***Tribe v Elborne Mitchell LLP* [2021] EWHC 1863 (Ch)**

An LLP agreement made provision for each member to receive a fixed share of profits and, if there was a balance, distributions from a discretionary fund could be allocated by a decision of the members on a recommendation from the senior member. A former LLP member disputed the distributions in certain years.

The court noted first that where an agreement could give rise to rival interpretations, weight should be given to the interpretation which was more consistent with business common sense (*Wood v Capita Insurance Services* [2017] UKSC 24). Second, where the agreement gave one party a discretion in making an assessment or choosing from a range of options there was an implied term that the discretion would not be exercised in an arbitrary, capricious or irrational manner, and such a term was difficult, though not impossible, to exclude (*Braganza v BP Shipping Limited* [2015] UKSC 17, *Mid Essex Hospital NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 and *Charterhouse Capital Ltd* [2015] EWCA Civ 536). The discretion was also fettered because in the context of an LLP a decision-making power must be exercised in good faith and in the best interests of the LLP. Thus the senior member making a recommendation, and the members collectively in making a decision, must exercise good faith and should not take into account irrelevant matters or ignore relevant ones, and the recommendation or decision should not be outside the range of reasonable proposals that might be made in the circumstances.

Applying these principles, the court held that the Agreement here did not require the members to adopt the senior member's recommendations, or to adopt or reject them in their entirety. Even if this had been a possible interpretation, it would have been rejected because it made less commercial sense, since it would have removed the opportunity for members to bring their personal knowledge and opinions into a debate, and would have meant that the whole process might fail and have to start again because of the senior member's failure to include a significant fact or matter. The recommendations did not need to be perfect or include all possible analyses, but needed to be full enough to allow a debate between partners, and could address matters other than financial performance, a term which in any event did not just include member billings. The court concluded that the recommendations had been reasonable exercises of the discretions to recommend and decide on distributions.

***Herberstein v TDR Capital General Partner II LP and others* [2021] CSOH 64**

A limited partner in a limited partnership registered in Scotland brought an action of count, reckoning and payment against the partnership. This action is a two-part procedure in the Scottish courts whereby a person such as a partner can compel payment of sums due to them in circumstances where they are not aware of precisely what sums are due. The first stage is concerned with whether the defender is liable to account, and the second stage is to ascertain what sum is due. This judgment concerned the first stage.

The court noted that there were advantages in choosing a Scottish limited partnership because under Scots law, unlike English law, partnerships had separate legal personality, but those who sought these advantages must accept the consequence of this choice that Scots law applied. It was fundamental to Scottish law that partners must act with what was referred to traditionally as 'exuberant trust' and more recently as 'utmost good faith', and the Scottish action of count, reckoning and payment was available to determine the amount due to a partner. The purpose of that action was the payment of sums due, not the provision of documents, which was simply a procedural step. This meant that it was different to the purpose in *Inversiones Frieira SL and another v Colyzeo II LP* [2012] Bus LR 1136, which was to obtain access to documents so as to enable the limited partners to understand the business in which they had invested. Here the pursuer was not seeking to understand the business, but to be paid what was due to him.

The court declined to depart from the normal two stages of the procedure, since this was not a situation where the pursuer had already received accounts. At this first stage the only question was whether the defenders owed a duty to account to the pursuer, and it held that they did. Partners owed a common law duty to account to other partners, and a duty under s28 of the Partnership Act 1890 to render true accounts and full information to the other partners, and the partnership agreement here did not have the effect of contracting the partners out of that duty. Its provisions simply regulated the administrative accounting procedure on the preparation and form of accounts and did not displace the legal obligation to account. The court expressly left open the question of whether it was ever possible to contract out of the s28 or the common law obligation to account, since that issue did not arise on the wording of this particular partnership agreement. It concluded that the action should proceed to the second stage.

***McMonagle v Harvey and others, Re Integrated Control Solutions (Eastern) Ltd* [2021] EWHC 1374 (Ch)**

Harvey and McMonagle had carried on business together through a company, but the relationship broke down after McMonagle discovered that Harvey had been operating a competing sole trader business and began to exclude him from management and withdraw money from the business. Each party brought a petition for unfair prejudice under s994 of the Companies Act 2006 seeking an order that Harvey sell his shares to McMonagle. However, McMonagle considered that the purchase should be discounted to reflect the fact that Harvey only had a minority shareholding and had been guilty of unfairly prejudicial conduct, whereas Harvey considered that there should be no minority discount and that account should be taken of McMonagle's unfairly prejudicial conduct.

The parties agreed that they had also formed a partnership, but disputed whether it had been formed before or after the company. The court held that they had initially carried on business though a partnership but then incorporated the company, with the partnership continuing to operate as a tax efficient way of receiving dividends and retaining ownership of some of the business chattels including computers. As to whether the company had

operated as a quasi-partnership, it noted that the parties shared profits equally did not have formal Board meetings but shared the same office and decided matters informally between themselves, and had a close personal relationship outside of the business, with McMonagle being godfather to Harvey's children. The articles of association were consistent with each having an equal role in management; there was no provision for the chairman of meetings of the Board or the members to have a casting vote, pre-emption rights applied on the transfer or issue of shares. The court therefore concluded that the business relationship began as a partnership and continued via a company, the operation of which was dependent on their relationship as the management team. Even if the partnership had been formed after the company, as one party contended, the court held that it would still have reached the same conclusion. The company operated on the basis of a close relationship of trust predicated on their equal participation on the operation of the business, and was therefore a quasi-partnership.

The court reviewed the jurisprudence on unfair prejudice and held that both parties had been guilty of such prejudice. Although the ways in which a member's interests may be prejudiced were virtually unlimited, in the context of a quasi-partnership they included the breakdown of trust and confidence. A minority discount was not normally appropriate in the case of a buyout in a quasi-partnership but where, as here, the minority shareholder was not an innocent party, it would be appropriate. McMonagle should not be required to pay a premium for a buyout to remedied a situation that he had not caused, albeit that his reaction to it could be criticised.

Moore Stephens LLP and others v Parr **[UKEAT] 0238/20/00**

The claimant was an equity member of the first respondent, an LLP. The LLP Agreement provided for all members to have a normal retirement age of 60, but with the LLP having a discretion to extend beyond that time. The claimant wished to stay on after his normal retirement date, and the parties agreed that he should continue for two further years but only as a non-equity member. They concluded a De-Equitisation Agreement under which he was repaid his capital and lost any right to distribution of capital profits. During the two years the LLP developed a plan to sell parts of its business, and the claimant alleged that its refusal to share the proceeds with him constituted direct age discrimination contrary to s13 of the Equality Act 2010. Section 123 of this Act imposed a three-month time limit which ran from the date of the conduct to which the complaint related, unless the tribunal considered an extended time limit to be just and equitable, and provided that for this purpose 'conduct extending over a period' was to be treated as done at the end of that period. The parties disputed whether time here ran from a single act, the De-Equitisation Agreement, or whether there was a continuing act in the form of the treatment of the claimant after that date.

The Employment Appeal Tribunal (EAT) reviewed relevant case law on the meaning of 'conduct extending over a period'. In *Amies v Inner London Education Authority* [1977] ICR 308 a distinction was drawn between the failure to appoint the female applicant, and the

continuing consequences of that failure. Similar distinctions were drawn in *Barclays Bank plc v Kapur and others* [1991] ECR 208 in relation to the failure to upgrade the applicant due to discounting her period of service overseas, and the continuing consequences of that failure, and in *Sougrin v Haringey Health Authority* [1991] ICR 791 (EAT) and [1992] ICR 650 (CA) in relation to a failure to regrade the applicant. In contrast, in *Calder v James Finlay Corporation Ltd* [1989] IRLR 55 it was held that a mortgage subsidy scheme which could only be accessed by male employees constituted continuing discrimination for so long as the female applicant remained in the employment. In *Owusu v London Fire & Civil Defence Authority* [1995] IRLR 574 it was held that a succession of specific instances could indicate the existence of a practice, which could in turn constitute a continuing act. In *Hendricks v Commissioner of Police of the Metropolis* [2002] EWCA Civ 1696 it was held that in circumstances where 60 or more incidents over several years were alleged, there could be continuing discrimination against the applicant even while she was off sick and absent from the work environment. In *South Western Ambulance Service NHS Foundation Trust v King* [2020] IRLR 168 the court noted that continuing conduct arose because of a link or connection between otherwise separate actions, and could take the form of a policy, rule or practice in place in accordance with which there were separate acts of discriminatory treatment, or of separate acts linked to one another which provided evidence of a discriminatory state of affairs.

The EAT held that the present allegation was of a discriminatory policy rather than a discriminatory state of affairs, but that this was not a case where such a rule continued to apply with a resulting continuing discriminatory effect. Instead, the De-Equitisation Agreement had made a one-off and permanent change to the claimant's status as an LLP member, and the claim related to the consequences of this rather than to continuing conduct. The EAT therefore concluded that time ran from the date on which this Agreement had been entered into, and remitted the case to the Employment Tribunal to consider whether to grant an extension of time.

***Harcus Sinclair LLP and others v Your Lawyer Ltd* [2021] UKSC 32**

This case concerned a number of issues in relation to a non-compete undertaking given by a solicitor on behalf of his law firm, an LLP, to another law firm, in relation to contemplated group litigation. The undertaking was that the LLP would not accept instructions from, or act on behalf of, any other group of claimants in the litigation without the permission of the other firm.

The court held, first, that the non-compete obligation did not go beyond what was necessary to protect the firm's legitimate interests, since those interests included the parties' non-contractual intention to collaborate informally. It was therefore not unenforceable as an unreasonable restraint of trade.

Second, however, it did not take effect as a solicitor's undertaking so as to trigger the inherent supervisory jurisdiction of the court over solicitors. This was because the subject

matter did not involve the sort of work which solicitors undertook not to do as part of their ordinary professional practice, and the reason for giving the undertaking was not to further the interests of a client as part of a professional service but to further the interests of the firm. Even if it had been a solicitor's undertaking, it would not have been enforceable against the LLP because the LLP was not an officer of the court and indeed was not a solicitor but an LLP. The solicitor who signed it did so as agent for a disclosed principal, the LLP, and was therefore not personally liable on it. Where a solicitor gave an undertaking on behalf of a general partnership of which they were a partner, they would be acting as agent for all the partners, including themselves (s5 of the Partnership Act 1890) and would be jointly liable as a partner (s9). However, where an undertaking was given on behalf of an LLP, the separate legal personality of the LLP and the limited liability of members meant that it only bound the LLP.

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

A previous judgment in these proceedings was noted in A Propos Partnership in November 2020. One of three equity partners in a solicitors' firm was convicted of a number of offences of dishonesty, and claims were brought against the two innocent partners by parties who alleged that they had suffered loss as a result of the fraudulent breach of trust.

In this judgment the court held that the exception in s21 of the Limitation Act 1980 to the usual six-year time limit on the bringing of proceedings did not apply here. That exception applied to an action by a beneficiary of a trust in respect of fraud 'to which the trustee was a party or privy'. It was clear that ss11 and 12 of the Partnership Act 1890 made innocent partners liable for a dishonest partner's acts in breach of trust, but these provisions did not make them 'party or privy' to those acts. In *Thorne v Heard* [1894] 1 Ch 599 (CA) and [1895] AC 495 (HL) the courts drew a clear distinction between liability for the wrongs of another, without which there would be no claim, and being party or privy to those wrongs so as to exclude the limitation defence. That case provided authoritative guidance on the meaning of 'party or privy' by referring to whether the defendant had participated in the fraud, or had any knowledge of it, or had assented to or ratified it, or had received any benefit from it, or had any moral complicity or any responsibility for it so as to be tainted by it. No cases supported the proposition that a fraudulent trustee's partner was to be to be treated as 'party or privy' to the fraud if they were entirely innocent. Here, there was no suggestion that the other partners were responsible for the fraud, the caselaw made it clear that they were not 'party or privy' to it merely by reason of the partnership relationship, and there was nothing in the Partnership Act which had the effect of making them 'party or privy' to it.

***Charles Tyrwhitt LLP v Revenue and Customs Commissioners* [2021] UKUT 165 (TCC)**

A number of employees of an LLP , who were members of an employee bonus scheme, became LLP members. They received bonuses from the scheme after they had become members, and HMRC treated these as earnings derived from employment, with tax and National Insurance Contributions (NICs) payable accordingly. The LLP argued that the bonuses were received by the members in their capacity as members, and should therefore be taxed and assessed for NICs as self-employed persons.

The tribunal upheld HMRC's decision. The Social Security Contribution and Benefits Act 1992 (SSCBA) distinguished between employed and self-employed earners, and the parties agreed that the members who had been paid the bonuses had changed their status from the former to the latter at the time they became members, and that as members they ceased to be employees. In order to determine whether a payment constituted earnings in employment it was necessary for it to be made by reference to the service the employee rendered as an employee and to be a reward for past, present of future services (*Hochstrassser (Inspector of Taxes) v Mayes* [1959] 3 All ER 817. The fact that the payment was made after employment had ceased was irrelevant (*RCI Europe v Woods (Inspector of Taxes)* [2004] STC 315). The tribunal concluded that the bonus payments had been made by virtue of the members' having complied with all the conditions of a scheme only open to employees, and not by virtue of them being LLP members. Section 4(4) of the LLP Act 2000, which provided that an LLP member was not to be regarded as an employee unless he would have been so regarded had the LLP been a partnership, did not affect that conclusion because a finding that a payment was derived from a former employment did not necessitate a finding that the recipient continued to be an employee. In any event, s4(4) took effect subject to any specific rules to the contrary, and the Social Security (Contributions) Regulations 2001 made it clear that earnings received in respect of an employment after the employment had ceased were to be treated as an addition to a payment of earnings made before the end of the employment.

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