

Judgment 47/2009

**Mateus v Walters – Royal Court (Civil Action File 1107) –
13 October 2009**

Probate – dispute regarding administration of personal estate of an Alderney resident – valuation of business – plaintiff had chosen, with the leave of the Royal Court, to proceed in the Royal Court rather than in the Court of Alderney – valuation commissioned by the Plaintiff was of little value – application for directions refused – parties encouraged to seek the assistance of a local mediator in Alderney – amount in dispute did not justify further litigation

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1107

The 13th day of October 2009 before Sir de Vic Graham Carey, Lieutenant Bailiff and Stephen Edward Francis Le Poidevin, Stephen Murray Jones and Peter Sean Trueman Girard Esquires, Jurats

KAREN ANN CAROL MATEUS

Plaintiff

v

ALASTAIR DONALD WALTERS

Defendant

Whereas on 30th September the Court considered an application by the Plaintiff for directions on the cause tabled on 22nd June 2007 to the effect that a valuation prepared by Chandler Limited dated 13th April 2006 be used for the purposes of calculating the value of the business conducted by the late Carol Gladys Walters. The Court after considering the affidavit of the Plaintiff dated 15th September 2009 and having heard thereon Advocate A. Merrien counsel for the Plaintiff this day handed down judgment in the terms attached hereto and REFUSED the said application.

S M D ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between:

KAREN ANN CAROL MATEUS

Plaintiff

and

ALASTAIR DONALD WALTERS

Defendant

Before Lieutenant Bailiff Carey

Jurats: S E F Le Poidevin, S M Jones and P S T Girard

Date of hearing: 30th September 2009

Date Judgment delivered: 13th October 2009

Advocate for the Plaintiff: A M Merrien

The Defendant was not represented and did not appear

Introduction

1. The Plaintiff and the Defendant are the only children of the late Gladys Walters nee Pike, who died in Alderney on the 27th September 2004. On 12th November 2004 Probate was granted by the Ecclesiastical Court to the Plaintiff and the Defendant as Executors of the Will. The residuary beneficiaries are as to one half the Plaintiff, as to three eighths the Defendant and as to one eighth the Defendant's daughter.
2. Gladys Walters, who we will refer to as "the Mother", died in possession of a certain real property in Alderney with which we are not directly concerned. So far as her personal Estate is concerned, there were the usual household contents and personal belongings and there were some bonds and policies, which appear to have been dealt with, and about which we are not asked to make any order. The Mother had been widowed for less than a year, her husband Donald Alan Walters ("The Father") having died on 2nd November 2003.
3. The main asset, over which there is a dispute, comprises the electrical business, originally operated by the Father and vested in the Mother at the date of her death. The Defendant appears to have worked in the business during the year prior to the Mother's death and continued to run the business on his own account after that event, although unfortunately he seems to have had some medical problems, which have impaired his ability to work.
4. The Plaintiff became concerned at the way in which the Defendant was dealing with his side of the administration of the Mother's Estate and, as long ago as the 7th September 2005,

instructed Advocate Haskins to write on her behalf to the Defendant. There then follows four years of correspondence, broken in 2007 by the issue of the proceedings, which are now before the Court. These proceedings appear to have been progressed somewhat spasmodically, although to be fair to Advocate Merrien, who has had conduct of the matter since proceedings were issued, the convenience of the Defendant and in particular his health problems, have meant that Court hearings may not have been able to be progressed with the speed one would have expected.

5. It is also clear that for the last two years, at any rate, the Defendant has chosen not to engage with his sister or her legal advisers and in particular has not turned up when summoned to Court. We will have to deal with the difficulties that these failings have created for the Plaintiff and the proper approach to proceeding in the absence of the Defendant later in this judgment.

Matters of Law

6. When an Executor swears an oath before the Dean or his delegate at the Ecclesiastical Court, he swears that he will produce a true and proper account of his administration if called upon so to do. Actions to enforce compliance with this oath are happily rare and the first issue is to establish what is the appropriate forum for such proceedings. Mr Merrien claims that the action lies before the Royal Court under its inherent jurisdiction and he concedes that this is not something that was transferred to the Royal Court under the provisions of the Ecclesiastical Court (Jurisdiction) (Bailiwick of Guernsey) Law, 1994. We agree Mr Merrien's submission save to say that in the view of the judge of law, this action could have proceeded in the Court of Alderney. However, the Defendant made no challenge to the choice of the Plaintiff to proceed, with leave of this Court, in Guernsey and he is deemed to have submitted to this Court's jurisdiction.

Preliminaries to this hearing

7. When applying for a date for this hearing, Mr Merrien sought leave for the Plaintiff's evidence to be given on affidavit. This was a sensible move having regard to the uncertainty as to whether the Defendant would wish to participate in these proceedings. We have had the benefit of reading her affidavit and in the absence of challenge from the Defendant, have to accept what she says in support of her application for relief. There are a number of heads of complaint both in the cause and the affidavit as to the way that her brother has conducted himself with regard to the administration of the Mother's Estate, but for the purpose of the hearing before us, there was really only one issue remaining between the parties, although agreement over the content of the final Estate Accounts may still be some way off.
8. The matter in issue involves what payment should be made by the Defendant to his Mother's Estate in respect of the value of the business which he took over from the Mother who in turn had run the business for the eleven months after the Father's death.

The Affidavit evidence

9. To ascertain the Plaintiff's case, it is necessary to look in detail at the affidavit, which she swore in Portugal on the 15th September last.
 - (a) At paragraph 5 she says that she and the Defendant have been unable to agree the valuation of the electrical business and that they have been unable to agree the method of valuing the business and that accordingly although he has taken the business over since October 2004, he has not accounted to the Estate for the purchase price (paragraph 6).
 - (b) There are then allegations of intermeddling, with which we are not concerned and there is also a complaint that he has indicated that he would charge for his time in

dealing with the matters relating to the Estate – no such charge has yet been levied.

- (c) She then deposes at paragraph 8, that it was orally agreed between the Defendant and her that he would carry on the business himself and would buy the shares of his sister and his daughter and that he had said that he wished to ensure that everybody had their fair share. She continues: *“The Defendant was supposed to sort out the business books and accounts and contact Chandlers in order to arrange for a valuation.”*
- (d) According to paragraph 11, the Defendant took no steps to have the business valued at first and therefore, through her Advocate, she proposed an independent valuation. The Plaintiff goes on to depose that the Defendant was advised of this before it was undertaken and raised no objection. Chandlers were engaged on the Plaintiff’s behalf by Mrs Haskins (see correspondence of December 2005 – January 2006).
10. Chandlers duly reported on 13 April 2006 and appended to the Plaintiff’s Affidavit is a copy of the valuation report, which also includes the unaudited financial statements of the business from the 3 November 2003 to the 27 September 2004. It is again clear from the report that Chandlers are reporting to the Plaintiff alone and that the report is not to be disclosed to any other person without their consent.

The correspondence

11. This valuation was produced on the 13th April 2006 and on the 27th April, Mrs Haskins wrote to the Defendant, sending the valuation from Chandlers, on the basis that the business value is £55,048 and, proposing how the remaining monies in the Estate Account should be distributed. There is also a request to the Defendant for the Executors to pay Chandlers’ fees. We have not explored the reason for this as the commission emanated from Mrs Haskins. The Defendant in his reply dated 1st May, agreed to pay that invoice and this was presumably because included in the work was the preparation of the financial statements, which was needed for the estate in any event.
12. In his reply to Mrs Haskins’ letter, the Defendant goes on to say:
“I am however in disagreement with the rest of the content of your letter for several reasons. I would request that you arrange for the return of all the documents and papers that I sent to Chandler so I may take advise (sic) on the matter.”
13. On the 30th May, the Defendant wrote again to Mrs Haskins in reply to her letter of the 27th April. He says he is not in a position to agree the distribution of the funds and makes three points:
- 1) He maintained that his sister and he had discussed at some length the value of the business shortly after the Mother died and that they agreed that the business was only worth the value of stock, minus debtors, plus creditors (this makes no sense and one can only assume that The Defendant was intending to say, stock plus debtors, minus creditors. He is however correct to say that on Chandlers figures this would have been a negative figure).
 - 2) He then referred to the report from Chandlers being based on the business making a profit, stating it actually made a loss in the last quarter of 2004 and again in 2005 and for that reason he claimed the valuation was incorrect.
 - 3) He again referred to the books not having been returned.

14. Mrs Haskins replied to him on the 7th June, pointing out that in fact that the letter of 1st May and the letter of 30th May were received by her in one envelope delivered on the 31st May. She went on to say that she is happy for him to contact Chandlers direct as they were “*in any event, jointly instructed*”. She then says that it was agreed that Chandlers would be instructed to value the business as at the date of the Mother’s death and that accordingly the fact that he made a loss later was not relevant. She again refers to the joint instruction to Chandlers to provide a formal valuation and asks to hear from him “*more constructively*”.
15. Mrs Haskins’ letter of 7th June is not answered until 12th September, when the Defendant wrote to Mrs Haskins asking for a reply to his letter of 29th August and complaining that the matter was being drawn out as he had not had the books back from the Accountants. He reiterates his alleged agreement with his sister that the business is worth the value of the stock, minus the debtors, plus creditors (sic). He then refers to the garage and workshop, which had been included in the Accountants’ Report as part of the business for tax reasons. We interpose to record that the parties appear to have settled the sale of the former residence of the Mother and Father and also agreed between them that when it was sold, the business premises at Albert Mews, be transferred to the sole name of the Defendant in consideration of a payment of half its value to the Plaintiff. As we will remark later, there is no reference to these premises in the report from Chandlers, although they are included in the accounts as fixed assets.
16. The letter of 12th September gets a somewhat brusque answer from Mrs Haskins in which she says she is astounded by the contents of the letter of 12th September and that she had not received any correspondence from the Defendant, save for a fax complaining about the answer-phone not working, since he had written on the 30th May. She then lists the letters which had remained unanswered.
17. Whilst we have some sympathy with Mrs Haskins that on occasion letters appear not to have been posted at the time that they had been dated by the Defendant, we see no reason for her to be so dismissive. The alleged letter of 29th August, could have gone astray and the proper approach in our view, for an Advocate of the Royal Court, dealing with an unrepresented opponent would be to invite the dispatcher of the letter for another copy. Nothing then seems to happen for four months and on the 14th February Mrs Haskins writes as follows, to the Defendant:

“As you are aware and as per your agreement with our client, the business was valued by Chandlers as at the date of your Mother’s death and therefore the time has come to finalise matters”.

Proceedings are threatened in the event of a failure to respond.

Proceedings begin

18. A summons is issued and Mr Merrien takes over from Mrs Haskins. The Defendant cannot appear on the return date of 27th April. Mr Merrien replies that there is no point in adjourning proceedings unless the Defendant is contesting them. In any event, Mr Merrien proceeded on the 27th April, but told the Court that the Defendant was not available and he later wrote to enquire from the Defendant as to his availability to appear before the Ordinary Court on a Friday morning.
19. A further hearing is fixed for 30th August. Despite Mr Merrien’s expectation that the Defendant would not turn up, he did. He apparently agreed to produce some documents and the matter was adjourned. Eventually some documents were received on the 20th November, but Mr Merrien is not satisfied that they are correct. The original documentation is sought in default of which there will be further directions before the Ordinary Court. Another two months passes and Mr Merrien gives notice that the matter will be restored to the Ordinary Court for directions on the 8th February. The file contains the correspondence and record of

what happened between then and the hearing before us, which we do not think needs to be recorded at length at this stage. We note that Mr Merrien was asking for more information relating to the financial situation of the business at the date of death. Whilst it appears that such information was recorded in Chandlers financial statements, Mr Merrien's concern was that the information provided by the Defendant was different. On 14th September 2007 shortly after the interlocutory court at which he did appear the Defendant redacted again a proposal to settle the outstanding differences over the business on terms similar to those he had proposed from the beginning. This was rejected without explanation

Preliminary Conclusions

20. We have studied all that the Plaintiff says in her affidavit and the contents of the correspondence that passed between her Advocates and the Defendant. The Jurats as judges of fact are satisfied that there was an acknowledgement by the Defendant that as he was going to carry on with the business previously conducted by his Mother on his own account, some compensation would be due to the Plaintiff and his own daughter. That acknowledgement would have been given before the accounts for the business, during the period that the Mother was proprietor and after the Father had died had been prepared. Even before any account is taken of the wages that the Defendant himself was drawing during that period, it seems that the previous profitability of the business had evaporated. However, the judges of fact can find no evidence to support the view that the Defendant agreed either that Chandlers be instructed to value the business (as opposed to preparing accounts for the period leading up to the Mother's death), or that their method of calculation was the appropriate one.
21. It is quite clear that the instructions to Chandlers emanated from Mrs Haskins alone on behalf of the Plaintiff. It is misleading to talk about a joint instruction, because although one can accept that the Defendant had an interest in having financial statements of the trading up to the date of the Mother's death prepared, it cannot be inferred that he was party to the giving of instructions for a valuation.

Further Considerations

22. That in our view is not an end to the matter, We have to take note of the fact that without explanation the Defendant has not appeared when summoned to do so by the Plaintiff's Advocate to a hearing when the Court is being asked to give "such directions as the Court deems just concerning the sale winding up or transfer of the business of the deceased". The Court has a wide discretion to do justice between the parties in a situation such as this. The Court has therefore taken upon itself to consider whether, notwithstanding the absence of agreement on the part of the Defendant, relief should be afforded to the Plaintiff on the lines she is seeking.
23. The Court has therefore taken a further look at the Chandler's valuation. It accepts that it has not heard from Mr Damsell and makes no criticism of Mr Merrien for not calling this gentleman and inevitably adding to costs. Indeed, whether Mr Damsell's evidence would have assisted or not, we know not. We can only look at what he has produced and we have to say that it is not helpful in persuading us we should follow it as a fair and just solution of the differences existing between the Plaintiff and Defendant.
24. The first point is that this is not an independent report. It is clearly produced as having been commissioned by the Plaintiff and therefore Mr Damsell is likely to be putting a gloss on this whole matter, which is favourable to the party instructing him. He reaches a conclusion that a business such as this is worth three times the annual profit before taking into account the fruits of the proprietor's own labour. During the Father and Mother's time it is clear that they did not draw a wage, but drew out any profits for their subsistence. When the Defendant came to work after the Father's death he began to draw a wage, which has been disregarded in the calculation of the profit for the year ended September 2004. Even by Alderney standards in 2004 it does not seem to have been a particularly lucrative appointment, although we have

no information as to how many hours he worked. Even after disregarding the defendant's labour the profit for the year after the Father's death was miniscule.

25. Although the premises are shown in the books of the company because of a tax advantage by so doing, not surprisingly no proper allowance has been made for the use of the premises and we have seen how the Defendant compensated the Plaintiff by paying her one half of the value of the premises.
26. Finally, we do not understand the calculation by which the figure of £55,048 was reached. The figures of profit cover a period of three years starting on the 1st January 2002 and ending on the 31st December 2004. They have been grossed up because the year-ends differed following the death of the Father and the Mother, and we do not take issue with this. We do however take issue with the way in which the profits have been added together (even giving credit for the fact that it was proper to deduct the Defendant's wages from the 2004 figure). The total sum of £36,698 is divided in two when in our view fairness would require it to be divided into three (the actual total being £36,699), so that the figure for the annual profit would, make a total of £12,233 and when multiplied by 3 would return to the sum of £36,699 and not £55,048.
27. Our view therefore is that the Chandler valuation is of little value and that certainly it would not be fair to impose a settlement on the Defendant using these figures. The Order which Mr Merrien seeks that the Court direct the Chandlers valuation be used as the value of the business is therefore refused.
28. So far as further directions we would propose to adjourn this matter for the parties to meet in Alderney with the assistance of a local mediator to see if the expressed wish of the Defendant that his sister and daughter get their fair share can be explored. Consideration should also be given to whether there was any goodwill or fixed assets in the business that was taken over from the Mother that has benefited the Defendant and for which the Plaintiff and the granddaughter be compensated. At the same time any outstanding differences on the estate accounts generally can be looked at. We do not believe from the papers that the amount in dispute justifies any further litigation in this Court.
29. There is also for me alone the question of the Defendant's costs of turning up at a previous hearing – I would not wish to encourage him to pursue this matter as he has not always helped himself but I leave him the opportunity to be heard thereon.
30. Finally the Court cannot leave this matter without recording the concern of all its members at the way this matter has been handled by Haskins and Co. As in all these situations we do not know what instructions they received from their client and we cannot do more than express anxieties. We feel that some of the work they have done has been unnecessary and ineffective and on the assumption that the usual level of fees were charged very expensive. Mr Merrien has tried to be fair in his presentation at the hearing before us but he should perhaps have looked more closely at the matter before listing it. In particular his file of correspondence as lodged originally was not complete. There was to say the least an imprecision in the way attempts were made to elevate Chandlers work to that of an agreed expert when clearly it was not. The serious shortcomings in that report, which we have outlined in paragraph 26, should have been detected before making demands of settlement and before issuing proceedings. Indeed the whole tone of much of the correspondence emanating from Haskins and Co falls short of what should be being sent to an unrepresented man particularly one who clearly had serious neurological problems. Had the valuation been as set out in paragraph 26, an earlier settlement may have been reached. Again we emphasise that we cannot make any judgement relating to the Advocate/Client relationship so far as concerns the Plaintiff as we are not privy to what instructions were given. However, speaking for myself, I feel the Plaintiff may need to obtain independent advice as to her position if Haskins and Co cannot resolve matters to her satisfaction.