Morton and another v Morton (as executrix of the estate of Morton (deceased) **[2023] EWCA Civ 700**

This case involved a family farming partnership. Previous judgments in the proceedings declared that the partnership had dissolved, that an account should be taken, and that the outgoing partner was entitled to statutory interest under s42 of the Partnership Act 1890.

Section 42(1) provides that, pending settlement of accounts, an outgoing partner is entitled to the share of profits attributable to the use of their share of the partnership assets, or to interest on the amount of their share. Section 42(2) excludes this right where the partnership agreement gives the continuing partners an option to purchase that share, and they exercises it.

The appellants alleged that since the judge had effectively varied the terms of the original option to purchase, by extending the limit for the exercise of the option in response to a successful claim for proprietary estoppel, and the option had been exercised, s42(2) precluded an award of interest

The Court of Appeal rejected the judge's rigid distinction between his judicial function in awarding the remedy, and the contractual option available under the partnership agreement. It considered that appellants had exercised a contractual option, albeit in the form modified by the judge.

The question then arose as to whether this prevented the payment of interest under s42(2). The Court held that it did. Although s42(2) only referred to the right to a share of profits being taken away if an option to purchase was exercised, and did not mention the right to interest, it nonetheless barred both. First, s41(1) provided for a single option providing a choice between two possibilities, and if there was no choice there could be no 'option' which could be excluded under s42(2). Second, s42(2) stated that partners who failed to properly exercise an option to purchase were liable to account under s41(1), which meant that if they did exercise the option, the outgoing partner could not rely on s42(1). Third, the term 'further or other share of profits' in s42(2) was imprecise, and was most likely to mean that if the outgoing partner received something under the terms of the option they were not entitled to anything further.

Preson and another v Preson and others **[2023] EWHC 1486 (Ch)**

This case also involved a family partnership. Although a number of claims were made (including the existence of a trust, estoppel, and unjust enrichment), the one of most interest to partnership practitioners is the claim that certain land was partnership property. The disputed land was part of a larger piece of property which was purchased by the four parties; the disputed land was registered to two of them, and the rest of the property was registered to the other two.

The court held that the disputed land was not partnership property. It noted that ss20 and 21 of the Partnership Act 1890 provided that property acquired on account of the firm, or for the purposes and in the course of the partnership business, or with money belonging to the partnership, would be partnership property. However, there was no evidence that any of these factors applied here. There was a partnership in relation to a

caravan storage business, and that business was conducted on part of the disputed land, but this did not mean that the disputed land was acquired for the purposes of that partnership business, especially given that the vast majority of the disputed land had no connection with that business. Although the funds to purchase the property which included the disputed land were alleged to have been paid into the partnership bank account prior to being used for the purchase, this would not make those funds partnership property, and there was no evidence of any intention that the disputed land be partnership property. The court also noted that there was no common intention by the parties when they purchased the property that it would be held by all four of them jointly, and it would therefore be surprising if they intended the disputed land to be partnership property since this would result in joint ownership.

Hamilton v Barrows and others **[2023] EWHC 1743 (KB)**

This case involved a dispute about the existence of a partnership in relation to an investment business. The claimant sought the return of the money he had invested in the business, on the basis of what he claimed were fraudulent misrepresentations.

The court noted that the definition of a partnership in s1 of the Partnership Act 1890 as 'the relation which subsists between person carrying on a business in common with a view of profit', and that the existence of partnership involved an objective determination of both law and fact. The court's explanation of the law is worth reproducing in full (at para 78):

> (1) The labels that parties themselves attach (or do not attach) to their relationship are not determinative. As Lord Cozens-Hardy MR put it in *Weiner v Harris* [1910] 1 KB 285 at 290:
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> > "Two parties enter into a transaction and say 'It is hereby declared that there is no partnership between us.' The Court pays no regard to that. The Court looks at the transaction and says 'Is this, in point of law, really a partnership?' It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is."
> >
> > It follows that no conclusions can properly be drawn from the titles and descriptions of the Currency Club adopted by the Defendants. The way that Club Leaders referred to themselves and the Currency Club is just one factor to consider in all the circumstances of the case.
>
> (2) A partnership requires two or more people to carry on a single business "in common". This means that collaboration between separate businesses does not result in a partnership but, equally, a single business may comprise various divisions (see *C Connelly & Co v Wilbey* [1992] S.T.C. 783 at 790a for an example of a partnership in which the partnership "was that of […] two offices together because the partnership was carrying them on a single combined business"). Paragraph 2-16 of *Lindley and Banks on Partnership* (21st ed) expresses it thus:
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> > "[…] this also presupposes that the parties are carrying on that business *together* for their common benefit and, thus, that they have, as regards the business, expressly or impliedly accepted *some* level of mutual rights and obligations as between themselves."

(3) A 'view of profit' does not imply or necessitate a sharing of profits, despite this being a common occurrence in practice: *M Young Legal Associates Ltd v Zahid* [2006] EWCA Civ 613.

(4) There are no requisite formalities for the creation of a partnership nor is there a checklist of features against which the existence of a partnership can be determined. Each case must be judged on its own facts with appropriate weight afforded to different features. Lord Coulsfield summarised the law in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 S.L.T. 186 at 195F as follows:

> "… it is undoubtedly true that there is no one provision or feature which can be said to be absolutely necessary to the existence of a partnership, so that the absence of that feature inevitably negates the existence of a partnership … "
>
> He also cautioned that "some degree of common interest must be involved in any commercial contractual venture". In other words, all partnerships will involve a common interest but a common interest does not create a partnership.

The court noted that in the absence of formal written documentation, the existence or otherwise of a partnership was to be inferred from the conduct of the parties.

It concluded that there was a partnership between the first defendant, who had initially managed all investors and continued to managed one group of investors when the decision was taken to split investors into sections, and his close associates or family members who had managed different sections of investors. It noted in particular that the different managers took part on joint voting on the text of messages to be sent to investors. Although independent businesses could collaborate and share resources, the arrangement here went beyond merely hearing banking facilities. The conduct of the managers was that of individuals who considered themselves to have mutual rights and obligations as to the running of the business. At least two of them met daily and were in near constant contact about the running of the investment sections, decisions were taken by majority vote of all the managers, and the first defendant had reassured investors that their accounts would be managed 'in the same manner as before' when he ceased to manage them all and split them into sections, which suggested he continued to influence the other sections.

As to whether the first defendant's wife was a partner in the partnership, the court noted that the line between a couple's marriage and their business relationship, in a partnership which had friends and relatives as clients, and which avoided formalities, was not easy to draw. However, it concluded that she was a partner. Although she provided administrative support to the first defendant, this was not the end of her involvement in the partnership. Both gave up their full time jobs to run the business, business decisions were presented as having been made by both of them, and the wife rather than the husband became a director and shareholder of a company whose bank account was used to route funds received by the partnership for investment.

However, the court held that individual investors were not partners with each other, either in a free standing partnership or a sub-partnership of the investment partnership, but were only clients of it. Although their investments were made with a view to profit, investors did not know each other or even how many there were, were not privy to management meetings, and did not have the oversight and information which the manager of their section.

National House Building Council v Gavin Henderson Joiner and Building Contractors and others **[2023] SAC (Civ) 11**

This case involved an action for payment by the National House Building Council (NHBC) against a partnership formed under the law of Scotland, which therefore had separate legal personality, and its partners. The partnership had traded as house builders and had had a contract with the NHBC under which purchasers of houses built by the partnership benefited from the protection of the NHBC's warranty, which provided insurance against defective works. The purchaser of a property completed in 2008 complained of defective works. The NHBC investigated and remedied the defects at its own significant expense. It notified the partners and the partnership in 2011 and made demand for payment from them in 2015 and 2018. They disputed the claim on the grounds that the partnership had dissolved on 31 March 2010.

The court held that the partnership had dissolved by the time of the NHBC's claims in 2015 and 2018. Section 1 of the Partnership Act 1890 provided that a partnership 'subsists between persons carrying on a business in common with a view of profit'. On the facts, there was no evidence of any continuing business or intention to profit after 2008. The partners' evidence was that after the housing crash of 2008, they stopped building houses and dissolved the firm. The four houses which the partnership built were completed in 2008 and it then ceased trading. One of the two partners left to find employment overseas, and although he returned after a few months, the partnership did not resume operation. In 2010 the partnership accountant notified HMRC and the NHBC of dissolution, and in 2012 the partnership bank account was closed.

Although the partnership had re-registered with the NHBC in 2010, the court held that this did not show that the partnership continued to exist. The dissolution of a partnership was liable to affect third parties which had traded with it, and the Partnership Act therefore afforded them certain protections against dissolution being abused to avoid liability to them. In particular, s38 provided that former partners had a right and duty to complete transactions begun but unfinished at the time of dissolution. As a result, the mere fact that the partners transacted some business after dissolution did not necessarily mean that the partnership had not dissolved. Such activity might simply indicate that the s38 post-dissolution duty was being carried out. Alternatively, it might mean that the ex-partners had formed a new partnership.

The court considered that the re-registration with the NHBC had no legal significance in relation to dissolution. First, it was not a new registration but a continuation of the status quo which had been allowed to lapse in 2010, and resulted from the NHBC advising that the final inspection of the partnership's houses prior to sale would require re-registration despite the fact that the partnership had by then ceased to trade. Second, there was no evidence that the re-registration was linked to continued or intended housebuilding activity. Third, there was a clear rationale for the re-registration which was not linked to any continued existence of the partnership, namely the need to effect the sale of the two remaining houses. The court concluded that the re-registration did not demonstrate a continuing partnership and was in fact more consistent with post-dissolution duties than with continued existence of the partnership.

The court also rejected the claim that the partnership or the partners continued to be liable after dissolution. Although the partnership was party to the contract with the NHBC, it had dissolved before it made demands for payment in 2015 and 2018. For liability to arise, the NHBC would therefore have to show either than the partnership continued in existence after 2010 despite the dissolution, or that the obligation existed prior to the date of dissolution. The court had held that the partnership had no continuing existence after its dissolution and, as to the possibility that the 2015 and

2018 claims related to pre-existing obligations, it held that the obligation on the partnership to make payment to the NHBC did not exist prior to the demands being made. The existence of potential liability, or contingent liability, or even knowledge of a likely claim, were not equivalent to a demand for payment and did not trigger any obligation. Even had the former partners wished to settle claims during the winding up, they would have had no means of identifying the nature or quantum of the NHBC claim.

As to partner liability, this was largely dependent on liability being established against the partnership, and no such liability was triggered while the partners were partners in the firm. Section 9 of the partnership Act created liability for partnership debts 'while a partner' and if the firm had dissolved there were no partners, only former partners.

Keane v Sargen and others **[2023] EWCA Civ 141**

This appeal concerned a business which provided alternative legal services to financial institutions. It was initially carried on by a limited company, but the four shareholders and the company itself subsequently formed an LLP to which the business was transferred, with the intention of the four shareholders later selling their shares in the LLP to the company as part of a tax planning scheme.

Prior to the formation of the LLP and the transfer of the business to it, negotiations were opened with Keane for him to join the business. However, Keane stated that he would not take shares un the company if that gave rise to a significant tax liability. After the LLP was formed and the business transferred to it, Keane joined the LLP.

Subsequently, the four shareholders drew up a draft partnership agreement and associated documents, including draft minutes of a meeting. These referred to them transferring their company shares to the partnership, the beneficial ownership of those shares being governed by the partnership agreement, and Keane becoming a partner at the close of the envisaged meeting.

However, after relations between the parties deteriorated, Keane left the LLP. The parties then disputed what his financial entitlement was and in particular whether he had been a partner in the partnership carrying on a business of holding the company's shares with a view of profit.

The Court of Appeal ruled that the first instance judge had not been entitled to find that Keane had become a partner, and allowed the appeal. It held that the 'general package' which the parties discussed as to the terms on which Keane would join the business was merely an agreement in principle. It had not reached the stage where it had taken effect contractually and, even had it done so, the LLP Agreement as finally drafted excluded the performance criteria which had been integral to the package as originally drafted, and without those criteria none of the provisions in the original package could have been applicable. Furthermore, Keane had stated that he would not take shares in the company if that gave rise to a tax liability, and this meant that the tax consequences had required further investigation. This conclusion was supported by the fact that the draft partnership documentation included a deed of adherence for Keane to join the

partnership, and draft minutes referring to him agreeing to join the partnership with effect from the close of a meeting to be held. Finally, the court held that the reference in an email to a change in the voting share split could not be held on the balance of probability that reflected Keane joining the partnership.

(Permission to appeal has subsequently been refused by the Supreme Court.)

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