

DISCOUNTS FOR BUSINESS ASSETS

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1 Hare Court



What do we mean when we talk about a 'business assets' or 'businesses'?



Computation

Distribution



***HO v TL* [2023] EWFC 215**

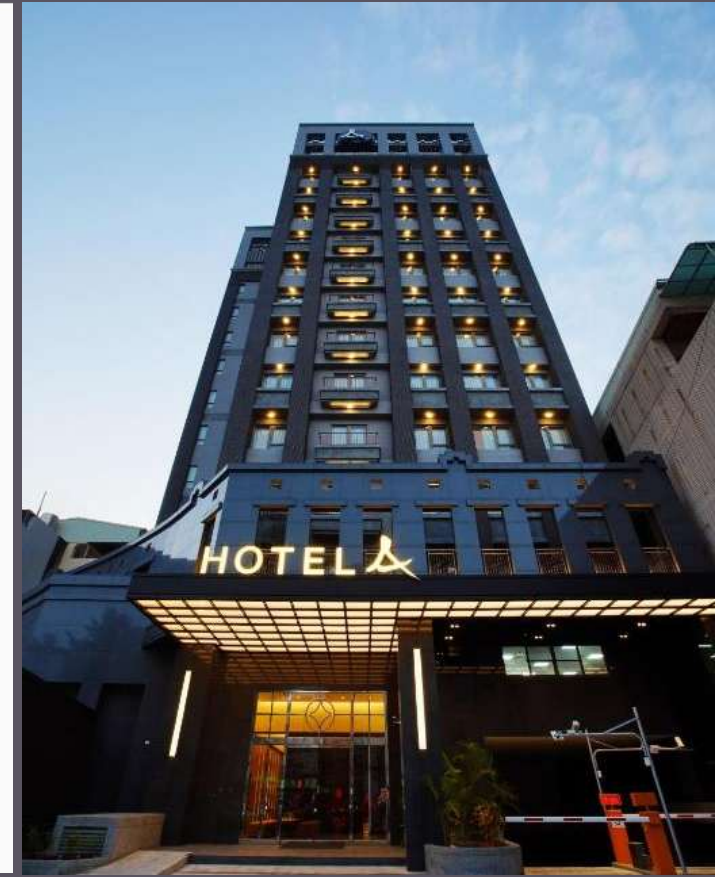
'21. First, it is for the court to determine the value, not the expert.



HO v TL [2023] EWFC 215

22. **Second, valuations of private companies can be fragile and uncertain.** In *Versteegh v Versteegh* [2018] EWCA Civ 1050 Lewison LJ said at para 185:

“The valuation of private companies is a matter of no little difficulty. In *H v H* [2008] EWHC 935 (Fam), [2008] 2 FLR 2092 Moylan J said at [5] that ‘valuations of shares in private companies are among the most fragile valuations which can be obtained.’ **The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even where valuers use the same method of valuation they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snap-shot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold.** Moylan J is not a lone voice in this respect: see *A v A* [2004] EWHC 2818 (Fam), [2006] 2 FLR 115 at [61] – [62]; *D v D* [2007] EWHC 278 (Fam) (both decisions of Charles J).”



HO v TL [2023] EWFC 215

23. **Third, I suggest that the reliability of a valuation will depend on a number of factors** such as:“(i) whether there are **applicable comparables**, (ii) how ‘niche’ the business is, (iii) **whether the business is to be valued on a net asset basis** (for example a property company) **or one of the recognised income approaches** (such as EBITDA or DCF), (iv) **the extent of the parties’ interests, and accordingly their level of control**, (v) **the extent of third party interests**, (vi) the relevance of any shareholders’ agreements, (vii) whether there is a realistic market for sale, (viii) the volatility or otherwise of the figures, (ix) the reliability of forecasts, and (x) whether the assumptions underpinning the valuation are seriously in dispute.”

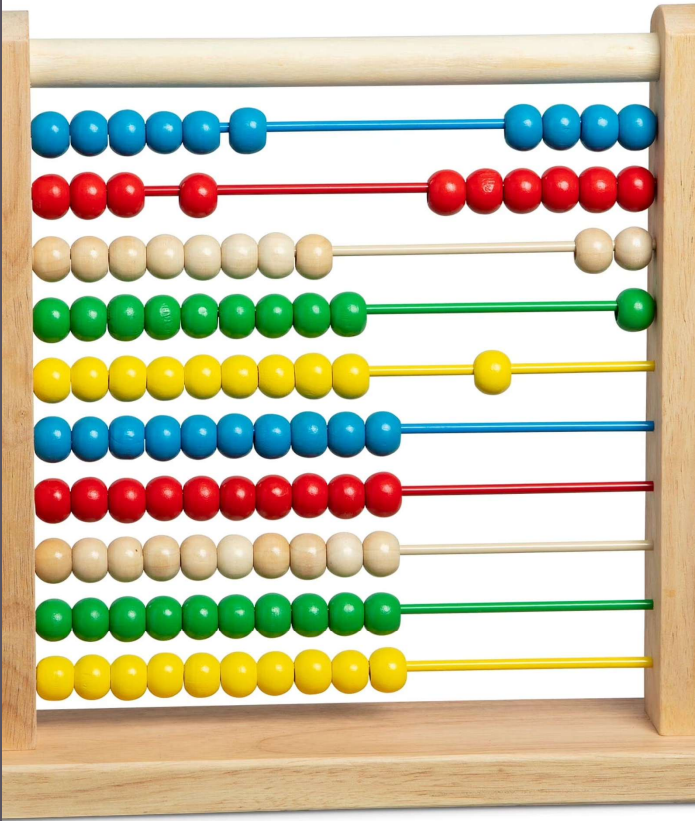


CG v SG [2023] EWHC 942 (Fam)



Nothing

Double Counting



Discounts

The Accountancy Discount

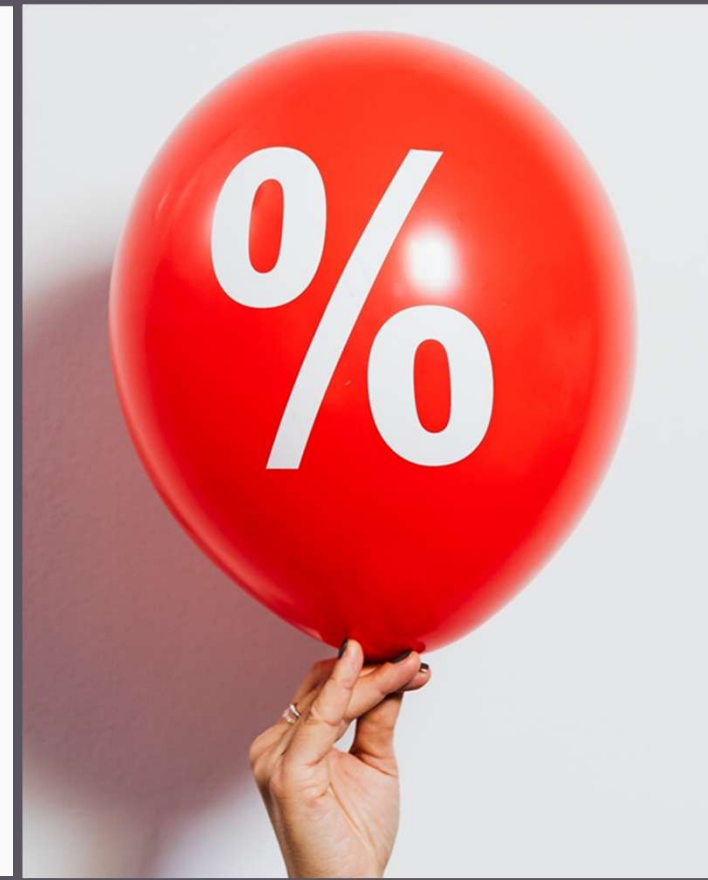
The Court Discount



The Accountancy Discount

HO v TL, Peel J:

26. Sixth, as was pointed out in *Wells (supra)*, *Versteegh (supra)* and *Martin (supra)*, there is a difference in quality between copper-bottomed assets and illiquid/risk-laden assets. As Moylan LJ said at para 93 of *Martin (supra)*: “The court has to assess the weight which can be placed on the value even when using a fixed value for the purpose of determining the award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties’ assets by application of the sharing principle also effect a fair balance of risk and illiquidity between the parties. Again, I emphasise, this is not to mandate a particular structure but to draw attention to the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties. I would also add that the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge”.

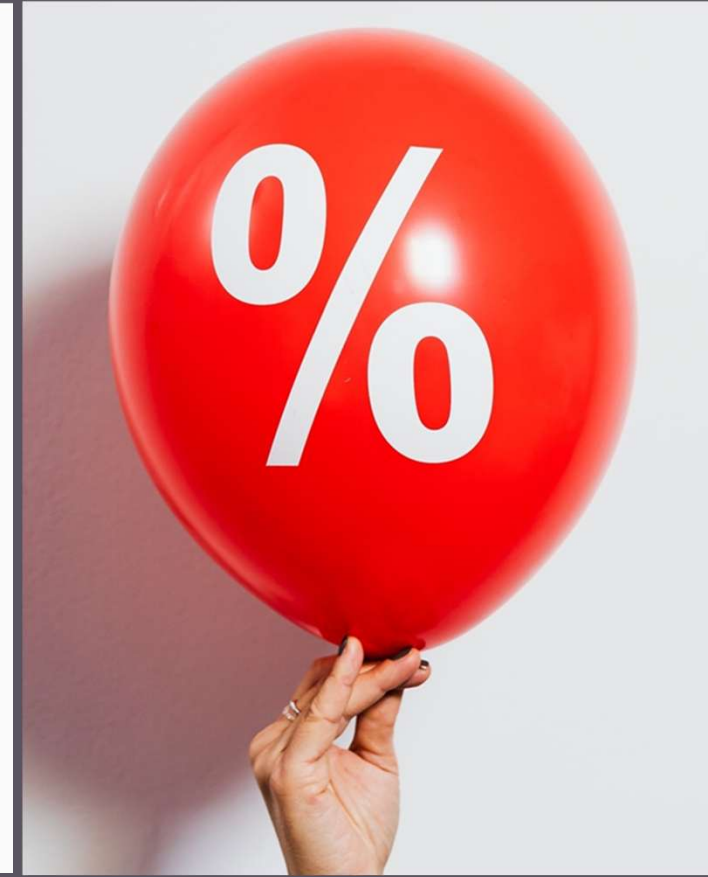


The Accountancy Discount

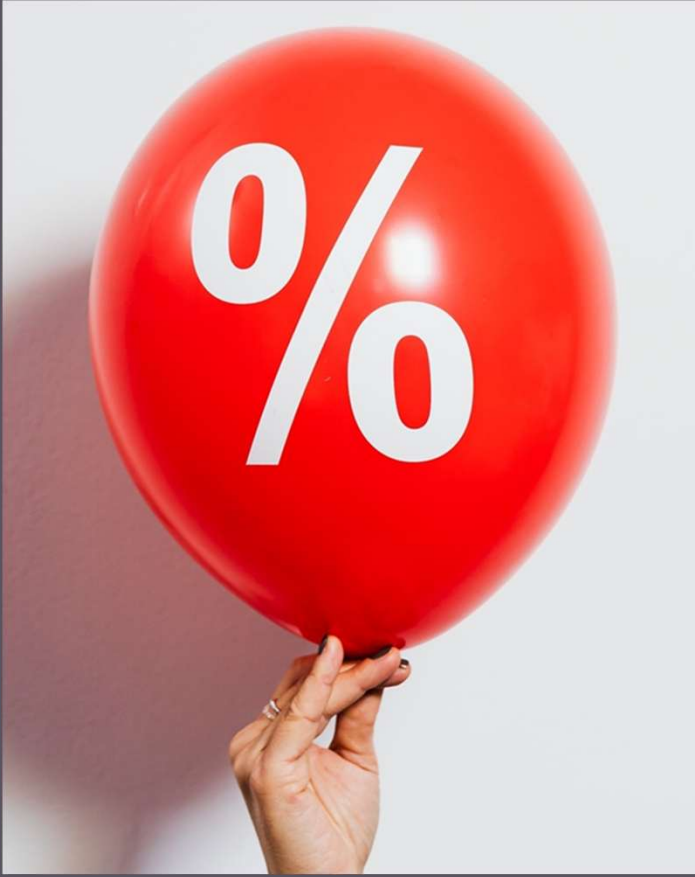
HO v TL, Peel J:

27. Seventh, when deciding how to reflect the illiquidity or risk in a private company, the court has three choices:

i) The business valuation may incorporate a discount for factors such as lack of control, lack of marketability, and lack of risk. This is particularly common where a party has a minority holding, or otherwise does not have overall control, and there are relevant third-party interests. In such circumstances, the court may simply adopt the business valuation as reflecting these matters. This I term an '**accountancy discount**'.



Minority Discounts





Quasi-Partnerships

What are quasi-partnerships?

Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492

In re Bird Precision Bellows [1984] 3 All ER 444;
affirmed [1985] 3 All ER 523I

G v G (Financial Provision: Equal Division) [2002] 2
FLR 1143

NA v MA [2007] 1 FLR 1760

Charman v Charman (No 2) [2007] 1 FLR 593.



Fisher v Cadman & Ors [2005] EWHC 377
(Ch) at [84]:

“the circumstances surrounding the conduct of the affairs of a particular company are such as to give rise to equitable constraints upon the behaviour of other members going beyond the strict rights and obligations set out in the Companies Act and the articles of association”



The three *Ebrahimi* factors indicating a quasi-partnership:

1. an association formed or continued on the basis of a personal relationship, involving mutual confidence;
2. an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business;
3. restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.



Clarke v Clarke [2022] EWHC 2698 (Fam) Mostyn J rejected a minority discount argument. He said this:

[17] ‘… (a minority discount) it is also completely unreal because, in my judgment, on the evidence it was not possible for the judge to find that there were any likely circumstances in which the respondent would sell his shares other than in conjunction with his fellow 50% shareholder. It is my opinion that the judge should have looked into the future, and asked himself whether it was more likely than not that a discount would be suffered…’



The Court Discount

HO v TL, Peel J:

27. Seventh, when deciding how to reflect the illiquidity or risk in a private company, the court has three choices:

i) [we have dealt with this above – this is the Accountancy Discount]

ii) To step back when conducting the s25 exercise and, in the exercise of its discretion, to allocate the resources in such a way as to reflect illiquidity and risk. Conventionally, that would be to allocate to the party retaining the business a greater share of the overall assets to provide a fair balance. As Bodey J said in *Chai v Peng and Others* [2017] EWHC 792 (Fam) at para 140:

‘It is a familiar approach to depart from equality of outcome where one party (usually the wife) is to receive cash, while the other party (usually the husband) is to retain the illiquid business assets with all the risks (and possible advantages) involved’.

It will be for the court to determine whether, and to what extent, to reflect this aspect in what might be termed a ‘**court discount**’. Of particular relevance, it seems to me, is whether the illiquid (or less liquid) business represents the principal asset in the case, in which event the distinction between liquid/illiquid assets may be sharper and require particular attention, or whether it is a relatively modest part of the overall assets.



Double Discounts

Double Dipping



**DOUBLE
DISCOUNT**

**20%
+
20%**

HO v TL:

27 iii) The court might, in the right case, take both the valuation, which includes an accountancy discount, and apply a further court discount i.e. an amalgam of (i) and (ii). Moylan LJ in *Martin* (supra) at para 94 considered that this would not be double counting: “... this is not ... to take realisation difficulties into account twice”. It will all depend on the case. If, for example, the accountancy valuation includes a discount for a minority holding, but it is clear that there is no possibility of realisation of interest in the future by sale or otherwise, it seems to me that it would not be unfair to further take that factor into account when allocating assets.”



DOUBLE
DISCOUNT
Wednesdays

How far can you push the courts over sharing the assets unequally in cases where a business is to be retained?

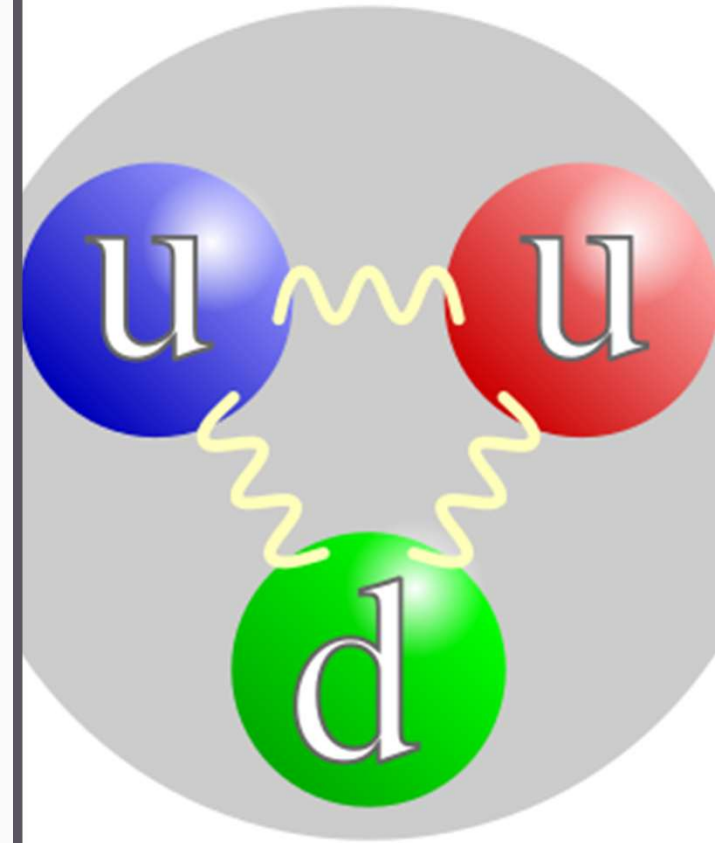


JV v MV [2025] EWFC 234



JV v MV [2025] EWFC 234

55. He was clear that he wanted to go on with what he was doing in the business and that he wanted to grow it before finding a buyer. When I tried to establish from him when that might be, he produced a long answer which related entirely to his other business activities and concluded with him saying "we are all one group of subatomic particles" before suggesting that he was raising the debate beyond the intellectual capacity of the court.



**THANK YOU FOR
LISTENING**



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