BEIS consultations

BEIS is consulting on 'Corporate transparency and register reform' (at https://www.gov.uk/government/consultations/corporate-transparency-and-register-reform) (deadline for responses 5 August 2019). Although the consultation largely refers only to companies (with the exception of Qs 37 and 38 on the striking off of limited partnerships), the General Information section states that 'we expect the new provisions to generally apply to….Limited Liability Partnerships and Limited Partnerships' and many of the proposals have clear parallels in the earlier BEIS call for evidence and consultation on limited partnerships and the government's response (see further https://www.gov.uk/government/consultations/limited-partnerships-reform-of-limited-partnership-law). BEIS is continuing to work on those earlier consultations and draft legislation is awaited.

Caselaw

Jospeh Puttnam v Commissioners for HMRC [2019] UKFTT 389 (TC)

The appellant was a mixed gas diver who treated the income from his engagement by a diving company, Subsea 7, as trading income of a partnership with his spouse. He reported 50% of that income as his share of the partnership profits for tax, but HMRC concluded that all of the income from Subsea 7 should be treated as his own income. The tribunal dismissed his appeal, concluding that he was an employee of Subsea 7 and that the income from his contract was not income of a partnership but his own income.

The tribunal ruled that s15 ITTOIA 2005, which stated that the "performance of the duties of employment [of a relevant diver] is … treated for income tax purposes as the carrying on of a trade in the United Kingdom" applied for income tax only. It had no effect for the purpose of National Insurance Contributions, and it only deemed "performance of the duties of employment" to be the "carrying on of a trade" rather than deeming the employment generally to be a trade for all purposes. It could therefore not be interpreted as meaning that the employment should be treated as a trade which was separate to the diver and capable of being owned and carried on by another person, or by persons in common under partnership law. The only person who could be regarded as "carrying on a trade" within the meaning of s15 was the individual "performing the duties of the employment", and so the employment income of an individual diver could not be regarded for tax purposes as trading income of a partnership in which he was a member. The tribunal also noted that *Fowler* [2018] EWCA Civ 2544 made it clear that s15 deemed a trade to be carried on by the diver only and did not create an actual trade which could be carried on by persons other than the diver. Similarly, although expenses could be deducted if they met the criteria to be deducted as expenses of the deemed trade, this did not mean that an actual trade capable of being carried on in partnership existed.

The tribunal cited the approach to determining whether an employment existed set out in *Ready Mixed Concrete (SE) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, p515:

"A contract of service exists if these three conditions are fulfilled.

(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
(iii) The other provisions of the contract are consistent with its being a contract of service."

It considered that there was mutuality of obligation during each assignment, and no right of substitution since the principal statement of employment was specifically between Subsea 7 and the appellant, made no reference to partnership and was entered into three years before the partnership existed, there was no evidence that the contract had been novated to the partnership, and Subsea 7 stated in correspondence that they would not enter into diving contracts with partnerships. The contract could not be interpreted as being one for team services provided by the appellant as the diver and his spouse as the provider of administrative services, and indeed the latter could not be regarded as being in substitution for the appellant in the Subsea 7 contract even if such substitution was permitted. As to control, it was clear that Subsea 7 had control over the work undertaken by the appellant, as it determined the tasks to be undertaken by the appellant and the hours to be worked on any given assignment. Other relevant factors included the appellant's entitlement to paid leave and sick pay, and the statement that the contract was one of employment. Although that was not definitive, there was nothing in the contract which was inconsistent with the appellant being an employee of Subsea 7. The tribunal therefore concluded that the relationship was one of employment and not a trade capable of being carried on in partnership.

Finally, the tribunal held that whether there was a partnership was largely irrelevant because the appellant's activities did not amount to a trade which could be carried on by that partnership, and his employment could not be regarded as income which could be attributable to the partnership for tax purposes. However, it explicitly rejected the appellant's argument that that *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ 98 implied that it was possible to have a valid partnership in which the partners entered into employment contracts with a client. The decision in *Protectacoat* referred to the possibility of the partners each being engaged as employees: it did not, even in obiter dicta, find that the partnership itself could be engaged as an employee. It was well established that employment required personal service and so could not be undertaken in partnership. The tribunal also rejected the appellant's argument that if the engagement with Subsea 7 was not with the partnership, then the appellant was required by s30 of the Partnership Act 1890 to account to the partnership for the profits made. Section 30 only obliged a partner to account for profits earned without consent in carrying on a business of the same nature, whereas the appellant was employed rather than carrying on a business, and since s15 applied only for income tax purposes it could not be interpreted as meaning that the appellant was carrying on a business for the purposes of the Partnership Act 1890. Finally, the tax concession which enabled the income of partners engaged as directors to be treated as income of the partnership rather than employment income of the individual did not mean that the engagement of a partner as a director equated to employment of the partnership, and therefore did not indicate that a partnership could be employed. The reason for the concession was that the earnings of a

director would otherwise be taxed as employment income because a director was an officeholder, and statute defined income of officeholders as being within the scope of PAYE.

***Riley v Reddish LLP* 7 June 2019, unreported**

The appellant had been a member of an LLP which had acquired shares in a company. He was sued by the seller of the shares for the purchase price of £1.3 million. The court held that the LLP was liable for the purchase price, but it went into liquidation and was unable to pay. The LLP then sued and obtained judgment against the appellant for the purchase price. The appellant's claim to have his judgment set aside on the grounds that he had refused service of the claim form and the particulars of claim was rejected.

On appeal, the court held that although the LLP had alleged that the appellant was a director who had breached his duties under the Companies Act 2006, LLPs did not owe fiduciary duties under that Act, and directors' duties could not be transposed on to LLP members. Whether an LLP member owed duties depended on his role in the LLP affairs (see further *F&C Alternative Investments v Barthelemy* [2011] EWHC 1731 (Ch)). Here there was no evidence of any agreement about his role, and it was therefore not possible to establish that he was in breach of duty.

***Karim Sophie Kingsley and others v Sally Margaret Kingsley and another* [2019] EWHC 1073 (Ch)**

This case involved a family farming partnership which had dissolved automatically on the death of one of two partners. The deceased partner's widow and sole beneficiary (Karim) brought a number of claims against the surviving partner (Sally), concerning the sale of the land which the partnership had farmed but which had been owned by the partners individually (the Farm Land) and the settling of the cessation and post-dissolution accounts.

As the Farm Land was not partnership property, its sale was governed by the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) rather than the Partnership Act 1890. However, the court noted the difficulty of valuation highlighted in the partnership case of *Benge v Benge* [2017] EWHC 2124. Section 39 of the Partnership Act 1890 normally entitled partners of a dissolved partnership to insist on the sale of partnership property, but under *Syers v Syers* (1876) 1 App Cas 174 the court had discretion to permit the majority partners to buy out the minority on dissolution. In *Benge* the court had declined to exercise this discretion and instead ordered a sale on the open market, because valuation was so problematic. In the present case the court ordered that Sally should have the option to buy the Farm Land by a deadline specified by the court and at a price specified by it on the basis of expert evidence, with sale on the open market if Sally failed to exercise this option.

The only outstanding dispute on the cessation accounts was the expenditure of partnership money on buildings erected on the Farm Land. Although the court could direct that the improved value of the property be treated as a partnership asset, that depended on what the

partners had agreed should happen as a result of the partnership expenditure, and there had been no agreement that it should become a partnership asset.

As to the post-dissolution accounts, the court applied the principle in *Lie v Mohile* [2014] EWHC 3709 (Ch) that the implied licence granted to the partnership by the partners who owned the property continued on the same terms until the partnership was wound up or a receiver was appointed by the court. The court considered that the District Master would not have ordered Sally to pay interim occupation rent had *Lie* been argued before her, but there had been no appeal against this order, and it therefore stood.

Robert Alan Liddle and others v Stuart David Liddle and others **[2019] EWCA Civ 346**

This case involved a dispute over the purchase of the shares of the respondents, who were the outgoing partners of a family partnership, by the appellants, who were the continuing partners. The partnership agreement provided that the purchase price was to be the net value of the partner's share as shown in the accounts.

The Court of Appeal reversed the ruling of the High Court that the appellants were obliged to make payments under this clause even before the purchase prices had been ascertained, and held that no sum was payable until the prices were ascertained. However, it rejected the appellants' argument that the purchase prices were not ascertained when the accounts were produced, but only when the appellants accepted them. As a result, it also rejected the appellants' argument that they were not in default of their payments.

Dakshu Patel v Kesha Patel **[2019] EWHC 298 (Ch)**

This case involved a challenge to an arbitrator's award that although two partnership agreements both provided for the partners to share profits and losses equally, one had been varied by agreement and the other by a course of conduct.

The court upheld the claimant's challenge. There was insufficient evidence that the claimant had offered to vary the agreement. As to the variation by course of conduct, s19 of the Partnership Act 1890 provided for a partnership agreement to be varied by unanimous consent either express or inferred from a course of dealing, but this required the parties to have reached a consensus. Thus, the conduct would need objectively to be capable of unambiguous interpretation. However, although the claimant had instructed the accountant that the defendant was to receive 100% of the profits of the partnership for two years, and had signed the accounts, this merely meant that he had waived his share in two accounting periods and could not objectively be interpreted as him giving up his rights to share in profits for any longer period. Indeed, the partnership agreement expressly provided that failure or delay by a partner in enforcing a term would not affect his right to enforce it later, and that any variation of the agreement must be in writing and executed as a deed. Even if the conduct could have given rise to a variation, consideration would have been required, for example in the form of an agreement not to terminate the existing partnership if new terms were agreed.

Recent publications on partnership law:

Books

Elspeth Berry, ***Partnership and LLP Law*** (2nd edn, Wildy, Simmonds and Hill 2018)

Stephen Chan, ***A Practical Guide to Partnership Law in Scotland*** (W Green 2018)
This new text, authored by a senior Scottish solicitor with extensive experience in partnership law, provides a thorough explanation of the law relating to Scottish partnerships and LLPs in the 21st century and highlights the difference between English and Scottish partnership law. The book is particularly timely because partnership law developments in Scotland have been prominent in recent years, including criminal prosecutions against dissolved partnerships and the extension of the legislation on persons with significant influence (PSCs) to some Scottish partnerships, as well as the current BEIS consultations on possible further regulation.

Michael Twomey, Maedhbh Clancy (ed), ***Twomey on Partnership*** (2nd edn, Bloomsbury Professional 2019)
The long anticipated second edition of this text, published 19 years after the first, continues to be the only book on Irish partnership law. That alone would make it significant but, more importantly, the author (currently a High Court judge) brings to bear his extensive experience as a solicitor practising solely in partnership law, and also as an academic, to produce a comprehensive, detailed and authoritative text. The new edition also benefits from the editorship of a senior solicitor with expertise in partnership law.

David Whiscombe, ***Partnership Taxation 2018/2019*** (Bloomsbury Professional 2018)

Articles

Elspeth Berry '**Square pegs and round holes: why company insolvency law is a bad fit for partnerships and LLPs'** (2018) Insolv Int 31(3) 88-91

Elspeth Berry, '**Limited partnership law and private equity: an instance of legislative capture?'** (2019) 1 JCLS 105-135

David Milman **'Legal characterisation of commercial relationships in the UK: the quasi-partnership example'** (2019) The Company Lawyer, forthcoming

A variety of articles on partnership law arising out of the **Inaugural Conference of the Partnership, LLP and LLC Law Forum** in April 2018, including by Professor David Milman and Professor Geoffrey Morse (authors of leading texts on LLP and partnership law respectively), are available at https://www.ntu.ac.uk/study-and-courses/courses/our-schools/nls/nottingham-insolvency-and-business-law-ejournal.

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