***Joseph v Deloitte NSE LLP* [2020] EWCA Civ 1457**

Joseph, an equity member who was expelled from the defendant LLP, claimed that the expulsion procedure set out in the LLP Agreement had not been correctly followed. His claim was rejected by the High Court, and he appealed to the Court of Appeal.

Clause 16.2 of the LLP Agreement provided that the LLP Board could give any equity member a notice of requirement. A notice was issued to Joseph on 23 July 2019. Clause 16.2(a) provided that a member who "feels aggrieved" had the right, within 7 days after receipt of such notice, to make his point of view known to the Chairman and to present his case to a Board meeting. On 1 August Joseph asked for the notice to be reconsidered, but he did not attend the Board meeting on 2 October to which he was invited. Clause 16.2(b) provided that if, following that meeting, the Board "has not withdrawn" the notice and the member was "still aggrieved", he could within 7 days of the date of the meeting notify the Chairman that he wished the Board to convene a special meeting of all the equity members to confirm or withdraw the notice. On 10 October Joseph notified the LLP that he had not yet been informed of the Board's decision and requested that, if the decision was adverse to him, a members' meeting be held. He was informed on 11 October that the Board had decided not to withdraw the notice. His request on 12 October for a members' meeting to be called was rejected as being out of time.

Before considering whether clause 16.2 contained an implied term as to the extension of the time limit, the court construed its express terms. First, although it did not specify a time limit for communicating the Board's decision to the member, clause 7.7 required the Board to notify equity members of its decisions in a timely and effective manner. What amounted to timely communication would depend on the circumstances and in particular the time taken by the Board to make its decision, and to communicate it to the member. This period might therefore exceed the 7 days allowed for the member to notify the Chairman that he was aggrieved and wished a meeting of all the equity members to be called. Second, although a member could only request a members' meeting if the Board "has not withdrawn" the notice, this condition could be satisfied not only by a positive declaration to maintain the notice but could also by a failure to withdraw the notice because no decision had been taken. Third, a notice would be effectively withdrawn once communicated to that member; no acceptance or agreement by the member was required. Fourth, it was not necessary for the Board's decision as to whether to withdraw the notice to be communicated to the member in order for him to be "still aggrieved" within clause 16.2(b); that phrase must refer back to the phrase "feels aggrieved" in clause 16.2(a), in which context the grievance was occasioned by the notice of retirement. The phrase in clause 16.2(b) therefore clearly included a grievance which persisted because a notice of retirement had been issued and no withdrawal of it had been communicated to the member. Finally, there was nothing in the wording of clause 16.2(b) to preclude a member from exercising their right to demand the convening of a members' meeting before they had been informed of the Board's decision not to withdraw the notice of retirement.

The court refused to imply a term into the agreement that the strict 7 day deadline imposed on a member by clause 16.2(b) be extended to 7 days from communication of the Board's decision where that communication was delayed beyond the date of the Board's meeting. The court noted that in order for a term to be implied into a contract it must
i) be reasonable and equitable,
ii) be necessary to give business efficacy to the contract or so obvious that it goes without saying,
iii) be capable of clear expression, and
iv) not contradict any express term of the contract.
The court held that the proposed implied term would conflict with the express words of clause 16.2(b), and the fact that clause 16.2(a) specified a time limit of 7 days from receipt of the notice indicated the ease with which clause 16.2(b) could have been similarly worded had this been intended. The court noted in passing that it disagreed with the weight given by the judge at first instance to the fact that the agreement was carefully drafted for a sophisticated group of signatories; it considered that it was not apparent that it had been drafted by lawyers or, given that it might have been presented by the LLP to members on a 'take it or leave it' basis, that it had been carefully negotiated, and that clause 16.2 was evidently not a well-thought out clause since it produced complications and unfairness.

The court also rejected the argument that a promissory estoppel arose. This would require
i) a legal relationship giving rise to rights and duties between the parties,
ii) a clear and unequivocal promise or representation by one party that they would not enforce their strict legal rights arising out of that relationship against the other,
iii) an intention by the former that the latter would rely on the promise or representation, and
iv) alteration of the position of the latter in reliance on the promise or representation such that it would be inequitable to allow the former to act inconsistently with it.
The communication from the Board to the member confirming details of the Board meeting at which he could put forward his case only represented that he would be informed of the Board's decision by 9 October 2019. Nothing was said or implied about the time within which he had to exercise his right to convene a members' meeting.

The court concluded that Joseph was entitled to feel harshly treated, but that his appeal must be dismissed. As had been stated by the courts on many occasions (*Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 482, *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at para 16, and *Chantry Estates (South East) Ltd v Anderson* [2008] EWHC 2457 (Ch), affirmed [2010] EWCA Civ 316), the role of the court was not to make a fairer or more reasonable contract for the parties but to ascertain what their contract was.

***Baines v Dixon Coles and Gill (A Firm)* [2020] EWHC 2809 (Ch)**

Mrs Box, one of three equity partners in a solicitors' firm, was expelled for dishonestly making unauthorised payments from client account money. She was subsequently convicted of a number of offences of dishonesty, and the firm entered a partnership voluntary arrangement. Claims were brought against the two innocent partners by parties who alleged that they had suffered loss as a result of Mrs Box's dishonesty. Those claimants sought summary judgment. The relevant ground for summary judgment, as set out in the Civil Procedure Rules 1998 (CPR) Rule 24.2, was that the defendants had no real prospect of success on the claim.

Section 10 of the Partnership Act 1890 provides that a firm is liable to make good loss caused by the wrongful act of a partner acting in the ordinary course of business of the firm or with the authority of his co-partners. The defendant partners accepted liability in relation to misappropriations made by Mrs Box in the course of conveyancing transactions, since that was within the firms business. However, they denied liability for all other misappropriations on the ground that her conduct was neither in the ordinary course of the firm's business nor authorised by them.

The court discussed at length the judgment in the leading case of *Dubai Aluminium Co Limited v Salaam* [2003] 2 AC 366 . In that case the court had noted that since wrongdoing was not normally authorised, the question whether an act or omission was done in the ordinary course of the firm's business could not be decided merely by reference to whether the partner had been authorised to do it. It had cited *Hamlyn v John Houston and Co* [1903] 1 KB 81 in which the court had held that if it was within a partner's authority to obtain information by legitimate means, then it was within the scope of his authority for the purposes of s10 to do so by illegitimate means. However, the court in *Dubai Aluminium* noted that there were limitations on this broad principle, and that a distinction should be drawn between unlawful acts done to further the business of the firm, and those done only to further the interests of the wrongdoing partner. In the latter case the firm would not be liable merely because the act was of the kind the partner was authorised to do, but it was still possible that the act was so closely connected with the ordinary course of business of the firm that the firm was liable for it.

On the facts of the present case, the court considered that there was a real prospect of establishing that Mrs Box's conduct in relation to two ledgers which she kept and which were not client ledgers was not conduct in the course of the firm's business, particularly as in relation to one of them she was in fact acting as signatory on the client's bank account. However, the other ledger was a client ledger, and it could not be argued that setting up and transacting through such a ledger was outside the ordinary course of business of a solicitor. Indeed, such steps were integral to the running of a solicitors' firm. The fact that none of the transactions were genuine did not transform a ledger which would otherwise be an account in the ordinary course of business, for which co-partners would be responsible, into a ledger for which they were not responsible. Nor was setting up and transacting through a client account ledger outside the apparent authority of a partner. Summary judgment was therefore given in relation to this ledger.

***Patel and Patel v Barlows Solicitors (a firm), Paul Stanley and Paul Barber (as joint trustees in bankruptcy of Drupad Chorera) and Tanna* [2020] EWHC 2753 (Ch)**

The first claimant alleged that there had been a partnership between him, a person who had subsequently become bankrupt and who was represented by his trustees in bankruptcy, and the third defendant. The first claimant's capital contribution, and a loan made to the bankrupt, had been used to pay for two investment properties. However, the bankrupt's solicitors had negligently paid the money to the vendor's solicitors without ensuring that the bankrupt would acquire good title to the properties, and the money was released to the vendor who dissipated it and became insolvent. The bankrupt's claim against the solicitors was settled, and the first claimant sought repayment of his capital out of the settlement amount.

Section 1(1) of the Partnership Act 1890 defines a partnership as "the relation which subsists between persons carrying on business in common with a view of profit". The court held that this definition was satisfied on the facts, and that the three alleged partners had indeed been in partnership. First, the purchase of a property with a view to its subsequent sale could constitute a business, and here the intended purchase and resale of three properties could realistically only have taken place in the course of carrying on a business. The court noted that the question of whether an enterprise amounted to a business was a mixed question of law – i.e. the legal principles governing the meaning of the word "business" - and fact – i.e. the facts of the case. Second, there were clearly two or more persons involved, and they had carried on the business in common. They were not carrying out separate businesses on behalf of a common enterprise or acting on behalf of a third party, but had carried out the purpose of the business for their common benefit and had agreed to share profits equally. Third, there was no suggestion that the business was not carried on with a view of profit, and indeed the written agreement between the three alleged partners expressly stated that it was. The court further held that the partnership had been dissolved at the point in time when it became clear that it would not be possible to complete the purchase of the first two properties, because at that stage the purpose of the partnership had wholly failed and there was no point in continuing with the purchase of the third property, not least because the vendor was the same.

On the basis that the court found a partnership to exist, it did not need to determine the alternative claim that the settlement amount received by the trustees in bankruptcy was held by on trust for the first claimant and fell outside the bankrupt's estate. However, it proceeded to do so in case it was found to have erred in the determination of the partnership claim. It noted that a *Quistclose* resulting trust (named after the case in which the House of Lords authoritatively articulated the nature of the trust, *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567) would arise when property was transferred on terms which did not leave it at the free disposal of the transferee, and that there was no reason why such a trust could not arise in a partnership setting (*Bieber v Teathers Ltd (in Liquidation)* [2012] Civ 1466). Here, the first claimant's capital contribution was paid to the solicitors to fund the purchase of the properties and was therefore held on trust by them for him, since monies paid by a client to a solicitor were generally held on trust for the client, and the solicitors knew both that the money was received from a third party and the purpose for which it had been paid to them. When the solicitors paid the settlement amount to the bankrupt (or the second defendants on his behalf), that amount represented or included the first claimant's capital contribution and this sum was therefore held by the bankrupt in his capacity as resulting trustee for the first claimant.

The court made a declaration that the enterprise was carried out in partnership, and that the partnership had been dissolved on the date that the first purchase of the first and second properties had to be aborted. It ordered that the affairs of the partnership be wound up and an account taken. It rejected the claimants' claim that the taking of an account was unnecessary, because there might be a balance from the settlement amount after the first claimant's capital had been repaid, which would have to be shared equally by the former partners, or the partnership might have made losses and the solvent partners might be required to make good not only their own share of the losses but also bankrupt's share. The court ordered that the first claimant's capital contribution be paid to him out of the settlement amount before the taking of the account, noting that if the account had been taken when the partnership came to an end ten years previously, his capital would have been returned much earlier.

***Davidison (as liquidator of Finnan Developments (Raynes Park) LLP) v Finnan and others* [2020] EWHC 1607 (Ch)**

The liquidator of an LLP had made a claim for wrongdoing against the members of the LLP under s212 of the Insolvency Act 1986, which was applied to LLPs by Reg 5 of the LLP Regulations 2001. Section 212 enabled a liquidator to apply to court for an order that a member who had been guilty of misfeasance or breach of duty should contribute to the LLP's assets by way of compensation. One of the LLP members, Capra, sought summary judgment dismissing the claim against him.

The liquidator argued that the members should have considered the contingent liability of a provisional arbitration award made against the LLP, and placed a value on it before negotiating the terms of Capra's retirement settlement. Had they done this, it would have shown that the settlement agreement would or was likely to result in the insolvency of the LLP. In circumstances where the members knew or ought to have known that the LLP was or was likely to become insolvent, they owed a duty to creditors to act in their best interests, and in deciding to enter into the settlement agreement they were in breach of that duty.

The court noted that it might be possible to argue that the duty to creditors, as recognised in relation to company directors, did not apply to LLP members, both because LLP members did not necessarily owe duties analogous to those of company directors and because, on the facts, Capra was not involved in the management of the LLP at the relevant time so as to owe fiduciary duties. However, the court considered that the reason why the existence of a duty owed to creditors by directors had been recognised by the courts (as in *BTI 2014 LLC v Sequana SA and others* [2019] EWCA Civ 112, [2019] BCC 631, currently on appeal to the Supreme Court), which was to protect the interests of creditors where solvency was in issue, applied equally to LLPs since they also had the benefit of limited liability. The court in *McTear (Liquidator of CJ & RA Eade LLP) v Eade and another* [2019] EWHC 1673 (Ch) had proceeded on the basis that such a duty applied to LLP members, although the point was not fully argued in that case and there were fundamental differences between LLPs and companies which might support a difference of approach. However, Capra had conceded for the purposes of this application that he should be treated as owing such a duty if it could be shown that on the date the settlement agreement was concluded he knew or ought to have known that the LLP was or was likely to become insolvent by reason of that settlement agreement.

As to whether the LLP was insolvent at the time of the settlement agreement, or likely to become so as a result of it, the parties disputed how solvency was to be defined, what provision should have been made for the contingent liability, and whether Capra had breached his duties as an LLP member in agreeing to the settlement agreement.

In considering how solvency was to be assessed, the court noted that a key problem was that there was no contemporaneous assessment of the value of the contingent liability. It further noted that the accounting principles applicable to LLPs in the Statement of Recommended Practice, Accounting by Limited Liability Partnerships (SORP) provided that notes to the accounts should explain where debts due to members would rank in relation to other unsecured creditors in the event of an insolvency. Here, there was nothing in the LLP accounts or in the LLP agreement which disclosed any protection to be afforded to third party creditors. In order to disprove insolvency, Capra might therefore have to make the new argument that the settlement agreement rendered the LLP insolvent but that it was likely to become solvent if third party debts were not to be paid ahead of loans to members. The court noted that it would be novel to suggest that no duty was owed to creditors in such circumstances, and whether the Supreme Court decision in *Sequana* would provide any guidance on that issue remained to be seen.

In considering whether provision should have been made for the contingent liability, the court noted that the arbitration award was provisional and there was no contemporaneous evidence of what a construction lawyer would have advised as to the prospects of success and the amount of any final award. However, the court concluded that the liability was not de minimis and that the provisional award provided a starting point when considering what provision should have been made by the LLP to meet the liability.

In considering whether Capra had breached his duties as an LLP member in agreeing to the settlement agreement, the court held that this was not suitable for summary determination given the dispute as to whether the LLP was insolvent or likely to become so at the relevant time, and the possibility of Capra needing to advance a different and novel argument on the matter.

The court concluded that it could not be said that there was no real prospect of the liquidator establishing at trial that the LLP was insolvent at the time of the settlement agreement or likely to become so as a result of it. It therefore dismissed Capra's application.

Elspeth Berry
Reader in Law, Nottingham Law School,
Nottingham Trent University
November 2020