Neutral Citation Number: [2019] EWHC 3364 (Ch)

Case No: BL-2018-001744

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)
BUSINESS LIST

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10/12/2019

Before :

MR MICHAEL GREEN QC

(sitting as a Deputy Judge of the Chancery Division)

- -

Between :

JOHN JARLATH BOYLE	**Claimant**
- and -	
(1) DERMOT FRANCIS MICHAEL BURKE	
(2) JEREMY SEAN CHARLES CAVE	**Defendants**

- -
- -

Mr Hugh Jackson (instructed by **Shoosmiths LLP**) for the **Claimant**
Mr Jeremy Callman (instructed by **Bells Solicitors Ltd**) for the **Defendants**

Hearing dates: 21, 22 and 23 October 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR MICHAEL GREEN QC

MR MICHAEL GREEN QC :

Introduction

1. Partnership law is still based on a statute passed nearly 130 years ago, the Partnership Act 1890 (**the Act**). The Act was an attempt by Sir Frederick Pollock to codify existing partnership law as developed by the Courts of Chancery and it reflected those principles of equity and of the common law that at the time made up the corpus of partnership law. Those principles survived the coming into force of the Act (see s.46 of the Act) save insofar as they are inconsistent with the express provisions of the Act.

2. This case is concerned with the somewhat elusive concept of dissolution of a partnership. The Claimant, Mr John Boyle, a retired partner and entitled to a pension from the partnership claims that the partnership in question dissolved in 2012 and that event triggered an entitlement to a lump sum to cover his future pension benefits. The Defendants, who were the only partners at that time, say that the partnership has not dissolved and that it still continues in existence.

3. There are two recognised forms of dissolution in partnership law: (1) a general dissolution where the partnership is brought to an end; and (2) a technical dissolution, where there is a change in membership but the partnership continues. The two are not distinguished in the Act. Unlike dissolution in relation to companies, which comes after a winding up, a general dissolution is the precursor to a winding up of a partnership. The issue in this case is whether there can be a general dissolution and winding up of a partnership even though the partners did not intend to dissolve the partnership. In fact, in this case, those partners, the Defendants, specifically decided not to dissolve the partnership because they wanted to avoid triggering the Claimant's pension entitlement. The Claimant says that such a dissolution occurred because an agreement to dissolve can be inferred from the Defendants' actions or be imputed by law.

These Proceedings

4. This is the trial of proceedings brought by CPR Part 8 Claim Form by which the Claimant seeks the following declarations from the Court (underlining added):

> "1. The solicitors' partnership, the terms of which were set out in a deed dated 27 January 1987, of which [the Claimant] was formerly a member until his retirement therefrom on 30 September 1988, terminated on or about 1 October 2012 upon the transfer of the entire business and undertaking of the Partnership to a company known as Bells Solicitors Limited.
>
> 2. Upon such termination the Defendants became liable to pay the Claimant the value of the pension payable to him by the partnership as if the same were a loan due from them."

5. It should be noted that the Claim Form uses the language of termination, rather than dissolution, but, as I understand the Claimant's case, he does not distinguish between

the two concepts and uses them interchangeably. That is perhaps confusing because, as will be seen, the relevant clause of the partnership deed uses "*dissolution*" and "*termination*" to mean different things, although it is fair to point out that the Act itself may not contemplate them being different (see for instance s.39 of the Act).

6. The CPR Part 8 procedure was used by the Claimant on the basis that the claim was "*unlikely to involve a substantial dispute of fact*" (see CPR 8.1(2)(a)). The evidence in support of the claim is two witness statements of the Claimant which exhibit the documents relied upon. On behalf of the Defendants, Mr Dermot Burke, the First Defendant, had filed two witness statements before the start of the trial and Mr Jeremy Cave, the Second Defendant, had also filed two witness statements but these merely adopted and confirmed Mr Burke's evidence. Neither party had sought to cross examine the other on their witness statements and the trial was set to proceed on the basis that each party's evidence was unchallenged. However, on the first day of the trial I was informed that the Defendants had an application to adduce further documentary evidence, apparently in response to what had been said in the Claimant's skeleton argument served a few days before. Even though the Claimant had been initially opposing the application, the parties sensibly agreed by the start of the second day of the trial that the documents should be admitted into evidence together with an explanatory witness statement from Mr Burke and that Mr Burke should be cross examined on that explanation and the new documents. Mr Burke was cross examined on those limited issues and I will deal in due course with that evidence.

The Issues

7. The central issue for determination concerns clause 2.43 of the Deed of Articles of Partnership for Bells Potter and Kempson dated 27 January 1987 (**the 1987 Deed**). It is common ground that clause 2.43 is the relevant provision governing the Claimant's pension entitlement. Clause 2.33 of the 1987 Deed provided for the Claimant to receive annual payments by way of pension from the partnership on his retirement. The annual figure started at £15,000 but it has increased since then each year. It is subject to an abatement provision if all the pensions being paid exceeded 20% of the profits of the partnership. These provisions will be explained in more detail below.

8. It is important at this stage to identify and set out clause 2.43. This has an explanatory title of "*Other Dissolution*" and states, materially, as follows:

> "2.43 Upon the final dissolution of the Partnership at its termination or in any event not otherwise herein provided for the affairs thereof shall be wound up and the assets and liabilities dealt with in manner provided by the Partnership Act 1890 subject to any statutory re-enactment or modification thereof provided that:
>
> A The goodwill (if any) shall not be sold but shall be divided between the Partners
>
> B Any pension then currently being paid or entitlement to which shall then have arisen shall cease to be payable but the person or persons entitled to such pension shall have the rights hereinafter specified

> C …
>
> D To the extent of any then current pension for which the Partnership is liable and which may be funded only in part or not at all under such contract policy or scheme as aforesaid the then value of the unfunded part of such pension or of the whole of such pension (as the case may be) shall rank and be treated as a loan due from the firm to the person or persons entitled to receipt of the pension…"

9. The Claimant's case is that his pension became a loan for the full amount of the pension outstanding on 1 October 2012 when the Defendants transferred the whole of their legal practice and other businesses to a company they set up for that purpose, Bells Solicitors Limited (**BSL**). The Claimant says that this was effectively a dissolution of the partnership that was liable to pay his pension and accordingly that pension became a loan due to him from the Defendants.

10. The Defendants by contrast say that no dissolution and/or winding up occurred within clause 2.43 upon the transfer of the businesses to BSL. Their central defence to the claim is that they did not intend or agree to any such dissolution and/or winding up and no such agreement can be inferred. While most of the assets were indeed transferred to BSL, the partnership retained the lease of the business premises which it sublet to BSL for a small profit. Furthermore, they say that the liability to pay the pension was not transferred but remains a liability of the partnership and will be payable in full if sufficient profits are made. Finally they say that the partnership has been looking for further profitable ventures to take on, they have since been providing cleaning services to BSL and trading accounts for the partnership have continued to be prepared.

11. Accordingly, I have to decide if the sale on 1 October 2012 constituted or brought about a "*final dissolution of the Partnership at its termination or in any event not provided for*" within the proper meaning of clause 2.43 of the 1987 Deed. That will involve interpreting the 1987 Deed and determining whether in law the events of 1 October 2012 amounted to a dissolution of the partnership.

The Facts

(a) The 1987 Deed

12. The Claimant practised as a solicitor from 1959 until his retirement in 1988. Prior to entry into the 1987 Deed, the Claimant was a partner in a firm of solicitors known as Bells which operated from offices in Farnham and Kingston in Surrey. There were then nine partners of Bells including the Claimant.

13. On 27 January 1987, Bells amalgamated its practice with another firm of solicitors called Potter and Kempson, which also operated from offices in Farnham, Surrey. There were four partners of Potter and Kempson.

14. This newly formed partnership was thereafter known as Bells, Potter and Kempson (**the Partnership**) and it was constituted by the 1987 Deed.

15. It is a major part of the Claimant's case that at the time the 1987 Deed was entered into solicitors were only able to provide legal services and they could only do so as sole practitioners or in partnership with other solicitors. He says that practising as a solicitor through a limited liability company was not possible until 1988 at the earliest and limited liability partnerships were only allowed from the enactment of the Limited Liability Partnership Act 2000. In paragraph 11 of the Claimant's first witness statement he says this:

> "I can state with certainty that it was understood by all of the Bells Partners, including myself, and the PK Partners at the time when the Articles were agreed that the sole object of the Partnership was that of a professional practice of solicitors of England and Wales, regulated by the relevant authorities, and providing legal services. It was never intended that the Partnership should engage in any other business or trade."

16. Clearly in construing the 1987 Deed, the Claimant's and other partners' subjective intentions at the time are irrelevant. It is however relevant context that at the time the only business that could lawfully be carried on by the Partnership was that of the provision of regulated legal services.

17. The 1987 Deed did not expressly state or limit the Partnership business, which was not a defined term. Mr Hugh Jackson, on behalf of the Claimant, pointed to a number of provisions in the 1987 Deed that he said limited the Partnership business to that of the practice of solicitors:

(1) The parties to the 1987 Deed are described as the "*PRESENT PARTNERS OF BELLS…who immediately prior to the date hereof carried on the practice or professional business of Solicitors of the Supreme Court*" and the "*PRESENT PARTNERS OF POTTER AND KEMPSON…who immediately prior to the date hereof carried on business of Solicitors of the Supreme Court"*;

(2) The Partnership was required to keep financial records in accordance with the Solicitors' Accounts Rules – clause 2.14 of the 1987 Deed;

(3) Each Partner was required to "*devote his full time and attention to the business of the partnership during normal business hours*" (clause 2.21A), although the business of the partnership was not defined;

(4) Clause 2.21E, Mr Jackson submitted, contemplates full time legal practice by the Partners; it provided as follows:

> "E No Partner shall except with the consent in writing of such a majority of the Partners as is herein mentioned for a Fundamental Decision
>
> (i) carry on or be concerned or interested directly or indirectly in the professional practice of a Solicitor except on account and for the benefit of the Partnership Business

(ii) save in the case of [the Claimant][1] provided that such engagement does not conflict with the best interests of the Partnership be engaged or interested either directly or indirectly in any capacity in any profession trade business or occupation whatsoever other than the business of the Partnership or be a director or officer of any company…or of any office or appointment of the Crown or any directorship for which approval has been given by the Partners prior to the date hereof"

(5) The Partners had to provide practising certificates and be members of the Law Society; clause 2.23 provided:

"2.23 The Partners shall provide for themselves and all admitted solicitors employed by them in a fee earning capacity current practising certificates and membership of the Law Society and of any relevant local Law Society and of such other professional and other bodies and institutions as may be necessary or desirable for the improvement of the professional standards of the Partnership business the continuing education of the Partners and professional staff and the benefit of clients."

(6) If a Partner was removed from the Roll of Solicitors, he could be retired from the Partnership (and there was a technical dissolution); clause 2.29A(iii) provided for retirement in the following circumstances:

"(iii) The removal of a Partner's name from the roll of Solicitors his suspension from practice arising out of disciplinary proceedings by the Law Society or his disqualification from holding a practising certificate Material date: the date of service by the other Partners upon the Partner concerned of notice that they invoke this ground."

18. Mr Jeremy Callman on behalf of the Defendants emphasised that there was no definition of the Partnership business and that if the then Partners had wanted to restrict the business to legal practice they could easily have done so in a number of places in the 1987 Deed. All the above-mentioned provisions are able to accommodate a broadening of the business beyond that of a solicitors' practice if that would be something that the Partners chose to do. The requirements in relation to Solicitors Accounts Rules and practising certificates are necessary to deal with the only business at that time but do not limit what they may do in the future. Mr Callman also referred to the ability of the Partners to amend the 1987 Deed which was an unfettered power under clause 2.4 and they could also make decisions as to "*the amalgamation or reconstruction of the Partnership*" (clause 10 of Part A).

19. The retirement and pension provisions of the 1987 Deed are at the heart of this case. I have already set out the critical clause 2.43 above. Other relevant provisions are as follows:

[1] I was told that the Claimant was exempt from this obligation because he had a part time appointment at the time as an Assistant Recorder.

(1) Clause 2.28 deals with the retirement of partners by the giving of 12 months' notice (although the Claimant only had to give 6 months' notice) or on attaining the age of 65. Clause 2.28E made it expressly clear that there was only a technical dissolution when a Partner so retired:

> "E. Upon a Partner retiring in accordance with the foregoing provisions of this clause the Partnership as regards the Partner concerned shall be dissolved on the last day of the relevant financial year but shall not be dissolved as regards the other Partner [sic] and every such retirement is hereinafter referred to as "normal retirement"."

(2) Clause 2.29 provides for "*Cessation in other circumstances*", confusingly using the term "*cessation*" to mean retirement. It deals with retirements that are not "*normal*", meaning in the event of death, incapacity, removal from the Roll and expulsion. Again, a technical dissolution follows such retirements.

(3) The pension arrangements for all Partners save the Claimant and two others are dealt with in clause 2.32A. Such retired Partners were entitled to an annuity based on 30% of their average pre-tax earnings for the 3 years immediately prior to retirement. Such annuity increased by "*5% compound*" each year.

(4) The Claimant's pension entitlement is set out in clause 2.33 as follows:

> "2.33 The retirement provisions hereinbefore provided shall apply to [the Claimant] save and except that upon his retirement or upon attaining the age of 60 years he shall receive a pension payable at the rate of £15,000 compounded from the 1st May 1987 at the rate of 5% each year or by an amount equal to the rise in the retail prices index whichever shall be the greater in substitution for a pension calculated on the basis provided in Clause 2.32B"

(5) All the pensions are made subject to the Abatement of Pensions provision in clause 2.35. This caps the pensions payable at 20% of the net profits of the Partnership as defined in the 1987 Deed. However, any shortfall as a result of the abatement is carried forward until it can be paid, including after a dissolution. Clause 2.35 says as follows:

> "2.35 The aggregate of the pensions (including any shortfall of pensions carried forward from previous years) payable hereunder by the Partners in any financial year or other period of the Partnership (abated as appropriate under the provisions of clause 2.37) shall not exceed 20% of the Net Profits of the Partnership for the same period before tax and the Partner's Basic and Additional Partnership Salaries and in the event of the same exceeding such profits in any such period the said pensions and amounts of shortfall shall abate proportionately for such period until they shall aggregate a sum equal to 20% of such profits…PROVIDED that the amount by which any pension or amount of shortfall from a previous financial period shall abate in any such period shall be carried forward to the next following year or other period and so far as necessary successive years without limit of time until paid and so that amounts of shortfall so carried forward shall rank equally with current pensions for the purposes of this sub-clause and on the dissolution of the Partnership shall rank as simple contract debts."

The reference to dissolution at the end must be to a general dissolution and consequent winding up when the Partnership will no longer be making profits.

(6) It is material also to refer to clause 2.2 which provides for the duration of the Partnership and may indicate what is meant by the reference to "*termination*" in clause 2.43. It says (underlining added):

"2.2 The Partnership shall continue for the duration of the lifetimes of the Partners and the survivor[2] and survivors of them and 21 years after the death of the last survivor so long as there shall be at least two Partners or until a resolution shall be passed by such a majority of the Partners as is required for a fundamental decision that the Partnership be wound up or otherwise terminated."

Fundamental Decisions required an 85% majority of the Partners to pass. But it would make sense and be consistent with clause 2.43 that for there to be a termination or winding up or a general dissolution then such a resolution should be passed.

(b) Partnership Changes between 1988 and 2012

20. In accordance with the notice provisions of clause 2.28, the Claimant retired from the Partnership on 30 September 1988. He thereby became immediately entitled to the pension specified in clause 2.33 of the 1987 Deed and it was paid by the Partnership until the events described below.

21. On 30 March 1990, a Deed of Retirement was entered into by the continuing and retiring Partners. This left four Partners in the Partnership operating the practice of Bells Potter & Kempson from the premises in Farnham. The Partnership was only technically dissolved and the continuing Partners expressly recognised that the 1987 Deed still regulated the terms of the Partnership, unless modified by the Deed or later agreements and the obligation to pay the Claimant's pension was expressly accepted. Mr Burke has commented that this was effectively a split of the Partnership between Farnham and Kingston, with the majority of the Partners going to Kingston. He has speculated that the split was structured in this way for tax reasons but that does not affect the fact that the ongoing pension obligation to the Claimant was accepted by the four continuing Partners in Farnham.

22. On 1 December 1991, the two remaining Partners, Mr Raymond Gordon and Mr Norman Kidd, adopted new Articles of Partnership, superseding the 1987 Deed. However the continuing obligation of the Partners to pay the Claimant's pension under the 1987 Deed and Deed of Retirement was expressly recognised. Clause 2.33 of that Deed is in very similar terms to clause 2.43 of the 1987 Deed.

23. On 1 December 1992, the First Defendant, Mr Burke, joined the Partnership and a new Deed was entered into. The three Partners expressly acknowledged their continuing obligation to pay the Claimant's pension. The Deed included a slightly different

[2] Neither Counsel was able to explain how this part of the clause could work and it was suggested by Mr Jackson that it might be there for some sort of perpetuities reason.

dissolution provision; clause 18.1 said "*Upon the final dissolution of the Partnership its affairs shall be wound up*…". But the parties have accepted that clause 2.43 of the 1987 Deed is the relevant governing provision in relation to the Claimant's pension.

24. In or around September 1995, the Partnership opened an Estate Agency business, as they were then permitted to do by the Law Society. The Estate Agency business was fully integrated into the Partnership as was required by the Regulations which only allowed such a business to be carried on by solicitors if it was done through the regulated entity, which was the Partnership. It is not disputed by the Claimant that the Estate Agency business was part of the Partnership business from 1995 onwards and that he knew that it was. He says however that such business was merely a sub-set of the legal practice and it is important that the Estate Agency business had to be carried on through the regulated entity that was carrying on the business of a law firm.

25. In September 1996, Mr Burke took it upon himself to try to renegotiate with the Claimant the amount of his pension. Mr Burke had been alarmed to find that the Claimant's pension was then in the region of £25,000 pa, which was more than some of the solicitor staff were being paid and more than he was drawing from the Partnership. The Claimant was amenable to what has been called a re-basing of the pension and on or around 18 September 1996, as evidenced by minutes of a Partners' meeting (which the Claimant signed), the Claimant had agreed with the Partnership that:

    (1) There would be a new base figure for his pension of £20,000 as from 1 December 1996;

    (2) The annual increase to which the Claimant was entitled would be limited to RPI only – the 1987 Deed entitled the Claimant to 5% or RPI whichever was the higher;

    (3) In all other respects the provisions of the 1987 Deed would continue to apply, including the abatement provisions should that be necessary.

26. On 7 July 1998, the Second Defendant, Mr Cave, joined Mr Burke and Mr Kidd in the Partnership and the three of them entered into a new Deed of Partnership. Again the Partners acknowledged their continuing pension obligations to the Claimant. There was a modified Dissolution provision in clause 19 but as the parties are agreed that clause 2.43 of the 1987 Deed is the relevant provision binding on the Defendants it is not necessary to set out the new provision. There are some other interesting provisions (replicating the 1992 Deed):

    (1) Recital (b) says as follows:

        "(b) The parties intend to continue to carry on the profession of solicitors in partnership together from the date hereof but wish to enter into a fresh agreement which is different in certain respects from that which has previously governed their relationship."

    (2) Clause 2.1 made clear that the principal business of the Partnership was that of solicitors:

> "2.1 The Partners shall as and with effect from the date hereof carry on the profession of solicitors in partnership upon the terms and subject to the stipulations and conditions contained in this Deed in continuation of the former practice of Bells Potter & Kempson."

(3) The new name of the Partnership was to be "*Bells Potter*" (clause 5) and they were to carry on the Partnership business from 11 South Street, Farnham, Surrey (clause 4).

(4) The Duration of the Partnership was specified in clause 3:

> "3.1 The Partnership shall continue for the duration of the lifetimes of the Partners or until a resolution shall be passed that the Partnership be wound up or otherwise terminated."

27. In January 1999, the Partnership started a Financial Planning business which, like the Estate Agency business, was operated as a department of the Partnership. This was subject to dual regulation by the Law Society (later the Solicitors Regulation Authority (**SRA**)) and the Financial Services Authority. In the first year it turned over approximately £160,000. The Partnership's monthly management accounts as well as their annual accounts included both the Estate Agency and Financial Planning departments' figures as though they were all part of the Partnership's business. The Claimant admits that he knew that the Partnership was carrying on these other businesses.

(c) The 2012 Transfer

28. Around the time of the global financial crisis in 2008, the Defendants (who were by then the only Partners) became particularly concerned about the viability of the firm and they were keen to transfer towards limited liability trading for obvious reasons. Mr Burke contacted the Claimant to discuss the ongoing pension liability in the context of their financial difficulties and sought to negotiate some sort of end to that liability. It was apparently only as part of those discussions that Mr Burke's attention was drawn by the Claimant to clause 2.43 of the 1987 Deed in the event that the Partnership was going to be dissolved. Mr Burke said that he was very alarmed by this "*pension bombshell*". Furthermore, Mr Burke said that negotiations with the Claimant broke down quite soon thereafter because the Claimant would not confirm that he would not sue the Defendants' wives in respect of his pension entitlement and was only prepared to consider a transfer of his pension to an LLP if the Defendants provided personal guarantees to him. In Mr Burke's mind this would have defeated the purpose of the transfer to limited liability.

29. In 2009, the Defendants sought advice from another firm, Thomas Eggar, on how best to transfer to limited liability without triggering the Claimant's pension entitlement under clause 2.43; in other words, how to do it without dissolving the Partnership. The advice that they apparently received was that they should consider transferring the higher risk parts of the Partnership's business to a new LLP or company but to keep the

lower risk parts of the business in the Partnership. As the Estate Agency business was low risk, the Defendants seemed to have decided that they would retain it within the Partnership but that they would transfer the higher risk Legal Services and Financial Planning businesses to the limited liability entity.

30. This seemed to have taken a very long time to implement and I have no evidence as to what was happening between 2009 and 2011. From 7 November 2011 to 17 January 2012, there was some correspondence between the Defendants and the Claimant in relation to the interpretation of clause 2.43, in particular how the lump sum would be calculated and the terms of the loan. The Defendants asked if the Claimant would be prepared to have his pension transferred to the LLP that they then had in contemplation. The Claimant responded to say that he would consider it but he would like to see the accounts before agreeing to it. The correspondence seems to have ended there.

31. In early 2012, the decision was taken that the transfer would be to a company and BSL was incorporated for this purpose. The intention to retain the Estate Agency business is evidenced by a memo dated 25 July 2012 sent to all the staff by Mr Burke to let them know about the changes proposed. The memo included the following statements (underlining added):

> "After many, many years of running Bells as a partnership, the partners have decided to incorporate i.e. to run the business as a limited company.
>
> …
>
> <u>How will this affect you?</u>
>
> The answer is that it will affect you very little. You will in due course be notified that the identity of your employer is changing from Bells Solicitors to Bells Solicitors Limited. That's about it…
>
> <u>Will it affect everyone?</u>
>
> No, <u>the estate agency will continue to be operated by the existing partnership</u>.
>
> Self-employed staff will be asked to renew their contracts with the limited company."

32. The Defendants decided to use Menzies accountants, rather than the Partnership's current accountants, to help them through the whole process. Mr Burke however decided that he would draft the Sale and Purchase Agreement himself basing such draft on a template that had earlier been provided by Thomas Eggar. Mr Burke says that his first drafts of the Sale and Purchase Agreement excluded the Estate Agency business from the transfer.

33. On 28 June 2012, Menzies prepared a valuation of the businesses being transferred. The following was stated in their report:

> "**STRUCTURE AND PURPOSE**

> The valuation is being performed at the request of the partners for the purposes of establishing a value for the proposed incorporation of parts of the business on 1 September 2012.
>
> The estate agency business run in the adjoining offices, whilst forming part of the present business, is not to be included in the incorporation and hence the business being valued.
>
> Therefore the business being valued comprises both a legal services business and an FSA registered business, both of which will be incorporated and therefore both need to be valued. The business has a long trading history of about 300 years, which therefore represents a long standing trading business."

Menzies overall valuation for the two parts of the business being sold was £1.06m.

34. However, the plan to retain the Estate Agency business within the Partnership ran into serious regulatory problems. The SRA were unwilling to regulate a standalone Estate Agency business. The SRA was also not prepared to allow the Defendants to run two businesses alongside each other, both using the name "Bells" and sharing the same premises where one was regulated and the other was unregulated. This was an insurmountable obstacle to the Partnership continuing the Estate Agency business and Mr Burke says that the Defendants reluctantly decided to close that business. He says that it was excluded from the sale to BSL but this is not entirely clear from the terms of the agreement and in his second witness statement he said that all of the Partnership's then businesses were transferred. The Estate Agency only ceased business in December 2012.

35. All the liabilities of the Partnership, such as suppliers' debts and staff salaries were to be assumed by BSL. The one liability that was specifically excluded from the transfer and which remained a liability of the Partnership was the Claimant's pension. Mr Burke explained in his evidence that he was unwilling to negotiate with the Claimant in relation to the pension because of the previous hostile reaction he had from the Claimant. Mr Burke considered that the Claimant's pension entitlement under clause 2.43 of the 1987 Deed was a "*sword of Damocles*" hanging over them and that they therefore had to find a way of continuing to trade the Partnership, as he put it, in accordance with s.1 of the Act. In other words, the Defendants were specifically trying to prevent a dissolution of the Partnership in order to avoid the triggering of the Claimant's entitlement under clause 2.43. This was made much harder by the inability of the Partnership to continue to run the Estate Agency.

36. The solution to this problem that they alighted on was to retain the Partnership's lease of the premises at 11 South Street, Farnham in their own names and to sub-let the premises to BSL. The lease from the landlords, Mr and Mrs Roberts, to the Defendants was granted without a premium for a 15 year term commencing on 1 May 2007. The lease was an asset of the Partnership. It was assignable with the landlords' consent, such consent not to be unreasonably withheld. Similarly the Defendants were allowed to sub-let with the consent of the landlords. Mr Cave took the lead in negotiating with the landlords and they were assured that a licence to sub-let would be forthcoming so long as the Defendants remained personally liable under the head lease. In the event, the Defendants took a 5% margin on the rent from BSL, thus making a small turn through the subletting.

37. On 1 October 2012, the Defendants and BSL entered into the Sale and Purchase Agreement (**SPA**). The SPA was entitled "*Agreement for the transfer of the business and assets of the Partnership known as Bells Solicitors to Bells Solicitors Limited*". There are the following material terms:

(1) In clause 2.1, there were these definitions

(a) "Business" was defined as:

> "The entire undertaking and concern carried on by the [Defendants] in the course of their profession as solicitors";

(b) "Goodwill" was defined as:

> "The goodwill, custom and connection of the Business including, without limitation, the exclusive right for [BSL] to carry on the Business under the Business Name in succession to the Partners";

(c) "Names" were defined as:

> ""Bells", being the name under which the profession of solicitors and the business of financial advisers is carried on; "Bells Potter", being the name under which the business of estate agency is carried on";

(2) The sale and purchase was provided for in clause 3.1:

> "3.1 With effect from the Transfer Date the [Defendants] agree to transfer to [BSL] and [BSL] agrees then to accept a transfer of the Business as a going concern comprising the following assets used in the conduct of the Business:
>
> 3.1.1 The Goodwill of the Business (which for the avoidance of doubt is agreed to include the right to use the Names and the right to take over the benefit of any Outstanding Agreements);
>
> 3.1.2 The tangible assets used in connection with the Business including office equipment, fixtures and fittings at the Business Premises but excluding motor vehicles;
>
> 3.1.3 The Work in Progress;
>
> 3.1.4 The Intellectual Property;
>
> 3.1.5 The Know How;
>
> 3.1.6 The Client Cash Balances; and
>
> 3.1.7 The Business Cash Balances."

(3) In clause 3.2, the grant of a sub-lease was provided for:

> "For the purpose of carrying on the Business the [Defendants] shall grant, and [BSL] shall accept a sub-lease of the Business Premises in the form previously agreed."

The sub-lease was granted some weeks later on 29 November 2012 for a term expiring one week before the head lease and at a rent of 5% more than the rent under the head lease.

(4) By clause 6.1 the Claimant's pension was specifically excluded from the transfer of liabilities:

> "6.1 [BSL] shall not take a transfer of or assume the Excluded Liabilities and the [Defendants] shall indemnify [BSL] against all proceedings costs claims and expenses in respect of the Excluded Liabilities"

The Excluded Liabilities were defined in the Schedule as being:

> "The liability of Bells Solicitors to make on-going pension payments in respect of [the Claimant] of…as more particularly set out in [the 1987 Deed]"

(5) The consideration for the transfer was in the form of BSL's assumption of liabilities and monetary consideration. Clause 8 stated as follows:

> "8.1 The consideration for the sale of the Business shall be:
>
> 8.1.1 The assumption by [BSL] of the Assumed Liabilities and the obligations of the [Defendants] under any Outstanding Agreements (insofar as the latter are not comprised within the Assumed Liabilities);
>
> 8.1.2 the sum of £1.06 million (one million and sixty thousand pounds) in relation to the Goodwill; and
>
> 8.1.3 a further sum representing the Net Assets Value, which sum is to be agreed within three months of the Transfer Date or in default thereof to be determined by the Accountants acting as jointly appointed experts.
>
> 8.2 The financial consideration referred to at sub-paragraphs 8.1.2 and 8.1.3 shall be satisfied by the issuing of Loan Notes by [BSL] to the [Defendants] within three months of the date hereof."

38. The Loan Notes referred to in clause 8.2 of the SPA were issued by BSL to the Defendants personally. On 1 October 2012, the same day as the SPA was entered into, two Loan Notes, each with a value of £530,000 (ie half of £1.06m) and including 2% pa interest were issued to each Defendant. This was the consideration for the Goodwill in accordance with clause 8.1.2. Two further Loan Notes were dated 1 July 2013 in respect of the Net Assets Value as described in more detail below.

39. The Claimant has attempted to make something of the fact that the Loan Notes were the consideration for the acquisition by BSL of assets of the Partnership, namely the Goodwill and the Net Assets. Mr Jackson submitted that the way these matters were dealt with shows that the Defendants were effectively winding up the Partnership and distributing the assets to themselves. I will deal with this submission below.

40. On the same day as the SPA was signed, there was a minute signed by both Defendants of resolutions passed at a Partners' meeting that day. The minute was in the following terms:

> "1. With effect from 1st October 2012, the entire business and undertaking of the partnership of Bells shall be transferred to Bells Solicitors Limited ("BSL") in accordance with the terms of a Business Transfer Agreement between the parties of even date.
>
> 2. With effect from 1st October 2012, the partnership known as Bells will change its name to "BPK Management Services".
>
> 3. The business of the partnership will thenceforth be the provision of services to BSL and such other business as may in the opinion of the partners be advantageously carried on.
>
> 4. For the avoidance of doubt BPK Management Services shall not from the date of this Minute until otherwise agreed carry on activities of a kind that require regulation by either the Solicitors Regulation Authority or the Financial Services Authority."

The Defendants therefore intended to keep the Partnership alive as BPK Management Services but not as a regulated entity or providing any of the services that it previously had. This was no doubt purely to avoid the triggering of the Claimant's pension entitlement. The only possible business of the Partnership in the immediate aftermath of the transfer to BSL was as sub-lessor of the premises, but there was even a gap between the SPA and the entry into the sublease of nearly two months. The Claimant says that as a result of the SPA, the Partnership ceased all its business and was effectively dissolved.

(d) Post-SPA events

41. The Defendants have maintained that the Partnership has continued to trade ever since the transfer of its business to BSL. In the immediate period following the SPA it continued to hold the head lease of the premises which it formally sub-let to BSL on 29 November 2012. Although the minute of 1 October 2012 referred to the provision of services to BSL, it was not until September 2015, nearly three years later, that cleaning services were provided to BSL. This was in any event after the parties' solicitors had begun engaging in pre-litigation correspondence. There were also debt recovery proceedings between the Partnership and a former client which had begun after 1 October 2012 but these are just as consistent with there being a winding up of the

Partnership. The Partnership has apparently looked at other properties to acquire but nothing has actually been acquired. In reality, and even though the Partnership continued to employ accountants and to prepare accounts, continued to file tax returns and to hold a bank account, the only relevant business was the sub-letting of the premises. I will have to decide if that is enough to have avoided a dissolution on 1 October 2012.

42. Mr Burke said in his witness statement that after 1 October 2012, he and Mr Cave "*could breathe a sigh of relief*" as they had achieved limited liability for their core business. However, he claimed that they were "*quite literally a heartbeat away from an accidental dissolution caused by the death of either one of us*" thereby triggering clause 2.43. They decided therefore to admit an "*immortal*" corporate partner to the Partnership. On 11 February 2013, the Defendants admitted Cumulus Financial Planning Limited (**Cumulus**) to the Partnership. Then on 1 October 2015, BPK Solutions Limited (**BPKS**) was admitted to the Partnership and on 6 October 2015, the Defendants retired as Partners. Therefore, the only current Partners of the Partnership are Cumulus and BPKS, both limited liability companies that are owned and controlled by the Defendants. The Claimant's ongoing pension entitlement, if clause 2.43 has not been triggered, is as against those two companies. The Defendants say that they hold the head lease on trust for the Partnership.

43. As to the Claimant's pension, because the Partnership's profits were drastically reduced after the transfer of its businesses, the abatement provisions in clause 2.35 of the 1987 Deed have meant that the Claimant's annual pension entitlement was reduced to just £1,200pa. Subject to the clause 2.43 question, the Partnership still remains liable for the Claimant's full pension when it has the profits to pay but this liability has not been included in the Partnership's accounts. The Claimant has refused to accept the monthly payments of £100 that have been offered since 1 October 2012 because of his position that clause 2.43 has come into effect and he is entitled to the full value of his pension.

44. As to the Loan Notes, the Defendants drew against the Goodwill Loan Notes at the same rate that they had previously been drawing against the profits of the Partnership. This was more tax efficient for them as, having paid Capital Gains Tax on the sale of the Partnership's business, the remaining draw downs on the Loan Notes were free of tax. Those Loan Notes were fully repaid by BSL by September 2016. Thereafter they have received mainly dividend income from BSL plus a minimal wage.

45. In relation to the Net Assets Value Loan Notes it took some time to determine the value in consultation with their accountants Menzies. This was the subject matter of the Defendants' late disclosure and Mr Burke's third witness statement that was admitted into evidence by consent on the second day of the hearing. Mr Burke was cross examined on this and, in particular, on the means by which they got to the final figure of £58,150 and the date on the Loan Notes that were then issued. As it turned out the Loan Notes must have been backdated to 1 July 2013 as the final figure was only determined some time later. Mr Burke frankly admitted that that must have been so and Mr Jackson accepted in his submissions that Mr Burke had honestly and fairly faced up to this point and he therefore did not seek to make anything of it. I consider that Mr Jackson was entirely correct to have done so and I find, insofar as it is necessary for me to do so, that Mr Burke was a truthful and credible witness on this minor issue on which he gave oral evidence.

46. In any event, I am not sure that the evidence really addresses the point that is made by Mr Jackson in his skeleton argument that the structure of the Loan Notes was effectively a distribution of the Partnership's assets, being the Goodwill and Net Assets Value of the Partnership, and that this was indicative of the Defendants' true intention to wind up the Partnership.

47. Mr Burke, supported by Mr Cave, is adamant in his evidence that they had no intention whatsoever to dissolve the Partnership. In fact, they say that was the very opposite of their intention because they were desperate not to trigger the Claimant's pension entitlement under clause 2.43 and therefore they necessarily had to keep the Partnership going to make sure that there was no dissolution. As Mr Burke says in paragraph 74 of his second witness statement:

> "There is very clear evidence (as contained in this witness statement and my previous witness statement) that we decided not to dissolve the partnership. I would confirm, for the avoidance of doubt, that we did not decide to dissolve the partnership when we set up BSL nor when we entered into the Sale and Purchase Agreement. Indeed our decision was entirely the opposite of that; we decided to continue the partnership and took clear practical steps to do so and to ensure it continued."

48. The fact that there was no cross examination on this and the other matters in the Defendants' witness statements (apart from the one small matter dealt with above), means that I am bound to accept what the Defendants say in their witness statements, in particular as to their lack of agreement and/or intent to dissolve the Partnership.[3] The Claimant says that that evidence is immaterial if by reference to what they actually did there was a dissolution. This is something I have to decide but I can only do so on the basis that it is accepted that the Defendants specifically did not agree or intend to dissolve the Partnership.

49. The battle lines between the parties were drawn shortly after the 1 October 2012 transfer, with the Claimant no doubt very concerned with what he considered to be a contrived scheme by the Defendants to avoid their pension obligations to him and the Defendants feeling aggrieved at the ongoing pension liability and the potential threat of the significant burden that the triggering of clause 2.43 would have on them. The later substitution of the Defendants as Partners by their corporate vehicles must have exacerbated the Claimant's concerns as to the recoverability of his full pension entitlement. While I have sympathy for the position in which the Claimant now finds himself, my sole task is to decide whether the transfer of the Partnership's business on 1 October 2012 brought about a dissolution and thereby brought into effect the Claimant's contractual entitlement under clause 2.43 of the 1987 Deed.

50. The Claimant first threatened proceedings between 2013 and 2016 through his then solicitors, Blake Lapthorn (which later became Blake Morgan) and Stevens & Bolton LLP. On 14 October 2015, Stevens & Bolton LLP sent a letter before action that enclosed draft Particulars of Claim, settled by Counsel, against the Defendants and against Cumulus and BSL. The central allegation was that the Partnership was no longer trading in accordance with s.1 of the Act and that it had been dissolved with effect from

[3] Mr Callman referred to *Browne v Dunn* (1894) 6 R 67 for the uncontroversial proposition that if a party is disputing the evidence of a witness he must cross examine that witness.

1 October 2012. There were also allegations of breach of fiduciary duty. The claim was subsequently quantified at £585,135.09. Those proceedings were never issued and there is no similar allegation of breach of fiduciary duty pursued in these proceedings.

51. These proceedings were finally issued pursuant to CPR Part 8 on 1 August 2018, just under 6 years from the date of the transfer to BSL when the Claimant alleges that his rights under clause 2.43 accrued.

The meaning of clause 2.43

52. The triggering of the Claimant's pension entitlement is only one of the elements of clause 2.43 of the 1987 Deed. It is important, therefore, to keep in mind the context and purpose of clause 2.43: it essentially modifies what would happen on a winding up of the Partnership under ss.39 and 44 of the Act. It assumes that a winding up is taking place following the dissolution of the Partnership. Thus, in relation to outstanding pensions being paid by the Partnership, by sub-clause B, these cease to be payable by the Partnership and the rights are transformed into the loan due under sub-clause D. If sub-clause B was not there, then the annual pension would have continued to be payable by the Partners despite the dissolution of the Partnership. The whole point of these sub-clauses is to draw a line under the Partnership so that its liabilities can all be settled and there are no ongoing indefinite liabilities for which the Partners remain responsible. That also seems to me to be the reason for the sinking fund required to be set up by sub-clause F to cover present and future claims.

53. Therefore, the overarching purpose of clause 2.43 is to deal with the consequences of the Partnership being dissolved. That means, in my view, that the Partnership must actually have been dissolved as a matter of law.

54. Mr Jackson submitted that at the time of the 1987 Deed the only business of the Partnership contemplated by the 1987 Deed was that of a solicitors' practice. In making that submission he referred to some of the provisions of the 1987 Deed that I have set out above, including in particular clause 2.14 (Solicitors Accounts Rules); clause 2.21E(i) and (ii) (conflicts of interest); clause 2.23 (practising certificates); clause 2.29A(iii) (removal from the Roll). In his reply submissions Mr Jackson referred to a number of authorities[4], including the Solicitors Act 1974 and *Cordery's Law relating to Solicitors* (7th Ed, 1981) to show, I think, that solicitors enjoyed a particular status and that they could only be in practice with other qualified solicitors. When the Claimant and his then partners therefore executed the 1987 Deed, there was an expectation, reflected in the 1987 Deed, that the Partnership would be that protected form of solicitors' practice and that the current partners would maintain that practice while paying the pensions due under the 1987 Deed.

55. Mr Jackson went on to submit that the well-known principles of contractual construction contained originally in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 apply to the 1987 Deed and on that basis

[4] *United Bank of Kuwait v Hammond* [1988] 1 WLR 1051*; Rotheray* [1864] Vol XII WR 1138 (concerned with a partnership of proctors, who were lawyers practising in ecclesiastical law)*; Hill v Clifford* [1907] 2 Ch 236 (a case concerned with dentists)

regard must be had to the strictures around solicitors' practice and what they were permitted to do in and around 1987. At that time, solicitors were far more restricted in what they could do alongside their legal practice and they could not then have operated the Estate Agency or Financial Planning departments that the Partnership did later run.

56. While I accept that this was the situation in 1987 and that this may be relevant background knowledge that the reasonable person would be deemed to have in order to find the true meaning of the 1987 Deed, I do not see that it actually helps in interpreting clause 2.43. It is necessary to look a bit more closely at the opening words of clause 2.43 which are:

> "Upon the final dissolution of the Partnership at its termination or in any event not otherwise herein provided for the affairs thereof shall be wound up…"

The crucial words are those that are underlined above. It uses the term "*final dissolution*" but this is clearly a reference to a general dissolution whereby the Partnership is brought to an end. There is no difficulty in interpreting those words in the context of a partnership deed. There is no reference to the "Partnership business" which, in any event, is not a defined term; nor is there any express restriction in the 1987 Deed on the business that could be conducted. Nor is there any reference to a cessation of business. Clause 2.43 is purely concerned with whether the Partnership has been dissolved as a matter of Partnership Law.

57. Unhelpfully, there is no punctuation in clause 2.43 (indeed there is hardly any punctuation throughout the 1987 Deed). Nevertheless, there seems to be two bases for the "*final dissolution*", namely: (1) either "*at its termination*"; or (2) "*in any event not otherwise herein provided for*". If "*termination*" meant simply "*dissolution*", then (1) is tautologous. In my view "*termination*" is a form of dissolution and it refers back to clause 2.2 of the 1987 Deed where the duration is provided for and the Partnership can be brought to an end by resolution of the Partners that "*the Partnership be wound up or otherwise terminated*". In other words, the Partners can agree to "*terminate*" or indeed to dissolve the Partnership. If they do so, clause 2.43 comes into play.

58. The Claim Form also uses the language of "*termination*" and the Claimant seemed to be relying on there having been a "*termination*" of the legal practice carried on by the Partnership on 1 October 2012. I do not see how "*termination*" can be construed in that way when it is so clearly referring to a form of dissolution.

59. Mr Jackson also made submissions directed at (2) above, that is, that there was some other event than "*termination*" that is not provided for in the 1987 Deed. He said that that other "*event*" could be when the business contemplated by the 1987 Deed, ie the solicitor's practice, had ceased. Again I do not consider that that part of clause 2.43 can be interpreted in such a vague way. In my view it is qualifying what is meant by a "*final dissolution*" and must be referring to a form of dissolution in the Act that is not specifically identified in the 1987 Deed. In such way, it contrasts with "*termination*" which is specifically dealt with in the 1987 Deed.

60. In short, I do not think there is any real doubt about the meaning of the opening words of clause 2.43. The Claimant has to prove that, in law, the Partnership was dissolved on 1 October 2012 when its business was transferred to BSL. It is not possible to construe "*the final dissolution of the Partnership*" as meaning "*the termination of the legal*

practice carried on by the Partnership" or "*the end of the Partnership's business contemplated by the Claimant and then partners in 1987*". The words are clear as is the purpose of clause 2.43 and it can only mean, in my judgment, an actual dissolution of the Partnership followed by its winding up.

The law in relation to dissolution

61. Even though there is a whole section of the Act headed "*Dissolution of Partnership, and its consequences*", the meaning of "*dissolution*" is not defined. Section 1 of the Act defines what a partnership is:

> "(1) Partnership is the relation which subsists between persons carrying on business in common with a view of profit."

This makes no reference to a contract or agreement between the persons involved and a partnership is something more than a contract; it is a fiduciary relationship that is governed by equitable as well as common law principles. As Lord Millett said in *Hurst v Bryk* [2002] 1 AC 185, 194C-D:

> "Disputes between partners and the dissolution and winding up of partnerships, however, have always fallen within the jurisdiction of the Court of Chancery. This is because, while partnership is a consensual arrangement based on agreement, it is more than a simple contract (to use the expression of Dixon J in *McDonald v Dennys Lascelles Ltd* 48 CLR 457, 476); it is a continuing personal as well as commercial relationship."

62. So while s.1 of Act describes how the relationship comes into being, dissolution, or more particularly a general dissolution, seems to me to be the formal end or termination of the relationship. The consequences of a dissolution as between the partners are contained in s.39 of the Act, which confusingly uses both the term "*dissolution*" as well as "*termination*". It provides:

> "39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the court to wind up the business and affairs of the firm."

Essentially this shows that dissolution ends the relationship between the partners and is followed by the settlement of dissolution accounts and the winding up of the partnership. As Lord Millett also said in *Hurst v Bryk* (supra):

> "When a partnership is dissolved, its affairs must be wound up."

63. Section 44 of the Act prescribes how the winding up should be done, subject to any contrary agreement of the parties, and the priority rules. Clause 2.43, as I have said above, effectively provided for specific adjustments or modifications to what would have otherwise been the consequences of the dissolution.

64. The grounds upon which a partnership can be dissolved are set out in ss.32 to 35 of the Act. These are often said to be exclusive grounds for dissolution although as ss.32 and 33 are "*subject to any agreement between the partners*", other grounds can presumably be agreed by the partners. Dissolution by mutual agreement has been clearly recognised in the authorities and was referred to by Lord Millett in *Hurst v Bryk* (supra) at p.195C. Lord Millett said that the mutual agreement form of dissolution was catered for in ss. 19 and 32 of the Act. These provide as follows:

> "**19. Variation by consent of terms of partnership.**
>
> The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing."
>
> …
>
> **32. Dissolution by expiration or notice.**
>
> Subject to any agreement between the partners, a partnership is dissolved-
>
> (a) If entered into for a fixed term, by the expiration of that term;
>
> (b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking;
>
> (c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.
>
> In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or if no date is so mentioned, as from the date of communication of the notice."

65. In this case, the mutual agreement form of dissolution could be said to have been agreed by clause 2.2 of the 1987 Deed, whereby the Partnership could be terminated by a resolution passed by the Partners by way of Fundamental Decision. *A fortiori* if there is a unanimous resolution which would be the same as a mutual agreement.

66. In the course of his submissions, Mr Jackson did try to suggest that the dissolution in this case could have been under s.32(b) of the Act on the basis that the solicitors' practice was a single adventure that came to an end when it was transferred to BSL. However, this is not the way it had been put in the Claim Form or the Claimant's evidence and is really unsustainable on the facts.

67. The Claimant's main case is that the Court can infer an agreement to dissolve from the transfer of all the business of the Partnership to BSL and the Partnership's continued ownership of the head lease and profit made on the sub-lease is insufficient to constitute the carrying on of any business by the Partnership. Most of the argument in this respect

has been around two judgments of Lord Neuberger: (1) as Neuberger J in *National Westminster Bank Plc v Jones* [2001] BCLC 98 (***NatWest v Jones***); and (2) as Neuberger LJ in the Court of Appeal in *Chahal v Mahal and anr* [2005] BCLC 655 (***Chahal***).

68. Before turning to those cases in detail, it is interesting to see what *Lindley & Banks on Partnership* (20th Ed) says at para. 24-53 (underlining added):

> "A temporary cessation of the partnership business will not cause a dissolution. However the current editor has always taken the view that, if the partners agree a *permanent* cessation of all forms of business, this must take effect as an agreement to dissolve since, in the absence of a business, no partnership can exist within the meaning of the Partnership Act 1890."

It seems to me that if the partners have actually agreed a permanent cessation of all forms of business, it must follow that the partnership is at an end. It is a little difficult to envisage a partner who has agreed such a permanent cessation arguing that there has not been a dissolution. That is certainly not the facts of this case where the Defendants specifically agreed to carry on a form of business, subletting the premises to BSL for profit, in order to avoid there being a dissolution.

69. *NatWest v Jones* concerned an agricultural business carried on by the defendants in partnership. In order to try to prevent the bank from being able to enforce its mortgage and floating charges, the defendants incorporated a company to which they sold the farm assets that were subject to the floating charges and granted the company a 20 year agricultural tenancy of the farm at full rent. The bank applied for declaratory relief on a number of bases as to the nature of its interest in the land and as to whether the floating charges had crystallised. That latter issue was in part dependent on whether the defendants' partnership had dissolved upon the transfer of the business to the company.[5] Neuberger J (as he then was) did not in the end decide this point but he made the following *obiter* comments concerning whether a transfer of all the business of a partnership can constitute a dissolution (underlining added)[6]:

> "112. The Bank's contention is based on the proposition that the partnership between the defendants must have been dissolved when they transferred possession of the property, on which the farming business was carried out, to the Company (by virtue of the tenancy) and when they transferred all the assets of the farming business to the Company (through the sale agreement). I accept that the effect of the grant of the tenancy and the sale of the assets to the Company was that the defendants ceased to carry on the only business which they had, up till then, being carrying on, namely a farming business on the property. That must be right, simply because, in order to carry on the farming business, they needed to have the right of possession of farm land and of assets, including livestock and deadstock. They divested themselves of the right to possession and of any such assets, and it was not as if they had any intention of acquiring other farm land and other farming assets. The furthest they could go would be to say that, as I have mentioned, there

[5] One of the grounds for crystallisation of an agricultural floating charge into a fixed charge is "*upon the dissolution of partnership in the case where the property is partnership property*" – under s.7(1)(iii) of the Agricultural Credits Act 1928

[6] Neuberger J was upheld on appeal although this was point was not considered – reported at [2002] 1 BCLC 55

> was a real prospect of their taking possession of the property back from the Company and taking a transfer back of the assets from the Company, but that would have been no more than a contingent future possibility as at 27th April 1999.
>
> 113. At least on the face of it, however, I do not consider that that necessarily means that the partnership between the defendants must have been dissolved as at 27th April 1999. The mere fact that partners cease trading does not, as I see it, put an end to the partnership. After 27th April 1999, it is quite possible that the defendants would have been advised to dissolve their partnership for tax or other reasons. Equally, it is quite possible that they would have been advised to continue their partnership for the time being, on the basis that partnership accounts for the year ending 1st April 1999 still had to be prepared, that possible partnership drawings might still be available to them, and that, in light of the fact that the Company was due to pay rent under the tenancy and instalments under the sale agreement, it would be better, at least for the time being, that the partnership should continue for the purpose of receiving those sums. It might also have been sensible to continue the partnership bearing in mind the possibility that the tenancy might be surrendered and the sale agreement reversed in the not too distant future.
>
> 114. Dissolution of a partnership can occur in any of the ways set out in Sections 32 to 35 of the Partnership Act 1890. Miss Middleton does not suggest that in any of those sections is there reference to dissolution merely by transfer of all the land and assets of the partnership (although it may be that an arguable case could be made for this under Section 32(b) of the 1890 Act). In light of the obiter observations of Lord Millett in *Hurst -v- Bryk* [2000] 2 BCLC 117 at 125, [2000] 2 WLR 740 at 749, there must be a powerful argument for saying that the provisions of the 1890 Act are intended to be exclusive so far as the circumstances in which dissolution can occur. The current edition of *Lindley & Banks on Partnership* (17th Edn, 1995), published before the decision in *Hurst v Bryk*, suggests that if partners agree a permanent cessation of all forms of business, this takes effect as an agreement to dissolve. As Mr Jourdan says, I do not need to decide whether that is right or not: in the present case, there is no evidence that the defendants took any such positive decision as at 27th April 1999. Indeed, Mr Jones's evidence suggests the contrary.

70. The last paragraph suggests that, on the facts of the case, there was no such agreement between the partners. Furthermore, Neuberger J seems to have been of the view that something more was required than the mere fact of ceasing trading and transferring all the business. The situation in *NatWest v Jones* is analogous to this case with the only possible ongoing business being the collection of rent under the tenancy.

71. *Chahal* was an unusual case. In 1980 the claimant and the two defendants acquired a freehold property and a caravan site business, each contributing an equal amount to the purchase price and agreeing that they would own the assets and business as equal partners. The business itself was run by the first defendant and the claimant was not involved. In 1981/2, the defendants transferred the land and business to a company which they solely owned. In 2001, the defendants sold the company for a substantial sum. The claimant claimed a share of the profits from the sale of the company on the basis that he was still a partner in the business at the time of the sale. The defendants argued that the partnership was dissolved in 1981/2 when the land and business had been transferred by them to the company. At first instance before Ms Hazel Williamson

QC, sitting as a deputy High Court Judge in the Birmingham District Registry, and on appeal, the claimant succeeded in showing that the partnership had not been dissolved in 1981/2 and that he therefore retained an interest in the proceeds of the sale in 2001.

72. Mr Callman took me first to the decision of the learned deputy Judge reported at [2005] EWHC 2859. She held that dissolution was dependent on the agreement of all the partners and as the claimant had not participated in the decision to transfer to the company, and had not been given shares in the company, there was not a dissolution. In paragraphs 93 and 94, she said as follows (underlining added):

> "93. However, a dissolution of the partnership itself could be effected, in my judgment, only by one of the ways provided in the Partnership Act 1890, ss 32–35. Apart from overriding matters such as illegality (Section 34) the principle behind these sections is fairly clear. Dissolution occurs only by the mutual agreement of the parties or by the order of the court. All the circumstances giving rise to dissolution under Sections 32 and 33 are founded on the parties' express or inferred agreement as to the circumstances in which a dissolution will occur, ie an agreement to dissolve. Apart from such agreement, if circumstances arise making it just and equitable, the court can be asked, under Section 35, to dissolve the partnership.
>
> 94. In my judgment the mere transfer of all assets of the partnership to a company without any such agreement does not, therefore, effect a dissolution of the partnership, unless it is accompanied by either an express or necessarily implied agreement by all parties to dissolve."

73. Neuberger LJ (as then was) gave the only judgment in the Court of Appeal which upheld the judgment below. Neuberger LJ referred to the two ways in which the defendants' leading Counsel had put his case that there had been a dissolution as a result of the transfer of all the assets and business of the partnership, namely: (1) the fact that after the transfer the partnership could not satisfy the requirements of s.1 of the Act; and (2) that the Court should infer an agreement to dissolve by the transfer. Neuberger LJ said that he preferred the analysis in (2) but that they both probably amounted to the same thing in the end. At paragraphs 23 to 29, he said as follows (underlining added):

> 23. The first basis is that, once all the assets and operational functions of the partnership have been transferred to a company, it cannot be said that the partners (or, perhaps more accurately, the former partners) are "persons carrying on a business", whether at all or "in common with a view to profit". They have become shareholders in a company which is carrying on the business. Hence, section 1 of the 1890 Act cannot apply.
>
> 24. The second argument is that, by transferring all the assets and operational activities of the partnership to a company, in which the partners (or former partners) are issued with shares for their own personal benefit, it is to be inferred, from their conduct, that they have agreed that the partnership should come to an end. In other words, the partnership is brought to an end in a way recognised by the 1890 Act,

as explained by Lord Millett[7] and Carnwath LJ, namely by mutual agreement, which, according to normal legal principles and in light of the way in which Section 19 of the 1890 Act is expressed, can be inferred from conduct.

25. Of those two analyses, I consider that the latter is to be preferred, albeit that, on closer analysis, they may amount to much the same thing. In other words, it appears to me that, in general, where all the business and assets of a partnership are transferred to a limited company, especially where the shares in that company are issued to all partners pro rata to their respective interests in the partnership, it would be easy, in the absence of other facts, indeed natural, to infer that the partners, now the shareholders, did thereby intend the partnership relationship to come to an end. Just as much as the assets and business are no longer owned by the partnership, but by the company, so the relationship changes from that of partners in the partnership to that of shareholders in the company.

26. The first way in which the point is put by Mr. Pymont appears to me to be too absolute in its effect. In my judgment, it is relatively easy to think of circumstances which could arise where a partnership ceased to have any assets or any business, and yet the partners intend the partnership relationship to continue. For instance, for the purpose of starting up a fresh business or venture, reviving the previous business, improving or maintaining their position with regard to tax liability, or crystallising certain rights or obligations. Mr. Pymont does not really challenge this proposition, which was treated as correct in *National Westminster Bank PLC v Jones* [2001] 1 BCLC 98 at paragraphs [113] to [114].

27. It is fair to say that, in that case, some of the reasons I mentioned as to why a partnership may not have determined, even though all its assets and operations had been transferred to a company, may not be justifiable, on the basis that they are really concerned with winding up, as opposed to dissolving, a partnership. As Mr. Pymont rightly says, dissolution is what brings a partnership to an end, and winding up is what occurs thereafter, as is clear from Sections 39 and 44 of the 1890 Act. (The potential for confusion in this field is reinforced by the fact that, whereas a limited company's winding up occurs before its dissolution, the dissolution of a partnership occurs before its winding up.)

28. On the basis of this analysis, it appears to me that, as pointed out in argument by Arden LJ, the two ways in which Mr. Pymont puts his case as a matter of principle may very well amount to the same thing. So far as his second, and less controversial, proposition is concerned, the transfer of all the assets and operations of a partnership to a company may result in dissolution of the partnership by agreement, on the ground that that is the proper inference to draw from all the circumstances. As to his first proposition, it appears to me that the fact that the partners have ceased carrying on business together, but have transferred its business together with all its assets to a company, in which shares are issued to the partners pro rata, can be said, at least in the absence of reasons to the contrary, to raise the inference that there is no longer a partnership because of the provisions of section 1 (1) of the 1890 Act.

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[7] This was a reference to Lord Millett in *Hurst v Bryk*, supra, in which he said that a "partnership may be dissolved by mutual agreement".

> 29. In other words, I would accept Mr. Pymont's general point that the law, like business common sense, would presume, in the absence of any reason to the contrary, that the transfer of all the business and assets of a partnership to a limited company, in which all the partners are given shares pro rata to their interests in the partnership, raises the presumption that the partnership is thereby determined. Of course, that does not mean that there will be no continuing liabilities, which will be governed by the partnership relationship, such as liability for any tax or other debts of the partnership which may arise, but, as Mr. Pymont says, that is part of the post-dissolution winding up. The point is that the fact that there has been dissolution does not mean that the relationship between the former partners is no longer governed by the terms of the dissolved partnership agreement."

74. In my view, Neuberger LJ is there saying that, in these sorts of circumstances, there has to be an actual agreement by all the partners to dissolve. It may be possible to infer such an agreement by their conduct in transferring all the business and assets of the partnership but it is still ultimately a factual question as to whether there was such an agreement by all the partners. Even though Neuberger LJ uses the language of "*natural presumption*" and "*natural inference*" in relation to dissolution rather than the agreement to dissolve (see for example paragraphs 33, 34 and 36), nevertheless his conclusions in paragraphs 39 and 47 make it clear that he considered there had to be an agreement between all the partners to dissolve:

> "39. In this connection, I consider that it is important to remember that one is here concerned with whether it is right to infer an agreement between all the partners that a partnership will be wound up as a result of actions or discussions. In my view, where, as here, one of the partners has not been involved in the relevant actions at all, and has only been peripherally involved in those discussions, it must at least be more difficult to spell out an agreement between all the partners, including him, that the partnership is to be dissolved."

> "47. For these reasons, I am of the view that the Judge was right to conclude that, on the rather unusual facts of this case, the transfer to HPL of the business, previously owned and run by the partnership, and of the land, being the asset of the partnership, did not operate to dissolve the partnership. Just as in *National Westminster Bank v Jones*, where the facts were also quite unusual, albeit very different from the present case, there are reasons for concluding that the complete transfer of the business and all its assets from the partnership to a company did not carry with it the inference of an agreement that the partnership should be dissolved."

75. Mr Jackson submitted that something less than a binding enforceable agreement was required. He said that there only needed to be a "*consensus*" between the partners, something of the level that might found an estoppel. I am not sure that I understand the sort of agreement that he has in mind. I think that Neuberger LJ was fairly clear that there had to be an agreement between the partners and that this can be inferred from the facts of the case. In this case there clearly was no agreement between the Defendants to dissolve because they intended the Partnership to continue, probably for the sole purpose of preventing clause 2.43 of the 1987 Deed from coming into effect.

76. In *Chahal*, the facts were perhaps extreme in that if there was no dissolution in 1981/2, the partnership had apparently continued to exist for some 18 years despite the fact that

all the assets were held and the operation of the business was conducted by the company. Furthermore, no partnership accounts were prepared and nothing was done to suggest that the partnership still existed. Nevertheless the Court found that the partnership had not been dissolved. If the facts in *Chahal* were insufficient to infer an agreement to dissolve, it is a little difficult to see that the facts would be sufficient in this case, where there was an actual agreement not to dissolve.

77. Mr Jackson submitted that the process that Neuberger LJ was describing in *Chahal* was that the Court looks objectively at the facts and ignores the parties' intentions and if the facts are that all the business and assets of the partnership are transferred leaving nothing in the partnership, the Court will infer an agreement to dissolve. That is more in the nature of the Court imputing an agreement to dissolve contrary to the actual intentions of the partners concerned. I disagree that this is what Neuberger LJ was saying. As I have said above, one of the ways of dissolving a partnership is by mutual agreement. If there was no express agreement to dissolve, the Court can infer such an agreement by reference to what the partners have done. However that is a matter of evidence and evidential presumptions. The Court is not declaring an agreement to exist when it knows that such an agreement did not and could not have existed in reality.[8]

78. Mr Callman submitted that the Court can only infer an agreement from the conduct of the parties if it is necessary to do so. He cited in support the well-known cases on implied contracts, including: *Blackpool and Fylde Aero Club Ltd b Blackpool Borough Council* [1990] 1 WLR 1195; *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; *West Bromwich Albion Football Club Ltd v El-Safty* [2006] EWCA Civ 1299. I am not convinced that the test of necessity is one that easily translates into the sort of agreement that is potentially to be inferred in these partnership dissolution cases. They were not referred to in *NatWest v Jones* or *Chahal,* and in my view that is because the focus is not on whether parties are bound by a contract that can be enforced as in the above-mentioned cases. In the partnership dissolution cases one is looking more at whether a decision was taken by all the partners to dissolve. I do not see that the concept of necessity helps in answering that question.

79. As an alternative way of putting the Claimant's case, Mr Jackson also relied on the first argument of the defendants' leading Counsel in *Chahal,* namely that the Defendants had ceased to carry on business and so failed to satisfy s.1 of the Act. Even though this argument was clearly entertained by Neuberger LJ, it was implicitly rejected, at least on the facts in that case (which as I have said were more extreme than this case). Mr Jackson's argument was perhaps more subtle because he was saying that the business contemplated by the 1987 Deed had ceased and that meant that the Partnership was effectively dissolved.

80. I have some doubts about this argument as a matter of law and whether it was actually being endorsed by Neuberger LJ. Section 1 of the Act describes when a partnership comes into being. It has nothing to do with dissolution. Sections 32 to 35 do not refer

[8] Mr Callman referred to *Stack v Dowden* [2007] 2 AC 432 on the difference between inference and imputation. Lord Neuberger at para. 126 said:

> "An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend."

to cessation of business or failure to fulfil the requirements of s.1 of the Act as a ground of dissolution. Once the relationship of partnership has been established in accordance with s.1 of the Act, I do not see that the relationship comes to an end if at some time in the future the partnership does not satisfy s.1. The relationship only ends through dissolution. I believe that that is implicitly recognised in paragraph 26 of *Chahal* where Neuberger LJ makes the point that even after a cessation of business the partnership may still exist.

81. In conclusion on the applicable law, I hold that:

(1) Clause 2.43 of the 1987 Deed is predicated on there having been a "*final dissolution of the Partnership*" and that means a dissolution of the Partnership existing at the time; there is no concept of partial dissolution or dissolution of a particular contemplated business of the Partnership;

(2) The Claimant therefore has to show that the Partnership was dissolved in law as of 1 October 2012;

(3) For there to have been such a dissolution in this case, there must have been an agreement by the Defendants to dissolve;

(4) Such an agreement can be inferred as a matter of fact from the Defendants' conduct; but it cannot be imputed to the Defendants as a matter of law; and

(5) Mere cessation of the Partnership's business is insufficient to establish that there has been a dissolution of the Partnership; in this case, that can only have been effected by the agreement of the Defendants.

82. As there was clearly no agreement between the Defendants to dissolve the Partnership on 1 October 2012, my conclusions on the law mean that the Claimant cannot succeed in showing that the Partnership was dissolved upon the transfer of its business to BSL. Accordingly clause 2.43 did not come into effect on that date and the Claimant is not entitled to a lump sum from the Defendants in respect of his pension entitlement.

83. Out of deference to the submissions of Counsel and in case this may go further, I will deal with two further factual points that were argued before me.

Partnership business post-transfer to BSL

84. Mr Jackson submitted that there was no partnership within the meaning of s.1 of the Act after the transfer of the business to BSL. The retention of the head lease and renting the premises out to BSL was insufficient, he submitted, to amount to the "*carrying on a business in common with a view of profit*." Mr Jackson pointed to s.2(1) of the Act which says (underlining added):

> "**2. Rules for determining existence of partnership.**
>
> In determining whether a partnership does or does not exist, regard shall be had to the following rules:

> (1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof…"

85. As I have held above, s.1 of the Act deals with the creation or start of a partnership. Similarly, s.2 of the Act sets out certain rules that may be useful in determining whether a partnership has come into existence. There is nothing in the Act to suggest that a partnership has to satisfy s.1 at every point of its existence. The only way that a partnership is brought to an end is through dissolution. If the partners were beginning a new partnership and they were simply going to be joint owners of a head lease and subletting the premises, there may be a question as to whether that is sufficient. But where a partnership has existed for many years, it seems to me that it should be much harder to say that it has slipped outside of s.1. As was said in paragraph 24.53 of *Lindley* (quoted above): "*A temporary cessation of the partnership business will not cause a dissolution.*"

86. In any event, as Mr Callman pointed out, there is a relatively low threshold to satisfy s.1 of the Act, as illustrated by the House of Lords decision in *Khan v Miah* [2000] 1 WLR 2123 where a partnership came into being before trading had commenced because they had spent money in acquiring premises and other start-up costs.

87. Mr Jackson submitted that the head lease was not a valuable asset, particularly as after the SPA, it would not classify as a business lease and the Defendants would have no rights of renewal under the Landlord and Tenant Act 1954. The sub-lease, with only a 5% margin on the rent, was "*simply washing its face*" and did not mean that any real business was being carried on. Mr Callman countered by saying that the head lease was a valuable asset held by the Partnership and that the collection of rent was clearly the carrying on of a business with a view to profit within the meaning of s.1 of the Act. Mr Callman showed me a valuation of the premises that the Defendants had commissioned in December 2017, which showed the market value of the premises to be £648,000 with vacant possession or £758,000 if subject to the lease. The valuation had been obtained because the Defendants have for some time wanted to buy the freehold of the premises through the Partnership. Mr Jackson submitted that the valuation did not indicate the value of the head lease to the Partnership and that the real economic value of the lease had been transferred to BSL by the grant of the sub-lease.

88. I consider that the Partnership continued carrying on business after the 1 October 2012 and insofar as it is necessary to find, that it satisfied the test in s.1 of the Act. The difficulty for the Claimant is that it has always been open to the current partners to amend the Partnership Deeds and to change the business conducted by the Partnership. The Claimant had no power to prevent a change of business and was really at the mercy of the current partners as to the direction in which they wished to take the Partnership. It seems to me that the Defendants could have legitimately decided that they no longer wanted to practise as solicitors and instead converted the Partnership business into solely one of say Estate Agency. So long as the Partnership remained in existence in some form, it could do whatever the partners wanted, even to the extent of dramatically cutting its size and turnover, and still avoid the triggering of clause 2.43.

89. Mr Burke has said that he and Mr Cave are always looking at other ventures, in particular, possible property purchases, including the freehold of the premises. I have

seen minutes of partnership meetings where these and other things have been discussed. I have also seen the trading accounts of the Partnership and a very small selection of bank statements. These show the much-diminished scale of the Partnership's operations since the transfer to BSL. While these must be alarming reading for the Claimant, they do indicate that a business of sorts is being conducted by the Partnership.

An Informal winding up

90. Mr Jackson submitted that the treatment of the consideration for the goodwill and Net Assets of the Partnership amounted to an informal winding up of the Partnership. He said that I could infer that there was therefore a dissolution of the Partnership on 1 October 2012 but I have rejected that submission above.

91. The basis for this contention is that the Loan Notes were payable to each of the Defendants personally, rather than to the Partnership, and the Loan Notes were not shown in the Partnership's accounts. Goodwill was included in the balance sheets of the Partnership pre-SPA as an intangible asset at a figure of £90,000. In a draft balance sheet as at June 2012 drawn up by Menzies, goodwill was included with a value of £500,000. They then valued it at £1.06m for the purposes of the SPA. However in all the Partnership's accounts post-SPA, there is no value attributed to goodwill or the Loan Notes that were the consideration for the goodwill.

92. Mr Jackson took me to extracts from *Lindley* and to *Twomey on Partnership* (2nd Ed) on the treatment of partnership goodwill. In my view there is nothing in this point. There is no doubt that goodwill was a valuable asset of the Partnership that was sold to BSL. The consideration for this goodwill was in the form of Loan Notes to the Defendants and they clearly agreed to distribute that asset to themselves. There is nothing to stop them doing that whether under the 1987 Deed or the Act. The fact that it should technically have first gone into the Partnership's accounts before being distributed to the Partners may be correct but it does not affect the question in this case as to whether there was a dissolution of the Partnership.

Conclusion

93. I have concluded above that the triggering of the Claimant's pension entitlement under clause 2.43 of the 1987 Deed requires there to have been a dissolution of the Partnership. However, there was not such a dissolution on 1 October 2012 when the Partnership's business was transferred to BSL. Accordingly, this claim is dismissed.

94. I will hear Counsel on costs and any other consequential matters should that be necessary on a date to be fixed. I am grateful to Counsel for their clear and helpful submissions.