***Lineker and Bux t/a Gary Lineker Media v The Commissioners for HMRC* [2023] UKFTT 00340 (TC)**

This case concerned the question of whether the intermediaries legislation known as IR35, contained in the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) and the Social Security (Intermediaries) Regulations 2000, applied to income received by the Gary Lineker Media partnership for the provision of Lineker's services to the BBC and BT Sport.

IR35 is intended to ensure that a worker who provides their services via their own intermediary pays broadly the same income tax and national insurance as an employee would. Section 49(1) ITEPA applied IR35 where a worker's services were provided under arrangements involving a third party (the intermediary) and not under a contract directly between the client and the worker.

The tribunal held that, in principle, IR35 could apply where services were supplied by a partnership. However, it concluded that since there were direct contracts between the BBC and Lineker, and between BT Sport and Lineker, IR35 did not apply on the facts of the case.

On the application of IR35 to partnerships, the tribunal noted that s49(3) ITEPA explicitly provided that a third party included a partnership of which the worker was a member. In addition, s52 ITEPA set out the conditions of liability where the intermediary was a partnership, and s164 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA) provided 'special rules for partnerships' for the purposes of calculating the profits of a firm treated as making employment payments under IR35. The fact that a partnership does not have separate legal personality therefore did not mean that a it cannot be an intermediary.

In the present case, there was a partnership according to the definition in s1 of the Partnership Act 1890, as a relationship which subsists between persons carrying on business in common with a view of profit. The tribunal helpfully summarised the principles relevant to determining the existence of a partnership at para 80 of its judgment:

(1) It is critical to determine (objectively) whether the parties intended to create a partnership (*Tiffin v Lester Aldridge LLP* [2012] EWCA Civ 35 at [21];
(2) In determining their intention all the features of their agreement must be considered, regard is to be given to the "substance of the relationship, not the words used by the parties to describe it" (*Sotheby's v Mark Weis Ltd* [2020] EWCA Civ 1570 at [84];
(3) It is not conclusive that someone is held out to the outside world as a partner, "one must in every case look at the terms of the relationship to ascertain whether or not it creates a true partnership" (*Stekel v Ellice* [1973] 1 WLR 191 at 473);
(4) Although it may provide "some evidence" their business is a partnership business, the terms used by the parties to describe their relationship will not be conclusive (*Patel v Barlows Solicitors (a firm)* [2021] 4 WLR 6 at [107];
(5) While a fixed remuneration does not preclude a finding of a partnership, it is in most cases a strongly negative indication of one: *M Young Legal Associates Ltd v Zahid Solicitors (a firm)* [2006] 1 WLR 2562 at [33];
(6) Although s 1(1) of the Partnership Act 1890 refers to the aim of making a profit, it "studiously abstain[s] from reference to any necessity that it be shared." The partners are free to arrange for their remuneration in any manner they choose including by agreement that one partner should receive specific sums irrespective of profits (*Tiffin v Lester Aldridge LLP* [2012] EWCA Civ 35 at [41];

(7) It is not necessary for all partners to make a profit earning contribution for there to be a partnership (*Newstead v Frost* (1980) 53 TC 525 at 553); and
(8) It is not a prerequisite for a relationship of partnership to exist that one of the partners should be involved in the management of the partnership. It is well-established that a sleeping partner can be a partner (*Hodson v Hodson* [2009] EWHC 430 (Ch) at [53].

The tribunal also noted that the application of IR35 to partnerships would not result in double taxation. The combined effect of s56 ITEPA and ss163-164 ITTOIA was that, if IR35 applied, the partnership would have to pay NI contributions and operate PAYE in respect of the deemed employment payment, and the partners would be treated as having received the payment as taxable earnings, but the firm would be able to deduct the payment from its taxable income, and the partners would not have to pay NI contributions.

The tribunal considered that the existence of a partnership, and in particular the carrying on of a business in common, was indicated by the partnership agreement in a number of respects. First, it clearly confirmed and recorded the parties' intention to enter into a partnership, and their agreement to the terms setting out their roles in responsibilities in the partnership. Second, it prevented either party from entering into new business activities without the agreement of the other, which effectively bound each party if they agreed to such an activity, and it also provided that both parties would work to promote Lineker's image. Third, it limited the extent to which either party could undertake any financial activity or incur any debts. Fourth, each party had a veto over the admission of new partners. Fifth, it referred to partnership accounts, and gave both parties access to them.

Although the agreement provided for Bux to be paid a specified amount regardless of the profits, and that she was subject to specified obligations whereas Lineker was subject to no corresponding obligations, neither of these features were determinative on their own, and all of the features of the agreement had to be considered (*M Young Legal Associates Ltd v Zahid Solicitors (a firm*) [2000] 1 WLR 2562). The tribunal also noted that although it provided for Lineker to be the sole signatory on the bank account, it was not necessary for all parties to be involved in the management of the business for there to be a partnership. Equally, the fact that the termination clause did not contain complex provisions typical of a partnership did not mean the parties were not carrying on a business in common. Finally, the absence of provisions for the treatment of losses did not affect the finding that there was a partnership since, in any event, s24(1) of the Partnership Act 1890 would have exposed Bux to liability for losses had there been any.

In addition to the partnership agreement, the tribunal held that its conclusion that a partnership existed was supported by the preparation of partnership accounts for each of five years in the name of Lineker and Bux trading as GLM, partnership tax returns for the same years identifying GLM as a partnership and Lineker and Bux as its partners, individual self-assessment returns in which it was stated that the individual was in a partnership, the contracts with the BBC and BT Sport which stated that GLM entered into them as a partnership, and information provided to HMRC at a meeting at which Lineker was present confirming the existence of a partnership.

As to whether IR 35 was inapplicable because there was a direct contract between the worker and the client, this was the first tribunal case in which the question had arisen. Previous cases had concerned the use of a company, and the fact that a company had separate personality from the worker meant that the question of whether there was a direct contract between the client and the worker had not arisen. Here, the contracts had been made between the BBC, or BT Sport, and Lineker and Bux as the 'Partnership', or Lineker and Bux trading as GLM 'the Partnership'. The BBC contracts were signed by both Lineker and Bux, either as 'Partners of the Partnership' or with a front page making it clear that they were signing in that capacity by stating that 'each [was] a Partner and trading as GLM, together the "Partnership"'. Section 5 of the Partnership Act provided that each partner was the agent of the firm and his partners, and that his acts bound them. The effect of s5 was that each partner acted both as principal and as agent, binding the firm and his partners in all matters under his authority (*Memec Plc v Inland Revenue Commissioners* [1998] STC 754).

However, the tribunal noted that had the contracts been signed by Bux only, the direct contract would have been either with her as Lineker's partner and thus agent, or with GLM given that the 'third party' definition in IR35 could include a partnership of which the worker is a member.

***THJ Systems Limited and Optionnet LLP v Sheridan and Sheridan Options Mentoring Corporation* [2023] EWHC 927 (Ch)**

This case involved a disputed expulsion of an LLP member. The LLP had two members, a corporate member, THJ, and an individual member, Sheridan. The business of the LLP was to sell and provide training on 'ONE' software. The LLP agreement between the LLP, THJ and Sheridan, granted an exclusive licence to Sheridan's company, the Sheridan Options Mentoring Corporation (SOM), to use the ONE software.

The LLP served notice of expulsion on Sheridan, pursuant to clauses of the LLP agreement which permitted expulsion for serious or persistent breaches of the LLP agreement itself or of the software licence agreement. The clause permitting expulsion for breach of the software agreement also required that the breach had not been remedied. The notice of expulsion was signed by the director of THJ 'for and on behalf of [the LLP]'.

After considering a number of cases (*Moody v Estate of the Late Norman Jones* [2021] EWHC 3443 (Ch), *Farman v Sunderland Association Football Club Ltd* [2015] EWHC 3759 (QB) [2016] IRLR 185, *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland (trading as Medirest)* [2013] EWCA Civ 200, *Gallagher International Ltd v Tlais Enterprises Ltd* [2008] EWHC 804 (Comm) and *Hanger Holdings v Perlake Corpn SA* [2021] Bus LR 544), the court summarised the law in relation to the 'serious breach' requirement in the LLP Agreement as follows (para 103):

> i) A serious breach is a material breach which is more than trivial but something less than a repudiatory breach.
> ii) A serious (or material) breach is one that has a serious effect on the benefit which the innocent party would otherwise derive from performance of the contract in accordance with its terms.
> iii) In deciding whether a breach is serious or not the court should consider all relevant circumstances, including the nature of the contract, the nature of the contractual term that has been breached, the nature of the breach, and the consequences or potential consequences of the breach.

It summarised the law in relation to the 'persistent breaches' requirement in the LLP Agreement as follows (para 104):

> i) In addition to the breaches in question being repeated there should also be some gravity to them, i.e. they should be non-trivial.
> ii) The repeated breaches must amount collectively to something serious in all the circumstances, including the nature of the contract, the nature of the contractual

term that has been breached, the nature of the breaches, and the consequences or potential consequences of the breaches.

The court also held that the test to be applied in order to determine whether any breach was remediable is whether it could be cured so that matters were put right for the future (*L Schuler AG v Wickman Machine Tool Sales* [1974] AC 235).

The court rejected most of the claims of breaches. It held that Sheridan's failings in relation to the provision of webinars, which were that they were sometimes shorter or longer than the specified hour, or did not take place exactly weekly, did not breach the agreement and certainly not seriously. The webinars had taken place for approximately the specified amount of time and at approximately the right intervals. The court noted that the claim 'takes no account of the ordinary give and take to be expected between business partners in a business involving the delivery of training and mentoring' (para 115).

The court also held that Sheridan's failure to display the specified copyright notice on materials, though a breach, was not serious or persistent. The ONE software itself generated a clear copyright notice, Sheridan had generally displayed a short copyright notice, the specified form had no additional legal impact, THJ had not been deprived of any material benefit under the LLP agreement, and the breach could have been remedied at any point before THJ's ownership rights were infringed.

The court also held that there was insufficient evidence that Sheridan had used software prohibited by the LLP agreement and that any such use had been erratic and fleeting rather than persistent or serious, and had petered out completely some years before the expulsion. There was therefore no serious or persistent breach.

The court further held that Sheridan's failure to provide a list of webinars in which ONE had been advertised was not a breach. The relevant clause in the LLP agreement replicated Reg 7(8)(of the LLP Regulations 2001, which itself replicated s28 of the Partnership Act. In *Inversiones Freira SL v Colyzeo Investors II LP* [2012] EWHC 1450 (Ch) the court had held that the obligation under s28 to provide full information was an obligation to produce existing documents, not an obligation to create records which did not exist. The LLP agreement did not oblige Sheridan to keep the requested record, and so his refusal to provide such a record was not a breach.

The court also dismissed the claim that the late filing of accounts was a breach. It was THJ that had responsibility under the LLP agreement for filing accounts, Sheridan was entitled to ask questions about the accounts once they were prepared and it was unreasonable to demined that he agreed them immediately, and the failure to file on time was because no arrangements had been made to do so. This was a failing by the LLP but, as between the members, it was the responsibility of THJ.

However, the court held that Sheridan's failure to advertise ONE in any webinars when SOM was also advertised, as required by the agreement, was a serious and persistent breach. To ensure ONE received a comparable level of advertising to SOM went to the heart of the joint business of the LLP. The central reason for THJ to enter into the business arrangement was to sell subscriptions for ONE, and fully equal advertising was essential to this. The fact that Sheridan had mentioned ONE was not sufficient; there needed to be a separate ONE slide, and its logo needed to be displayed on all materials. The court held that this was a serious breach of the advertising obligations, which robbed THJ of a benefit which it reasonably expected to receive under the LLP agreement. It was also a persistent breach which could not be remedied, and a breach which was capable of being a ground for expulsion.

The court held that the expulsion notice had been validly served. The agreement vested the power of expulsion in the LLP, and it did not make provision for the exercise of this power to be unanimous. The judgment in *Hitchman v CBAS Services* ((1983) 127 SJ 441) had made it clear that consent of the member being expelled was not necessary. This did not lead to uncertainty as to who could expel who first, because all the expulsion clauses in the agreement contained objective pre-conditions.

The court rejected the claim that the expulsion had breached the good faith requirement in the LLP agreement. The fact that the agreement used the language of 'utmost good faith' and provided that this duty was owed by members to each other (rather than just to the LLP) indicated that the parties intended to subject themselves to the same standard as partners in a traditional partnership. The court then summarised the relevant law relating to good faith (para 178):

> ii) In that context, partners are expected go much further than merely acting "honestly"; their conduct towards each other falls "to be tried by the highest standard of honour": *Lindley & Banks on Partnership* (21st ed.) at 16-01.
> iii) In the context of partnerships and analogous relationships, a duty of good faith requires certain minimum standards of fairness before a partner is expelled. A breach of that duty does not necessarily require dishonesty.
> iv) In the context of partnerships and analogous relationships, a duty of good faith requires certain minimum standards of fairness before a partner is expelled. A breach of that duty does not necessarily require dishonesty.
> v) The leading case is *Blisset v Daniel* (1853) 10 Hare 493, 68 E.R. 1022. In that case, one partner had persuaded his fellow partners to expel Mr Blisset without affording him the right to participate in the decision-making process.
> vi) The principles in *Blisset* still apply in the modern era. See - *Re Audas Group Ltd* [2019] EWHC 2304 (Ch) at para 108 (a quasi-partnership) and *Eaton v Caulfield* op cit at para 25 (an LLP). In *Re Audas* a member had been removed "without first clarifying and investigating with [him] the substance of their concerns, exploring the range of options that might be available and providing him with at least some form of warning". It was held that the duty of good faith had been breached.

The court concluded that the concern about the fall in sales figures and the potential connection to Sheridan's failure to comply with his advertising obligations was genuine, Sheridan had been given plenty of opportunity to respond to these concerns, there were no ulterior motives, and other possibilities to expulsion had been considered. There had therefore been no breach of the duty of good faith.

Cutlers Holdings Limited (formerly Sheffield United Limited and another v Shepherd and Wedderburn LLP and others **[2023] EWHC 720 (Ch)**

This case concerned claims for solicitors' negligence. However, of interest in terms of LLP law specifically, is the court's ruling that individual members of an LLP incurred personal liability to the LLP's clients only where there was an assumption of responsibility such as to create a special relationship with the partner themselves. In determining whether that was the case, the focus should be on whether the member, by their statements or conduct, conveyed directly or indirectly that they assumed personal responsibility towards the client (*Williams v Natural Health Foods* [1998] 1 WLR 830, 835). The same test applied whether liability rose from the member's own negligence (*Williams*) or their own breach of fiduciary duty (Whittaker and Machell, *The Law of Limited Liability Partnerships* (5th edn, 2021), para 18.16).

Mir v Mir **[2023] NSWSC 408**

This is a judgment of an Australian court, but English courts will refer to Australian cases where appropriate, and New South Wales' Partnership Act 1892 is in similar terms to the UK's Partnership Act 1890. This case concerned a business conducted by three brothers, one of whom had died by the time of this judgment, through a complicated structure of partnerships, trusts and companies. Of particular interest is the court's ruling on whether there was an overarching partnership between three brothers or, in the alternative, a number of sub-partnerships and, in either event, whether a receiver should be appointed to wind up the partnership(s).

As to whether there was an overarching partnership, the court held that this was inconsistent with the company and trust structures which the brothers had established. It was possible for a partnership to hold assets through companies (*Zheng v Deng* [2020] NZCA 614), in which case the partnership assets were the company shares. If the shares were not held equally by the partners, they could agree to hold them on trust for the partner in equal shares, or the shares could be held by a nominee on trust for the partnership. On the dissolution of the partnership, the shares could be sold, or the companies would up and their assets distributed to the partnership. However, if the underlying assets were subject to a trust, the rights to them would be governed by the terms of the trust and could not also be governed by the terms of a partnership. If a partnership itself was the beneficiary of a trust, its rights to trust assets would be governed by the terms of the trust.

The court noted that a similar problem existed in relation to the alleged sub-partnerships. These would normally be partnerships entered into by one or more partners of the main partnership in relation to their share in that partnership (*Lindley & Banks on Partnership* [current reference para 5-109 of the 21st edn, 2022]). However, the arrangements here were not all of that kind. For example, one partnership was between the brothers' wives. If the wives held their interests in the partnership property beneficially, the husbands would not have any interest in it. Yet if the wives held their interests on trusts for their husbands, the wives could not be in partnership. Another partnership was between companies in which the brothers had an interest. Again, if the property was held beneficially by the companies, the partnership could not have an interest in them. Yet if the companies held their interests on trust for the brothers, the companies could not be said to be carrying on business in partnership.

The court concluded that these difficulties were fatal to the claim that there was an overarching partnership. This was despite some evidence which was consistent with the existence of a partnership; for example, the three brothers had jointly operated a single business until at least 2017, had shared the profits equally between them, and had described themselves as carrying on business in partnership.

As to whether there were sub-partnerships, some were accepted to be partnerships by the parties, although the court also accepted as evidence the submission of partnership tax returns. Other alleged sub-partnerships owned property which had been acquired by the brothers as part of a business carried on by them on the basis they and their families would share the profits equally. In the broader context of the business this could not simply be categorised as the ownership of property as tenants in common, and although the submission of partnership tax returns was not conclusive, it did support the view that the relevant individuals carried on business in partnership.

Finally, the court held that, in the absence of contrary agreement, the partnerships in which the deceased brother had been a partner were dissolved by his death (under s33(1) of the Partnership Act 1892), and the other partnerships could be dissolved by the giving of notice by any partner (s32(c) of the Partnership Act).

Fisher v Dinwoodie **[2023] EWHC 1279 (Ch)**

The parties had carried on business, including the provision of consultancy services, for a number of years before they agreed that two companies would provide these services in future. The appellant owned the legal title to the shares of these companies, and the respondent claimed an interest in them.

At first instance the court held that the appellant's retention of title to the shares in the companies was a breach of his fiduciary duty to act in good faith and with loyalty in relation to the shareholding, and that the shares issued to the appellant were to be held on trust for both parties. The court also issued an injunction restraining the appellant from competing with the business of the companies.

On appeal, the court quoted from *Bristol & West Building Society v Mothew* [1998] Ch 1, 18, both as to the nature of a fiduciary:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence

and as to the nature of fiduciary duties:

> The distinguishing obligation of a fiduciary is the obligation of loyalty…This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

The court noted that outside the established categories of fiduciary relationships, including partnership, it was more difficult to establish that the necessary relationship existed (*Al Nehayan v Kent* [2018] EWHC 333 (Comm) and *Glenn v Watson* [2018] EWHC 2016). Relevant factors included reasonable expectations, an imbalance of power and vulnerability, and a close personal relationship, but no single factor would be sufficient.

Although the court accepted that a joint venture or participation in a company did not, without more, give rise to a fiduciary relationship (apart from the one owed by a director to a company) (*Shalson v Russo* [2005] Ch 281 and *Chahal v Mahal* [2005] BCC 655), it rejected the claim that a relationship which transitioned to a corporate relationship left no room for a fiduciary relationship because it was governed by company law. It also rejected the claim that s125 CA 2006, which gave the power to rectify the register of company members, ruled out any such relationship. First, it was a remedy not a right. Second, it was a summary remedy, which was not appropriate for substantial disputes on the merits. Third, it was not clear that it could be invoked in a dispute between two shareholders, or a between a shareholder and a would-be shareholder as to the latter's entitlements. The court also noted that there had been cases where directors had been held to owe fiduciary duties to the individual shareholders, and that these had mostly involved small and closely held companies and a family or other personal relationship (*Sharp v Blank* [2017] BCC 187).

The caselaw indicated than in a 'commercial relationship' parties were expected to define their relationship as a matter of agreement, and there was less room for implication of a fiduciary relationship where the parties had pinned down their responsibilities. However, that was not true of all commercial relationships, and indeed a partnership was a commercial relationship yet fiduciary duties had been imposed on that relationship.

The court upheld the finding that the appellant owed fiduciary duties, albeit that the relationship was at the lower limits of what was required to establish the existence of fiduciary duties. The relevant factors were that there had been a partnership prior to the involvement of the companies; the parties continued to use the words 'partner' and 'partnership' after the corporate structure had been introduced, and referred to their interests being 50/50; the appellant's statement that they had both always acted in good faith and in their mutual interests; the close personal relationship between the parties, which meant that it was not primarily a commercial venture and that they did not record their agreement'; and the respondent's reliance on and vulnerability to the appellant, as illustrated by the appellants' exclusion of the respondent from the business and his restructuring of the shareholding.

The court noted that fiduciary duties could be confined to a particular aspect of the relationship (*Farrar v Miller* [2018] EWHC Civ 172). Here, the respondent had trusted the appellant to deal with shareholding matters, and the appellant knew this. This gave rise to a fiduciary duty in that respect and so in relation to both sets of shares the appellant was in breach of duty in failing to give the respondent his entitlement. The duty was to act in good faith and loyally in relation to the shareholding of the company – which in practical terms, was t make sure that the respondent got his shares. This duty was absolute and so a breach did not have to be deliberate but could be careless.

As to the injunction, the court ruled that the duty of good faith and loyalty prevented competition with the venture while it was continuing but, absent special circumstances, would fall away when the relationship giving rise to it comes to an end (*A-G v Blake* [1998] Ch 439). There was no obvious reason why there should be a restraint on competition after that time. However, the joint venture relationship here was not a legally prescribed relationship like a contract of employment and therefore it was more difficult to know when it came to an end. The court considered that since no terms had been agreed for the duration of the relationship, it could be determined on (possibly reasonable) notice and therefore the appellant had been entitled to withdraw as he had done. As to whether the duty of loyalty had to be immediately qualified so as to allow competition thereafter, it might be possible to argue that the good faith and loyal winding up of the business required non-competition for a period of time but even if this was so, the time would be limited and have a limited purpose. Here the relationship had broken down 4 years before the first instance judgment and the joint venture was clearly not continuing even though the affairs of some of the companies had not been wound up. There was therefore no lingering duty of loyalty and the injunction should not have been granted, or at least without some qualification as to time or purpose.

The court therefore dismissed the appeal except as to the injunction.

Elspeth Berry
Reader in Law, Nottingham Law School,
Nottingham Trent University
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