

## Collaborative law in big money cases

### **What is collaborative law?**

Collaborative law is a new type of alternative dispute resolution in the family law field and has been given much publicity recently, both in the press and at Resolution's main conference in the spring.

This approach is not suitable for every case. There is however a substantial proportion of clients for whom this would be a far preferable way of sorting out the problems arising on divorce. For them, the confrontation of the court process is unattractive, with the inevitable consequences of expense and polarisation of family relationships.

One of the benefits of the collaborative law process is that it is focused exclusively on working out solutions. Financial disclosure is still an essential part, but the extraneous preparation of court documents – of preparing statements of issues or instructions for counsel – can be dispensed with. It is no longer necessary to put the evidence into a framework that is designed to produce the “best result” within the confines of the Matrimonial Causes Act. Instead, the discussion can focus on the broader objectives of the family, perhaps anticipating the intentions to pass the business to the next generation or the need to deal with inheritance tax planning.

This is particularly helpful in complex cases – those involving family businesses, family trusts or landed estates. Not only can this be immensely attractive to clients themselves, but it is very much welcomed by other professionals involved with those clients, such as accountants, professional trustees and financial advisers. In short, the approach can be extremely effective as a marketing tool as well as a method of resolving disputes.

### **How does collaborative law work?**

The backbone of the collaborative law process is a series of four-way meetings, involving both parties and their legal representatives. There is a minimum of correspondence. Minutes of the four-way meetings are prepared and circulated and these provide a record of the discussions as to how matters are going to be moved forward and what proposals for settlement are made.

As with mediation, the financial disclosure is open and could potentially be used if necessary in any future court proceedings. The discussions are however all conducted on a without prejudice basis.

Crucially, both clients and their lawyers sign a participation agreement. At the outset, it is agreed that court proceedings will not be set in motion unless previously agreed. For example, it may be helpful to move ahead with divorce, and at the end of the process it would be anticipated that a minute of order would be sent to the court.

A central tenet of collaborative law is that, if contested litigation does begin, then both of the solicitors involved have to be disinstructed. This is an essential part of underpinning the process. Both clients know that their solicitors are committed to resolving the issues, and share a transparency of purpose in doing so. If they cannot, then those solicitors are no longer involved and the clients move elsewhere. This has a centripetal influence on the discussions and ensures that the focus remains on resolving the issues together instead of walking away from those discussions when a difference arises and asking a court to adjudicate upon it.

### **A multi-agency solution**

Another feature of the process is the more open use of other professionals, be they accountants, IFAs or those in the therapeutic field. The couple may agree – and are more likely to be encouraged – to discuss their children's needs as part of the process, for example, should that emerge from the four-way discussions as an area of concern that needs to be addressed. Or a pension problem could be assisted by asking an IFA to join the meeting to understand the issue and to help work out a detailed response to the agreed agenda.

This type of “teamworking” with other professionals is a natural corollary of the collaborative process, to ensure that the right help can be brought to bear on a particular problem when it is needed. The informality of the process facilitates this, and training courses are now available to other professionals who wish to work in this way.

In contrast, the court process cannot be so flexible. The “one size fits all” approach is inevitable in the framework of litigation. The procedural rules and practice directions of the judicial system are designed to ensure that there is a smooth and unified approach. It is a universal framework designed to enable the court to do its work efficiently in every case.

### **Conventional cases involving accountancy evidence**

The development of case law since *White* has placed far greater emphasis on the need to obtain accurate valuation evidence. The appointment of a single joint valuer in cases involving businesses has become standard. The role of the forensic accountant is usually restricted in its scope to the valuation of share interests and an analysis of liquidity.

From a client’s perspective, there are often two areas of frustration with this standardised approach.

The first relates to the valuation process itself. One can only have some sympathy with the valuers when confronted with the prospect of putting an accurate value on the shares in a family-owned business. There are so many factors that can dramatically affect the outcome, both external and internal. The business may be at a particularly vulnerable stage of its growth or it may just have finished a period of expansion. The owner may not wish to remain in office in the event that the business is sold. Equally, what is the impact of the divorce – real rather than imagined?

The valuer has to come up with a valuation figure, having looked at the net assets in the business, the turnover and the performance of that sector of the economy. Necessarily, the valuer will be making a series of judgements about a variety of factors. In the absence of debate of the type that would occur when separate valuers are negotiating the figures, there can be a higher degree of subjective judgements than in, say, the property market where there is much more evidence of similar properties being sold.

Enormous reliance is placed on the figure, and the impact on the subsequent negotiations is huge. In many cases, for all the admonitions in *Wells* about sharing risk, for every pound of value in the company there will be a corresponding pound in the other spouse’s side of the ledger. Sharing the risk in a business is still very rare. Shareholders’ agreements are far from commonplace and are likely to remain so when the courts are reluctant to see warring parties tied together in an ongoing commercial enterprise.

The upshot of this process is that the owner of a family business is likely to find himself or herself in the run-up to financial dispute resolution hearing with a valuation with which they have deep misgivings and legal bills of £30,000 or £40,000. Worse still, the negotiations will only just be kicking off, but already they will be strongly tilted against the business owner having any liquidity for housing or anything else.

Generalised as this account is, very few would advocate that the system of dealing with businesses in the family courts is anything other than cumbersome and uncommercial.

The second area of frustration for business owners is that there is often little recognition of the rationale behind the business during the litigation process – certainly during the valuation process. There is no distinction between different types of business. For example, the high-tech sector, which is specifically set up to sell on at an early stage, is fundamentally different to the farming business where the ethos is to sustain a lifestyle and pass to the next generation.

The courts may wish to adopt a uniform approach to valuation – how much would these shares be worth if the business were to be sold – but that is often out of line with what the intentions of the family are in setting up and developing the business. “But we are not going to sell the business at this point – do we really have to go through the expense of valuing it, and can’t we do something else instead to share the benefits, be they the income, the contributions to pension or the ultimate capital if it is to be sold?”

### **Limitations of the Matrimonial Causes Act (MCA) in providing suitable remedies**

Underlying all these issues is the fundamental lack of flexibility in the legislation. Although the MCA is designed to be flexible enough to deal with the infinite variety of personal circumstances, the remedies are inadequate for dealing with the wide spectrum of commercial cases that need to be dealt with on marriage breakdown.

Remedies such as maintenance or capital orders at the time of divorce (lump sum payments, the transfer of shares or even the sale of a company) are of limited use in building the right kind of framework, where the benefits of a business need to be shared during a period of volatile transition for the family concerned. The search for “fairness” in such cases is often constrained by the tools that the court is given to use. Maintenance rights are not appropriate as a medium for sharing future pension contributions, and the right to capitalise maintenance under MCA section 31(7) is too vulnerable, being lost on remarriage, as a means of sharing the sale proceeds of a company.

Although the higher courts may be more willing to adopt a flexible approach to the constraints of the legislation (eg, *R v R (Lump Sum Repayments)* [2003]), there is a real reluctance on the part of most county courts to approve arrangements such as the postponement of lump sum applications even when these are agreed, let alone initiate them at the end of litigation.

### **Can the collaborative process provide a better alternative?**

Collaborative law is certainly not some kind of universal panacea in complex cases of this kind. It is not going to work where there is an unwillingness of one or the other party to cooperate in the process of discovery, or if one party approaches the discussions with a fixed and inflexible view as to the outcome. There also needs to be a basic level of trust on which to build.

But the immediate benefit is that the whole process is conducted as a dialogue in which both parties engage from the beginning as active participants. The need for disclosure is explained; the purpose of involving an accountant is considered and the ultimate objectives of the family in the business can be given the priority the parties feel is appropriate.

If it is not going to be helpful for there to be a full valuation, then the instructions to the accountant can be limited to whatever aspect is felt to be most relevant. That discussion will focus on what the family is trying to achieve, both within the terms of the divorce settlement and within the business itself.

Knowing what the shares are worth may not be of interest if retirement is imminent and the business is going to be sold in a short period, in circumstances where both parties have discussed and agreed that they would prefer to wait. In the parallel world of litigation, it is unlikely that such a dialogue would have taken place until after the full valuation had taken place.

Similarly, both parties may agree that they regard the business as an income producing entity. The role of the accountant may be better directed towards setting up a suitable structure so that dividend income could be shared in the future, perhaps with the control of the company being retained by one party rather than both. A shareholders' agreement with different types of share can be discussed far earlier, and the expense of setting it up is at least offset by the costs saved in conducting a full valuation.

Alternatively, in cases where the business is a build-to-sell entity, valuation will be of little use. Instead the accountancy work can be directed to creating whatever framework may be most tax effective for the family as a whole – not just the spouses but also the children.

Again, it may be established at the outset that the main objective is to pass the business to the next generation. The focus may well be less on the value of the business as a whole and more on the possibility of raising capital. In this type of discussion, the emphasis may well be as much on inheritance tax planning as it is on the list of considerations listed in MCA section 25.

The strong feelings about such issues can derail sensible discussions unless they are addressed at the outset. In the collaborative process these can be resolved, or at least acknowledged, at an early stage. The solicitors

and their clients can then discuss these issues and agree either to go ahead with the valuation process in full or to adjust the process of fact finding and valuation, having advice as to the consequences of taking a particular course of action. Either way, at least the views of the parties are explored. Care obviously has to be given as to the extent to which they should influence the process. But even if they do not, the acknowledgement of those feelings – about the wish to pass on the business for example – may help to reduce the emotional temperature and facilitate discussion. It is so much easier to deal with this face to face, in the setting of a four-way meeting, than during the course of litigation.

For the accountant – and for the valuer of substantial commercial properties – the flexibility of this approach feels wholly different to the court process. It is much more akin to the way in which advice would normally be given to a family that was planning a major change in its business arrangements. There is far less emphasis on preparing bundles of supporting information and presenting this in the way demanded by the court, which creates so much of the expense.

The accountant or valuer can be brought into the four-way meeting to discuss the objectives and can give advice as to why a range of values may be possible, for example, or where non-core parts of a business could be sold off or used more creatively to produce an income. It is much more satisfying for them to be involved in this way rather than facing the prospect of being cross-examined in the witness box on a specific figure! Instead, their experience and views regarding how best to approach valuation can be considered and discussed in a way that is of direct relevance to the family, and then in considering the ultimate settlement.

As in mediation, when both parties engage in dialogue about the options, the outcome is often far more palatable than a solution that is imposed without this high degree of involvement.

### **Cases involving trustees**

Another type of case that might well benefit from the collaborative process is where trust assets are involved. The involvement of trustees can complicate litigation. The background of family trusts can be complex, but more importantly the attitude of the trustees themselves towards issues like capital distribution can be vital.

Trustees can get caught in the middle of opposing and competing claims. Their role is to be responsible for the beneficiaries of the trusts, which may include a far wider class than the parties to the divorce and their children, while attempting to adopt a reasonable line with the parties and the court. It is an invidious position for many such trustees, who have to be mindful of these conflicts. The threat of being joined as a party to the action is abhorrent to many.

The collaborative process again offers a potentially more suitable medium through which to facilitate both the disclosure and the contribution which the trustees may be able to bring to the settlement discussions. It may be helpful for both parties and their advisers to hear firsthand how the trusts operate. Equally, it may cut through the problem of conducting a three-way correspondence about settlement terms. The trustees can simply come to a four-way meeting and say what they can feasibly contribute to any deal between the parties. Substantial cost savings may be possible with this approach, which prevents the discussions becoming “triangulated” where the existence of a third party impedes or is made to obstruct settlement proposals being made.

To summarise, there are considerable opportunities for family lawyers – especially those used to being involved in complex cases – to extend their practices by adopting the collaborative process. Its appeal to other professionals, as well as to clients, opens up substantial opportunities for developing one’s practice. There is much greater scope for those with experience in dealing with businesses and trusts to display their acumen. Indeed, that expertise may well be more fully engaged in this process than in litigation where the responsibility passes to counsel and ultimately to the courts themselves.