

Judgment 20/2005

**Bach v. Amiss – Royal Court (Civil Action File
772) – 8 April, 2005**

Application for summary judgment/strike out of Defendant’s claim – dispute between shareholders in trust company – effect of disclosure to the valuer of ‘without prejudice’ offer – premature to dismiss action without hearing evidence – issue of ‘without prejudice’ letter a matter for the Jurats – application dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 8th day of April, 2005 before Sir de Vic Carey, Bailiff; sitting alone.

In the matter of

Between:

RICHARD JOHN BACH

Plaintiff

and

MICHAEL HAMILTON AMISS

Defendant

WHEREAS on the 24th day of March, 2005 the Bailiff considered an application by the Plaintiff for summary judgment and/or to strike out the Defendant’s claim and heard thereon Advocates P. Richardson and J. P. Greenfield, Counsel for the Plaintiff and Defendant respectively;

THE BAILIFF, this day, gave judgment in the terms attached hereto and **DISMISSED** the said application and; **RESERVED** the question of costs.

S. M. D. ROSS
Her Majesty’s Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between:

RICHARD JOHN BACH

Plaintiff

AND

MICHAEL HAMILTON AMISS

Defendant

Date of Hearing: 24th March, 2005

Date judgment to be handed down: 8th April, 2005

Advocate for the Plaintiff: Paul Richardson

Advocate for the Defendant: John P. Greenfield

**JUDGMENT OF THE BAILIFF ON THE APPLICATION OF THE PLAINTIFF FOR SUMMARY
JUDGMENT AND/OR TO STRIKE OUT THE DEFENDANT'S CLAIM.**

Introduction

1. Safehaven International Limited is a trust company of which the Plaintiff is the sole working director. The Defendant currently holds 35% of the shares and the Plaintiff 65%. There is a long history of difficulty between the Plaintiff and the Defendant which I need not go into. At one stage the Defendant started proceedings for relief as an oppressed minority shareholder. In order to settle their differences, and putting it figuratively, getting each other out of the other's hair the Plaintiff and Defendant entered into an agreement whereby a Mr. Thompson would be appointed to value the shares of the Defendant at which point the Plaintiff would purchase them. In view of the history of difficulties between them getting as far as an agreed valuer and agreed terms of reference took a long time, but eventually documentation was completed and Mr. Thompson accepted the brief on terms set out. On the 21st July, 2003, Mr. Thompson gave his valuation of the shares as £715,000.

The present litigation

2. The Plaintiff seeks to have the valuation set aside for reasons that he has set out in his Cause. The Defendant is claiming payment of the sum of £715,000 in respect of the agreed valuation. Both parties originally issued their own proceedings, but the actions were

consolidated and I made an Order some time ago to the effect that the Plaintiff who was seeking to have the valuation set aside should be the Plaintiff and the Defendant should counter-claim as Defendant. This has in practice been a little unsatisfactory because this is a case where it is really the Defendant who is anxious to get on with the matter and get his money.

3. The Plaintiff has a number of complaints about the way in which the valuation was handled and one of these he has taken rather late in the day, as it were, as a "knock out" point which would if it is correct give him summary judgment and an Order that the valuation should be set aside without further argument. The point which the Plaintiff takes and which Mr. Richardson has argued on his behalf with skill and perseverance is that the submission of a particular letter which was headed "without prejudice" to the valuer by the Defendant's Advocate is sufficient in the particular circumstances of this case to vitiate the valuation and entitle without more the Court to make an Order upholding the Plaintiff's claim.

The valuation process

4. I will come on to consider the Law relating to disclosure of without prejudice communications later, but I consider it appropriate to start by recording the arrangements made between the parties and for the sale and transfer of the 35% shareholding of the Defendant to the Plaintiff and the procedure for appointing a valuer to decide on the purchase price. The main terms of the Agreement are to be found in an Instrument dated the 2nd April, 2003, between the Plaintiff and the Defendant. That Agreement identifies Mr. Mark Thompson a partner in KPMG as the valuer and the terms of reference are succinct namely "What is the value of the 35% shareholding and hence the sale price for the purposes of the sale of the 35% shareholding by the Defendant to the Plaintiff?".
5. The Agreement goes on to deal with the provision of information both by Safehaven and the Plaintiff and for the exchange of submissions by both vendor and purchaser. The Agreement requires the Valuer to give brief written reasons for the valuation and the valuation is declared to be final and binding on the shareholders of Safehaven without right of appeal or review. Following completion of the Agreement between the parties, Mr. Thompson wrote a letter on behalf of KPMG dated the 2nd May, 2003, setting out the position of KPMG and their terms of engagement.

The process for submissions

6. In order to assist with the submission of material to the value of Mr. Thompson, the Defendant appointed BDO Stoy Hayward to assist him with presenting his case and the Plaintiff instructed Deloitte & Touche. As a prerequisite to finalising submissions by each

party there was a requirement that certain information concerning the operation of the company should be given to Deloitte & Touche on behalf of the Defendant. Once this had been done there was provision that the shareholders would produce written submissions and deliver them to the valuer. The shareholders would then have a further fourteen days in which to respond to the other shareholders submissions and deliver such response to the valuer. Deloitte & Touche duly prepared a report dated the 19th June, 2003, which set out the basis for their valuation of the shares which they considered should be in the range of £0.97M to £1.22M.

7. The submission of the Defendant was in somewhat different form. It too was dated the 19th June and started off with a history of earlier financial dealings between the various shareholders and included a history of negotiations between the parties concerning their attempts to settle their differences. In particular there was reference to a figure of £350,000 being acceptable to the Defendant if the Plaintiff was prepared to accept some future sale warranties. The representation then went on to talk about some offers of £91,000 for The Defendant and Mr. Perry's shares and more importantly reference to the fact that in 2001 The Defendant had purchased the shares of Mr. Perry, who until that date appears to have had an equal number of shares to him i.e. 3,500 for £91,000. The submission then goes on to deal with matters arising out of the application under section 75 of the Guernsey Companies Law to which I have already referred. I do not propose to explore any of this at this stage. The submission of the Plaintiff contained a considerable amount of paper, not all of which could be regarded as relevant for the use of a chartered accountant engaged in a valuation exercise.
8. As provided in the instrument of appointment the parties had a short period in which to respond to the other side's submissions and both parties afforded themselves of the opportunity to do so submitting further papers on the 3rd July. In the case of the Defendant this consisted of a letter from Deloitte & Touche commenting on BDO's valuation and confirming their original figure as to what was an appropriate valuation. However there was one material paragraph that appeared for the first time as part of the response to the Plaintiff's submission Deloitte & Touche said this at paragraph 4.31 of their report of 3rd July:

"We note that in April 2002, Mr Bach was prepared to offer Mr Amiss £325,000 for his shareholding (Appendix 1). Given that the company was smaller and less profitable than currently, a value higher than this would be expected. We note however that BDO have valued Mr. Amiss' shareholding at £173,250 which is considerably lower than what Mr. Bach was willing to pay a year ago."

9. Appended to the submission was the letter relating to the offer of £325,000. I set it out in detail for completeness; it was dated the 22nd April, 2002, and appears to have been written by Ozannes, who then represented the Defendant, at the time that the issue of submitting this dispute to an independent valuation was first being considered:-

"We write further to our open letter of today's date.

Your client has previously indicated that he would accept £325,000 for his shares. To put an end to matters, Mr Bach is prepared to pay him that figure.

If Mr Amiss refused to accept this offer, and the matter proceeds to an independent valuation, (whether as a result of his accepting the offer made in our open letter of today's date or a subsequent Court Order) we reserve the right to produce this letter to the valuer (or the Court if appropriate) on the question of costs.

If the valuer decides that Mr Amiss' shares are worth less than or in the region of £325,000, then we will rely upon this letter to argue that Mr Amiss should bear the full amount of the costs of the valuation. In simple terms, we will be seeking to argue that the valuer should exercise his discretion in a manner similar to Part 36 of the Civil Procedure Rules."

10. On the 7th July Ozannes wrote to Mr. Thompson pointing out to Mr. Thompson that this was a "without prejudice" offer and asking him to ignore it, saying that the letter is of no evidential assistance in determining the proper value of the shares either on an open market basis or a fair value basis or whatever basis you as the valuer are entitled to adopt. Ozannes continue as follows:

"We therefore ask you to remove the letter and its contents from your consideration and by copy of this letter put Messrs Deloitte & Touche and Carey Olsen on notice that the use of "without prejudice" material in this way may put the Valuation Agreement in jeopardy and potentially damage the process as a whole. We have advised our client of the seriousness of this wrongful disclosure and any reliance upon the same."

11. Mr. Thompson chose not to reply to this letter. That may or may not have been a matter for him. He did not say anything about ignoring the letter when he came to carry out his valuation and therefore I have to take it that the document was indeed in front of Mr. Thompson and not positively rejected from his deliberations at the time he made his valuation.
12. Any prejudice that could have been raised in Mr. Thompson's mind was further exacerbated by a letter of 16th July from Miss Dinning of Carey Olsen to Ozannes. Firstly she starts to say that the Without Prejudice Rule did not cover a situation like this because the protection was lost if the person who has written the letter then behaves without good faith later on in the same proceedings. As evidence of bad faith she identified the fact that a value of £129,000 (in fact it was £179,000) was then being suggested for the shares when an offer of £325,000 had previously been made. She goes on to say that it is expressly for that reason that she supplied Deloitte & Touche with the letter about which complaint was being made. Mr. Greenfield has not suggested seriously that any of this argument can be sustained. It is, however, interesting that Miss Dinning on behalf of the Defendant seems to have accepted

that, were it not for being able to argue bad faith, there might be some merit in the point that Ozannes were making concerning the “without prejudice” letter.

13. Mr. Richardson has put in a great deal of authority on the subject of “without prejudice” communications. There is no substantial argument between him and Mr. Greenfield that in the general context of litigation the Without Prejudice Rule is an important shield behind which people who are genuinely trying to settle litigation without recourse to the Courts can hide. I do not consider it necessary for me to review all those cases or add my own gloss to the learning of the courts both in these islands and in England, particularly as I am under pressure to get this judgment out as a matter of urgency.
14. What I consider is the real issue here is not whether the “without prejudice” letter was rightly, or wrongly, submitted to the valuer, but rather whether I can be certain that his work is to be regarded as rendered nugatory as a result of his having seen this understandable and somewhat guarded offer from the Defendant. In this regard I do take seriously the point made by Mr. Greenfield that none of this would have arisen had the Plaintiff kept to the real issues which were facing Mr. Thompson as a practising chartered accountant namely, what was the proper value from an accountant's point of view to be placed on these shares when they were to change hands from the Defendant to the Plaintiff. It is clear from subsequent correspondence that some of what the Plaintiff said particularly concerning the arrangements between the Defendant and Mr. Perry about the purchase of Mr. Perry's shares were misleading and the facts appear to have been quite different from what he was suggesting. There was also all this material about other deals and discussions there had been, including the section 75 proceedings. In the light of that I am forced to ask myself whether seeing this letter could really have had any influence on the final figure that Mr. Thompson reached.
15. I have re-read the Plaintiff's cause and it is clear that at trial the issue of the “without prejudice” correspondence and its effect will be an issue for the Jurats and it may well be that after hearing from Mr. Thompson they will take the view that the submission of the “without prejudice” letter, and perhaps more importantly the response of Advocate Dinning to the complaint about it having been submitted, have indeed so influenced the value he put on the shares that his valuation can no longer be relied on. However, to dismiss this point without hearing any evidence would in my view be premature and would involve the Court falling into the trap against which it was cautioned by Hoffman, J.A. in Cherub Investments Limited v. Channel Islands Aero Club Limited.
16. Mr. Richardson's application is dismissed.