire the loss making business of Just Wills or would have acquired it on the basis of its future potential. In either event there would have been no justification for depressing the value of the CCB Group in order to offset future losses by Just Wills. AD's consolidated accounts for 2003 took account of the losses incurred by Just Wills. 20. We think that the approach of JWW is to be preferred, not least because it was the approach adopted by both parties in 2003. As a matter of logic, it seems to us that the losses incurred by Just Wills would not have affected the price to be paid by a prospective purchaser for the husband's interest in the CCB Group for the reasons given by JWW. Conclusions 21. These findings can now be reflected in tabular form in the following adaptation of the chart placed before us at the trial by JWW.

	1999	2001	2003
CFSL results adjusted for income transferred to CSA	£'000 680	£'000 1,437	£'000 1,161
Adjusted dividend stream	680	1,437	1,161
Adjust for extraordinary and non-recurring items	- 755	786	1,437
Average 1998 to 2003 - 6 years	£ 870,000		
Average 2001 to 2003 - 3 years	£ 999,700		
Mid point between two averages	£ 934,800		
Value of CFSL using a of return of 10%	£ 9,348,000		
The husband's share - 63%	£ 5,889,000		

We have adopted the same approach as JWW in taking the mid point between the average of the six years between 1998 and 2003 and the three years between 2001 and 2003. The effect is to smooth out further the differences between individual years and to give added weight to the performance of the CCB Group in the period leading up to the critical valuation date. The total value of the CCB Group is therefore £9,348,000 and the value of the husband's 63% interest is £5,889,000 which we have

rounded to £5.9 million. 22. Applying those figures to the other values contained in the 2003 judgment, it is possible to arrive at a revised lump sum award expressed in the following table:-

Value per	Value per
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Judgment

Judgment

£ £ Total other assets 4,475,655 4,475,655 CCB Group 4,400,000 5,900,000 8,875,655 10,375,655
Split : Husband: various 1,819,734 1,819,734 CCB Group 4,400,000 5,900,000 6,219,734 7,719,734
less lump sum - 2,200,000 - 3,000,000 45.29% 4,019,734 45.49% 4,719,734 Wife: various 2,655,921
2,655,921 add lump sum 2,200,000 3,000,000 54.71% 4,855,921 54.51% 5,655,921 23. We turn finally
to consider whether the husband can afford to pay the revised lump sum award of £3,000,000,
and whether it is fair to require him to do so. As stated above, the amount held in the escrow
account is, co-incidentally, £3,000,000. For the avoidance of any doubt, the court's analysis and
calculations were performed progressively as set out in this judgment, and not retrospectively
from the known figure held in the escrow account. It is clear that the husband can afford to pay
£3,000,000 because that figure is available for the express purpose of meeting any award. Is it fair
to require him to do so having regard to the current state of his assets? 24. The husband's
evidence was that the value of his remaining assets, (including the escrow account) totalled
approximately £3,400,000. That evidence must however be viewed against the historic finding of
material non-disclosure of assets. At paragraph 38 of the 2006 judgment the Court stated:- "(1) We
think that the husband is prone to prevaricate, and to seek to undermine the evidence of the wife
if he can. In contending that there was no necessity to appoint a forensic accountant outside
Jersey he insisted in evidence that he had not been on holiday with Mr Branch and their
respective partners. It was only when faced with the prospect of contrary evidence from the wife
that he instructed his counsel to concede that he could in fact now recall this shared holiday. We
find that he is prone to holding back information if he thinks that he can avoid disclosure. (2) The
husband is an intelligent and articulate chartered accountant as well as being the architect of the
success of the CCB Group and its chairman. We find it incredible that he did not know in
reasonable detail about the draft Client Entity Transfer Agreements nor the considerations
agreed or in contemplation. To the extent that he disavowed such knowledge, we reject his
evidence. (3) With the benefit of hindsight it seems plain to us that the decision to instruct Mr
Pushman, his expert adviser in 2002/2003, not to investigate or assess the value of the Swiss
operations was deliberate. The husband wanted to obscure the picture in relation to the CCB
Group's activities in Switzerland and it would not have been helpful to instruct Mr Pushman in
that respect. (4) We find that the husband's evidence was less than candid. In particular he failed
to disclose the existence of Mayo and the options agreement in relation to the shares of Mayo,
and the fact that Client Entity Sale Agreements were in draft. Mr Beamish's final report stated at
paragraph 4.2.9. - "CSA. We understand that this company represents CCB's investment in its
Switzerland-based operations." The husband knew that this was inaccurate but failed to say
anything. Mr Whale eventually agreed in evidence that the board of CFSL was aware of the

agreements and the prospective considerations." 25. One might have thought that, in the light of such criticism the husband would have been anxious to avoid any suggestion that information was being withheld in the period leading up to this trial. Unfortunately, that has proved not to be the case. JWW stated at paragraph 13 of her report dated 15th September 2008:- "I prepared a questionnaire on 22 May 2007. Obtaining responses to the request for information and documents has been arduous, the reasons for which are already before the Court. It was not until 8 September 2008 that I was satisfied that I have sufficient information in which to draft this report. Accordingly I have had to prepare this report under time pressure." 26. On 1st November 2007 it was necessary for the Bailiff to give directions in relation to a questionnaire prepared by JWW in the following terms:- "Counsel asks me to make allowance for the fact that his firm was only instructed in July 2007 and that there was some correspondence as to whether the extensive nature of the questionnaire could be cut down. Counsel requests that I should substitute the first week of January 2008 for the four weeks delay set down in the draft directions. I propose to accede to that request and to fix 4th January 2008 as the deadline for the filing of the response to the questionnaire. I want to emphasise that that date is a deadline and not a negotiable date to be extended, or to be regarded as a date where part only of the questionnaire should be dealt with. I expect the questionnaire to be fully answered and I give notice that I am unlikely to be sympathetic to pleas for further time, should the questions put in the questionnaire not be comprehensively and fairly answered." 27. An answer to that questionnaire was filed but it was incomplete. A schedule of deficiencies and omissions was prepared, and on 11th July 2008 the Bailiff directed that it be answered by 31st July 2008. On 19th August 2008 the parties were again before the Bailiff and it was necessary for an order to be made in the following terms:- "The second order relates to the position of Caversham SA which is based in Geneva. The information which is required by Miss Walker in relation to the affairs of this company are really central to the adjudication which the Court has to make in January next year. The position of the Respondent is, and I quote from his latest answer to the questionnaire " The information requested is not available to the Respondent for reasons of confidentiality as outlined in the advice from Baker and MacKenzie dated 13th December 2007" . The instructions given to Baker and MacKenzie which led to that advice have not been drawn to my attention. By contrast I have seen the instructions given to Messrs Kerhole Hulse Hess, advocates or legal advisers in Zurich, who were instructed by counsel for the Petitioner to advise as to whether there was any inhibition under Swiss law preventing Caversham SA and its directors from answering questions and providing the information which had been requested. In a nutshell, the advice of Kerhole Husle Hess was that there was no such inhibition. I incline to accept the position as stated by that firm, not only for the reasons set out in their letter of 13th August 2008, but also on the common sense basis that a majority share-holder of a private company is essentially able to procure that the directors and management of that company perform any requests made of it. It is quite intolerable that the Court should be placed in the position at this late stage of not having made available to it information which is essential for a proper and fair determination of this Court. I am therefore going to order that the Respondent shall procure on pain of contempt that the directors of Caversham SA should provide the answers set out in paragraphs 5 and 6 in the schedule filed by Miss Walker on or before 26th August 2008." 28. That order led to a written

complaint to the Bailiff from the directors of CSA, but they did comply with the order. On 14th November 2008 the Bailiff heard a further summons issued by the wife seeking a further order that the husband answer questions in a schedule of deficiencies and omissions. During his judgment the Bailiff stated:- "As I indicated to counsel during the course of exchanges, the background to this summons issued by the Petitioner is one of non-disclosure by the Respondent and persistent failures to provide detailed answers to questions designed to elucidate the extent of his assets." 29. We have reached the conclusion that the husband is temperamentally incapable of giving straight and comprehensive answers to questions about his financial interests. The burden of proof is on him to show that it would be unfair to order him to pay the award at which we have arrived. He has failed to satisfy that burden. We take his declared statement of assets with a very large pinch of salt. He has now become the executive chairman of CSA at a salary of £120,000 per annum. On the face of it, CSA is owned by the husband's second wife ("Mrs C"). But the evidence which the Court heard has made it clear that the business affairs of Mrs C are intertwined with the affairs of the husband to a considerable extent. Mrs C was unwilling to have her business affairs subjected to scrutiny until a limited offer was made during cross examination by counsel for the wife. It is impossible for the Court to be satisfied that there are no share options, bonus arrangements, or other unwritten agreements affecting the net worth of the husband. We are not satisfied that it would be unfair to require him to meet the award in favour of the wife. We accordingly order that the £3,000,000 held in escrow be transferred forthwith to the order of the wife. Authorities P-S v C and M

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