Re A&C Restoration LLP: Manolete Partners plc v Riches [2020] EWHC 1404 (Ch)

(Judgment in this case was given in May 2020 but the transcript has only recently become available)

Riches was a designated member of A&C Resoration LLP until he retired under the terms of a retirement deed. At that time a new member was appointed. The deed included a waiver of any claim by the LLP for sums owed by Riches as a result of drawings by him which exceeded profits, and Riches claimed that he had agreed with the continuing member that the latter would take over the business and debts of the LLP. The LLP and its liquidators assigned their claim against him to Manolete.

The court noted that even if such an agreement had been reached, the LLP itself was not a party to it and could not be bound by it. As to the deed of retirement, although the LLP was a party to the deed, it was insolvent at the time the deed was entered into. The court held that designated members of an LLP, such as Riches, owed the same duties as company directors owed to limited companies (*McTear v Eade* [2019] EWHC 1673 (Ch)), and that these duties included a duty to take into account the interests of creditors at a time when the firm was insolvent. It concluded that it was a breach of duty, objectively viewed, to cause the LLP to agree to a waiver which released a debt, since this could not be in the interests of the creditors. Riches was therefore estopped from relying on the clause, and remained liable for the debt. He was not able to ask the court to grant relief for any breach of duty pursuant to s1157 of the Companies Act 2006 (applied to LLPs by the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009), because that section was dependent on him having acted honestly and reasonably, and the court considered that it could not be a reasonable decision to waive one's own liabilities in the context of insolvency.

In the light of that conclusion, the court held that it did not need to deal with the claims that the waiver should be set aside as a transaction at an undervalue under s238 of the Insolvency Act 1986, or that Riches should return the money under the 'clawback' provisions of s241A.

Loveridge and others v Loveridge [2020] EWCA Civ 1104

The Loveridge family owned and operated a caravan park business through several companies and three oral partnerships at will. The partnership proceedings related to the winding up of the three partnerships.

The first instance judge had appointed the respondent partner to manage the partnerships pending their winding up, and ordered that the three other partners be restrained from interfering with the business. He discounted the possibility of appointing a third party receiver or manager because it would involve unjustified expense, and there also insufficient time for it to be done. He applied the *American Cyanamid* ([1975] AC 396) principles to the granting of interim relief, noting that there was a serious question to be tried and that damages would not be an adequate remedy for either side because the damage to the businesses which were ultimately to be sold would be substantial and incalculable. As to the balance of convenience, he noted that the respondent had displayed more professionalism, had driven the expansion of the business, had given substantial undertakings in relation to the conduct of the business and would have been regarded as the managing partner, and that these factors outweighed the considerable contributions of the other partners.

The Court of Appeal allowed the appeals. It noted that when appointing a partner rather than a third party receiver or manager, it was necessary to take account of the fact that the majority partners, by definition, had the most to lose from any mismanagement. Further, where several partnerships were involved, it was not necessary for the court to order 'unitary control' by one partner of all the partnerships. There was no reason to disrupt the status quo of the management of the partnerships my removing all control from the appellants. While the respondent's skills as a businessman were not irrelevant, he was not the only person capable pf running any individual partnership, and his historical role in the expansion of the business was at most of tangential relevance. As it was unclear whether the respondent was a partner at all in one of the partnerships, in which case he would have no say in its future, and at most he had a 25% interest, and as he had made no complaints about the its continued management by the partner who might in fact be its sole owner, the court ruled that she should remain in sole day to day control of this partnership pending trial of the respondent's claim. The court awarded sole control of one of the other partnerships to the two appellants who lived on its principal site, and awarded the respondent sole control of the other partnership.

***Malik v Hussain and others* [2020] EWHC 2334 (Ch)**

This case also involved a business operated though an alleged combination of partnerships and companies. In 2002 the claimant and the first defendant took preparatory steps to enter into a restaurant business together. They later incorporated a company and acquired a property from which the restaurant was to operate, and in 2003 the restaurant

began trading. They only entered into a formal partnership deed in 2006. In 2013 the first defendant opened a restaurant trading under the same name but in a different location.

The claimant argued that there was an overrarching partnership encompassing the property and the restaurant business, and envisaging the opening of further restaurants in other cities. The defendants denied that there was a partnership, despite the existence of a partnership deed, and alleged that their legal relationship consisted solely of co-ownership of the property and co-shareholding of a company which owned in the business.

The court held that there was a partnership in relation to the property and the business, that the two partners held their shares in the company as partnership property, and that the partnership should be dissolved and wound up.

It stated that the normal rules applicable to the construction of written commercial contracts applied equally to partnership agreements, and the relevant principles were clear (*Autoclenz v Belcher* [2011] UKSC 41). The parties were therefore bound by the written terms of the deedand could not seek to imply inconsistent terms. Although a partnership deed which was not acted upon could not create a partnership where was otherwise none, and the mere fact that an agreement described itself as a partnership agreement, or purported to record the existence of a partnership as from a prior date, was not conclusive, extrinsic evidence could not be admitted to contradict or vary the express written terms of the contract. It could only be argued that to be a sham if the parties had the common intention that the contract was not to create the legal rights and obligations which it purported to create (*Snook v London and West Riding Investments Ltd* [1967] 2 QB 786).

The court held that there was sufficient evidence that an informal partnership came into existence in 2002. The claimant and the first defendant had agreed to go into business together, with a view to owning property and using it to run a restaurant business, they had opened a joint bank account which they were using for the development of the business, and they had decided to take out a joint loan. The company which they had set up had never been intended to take over the whole of the business, and the joint current and loan accounts continued after it had been incorporated and were used for a mixture of personal and company purposes. There was no evidence that the opening and operation of the company current account, and the treatment of the restaurant business in the accounts, the property rental statements and the personal tax returns, were carefully considered decisions, the effect of which had been explained by the accountants. In the absence of such

evidence, they were insufficient to infer that the claimant and the first defendant had agreed to hive the restaurant part of the partnership business completely out of the partnership and into the company. The court concluded that the more plausible explanation was that they intended to own the whole business as partners but for the company to operate the restaurant business on behalf of the partnership.

In the absence of an exhaustive definition of the partnership assets in the partnership deed, the court held that particular attention should be paid to i) the recital, which stated that the parties wished to carry on the business of an Indian restaurant in partnership; ii) clause 5, which stated that all the equipment, assets and fittings in the property and used for the purposes of the business should be partnership assets; and iii) clause 6, which provided that the capital was £6 million and which was only explicable if the value of the business was included. These demonstrated that the business was a partnership asset and that this was the basis on which the shares in the company were held by the partners as partnership assets.

The court also held that the obligations in s29 of the Partnership Act 1890 to account for benefits derived from the partnership, and in s30 to account for the profits of a competing business, did not arise. Any benefit derived by the second restaurant from the use of the name of the first and its reputation was modest and short lived, especially given that the name was not unique. There had also been no meaningful competition given that the second restaurant was over 200 miles from the first. In any event, the parties had given prior consent to either of them operating a competing business. It was true that the deed was silent on the point, and a file note referring to prior agreement reached during the negotiations (which recorded that competition was allowed, and which explained the deletion of a clause in an earlier draft forbidding involvement in any other business) was not admissible to the construction of the partnership deed. However, that did not prevent a separate oral agreement, which the court considered to have been made and recorded in that file note, amounting to a valid consent under s30.

The court concluded that the relationship between the two partners had wholly broken down, and therefore that it was it was just and equitable to make an order for the dissolution of the partnership under s35(f) of the Partnership Act and for the partnership to be wound up and a final account taken.

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