

***Bahia v Sidhu* [2023] EWHC 3028 (Ch)**

In *Bahia v Sidhu* [2020] EWHC 875 (Ch) the defendants had been ordered to restore monies to the partnership in circumstances where there had been a failure to account for money that should have been properly received by the partnership, and where the defendants had taken benefits from the partnership.

The sums remained unpaid, and in these proceedings the claimant sought a transfer of partnership property to him in payment of the sums. The defendants sought the disposal of partnership assets at auction and a distribution of the proceeds in order to give them the resources to repay the sums.

Section 39 of the Partnership Act 1890 provides that on dissolution of a partnership, every partner is entitled to have the partnership property applied in payment of its debts and liabilities, and to have surplus assets thereafter applied in payment of what was due to the partners. The court noted that s39 did not require surplus assets to be sold, merely to be applied in payment to the partners (*Latchan v Martin* (1984) 134 NLJ 745). Nonetheless, partnership property would normally be sold even if the firm's debts and liabilities could be discharged without a sale, in order that justice be done to all parties when no other course had been agreed on (*Benge v Benge* [2017] EWHC 2124).

However, the court also noted that its discretion under *Syers v Syers* [1876] 1 AC 174 to make a different order, such as allowing a partner to acquire the share of another partner, was (per *Hammond v Brearley* [1992] 12 WLUK 185) a 'valuable one' which the court 'should not hesitate to use when it suits the justice of the case'. On the facts, it considered that it was in the interests of justice for the property to be transferred to the claimant rather than sold at auction. In reaching this decision, it took particular account of the fact that the claimant, as the injured party, should not be kept out of receiving value from the partnership longer than was necessary; the wishes of the claimant as sole remaining former partner of the partnership; and the avoidance of the costs of an auction.

***Rued v Dormer* [2023] EWHC 3118 (Ch)**

The parties had been in a property development partnership together. The claimant provided the funding by way of loans, and the defendant provided the work, with the profits to be divided equally after repayment of the loans with interest. This judgment concerned the extent to which the defendant was entitled to deduct wages and other costs from the business.

Most of the judgment concerned the detail of what the defendant was, or was not, entitled to deduct. However, in terms of general principles, the court noted that a partner was under a duty to act in good faith, and that this duty was fiduciary in nature (*Helmore v Smith* (1886) 35 Ch D 436). Not all conduct would constitute a breach of the duty of good faith; it required some dishonesty, improper motive, or element of bad faith, to be established (*Medforth v Blake* [2000] Ch 86). Although it obliged partners not to benefit themselves at the expense of their co-partners, it did not require either party to give up a freely negotiated financial advantage clearly embedded in the contract (*Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632). Here, it was a fundamental element of the partnership that the defendant would not only manage but also carry out some of the work himself, hence the agreements from time to time as to what he was entitled to deduct from the business as wages, overtime and commission on materials.

Frontiers Capital I Limited Partnership v Flohr [2023] EWHC 2723 (Ch)

The claimant limited partnership (LP) alleged that the defendant was liable to it for breaches of contract and fiduciary duty. The claimant had been dissolved and apparently wound up, but the cause of action had accrued before that dissolution. The defendant sought summary judgment on the grounds that the claimant had no standing to bring the claim because it had been dissolved.

The court refused to grant summary judgment. Article 38 of the Partnership Act 1890 provided that a partner's authority after dissolution continued 'so far as may be necessary to wind up the affairs of the partnership, and complete transactions begun but unfinished at the time of the dissolution....but not otherwise'. Although *Boghani v Nathoo* [2011] 2 All ER (Comm) 743 concerned contracts uncompleted at the time of winding up, there was no English authority on how causes of action accruing to the partnership before dissolution were to be dealt with. In the light of Australian authorities on the matter (*Queensland Southern Barramundi v Ough Properties Pty Ltd* [2000] 2 Qd 172 and *Belgravia Nominees Pty Ltd v Lowe Pty Ltd* [2015] WASCA 143), the court held that s38 provided authority to start a claim if this was necessary to wind up the partnership's affairs. This would be so where there was a partnership asset in the form of a claim with some merit, and that claim was capable of being realised. The court held that a cause of action against a third party which had accrued to the partnership before dissolution, was not pursued, realised, or dealt with by assignment, and which had not become time barred, remained a partnership asset. Its realisation was therefore one of the affairs of a partnership which remained to be wound up even if the person carrying out the winding up had mistakenly believed the winding up to have been completed.

The court also noted that the statutory exclusion of limited partners from involvement in the partnership's affairs continued to the end of those affairs, and thus it was for the general partner to rely on s38 to pursue any claims accruing to the partnership before dissolution and constituting partnership property. The court held that it did not need to decide whether a single partner could, by way of alternative to reliance on s38, bring a claim and join in the other partners, but doubted that it could. However, if a general partner expressly decided not to pursue a claim, and one of more limited partners wished to do so, they could apply to the court for an order under s6(3) of the Limited Partnerships Act 1907 which allowed the court to appoint a different person to carry out the winding up.

Anglian Windows Ltd t/a Anglian Home Improvements v Webb [2023] EAT 138

The claimant and his wife operated a two person partnership through which the claimant provided services to the respondent. The claimant claimed unfair dismissal by the defendant.

The court held that the claim had no reasonable prospect of success. Section 5 of the Partnership Act 1890 provided that a partner who entered into a contract as a partner would bind the other partners unless he had no authority and the third party knew that, or did not know or believe him to be a partner. The claimant had been acting on behalf of the partnership when he entered into the contract and thereby bound both partners. There was no suggestion that the partnership here was other than a genuine partnership, or that this arrangement did not reflect the genuine intention of the parties.



Although the services were provided only by the claimant, it was a requirement of many contracts with partnerships that work performed under the contract be carried out by a particular named individual. In those circumstances, the court was obliged to follow *Firthglow Td v Descombes and another* [UKEAT/0916/03], in which it had been held that where the relevant work was being undertaken under an agreement with a partnership, that precluded the possibility of one of the individual partners being able to claim they were an employee.

Elsbeth Berry
Reader in Law, Nottingham Law School,
Nottingham Trent University
December 2023