



Neutral Citation Number: [2023] EWCA Civ 141

Case No: CA-2022-001405

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Insolvency and Companies Court Judge Jones (sitting as a Judge of the High Court)
[2022] EWHC 1006 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2023

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE NEWEY
and
LADY JUSTICE SIMLER

Between:

GARY JAMES KEANE

**Claimant/
Respondent**

- and -

(1) DAVID SARGEN
(2) MICHAEL FRANCIS BEATON
**(3) YANG FAN (as personal representative of
SEAN MACGLOIN deceased)**
(4) JONATHAN MARTIN
(5) DOCUMENT RISK SOLUTIONS LIMITED
- and -
(6) DERIVATIVES RISK SOLUTIONS LLP

**Defendants/
Appellants**

Defendant

Lesley Anderson KC (instructed by Brabners LLP) for the Appellants
**John McDonnell KC (instructed by Richard Slade and Company Limited) for the
Respondent**

Hearing dates: 25 & 26 January 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 15 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Newey:

1. This is an appeal from a decision of Insolvency and Companies Court Judge Jones, sitting as a Judge of the High Court (“the Judge”). In a judgment dated 6 May 2022 (“the Judgment”), the Judge concluded that the claimant, Mr Gary Keane, had on 18 June 2012 become a partner in a partnership relating to the shares in the fifth defendant, Document Risk Solutions Limited (“DRSL”). The first to fifth defendants appeal against that decision.

Narrative

2. This section of this judgment seeks to provide a summary of events by reference to matters which are not (at any rate before us) in dispute.
3. The appeal concerns a business known as “DRS” which was started in 2009 to provide alternative legal services to financial institutions. The founders were the first and fourth defendants, Mr David Sargen and Mr Jonathan Martin, and Mr Sean MacGloin, who was the third defendant until his death in 2021. The second defendant, Mr Michael Beaton, joined the business in 2010. Mr Sargen, Mr Beaton and Mr Martin had met when working for Barclays Capital, and Mr Sargen and Mr Martin had also both worked for Derivatives Consulting Group (“DCG”). Mr MacGloin had been manager of the legal department of Mitsui’s energy risk management arm before also working for DCG. All four were solicitors.
4. The business was initially carried on by DRSL. Following Mr Beaton’s arrival, the directors of DRSL were Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin, and each of them held one of the company’s four issued shares.
5. In early 2012, the possibility of Mr Keane joining DRS was discussed. Mr Keane was at the time global head of collateral operations projects with Bank of America Merrill Lynch and had previously gained experience with a number of other banks as well as DCG, where he had met Mr MacGloin and Mr Martin.
6. On 21 February 2012, Mr Sargen, who tended to handle DRSL’s corporate and administrative matters, sent Mr Keane an email which, he said, was “to follow up on our discussion last week to confirm our proposal and reiterate our enthusiasm for getting you on-board”. Mr Sargen explained that he and Messrs Beaton, MacGloin and Martin were intending “to move to a model whereby the directors share equally in the profits of DRS” and, in that context, had suggested a package under which, among other things, Mr Keane would be granted “a 5% equity stake in the Company” on joining, rising by increments to equal parity with DRSL’s existing directors after 18 months subject to Mr Keane meeting performance criteria. Mr Sargen referred to “very early discussions with others [i.e. persons other than Mr Keane, Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin] regarding a broader management role”, but said that “[t]he aim of creating a structure whereby you would achieve equal parity with the existing directors would remain however”.
7. Mr Sargen emailed Mr Keane again on 1 March 2012 with an updated proposal following discussions Mr Keane had had with Mr MacGloin. The email recorded that Messrs Sargen, Beaton, MacGloin and Martin were “happy to agree that, subject to the Performance Criteria being met, the increase in both profit share and equity increases

at a higher level than previously, such that [Mr Keane] would achieve parity with the existing directors at the first anniversary of [his] joining”. On this basis, Mr Keane would have a 7.5% equity stake from the start. The email also contained suggested performance criteria.

8. A month or so later, the sixth defendant, Derivatives Risk Solutions LLP (“LLP”), was incorporated. Messrs Sargen, Beaton, MacGloin and Martin had instructed Kingston Smith LLP, the accountancy firm, to advise them on how their business could be restructured so as to reduce their tax burden. In a report of 20 February 2012, Kingston Smith proposed that DRSL’s shareholders should become members of a “newly formed Document Risk Solutions LLP”. This, they said, would achieve tax savings through “profits being taxed at [the] more favourable Capital Gains Tax rate of 10% rather than at Income Tax rates of up to 50%” and, further, “a reduction in National Insurance Contributions and Corporation Tax”. The scheme involved Mr Sargen, Mr Beaton, Mr MacGloin, Mr Martin and DRSL all becoming members of the new LLP; DRSL’s trade being hived down to the LLP at book value; the LLP recognising goodwill; and, after an interval of at least 12 months, Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin selling “a share of their LLP goodwill” to DRSL at market value. Kingston Smith explained:

“The sale will attract Capital Gains Tax with the probable benefit of Entrepreneur’s Relief, though only where the Members are selling an interest in a qualifying business which they have held for 12 months ending with the date of sale”

The report also stated:

“The proceeds to each of David Sargen, Sean MacGloin, Jonathan Martin and Michael Beaton for the disposals of their interest in Document Risk Solutions LLP will be left on a loan account in [DRSL] to be drawn down. The draw down of this loan by the individual Members will be tax free, though an upfront Capital Gains Tax charge will be applied on the sale of the share in the business from the individual to the Corporate Member”

9. LLP was formed in pursuance of Kingston Smith’s advice on 2 April 2012. Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin were named as the designated members and DRSL as a corporate member. On 4 April, Mr Sargen completed applications for LLP to be registered for VAT and also for LLP and DRSL to be treated as members of a group for VAT purposes. The form relating to group treatment included this:

“Please give full details of the individual, corporate body or partnership who controls the group If it is a partnership give the names of **all** the partners.”

By way of response, Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin were named. A further form bearing the same date, headed “Value Added Tax Partnership Details” and providing for completion by “[e]ach partner”, was signed by Mr Beaton, Mr MacGloin and Mr Martin as well as Mr Sargen. Mr Sargen forwarded the “(mostly) completed VAT forms” to Kingston Smith on 5 April.

10. In the morning of 27 April 2012, there was a meeting attended by Mr Keane, Mr Sargen, Mr Beaton, Mr MacGloin, Mr Martin and representatives of Kingston Smith. Mr Keane explained in cross-examination that he had no real recollection of the event, but Mr Martin described it as a meeting led by Kingston Smith to discuss the tax structure. Mr Martin also said that Kingston Smith had mentioned that Mr Keane might incur a tax liability if he took equity in DRSL and was a director or shareholder of the company.
11. At 12.35 pm on 27 April 2012, Mr Sargen sent Mr Chris Hughes and Mr Chris Barker of Kingston Smith an email whose subject was given as “New Member – Gary Keane”. Given the significance which the Judge attached to this, I think I should quote the email in full. It read:

“Hi both

Many thanks for your time earlier – good to see you (and meet Matthew) and glad we’re making good progress.

Below is the general package we have agreed with Gary:

“(a) Financial –

- For the first six months, you would be entitled to the greater of (a) £50k (£25k per quarter in line with how we currently take some of our profit share) and (b) a 5% share in all DRS profits (excluding any profits attributable to projects which you have brought to DRS during that time “GK Projects”). You would also be entitled to an equal profit share (i.e. 20% with 5 directors) in any profits attributable to GK Projects;
- At the initial six month point, we would all have the ability to decide to walk away if things are not working out as expected;
- After the initial six months, assuming you had met the Performance Criteria (see below) you would receive 12.5% share of DRS profits excluding those attributable to GK Projects and continue to receive an equal share in profits attributable to GK Projects; on the anniversary of you joining, subject to the Performance Criteria your share in DRS profits (excl GK Projects) would rise by 7.5% with the aim that you would have equal parity with the existing DRS directors after 12 months.

(b) Equity –

- Upon joining, we would grant a 5% equity stake in the Company to you, representing a 5% share in the value of DRS;
- After six months, assuming the Performance Criteria had been met, you would receive a further 7.5% equity stake (clearly if we all decided to walk away as above then equity would revert back to the existing shareholders), with this rising on the year

anniversary of you joining by 7.5% (again subject to Performance Criteria) with the aim that you would have equal parity with the existing DRS directors after 12 months.

(c) Performance Criteria –

- As mentioned, we do not believe that performance is solely illustrated by bringing in revenue and clients. We see a great deal of value in your becoming part of a comprehensive training offering and also in you talking and marketing to clients. Having said that, we do at least need some objective measurement of performance and propose as follows:

DRS Revenue Target for 2012-13	3,500,000.00
Profit 2012-13 @ 40%	1,400,000.00
Profit 2012-23 per MD	280,000.00
GK discount for first year @ 50%	140,000.00

As per above, this gives you a revenue target of £140k for the year 2012-13 (which runs from June 1). We had looked at averaging out the first 3 years’ of the company’s operation then dividing by 5, however this gives you a slightly higher number (£200k); we are however comfortable with the figure of £140k as a reasonable number.”

Many thanks

David”

The “general package” which Mr Sargen set out within the quotation marks was copied from his email to Mr Keane of 1 March. On 28 April, Mr Hughes forwarded the email to a colleague at Kingston Smith with the message, “For your LLP agreement. Happy to discuss when you get to this point”.

12. There was a further meeting attended by Mr Keane, Mr Sargen, Mr Beaton, Mr MacGloin, Mr Martin and Kingston Smith on 10 May 2012. At 8.24 that morning, Mr Sargen sent Kingston Smith an email in which he said:

“Following our last meeting I think you were due to circulate a one-pager dealing with the potential taxable event for Gary

joining us and being granted equity. Can you circulate this please?”

Replying at 8.47, Kingston Smith said in an email which was forwarded to Mr Keane at 9.21:

“I have looked at this and as long as Gary is not going to be a Director of the company (and cannot be seen to be acting as if he is a Director) and is not an employee of the company, then there should not be a taxable event. This would have been significantly different had the structure stayed as a limited company and he became an employee/director.

If you were to insist on Gary being a Director of the company, he would be subject to income tax on the difference between the price he pays for the shares (par I suspect) and the market value of those shares. Hopefully, with the LLP structure he will not feel the need to be a Director of the Limited company.”

13. Mr Sargen, Mr Beaton, Mr MacGloin (in a witness statement made before his death which was admitted into evidence) and Mr Martin all gave evidence to the effect that, at the 10 May meeting, Mr Keane said that he did not want shares in DRSL. Mr Sargen, for example, said in his witness statement:

“At the meeting of 10 May 2012, one of the first issues that was discussed was whether Gary would take an equity interest and become a director in DRSL. Chris Barker [of Kingston Smith] began by summarising his email of that morning, then Chris Hughes [of Kingston Smith] took over and explained to Gary that by taking the shares on offer from DRSL he would incur an income tax charge, as he wouldn't be paying for them Gary's response was to say he wouldn't take shares – I don't recall his precise words but I do remember his response was both quick and unequivocal. I remember being surprised by this as, even though I appreciated that by him taking shares there might be an income tax charge arising for Gary which he would need to pay, not taking shares would mean he would have no say in the corporate decision making of DRSL in the future.”

For his part, Mr Keane did not at trial dispute that he had said that he would not take the shares with a tax liability. As the Judge recorded in paragraph 85 of the Judgment, Mr Keane “recollected during cross-examination that this flowed from the content of Kingston Smith's email ... earlier that day”.

14. The DRS business was transferred to LLP by DRSL pursuant to a business transfer agreement dated 14 May 2012. The consideration was to be calculated on the basis of the market value of the business as determined by a valuer and to be credited to an account showing “the interest of [DRSL] in [LLP] in its capacity as a member thereof”.
15. On 18 June 2012, a limited liability partnership agreement (“the LLP Agreement”) was concluded in respect of LLP “to set out the basis on which the LLP is to be organised

and the rights and obligations of the Members of the LLP” (to quote from a recital). Aside from LLP itself, the parties were Mr Keane, Mr Sargen, Mr Beaton, Mr MacGloin, Mr Martin and DRSL as the “Initial Members”. The LLP Agreement provided for the “Initial Members” to contribute £1,000 each to the capital, save that DRSL’s contribution was the “transfer of those assets set out in the Transfer Agreement”. Profits and losses were to be divided in accordance with part 2 of schedule 3 to the LLP Agreement. DRSL was to receive a “multiple of £10,000” which was to be “determined by the Designated Members but ... not to be less than 2”. Profits were otherwise to be shared between the individual Members (Mr Keane, Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin) as they determined. The Judge termed the provisions in schedule 3 relating to the division of profits and losses “the Contractual Waterfall”.

16. The LLP Agreement made no provision for performance criteria. Nor did a draft of what became the LLP Agreement, disseminated on 8 May 2012, make such provision. The Judge explained in paragraph 73 of the Judgment that “[n]o-one was able to recollect when or in what circumstances those criteria were dropped”.
17. A few days earlier, on 14 June 2012, HM Revenue and Customs (“HMRC”) had written to ask for further information in relation to the request for group VAT treatment. Noting that “if David Sargen, Jonathan Martin, Sean MacGloin and Michael Beaton are not in a natural partnership, and they do not carry out any other work – as a legal partnership – with a view to furthering the business activities of the group, then group registration cannot be allowed to proceed”, HMRC requested a description of “how the control condition as per schedule 43(A) of the VAT Act 1994 is met”. This example was given by HMRC:

“If A, B and C each hold 17% of the voting rights in a company, they do not control it even though their collective holdings amount to 51%. In order for them to control the company, they must hold all 51% of those voting rights in joint names. This applies to families, partnerships, unincorporated associations or any other group of persons (legal or natural).”

18. On 21 June 2012, Mr Sargen emailed Kingston Smith about HMRC’s letter. He said:

“Just received the attached letter from HMRC. Any idea how we should answer this? I would have thought that it is the partnership that owns the Ltd Co, which no longer has 25% voting share splits, but if you have any suggestions as to how to explain this, it would be much appreciated!”

The following day, Kingston Smith told Mr Sargen in an email that they wanted “to run this one by one of our VAT specialists”, going on:

“The letter from HMRC says that we can reply online using the reference number they provided. When I have spoken to our VAT specialist on Monday, I will go online and reply to this for you and then drop you an email with what our response was.”

On 26 June, Kingston Smith sent Mr Sargen an email reading, “Attached is our reply to HMRC submitted today”. That reply stated:

“Document Risk Solutions Ltd and Derivatives Risk Solutions LLP are both controlled by the four individuals in partnership and therefore form a group for VAT purposes. Both the Ltd company and the LLP carry on the business of consultancy advice to financial services companies. Document Risk Solutions Ltd is also a member of Derivatives Risk Solutions LLP.”

19. In letters of 5 July 2012, HMRC said that the application for group VAT treatment had been approved.
20. On 27 July 2012, Kingston Smith sent Mr Sargen drafts of (a) a partnership agreement for a partnership called “DRS Partnership” with Messrs Sargen, Beaton, MacGloin and Martin as the partners, (b) a deed of adherence providing for Mr Keaton’s admission to the partnership and (c) minutes for a meeting of the partnership. The last of these referred to Messrs Sargen, Beaton, MacGloin and Martin reviewing stock transfer forms transferring their shareholding in DRSL to the partnership, to legal ownership of the shares being vested in the names of Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin while “the beneficial ownership ... would be subject to the provisions of the Partnership Agreement” and to Mr Keane having agreed “to join the Partnership with effect from the close of the meeting”. The draft partnership agreement recorded that the partnership, “having been established by the Partners before the Commencement Date, shall be deemed to have been carried on under the terms of this agreement at all times”, and referred to Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin each contributing one share in DRSL. The draft deed of adherence provided for Mr Keaton to be admitted to the partnership with a capital contribution of £1 and for profits and losses to be divided as agreed by the “Applicable Majority” and, in the absence of any agreement, equally. Under the draft partnership agreement, “Applicable Majority” was defined as “all but one of those Partners that have the mental and physical capacity to vote”.
21. Mr Sargen sent these various documents on to Mr Beaton, Mr MacGloin, Mr Martin and Mr Keane on 6 August 2012. He said in his email:

“As you might recall from discussions near to the end of the LLP set-up process, the idea was that the shares of DRS Ltd would be held in a partnership, largely due to the fact that this was the best way to ensure Gary retained the ability to be part and parcel of the decision-making within DRS Ltd but wasn’t required to pay to join the company. [Kingston Smith] have at long last produced the partnership agreement ... and I’ve attached it here together with a deed of adherence for Gary to come into the partnership and the board minutes for the new partnership and company.

You’ll see I’ve added comments on both the partnership agreement and deed of adherence – yell if you have any others Equally, let me know if you have any comments on the board minutes”

22. There was little response. Mr Martin told Mr Sargen, “Nothing further from me over and above the comments that you’ve already made on the doc.” Mr Keane said, “To be honest not had chance to go through I’m presuming everyone else is same or in agreement?” The Judge accepted evidence given by Mr Sargen, Mr Beaton and Mr Martin that “they each expected at least one further redraft and that the terms within the draft disseminated were not progressed or, it follows, agreed”: see paragraph 132 of the Judgment. “[T]he discussions were not concluded” (paragraph 215) and the documents “remained in draft” (paragraph 233).
23. In 2013, two “members’ interest purchase agreements” (“MIPAs”) were executed. As the Judge observed in paragraph 138 of the Judgment, “[t]he purpose of the MIPAs was to implement the [Kingston Smith] Report’s tax advice by achieving transfers to which capital gains tax, not income tax, applied and by moving towards the position of DRSL becoming the main recipient of profit distributions at corporation tax rates (insofar as it would not be already based upon majority voting in accordance with the Contractual Waterfall)”. The earlier of the MIPAs, dated 22 May 2013, provided for the sale to DRSL by each of the other members of LLP (i.e. Mr Keane, Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin) of 37.5% of his interest as a member of LLP. The consideration payable to each transferor was £267,000, a figure determined by reference to valuations prepared by Kingston Smith, and this amount was credited to a loan account with DRSL in favour of each member. The later MIPA, dated 22 November 2013, similarly provided for the sale to DRSL by the other members of LLP of 55% of their interests in LLP. This time, the amount due to each transferor was specified as £246,000, to be credited to the relevant loan account with DRSL.
24. By the end of 2016, deteriorating relationships led to the parties discussing Mr Keane’s departure. The discussions ultimately resulted in a deed of asset transfer dated 30 November 2017. This provided for the sale to DRSL by LLP of its business. It was explained that Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin were transferring their interests in LLP by way of gift. In contrast, DRSL was to pay Mr Keane the “Interest Purchase Price” for his interests in LLP. “Interest Purchase Price” was defined to refer to (a) a payment of £220,000 to be made on the date of the deed and (b) “[f]urther additional payments, subject to a floor of £160,000 ... , representing a proportion of gross profits derived by [DRSL] from certain projects delivered for Barclays Bank plc (or any affiliates thereof) in a 12 month period from the date hereof and determined in accordance with the Contract for Services”. The “Contract for Services” was an agreement also dated 30 November 2017 by which a company associated with Mr Keane agreed to supply services for 12 months in return for 40% of the gross profit, subject to a minimum of £160,000. In the event, Mr Keane received some £640,000 pursuant to the “Contract for Services”.
25. Kingston Smith had on 8 November 2017 concluded that “a valuation range of £7.151m to £8.076m for the trade of the LLP is reasonable”.
26. As the Judge noted in paragraph 162 of the Judgment, Mr Keane said the following in his witness statement about the background to the deed of asset transfer:

“During my exit negotiations, my partners informed me that the only remaining equity I held in the business was a 4.5% share in the LLP. I was floored. I had gone from believing I owned 20%

of the business to being informed that in reality I owned 4.5% of the LLP.”

27. In the course of the negotiations leading to the deed of asset transfer, Mr Keane sent Mr Sargen, on 1 September 2017, an email which included the following:

“Questions ;

- Is there a singular or dual approach to the questions - considering that I was not and still am not part of Limited
- In regards to the original advice given are we addressing fact that I was not given individual advice in the company set up although the end result was markedly different (ie I was not part of the ‘limited’ structure)

....”

28. The Judge explained in paragraph 173 of the Judgment that there was “no dispute that the interest sold by Mr Keane was and was valued as a 4.5% interest in the LLP”. In paragraph 174 of the Judgment, the Judge said:

“The practical outcome of the Deed of Asset Transfer was that DRSL continued the legal side of the DRS business previously carried out by the LLP, whilst the operations side would no longer be pursued subject to transitional changes and any new arrangements made in the absence of Mr Keane. He would form a new operations entity but continue to work with DRSL in respect of the services to be provided to Barclays Bank plc. That occurred ”

29. LLP was dissolved on 7 May 2019. The individual defendants have, however, agreed to discharge any sums found to be owed by it to Mr Keane.

The Judgment

30. The Judge declared in paragraph 1 of his order that “the beneficial interest in the issued share capital of [DRSL] is the partnership property of a partnership formed between [Mr Keane] and [Messrs Sargen, Beaton, MacGloin and Martin] on 18 June 2012”. The Judge termed this “the DRSL Shareholding Partnership”.

31. The conclusions on which that determination was based included these:

- i) Messrs Sargen, Beaton, MacGloin and Martin had by 4 April 2012 formed a partnership to own the DRSL shares and to carry on the business of controlling the future DRSL and LLP group (paragraphs 55 and 114 of the Judgment). As at 4 April, therefore, they “were in partnership carrying on the business of holding the beneficial interest in DRSL’s issued share capital as an investment” (paragraph 201);
- ii) After this, but no later than 27 April 2012, the terms of the 1 March 2012 proposal were agreed (paragraph 54 of the Judgment). The email which Mr

Sargen sent to Kingston Smith at 12.35 pm on 27 April confirms that agreement had by then been reached on the “general package” of which details were given in the email (paragraph 65). The Judge termed this “the Agreed General Package”;

- iii) That agreement was not appropriately described as an “outline proposal” but “set out the agreed terms upon which Mr Keane would join the DRS business” (paragraph 66 of the Judgment). Those terms included the 1 March proposal’s “equal parity provisions in respect of equity and profit share” (paragraph 67), and “the fact that Mr Keane would join the LLP would not in itself change the substance of the Agreed General Package, including the equity and profit sharing provisions” (paragraph 68). The Judge referred to “these agreed equity and profit sharing provisions within the Agreed General Package, as varied by their application to the LLP” as “the Equal Parity Agreement” (paragraph 68);
- iv) Evidence which Messrs Sargen, Beaton, MacGloin and Martin gave to the effect that the offer of 1 March fell away when Mr Keane said that he did not want shares in DRSL was “based upon their incorrect understanding that there was only an outstanding offer and, therefore, that the parties were not proceeding on the basis of two agreements, namely the Agreed General Package and an LLP Agreement” (paragraph 86 of the Judgment). Further, the evidence of Messrs Sargen, Beaton, MacGloin and Martin “assumes a new agreement superseded the Equal Parity Agreement even though there was no such discussion and even though that would mean the terms of the draft LLP Agreement (when read on their own and without being inter linked to the Equal Parity Agreement) would produce a significant imbalance between Mr Keane and themselves” (paragraph 244);
- v) Although at the 10 May meeting Mr Keane said words to the effect that “he would not want the DRSL shares if they came with a (by implication) significant tax bill” (which the Judge termed “Mr Keane’s 10 May 2012 Statement”) (paragraph 206 of the Judgment), this was not a rejection of the 1 March offer (paragraph 207) or of “the Agreed General Package, including the Equal Parity Agreement” (paragraph 232). The offer “had become the Agreed General Package by [10 May]” (paragraph 207) and the effect of what Mr Keane said at the 10 May meeting “falls to be determined in the context of that extant agreement, which included the Equal Parity Agreement, not in the context of an unaccepted offer” (paragraph 208). “[T]he Equal Parity Agreement was not renegotiated and the Agreed General Package was not varied or terminated at the 10 May 2012 Meeting” (paragraph 209) and “the parties decided (whether at the meeting or afterwards, it does not matter, but probably at the meeting) to investigate methods to achieve the Equal Parity Agreement without producing a significant tax liability for Mr Keane” (paragraph 210; see also paragraph 232);
- vi) By 18 June 2012, the date of the LLP Agreement, “[t]he only agreed material change [to the Equal Parity Agreement] was the removal of the performance conditions identified in the 27 April 2012 email. Subject to that, the Equal Parity Agreement remained extant when the LLP Agreement was executed but subject to the effect of Mr Keane’s 10 May 2012 Statement” (paragraph 216 of the Judgment; see also paragraph 232). “The Equal Parity Agreement had only been

materially varied to the extent that parity with [Messrs Sargen, Beaton, MacGloin and Martin] in equity and profit share (to use the original language of the 1 March 2012 proposal) would start immediately upon Mr Keane joining the LLP subject, however, to the effect of Mr Keane's 10 May 2012 Statement" (paragraph 234(a));

- vii) In the circumstances, "on 18 June 2012 the parties entered into two, inter-linked agreements: the LLP Agreement and the Agreed General Package (subject to its variations)" and "[i]t remained the case ... that the Equal Parity Agreement would give Mr Keane an equal interest in DRSL which when added to his membership share in the LLP would achieve equal equity and profit share with [Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin] unless Mr Keane's 10 May 2012 Statement prevented it" (paragraph 235 of the Judgment); and
- viii) "Mr Keane's 10 May 2012 Statement" "did not provide for the exclusion of the agreement to profit share" (paragraph 236 of the Judgment). "[T]here would still be a contractual agreement which produced a relation between him and [Messrs Sargen, Beaton, MacGloin and Martin] carrying on in common a business of holding the DRSL shares as an investment with a view to profit" which "in law created a partnership", viz. "the DRSL Shareholding Partnership" (paragraph 237). Mr Keane "did not need a beneficial interest in the shares for that relation to subsist": "[t]he only effect upon that relation if he did not have a one fifth interest in the DRSL shares would be that his capital account would not be credited with the value of those shares upon their transfer to the partnership to become partnership property" (paragraph 237).

32. The Judge went on in paragraphs 238-240 of the Judgment:

"238. Therefore, in accordance with the Equal Parity Agreement (as varied) and applying the law of partnership to the DRSL Shareholding Partnership upon execution of the LLP Agreement, as at 18 June 2012:

- a) The DRSL shares became partnership property now of a partnership of five not four partners. Each partner should have had their capital account credited with an agreed equal value attributable to their respective equal beneficial interest in the DRSL shares which they transferred into the DRSL Shareholding Partnership.
- b) Subject to the application of Mr Keane's 10 May 2012 Statement ('Mr Keane's Exception'), this would include Mr Keane because he would receive an equal beneficial interest under the terms of the Equal Parity Agreement (as varied) upon execution of the LLP Agreement.
- c) Mr Keane's Exception was a right to refuse or an automatic exemption from receiving a beneficial interest in the DRSL shares (and, therefore, from receiving a consequential credit to his capital account) if a transfer to him of an equal beneficial interest in the

DRSL shares would result in a significant personal tax liability. It did not affect his entitlement as a partner to share the DRSL Shareholding Partnership's profits equally with the 1-4 Ds. That right would continue whether he had a credit to his capital account or not.

- d) There being no contrary agreement and consistent with the equal sharing of profit and loss, distribution upon dissolution would be in equal shares after payment of debt and liabilities and repayment of sums credited to partners' capital accounts (applying sections 39 and 44 of the Partnership Act 1890).

239. Paragraph [238(c)] above leaves open the question whether Mr Keane's Exception was an option to refuse a one-fifth beneficial interest with the consequence that his capital account would not be credited or whether that would occur automatically if it was established that he would incur a significant tax liability should he receive and contribute as capital an equal interest with the 1-4 Ds in the beneficial title to DRSL's shares.

240. It would appear to be the former option when there is no evidence of anyone having at the time identified whether or precisely when a tax liability would arise and/or, if so, what the quantum would be and, therefore, whether it would in fact be a significant tax liability. It may not be necessary in practice to determine the matter. However, in any event no submissions have been made on this point and the parties are entitled to argue otherwise and upon the consequences should they so wish. This is a question that can be adjourned or addressed upon winding up of the DRSL Shareholding Partnership if appropriate."

33. "[E]ven assuming in favour of [Messrs Sargen, Beaton, MacGloin and Martin] that Mr Keane's 10 May 2012 Statement had been binding and not subject to investigation," the Judge said in paragraph 244 of the Judgment, "it would only have been a variation of the term of the Equal Parity Agreement entitling him to an interest in the DRSL shares". Mr Keane "did not reject the agreement of parity including his entitlement to share equally in the LLP's profits" and "that agreement would in itself have created a partnership" (paragraph 244). The Judge continued:

"The shares would have become partnership property and [Messrs Sargen, Beaton, MacGloin and Martin] would have had their capital accounts credited with their value. [Mr Keane] did not have to have been a beneficial owner of and transfer an interest in DRSL shares to become a partner entitled to share in profits and losses. He would be a partner with that entitlement but without an initial credit to his capital account."

34. In paragraph 264(a) of the Judgment, the Judge said that he had decided:

“The beneficial interest in DRSL’s issued share capital is the partnership property of the DRSL Shareholding Partnership formed between [Messrs Sargen, Beaton, MacGloin and Martin] and Mr Keane on 18 June 2012, as defined at paragraph 237 above. Each of the partners is entitled to share equally in the profits/losses of the DRSL Shareholding Partnership and in any residue (i.e. after payment of debts and liabilities and repayment of capital accounts) in a winding up following its dissolution”

35. In paragraph 258 of the Judgment, the Judge expressed the view that the “DRSL Shareholding Partnership” was continuing. However, in the light of submissions made on the defendants’ behalf, the Judge concluded at a hearing concerned with consequential matters on 27 June 2022 that the partnership had in fact come to an end on 30 November 2017. The Judge’s order therefore includes a declaration to that effect.
36. The Judge further declared that the “DRSL Shareholding Partnership” ought to be wound up by the Court and directed accounts and inquiries to that end. The order includes specific provision for the first to fourth defendants to pay Mr Keane the amount of any profits made by DRSL since 30 November 2017 which were attributable to use of Mr Keane’s share of its assets should Mr Keane make an election under section 42 of the Partnership Act 1890. The order also provides for DRSL to pay Mr Keane the amount found to be outstanding on the loans which Mr Keane made to DRSL pursuant to the MIPAs.
37. It had been submitted to the Judge at the trial that the case being advanced by Mr John McDonnell KC, who was appearing for Mr Keane (as he also did before us), was not within the ambit of his pleaded case, in part because the claim form sought a declaration that Mr Keane and Messrs Sargen, Beaton, MacGloin and Martin “had carried on the business of holding and managing the shares in [DRSL] in partnership since *about 20 August 2012*” (emphasis added). In paragraph 188 of the Judgment, however, the Judge rejected that submission. He further, by paragraph 4 of his order, granted Mr Keane permission “to amend the date in para 1(a) of his Claim Form from ‘about 20 August 2012’ to ‘18 June 2012’”.
38. I should also, I think, mention the Judge’s views of the witnesses. Oral evidence was given by Mr Keane, Mr Sargen, Mr Beaton and Mr Martin. The Judge said of Mr Keane that “some of his evidence was unsatisfactory, particularly when he sought to suggest that he really did not understand the difference between fundamental concepts such as a limited company and a limited liability partnership”, but “the reality is that he honestly recognised that he did not have a good memory of the detail which surrounded and gave rise to him joining the LLP”: paragraph 38 of the Judgment. With regard to Mr Sargen, Mr Beaton, Mr MacGloin and Mr Martin (though Mr MacGloin’s death meant that there was only written evidence from him), the Judge explained that he “approach[ed] their evidence from the perspective that they have sought to assist the Court but do not have the accuracy of recollection that they probably think they have”: paragraph 44. No one from Kingston Smith gave evidence. As to that, the Judge said in paragraph 46:

“neither side has presented evidence from those who were advising upon and drafting agreements for and relevant to the transfer of the DRS business from DRSL to the LLP, Mr Keane

joining the LLP, the MIPAs and the Deed of Asset Transfer. Although one might have anticipated that such evidence would have assisted, both sides made that choice and the point will not be taken against either of them.”

The issues

39. Although there are five grounds of appeal, it seems to me that the main issues to which the appeal gives rise can be summarised as follows:
- i) Did the Judge wrongly allow Mr Keane to advance, and himself proceed to make findings on, a case which was outside the scope of Mr Keane’s pleadings (“the Pleadings Issue”)?
 - ii) Was the trial procedurally unfair because of interventions by the Judge (“the Interventions Issue”)?
 - iii) Was the Judge wrong to find that there was a partnership between Mr Keane and Messrs Sargen, Beaton, Mr MacGloin and Martin (“the Partnership Issue”)?
40. I find it convenient to consider these issues in reverse order.

The Partnership Issue

41. It is trite law that there are only limited circumstances in which an appellate Court should interfere with a finding of fact made by a trial judge. Thus in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600, Lord Reed (with whom Lords Kerr, Sumption, Carnwath and Toulson agreed) said at paragraph 67:
- “in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”
42. Of course, questions as to whether contracts have been concluded, or partnerships formed as a result, are not exclusively factual and may potentially turn on issues of law rather than fact. The present case, however, is one where the Judge’s decision turned to a very substantial extent on his assessment of factual matters.
43. It is nonetheless the appellants’ case on this appeal that this Court should reject the Judge’s conclusion that a partnership in respect of the DRSL shares was formed between Mr Keane and Messrs Sargen, Beaton, MacGloin and Martin. They maintain, putting matters broadly, that the Judge’s decision lacked an evidential foundation and cannot reasonably be justified.
44. As I read the Judgment, the Judge’s overall conclusion depended crucially on a finding that what he termed the “Agreed General Package” had been contractually agreed by 27 April 2012. In paragraph 63 of the Judgment, the Judge rejected evidence that the

proposal previously put to Mr Keane was “not formally accepted” as “contradicted by the contemporaneous correspondence” and, after noting that Mr Sargen had referred in his email to Kingston Smith of 27 April to “the general package agreed with [Mr Keane]”, the Judge said in paragraph 65 that Mr Sargen “would not have referred to the package being agreed without meaning it”. Further, the Judge is, I think, to be understood to have found, not merely that the “general package” had been agreed in principle, but that a contract to that effect had been concluded. Both Ms Lesley Anderson KC, who appeared for the appellants, and Mr McDonnell endorsed that view, and it is borne out by various passages in the Judgment. If the Judge had seen the “general package” as no more than an agreement in principle, he would hardly have taken issue with Mr Sargen’s description of it as an “outline proposal” (as to which, see paragraph 66). When considering the 10 May meeting, the Judge referred to an “incorrect understanding that there was only an outstanding offer and, therefore, that the parties were not proceeding on the basis of two agreements, namely the Agreed General Package and an LLP Agreement”: see paragraph 86. Likewise, the Judge spoke of the defendants’ recollection being “incorrectly based upon an offer rather than agreement having been reached on or about 27 April 2012” and of an “extant agreement, ... not an unaccepted offer”: see paragraphs 73 and 208. The Judge, moreover, used the language of contract when referring to whether the “Agreed General Package” had been “varied”, the subject of “variation” or “terminated”: see paragraphs 68, 73, 94, 95, 209, 232 and 235.

45. The Judge’s finding as regards the “Agreed General Package” affected his assessment of evidence on other matters: he said that evidence given by Messrs Sargen, Beaton, MacGloin and Martin was “based upon the incorrect premise that the 1 March 2012 offer had not been accepted and was rejected by Mr Keane’s 10 May 2012 Statement” (paragraph 242) as well as “based upon their incorrect understanding that there was only an outstanding offer” (paragraph 86). More importantly, the fact that, as the Judge saw things, the “Agreed General Package” had taken effect contractually can be seen to have played a key role in the reasoning which led him to hold that Mr Keane had become a partner in the “DRSL Shareholding Partnership” on 18 June. The effect of “Mr Keane’s 10 May 2012 Statement” fell to be determined in the context of “that extant agreement” (paragraph 208) and, the “Equal Parity Agreement” derived from the “Agreed General Package” having “only been materially varied to the extent that parity with the 1-4 Ds ... would start immediately upon Mr Keane joining the LLP” (paragraph 234(a)), on 18 June the parties “entered into two, inter-linked agreements: the LLP Agreement and the Agreed General Package (subject to its variations)” (paragraph 235) and “in accordance with the Equal Parity Agreement (as varied) ... [t]he DRSL shares became partnership property now of a partnership of five not four partners” (paragraph 238). As I understand the Judgment, it was the Judge’s view that Mr Keane became a partner in the partnership which held the DRSL shares *because* there was a pre-existing contract between the parties in the form of the “Agreed General Package”, as varied.
46. It seems to me, however, that the Judge was not entitled to find that the “general package” set out in Mr Sargen’s 27 April 2012 email to Kingston Smith took effect contractually. So far as I can see, Mr Keane had never advanced such a case. Nothing to that effect is to be found in his pleadings, in Mr McDonnell’s skeleton argument for the trial or even, it appears, in Mr McDonnell’s closing submissions before the Judge. In any case, the finding was not available to the Judge on the evidence. As the Judge

noted in paragraph 61 of the Judgment, Mr Keane stated in cross-examination that he had no real recollection of the 27 April meeting. For his part, Mr Sargen described his email to Kingston Smith as containing an “outline proposal” which had not been formally accepted by Mr Keane, and he was not challenged on that in cross-examination, as he should have been if Mr Keane’s case had been to the contrary (see e.g. *Browne v Dunn* (1893) 6 R 67, *Markem Corp v Zipher Ltd* [2005] RPC 31 and *Chen v Ng* [2017] UKPC 27). Nor was there any support for the Judge’s finding in the evidence of Mr Beaton, Mr MacGloin or Mr Martin, and, when Mr Beaton and Mr Martin came to give oral evidence, the question whether a contract had been entered into by 27 April was not explored. Again, if it was to be suggested that a contract had been made on 27 April, the point should have been put to Mr Beaton and Mr Martin given the general rule that “a party should put to each of his opponent’s witnesses in turn so much of his own case as concerns that particular witness” (to quote Phipson on Evidence, 20th ed., at paragraph 12-35). On top of that, the 27 April email to Kingston Smith was entirely compatible with an agreement in principle rather than a concluded contract. In the course of the hearing before us, Mr McDonnell accepted that Mr Sargen might have written in the same terms had he thought, not that there was a contract, but that he and Messrs Beaton, MacGloin and Martin had agreed with Mr Keane a proposal which was to be taken forward into detailed documents. That the email does not constitute evidence of a contract is indicated by the references in it to “making good progress” and to a “general” package and by its repeated use of the word “would”. The email cannot be said to show that the parties had moved beyond heads of terms which needed to be the subject of detailed drafting. In fact, Mr Hughes of Kingston Smith appears to have forwarded the email on 28 April with that end in view.

47. In any event, on the Judge’s findings the performance criteria embodied in the “general package” were “dropped”: see paragraph 73 of the Judgment. The fact that, as the Judge recorded, “[n]o-one was able to recollect when or in what circumstances” that had happened is consistent with the “general package” having represented no more than an agreement in principle, such that what was envisaged could be changed or developed without a contractual variation or rescission having been agreed. Even supposing, however, that the “general package” had taken effect contractually, it is hard to see what could have survived the excision of performance criteria, which were integral to the “general package”. In fact, not a single sentence (or even line) of the “general package” would have remained applicable as it stood. The parties would surely have had to agree a new contract. The original one would have been spent.
48. Be that as it may, the Judge found that at the meeting on 10 May 2012 Mr Keane made “Mr Keane’s 10 May 2012 Statement”. In his submissions to us, Mr McDonnell was inclined to suggest that, having regard to what Kingston Smith had explained in their email of 8.47 on 10 May, Mr Keane need have had no concern about becoming a member of the partnership holding the shares in DRSL. It can be seen, Mr McDonnell suggested, that mere acquisition of an interest in DRSL’s shares would not have triggered any tax liability. However, the simple fact is that, on the Judge’s findings, “Mr Keane’s 10 May 2012 Statement” was made and, as a result, there was perceived to be a need for further investigation. The position Mr Keane took may in reality have been an unwise one, but that does not matter. At trial, he himself “no longer disputed that he said he would not take shares with a tax liability” (paragraph 85 of the Judgment), while Messrs Sargen, Beaton, MacGloin and Martin all testified to Mr

Keane's rejection of shares in DRSL (and, in the case of Mr Sargen and Mr Beaton, to their surprise at that).

49. By 10 May 2012, as the Judge found, Messrs Sargen, Beaton, MacGloin and Martin "were in partnership carrying on the business of holding the beneficial interest in DRSL's share capital as an investment" (paragraph 201 of the Judgment). That evidently remained the case following 10 May. The Judge did not find that Mr Keane had joined the partnership on 10 May, but rather that there was a perceived need for investigation. Nor did Mr McDonnell, in his submissions before us, argue that Mr Keane had become a partner in the DRSL shares partnership by 10 May.
50. The Judge nevertheless held that, on 18 June 2012, the "DRSL Shareholding Partnership" was created, in that there was "a contractual agreement which produced a relation between [Mr Keane] and [Messrs Sargen, Beaton, MacGloin and Martin] carrying on in common a business of holding the DRSL shares as an investment with a view of profit" (paragraph 237 of the Judgment). It seems to me, however, that there is more than one objection to that conclusion. In the first place, as I have already indicated, the conclusion appears to be rooted in the Judge's view that the "Agreed General Package" had been contractually agreed by 27 April and remained in force, subject to variations, yet, as I see it, (a) the Judge was not entitled to find that the "Agreed General Package" ever had contractual effect and (b) there would anyway have been a need to agree a new contract once the performance criteria had been dispensed with. Even assuming, however, that, as was the Judge's view, the "'Agreed General Package' (subject to its variations)" was contractually binding on 18 June, I cannot see on what basis the Judge could have been justified in concluding that on 18 June Mr Keane acceded to the partnership holding the DRSL shares. Matters had been left on 10 May on the basis that there would be investigation, and there is nothing to indicate that those investigations had been concluded by 18 June. The Judge himself said that "the investigations produced the potential solution of a partnership agreement", but "the evidence establishes that the discussions were not concluded" (paragraph 215 of the Judgment). He evidently had in mind the draft documents circulated to Mr Beaton, Mr MacGloin, Mr Martin and Mr Keane by Mr Sargen on 6 August, which, as the Judge noted in paragraph 233, "remained in draft". It is noteworthy, moreover, that Mr Sargen referred in the email to which he attached the draft documentation to a "deed of adherence for Gary *to come into* the partnership" and that the draft partnership minutes spoke of Mr Keane agreeing to join "*with effect from the close of the meeting*" (emphasis added in each case). It thus appears that, even in August, the parties had not moved beyond investigations and Mr Keane had yet to become a partner in the DRSL shares partnership. Nor is there any other evidence to show that Mr Keane joined the partnership on 18 June. The LLP Agreement was finalised on that date, but that cannot establish that Mr Keane had by then overcome his doubts and acceded to the partnership and the Judge did not identify anything else from which it could be inferred that it had been agreed that Mr Keane should be added as partner. Mr McDonnell himself observed in submissions that "nothing happened, in a sense, in that the abortive discussions over the documents produced by Kingston Smith appear not to have reached a conclusion". Mr McDonnell said that emails for the period between 10 May and 18 June were missing, but (a) Ms Anderson disputed that there was any reason to believe that relevant emails were not available, (b) it is apparent from the Judgment (especially paragraphs 93, 97-99, 101 and 103) that *some* emails from the period were before the Judge and

(c) there is in any case no basis for inferring that any email would have evidenced accession by Mr Keane to the partnership.

51. During his submissions, Mr McDonnell reminded us of what Mr Sargen had said in the email to Kingston Smith of 21 June 2012 quoted in paragraph 18 above and told us that he had suggested to Mr Sargen during cross-examination that he (Mr Sargen) had meant that the four-man partnership previously notified to HMRC had become a five-person one. As, however, Mr McDonnell recognised, the Judge addressed Mr Sargen’s email in paragraphs 219 and 220 of the Judgment and said that “it would not be right to conclude on the balance of probability that the reference to the change in the percentage ‘split’ reflected the effect of Mr Keane’s addition to the partnership”. Further, when we asked Mr McDonnell whether this was challenged, he did not say that it was, and there is in any event no respondent’s notice. In the circumstances, I do not think the 21 June email can assist Mr Keane.
52. All in all, it seems to me, with respect, that the Judge was not entitled to find that Mr Keane became a partner in the partnership relating to the DRSL shares. There was no evidence to support that conclusion.
53. It is clearly the case that, in 2012, Messrs Sargen, Beaton, MacGloin and Martin would have been happy for Mr Keane to accede to the DRSL shares partnership. In fact, at least Mr Sargen and Mr Beaton were surprised when Mr Keane declined to take DRSL shares at the meeting on 10 May 2012, and no one raised any objection to partnership documentation substantially in the form of the drafts circulated in August being executed. In the event, however, the discussions “were not concluded”, the documents “remained in draft” and no further steps were ever taken to make Mr Keane a partner.
54. I would accordingly allow the appeal and dismiss the claim.

The Interventions Issue

55. One of the grounds of appeal is to the effect that the trial was unfair because the Judge intervened too much when Mr Keane was giving oral evidence. Ms Anderson did not advance the point with any force, but I should nevertheless address it briefly.
56. The Courts have repeatedly warned of the dangers of judges intervening when witnesses are giving evidence. In *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455, Lord Wilson (with whom Lord Reed, Lord Briggs, Lady Arden and Lord Kitchin agreed) noted at paragraph 40 that “[t]he leading authority on inquiry into the unfairness of a trial remains the judgment of the Court of Appeal, delivered on its behalf by Denning LJ, in *Jones v National Coal Board* [1957] 2 QB 55”. In *Jones v National Coal Board* (“*Jones*”), Denning LJ said at 63 that a trial judge “sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large” and went on:

“Was it not Lord Eldon L.C. who said in a notable passage that ‘truth is best discovered by powerful statements on both sides of the question’?: see *Ex parte Lloyd* and Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should

himself conduct the examination of witnesses, ‘he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict’: see *Yuill v. Yuill*.”

At 65, Denning LJ said:

“Now, it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness’s evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness’s evidence can be properly tested, and it loses much of its effectiveness in counsel’s hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy sometimes to return.”

57. In *Southwark London Borough Council v Kofi-Adu* [2006] EWCA Civ 281, [2006] HLR 33 (“*Kofi-Adu*”), Jonathan Parker LJ, giving the judgment of the Court of Appeal, observed at paragraph 142 that “a first instance judge is entitled to a wide degree of latitude in the way in which he conducts proceedings in his court” and at paragraph 145 that “[n]owadays, of course, first instance judges rightly tend to be very much more proactive and interventionist than their predecessors, and the above observations [i.e. those in *Jones and Yuill v Yuill*] (made, in the case of Lord Denning M.R., almost 50 years ago, and, in the case of Lord Greene M.R., more than 60 years ago) must be read in that context”. Jonathan Parker LJ continued, however:

“That said, ... it remains the case that interventions by the judge *in the course of oral evidence* (as opposed to interventions during counsel’s submissions) must inevitably carry the risk so graphically described by Lord Greene M.R.”

“The risk,” Jonathan Parker LJ explained in paragraph 146, “is that the judge’s descent into the arena (to adopt Lord Greene M.R.’s description) may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may *for that reason* render the trial unfair.”

58. In a similar vein, in *Michel v R* [2009] UKPC 41, [2010] 1 WLR 879, Lord Brown, giving the judgment of the Privy Council, referred in paragraph 31 to “[t]he core principle ... that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence”. He went on to quote from “Denning LJ’s celebrated judgment in *Jones v National Coal Board*”.
59. On the other hand, excessive interventions by the judge during oral evidence will not necessarily render a trial unfair. Thus, in *Shaw v Grouby* [2017] 1 WLR 2455, Patten LJ, with whom Vos C agreed, considered that “the judge’s interventions, whilst always courteous, were ... excessive and ... he should have attempted to postpone his questioning, particularly of the witnesses of fact, until after counsel had conducted his cross-examination except when it was necessary to ask the witness to clarify an answer so that the judge could understand the evidence that was being given” (paragraph 45), but “reached the conclusion that there was still a fair trial and a proper judicial determination of the main issues” (paragraph 46). “The allegation of unfairness,” Patten LJ said, “requires one to look carefully at what were the real issues in the case and how the judge’s conduct impacted on them” (paragraph 46).
60. In the present case, Ms Anderson did not suggest that the Judge had ever been other than courteous and stressed that she was not advancing a complaint of judicial misconduct. She pointed, however, to 52 occasions when the Judge intervened during her cross-examination of Mr Keane.
61. Having read the relevant transcripts, it is plain, not only that the Judge was courteous, but that he was concerned to ensure that Mr Keane understood Ms Anderson’s questions and had a fair opportunity to answer them. Even so, looked at in the round, it does seem to me that the Judge interrupted more often than was appropriate.
62. It is worth, I think, commenting specifically on two of the interventions. So far as the first is concerned, the relevant transcript extract reads as follows:

“Q. Forgive me, so we can pin it down even further, between 1 March, you say, when this was sent to you, and the 10 May, then you say some other offer was made to you?

A. From my memory, yes.

Q. Where do we see that in your evidence?

A. Sorry, are we back to my witness statement?

Q. Yes, back in bundle B.

A. Bundle B, yes, sorry, I have it, yes.

JUDGE JONES: So to cut down the awful problem that always arises of a witness in the witness-box suddenly having to work out what is in his statement, with a certain amount of panic that ensues when somebody is put on the spot, are we right that we are dealing with between paragraphs 2 and 17, simply because it can’t be between anywhere else, Ms Anderson?

MS ANDERSON: I think so, yes.

JUDGE JONES: Okay, Mr Keane, if we look at your paragraph 12, you are explaining some background in paragraph 12.

A. Yes.

JUDGE JONES: So that sort of sets it up. And 13, but emphasising your main contact is Mr MacGloin. And then at 14 you are making an observation with regard to DRSL's performance. And then for 15 you are talking about Sean approaching you, so now we are in February 2012.

A. Yes.

JUDGE JONES: This is obviously a little early and he is telling you that there is a space for you. And then at 16 you are referring to how much you were getting Bank of America and it was made clear to you you would be joining as an equal partner. You don't set out any dates about this, but that is what you are saying.

A. No.

JUDGE JONES: And various observations that you make and then:

'By the time negotiations reached fruition those requirements [which I understand are performance criteria] were no longer discussed and no targets were put and it is clearly agreed that I would join the business as an equal partner.'

And then in 17 you go into what you would do, your plan of what you would do as head of operations, and that is a little bit more - I am just going to put it in those terms - at the top of page 5. That's what we are looking at.

A. Yes, my Lord.

JUDGE JONES: Now, if you want to ask the question, Ms Anderson, it will help because he has got in his mind what he is dealing with."

63. As Denning LJ noted in *Jones*, "the very gist of cross-examination lies in the unbroken sequence of question and answer" and it "loses much of its effectiveness if the witness is given time to think out the answer to awkward questions". In the intervention set out in the previous paragraph, the Judge will not merely have given Mr Keane "valuable time for thought" (to use words of Denning LJ), but pointed him to where he might find an answer to Ms Anderson's question. It seems to me that it was inappropriate for the Judge to intervene in this way and thereby to run the risk of debilitating the cross-examination. This intervention and the questions asked by the Judge in the passage that followed also risked clouding his ability properly to weigh and evaluate the evidence.

64. The second intervention can be seen in the following transcript extract:

“Q. Mr Keane, it is so obvious that you are not telling the truth about this.

A. No.

JUDGE JONES: It is not a question of not telling the truth. You have many times accused him of telling lies. I don’t think this is this sort of case at all. It is not a case of intending to lie. I have had all of this yesterday and I formed a pretty clear view as to his evidence.

MS ANDERSON: I’m grateful.

JUDGE JONES: And I don’t think this is really particularly helpful, but I take the note, except for the fact that the note refers specifically to these points, and I agree, and that is in the document.”

65. While a judge may of course form a provisional view as to the truthfulness of a witness while cross-examination is in progress, his role at that stage is not to arrive at a conclusion, let alone to voice one, but essentially to listen. To my mind, it was not appropriate for the Judge to state while Mr Keane’s cross-examination was still in progress that “[i]t is not a question of not telling the truth”. The Judge will here, I think, both have prevented Ms Anderson from asking a legitimate question and in all probability provided Mr Keane with reassurance as to how his evidence was being received and, hence, made Ms Anderson’s task generally harder. Of course, there can potentially be occasions when it is not only legitimate but incumbent on a judge to intervene during cross-examination to prevent a witness from being subjected to unfair bullying, but there was no need for that in the present case. If, alternatively, a judge feels that a point has already been explored with a witness sufficiently, he can seek to move the cross-examiner on without expressing any view as to the veracity of what the witness has said.
66. The ultimate question, however, is whether the Judge’s interventions made the trial unfair. I have already indicated that the Judge intervened more often than was appropriate. He should have attempted to postpone his questioning of Mr Keane until after Ms Anderson had conducted her cross-examination, save when it was necessary to clarify the evidence being given. Judicial self-restraint is required to avoid the consequences referred to above and to ensure that the trial process is fair to all involved. That said, I do not consider that the interventions either prevented the appellants from fully presenting their case at trial or impaired the Judge’s decision-making. There was a fair trial and Ms Anderson did not really suggest otherwise in her submissions to us. While the Judge may have intervened more than was appropriate, his conduct was nothing like that which led to appeals being allowed in *Kofi-Adu* and *Serafin v Malkiewicz* and, “look[ing] carefully at what were the real issues in the case and how the judge’s conduct impacted on them”, I am in no doubt that the trial remained fair.

The Pleadings Issue

67. When these proceedings were issued on 26 April 2019, paragraph 1 of the claim form explained that, as against the first to fourth defendants, Mr Keane claimed:
- “a. a declaration that he and the First to Fourth Defendants have carried on the business of holding and managing the shares in the Fifth Defendant in partnership since about 20 August 2012, an order that the said partnership be dissolved and that its affairs be wound up, and an order for the taking of all necessary accounts and inquiries;
 - b. alternatively, a declaration that the First to Fourth Defendants hold their shares in the Fifth Defendant on constructive trust for themselves and the Claimant in equal shares.”
68. When, on 22 August 2019, Mr Keane served his particulars of claim, paragraph 1 of the prayer sought “a declaration that the First to Fourth Defendants hold their shares in the Fifth Defendant on trust for themselves and the Claimant in equal shares”, but there was nothing corresponding to paragraph 1(a) of the claim form. Further, while paragraph 20 of the particulars of claim asserted that Mr Keane and Messrs Sargen, Beaton, MacGloin and Martin “agreed the terms of a partnership set out in [the draft documents circulated in August 2012]” and that Mr Keane “believes that the draft partnership agreement, the draft DRS Partnership minute and the draft deed of adherence were signed”, there was no other mention in the particulars of claim of a partnership in respect of the DRSL shares having been concluded. The focus was on claiming that the shares in DRSL had become subject to a constructive trust.
69. Mr McDonnell nevertheless opened his skeleton argument for the trial with the sentence, “This is a Partnership Action concerning a partnership which Mr Keane claims was formed in 2012 between himself and the first four Defendants ...”. He was evidently encouraged to put Mr Keane’s case in this way by the disclosure by the defendants of documents relating to the application for group VAT treatment. However, it remains the case (a) that the claim had not been framed as “a Partnership Action” in the particulars of claim, (b) that even the claim form alleged a partnership only from “about 20 August 2012” and (c) that Mr McDonnell did not argue for an earlier start date in his skeleton argument.
70. The Judge, however, rejected a submission by Ms Anderson that the claim presented by Mr McDonnell fell outside the ambit of Mr Keane’s statements of case (paragraph 188 of the Judgment) and ultimately, following the handing down of the Judgment, gave permission for paragraph 1(a) of the claim form to be amended so as to refer to “18 June 2012” rather than “about 20 August 2012”. In that connection, the Judge considered that, on the basis of Mr Keane’s pleaded case, the defendants “would or should have addressed events from the beginning of 2012 and through to and including August/September 2012 for the purposes of their Defence, disclosure, witness statements and the trial” (paragraph 20). The Judge further said that, while the declaration sought in the claim form would need to be redrafted if he accepted Mr McDonnell’s submissions, “[p]lainly amendments would be allowed” (paragraph 178);

that, while “[s]trictly ... the existence of a partnership from 4 April 2012 and the additional facts and matters concerning Group registration should have been pleaded”, those facts and matters derived from disclosure, and notice of Mr Keane’s reliance on the documents had been given in pre-trial correspondence (paragraph 180); and that he could not conclude that the defendants had been taken by surprise or that any unfairness had arisen for the trial (paragraph 183).

71. One of the grounds of appeal proceeds on the basis that the “Judge erred in law in allowing the Claimant to advance at trial, and then himself proceeding to make findings on, a case which was outside the scope of his pleadings which constitutes serious procedural unfairness to the Defendants”. Before us, Ms Anderson did not press the point as an independent basis for allowing the appeal and, given my conclusions on the Partnership Issue, it is in any event of no practical significance. I should still, however, say something about it.
72. My own view is that the case presented by Mr McDonnell at the trial, and even more so the (somewhat different) case on which the Judge ultimately founded his decision, were not within the ambit of Mr Keane’s existing pleadings. Not only had paragraph 1(a) of the claim form alleged a partnership only “since about 20 August 2012”, but that head of claim was not replicated in the particulars of claim and so had been dropped. On the other hand, (a) the Judge gave permission for the claim form to be amended, (b) the power to permit amendment is discretionary, (c) the Judge was, I think, entitled to take the view that the defendants would not suffer any relevant prejudice if the possibility of a partnership having come into being earlier in 2012 were entertained and (d) Ms Anderson did not insist on the Judge making a formal ruling during the trial. With regard to the last of these points, Mr McDonnell referred us to *Hawksworth v Chief Constable of Staffordshire* [2012] EWCA Civ 293, which the White Book cites at 16.0.1 for this:

“Complaints that a party was permitted to rely upon an unpleaded point at trial cannot be raised by way of appeal unless, at the trial, the complaining party invited the judge to rule upon the point and insisted upon a ruling. If this is done and a ruling preventing departure from the pleading is made, the other party would then have an opportunity to seek permission to amend his pleading”

73. In all the circumstances, I would not have allowed the appeal on this particular ground.

Conclusion

74. I would allow the appeal and dismiss the claim.

Lady Justice Simler:

75. I agree with both judgments.

Sir Geoffrey Vos, Master of the Rolls:

76. I also agree.

77. I add a few words to emphasise that, in my view, the way in which the judge interrupted the cross-examination of Mr Keane was, as Newey LJ has said, inappropriate. My reading of many of the interruptions is that the judge was, perhaps inadvertently, but certainly inappropriately, protecting the witness. I also agree that ultimately the trial was not rendered unfair, but that is only because Mr Keane had almost no detailed recollection of what had occurred and that is what the judge found (see, for example [38], [61], [79], [80], [135] and [213] of his judgment). That finding has formed a key part of our decision that the judge's reconstruction of the facts cannot be sustained on the evidence.