

Andrew Marr International Limited v Mackinnons Solicitors LLP [2025] CSOH 20

The pursuer alleged that Mackinnons, a firm of solicitors, had acted for it negligently and in breach of contract. The firm and its partners had subsequently transferred its business to the defender, an LLP. The transfer agreement provided that the consideration for the transfer was to be satisfied, inter alia, by the LLP assuming the liabilities of the partnership. The defender argued that since there had been no agreement between it and the pursuer to novate the obligation to the LLP, the pursuer must pursue its claim against the firm of Mackinnons and its partners.

The court relied extensively on the judgments in *Sim v Howat* [2011] CSOH 115 and *Scottish Pension Fund Trustees Ltd v Marshall, Ross & Munro* [2018] SC 523. It noted that although both cases concerned a new partner being taken on by an existing partnership, the comments in the judgments were capable of applying where a business was transferred from one entity to another, as here.

In *Sim* the court had noted that Scots law, unlike English law, presumed that the gratuitous transfer of business assets entailed the recipient assuming liability for prior debts. The presumption did not arise where the recipient had paid value for the assets, or if the contract stated that the new partnership was not liable for the debts of the old, unless there was an express undertaking to a creditor of the old firm.

In *Scottish Pension Trustees* the court had noted that the application of the presumption was supported both by the equitable consideration that it was only fair that a new partnership which took over an old partnership's assets should also take on its liabilities, and by the general expectations of those who dealt with a partnership whose business was transferred to another entity.

On the facts of this case, it was strictly unnecessary to rule on whether the presumption could apply on the transfer of a partnership business to an LLP, since the defender had agreed in the transfer agreement that it was to assume the liabilities of the partnership. However, the court considered that both *Sim* and *Scottish Pension Trustees* indicated that the presumption could apply. In *Scottish Pension Trustees* the court had held that the presumption only operated if the new partnership was 'practically the same' as the old one, and here the partners were the same and had regarded the transfer as merely one of 'conversion' to LLP status. In any event, the court in *Scottish Pension Trustees* had also held that the most important condition for the presumption to apply was that the business be continued without interruption, which indicated that the conditions were not of equal weight and that the requirement that the business be 'practically the same' was not an inviolate requirement. Here, not only did the transfer agreement state that the business was to be carried on after the transfer, but the pursuer had instructed both the partnership and subsequently the LLP to handle its affairs. The law's flexible approach was also indicated by the court's view in *Sim* the court that there were circumstances in which it could find that the transferee had assumed liability even without the application of the presumption.

As to whether the transfer of liabilities to the defender was binding on the pursuer, in other words whether it had been novated, the court held that the pursuer's consent was required, and had been given. The defender had no right to refuse to accept that the liability had been novated to it. The concept of novation here was closely linked to the presumption of transfer of liability, and all that was required was an indication that the creditor had consented to the transfer of its debts. In *Scottish Pension Trustees* the court had noted that this could be in the form of accepting payment from the new entity or raising proceedings against it, and that it was 'manifestly' in the interests of creditors

that their debts be transferred to the new partnership, since that partnership had taken over the assets of the old firm. The court in *Scottish Pension Trustees* had also noted that the reasons for agreeing to a novation went further than the mere transfer of assets, and were supported by 'considerations of liquidity, as well as solvency', since a creditor normally expected its debts to be paid from earnings, and if the business passed to a new firm, it was the earnings of that firm which would provide the resources to pay it.

In the current case, the court noted, first, that in the relevant cases novation had been inferred from the presumed assumption of liability on one hand and the pursuer's election to pursue the new debtor on the other. Second, an insistence on novation was only relevant where the liability arose out of a contract and here the pursuer's claims were brought in delict as well as contract. Third, and most importantly, the underlying legal theory did not require novation in the strict sense because the theory was either that an agreement to assume liability was itself an offer to novate, which the creditor could accept by simply electing to sue the new debtor; or that the new debtor had entered into a unilateral binding obligation, leaving it to the creditor to choose which debtor to pursue. Neither theory required the debtor to make any further offer to novate following its assumption of liabilities, or to have the right to withdraw any implied offer to novate or unilateral obligation.

The court refused the defender's motion to dismiss the action.

***Osborne and Howes v Osborne* [2025] EWHC 455 (Ch)**

The defendant and his late father had been partners in the family accountancy practice. The defendant and his two siblings, the claimants, were executors of their father's estate. The claimants brought an action against the defendant to remove him as an executor.

In relation to the partnership issues, the court noted that the death of a partner dissolved the partnership subject to any contrary agreement, and the executors were entitled to have the partnership wound up and the deceased partner's share of any surplus treated as a debt due to the estate (s43 of the Partnership Act 1890). The estate was therefore entitled to bring an action against the defendant as the surviving partner, to wind up the partnership and to have dissolution accounts taken. Although the goodwill of the practice had been sold, and a loan repaid on the sale of its property, a dissolution account had never been properly taken and the firm was never wound up.

Where a surviving partner was appointed as an executor, that gave rise to a conflict between his personal interest as a surviving partner, and his duty as an executor. Neither this conflict of interest, nor the claimants' right to bring an action for winding up and the taking of an account, would be enough to justify the court's removal of the defendant as an executor. However, here the claimants had satisfied the test in *Re Folkes* [2019] EWHC 753 (Ch) for the removal of an executor, that the claim had a reasonable prospect of success and was proportionate for the estate to pursue. First, there was a dispute as to the authenticity and effect of the deceased's Letter of Wishes concerning the disposal of his share of the partnership capital, which increased the conflict of interest and might mean that the defendant had failed to account for one of the principal assets. Second, the net assets which had not been distributed were substantial. Third, there had been adjustments to the accounts which clearly needed investigation, and indeed the accounts themselves raised a number of important questions. Fourth, given the obvious conflict of interest, it would have been reasonable

for the defendant, a professionally qualified accountant, to recognise and act on that conflict, in particular by instructing solicitors and possibly counsel in relation to the Letter of Wishes, and an independent accountant to draw up a dissolution account.

The court therefore ordered the removal of the defendant as an executor.

***Mariampillai v Sooben* [2025] EWHC 394 (Ch)**

The two parties were solicitors who practised in partnership. Their written agreement provided for equal shares. The claimant argued that had been superseded by an oral agreement which provided that the defendant was only entitled to 100% of the profits on work he did or brought in, and would not be liable for expenses or be involved in management. The trial judge held that the alleged 100% agreement did not supersede the written agreement.

On appeal, the court noted that there had been errors by the trial judge; even if the defendant was not entitled to a share of the profits because the alleged 100% agreement applied, he could nonetheless have continued to be a partner as a matter of law, and it would not have affected the firm's application for SRA authorisation.

However, the court held that these errors did not affect the validity of the judge's decision. First, the 100% agreement would have been a fundamental change which it would be expected to have been recorded in writing, especially given that the parties were solicitors. Second, it was not credible that the defendant would have abandoned his equity interest in return for 100% of his profit costs, especially as he had a key negotiating position and his involvement was vital to satisfying Solicitors Regulation Authority (SRA) requirements. Third, it was inconceivable that the claimant would have excluded the defendant as an equity partner while an SRA authorisation application was pending. Fourth, there had been no discussion about the consequences of the 100% agreement. Finally, it had always been agreed that the claimant would provide the business capital, not the respondent, and therefore it could not have been the case that the alleged 100% agreement in was triggered by the respondent making it clear that he no longer wished to invest in the business.

***Flohr v Frontiers Capital I Ltd Partnership* [2024] EWCA Civ 1385**

An earlier judgment in this case was noted in December 2023.

The appellant appealed against a decision that the respondent limited partnership (LP) could bring a claim against him acting by its general partner. The LP had been dissolved and wound up in 2010. The general partner was a company which was restored to the register in 2021 and issued proceedings on behalf of the LP alleging breach of contract and of fiduciary duty by the appellant in his capacity as agent of the LP.

The court noted that a partnership was not a separate legal person, and the relationship between partners continued for limited purposes even after dissolution. Section 38 of the Partnership Act 1890 provides that, on dissolution of the partnership, the authority of each partner to bind the firm continues to the extent necessary to wind up the partnership's affairs. The court held that a cause of action against a third party which had accrued to the LP before dissolution, which had not been pursued, released or

assigned, or become time barred, remained an LP asset. Realising that asset was one of the affairs of the partnership under s38, and was 'necessary', in the sense of 'reasonably required', to wind the partnership up (*Boghani v Nathoo* [2011] EWHC 2101 (Ch)). In the circumstances of the case, winding up was not complete even if the person carrying out the winding up had mistakenly believed that it had been, and so s38 continued to operate.

***Scott v Walker Morris* Case No:1806503/2023**

The claimant had been a member of the respondent LLP. He claimed that his forced retirement at age 63 constituted direct age discrimination. The LLP agreement had originally provided for a retirement age of 60, but was subsequently amended to allow a member to apply for a first postponement of retirement for three years, and a second postponement for a further two years, provided that they had made an exceptional contribution to the LLP. The claimant had successfully applied to postpone his retirement to age 63, but his application to postpone again was rejected.

The Employment Tribunal upheld the claim of direct age discrimination.

The Equality Act 2010 prohibits discrimination by an LLP against a member by subjecting them to a detriment. It defined direct discrimination as less favourable treatment on ground of, inter alia, age, unless the treatment was a proportionate means of achieving a legitimate aim.

The Tribunal held that the refusals of both the LLP Board and the LLP's members to refuse to approve the claimant's application to extend his retirement date, and the termination of his membership, each amounted to a detriment, and that the refusals were because of age. Members below age 60 were not required to go through the application process, or demonstrate an exceptional contribution to the business.

As to the legitimate aim, the Supreme Court in *Seldon v Clarkson Wright and Jakes* [2012] IRLR had held that this must correspond to a real business need and be of a public interest nature, and pursue social policy objectives. Examples included intergenerational fairness, dignity, and avoiding disputes about the fitness to work over a certain age.

The Tribunal accepted that the respondent had two legitimate aims for its retirement policy: workforce and succession planning to ensure it had sufficient members, which fitted within the aim of intergenerational fairness; and maintaining a collegiate and cohesive atmosphere amongst members, which fitted within the social policy aim of maintaining dignity of individuals in the workplace.

However, it held that there was no evidence that the original or the revised retirement policies actually helped with these aims. There was no evidence of the respondent needing to free up equity in order to give professional opportunities to younger members, or of any imbalance between the aims of younger and older members, or that poor performance was an issue for the claimant. The Tribunal also mooted a number of alternatives that the respondent could have considered to achieve workforce planning. For example, it could have had career conversations with employees and members annually, rather than at three set ages, or required members to have handed over equity and influence while retaining the title, or incentivised early retirement, or used



part time working options. As to collegiality, it could have strengthened the existing review process with which members were familiar.

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