***O'Boyle (trading as Viridian) and O'Boyle v Wallis* [2024[] EWHC 560 (Ch)**

This decision concerned a dispute over whether permission should be granted to amend the particulars of claim. The claimants, Mr and Mrs O'Boyle, had leased units from Mrs and Mrs Wallis, and Mr O'Boyle had entered into agreements for storage with Woodmancott Enterprises, which was a general partnership of whom the only partners were Mr and Mrs Wallis. The partnership dissolved on the death of Mr Wallis and his estate was fully administered. Mrs Wallis continued the business as a sole trader, and was one of Mr O'Boyle's beneficiaries.

The O'Boyles brought proceedings against Mrs Wallis and the executors of Mr Wallis for unlawful eviction, costs of refurbishment, delivery up and return of goods held in the units and the storage, and loss of profit. The claim including a statement that the defendants were trading as Woodmancott Enterprises when the agreements were entered into. The O'Boyles subsequently sought to amend the claim to join the partnership as a party.

The court noted that where a cause of action arose before a partnership dissolution, the simplest approach was to sue the partnership in the firm name. However CPR 16 and CPR PD 16.2 permitted a general partnership to be sued in the name of the firm, or those of the partners individually. There was 'a slight tension' between this, and PD7A 7.3 which provided that claims should be brought in the partnership name 'unless it was inappropriate to do so', but PD7A 7.3 was clearly not an absolute bar to suing in the names of the partners.

The substance of the claim was that Mrs Wallis was being sued as the surviving partner after the deceased partner's estate had been fully administered, which administration included his entitlement to the net assets from the partnership's winding up. She was also the beneficiary and net recipient of at least part of the deceased partner's estate. Naming the partnership as party to the claim would not change her substantive role in relation to the claim, and so it was not inappropriate to allow the claim to continue against her rather than having to reconstitute it against the partnership. The court concluded that pursuing a claim against the surviving partner was procedurally permissible and consistent with the overriding objective of the court to deal with cases justly and at proportionate cost.

***Lane v Lane and others* [2024] EWHC 275 (Ch)**

This judgment concerned a dispute over the effect of a will in which the testatrix left her 'share and interest' in a partnership to the surviving partner. One of the other beneficiaries claimed that the testatrix had become incapacitated shortly before her death, and that it was this, rather than her subsequent death, which led to dissolution of the partnership. The beneficiary claimed that, as a result, the gift in the will failed because the testatrix did not own a share of the partnership by the time she died.

The court considered in some detail the nature of a 'share and interest' in a partnership. Although the ultimate question was the meaning of this phrase in the will, it started by looking at it in partnership caselaw and textbook discussions.

The starting point for partnership law purposes was that a partner had a bundle of rights in respect of a partnership, and which one of these rights formed part of their 'share' depended on the context. When focusing on a partner's economic rights, which

concerned what they were entitled to receive financially, as opposed to rights such as to information, or to manage management, the term a 'share' often included entitlement to a proportion of the net proceeds of sale of the assets after meeting all liabilities. Lindley & Banks on Partnership (para 19-08) stated that 'what is meant by a share of a partner is his proportion of the partnership assets after they have all been realised and converted into money, and all the liabilities have been paid and discharged' and the Court of Appeal in *Sandhu v Gill* [2006] Ch 456 (at para 19) described this as the 'classic definition'.

Similarly, an 'interest' in a partnership commonly referred to an indefinite and fluctuating interest consisting of the right to a proportion of the surplus after the realisation of the assets and payment of the debts and liabilities of the partnership (Lindley & Banks at [19-12] to [19-14] and the decision of the Supreme Court of Western Australia in *Rojoda Pty Ltd v Commissioner of State Revenue* (2018) 368 ALR 734 at [107]-[110]).

Thus, 'share' and 'interest' were two ways of describing similar aspects of a partner's rights. 'Share' was typically used to describe the size of the proportion that a partner was entitled to, whereas 'interest' could connote the proprietary interest that they had in the partnership assets at a particular time. However, it was common to use the joint category 'share and interest' in a broader sense.

These definitions included what a partner was entitled to receive on dissolution. Unlike in a company, dissolution did not mark the end of a partnership because it must then be wound up, and the partners had continuing authority under s38 of the Partnership Act 1890 to conduct the winding up. A partner's share or interest did not disappear on dissolution, but crystallised, because dissolution marked the time from which it must be turned into cash through winding up.

The court rejected the submission that s43 of the Partnership Act, which provides that the amount due from surviving partners to an outgoing partner or their representatives is a debt accruing at the date of the dissolution or death, converted the share into a debt at the point of dissolution so that no share or interest remained. First, since a share or interest included what a partner was entitled to get out of the partnership, it would not make sense for it to disappear on dissolution. Second, the purpose of s43 was to ensure that claims by an outgoing partner or their representatives were subject to the limitation period applicable to ordinary debts, with time running from the date of dissolution, and to make it clear that the remaining partners were not trustees for the departing partner.

Third, s43 did not reduce the rights of the departing partner to a debt, but stated that the amount due in respect of his share was debt. A departing partner had the right to have the continuing partners account and conduct the winding up conducted properly to come up the figure that he was entitled to receive. Therefore, a departing partner retained a bundle of rights. Further, as explained in *Duncan v The MFV Marigold PD145* (2006) 35 SLT 975 (OH) at [51], the debt was not fixed at the point of dissolution but only 'ascertainable through the process of winding up'. Fourth where all partners agreed to bring the partnership to an end, so that there was no single departing partner, all partners had rights under s43. Finally, it was only once winding up had been completed and the partners paid out that the partnership was in substance at a complete end for all purposes.

The court concluded that the reference in the will to the 'share and interest' meant passing on the rights to whatever would be received through the winding up. The testatrix still had a share at the date of her death because there was no completed winding up of the partnership and she had not yet been paid out. It was only when she

had been paid out in full that she would cease to have a share and interest for these purposes. Even if she was permanently incapacitated before her death, she still had a right to be paid out following the winding up of the partnership.

***Holden v Holden and another* [2023] EWHC 3292 (Ch)**

This case involved a family farming partnership between three brothers, who were the claimant and the two defendants. They agreed that they were working in partnership together by November 1989. However, while the claimant (Robin) argued that the terms agreed in the Meeting Note of 10 October 1989, supplemented by the default provisions of the Partnership Act 1890, governed the partnership, the defendants (David and Nick) argued that this was replaced by a Draft Deed in 1990. Robin also argued that the settled accounts of the partnership should be reopened.

The court noted that although a partnership was a relationship as well as a contract, the agreement governing a partnership was subject to general contractual principles. There must therefore be, objectively viewed, an offer, acceptance, and an intention to form legal relations. By signing the Meeting Note and having their solicitors to sign to say that this note was intended to have contractual effect, it was clear that all the partners agreed to be bound by the terms in it. In so far as it did not deal with a point that was necessary to dealt with, that point would be governed by the statutory default provisions in the 1980 Act.

The question was whether there was evidence that showed that the parties intended to vary or replace the terms they had already agreed with the new terms in the form of the 1990 Draft Deed. The court emphasised that when considering whether any conduct demonstrated acceptance of the new terms, that conduct would be inconclusive if it was also compatible with the parties continuing with the terms recorded in the Meeting Note.

The court held that that there was never a settled agreement for the Draft Deed to replace the arrangements set out in the Meeting Note as supplemented by the Partnership Act. There was no written or oral agreement, and no conduct that unambiguously demonstrated that Robin had accepted the Draft Deed. First, he had expressed his objections to it at the time, and had never indicated that he had withdrawn those objections. Second, David had not made it sufficiently clear that he would not carry on with the partnership unless particular provisions of the Draft Deed were agreed. In any event, Robin’s conduct in carrying on the partnership was equally compatible with the interpretation that he was content with the arrangements based on the Meeting Note and was happy to continue on that basis. Third, there was nothing in Robin’s later conduct that demonstrated acceptance of the terms of the Draft Deed.

The court concluded that Robin and David were content to carry on in partnership because their respective – and mutually incompatible – understanding of the status quo suited them. Robin thought that the partnership proceeded on the basis of the Meeting Note, while David thought it proceeded on the basis of the Draft Deed. However, the issue was not what they thought had been agreed, but of what an objective observer would concluded from their discussions and actions. Although their relative financial positions meant that David was in a strong position to force the provisions of the Draft Deed on Robin, that did not mean that he had done so or that Robin accepted them. Similarly, the fact that David was motivated to want the provisions of the Draft Deed, because they were more favourable to him, did not provide any evidence that the parties agreed them. Robin had spoken once against the Draft Deed, and his subsequent silence

could not be taken as acceptance when there were existing arrangements that the Draft Deed would need to displace.

As to the reopening of the partnership accounts, the basis on which these had been produced had changed over time. The questions for the court were whether Robin and Nick had agreed to these changes and, if they did not, whether it was too late for the accounts to be reopened.

The court held that an independent observer would consider the fact that over many years they signed off accounts and submitted tax returns which reflected the changes amounted to agreement by conduct.

The court also held that even if it was wrong in concluding that Robin had agreed the changes to the accounting practices, he would not be entitled to reopen the accounts.

First, as a matter of general principle, a settled account would not be disturbed in the absence of a specific direction from the court, and such a direction would not normally given in the absence of fraud or undue influence, neither of which had been pleaded here.

Second, there was an estoppel by representation. This was because

i) by signing the accounts, Robin and Nick had made representations that they accepted the accounts, and the disputed changes had been clear on the face of those accounts;

ii) David had changed his position in reliance on such representations. In particular he had not taken any drawings for a period of time, he had risked more of his money in purchasing land for the partnership, he had paid tax and submitted tax returns where there was no chance of reopening them with HMRC, he had allowed Nick to borrow from the partnership in a way which was effectively financed by David's own undrawn earnings, and he had allowed the partnership to pay private expenses of Nick and Robin on the understanding that they had accepted a lower salary; and

iii) Nick and Robin must or should have realised that David, in changing his position in this way, was relying on the representations that the accounts correctly reflected agreed practice.

Third, there was an estoppel by convention, which arose where parties to a transaction acted on an assumed state of facts or law, the assumption was either shared by both or made by one and acquiesced in by the other, and the person raising the estopped had relied on it such that it would be unfair for the other to resile from it (*Republic of India v India Steamship* [1998] AC 878). The accounts reflected an assumption that certain matters were agreed between the parties, and Nick and Robin acquiesced in these assumptions. David had relied on this assumption and it would be unjust for Nick and Robin and Nick to resile from it.

As to limitation periods, although s23 of the Limitation Act 1890 provided that an action for an account could not be brought after the expiry of the applicable limitation period, this was subject to the general principle that limitation did not bar the reopening of settled accounts because time did not begin to run until a partnership was dissolved (*Noyes v Crawley* (1978) LR 10 Ch D 31; Lindley & Banks on Partnership para 23-45). Whether this principle applied to all elements of accounts, or only in relation to the determination of capital balances, was an unresolved issue, but the court held that it did not need to comment on this given its findings on estoppel.

The court noted that although s32(1)(c) of the Limitation Act 1980 delayed the time from which a limitation period started to run where the action was for relief from the consequences of a mistake, to the time at which the claimant discovered the mistake or could reasonably have discovered it, it did not assist Robin because he could have discovered the change of treatment in the accounts.

By way of exception, the court accepted that neither estoppel nor limitation applied to the accounting changes in relation to fuel payments, since the accounts were not clear in showing the changes. Robin could therefore not have demonstrated acceptance of this point by conduct, or made any representation about it, or discovered it with reasonable diligence. However, the general principle that settled accounts would not be reopened, absent fraud or undue influence, still applied.

Finally, the court considered s39 of the Partnership Act. This provided that, on dissolution, surplus assets after payment of creditors should be 'applied in payment of what may be due to the partners respectively'. In the event of a general dissolution, each partner was normally entitled to insist that all partnership property be sold, even if the firm's debts and liabilities could be discharged without such a sale. However, ss39 itself did not require surplus assets to be sold, and the court should always consider possible alternatives to a sale (*Syers v Syers* (1876) 1 App Cas 174 and *Benge v Benge* [2017] EWHC 2124). In view of the history of this case and the fact that it involved a family farm, an alternative solution might be preferable here, such as one of the partners buying out the partnership land at a valuation, or for a partition of the land. However, if the partners could not agree a way forward, any of them could ask the court to approve a sale to a third party.

***Hayman-Joyce Property Ltd v Hayman-Joyce Broadway LLP and another* [2023] EWHC 1028 (IPEC)**

The claimant set up an estate agency under his name, Hayman-Joyce, with offices in Moreton-in-Marsh and Broadway. The second defendant joined the Broadway office as a manager, and was subsequently made a partner. The claimant continued to work primarily from the Moreton office. Both businesses were then incorporated as LLPs, and the second defendant was the LLP which ran the Broadway business. After the relationship between the parties deteriorated, a dispute arose as to whether the defendants' use of the claimant's name constituted passing off.

The court held that the parties had agreed that the Broadway partnership could use the name and build up its own goodwill, and that subsequent accounting treatment, and the negotiations for an LLP agreement to replace the Broadway partnership agreement indicated that the parties had accepted that this goodwill belonged to the partnership outright rather than to the Moreton business as its licensor. Goodwill accrued after the partnership was incorporated belonged to the LLP. Although the claimant had referred to a licence for use of his name, he had expressly acknowledged the ownership of goodwill by the first defendant, at least in relation to the Broadway area.

The court also held that the defendants' use of the claimant's name with the addition of the suffix 'Broadway' did not constitute a misrepresentation. Indeed its use in the areas and for the services for which the first defendant had goodwill was likely to help avoid confusion. The first defendant was therefore entitled to register new domain names and set up new social media accounts using either the 'Hayman-Joyce' or 'Hayman-Joyce Broadway' names.

The parties' shared or overlapping goodwill in the name meant that the name could identify the claimant, the first defendant, or both of them. The first defendant's use of the name in areas in which it had goodwill therefore did not amount to misrepresentation or passing off.

However, it was a misrepresentation for the first defendant to advertise its business as selling houses within a 20 mile radius of Broadway, since that would have included the Moreton patch and was not justified as honest concurrent use of the first defendant's own goodwill. It was also a misrepresentation for the first defendant to use testimonials relating to the claimant's business as if they related to its own business, and to have distributed fliers in the Moreton area.

Finally, the court held that the defendants could successfully challenge the validity of the claimant's trade mark over his name, on the grounds of the first defendant's goodwill in it.

***Procter v Procter* [2024] EWHC 560 (Ch)**

Earlier judgements in this dispute were included in the Legal Updates for March 2021 and June 2022. The Court of Appeal has now dismissed the appeal against the 2022 judgment of the High Court. It confirmed that a retiring partner was not entitled to a sale of partnership assets, but was entitled to be paid out for his share at a valuation according to accounts and inquiries directed by the court. It also confirmed that the valuation would be based on the actual value of the relevant assets at the relevant time, not the book value at which they had been entered into the accounts.

The **Limited Liability Partnerships (Application of Company Law) Regulations 2024** SI 2024/234 came into force on 4 March 2024. These Regulations amend the Limited Liability Partnerships Act 2000 and the Limited Liability Partnerships (Application of Company Law) Regulations 2009, so as to apply many of the provisions of the Economic Crime and Corporate Transparency Act 2023 to LLPs. Changes include new restrictions on the registered office and registered name, and requirements for a registered email address and a statement that the business is formed for a lawful purpose. The Act also gives the Registrar new powers to query registered information.

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