***Liddle and another v Liddle and others* [2017] EWHC 2261 (Ch) and *Liddle and others v Liddle and another* Nos 20-27 of 2017, Leeds County Court**

Three of the original partners of a family farming partnership ceased to be partners. The partnership agreement gave the continuing partners an option to purchase the shares of retiring or deceased partners but the parties disputed the correct interpretation of the relevant clause (the High Court action). The continuing partners also disputed the validity of statutory demands served on them by the one outgoing partner and the personal representatives of the other two outgoing partners.

The judgment mainly focused on the interpretation of specific clauses of the partnership agreement, but it included two points of wider interest. First, the court held that to the extent that the agreement made no provision for interest on one element of the overdue purchase price, it could award interest under s35A of the Senior Courts Act 198. However, the rate was not necessarily that specified in the Judgment Act and could, for example, be the commercial rate. What was necessary was to reflect the loss which the claimants could show they had suffered. Second, the court held that the statutory demands were not valid because the debt must be payable immediately and this required that it be both liquidated, and payable immediately as distinct from being payable at a later date (*Wallace LLP v Yates* [2010] EWHC 1098 (Ch); [2010] BPIR 1041). The fact that the measure of liability was calculable by reference to the formula specified in the partnership agreement was not sufficient to make it a liquidated claim. The accountants had failed to follow the formula when producing a valuation, and this had been successfully challenged at a previous hearing. Since the debt was not liquidated, the demands were invalid and should be set aside. The court noted, however, that the demands would not have been defective merely for referring to 'the personal representatives' of the deceased partners rather than to the personal names of those representatives themselves and that even if they would have been defective, the court would have waived the defect, not least because the recipients know exactly who the personal representatives were.

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***Dinesh Kotak v Jagdish Kotak and others* [2017] EWHC 1821 (Ch)**

An earlier judgment in this case were reported in A Propos Partnership Issue 42 in 2014.

This judgment determined the preliminary issues of the scope of bank mandate, which provided that the signature of one of the two partners was sufficient authority to bind the partnership, and whether the loan agreements in dispute were binding on the partnership when only one partner had signed them.

The court held that the bank mandate covered the disputed loan agreements. The mandate referred to the partners being liable for any overdraft or 'for any other purpose', and given that that section of the mandate dealt with partners' liabilities, the only sensible interpretation was that this meant 'for any other purpose giving rise to liability'. It was therefore apt to include the liability arising under a loan agreement. Furthermore, entering into a loan agreement fell within the ambit of an ordinary banking relationship and hence within the ambit of the mandate. The scope of the mandate was thus sufficient to bind the partnership and the partners to the disputed loan agreements.

The court also held that even if this was not correct, s5 of the Partnership Act 1890 applied to give the sole partner who signed the loan agreements ostensible authority to do so. In determining whether an act of a partner constituted the carrying on of a particular business in the usual way, as required by s5, the court must examine whether the conduct in question was usual to the type of business carried on by the partnership, both when viewed at a high level of generality and when examined in detail (*JJ Coughlan Ltd v Ruparelia* [2014] PNLR 4). The question was not whether the conduct was carried out in the usual way of a business of a relevant kind, but whether a rational, competent, reasonable counterparty to the transaction at issue - so here, a reasonably prudent and competent lender - would so regard it. Since it was an everyday commonplace of a commercial property business to operate on borrowed money, the acts of borrowing at issue here were clearly usual for the kind of business carried on by the partnership. Although some older cases suggested that borrowing money was only to be treated as falling within the usual way of carrying on business where the partnership was a trading partnership, it was outdated to suggest that the borrowing of money was not something that arose in the carrying on of many businesses in the usual way.

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***Liontrust Investment Partners LLP and others v Flanagan* [2017] EWCA Civ985**

An earlier judgment in this case were reported in A Propos Partnership Issue 44 in 2016.

Flanagan, who had been a member of the Liontrust LLP, appealed against the decision of the High Court that the LLP's third notice to him of compulsory retirement (though not the first two) was valid, and the LLP appealed against an order to make payments to Flanagan which were contractually due to him as a member. The Court of Appeal dismissed both appeals.

Clause 18.1.3 of the LLP agreement provided that notice of compulsory retirement could be given on the expiry of the notice period set out in a particular member's side letter; and Flanagan's side letter provided for a notice period of 6 months, such notice not expire earlier than the 24 month anniversary of his joining the LLP, which was 4 October 2011. The LLP gave Flanagan the first notice on 20 August 2012 but stated that the retirement would only take effect on 4 October 2013. The court held that this was invalid because it was not open to the LLP to operate the notice period more than 6 months before the anniversary date, and the garden leave provisions in clause 21 could also not be operated before this date. Although it might be possible to serve a notice which stated that it was to take effect on a future date for a specific period of time, the first notice purported to be compliant with clause 18.1.3 and to have immediate effect. The second notice was also invalid because clause 18.1.3 required the giving of notice to be treated as a 'Reserved Matter' which, under the LLP agreement, required a resolution of the management committee, and no such resolution had been passed. Although the reference in clause 18.1.3 to treatment of the giving of notice of compulsory retirement as a Reserved Matter was in parenthesis, whereas other such references in the agreement were not, and the definition of Reserved Matters in Schedule 3 to the agreement did not include the compulsory retirement of a member, the court held that these arguments did not justify construing clause 18.1.3 as though it did not include the requirement to treat the decision as a Reserved Matter.

On the basis that the first and second notices were invalid, Flanagan remained a member until the service of the third notice on 22 December 2014. However, he did not remain a member of the management committee up to that time and therefore the fact he did not receive notice of the meeting called to approve service of the third notice did not render it invalid. The corporate

member of the LLP which had the power to remove the existing members of the committee and appoint a new one had by that time properly exercised that power by a notice to the LLP, and a notional recipient would reasonably have interpreted the list of the new members included in the notice, which did not include Flanagan, as the appointment of those members.

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***Halborg v EMW Law LLP* [2017] EWCA Civ 793**

Halborg, a sole practitioner solicitor, was the solicitor on the record in relation to legal proceedings against his client. He appointed the respondent LLP to act as his agent in the proceedings, which were compromised by a payment to his client. The LLP subsequently sought assessment of its costs and Halborg applied for summary judgment against the LLP or for the claim to be struck out. This was dismissed and he was ordered to pay LLP's costs. He appealed on the ground that the LLP should have been treated as a litigant in person and its recoverable costs limited accordingly.

The Court of Appeal dismissed the appeal, holding that the LLP was not a litigant in person within the meaning of CPR 46.5(6). This rule states that a litigant in person includes (a) a company or corporation which is acting without a legal representative; and (b) (inter alia) a solicitor, except where he is represented by a firm in which he is a partner. The LLP was not a litigant in person under CPR 48.5(6)(a) because, although it was a corporation, it had acted with a legal representative. The commentary in the 2017 White Book at 46.5.1 stated that a company acting through an in house legal representative acted with a legal representative, and there was no difference between this and a solicitors LLP acting by its members or their employees. The court also held that the LLP could not be a litigant in person under CPR 48.5(6)(b) because that only applied to individuals, and corporations were governed exclusively by CPR 48.5(6)(a).

The Court of Appeal also held, however, that if it was wrong in its interpretation of CPR 48.5(6)(b) as being confined to individuals, that provision was capable of applying where an LLP member or the LLP itself was represented by the LLP. CPR 48.5(6) reflected the common law principle established in *The London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872, that a solicitor who acted for himself in litigation could recover his expenses and his profit costs but not for anything which his acting in person made unnecessary. The rationale was that the solicitor party had expended professional skill and labour, that expenditure was measurable, he would otherwise employ a solicitor whose costs he would be able to recover if successful, and the unsuccessful party would have the benefit of the disallowance of anything which the solicitor's acting in person made unnecessary. Following the introduction of the CPR, the Court of Appeal in *Malkinson v Trim* [2002] EWCA Civ 1273, [20013] 1 WLR 463 had noted that that it was evident that the *Chorley* principle was unaltered by CPR 48.6 since para 52.5 of the Costs Practice Direction stated that 'Attention is drawn to rule 48.6(6)(b). A solicitor who, instead of acting for himself, is represented in the proceedings by the firm or by himself in his firm name, is not, for the purposes of the CPR, a litigant in person'. The court in *Malkinson* had therefore held that if a solicitor could charge for his own time and that of his employees, he should also be able to charge if the work was carried out by his partners or employees of the firm. Against this background, the Court of Appeal in *Halborg* applied a purposive interpretation to CPR CPR 48.6, and held that the word 'firm' included a sole practitioner, and 'partner' included a case where there was only one principal in the firm. It also held that an LLP and its members should be treated in the same way as a partnership, since the fact that an LLP had

separate legal personality and its members had limited liability was not relevant to the rationale for the *Chorley* principle.

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***Rendall v Commissioners for HMRC* [2017] UKFTT 356 (TC)**

HMRC had issued a notice requiring the appellant, in her capacity as representative partner of the partnership, to file a partnership tax return. The appellant failed to do this by the deadline, and HMRC issued a number of penalty notices, in respect of which there were a number of conversations between the appellant and HMRC as to what HMRC required. The appellant eventually filed the return, and appealed against the penalties.

Schedule 55 to the Finance Act 2009 provided that penalties could only be cancelled, absent a procedural irregularity, if the appellant had a reasonable excuse for the failure to file by the deadline, or if HMRC's decision that there were no special circumstances was flawed. The tribunal held that there was no evidence of any reasonable excuse for the failure to file on time. However, it held that HMRC had not taken into account the fact that it had been given, in the partners' individual returns which were made on time, all the information that the partnership return required, including the share allocated to each partner. Nor had it taken into account the fact that a partnership return did not in itself disclose any income chargeable to tax about which it would otherwise be ignorant. The tribunal concluded that this failure made the decision flawed in judicial review terms. It also held that the intention of Schedule 55, and of s12AA of the Taxes Management Act 1907 which required a partnership return to be made, was to encourage timely submission of the amounts of income on which partners were to be assessed to income tax, and that the appellant had complied with this obligation. The tribunal therefore reduced the penalties to nil.

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