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ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH
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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-171
[2014] NZHC 2851

BETWEEN

IAN WILLIAM DALLISON
Appellant

AND

JAN VERONICA VAN DYK
Respondent

Hearing: 1 and 2 September 2014

Appearances: P Egden for Appellant
A M Manuel for Respondent

Judgment: 26 November 2014

JUDGMENT OF MANDER J

limited to whether the Family Court Judge has failed to take into account relevant factors, took into account irrelevant factors, or that the decision was wholly wrong.⁷

[18] Heath J, in *B v F*, approached the appeal on the following basis:⁸

- a) first, I must take account of the advantage that [the Family Court Judge] had of hearing and seeing the witnesses give evidence before him (see *Austin Nichols* at para [13]);
- b) secondly, to the extent that the Judge exercised any discretion in reaching his decision, I must determine whether those discretionary decisions were or were not open to him, based on *May v May* [1982] 1 NZFLR 165 (CA) and *Blackstone v Blackstone* [2008] NZCA 312 at para [8];
- c) otherwise, I am free to reconsider the Family Court's decision and to substitute my own view on questions of fact and evaluation, if I were convinced that the first instance decision was wrong.

[19] This is the basis upon which I approach the present appeal. Heath J considered such an approach consistent with that adopted by Randerson J in *WPH v ITP*,⁹ who concluded, in light of the observations of the Court of Appeal in *Blackstone*,¹⁰ that "some reasonably plain ground ought to be made out before an appellate Court will intervene".¹¹

The Family Court's approach to the evidence of the husband's expert accounting witness

[20] Evidence of the value of the companies and the husband's ophthalmological practice was the subject of competing evidence from two accountants. Mr Crichton, who has been the husband's accountant throughout his business life and is one of the trustees of the husband's new family trust, was called by the husband to give valuation evidence of the companies and the practice. Mr Innes-Jones, a chartered accountant from Auckland with no previous association with the wife or knowledge of these matters prior to providing his professional opinion, gave evidence on behalf of the wife.

⁷ *Abercrombie v Abercrombie* [1997] NZFLR 666 (HC) at 671.

⁸ *B v F*, above n 1, at [8].

⁹ *WPH v ITP* [2009] NZFLR 745 (HC) at [15]-[17].

¹⁰ *Blackstone v Blackstone*, above n 5.

¹¹ *WPH v ITP*, above n 9, at [16].

[21] Judge Smith held that having regard to Mr Crichton's long and close association with the husband, it was not possible for Mr Crichton to put himself forward as an independent expert witness. Judge Smith found, and it is not disputed otherwise, that Mr Crichton was responsible for the compilation of the annual accounts of the various entities, and that he had been involved in the structuring of the business, as well as the accountancy treatment of the income and assets of the companies and the practice before and after the separation. It was apparent that Mr Crichton was a longstanding and close business advisor of the husband. During the course of giving evidence, he sought to defend his approach to these matters and the advice that he had provided to the husband.

[22] The Family Court concluded that, because Mr Crichton was not an independent expert, the Court was reliant in its approach to the issue of valuations on Mr Innes-Jones' expert opinion. In reaching that finding, Judge Smith referred to a lack of adherence by Mr Crichton to an advisory engagement standard issued by the New Zealand Institute of Chartered Accountants (NZICA). That standard provides:

11. When expressing an independent business valuation conclusion, a member must be, and appear to be, free from any interest which might be regarded, whatever its actual effect, as being incompatible with integrity, objectivity and independence.

Mr Crichton, as a chartered accountant, was required to comply with this standard if he was purporting to express an independent business valuation.

[23] The husband initially submitted that Judge Smith had ruled Mr Crichton's expert evidence to be inadmissible. On the hearing of the appeal, the husband resiled from that submission but maintained that Judge Smith had erroneously put to one side Mr Crichton's evidence.

[24] Lack of independence does not render expert evidence inadmissible except in the most extreme cases where bias is established.¹² An expert witness who is not independent of a party is nevertheless competent. Independence, or lack of it, goes

¹² *Lisiate v R* [2013] NZCA 129, (2013) 26 CRNZ 292 at [55]; *M (CA438/10) v R* [2011] NZCA 84 at [35]-[37]; *Commissioner of Inland Revenue BNZ Investments Ltd* [2009] NZCA 47, (2009) 19 PRNZ 553.

to the weight of the evidence.¹³ The husband submitted that Mr Crichton was a highly experienced accountant, well qualified to give expert evidence on the valuation of shares and businesses. He submitted that Mr Crichton had intimate knowledge of the husband's financial affairs and that it had not been suggested he was "independent". Mr Crichton's involvement with the husband was well documented and freely acknowledged. That acknowledgment however has to be reconciled with the policy that lies behind the code of conduct for expert witnesses and the NZICA advisory engagement standard.

[25] As I have acknowledged, admissibility does not require independence and the issue of independence in terms of compliance with the code of conduct for expert witnesses is not explicitly addressed in that document.¹⁴ However, the overriding duty to assist the Court impartially, and when conferring with another expert witness to exercise independent judgment, means that in large measure the value of an expert's evidence is likely to be predicated on his or her independent approach to the evidence and the issues. A lack of independence may denote a lack of impartiality which in turn may affect the weight that can be afforded to an expert's evidence. As the Court of Appeal has observed, in cases where the position of the proposed expert is so lacking in independence as to make it obvious that an opinion he or she expresses in evidence will not be able to be substantially helpful, an issue may arise as to the admissibility of the evidence under s 25(1) of the Evidence Act 2006.¹⁵

[26] The advisory engagement standard, to which Judge Smith made direct reference, could not be clearer. The standard not only requires a chartered accountant when expressing an "independent business valuation conclusion" to be free from any interest incompatible with "objectivity and independence" but to "appear to be free from any interest which *might* be regarded, *whatever its actual effect*, as being incompatible with objectivity and independence".¹⁶

[27] Mr Crichton essentially presented as a witness of fact as a professional advisor who had been closely involved in the husband's business since its inception

¹³ *Geddes v New Zealand Dairy Board* HC Wellington CP52/97, 27 August 2003.

¹⁴ Evidence Act 2006, s 28; High Court Rules, sch 4.

¹⁵ *Commissioner of Inland Revenue v BNZ Investments Ltd*, above n 12, at [22].

¹⁶ Emphasis added.

and continued in that role after the separation of the parties. In that capacity, he was closely associated with the husband. Of itself, that did not disqualify him from expressing his opinion regarding the valuation of the practice and the companies. Mr Crichton is qualified to do so. In that capacity his evidence was discussed and considered by Judge Smith in respect of both the companies and the practice. The Court however, in determining fair value, is dependent on specialist expert opinion. A prerequisite to the level of reliance and weight that a Court can place on such opinion is the objectivity and independence which such an expert witness brings to that evaluative process. The Court can thereby have confidence that the witness is abiding by their foremost obligation to assist the Court.

[28] For the reasons already canvassed, Mr Crichton simply did not stand in the shoes of an independent business valuer. It appears that the submission made on behalf of the husband is that at no time did Mr Crichton seek to represent himself as an independent expert witness and therefore the accountancy standard did not have application to him. In the circumstances, it is apparent that he could not represent himself as independent, but with that concession must come the related concession that Mr Crichton could not have been expressing an independent business valuation. The only expert that could therefore provide such a view was Mr Innes-Jones. The Court was left with the valuations of Mr Innes-Jones, called by the wife, who had no previous association with either party and who expressed his professional opinion in the capacity of an independent expert witness. It is unsurprising therefore that Judge Smith felt himself compelled to approach the issue of valuation by using Mr Innes-Jones's evidence, at least as a starting point.

[29] It is apparent that in respect of both the companies and the practice, Mr Crichton's views were considered and taken into account by Judge Smith. In some instances, Mr Crichton's treatment of various items was accepted and the figures he calculated applied. In each case, Mr Crichton's approach was discussed and considered, and the reason for preferring Mr Innes-Jones' method articulated. No doubt the Family Court's overarching concern regarding the reduced status that could be afforded to Mr Crichton's opinion evidence, essentially in the capacity of the husband's accountant and associate, permeated Judge Smith's assessment of the business valuation evidence. In my view, Judge Smith was entitled to take the

approach he did. It is unsurprising that the Family Court had greater confidence in Mr Innes-Jones' evidence and preferred it to that of Mr Crichton having regard to the latter's association with the husband and his lack of independence.

Date of valuation for the practice

[30] The husband submitted that to achieve a just division the Family Court should have exercised its discretion under s 2G(2) of the Act and valued the ophthalmology practice at the hearing date. Alternatively, it should have awarded compensation under s 18B to the husband in an amount equal to the increase in value between the time of separation and the hearing date. The Family Court accepted Mr Innes-Jones' adjusted valuation of the practice as at the hearing date of \$354,084, although it rejected that witness's treatment of tax losses in L V Holdings that otherwise would have increased the value of the practice.

[31] The husband's submission was that while hearing date valuations were appropriate for the companies, the practice should have been valued at the date of separation. He submitted that adopting a hearing date valuation for the practice resulted in an unjust outcome for him. The unfairness, the husband submitted, arose because the hearing date valuation of the practice included assets which in his submission had been created from his separate income. Additionally, the hearing date valuation did not account for debt reduction achieved as a result of his efforts since separation. The husband's position was that the increase in the value of the practice post-separation was due entirely to the application of his separate income.

[32] Section 2G of the Act provides as follows:

2G Date at which value of property to be determined

- (1) For the purposes of this Act, the value of any property to which an application under this Act relates is to be determined as at the date of the hearing of that application by the court of first instance.
- (2) However, the court of first instance or, on an appeal the High Court, Court of Appeal, or Supreme Court may, in its discretion, decide that the value of the property is to be determined as at another date.
- (3) This section is subject to Part 6