

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION

CLAIM NO. BVIHCV 2017/0030

BETWEEN:

LISA AHEARNE

Claimant

AND

ANNETTE AHEARNE

Defendant

Appearances

Mr. Sydney A Bennett KC and Ms. Anthea L Smith for the Claimant
Mr. David Abednego for the Defendant

2022 November 3
November 4

JUDGMENT

[1] **JACK, J [Ag.]**: William Ahearne died intestate on 26th January 1999. He left a widow, the defendant, and a daughter, the claimant. The defendant is the deceased's sole personal representative. By an order made by Matthew J on 1st May 2002 in an action between the same parties under action number BVIHCV 2000/0127, it was declared *inter alia* that certain shares ("the Trust Shares") in Road Town Wholesale Trading Ltd ("RTW") were held on trust for the defendant for life on statutory trusts under the **Intestate Estates Act 1945**¹ with remainder to the claimant.

¹ Cap 34, Revised Laws of the Territory of the Virgin Islands.

- [2] In 2017, an offer was made by a third party to purchase all the shares in RTW, which controlled Riteway, the well-known chain of supermarkets in this Territory. Although various issues were raised on the pleadings as to the way in which the offer was communicated to the parties and an issue of estoppel was raised, none of these were pursued at trial. It is common ground that the offer to purchase reached the 75 per cent threshold required by the purchaser and that the Trust Shares were sold to the purchaser.
- [3] The monies paid in connection with the share purchase of the Trust Shares comprised two payments. The first was a declaration of a special dividend by RTW in the sum of \$831,423.57. This payment was made before completion of the sale to the purchaser, but was a condition of the purchase and sale agreement. These monies came from sums held within RTW. The second was the consideration paid by the purchaser. This comprised \$1,591,270.08.
- [4] Two issues arise. First, is the dividend treatment to be treated as a payment of income (so that it goes to the defendant as life tenant), or as a payment of capital (so that it stands to be held on the statutory trusts), or as a mixture of the two? Second, it is common ground that the defendant is entitled to have her life interest bought out, but in dispute is what the sum for the buy-out should be.
- [5] As to the first issue, there is very little dispute on the facts. RTW had for many years had a policy of only making small dividend payments. The majority of profits were retained in the business, so that it could be expanded. When the offer to purchase was made, there was a substantial amount of cash retained in the business. It was this cash which RTW agreed with the purchaser should be distributed before completion as a special dividend.
- [6] I heard evidence from Ryan Geluk, a director of the well-known firm of accountants, BDO BVI. He says in his witness statement:

“[I]t can be argued that, since the cash which is being required to be distributed came from the profits made in the business operations, such

distribution of cash should be an income distribution or dividend; after all, RTW has significant undistributed profits which have built up over the years and such payment is merely distribution of such profits.

The second factor, which I am unable to ignore, however, is the extraordinary size of the dividend being made immediate prior to the sale in comparison to historical trends. In my opinion, due to the extraordinary size of the dividend, it must be viewed differently. This is especially true given that the distribution was a requirement to comply with the share purchase agreement which significantly reduced the value of the shares of RTW.

...

[T]here is no distinction between different types of surplus accounts, [so] it can be argued that any dividends over and above the historical trend of dividends form the capital of the company and would be treated as capital upon distribution or redemption at liquidation.”

[7] That evidence was barely challenged in cross-examination. I accept that as a matter of modern accounting practice the special dividend (minus a small amount which would have paid under the historic dividend policy) constitutes a distribution of the capital.

[8] As a matter of law, however, the position is in my judgment different. In **First Nationwide v Revenue and Customs Commissioners**,² the English Court of Appeal held, on not dissimilar facts (reading from the headnote):

“UK law recognised only two species of payment in respect of shares: capital or income payments. The jurisprudence established that it was the form by which the payments were made that determined their character. As the payments were made adopting the mechanism of distribution by way of dividend, that mechanism dictated the conclusion that the payments were income not capital.”

[9] Mr. Bennett KC drew my attention to **Re Kleinwort's Settlements; Westminster Bank Ltd v Bennett**,³ where a special dividend was declared, but the trustees had

²[2012] EWCA Civ 278, [2012] STC 1261.

³[1951] 1 Ch 860 at p 863.

refused prior to the distribution to sell the stock *cum* dividend. Vaisey J accepted that the Court may well have a jurisdiction to split such dividends between capital and income but said that “the court’s interference may only be justified where the trustees could be said to have committed a breach of trust consisting either of some action or inaction on their part.” He added that he could not “thank that there anything in the nature of a general rule that profits distributed, in whatever shape as dividends, and belonging under well-settled principles to the tenant for life, must be subject to an apportionment for the benefit of capital.”

[10] Likewise here, there are in my judgment no special circumstances to depart from the normal rule. No issue of breach of trust was raised. The normal rule promotes certainty. Accordingly, I find that the defendant was entitled to the special dividend of \$831,423.57 absolutely.

[11] I turn then to the purchase price of \$1,591,270.08. Section 7(1) of the **Intestate Estates Act** provides:

“Where a surviving... wife is entitled to a life interest in the residuary estate or any part thereof, the personal representative may... where the tenant for life is the sole personal representative, with leave of the Court, purchase or redeem such life interest (while it is in possession) by paying the capital value thereof (reckoned according to tables selected by the personal representative) to the tenant for life... and thereupon the residuary estate of the intestate may be dealt with or distributed free from such life interest.”

[12] Each side has produced redemption figures as at 2017. The claimant produces a report from Amanda Salvatori, which is based on Guyanese life tables. The defendant produces a report from Triad Management Services Ltd, which is based on United States life tables. Life expectancy under the United States tables is longer than under the Guyanese tables. Neither producer of the reports was sought to be cross-examined. It is common ground between the parties that I should determine the redemption figure based on the figures for 2017 and then add interest to date on the amount which should have been payable in 2017.

- [13] The defendant is a citizen of Guyana. However, for many years she has had her principal residence in Louisiana. Unfortunately those premises were badly affected by the flooding in early 2016. She was in Guyana at the time and was only able to return in 2018. Since then she has been back and forth between Louisiana and Guyana.
- [14] The defendant seeks to rely on the US life tables. I remind myself that my task under section 7 of the 1945 Act is one of review. The primary decision on which set of life tables to use is that of the defendant. In my judgment, her choice of the US tables is wholly defensible. It is where she has her primary residence and where she is likely to receive any medical attention she needs. Accordingly, I grant leave for her to rely on the Triad figures.
- [15] Both the Triad figures and the Salvatori figures take the purchase price of the Trust Shares as \$1,873,057. The parties are now agreed that the right figure is \$1,591,270.08 (or 85 per cent of that figure). Reducing the Triad figure of \$631,629 to that percentage gives a redemption figure of \$536,884.
- [16] Accordingly, I declare that the defendant is entitled absolutely to the \$831,423.57 paid by way of special dividend and that the claimant shall buy out the defendant's life interest in the \$1,591,270.08 purchase price at a redemption figure of \$536,884.00 with interest. I shall consider written representations as to the interest figure and costs.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar