Legal Update

Hilton and others v D IV LLP [2015] EWHC 2 (Ch), judgment of 12 January 2015

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The claimants were LLP members who sought a declaration that they were entitled to inspect and copy certain documents. These were in the possession of the fifth defendant, a firm of solicitors which had acted for the other four defendants, LLPs formed for the purpose of carrying on unregulated collective investment schemes which enabled high net worth individuals to invest in film and television productions. The schemes had been failures but HMRC held that no allowances should be made available to the LLP members since the LLPs were not carrying on a trade, the amounts spent by the LLPs were not spent on allowable expenses and the real purpose was to carry out a tax avoidance scheme which sought to generate losses. The defendants' appeal was stayed pending determination of criminal proceedings against the individuals who had established the LLPs, and the claimants sought access to documents in order to support their allegation that the schemes were fraudulent.

The court held that clause 5.4 of the LLP agreement, which entitled members to information necessary for the administration of their personal tax affairs, did not entitle the claimants to access the documents because it must be read in the context of s10 of the Limited Liability Partnerships Act 2000. Section 10 provided that an LLP's trade was to be treated for tax purposes as having been carried on by the members and not by the LLP, so the members were personally liable for tax. The effect of clause 5.4 was therefore to mandate disclosure of the information required by members to pay their tax or complete their tax return. However, the documents sought were not needed for this purpose and, even if clause 5.4 was wide enough to cover information required to resist claims by HMRC for repayment, interest and penalties, it had not been shown that they were needed for this purpose either.

The court also held that the claimants were not entitled to inspect the documents pursuant to *Norwich Pharmacal Co v CEC* ([1974] AC 133). Even if the fifth defendant was an innocent party who had been mixed up in the tortious acts of others, beyond being a mere spectator or in possession of a document relating to it, which the court doubted, it was not necessary to order disclosure in order for the claimants to obtain the information required to plead a case against the alleged wrongdoers (*RFU v CIS Limited* [2012] UKSC 55 [2012] 1 WLR 3333) because that information could be obtained more straightforwardly from the first four defendants.

However, the court held that the claimants were entitled to inspect the books and records of the LLP pursuant to clause 12 of the LLP agreements applicable to the first two defendants and clause 13 of the agreements. These clauses provided that the books and records of the LLP, the register, the annual financial statements and a copy of the agreement were to be maintained by the designated members and be available for inspection by members, while other books and records and statements were to be maintained at the discretion of the designated members. The court considered that although maintaining the first category of documents was

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mandatory while maintaining the second was discretionary, both were subject to the right of inspection.

As to what books and records were covered by clauses 12 and 13, these were those which satisfied the functional test in *Inversiones*. Reg 7(7) of the LLP Regulations 2001 provides, in default of contrary agreement, that the books and records of an LLP are to be made available for inspection and that any LLP member may inspect and copy them. Since the purpose and effect of Reg 7(7) was to create the same default position as for partnerships, which was that the equivalent phrase in the partnership legislation should be construed widely to include any books and records kept by the firm, and there was no basis to draw a distinction, the functional test set out in *Inversiones Friera SL v Colzeo Investors II LP* ([2011] EWHC 1762 (Ch) [2012] Bus LR 1136) applied. Thus the books and records of an LLP were those which would be necessary or advantageous for it to rely on in order to establish its rights against a third party or adjust the rights of members inter se, and those which were paid for by the firm. The only qualification was that the books and records must relate to the business and prospects of the firm as it was, and not as it might have been, so that proposals which did not come to fruition or drafts which were subsequently altered were not covered (*Inversiones*).

The court rejected the claim that it should decline to exercise its discretion to order inspection. Unlike clause 5.4, clauses 12 and 13 were not qualified by reference to the purpose of the information sought, and the fact that the documents were sought for the purpose of bringing litigation was irrelevant (*Inversiones*). The court also noted that even if some of the documents were privileged, LLP members were entitled to see documents which were privileged in the hands of their LLP just as company shareholders were entitled to see privileged material in the hands of their company (*CAS (Nominees) Limited v Nottingham Forest plc and others* [2002] 1 Ch 220).

Eclipse Film Partners No 35 LLP v Commissioners for HMRC [2015] EWCA Civ 95, judgment of 17 February 2015, not yet reported

Earlier judgments in this litigation were noted in Issue 40 of A Propos Partnership (May 2014) and Issue 35 (August 2012).

Eclipse, an LLP, paid for a licence to the rights to exploit and distribute films, and sublicensed these rights to a distributor who was obliged to make specified annual payments to Eclipse. Further payments by it to Eclipse were contingent on the gross receipts from the exploitation of the films.

Eclipse's members borrowed to finance their capital contributions, and claimed tax relief for interest paid on the borrowings. Sections 353 and 362 of the Income and Corporation Taxes Act 1988 read with s863 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA) permitted members of an LLP to claim such tax relief only if the money borrowed was used wholly for the purposes of a trade carried on by the LLP with a view of profit. HMRC took the view that Eclipse's activities did not amount to a trade, and both the First–tier Tribunal and, on appeal, the Upper Tribunal, agreed with HMRC. The Court of Appeal also agreed and dismissed Eclipse's appeal, although it acknowledged that the fact that a taxpayer had entered into a transaction of conducted activity in order to obtain a tax advantage was not determinative of whether it was carrying on a trade (*Ensign Tankers (Leasing) Ltd v Stokes* [1992] 1 AC 655).

The court held that trade denoted commercial operations by which a trader provided goods or services to another for reward (*Ransom v Higgs* [1974] 3 All ER 949) and must involve a counter-party of some kind. However, the transactions in which Eclipse engaged were simply a payment by it which would effectively be repaid and produce a profit which was unrelated to the success of the rights sublicensed, and the possibility of Eclipse obtaining a share of contingent receipts. The former was an investment not a trade, while the latter was insufficiently significant to Eclipse's business to be characterised as a trade.

Lie v Mohile [2015] EWHC 200 (Ch)
An earlier judgment in this litigation was noted in Issue 42 of A Propos Partnership (December 2014).

Lie and Mohile were doctors in a partnership who disputed the way in which it had come to an end. Mohile served a purported notice of dissolution on Lie, but subsequently accepted that this was ineffective. Lie commenced proceedings for dissolution and claimed that Mohile was in repudiatory breach of the partnership agreement. Lie subsequently served an expulsion notice on Mohile pursuant to the partnership agreement, which permitted expulsion for a grave breach, or persistent breaches, of the agreement. The court held that the expulsion was invalid and ordered dissolution under s35 of the Partnership Act 1890 on the just and equitable ground, and the taking of an account. Lie appealed.

The court dismissed the appeal. First, the ineffective dissolution notice did not constitute a repudiatory breach of the agreement. This case was distinguishable from *Hurst v Bryk* [1999] Ch 1 because the notice was ineffective to bring the partnership to an end, and so there was no possibility of acceptance by the other partner. Although the fact that Mohile had acted in good faith (see below) would not have been a defence to a claim of repudiatory breach of contract, the judge had found that in so far as there was a breach, Lie had affirmed the contract.

Second, even if Mohile's notice of dissolution and other actions breached the agreement (and whether or not the breach was grave or persistent within the meaning of the partnership agreement), Lie had not accepted them and the partnership had continued. He had continued to work in the practice and continued to take his drawings and had thereby elected to affirm the contract. Although Lie had originally alleged a repudiatory breach of contract in his claim for dissolution, he had originally sought dissolution rather than expulsion, and could not now rely on that allegation as constituting acceptance of the breach. The fact that there was no time limit in the agreement for notice of expulsion based on grave or persistent breaches of the partnership agreement was irrelevant in view of the finding that Lie had affirmed the contract, and while it was true that behaviour which might amount to an affirmation of contract would not prevent the exercise of the court's discretion to order dissolution (see *Golstein v Bishop* [2014] EWCA Civ 10), it was not Lie who was seeking dissolution.

Third, Mohile's notice of dissolution was not a breach of the duty of good faith because he had not placed his interests above those of the partnership or the practice, and his termination of the tenancy of the premises and registration of the practice as sole practice with the Care Quality Commission did not prevent Lie continuing to work in the practice afterwards.

Fourth, by electing to keep the partnership alive, Lie had affirmed that the notice of expulsion was not a grave or persistent breach of the agreement, and the allegation that the dismissal of an employee, which led to a costly unfair dismissal claim, constituted a grave breach, had not been raised earlier and could not be raised now.

Finally, the fact that Mohile had originally claimed in his defence that the partnership had been dissolved by notice but subsequently claimed that it should be dissolved on the just and equitable ground was not an abuse of process. By the time the protracted litigation had reached the judge, the parties had agreed that there was no future in the partnership and their positions were that this should be either by dissolution or expulsion.

Reinhard v Ondra LLP and others [2015] EWHC 26(Ch)

The claimant, Reinhard, joined Ondra LLP on the terms of a contract dated 15 July 2009 and signed by Reinhard on 11 September 2009. The principal matters in dispute were whether the contract meant that he became, or became entitled to become, a member of Ondra and, if so, on what terms as to profit share and capital interest.

The contract provided that it set out the terms of Reinhard's employment as a managing director to work as part of the firm's core senior professional team, with the opportunity for election to the title of partner. Its terms included a 1% share of the partnership which was reviewable upwards, a salary, and eligibility for a discretionary bonus. Prior to signing the contract, Reinhard was supplied with a copy of a draft LLP Agreement dated April 2009.

Section 4(4) of the LLP Act 2000

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provides that an LLP member is not to be regarded as employed by the LLP 'unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership'. The court held, relying on *Clyde & Co LLP v Bates van Winkelhof* [2012] EWCA Civ 1207, that since a person could not be an employee of a firm in which he was a partner, a person could not be both a member and an employee. Even if that part of the ruling in Clyde was obiter and therefore the test laid down in *Tiffin v Lester Aldridge LLP* [2012] EWCA Civ 35 [2012] 1 WLR 1887 applied - that it was necessary to determine whether the person would have been a partner had the firm been a partnership, in which case he could not also have been an employee of the partnership and so could not be an employee of the LLP – the result would be the same on the facts. If Reinhard's argument was correct, he would have been able to participate in the management of Ondra's business and to share in any surplus assets on a winding up, and would therefore have been a partner in the notional partnership.

The court concluded that, ignoring s4(4), the true construction of the contract was that Reinhard was to become a member of the LLP on the commencement of his employment. However, this construction was not possible because of s4(4). Therefore the court requested further submissions on the basis of the conclusion on construction, but indicated that it leaned towards holding either that Reinhard was an employee or that he was a member (and not that he was an employee with a future entitlement to become a member) and, in either case, giving some effect to the clauses of the contract giving Reinhard a 1% share with the possibility of upwards adjustment.

As to the terms on which Reinhard was to be admitted as a member, the court concluded that these were to be found in the draft LLP Agreement of April 2009, although it might formally have been superseded by the March 2010 LLP Agreement which was the relevant executed deed. So far as Reinhard was concerned there were no material differences. The court also noted that it was not necessary for there to be a written variation of the LLP Agreement when a new member was admitted, and that different terms could apply to different members.

Gharavi-Nakhjavani v Pelagias [2014] EWCA Civ 1699

In the course of a disputed claim for an account of partnership assets, accounts were ordered in 2004 in relation to a property, and a business. They were not taken. In March 2012 the defendant filed a witness statement and documents referring to a number of specific accounting claims in relation to the business (the STP claims) and an account was ordered in July 2012 by specific reference to the claims in the witness statement. In September 2012 accounts were again ordered in relation to the property and the business. In April 2013 the order in relation to the business was revoked by consent. Judgment in favour of the defendant was finally given in relation to a number of the STP claims. The claimant appealed on the grounds that the claims could not be determined because the relevant accounts had been revoked, and that he had not had a fair opportunity to address the claims.

The court dismissed the appeal. It held that the specific order of July 2012 had not been overtaken by either the more general order of September 2012 or the revocation of the part of the latter relating to the business in April 2013. The claimant had been aware of the claims for years and had not answered them or explained what set-offs he might have and he had failed to adduce evidence in violation of repeated directions by the court.

Ma'har v O' Keefe [2014] EWCA Civ 1684

Two sisters bought a hotel in unequal shares, and subsequently entered into a partnership to run the hotel and share the profits equally. The hotel did not become partnership property. The partnership subsequently dissolved but one sister, Mrs O'Keefe, continued to run the hotel with her husband until he left and she became a sole trader. The other sister, Mrs Ma'har, and Mr O'Keefe, sought to realise their investment in the hotel.

In September 2000 an interim payment of £20,000 out of the net proceeds of sale was made in favour of Mrs Ma'har, the balance of her claim being £70,500. She was ultimately awarded an additional £8,989.80 and ordered to pay 35% of Mr O'Keefe's costs between the date of his offer to settle and the date of final judgment. Mrs Ma'har appealed against the costs order.

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The court stated that the starting point for the taking of a dissolution account between partners was no order as to costs. As established in *Hamer v Giles* (1879) 11 Ch D 942 and *Sahota v Sohi* [2006] EWHC 344 (Ch), where there was no fault on either side but the partnership accounts had to be taken by the court, the costs of the action should be met from the partnership assets, as with all other costs of necessary administration, but where an action was rendered necessary by the misconduct of a partner the court should make that partner pay the costs caused by his misconduct. As an order for costs against the partnership would effectively be no order as to costs because it would reduce the fund available to divide amongst all the partners, partnership litigation was different from the more familiar adversarial litigation where it was easy to identify the winner and the loser.

The court dismissed the appeal. The judge had acted within his direcretion, having taken the view that Mrs O'Keefe had been the more successful party on the contested issues in the period to which the costs order related and noting that Mrs Ma'har had rejected several offers to settle, including an offer which, because it included costs, totalled more than she was ultimately awarded, had only put forward offers to settle which exceeded her final award, and had only been ordered to pay a percentage of Mrs O'Keefe's costs and not all of them.

Drilling Global Consultant LLP v Commissioners for HMRC [2014] UKFTT 888 (TC)

The appellant LLP, which had one individual member and one member which was a company, claimed an annual investment allowance (AIA) for the cost of an upgrade to an aircraft used in the LLP's business. The Capital Allowances Act 2001 (CAA 2001) provided that AIA was available in respect of 100% of qualifying expenditure by a qualifying person. A qualifying person was defined in s38A CAA 2001 as an individual, a partnership of which all the members were individuals, or a company. HMRC amended the LLP's tax return by removing the AIA claim and replacing it with Writing Down Allowance at the rate of 20%. The appellant appealed.

The tribunal dismissed the appeal on the ground that the LLP was not a qualifying person for the purposes of AIA. It was clearly not an individual, and it was not a company since the taxation legislation (in particular s863 of the Income Tax (Trading and Other Income) Act 2005 and s1273 of the Corporation Tax Act 2009) clearly intended references to a partnership to include an LLP. Had Parliament intended a claim by an LLP for AIA to be treated as if it were a claim by a company, it could have readily said so, but it had not done so either expressly or by implication, and indeed s863 and s1273 suggested the very opposite. If the LLP was to be treated as a partnership then its members must be regarded as partners and, as one was a company, not all of them were individuals. The clear and unambiguous wording of s38A CAA 2001 could not be interpreted as making either a mixed partnership or a mixed LLP eligible for AIA.

Polegoshko, Westa Holding Ltd, Holding Associates Ltd and Fingood LLP v Ibragimov and Others [2015] EWHC 1669 (Ch)

This case involved a dispute about the beneficial ownership of the fourth claimant, Fingood LLP. On 6 April 2010 the LLP ostensibly held a meeting of its members, although the court described the document purporting to confirm the fact of the meeting, and the purported decisions made at it by the second and third defendants to resign the second and third claimants as members and appoint themselves as members instead, as a 'charade'. There followed attempts to register these and subsequent changes to the membership (including the resignation of the second and third defendants and the appointment of the fourth, fifth and sixth defendants) at Companies House. The first claimant was the widow of the person whom the claimants alleged was the sole beneficial owner of the LLP. The claimants sought and were granted an interim declaration restoring the second and third claimants to the register and an interim injunction restraining further presentation of documents to Companies House. As the current members of the LLP, the second and third claimants were thus its legal owners. The claimants then sought rectification of the register pursuant to s1096 of the Companies Act 2006 as modified for LLPs by Reg 69 of the Limited Liability Partnerships

(Application of Companies Act 2006) Regulations 2009. The defendants sought a declaration that the first defendant had always been the sole beneficial owner.

The court found the evidence of the first defendant unconvincing and held that the evidence of other witnesses, and the documentary evidence to the limited extent that it was reliable, supported the claimants' case. It held that the first defendant had never been the sole beneficial owner of the LLP, and that there could therefore be no justification for any of the purported changes in membership of the LLP which he had claimed were permissible on the basis that he was the sole owner and could do whatever he wanted with the LLP. The court ruled that the claimants were entitled to rectification of the LLP's register of members so as to remove from the register any entries made since 6 April 2010 and restore the register to its state prior to that date.

The court noted that since the first defendant was not the sole beneficial owner, it need not decide whether the principle in *Re Duomatic Ltd* [1969] 2 Ch 365 - that any matter which could be achieved by resolution at a general meeting of shareholders was valid and effective if it had the agreement of all the shareholders - could apply even where there was agreement only by those with beneficial rather than legal title to the shares or where there was a transfer of membership, which was not a matter for shareholders in general meeting.

Kommalage v Sayathakumar [2015] EWCA Civ 1832

Kommalage and Srinivasan were in partnership together at two separate times: from 13 December 2007 to 15 February 2009 and from 13 April 2012 to approximately 10 April 2013. On 5 August 2009 Sayanthakumar issued proceedings against 'Srinivasan Solicitors' in relation to bills dated between 1 June 2006 and 13 December 2007, a period of time during which it was agreed by the parties that Kommalage was not a partner. On 24 October 2012, by which time he had become a partner again, the defendant firm was ordered to pay costs, and on 8 November Sayanthakumar served a statutory demand on Kommalage in respect of part of the costs order which remained unpaid. Kommalage appealed.

The court held that the first question was the substantive one of who was liable for the debts of the partnership, and that the answer was the persons who were partners at the time the cause of action accrued. This was clear from paragraphs 5A and 5B of Practice Direction 7A on claims by or against partnerships, which referred to claims brought by or against persons who were partners and carried on the partnership business at the time when the cause of action accrued, against a partnership in the name it carried on business at the time the cause of action accrued, and also required a request for a copy of the partnership membership statement to specify the date at which the cause of action accrued; and from paragraph 4.4 of Practice Direction 10 on the acknowledgement of service, which provided that service must be acknowledged on behalf of all persons who were partners at the time when the cause of action accrued. These rules reflected s9 of the Partnership Act 1890 which provided that a partner was liable for all debts and obligations of the firm incurred while he was a partner. In *Dean & Dean (a firm) v Angel Airlines SA* [2009] EWHC 447 (Ch) [2009] BPIR 409 the court had rejected the argument that a costs order against a firm should be treated as made against whoever was a partner at the time the order was made. Since Kommalage had not become a partner until after the time at which all the bills which were the subject of the action were rendered, the cause of action could not have accrued at a time at which he was a partner.

As a result of this conclusion the court held that the second question, which was the procedural one of whether paragraph 6A.2 of CPR Practice Direction 70 on the enforcement of judgments and orders applied so as to allow Sayanthakumar to enforce the costs judgment against Kommalage by the service of a statutory demand, did not arise. Paragraph 6A.2 set out the natural persons against whom an order made against a partnership could be enforced, but such an order could not be enforced under those provisions unless the person in question was on object of the judgment in the sense that the proceedings were brought against him as a person who was a partner in the relevant firm at the time the cause of action accrued. Even if he had been, so that the four possibilities in paragraph 6A.2 were engaged, none applied. First, he was not served as a partner with the claim form and, second, he had therefore not failed to acknowledge service of it. Third, he had not admitted that he was a partner. Fourth, the court could not have found that he had been a partner at a material time, because had not been and, in any event, such a finding would have to have been made before a valid statutory demand could have been made.

The court noted that its ruling did not necessarily mean that steps could not be taken to make the costs order enforceable against Kommalage under s51 of the Senior Court Act 1981 which provided that costs were in the discretion of the court and that the court should have full power to determine by whom and to what extent they were paid.

Barclays Bank plc v McMillan [2015] EWHC 1596 (Comm)

This case concerned a claim by Barclays Bank against McMillan, who was a former member of Dewey & LeBoeuf LLP, for repayment of a loan advanced to fund his capital contribution. Such loans were negotiated by and paid to the firm on behalf of the members but credited to the capital accounts of the members. The firm became bankrupt and the bank sought repayment of the outstanding loan from McMillan personally.

The court rejected McMillan's arguments that he was not liable to repay the loan, and found in favour of the bank.

First, the contractual documents made clear that it was McMillan who was the borrower and that he was personally liable to repay the loan, the bank's recourse to the firm being merely by way of collateral. It was not true that McMillan did not want or need to fund his capital account; he signed the documentation in the full knowledge that that was its purpose. His argument that it was not intended that he should get the benefit of the loan was inconsistent with the correspondence, and the provision of working capital to the firm was what member capital contributions were intended to provide. Even if the firm did not intend to pass the benefit of the loan to McMillan, its intention could not be imputed to the bank. Although the loan was intended to be repaid by the firm, the terms also provided for recourse to personal liability in certain circumstances such as the bankruptcy of the firm. The firm negotiated with the bank on behalf of its members and there was no evidence that it was acting as agent for the bank. There also was no evidence that the firm had made incorrect representations to McMillan concerning the loan and, even if it had, it was not the agent of the bank in so doing. There was no unremedied default at the time the loan was made and, in any event, the terms did not impose an obligation on the firm to pay the bank immediately but only prevented it from repaying the balances to the members in preference to the bank.

Second, there was no sham transaction. In *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 it was held that such a transaction required i) acts done or documents executed by the parties to give third parties or the court the appearance of creating between the parties legal rights and obligations which were different from the actual rights and obligations which they intended to create, and ii) a common intention by all parties that such acts or documents were not to create the legal rights and obligations which they gave the appearance of creating. However, the latter requirement was not satisfied because McMillan had understood and intended that the purpose of signing the loan documentation was to provide loan capital, as had the bank.

Third, the fact that Mc Millan never received the loan proceeds was irrelevant, because the terms of the loan were that it was to be drawn down by the firm, and the firm was the agent of McMillan for this purpose.

Fourth, there was no breach of an implied representation that there were no unremedied events of default, because there had been no such representation and indeed no such events.

Fifth, although the loan agreement was a 'credit agreement' within the meaning of the Consumer Credit Act 1974, it was not an unfair debtor creditor relationship and would therefore not be declared unenforceable. The terms of the loan were negotiated on behalf of all the members by the firm's financial officers, whom the bank was entitled to assume were acting in the best interests of the members; McMillan was an experienced member of an international law firm whom the bank could reasonably expect to understand the clear terms of the agreement and assess its financial implications; the structure of the loan was standard for member capital loan programmes to professional firms; the interest rate and tenor of the loan were not unusual, unfair, or disadvantageous to McMillan; and McMillan was under no obligation to finance his capital contribution in this way and was free to do so from other sources of funding. Furthermore, the bank was entitled to assume that McMillan would be in a position to repay the loan, had no grounds to suspect that the firm might be unable to do so and was entitled to assume that McMillan had as much knowledge of the financial health of the firm as the bank did. There was also no evidence that the firm failed to comply with the terms of the loan at the time McMillan left the firm in 2010; the court was unable to conclude that he had in fact left the firm in 2010, given his substantial receipts from it in 2011, and he was therefore not entitled to a withdrawal from his capital account at any time before the bankruptcy of the firm.

Fifth, the bank was under no relevant duty to advise McMillan and, in any event, the matters referred to were either clear from the documentation or outside the knowledge of the bank. There was also no evidence that McMillan would have done anything different which would have resulted in repayment of any part of the loan by the firm, and therefore even had there been a breach of duty by the bank, he would have failed to prove any loss.

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Finally, although the firm had made some repayments in respect of members who had left prior to its bankruptcy, it had correctly made no repayments in relation to McMillan because he had not ceased to be a member or become entitled to a withdrawal from his capital account at any time before the bankruptcy of the firm. However, as interest should have been paid, the court would consider the possibility of the taking of an account in relation to interest in the light of the quantification of interest proposed by the bank following judgment.

Bottrill v Harling [2015] EWCA Civ 564

Bottrill had entered into partnership with Harling, although no written agreement was ever drawn up. When Bottrill retired, he became a consultant with the firm and, when that was terminated, he brought proceedings for the sum due on his capital account, and an account of profits and consulting fees.

The judge at first instance held that contemporaneous documents and subsequent conduct were admissible to establish the existence and terms of an oral partnership agreement. On that basis, he found in favour of Bottrill. Harling appealed.

The Court of Appeal held that although subsequent actions were inadmissible to interpret a written agreement already reached, it was correct to take them into account to establish whether an oral agreement had been made and what its terms were. It rejected the appellant's criticism of the judge's conclusions as to the existence and terms of an agreement which had been made in informal discussions that had taken place many years previously. It noted Lord Hoffmann's comments in *Biogen Inc v Medeva Plc* [1997] RPC 1 at 45 that appellate caution was required in reversing a judge's evaluation of facts because specific findings were inherently an incomplete statement of the impression made on him by the primary evidence and were always surrounded by a 'penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance' which could not be exactly expressed but which might play an important part in his overall evaluation.

The Court of Appeal therefore dismissed the appeal. Although it was not then necessary for it to decide the point, it noted that s39 of the Partnership, Act 1890 which entitled a partner to repayment of capital on a dissolution, did not apply because it had been agreed that the partnership would continue rather than being wound up, and there was no agreement about capital contributions.

Finally, the Court of Appeal noted that it had refused leave to cross appeal on the judge's finding that the part of the overheads which were attributable to work carried out by Bottrill on his own account in the firm's time and using its equipment were payable by Bottrill. He had held that the term alleged by Bottrill, that such overheads were to be borne by the partnership although the profits would be his alone, would be unusual and burdensome, and that there was insufficient evidence that it was agreed. The Court of Appeal had been confident that it would not reverse this finding of fact.

Hussain v Iqbal and Khan [2015] EWHC 1551 (Ch)

Hussain and Iqbal were in partnership together to operate a restaurant, but the relationship broke down and Iqbal excluded Hussain from the premises and entered into agreement to sell the lease and the business to Khan. Hussain sought and was granted an order that he be allowed back into the premises to carry on the partnership business. Iqbal applied to set aside or vary that order.

In his Particulars of Claim, Hussain sought an order to establish that the partnership had not been dissolved and that the lease formed part of its assets, that he be allowed to carry on the business at the premises and have full access to the partnership's books and records, and for partnership accounts and enquiries to be taken. He also claimed for losses resulting from his being wrongfully prevented from carrying on the business. Iqbal claimed that the lease was not part of the partnership assets and that he had dissolved the partnership or, in the alternative, that the court should do so. He also claimed for losses resulting from Hussain's breaches of the partnership agreement.

The court first rejected the submission that it was clear that the lease was not partnership property and that there was no serious issue to be tried that it was. First, whether there was

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a condition precedent to the lease becoming partnership property that Hussain should pay £45,000 was a matter for trial and it was not clear that there was. In any event, the partnership agreement suggested that the lease was partnership property because it recorded that Iqbal's contribution included the premises, and Clause 25 made provision for transfer and payment in respect of the lease on dissolution. Second, although Iqbal remained the registered proprietor of the lease, it was not clear why this was so; there was a signed form for the transfer of the lease into joint names, and there was evidence of negotiations with the landlord to assign the lease into joint names and engrossed licence documents. Even if there was no agreement for the transfer of the lease into joint names sufficient to comply with s2(1) of the Law of Property (Miscellaneous Provisions) Act 1989, the partnership agreement itself was a sufficiently clear and enforceable agreement, signed by both parties, that the lease should become a partnership asset, for the beneficial interest in the lease to have become partnership property held by Iqbal for both partners. It was also arguable that Hussain had spent money on refurbishing and equipping the premises on the basis that the lease was a partnership asset, and therefore a possibility that the lease had become partnership property by proprietary estoppel or constructive trust.

The court noted, second, that even if the lease was not a partnership asset, this was not determinative of the question of whether the business should be continued pending trial and if so by whom, since the partnership agreement contemplated that the business be continued pending the conclusion of the Clause 25 process.

Third, the court agreed with the original ruling that the balance of convenience favoured allowing Hussain alone to run the business pending trial because he appeared to be a more appropriate person to run the business than Iqbal and, if the business were instead to be run on split shifts, this would multiply the risk of disputes arising to the detriment of the business and multiply the difficulties of ensuring the monitoring of profits being earned on the respective shifts. Indeed the passage of time since that ruling was a strong factor against interfering with the position which had remained for the past 18 months given that a resolution of the dispute should occur in a considerably shorter time.

Finally, the court held that it could not form a view on whether Hussain had breached the partnership agreement or was trading at a loss, but the breaches alleged were not of such a nature to make it appropriate to interfere with his sole running of the business and it was not clear how Iqbal's trading with Hussain would stop any loss being made. Although the making of losses might mean that the business should no longer be carried on, the court was not prepared to interfere with the status quo in the absence of any evidence.

The court therefore dismissed Iqbal's application to set aside or vary the order. It ordered that accounts should be prepared and made available to Iqbal, and the underlying documents be made available to him to inspect and copy at his own expense. As the landlord of the premises had commenced proceedings for non-payment of rent, it also ordered Iqbal to pay all arrears for the period since he became the lessee, and Hussain to reimburse Iqbal all sums paid since Hussain took sole possession.

Bank of Beirut SAL and Banque du Liban v HRH Prince Adel El-Hashemite and the Registrar of Companies of England and Wales [2015] EWHC 1451 (Ch)

The claimant banks were victims of various frauds carried out by the first defendant (the Prince). These frauds included the registration by the Prince of limited partnerships in which he was the limited partner and the bank in question the general partner. In each case the registration form (Form LP5) was signed by the Prince on his own behalf and on behalf of the bank. Companies House issued a certificate of registration for each of the limited partnerships. The banks each denied that they had granted the Prince any power of attorney or authority to sign documents on their behalf or had entered into a limited partnership with him.

In an action by the banks for summary judgment and relief, the court gave judgment against the Prince. At a later date it gave the reasons for its judgment and also gave judgment for the second defendant, the Registrar. It granted the banks relief in the form of a number of declarations, damages for unlawful interference with business interests and an injunction.

The declarations were that the limited partnership agreements purported to be made by the banks and the Prince were not the deeds of the banks and were void, the prince had no power of attorney on their behalf, the applications in form LP5 filed by the Prince were false, fraudulent and made without authority, the documents on the

public register only existed as a result of the Prince's false representations and fraud, and the banks were to be indemnified by the Prince for any debts and liabilities arising in relation to the limited partnerships. The injunction restrained the Prince from taking any steps to register any entities or limited partnerships that involved the banks with Companies House or the Registrar.

The banks also sought an order against the Registrar requiring him to remove all documents relating to the limited partnerships from the records held at the Registry at Companies House. However, after judgment without reasons had been given against the Prince, the Registrar had annotated the register in order to alert third parties to the position and the court held that this was sufficient.

It noted that the Prince had no authority to act for the banks, and thus no authority to constitute them as general partners of the partnerships or sign the registration form on their behalf. The applications were therefore not in accordance with the requirements of s8A of the Limited Partnerships Act 1907 and the Registrar had been under no duty to register them. However, the Registrar was also under no duty to validate or verify the information received; the Registrar's team simply checked that all of the necessary information had been included. Once the limited partnership was registered, s8C imposed a duty on the Registrar to issue a certificate of registration and provided that that a certificate was conclusive evidence that a limited partnership had come into existence on the date of registration. The Registrar had no statutory power to remove registrations of limited partnerships (unlike companies or LLPs) and although *Re Calmex* [1989] 1 All ER 485 established that the Registrar had a duty to remove invalid documents from the register and that the court could enforce that duty, in that case there had been no conclusive evidence provision. The court held that s8C could not be read as making the certificate conclusive evidence that a limited partnership had come into existence except where registration had been procured by fraud. Indeed the mischief at which s8C had been aimed was to enable investors who were invited to join an existing limited partnership (as was common) to be assured, without extensive and expensive legal research, that the partnership existed so that their liability would be limited.

Since the 1907 Act contained no provision for deregistration, and indeed there was no statutory requirement for dissolution of a limited partnership to be notified to the Registrar, the register was not simply a register of existing partnerships but of partnerships that had come into existence. The Registrar had annotated the register to indicate that the status of each of the partnerships was 'converted/closed', and there was a link to a statement that there was an order declaring the registration application to be false, fraudulent and made without the authority of the bank in question. The court held that this was sufficient for anyone searching for the partnerships to be alerted to the position, without causing the confusion that would result from removing the partnerships as if they had never existed.

Comment

The Law Commissions, in their comprehensive review of partnership law leading up to their report in 2003, identified as problems arising from the Registrar's lack of power to deregister a limited partnership the register becoming progressively more and more out of date and other businesses not being able to register under the same name as a registered limited partnership. They proposed a new procedure for deregistration, and a power for the Registrar to correct both the register and the certificate in the case of erroneous information. In 2008 BIS proposed a range of reforms to limited partnership law, including the new procedure for deregistration and a power of rectification modelled on existing company (and now LLP) law. However, these fell victim to BIS's decision to introduce the reforms on a piecemeal basis; although the first set of reforms (ironically including s8C) was enacted in 2009, the other planned reforms appear to have been abandoned.

A Partnership v Commissioners for HMRC [2015] UKFTT 0161 (TC)

A partner alleged bad faith on the part of two of the other partners and sought dissolution of the partnership. The two partners obtained legal advice as did, separately, a third partner against whom no allegations of bad faith had been made. The matter was settled; the complainant partner retired and the partnership continued with three partners. However, a dispute arose with HMRC which disallowed the partnership's claim for VAT paid on the invoices for legal advice.

In order for the VAT to be reclaimed, the VAT legislation (the Value Added Tax Act 1994 and the VAT Regulations 1995/2518) required the partnership to show that the VAT had been charged on the supply to it of the legal services, and that it was the addressee of the invoices.

The court held that neither of the firms of solicitors could have acted for the whole partnership of four partners at a time when some of the partners had opposing interests, or for the future partnership of three partners which did not at that time exist. It was also clear that the firms of solicitors had been engaged by the two partners or the third partner respectively and had not purported to act for the partnership. It could not therefore be said that any of the partners had been authorised on behalf of either the current or the future partnership. For a supply of services to be 'to' a person, that person must both benefit from the supply and be liable to pay for it. (*Redrow* [1999] UKHL 4; see also *Airtours* [2014] EWCA Civ 1033), and neither of these requirements was satisfied. Furthermore, the invoices were only addressed to either the two partners or the third partner, and thus were not addressed to the partnership.

The court also examined whether the legal expenses would have been business expenses in the VAT sense had they been provided to the partnership. It held that they could not be directly attributable to any particular taxable supply made by the partnership; if it was an expense at all, it would have been an overhead expense and therefore recoverable only if it had a direct and immediate link to the taxpayer's business overall (C-98/98 *Midland Bank*). As the partners' interests in preserving the partnership business were indistinguishable from the partnership's interests in so doing, then had the legal expenses been occurred on behalf of the partnership, they would have been directly and immediately linked to its business (*Hartridge T/A Hartridge Consultancy* (VTD 155553) (1998)).

Finally, the court noted that although HMRC had issued two assessments, because of some doubt over conflicting Court of Appeal decisions on whether the correct period of assessment was when the tax claim was submitted or when it was paid, only one assessment could be correct and it did not matter which of the two was paid.

> *"In order for the VAT to be reclaimed, the VAT legislation (the Value Added Tax Act 1994 and the VAT Regulations 1995/2518) required the partnership to show that the VAT had been charged on the supply to it of the legal services, and that it was addressee of the invoices."*