Town & Country Properties (GB) Ltd and others v Black Capital (an unregistered company) and others **[2022] EWHC 2914 (Ch)**

The petitioners had originally petitioned the court for a winding up order against an investment partnership (which the provisional liquidator considered had operated a Ponzi scheme) under Art 7 of the Insolvent Partnerships Order 1994 (IPO). Art 7 which set out the procedure for applying for winding up of a partnership by a creditor without any concurrent petition against a partner. They subsequently issued bankruptcy petitions against the two partners, Patel and Ubhi, but without first serving statutory demands against them as required by the Insolvency Rules. They then sought, and were granted, permission to amend the petition so that it was presented under Art 8, which set out the procedure for applying for the winding up of a partnership by a creditor with concurrent petitions against one or more partners. Finally, they sought permission to present the bankruptcy petitions on a date different from the winding up petition.

The court held, first, that there was a dispute on substantial grounds as to whether Ubhi was a partner. The court noted, on the one hand, that:

i) the managed fund agreements, entered into by the partnership and the petitioners each time the petitioners made an investment, were signed by both partners either physically or electronically;
ii) a business card handed to the petitioners displayed Ubhi's name, the word 'partner' and the name of the partnership business, and gave contact details which were those of the business;
iii) there were emails and Whatsapp messages in which Ubhi gave directions as to the investments, or to which he replied or was copied in, and a video in which Ubhi stated that he and Patel were partners; and
iv) there was a partnership agreement signed and executed between Patel and Ubhi.

However, on the other hand, there was sufficient contrary evidence to demonstrate a dispute on substantial grounds, including:

i) Ubhi's evidence that he only signed the fund agreements as a partner because he did not understand the legal significance of this and was told by Patel to do so, and that he had only signed some of them – which, though implausible, could not be ignored; and
ii) the existence of an independent contractor agreement, and an employment contract, with Ubhi, were both irreconcilable with a finding that he was a partner, not least because the partnership agreement prohibited a partner from receiving remuneration and its provisions for partner drawings were inconsistent with an employee salary.

Second, the partnership petition was for a liquidated sum. The managed fund agreements were fixed term agreements which obliged the partnership to return 90% of the investment after the expiry of the term. This created a liquidated debt for that sum. The fact that the agreement recognised the possibility of losses greater than 10% did not prevent there being a lower liquidated sum due, and in any event, there was no evidence that that there had been such losses.

Third, the court refused to grant an order dispensing with the service of a statutory demand prior to the issue of the partnership petition or otherwise waive the defect in the petition as amended, and so the petition stood to be dismissed. The court noted that Art 7(1) IPO applied Part V of the Insolvency Act 1986 (IA 86), including ss223 and 224, so that the petitioners could rely on any of the ways set out in those sections to establish

that the partnership was unable to pay its debts. Section 224(2) allowed the balance sheet insolvency test to be used, and so there was no requirement to issue a statutory demand in relation to an Art 7 petition. However, the petition as amended was an Art 8 petition, and Art 8 expressly excluded ss223 and 224. This meant that the only way for the petitioners to establish the inability to pay debts was the one set out in s221 as modified by Sch 4, Pt II, of the IPO, which provided that the statutory demand regime was the only option. IA 1986 required the court to be satisfied that the partnership was unable to pay its debts before it could consider whether to make a winding up order, and there was no mechanism in the IPO, IA 1986 or the Insolvency Rules which would enable the court to ignore the requirements of Art 8.

The court noted that Art 14 IPO inserted into IA 1986 s168(5), which enabled the court to make any order as to the conduct of insolvency proceedings, and apply any provision of the IPO with any necessary modification. However, s168(5) only applied where a winding up petition had been presented against a person, and the court's attention was subsequently drawn to the fact that the person was a partner of an insolvency partnership. That was not the case here; the petitioners had presented a petition against the partnership under Art 7 and then amended it so as to proceed under Art 8.

The court also noted that Art 19(5) IPO stated that nothing in the IPO was to be taken as preventing any partnership creditors from petitioning against one or more partners liable for that debt, without including the others and without presenting a partnership winding up petition. However, although this meant that the petitioners had a choice to deal with the individual partners either under or outside the IPO, they had, by amending the petition, chosen to use Art 8 IPO.

Fourth, the court held that the same reasoning applied to the failure to properly serve the statutory demands against the individual partners, in accordance with ss267(2) and 268 IA 1986 and the Insolvency Rules as modified by the IPO, so that the partnership petition also stood to be dismissed for these reasons. The statutory demands had been served, but did not provide for the requisite period of three weeks for the debtor to apply to set them aside, and the court refused to grant an order waiving the defect that the bankruptcy petitions were issued prior to expiry of that period

Finally, the court held that although it had power under s124 IA 1986, as modified by Art 8 IPO, to exceptionally permit petitions under Art 8 to be presented on different dates, it was unlikely to grant permission retrospectively for the bankruptcy petitions to be presented after the partnership petition, since the petitions failed for other reasons.

Morton v Morton and another **[2022] EWHC 2689 (Ch)**

The court had previously made an order in these proceedings declaring that a family partnership had dissolved, and that an account should be taken. This judgment concerned a dispute on the repayment of capital, and as to a claim under s42 of the Partnership Act 1890.

The account which had been taken concluded that interest payments on a partnership mortgage for which one partner had assumed responsibility should be treated as a cost of the business and apportioned in the profit sharing ratios. This was because it had been used to fund the purchase of partnership land and the partnership had used the land rent-free. The account also concluded that the capital repayments could not be

treated as a partnership liability. It had been understood that the partner who had taken responsibility for the mortgage would be credited with value of the land, that his secured borrowing would be deducted from his share, and that it would not be treated as a partnership liability on dissolution. This latter finding was challenged by the claimant, but upheld by the court.

The court also held that while the partnership accounts indicated an intention to make gifts to the children or grandchildren, there was no evidence that such gifts were ever made, and a unilateral intention to do so evidenced in the partnership accounts was insufficient to create a trust (*Milroy v Lord* [1862] EWHC (Ch) 78) or render it unconscionable for the partners to retract (*Pennington v Waine* [2002] 1 WLR 2075).

Section 42 of the Partnership Act 1890 is headed 'Right of outgoing partner in certain cases to share profits made after dissolution', and the court noted that while this heading would not have been debated in Parliament and would have been included for ease of reference only, it could be taken into consideration, as part of the overall context, when construing the Act itself.

Section 42 provides:

(1) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

(2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

The court noted that the proviso in s42(2) - that the outgoing partner lost their entitlement in s42(1) if the partnership agreement provided an option to purchase and that option was exercised - referred only to one of the options provided by s42(1), the outgoing partner's right to a share in profit. However it held that s42(2) must also apply to the alternative right to interest. First, there would be no statutory right of election under s42(1) if one of the options was barred under s42(2), and if that was intended the Act could reasonably have been expected to provide for this in clear and unambiguous terms. Second, in the event that a contractual option was exercise there was no obvious reason to exclude the outgoing partner's share of profits but not her alternative right to interest. Although the opposing view was taken in *Lindley & Banks on Partnership* (20th edn at para 25-41), the court considered that this was based on a narrow view of the reference in s42(2) to 'further or other share of profits' and did not take into consideration the full ambit of the statutory mechanism in ss42(1) and (2).

Here, the partnership deed had provided an option to purchase within a specified time limit, but the continuing partners' attempt to exercise this option had been set aside by the court, although the court had extended the time for service of another option notice, based on the doctrine of proprietary estoppel. However, the court held that the right to

serve such a notice was based on the judicial award rather than the partnership deed, and so s42(2) did not apply.

The court concluded that the outgoing partner was entitled to statutory interest under s42(1), but that this was limited to the share of partnership assets from which the continuing partners carried on the business, and not the partnership asset which had continued to be occupied by the outgoing partner.

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