***Horsford v Horsford* [2020] EWHC 584 (Ch)**

The parties, who were mother and son, had been in a farming partnership together with the father who, by the time of the proceedings, had dementia. When the mother retired, the son served a notice exercising his option under the partnership agreement to buy her share rather than allow the partnership to be dissolved. The parties disputed the amount to be paid for that share. the son also argued that he had an equity arising by way of a proprietary estoppel as a result of assurances given by his parents that he would inherit their shares in the partnership assets when they died, and that this estoppel prevented the mother from exercising her rights under the partnership agreement.

The court noted that since the decision in *Gillett v Holt* [2001] Ch 210 proprietary estoppel had been invoked on a number of occasions to allow a promisee to prevent a promisor from reneging on their promise to make testamentary dispositions of their property. It was necessary for the promisee to prove that a promise had been made, and that they had relied on it to their detriment, but if the promise and detriment were proved, reliance would be presumed unless rebutted. The court would then do what was necessary to avoid an unconscionable result (*Moore v Moore* [2018] EWCA Civ 2669), but unconscionability also required a consideration of the behaviour of the promisee. Whether the detriment had been sufficiently substantial for it to make it inequitable or unjust for the promise to be disregarded depended on any benefits the promisee had received and on the principles set out in *Davies v Davies* [2016] EWCA Civ 463.

On the facts, the son claimed that his reliance on the promise was indicated by his lifelong work on the farm and attendance at agricultural college, his working for longer hours than justified by his low wages, his capital payments, his management of the development of various buildings, his management of the business on his own after his father's retirement while allowing his parents to draw a share of the profits, and his wife's unpaid work on the partnership accounts. His detriment included low wages and a depleted share of the profits, and a substantial discrepancy between the financial benefits of farming in partnership and the much greater benefits from leasing the land and farming it for himself.

However, the court considered that although there had been statements of intention by the parents, these were not the same as promises. The facts were consistent with either, but the court concluded that they were statements of intention rather than irrevocable assurances because the parents retained the authority and freedom to act as they thought best for the farm, and its future ownership had clearly been made subject to some approximation of equality between the son and his siblings, with compensation payable to the siblings which had not yet been settled. The son had benefitted, like his siblings, from his parents' generosity, his hard work for the partnership was not detrimental to him, and the intended equality between the siblings suggested he had not received or relied on the alleged promises. The option given to each partner under the partnership agreement to retire by notice, and the option given to the remaining partners to buy their share, were inconsistent with the mother having previously promised to dispose of her share of the partnership in the son's favour. The parents' severing of their joint tenancy of part of the farm in a document which referred to their individual rights to dispose the property in their will was similarly inconsistent.

The court noted that in the usual proprietary estoppel case, the promisee would seek an order for the property to be transferred to him. However, here, the son had already acquired the property, and he now owed his mother the purchase price. The right to apply for an equitable remedy such as the transfer of any remaining interest belonging to the mother, or relief from payment, was inconsistent with the exercise of this option

and with the partnership agreement. The partnership agreement stated clearly that it constituted the whole agreement between the parties and that it could only be varied by unanimous consent. In any event, where a person entered into a contract which was inconsistent with the continued existence of his alleged property rights, those rights were extinguished by the contract (*Foster v Robinson* [1951] 1 KB 149).

The court also found nothing unconscionable in the behaviour of the mother. She had sought to invoke the provisions of the partnership agreement for retirement with an option to be bought out, and these provisions were consistent with the agreement's objectives of ensuring business continuity, maximising the possibility of obtaining tax reliefs, and avoiding disputes by recording the partners' rights and obligations clearly.

As to the dispute about how the mother's share should be valued, the court noted that unless a partnership agreement made it clear how profits made when partnership property was sold – 'capital profits' as opposed to 'income profits' from the ordinary trading of the business – were to be shared, such profits should be shared equally (s24 of the Partnership Act 1890 as interpreted in *Popat v Shonchhatra* [1977] 1 WLR 1367). The court also noted that the professional valuation of the lease of partnership property to a wind farm included in the parties' statement of agreed facts was binding on the son, and that there was no reason why he should not be equally liable with his mother to pay the valuer's fee. All the partners had signed declarations of trust declaring that property previously held by them outside of the partnership was to be held as partnership property, and the court deduced from this and the absence of any valuation at this time that the value of the each of the properties contributed was taken to be the amount then credited to the partners' land capital accounts. As to the market value of the property at the date it was transferred from the mother to the son, any special influences on the price that would have been achieved should be taken into account, including valuing the partnership land as a whole and thus including in the valuation of the mother's share any value attributable to the different parcels of land being more valuable if sold together.

***R (on the application of Amrolia) v Revenue & Customs Commissioners* and *R (on the application of Ranjit-Singh) v Revenue & Customs Commissioners* (2020) EWCA Civ 488**

The appellants had invested in the LLP with the purpose of generating trading losses to offset against their other taxable income. In 2006, HMRC gave notice of an enquiry into the LLP's partnership tax return. The appellants received their claimed tax repayments in 2009. In 2011, in relation to similar schemes carried on by predecessor LLPs, the Supreme Court upheld only 25% of the claimed allowances (*Tower MCashback LLP 1 and Another v Revenue and Customs Commissioners* [2011] UKSC 19, [2011] 2 AC 457). In 2016, HMRC served notices under s28B(4) of the Taxes Management Act 1970 (TMA 1907) amending the LLP members' personal tax returns to reduce the claimed losses by 75%. The appellants brought a judicial review claim challenging the lawfulness of the notices on the basis that they purported to amend their tax liability and require repayment of tax which had already been repaid to them. The court noted that although an LLP was a corporate entity, it was treated for income tax purposes in the same way as a general partnership (863 of the Income Tax (Trading and Other Income) Act 2005 and *Revenue and Customs Commissioners v Vaines* [2018] EWCA Civ 45, [2018] STC 297).

The court held that a distinction had to be drawn between the requirements for a valid closure notice given to an individual under s28A TMA 1970, set out in *R (on the application of Archer) v Revenue and Customs Commissioners* [2017] EWCA Civ 1962, and the much more limited function of a notice given to an individual partner under

s28B(4) following an enquiry into the partnership return. All that was that was required for compliance with s28B(4) was that, as here, the notices given to each LLP member amended their personal tax returns so as to give effect to the amendments to the LLP's partnership return (the validity of which had not been challenged) by stating the reduced amount of each member's share of the LLP's loss. It was not necessary for HMRC to state the precise amount of tax due since that could easily be worked out from the terms of the notice.

However, the notice given to the second appellant was invalid to the extent that it purported to amend her self-assessment by assuming that she would wish to carry back the whole of her reduced losses, rather than claim both carry-back and sideways relief as she had originally done, and required her to pay additional amounts of tax calculated on that basis. This went beyond the limited scope of s28B(4), namely that of making amendments to her self-assessment which were purely consequential on the reduction in her share of the LLP's allowable loss. Until she had been given the opportunity to consider her options in relation to the losses, no final amendment to her self-assessment could properly be made.

The court noted that had it concluded otherwise in relation to the second appellant, it would still have been open to HMRC to enquire into her claim for sideways relief and, if necessary, recover part of the repayment made to her in error. The only requirement for HMRC to be able to do this was the existence of an open enquiry into the taxpayer's return for the year in which the relief was claimed (*R (on the application of de Silva) v Revenue and Customs Commissioners* [2017] UKSC 74), and that was satisfied here because the notice of enquiry to the LLP was deemed to include notice of enquiry to each individual LLP member under s12AC(1) TMA 1970.

Finally, the court held that, had it ruled differently, any defects in the notice given to the second appellant could not have been objectively described as a mere 'want of form or omission' under s114 TMA 1970, which would have allowed HMRC's assessment to stand. HMRC did not yet have sufficient information to issue her with a valid closure notice and defects of that nature were matters of substance, not form. In contrast, even if the failure to state the precise amount of tax due in the first appellant's notice had been a defect, the assessment would still have stood because the test in s114 would have been satisfied, as his liability could have been easily worked out from the terms of the notice.

***Walewski v Revenue and Customs Commissioners* [2020] UKFTT 58 (TC)**

Walewski appealed against two assessments made by HMRC under the 'mixed partnership' rules in ss850C-850E Income Tax (Trading and Other Income) Act 2005 (ITTOIA 2005) arising from his interest in two LLPs of which he was a member. The 'mixed partnership' rules are anti-avoidance rules which apply to LLPs if those LLPs include both individual and non-individual members. HMRC assessed Walewski to income tax under these rules on the basis that profits which were allocated to the corporate member of those two LLPs ('W Ltd') should instead be reallocated to Walewski as the individual member. It considered that W Ltd had not earned those profits and that they were being channelled through it to avoid tax, since Walewski was its sole director and it paid its profits to an offshore trust fund of which Walewski's children were beneficiaries.

Section 850C ITTOIA sets out a number of conditions which need to be fulfilled in order for the 'mixed partnership' rules to apply to allow HMRC to re-allocate profits other than as they have been allocated under an LLP agreement. These effectively required that W Ltd's profit share exceeded its appropriate notional profits, Walewski had power to enjoy

W Ltd's profit share, it was reasonable to suppose that W Ltd's profit share was attributable to Walewski's power to enjoy it, and both Walewski's profit share and the total tax payable by him and W Ltd were lower than they should have been in the absence of his power to enjoy W Ltd's profit share. The parties accepted that Walewski had the power to enjoy profits allocated to W Ltd because of his children's interest in the trust, and that the tax payable was lower than it would have been had the profits not been allocated to W Ltd.

The tribunal noted that the definition of 'appropriate notional profits' in s 850C(3)(a) had two elements: 'the appropriate notional consideration for services' and 'the appropriate notional return on capital'. It held first that there was no evidence that Walewski's activities as sole director of W Ltd were separated in any meaningful way from his work for the LLPs, or of what W Ltd did to earn its profit share. W Ltd's profit share therefore exceeded the appropriate notional consideration for services, and the profits allocated to it were not allocated as consideration for Walewski's services through it. Second, the tribunal considered that little of the capital in the LLPs was W Ltd's capital contribution (but was instead unallocated profits), because it was not clearly treated as member capital by the LLPs and there was no evidence that it belonged to W Ltd.

The tribunal also held that the only reasonable explanation of the payment of profits by the LLPs to W Ltd was Walewski's power to enjoy those profits. It reached this conclusion having regard to the fact that W Ltd had the right to over 99% of the LLPs' profits regardless of the work done by Walewski, Walewski did not take his full salary or claim the bonuses to which he was entitled, and there was a significant difference between the income tax rate payable by Walewski on profits paid directly to him, and the corporation tax rate payable on profits paid via W Ltd.

As to the 'just and reasonable' amount by which Walewski's profit share should be increased under s805C(4), the tribunal concluded that a return of 5% on W Ltd's capital should be deducted from the LLPs' profits and the remainder reallocated to Walewski on the basis that W Ltd had not carried out any services for the LLPs other than those carried out by Walewski, and these could not be distinguished from the services which he carried as member of the LLPs.

Elspeth Berry
Reader in Law, Nottingham Law School,
Nottingham Trent University
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