***Parr v MSR Partners LLP (formerly Moore Stephens LLP) and others* [2022] EWCA Civ 24**

The appellant had been an equity member in the first respondent LLP. He alleged age discrimination by the respondents.

The LLP agreement provided for a normal retirement age of 60, but also provided a discretion for the managing partner to agree an extension of membership if there was a valid business case to do so. In October 2017 the appellant and the LLP entered into a de-equitisation agreement which provided that he would cease to be an equity partner on reaching normal retiring age in April 2018, but would then become a salaried member. He was not given the option of remaining an equity member, although some other equity members had previously been allowed to do this.

In September 2018 the appellant learned that the LLP was planning to sell parts of its business, but in December 2018 he was told that he was not entitled to share in the proceeds because he was not an equity member. The sale took place in February 2019.

The appellant issued a claim in January 2019, arguing that he had been discriminated against on grounds of age, contrary to the Equality Act 2010, and that his claim had been brought within the three-month time limit because there had been discriminatory conduct over a period of time, and s123(3)(a) of the Equality Act provided that, for the purpose of calculating the time limit on bringing proceedings, conduct continuing over a period of time was to be treated as done at the end of that time.

The Court of Appeal dismissed the appeal. It held that the de-equitisation agreement made a one-off and permanent change to the appellant's status as an LLP member, and so his losses were not derived from the ongoing application of a general discriminatory rule relating to the payment of remuneration to a group of workers with a particular protected characteristic. The fact that the discretion in the LLP agreement resulted from, and was exercised because of, the underlying normal retirement age did not result in there having been a discriminatory rule in operation throughout. There was therefore no continuing conduct for the purpose of s123(3)(a) of the Equality Act.

The court also noted that if the contrary argument were accepted, it might encourage greater ruthlessness by partnerships and LLPs in making sure that a retirement age clause was put into effect so as to terminate the relationship altogether, rather than allowing the former equity member to continue in the lesser status of salaried member, since the latter would leave the firm exposed to a discrimination claim for so long as any contractual relationship existed between the parties.

***TR, SP and SR Rogers v Commissions for HMRC* [2021] UKFTT 0458 (TC)**

Criminal charges for selling stolen property had been brought against two partners in a three-partner scrap metal firm. One was found not guilty and one successfully appealed his conviction. The legal defence costs of both partners were claimed as a deduction in the partnership accounts. Section 34 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA) provided that no deduction was allowed for expenses not incurred wholly and exclusively for the purposes of the trade. HMRC rejected the deduction, and the partners challenged this decision.

The tribunal held that the purpose of incurring expenses on legal fees was the defence of trade. It was not motivated by the risk of imprisonment, since there was no real risk of this, but by the impact of a conviction on the business and the ability to continue trading. The evidence showed that the lease of the partnership's premises would have been terminated, and it would have been unlikely that the Scrap Metal Dealer's licence would have been renewed.

The tribunal also held that this was the exclusive purpose. It was true that the successful appeal against conviction had an effect on the partner's reputation, but this was not necessarily the purpose of obtaining legal advice, and here the defence of personal reputation had not been relevant when deciding whether to incur legal fees. Indeed, the comments of the trial judge were such as to minimise any reputational damage, while the judgment of the Court of Appeal was not such as to wholly reverse any negative impact; and any damage was largely done by the initial reporting of the case.

***Moody v Estate of the late Norman Jones and others* [2021] EWHC 3443 (Ch)**

The claimant sought a declaration that the partnership had been dissolved by valid notices given by him under clause 13(iii) of the Partnership Agreement (dissolution for cause) or by the death of the other partner, and that he had validly exercised an option under clause 14 to purchase the other partner's share on the terms set out in the Agreement. The defendants argued that the claimant had abandoned his interest in the partnership and/or was barred by the equitable doctrine of laches from maintaining the claim, or that the deceased partner (the first defendant) had served a valid notice of dissolution under clause 13(iii) before the claimant had served either of his notices. The parties also disputed as to whether a particular building was partnership property and whether the second defendant, who was the first defendant's son and owner of the company which occupied the property, and the third defendant, which was the company itself, were liable to account for income received by them from the property.

The court held that the disputed building was partnership property. The register of title showed a transfer from the previous owner to both the claimant and the first defendant. In the absence of an express declaration of trust, the court considered that the key consideration was that although the defendant's company might have initially funded the purchase, the two partners had borrowed a sum in the name of the partnership which was paid to the company before the building was registered in their joint names. This raised a strong presumption that it was it was partnership property, pursuant to s21 of the Partnership Act 1890 which provided that property bought with the firm's money was deemed to have been bought on its account unless a contrary intention appeared, and there was nothing to rebut this. Indeed, the parties acted on the basis that it was partnership property: for example, consistently showing an item in the accounts for 'property at cost' when there was no other partnership property; and the first defendant on many occasions expressly referring to the building as being a partnership asset or to the claimant as having a 40% beneficial interest in it by virtue of his status as partner.

The court held that the claimant had not abandoned the partnership and was not to be treated as barred by laches from asserting his rights as a partner. The partnership was not purely about the management of the building, which was largely undertaken by the first defendant, but also about its development, which was the claimant's area of expertise. Attendance at the building in order to manage it was therefore only one part of the partnership's activities and so even if the claimant absented himself or was

excluded from the building that did not mean he did not have a continuing interest in the partnership's affairs. Abandonment would involve some form of agreement or estoppel based on an offer by the claimant to renounce his rights, and there was no evidence of any such agreement or of the defendant acting to his detriment in reliance on the claimant holding back from asserting that he was a partner. Laches would involve disallowing an equitable remedy because of unconscionable delay in acting to protect a claim, but even if laches could affect the claimant's property rights, which was doubtful, it could not apply here because there was no detrimental reliance as required if laches were to defeat the assertion of the rights of a partner.

The court held that the notice to dissolve given by the first defendant was invalid. First, the claimant had not committed 'grave' or 'persistent' breaches of the agreement as required by clause 13(iii)I of the Partnership Agreement so as to justify such a notice being served on him, although it refused to imply a term into the Agreement that a partner must have a reasonable opportunity to respond to allegations of misconduct prior to service of notice of dissolution for cause, since such a term was not generally to be implied (*Green v Howell* [1910] 1 Ch 495). The interpretation of these terms by the court is noteworthy because the Partnership Act itself includes a similar ground - wilful or persistent breach – for judicial dissolution. The court noted that a grave breach would go to the root of the confidence and good faith between partners *(DB Rare Books Ltd v Antiqbooks* [1995] 2 BCLC 306), and that persistent breaches must not only be repeated but also be of some gravity. Second, the claimant had not been guilty of conduct likely to have a serious adverse effect on the partnership business so as to justify a notice under clause 13(iii)I. Again, the interpretation of these terms is noteworthy because the Partnership Act includes a similar ground - conduct prejudicial to the business. – for judicial dissolution. The court noted that the appropriate considerations in relation to whether conduct would have such an affect were: i) the nature of the business; ii) the nature of the conduct; iii) whether the party had done something that ought not to have done in accordance with the express or implied terms of the partnership agreement; and iv) whether something had occurred that had fundamentally affected the confidence and good faith that existed between partners, without which any adverse effect of the conduct on the business was unlikely to be serious.

On the facts, there was no breach of clause 13. The claimant had not failed to contribute to a partnership debt as the first defendant had alleged. He had offered to provide any financial contribution needed but the first defendant had never notified him of any such need. Nor was he obliged to disclose advice which he had obtained in relation to this debt and the charge which secured it, because this was for his own benefit and not that of the partnership. The claimant's return of the key to the building and his lack of regular attendance there reflected the division of responsibility between the partners rather than any failure by the claimant to engage. The court also noted that this state of affairs had had lasted for several decades prior to the notice of dissolution served by the first defendant and that he had thereby waived any entitlement to dissolve, since the claimant's behaviour could not be regarded as a continuing breach which could not be waived. Furthermore, a partner's duty of good faith meant than an expulsion notice, or a notice of dissolution which had the same effect, should only be served in good faith for the benefit of the firm as a whole and not for the partner's own ends (*Blisset v Daniel* (1853) 10 Hare 493), whereas the first defendant had an impermissible collateral purpose of frustrating the claimant's attempts to obtain further information about the partnership accounts and the use of the partnership property.

However, the court held that both of the claimant's notices to dissolve were valid, since the first defendant had gravely breached the Partnership Agreement and been guilty of conduct likely to have serious adverse effect upon the partnership business by failing to

respond to the claimant's request for information, including about what was happening to rental income from the building. As a result, the claimant had also validly exercised the option under clause 14(ii) of the Agreement to acquire the first defendant's share. In any event, the partnership would have dissolved pursuant to s33 of the Partnership Act when the first defendant died, and so the validity of the dissolution notices only affected the date of dissolution which was to be considered when drawing up the balance sheet required by the Agreement.

As to the exercise of the court's discretion to grant specific performance of the option in the agreement to buy out the first defendant, the court ruled first that there was no evidence to support the contention that the claimant had not acted in good faith. Second, even if the claimant had attempted to acquire the third-party charge over the building in order to pressurise the first defendant to buy him out, which was not clear on the facts, this would not have been enough to bar a grant of specific performance. Third, the claimant could not be criticised for not serving a notice of dissolution earlier because he had no grounds to serve a dissolution notice for cause until the first defendant had failed to supply the information requested, and he could have had legitimate commercial reasons for seeking to avoid serving a notice for dissolution on notice under clause 13(i).

As to the valuation of the property, the court noted that the Partnership Agreement provided that the property should be valued by reference to the balance sheet as at the date of dissolution, adjusted in consequence of any valuation at the date of dissolution requested by either party within three months of the dissolution. Although the first defendant did not make the request within three months, the court held that time was not of the essence. The usual test was what the relevant words in the agreement would mean to a reasonable objective bystander with knowledge of the background. Time would normally be of the essence in the exercise of an option (*United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904), such as the option to purchase a partner' share, but this was not necessarily the case for any further time limits which arose as a result of the exercise of the right (*Simmers v James* [2008] SC (HL) 137), such as the option to request a valuation of the partnership property. Time could objectively be considered to be of the essence in order to give rise to a binding agreement between the parties for the acquisition of the partnership share and for the parties to know where they stood, but this did not apply to a request for a valuation. The court also noted that the Agreement provided for a valuation to be requested within two months in the event of dissolution on death, this was unrealistic since probate would not normally have been taken within this timescale, and this pointed to the three-month deadline for dissolution for cause not being intended to be a hard deadline either. What mattered was that any valuation should be obtained within a timescale which permitted the balance sheet figures to be adjusted in the light of it and thus in the same sort of timescale, and there was no three-month time limit on preparation of the balance sheet. Indeed, the requirement that the balance sheet be prepared 'as quickly as reasonably practical' reflected the possible existence of practical difficulties and consequent delays in immediately preparing a balance sheet and profit and loss account. Further, failure to request a valuation within three months, were this to be a strict deadline, could have very serious consequences and indeed did so here, since the book value of the property was approximately £20,000 whereas its current valuation was £2.25 million, and it was therefore unlikely that the parties intended it to be a strict limit. The court concluded that time was not of the essence here, and since the parties were a long way off having prepared a balance sheet as required by the Agreement, it remained open to the defendants to seek a valuation at the date of dissolution.

The court ordered the first defendant to account for all income in respect of the building, whether received from the second and third defendants or otherwise, and to compensate the partnership for the breach of duty of good faith (in respect of which the court ordered an inquiry as to the loss suffered by the partnership as a result). It held that the he had acted in breach of his duty of good faith to the claimant by failing to ensure that the fee payable under the formal licence over the building granted by him to the second and third defendants was accounted for to the partnership and, when the formal licence was replaced by other arrangements, by failing to define the basis on which they should account to the partnership. Furthermore, the agreement between the first and second defendants for the latter to receive 80% of the income from the building could not have been bjecttively honest, and the first defendant had no authority under s5 of the Partnership Act to enter into the licence or the subsequent arrangements because they were not 'act[s] for carrying on in the usual way business pf the kind carried on by the firm'.

The parties were agreed that, so long as a partnership existed, time could never run in respect of an action between partners based on their fiduciary duties. Time therefore only ran from dissolution, and so the claimant's claim was not statute barred under s23 of the Limitation Act 1980.

Finally, the court held that the second and third defendants were liable for an account of profits as constructive trustees from when the claimant began to make serious complaints about the failure to account to him for the profits made in respect of the building. After this, the failure to account could not objectively be considered to be honest behaviour, thus rendering the second defendant's behaviour unconscionable in retaining monies received without accounting to the partnership.

***BNM Parkstone LLP v Khazai and another* [2022] EWHC 345 (Ch)**

The parties disputed a number of issues concerning the business arrangements between them. Khazai, who was a member of the claimant LLP, was responsible for the day to day management of part of its business. He subsequently transferred the operation of that part of the business to a company of which he was a member. The court held that this was a repudiatory breach of the contract between Khazai and the LLP.

Of particular interest as a matter of LLP law is the dispute about fiduciary duties.

The court held that Khazai owed fiduciary duties to the LLP in relation to the part of its business which he managed. First, the contract between the LLP and Khazai provided that he would manage the day to day operation of that part of the business, and thus necessarily put him in a position where the LLP placed trust and confidence in him. These fiduciary obligations were subject to the terms of the contract (*F&C v Barthelemy* [2011] EWHC 1731 Ch). Second, the court held that Khazai also owed potential fiduciary obligations as a member of the LLP. These would depend on his specific role and circumstances and although the default rules in the LLP Regulations 2001 could be relevant in this respect, here they were displaced by the provisions of the contract.

The court held that Khazai's actions as a fiduciary were not carried out in good faith and thus that his claim for relief under s1157 of the Companies Act 2006 (applied to LLPs by the LLP Regulations 2009) must fail. Section 1157 provides that in an action against an LLP member for breach of duty, the court could relieve the member of liability if he had acted honestly and reasonably, and ought fairly to be excused. However, in transferring

the management of the LLP’s business without its consent or knowledge, Khazai had made a choice to prefer his own interests over those of the LLP and ‘as such it was a breach of the core fiduciary obligation to act in the interests of the beneficiary’. Furthermore, although he had not acted dishonestly, his conduct was not reasonable given that it was contrary to the contract and that he had acted unilaterally. He had also failed to communicate with the LLP about the situation and had acted with secrecy.

However, the court held that although Khazai was in breach of contract and in breach of fiduciary duty, he was nonetheless entitled to the share of profits which the contract allocated to him for so long as the contract existed. The court also ordered an account of his interest in the LLP to establish the value of his share.

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