Neutral Citation Number: [2020] EWHC 465 (Ch)

Case No: PT-2019-BRS-000035

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 03/03/2020

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

JILL DEACON **Claimant**

- and -

NISAR YASEEN **Defendant**

- -
- -

Guy Adams (instructed by **BMA Law**) for the **Claimant**
Simon Hunter (instructed by **Appleby Shaw**) for the **Defendant**

Hearing date: 21 February 2020

- -

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.

.....

HHJ Paul Matthews :

Introduction

1. This is my judgment on a claim brought under CPR Part 8 for the determination of certain questions relating to non-residential premises in Hazlemere, Buckinghamshire, used as accommodation for a general medical practice known as "Highfield Surgery". The parties are medical practitioners, and were formerly partners in that practice. There are four main documents to be considered. First, there is the partnership agreement between originally three, but later two, medical practitioners to carry on the practice. Second, there is the current contract between the partnership and the National Health Service Commissioning Board ("the Board") for the partnership to supply general medical services ("GMS") as a local NHS GP practice. Thirdly there is the lease of the premises themselves. Lastly, but certainly not least, there are the National Health Service (General Medical Services – Premises Costs) Directions 2013 ("the 2013 Directions"), made by the Secretary of State under s 87 of the National Health Service Act 2006. There are also a few other provisions of that Act to take into account.

2. The background is not in dispute, and can be summarised as follows. On 26 October 1993, Wycombe District Council, in the exercise of local government powers, granted a lease of the premises to three medical practitioners then in partnership (but not the parties to the – later – partnership agreement I have to consider) for a term of 125 years. The rent reserved was £18,900 per annum, subject to upwards only rent reviews at five-yearly intervals. The formula for ascertaining a reviewed rent made clear that the rent reserved was not the open market rack rent, or anything like it. Instead it worked out at about 22% of the open market rack rent. But a restrictive covenant prevents the user of the premises for other than accommodation for general medical practitioners or for local health care purposes. Despite the rent review provisions, the rent under this lease has never been increased from £18,900 per annum.

3. On 9 December 2008 the claimant, the defendant and a Dr Masters entered into the partnership agreement with which we are concerned, in order to carry on the general medical practice at Highfield Surgery. Notwithstanding the date of execution, the agreement was expressed to take effect as from 1 July 2007. The lease of the premises was transferred to the three partners, and they were registered as joint proprietors at the land registry on 4 December 2008. I proceed on the basis that they (or at least the claimant and the defendant) are still so registered. On 30 April 2013, Dr Masters retired from the partnership, and the practice was carried on by the remaining two partners, the parties to this claim. On 12 October 2015, the defendant gave notice of his intention to retire from the partnership, and he retired on 11 April 2016.

4. Under the terms of the partnership agreement, the claimant as continuing partner had the option to purchase the defendant as outgoing partner's "share in the Partnership" within two months after the leaving date. On 7 May 2016 she exercised that option. That gave rise to a need for the Partnership Accountants to prepare Dissolution Accounts, valuing the "assets of the Partnership" in accordance with the terms of the partnership agreement. A dispute has arisen between the parties as to how the lease of the premises as a partnership asset is to be valued. There is a subsidiary issue as to what interest (if any) the defendant now has in the premises. But in order to understand how these disputes have arisen, it is necessary to explain the way in which

the state currently organises the provision of primary health care in general medical practices.

National Health Service Act 2006

5. Under the 2006 Act, section 1, the Secretary of State has a duty to promote a comprehensive health service. Under section 1H, this duty falls concurrently on the Board, subject to immaterial exceptions. Under section 83, the Board must exercise its powers so as to secure the provision of primary medical services throughout England. Under section 84 the Board may enter into a contract with a "contractor" (who by section 86 may be an individual or a partnership, but including at least one medical practitioner) to supply general medical services. Under section 87 the Secretary of State may give "directions" as to payments to be made under GMS contracts. As I have said, it is under this provision that the 2013 Directions were made.

6. It is also necessary to refer to section 259 of, and Schedule 21 to, the 2006 Act (replacing earlier provisions in section 54 of, and Schedule 10 to, the National Health Service Act 1977). So far as relevant, section 259 provides:

> "(1) It is unlawful to sell the goodwill of the medical practice of a person to whom any of subsections (2) to (4) applies, unless the person –
>
> (a) no longer provides or performs the services mentioned, and
>
> (b) has never carried on the practice in a relevant area.
>
> (4) This subsection applies to a person who has at any time, in prescribed circumstances or, if regulations so provide, in all circumstances, provided or performed primary medical services –
>
> (f) under a general medical services contract …
>
> (5) In this section –
>
> "goodwill" includes any part of goodwill and, in relation to a person practising in partnership, means his share of the goodwill of the partnership practice …
>
> (6) Schedule 21 makes further provision in relation to this section."

7. So far as relevant, Schedule 21 provides:

> "1(1) Any person who sells or buys the goodwill of a medical practice which it is unlawful to sell by virtue of section 259 is guilty of an offence and liable on conviction on indictment to a fine not exceeding –
>
> (a) such amount as will in the court's opinion secure that he derives no benefit from the offence, and
>
> (b) the further amount of £500,
>
> or to imprisonment for a term not exceeding three months, or both.

> (2) Any person proposing to be a party to a transaction or series of transactions which he considers might amount to a sale of the goodwill of the medical practice in contravention of section 259 may ask the Secretary of State for a certificate under this paragraph.
>
> (3) The Secretary of State must –
>
> > (a) consider any such application, and
> >
> > (b) if he is satisfied that the transaction or series of transactions does not involve the giving of valuable consideration in respect of the goodwill of such a medical practice, issue to the applicant a certificate to that effect.
>
> 2(1) For the purposes of section 259 and paragraph 1, a disposal of premises previously used for the purposes of the medical practice is deemed to be a sale of the goodwill of a medical practice if –
>
> > (a) the person disposing of the premises did so knowing that another person ("A") intended to use them for the purposes of A's medical practice, and
> >
> > (b) the consideration for the disposal substantially exceeded the consideration that might reasonably have been expected if the premises had not previously been used for the purposes of a medical practice.
>
> (4) Where in pursuance of any partnership agreement –
>
> > (a) any valuable consideration, other than the performance of services in the partnership business, is given by a partner or proposed partner as consideration for his being taken into partnership,
> >
> > (b) any valuable consideration is given to a partner, on or in contemplation of his retirement or of his acceptance, reduced share of the partnership profits, or to the personal representative of a partner on his death, not being a payment in respect of that partners share in past earnings of the partnership or in any partnership assets or any other payment required to be made to him as the result of the final settlement of accounts, as between him and the other partners, in respect of past transactions of the partnership, or
> >
> > (c) services are performed by any partner for a consideration substantially less than those services might reasonably have been expected to be worth having regard to the circumstances at the time when the agreement was made,
>
> there is deemed for the purposes of section 259 and paragraph 1 to have been a sale of goodwill as specified in subparagraph (5)."

8. It is a feature of the GMS contract model that, instead of the state providing the premises in which local primary medical services are to be provided by the contractor, it is the *contractor* who provides them. The contractor is then reimbursed for the cost

by the state, in accordance with the terms of the GMS contract and the 2013 Directions. If the premises are owned freehold by the contractor, rather than leasehold, so that there is in fact no rent to pay, the contractor is paid a notional rent, so that the contractor obtains a return on the capital tied up in the use of the property for the purposes of the general medical practice. In the present case, where there is a lease of premises at a rent, I am not concerned with that situation.

National Health Service (General Medical Services – Premises Costs) Directions 2013

9. The provisions of the 2013 Directions which are most relevant to this case are as follows:

> "3. These Directions apply in relation to the payments made to contractors –
>
> (a) in respect of premises developments or improvements;
>
> (b) in respect of professional fees, and related costs, incurred in occupying new or significantly refurbished premises under Part 3 of these Directions;
>
> (c) relating to the relocation of, or remortgaging by, the contractor; (d) in respect of recurring premises costs.
>
> 5.-(2) Where the Board makes a payment to a contractor under these Directions, it must –
>
> (a) only make the payment in the circumstances specified in these Directions;
>
> (b) ensure that the payment is made under the terms of the contractor's GMS contract; and
>
> (c) ensure that any conditions to which the payment is subject are included as terms of the GMS contract.
>
> 6. These Directions do not prevent the Board from providing such financial assistance as it thinks fit in order to pay, or contribute towards, the premises costs of the contractor in circumstances that are not contemplated by the payment arrangements set out in these Directions such as where –
>
> (a) the contractor is providing services under a temporary GMS contract;
>
> (b) an emergency need for financial assistance in respect of premises costs arises in circumstances that could not reasonably have been foreseen;
>
> (c) the contractor needs temporary accommodation (whether in the form of portable premises or an existing building) while new practice premises are being built or existing practice premises refurbished; or
>
> (d) the financial assistance relates to contractual arrangements for the provision of primary medical services under section 83(2) of the 2006 Act (primary medical services).

7.-(1) Where a contractor has a proposal for –

(a) the building of new premises to be used for providing primary medical services;

(b) the purchase of premises to be used for providing primary medical services;

(c) the development of premises which are used or are to be used for providing primary medical services (or for significant changes to existing development proposals);

(d) the sale and lease back of premises used for providing primary medical services;

(e) the increase of the existing floor area of premises used for providing primary medical services which would lead to an increase of a payment made to the contractor under these Directions; or

(f) premises improvements, which are to be the subject of a premises improvement grant application,

and it puts that proposal to the Board as part of an application for financial assistance in respect of the proposal the Board must consider that application.

(2) Subject to direction 32(4), the Board must not agree to fund any proposal under paragraph (1) where –

(a) a contract has been entered into, or

(b) work has been commenced, and that contract or work has not been subject to prior agreement with the Board.

31. Subject to the following provisions of this Part, where –

(a) a contractor which rents its practice premises makes an application to the Board for financial assistance towards its rental costs; and

(b) the Board is satisfied (before the lease is agreed or varied), where appropriate in consultation with the District Valuer Service, that the terms on which the new or varied lease is to take effect represent value for money,

the Board must consider that application and, in appropriate cases (having regard, amongst other matters, to the budgetary targets it has set for itself), grant that application.

32.-(1) Subject to the following provisions of this Part, where the Board grants the application, the amount that it must pay in respect of a contractor's rental costs for its practice premises is –

(a) the current market rent for the premises, plus any Value Added Tax payable by the contractor if this is properly charged to the contractor by the

> landlord (but excluding any Value Added Tax for which the contractor can claim a refund); or
>
> (b) the actual lease rent payments plus any Value Added Tax payable by the contractor if this is properly charged to the contractor by the landlord (but excluding any Value Added Tax for which the contractor can claim a refund),
>
> whichever is the lower amount.
>
> 33.-(1) The Board must determine the amount of the current market rent of leasehold premises in accordance with Parts 1 and 2 of Schedule 2.
>
> (2) Having regard to the fact that the current market rent levels in some areas of deprivation may be too low to provide –
>
> (a) sufficient returns to support new capital investment in practice premises; or
>
> (b) sufficient support for existing premises that must meet the minimum standards set out in Schedule 1,
>
> the Board may in such circumstances, having taken advice from the District Valuer Service, add an appropriate supplement to the amount it would otherwise pay as the current market rate of practice premises, in order to provide sufficient returns or support.
>
> (3) The Board must reduce payments of the supplement in paragraph (2) in line with any increases in the current market rent until such time as the supplement is extinguished.
>
> 34.-(1) Where the actual lease rent for practice premises, plus any properly chargeable Value Added Tax, is only lower than the current market rent for those premises because, in the calculation of the current market rent for the premises, the Board includes the value of a premium paid by the tenant, the amount to be paid by the Board pursuant to direction 32 is the current market rent for the premises rather than the actual lease rent.
>
> 56.-(1) Where immediately before 1 April 2013, a Primary Care Trust was making payments to a contractor under Parts 4 (grants relating to the relocation of the contractor), 5 (recurring premises costs), or 6 (supplementary provisions) of the 2004 Directions, the Board must continue to make those payments as if the 2004 Directions, as in force immediately before 1 April 2013, continued to apply, and those Directions are to be treated as directions to the Board."

The GMS Contract

10. I do not have a copy of the GMS contract entered into between the Board and the partnership of Dr Masters, the defendant and the claimant. Instead I have a copy of a contract made on 11 April 2016 between the Board and (I assume) the later partnership of the claimant and a Dr Martin Davis. I proceed on the basis that (so far

as this matters) the earlier GMS contract would have been similar, if not identical, to the one which I have before me.

11. The relevant terms of this GMS contract are as follows:

> "2.1. Relationship between the parties
>
> 2.1.1. The Contract is a contract for the provision of services. The Contractor is an independent provider of services and is not an employee, partner or agent of the Board. The Contractor must not represent or conduct its activities so as to give the impression that it is the employee, partner or agent of the Board.
>
> 2.1.2. The Board does not by entering into this Contract, and shall not as a result of anything done by the Contractor in connection with the performance of this Contract, incur any contractual liability to any other person.
>
> 2.1.3. This Contract does not create any right enforceable by any person not a party to it.
>
> 2.1.4. In complying with this Contract, in exercising its rights under the Contract and in performing its obligations under the Contract, the Contractor must act reasonably and in good faith.
>
> 2.1.5. In complying with this Contract, and in exercising its rights under the Contract, the Board must act reasonably and in good faith and as a responsible public body required to discharge its functions under the 2006 Act.
>
> 2.1.6. Clauses 2.1.4 and 2.1.5 above do not relieve either party from the requirement to comply with the express provisions of this Contract and the parties are subject to all such express provisions.
>
> 2.1.7. The Contractor shall not give, sell, assign or otherwise dispose of the benefit of any of its rights under this Contract, save in accordance with Schedule 1. The Contract does not prohibit the Contractor from delegating its obligations arising under the Contract where such delegation is expressly permitted by the Contract.
>
> 18.1. Payment under the Contract
>
> 18.1.2. Subject to clause 18.1.3 The Board shall make payments to the Contractor in such amount and in such manner as specified in any directions for the time being in force under section 87 or 98A of the 2006 Act. Where, pursuant to directions made under section 87 or 98A of the 2006 Act, the board That is required to make a payment to the Contractor under the Contract but subject to conditions, those conditions are to be a term of the Contract.
>
> 18.1.3. Payments to be made to the Contractor (and any relevant conditions to be met by the Contractor in relation to such payments) in respect of

> services where payments, or the amount of any such payments, are not specified in directions pursuant to clause 18.1.2, are set out in Schedule 6 to this Contract.
>
> Schedule 6 Payment Schedule
>
> | Description | Annual Amount £ | Monthly Payment £ |
> |---|---|---|
> | […] | | |
> | Premises (note 5) | | |
> | Rent | £67,450 | £5,621 |
> | […] | | |
>
> Note 5 – Premises
>
> Other reimbursable cost are not included above as these are variable such as nondomestic rates and clinical waste
>
> […]"

12. The evidence in the present case shows that the sum of £67,450 paid annually as "Rent" by the Board under the GMS contract dated 11 April 2016 comprises *the sum* of (i) the rent under the lease (£18,900) and (ii) the "Current Market Rent" before 4 October 2014 as assessed by the District Valuer (£48,550). The "Current Market Rent" after 4 October 2014 was subsequently assessed by the District Valuer at £47,400. It is not clear to me, as I think it was not entirely clear to either counsel appearing before me, why the Rent payable under the GMS contract should be the total of *both* the current market rent and the actual lease rent, in the light of the wording of Direction 32 of the 2013 Directions. It was even less clear, if it should be that total, why the total is not now £66,350, rather than £67,450. I will return to this later.

The partnership agreement

13. The partnership agreement placed before the court, is dated 9 December 2008, and made between Dr Masters, the defendant and the claimant. I was referred to the following provisions in particular:

> "4. Practice Location
>
> 4.1. The Practice shall be carried on at the Premises or at such other place or places as may be agreed between the Partners from time to time subject to the approval of the Primary Care Trust
>
> 8. Partnership Property
>
> The property of the Partnership shall consist of:

8.1. The medicines and drugs bottles instruments and apparatus reference books files furnishings book debts cash at bank loose cash computer equipment and other assets or things pertaining to the Practice as at the Commencement Date or from time to time acquired and used by the Practice

8.2 The benefit of each Partner's membership of a medical practitioners Insurance and Indemnity scheme in respect of or incidental to the carrying on of the Practice of the Partnership for the mutual benefit of the Partners

8.3. such lease or licence of the Premises subject to which the Practice currently occupies the Premises

8.4. such other freehold, leasehold or other properties as the Partners from time to time may agree to purchase

10. Premises

10.1. The Partners own the shares in the Premises as set out in Schedule 3.

10.2. Dr Masters and Dr Deacon own their shares of the Premises subject to mortgages with the Norwich Union who have secured the mortgages against the Premises.

10.3. Dr Masters shall pay, discharge, indemnify and keep indemnified Dr Deacon and Dr Yaseen, or their estate and their personal representatives, against all debts and liabilities, guarantees and obligations in relation to the mortgages secured against the Premises as referred to in clause 10.2 above

10.4. Dr Deacon shall pay, discharge, indemnify and keep indemnified Dr Masters and Dr Yaseen, or that the estate and their personal representatives, against all debts and liabilities, guarantees and obligations in relation to the mortgages secured against the Premises as referred to in clause 10.2 above

25. Retirement from the Partnership

25.1. A Partner may retire from the Partnership by giving a Notice of Retirement to expire in not more than twelve months and not less than six months' to the other partners

27. Option to Acquire Outgoing Partner's Share

27.1. Arising with effect from the Leaving Date the Continuing Partners shall have the option of purchasing the share in the Partnership of the Outgoing Partner on the terms hereinafter contained Provided Always that such option may only be exercised by a notice in writing given to the Outgoing Partner no later than 2 months after the Leaving Date. For the avoidance of doubt upon exercise of the option by the Continuing Partners of purchasing the Outgoing Partners share in the Partnership and payment of the price to the Outgoing Partner the Outgoing Partner must transfer their share in the Premises as directed by the Continuing Partners.

27.2. Upon the exercise of the said option and thereafter as soon as is reasonably practicable the Partnership Accountants shall prepare the Dissolution Accounts in accordance with the accounting principles and practices adopted in the last Annual Accounts but on the assumption that

27.2.1. The assets of the Partnership (other than goodwill) shall be shown at their market value as at the Leaving Date save only that in valuing the Premises the value shall be calculated in accordance with the conditions for such valuation set out in this agreement

27.2.2. In the case of each such asset (save as aforesaid) the market value thereof shall be agreed between the Outgoing Partner and the Continuing Partners and in default of agreement within 2 months after the Leaving Date or the exercise of the said option (whichever shall be the later) shall be determined by an independent valuer (acting as an expert and not as an arbitrator)

27.5. The purchase price of the Outgoing Partner's share in the Partnership shall be the net value shown in the Dissolution Accounts (but giving credit for any advance payment that may have been made) and the said purchase price shall be paid by the Continuing Partners not less than [one year] from the Leaving Date together with interest on the full amount of the balance of the said purchase price for the time being and from time to time outstanding …

32. Valuation

32.1. Any valuation required under this agreement shall be made by an independent valuer to be agreed or if the Partners cannot agree upon one valuer by two independent valuers one to be appointed by each party to the dispute difference or question but so that if either party shall fail or omit to appoint a valuer within one month being requested to do so by the other party the other party may call for the President of the Royal Institution of Chartered Surveyors to appoint one on the other party's behalf

32.3. All valuations shall be made upon the basis that the property to be valued is the subject of negotiation between a willing buyer and a willing seller in the open market and in the case of any freehold or leasehold premises used and occupied for the purposes of the practice with vacant possession on completion and for the purpose of the user as the professional accommodation of a general medical practitioner. The valuer or valuers (as the case may be) shall disregard any value attaching to the subject matter of the valuation by reason of the goodwill of the Practice

THE SECOND SCHEDULE

Schedule of Profit Shares

Name	Profit Share
Dr Masters	9/22nds

Dr Yaseen	9/22nds
Dr Deacon	4/22nds

THE THIRD SCHEDULE

Shares owned in the Premises

Name	Share in Premises
Dr Masters	2/5ths
Dr Yaseen	2/5ths
Dr Deacon	1/5th"

Questions for the court

14. The questions which I am asked to decide in this claim are set out in the claim form itself, under paragraph 1 of the prayer for relief. They are as follows:

> "1. The determination by the Court of the following matters, namely:
>
> 1.1. Whether or not the valuer, when valuing the land and buildings known as Highfield Surgery, Highfield Way, Hazlemere, Buckinghamshire ("the Practice Premises") in accordance with clause 32.3 of the Deed of Partnership dated 9 December 2008 ("the Partnership Agreement"), can have regard, whether directly or indirectly, to the sums that a willing buyer or any potential subtenant of his might be entitled to receive from the National Health Service Commissioning Board in respect of the Practice Premises under the National Health Service (General Medical Services – Premises Costs) Directions 2013 ("2013 Directions") or otherwise and, if so, how should such sums be regarded;
>
> 1.2. If the valuer can have regard to such sums, whether such a willing buyer for the purpose of user as the professional accommodation of a general medical practitioner would be entitled under the 2013 Directions or otherwise to be paid a sum equal to (a) the actual rent for the premises under the Lease or (b) the current market rent for the Practice Premises calculated in accordance with the 2013 Directions ("Current Market Rent") or (c) the actual rent for the premises under the Lease together with the Current Market Rent or (d) some other sum;
>
> 1.3. If the valuer can have regard to such sums, whether any potential subtenant of such a willing buyer for the purpose of user as the professional accommodation of a general medical practitioner would be entitled under the 2013 Directions or otherwise to (a) payment of the actual rent for the premises under the sublease or (b) the Current Market Rent or (c) some other sum;
>
> 1.4. If the valuer can have regard to the Current Market Rent, how any premium paid by a willing buyer of the Practice Premises for the purpose of

> user as the professional accommodation of a general medical practitioner should be taken into account in calculating the Current Market Rent in accordance with Schedule 2 of the 2013 Directions.
>
> 2. Further or alternatively, determination by the Court of the following matters, namely:
>
> 2.1. What interest does Dr Yaseen currently have in the Practice Premises, if any;
>
> 2.2. Whether Dr Yaseen is entitled to be paid any sums in addition to his entitlement under clause 27.5 of the Partnership Agreement in respect of the Practice Premises."

15. A feature of the present case is that I am asked to construe a number of documents for the purposes of the dispute between the claimant and the defendant (who are the only parties to this claim), although some of the documents were made between other persons, or between one of the parties and other persons. No one other than the parties has been heard, no one other than the parties has (so far as I am aware) agreed to be bound by my decision, and accordingly my decision is binding only on the parties. In particular, the Board is not bound.

Question 1.1

16. I turn to question 1.1. This is in two parts. The first part runs from beginning to the words "or otherwise", and asks generally whether the valuer may take into account sums which a willing buyer of the premises would receive from the Board under the 2013 Directions or otherwise. The second part is the short remainder of that question: "if so, how should such sums be regarded?" In fact the parties are agreed on the answer to the first part of the question, and there is no issue between them on it. They agree that the answer is Yes. Given that my decision will not bind anyone else, there is no reason for me not to accept this agreement. Indeed, since the parties are generally free, as between themselves, to agree what they wish, and this is simply a working out of their partnership agreement, I do not think there is any basis upon which I could properly express a different view.

17. As to the second part of question 1.1, that is, how such sums should be regarded, the defendant submits that the court should not answer this question at this stage. This is because the parties have agreed, by clause 27.2.2 of the partnership agreement, that if the valuation is not agreed between them, it should be "determined by an independent valuer (acting as an expert and not as an arbitrator)". Since the parties have effectively agreed to determine any dispute between them in this way, then, unless and until that process breaks down, the court should not interfere. There is, for example, no suggestion that an independent valuer cannot be appointed as expert for this purpose. To the extent that the claimant had an answer to this point, it lay in the problem of the sale of goodwill.

18. As I have already noted, section 259 of, and Schedule 21 to, the 2006 Act prohibit the sale of goodwill attaching to the practice of a medical practitioner providing services under a GMS contract. The claimant is quite properly concerned that she does not overpay for the defendant's share of the premises. She is also concerned that any such

overpayment would include an element of goodwill, the sale of which would be unlawful under the statutory regime and potentially constitute a criminal offence.

Goodwill

19. There was no real difference between the parties as to the concept of goodwill. Nevertheless, I was referred by the claimant to two authorities in particular, both well known. The first was *Trego v Hunt* [1896] AC 7, where the House of Lords had to consider whether a person selling the goodwill of the business without further provision could be restrained from canvassing the customers of the old firm to become customers of a new rival business. The House of Lords held that the vendor might set up a rival business, but was not entitled to canvas the customers of the old business, and could be restrained by injunction from doing so.

20. Lord Macnaghten said this (at 23-24):

> "I agree, in substance, with the observations which I have quoted from the judgment in *Harrison v Gardner*. What 'goodwill' means must depend on the character and nature of the business to which it is attached. Generally speaking, means much more than what Lord Eldon took it to mean in the particular case actually before him in *Cruttwell v Lye*, where he says: 'The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place.' Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money…"

21. The other authority was *Commissioners of Inland Revenue v Miller and Co's Margarine Ltd* [1901] AC 217, another decision of the House of Lords. This case concerned the application of the Stamp Act 1891, section 59(1), which charges ad valorem duty on contracts and agreements "made" in the United Kingdom for the sale of any estate or interest in any property "except lands… or property locally situate out of the United Kingdom…" A wholesale manufacturing business (including premises) situated abroad, together with its goodwill, was sold to a purchaser in England, by a written agreement executed by the vendor abroad and the purchaser in England. All the customers of the business were abroad. The House of Lords held by majority that the goodwill was "property locally situate out of the United Kingdom" and therefore the agreement was not chargeable with the duty.

22. Lord Lindley said (at 235):

> "Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own.

> That in some cases and to some extent goodwill can and must be considered as having a distinct locality, is obvious, and was not in fact disputed. The goodwill of a public house or other retail shop is an instance. The goodwill of the business usually adds value to the land or house in which it is carried on if sold the business; and so far as the goodwill adds value to land buildings, the goodwill can only be regarded as situate where they are. In such a case the goodwill is said to be annexed to them."

23. These authorities are of course decisions in a particular legal context. The first arises when there has been a sale of goodwill and then there is potential competition between the vendor and the purchaser. It is a question in substance of non-derogation from grant. You cannot honestly sell something and then try to take it back again. The second arises in the statutory context of stamp duty, and whether a particular sale of goodwill is one of goodwill situated outside the United Kingdom. Neither of them is a decision in the context that arises in the present case, of a statutory prohibition of the sale of goodwill attaching to a general medical practice. I entirely accept that the statements made by the judges in those House of Lords cases sufficiently define goodwill for the purposes of those cases. Moreover, I accept that those statements are useful as a starting point, even when it comes to considering the concept of goodwill in other contexts. But I do not accept that they can be unthinkingly applied to other contexts as if they were a statutory definition of the concept for all legal purposes. It is instead necessary to look at the specific contractual and statutory provisions governing the particular situation.

The parties' contentions

24. Unfortunately, the definition of "goodwill" in section 259(5) of the 2006 Act (set out above) does not assist, being concerned simply to *include* in the concept any part of goodwill and goodwill shared between partners. Nevertheless, the claimant says that any payments made by the Board which are in effect discretionary, that is, in excess of what the purchaser would be *entitled* to receive in respect of the premises, because of the special situation of the practice and/or its connection with the Board, are necessarily in the nature of goodwill, and therefore must not be taken into account in determining the value of the premises in accordance with clause 32 of the partnership agreement.

25. The defendant however says that any valuer of the premises would want to have regard to those payments that have historically been made by the Board in respect of the premises, and to consider whether or not it is likely that such payments will continue to be made in the future. Whether they are discretionary or compulsory is in the defendant's view irrelevant, because they are payments in respect of property costs, recoverable under the statutory scheme to deal with such costs, rather than attributable to the established reputation of the business, when they would or might be goodwill.

Decision

26. I have already referred above to the unusual feature of this case, that the payments made by the Board in respect of "Rent" under the GMS contract, appear to exceed the limits set out in direction 32 of the 2013 Directions. But we do not know the reason for this; it may for example be related to a historical situation, carried over by virtue

of the transitional provision in direction 56, or it may be a supplement under direction 33, or simply a discretionary payment towards premises costs under direction 6. But on any view it is a payment in respect of *premises costs*, and not a payment referable to, or variable by reference to, the business, or the success or otherwise, of the practice. Accordingly, I conclude that it is not goodwill for the purposes of the 2006 Act. That being the case, I accept the defendant's submission on the second part of question 1.1, and decline to answer this part at this stage.

Question 1.2

27. I turn now to question 1.2. This asks in substance whether a willing buyer of the premises would be *entitled* to be paid by the Board simply the actual rent, the "Current Market Rent" (as calculated under the 2013 Directions), both of those, or some other sum. It will be recalled that the Current Market Rent is significantly in excess of the actual rent paid under the lease.

The parties' contentions

28. The claimant submits that the valuer should, when determining the amount that a purchaser of the lease would be prepared to pay, consider that a medical practitioner purchaser would be entitled to receive the Current Market Rent by way of financial assistance, if he or she paid a premium for the lease. Thus the Current Market Rent would effectively determine the amount of the premium. She relies on direction 34, which provides that, if the actual rent is only lower than the current market rent because the calculation of the Current Market Rent takes account of the value of the premium paid by the tenant, then the sum payable is the Current Market Rent rather than the actual rent.

29. Once again, the defendant submits that the court should not answer this question. Indeed, he says that the court "cannot hope to answer this question". He refers to the terms of the relevant directions, including direction 31, which requires the Board to be satisfied of various matters, including compliance with its budgetary targets, before granting an application for financial assistance. Since entitlement depends on decisions entrusted to, and to be made by, the Board, rather than the court, the most the court could do would be to look at the past history and consider whether or not it was likely that past behaviour would continue into the future. In addition, the valuer is asked to value the premises on the basis of a hypothetical purchase, rather than an actual one.

Decision

30. I see the logic of the claimant's submission, but in my judgment the defendant is right to say that the court cannot deal in the abstract with questions of *entitlement* under the 2013 Directions. In any event, once again it is a matter in the first instance for the valuer rather than for the court.

Question 1.3

31. I turn to question 1.3. This asks a similar question to 1.2, but predicated on the basis that a willing buyer of the premises sublets to someone else for the purpose of user as the professional accommodation of a general medical practitioner. Instead of the

buyer being entitled or not to sums under the 2013 Directions, the question relates to the entitlement of the *subtenant*. The claimant submits that the valuer should consider that any potential medical practitioner subtenant would receive up to the current market rent by way of financial assistance in respect of the passing rent under any sublease, and take that into account in determining the amount of premium that a purchaser of the lease would be prepared to pay. The reasoning is in substance the same as in the claimant submission under question 1.2. The maximum rent which a purchaser investor could get from his subtenant would effectively be the current market rent, and this would determine the premium that the purchaser was prepared to pay.

32. The defendant once more submits that it is not necessary for the court to answer this question. He says the valuer's function is to value the premises on the agreed assumption that they are purchased "for the purpose of use as the professional accommodation of a general medical practitioner". An investor would be purchasing for the purpose of subletting as such professional accommodation. Even if that is not so, at best the position can be no better (from the claimant's point of view) than if the purchaser was a medical practitioner intending to occupy the premises as his or her professional accommodation. So in my judgment the answer is the same as under question 1.2.

Question 1.4

33. I turn to question 1.4. This asks how any premium paid by willing buyer of the premises should be taken into account in calculating the Current Market Rent in accordance with Schedule 2 of the 2013 Directions. The claimant says that the valuer should take into account that those Directions effectively require the Current Market Rent to be determined by the District Valuer before any premium is finally agreed, and determine the premium that would be paid by a willing buyer accordingly.

34. Once again, the defendant says that the court should not answer this question at this stage, because it is a matter for the valuer. In addition, the defendant says that the question is irrelevant, because the valuer looks to the hypothetical purchaser, rather than to a specific purchaser. But the defendant accepts that in an appropriate case the valuer might undertake the kind of exercise contemplated by this question. For my part, I consider that this, if it properly arises at all, is a valuation question, and therefore one which in the first instance should be dealt with by the valuer, to whom the parties have by their agreement entrusted this decision.

Question 2

35. Question 2 is in two parts. The first part asks what interest the defendant currently has in the premises, and the second part asks whether in he is entitled to be paid any sums in addition to those under clause 27.5 of the partnership agreement in respect of the premises. The claimant submits that the answer to both parts is No. In essence, the claimant says that the defendant no longer has any interest in the premises, because having retired from the partnership any such interest has been converted to a claim to sums of money under the partnership agreement. At best, therefore, he is a creditor (of the claimant) and not an owner (of the premises). In this connection, I was referred to four cases.

Authorities cited

36. The first of these was *Sobell v Boston* [1975] 1 WLR 1587, a decision of Goff J. There the plaintiff claimed as against his former partners (who had carried on the business after he left) a declaration as to dissolution of the partnership, an account, and an order for sale of the assets and goodwill of the business. He also claimed the appointment of a receiver and manager on the ground that the defendants had been carrying on the business on their own account and using his share for that purpose. Goff J held that in the circumstances there had been a dissolution of the partnership.

37. The judge then went on to say this (at 1590-1591):

> "Then one has to see what effect that retirement has, seeing that the financial terms were never finally settled. I turn accordingly to the remaining ways in which Mr Sunnucks presented the argument, in support of which he relied on this passage in *Lindley on Partnership*, 13th ed (1971) p 468:
>
> > 'When a partner retires, the firm is thereby dissolved so far as concerns that partner and if, whilst making provision for such retirement (either originally or by subsequent variation) the partnership agreement is silent as to how the retiring partners share in the partnership assets (including goodwill) is to be acquired by the continuing partner or partners, then the retiring partner is, in the absence of agreement, entitled, if necessary by an order for sale, to receive his appropriate share of the assets.'
>
> That does not appear in the last edition for which Lord Lindley was responsible (namely the 5th) and I observe it does not say 'entitled by an order for sale' but 'if necessary' by such an order.
>
> Of course, the failure to agree terms may in any given case result in the conclusion that there has been neither dissolution nor retirement, but once given that it is found that a partner has retired, I do not see how as a general rule he can be entitled to a sale which is inconsistent with retirement, involving as that does the other partners taking over the business for themselves, and which, so far as goodwill is concerned, would give him not that which he ought to have, a share of the goodwill as it was when he retired, but something different, a share of the goodwill as at a fortuitous date, the date of the sale.
>
> In my judgment, what he is entitled to is the value of his share at the date of his retirement, including, of course, the then goodwill, the ascertainment of which must at all events normally be a matter of inquiry, accounting and valuation, not sale. Once that conclusion is reached and sections 42 and 43 of the Partnership Act 1890 do apply, and whatever is due to the plaintiff, whether under section 42 or on the general account, is a debt due to him from the continuing partners. Accordingly he is merely an unsecured creditor and has no right to interfere or to ask the court to interfere in his debtor's business or to ask that it be saved for him to have recourse thereto to satisfy his demand; and I must, as I do, accept the defendants' submission that the appointment of a receiver and manager is not an appropriate remedy at all."

38. The second authority to which I was referred was the decision of the Court of Appeal in *Brown v Rivlin*, unreported, 1 February 1983. In that case the plaintiff claimed to be entitled to four separate sums of money from the defendant, his former partner, and obtained summary judgment in respect of three of them. The defendant appealed against the order for summary judgment, on the basis that the only remedy of a partner against a former partner following the dissolution of the partnership, subject to any provision to the contrary contained in the partnership agreement, was to obtain the taking of an account by the court. Thus the judge below had been wrong to find that there was a contrary provision in the particular partnership agreement.

39. In giving the judgment of the court, Eveleigh LJ said:

> "In order to decide the present case we ask the reason for the existence of the principle contended for by the defendant. It is not hard to find. The assets of the partnership are owned by all the partners. When the partnership was dissolved the assets will be distributed according to the state of accounts between the partners and proportionately to their shares. In relation to a specific asset in the hands of one of the partners it is quite impossible to attribute to any partner a specific share of it or of its value. Until an account is taken it is not possible to say that the partner who holds the property or money has no claim to any part of it whatever. Such a partner will usually have claims against the partnership for various things which would have to be taken into account when the partnership accounts are taken so that until then it is impossible to say what sum is held for the partnership. There is however no general rule that a partner may not be sued for the recovery of partnership assets in his hands when it can be demonstrated that nothing is due to him from the partnership.
>
> […]
>
> In the present case the terms of the partnership agreement to which we have referred show that no account was to be taken for the purpose of determining a share of the assets as between the plaintiff and the defendant. The defendant by virtue of the provisions of paragraph 1 of the schedule has no share in the assets. His share has vested in the plaintiff. There is no purpose in taking in account of the kind envisaged by the principal contended for by the defendant. The account contemplated by clause 21 is of a different nature and is required for a different purpose. It has to be taken in order to determine all monies owing to the outgoing partner. Such sums do not include any share of the assets of the partnership. An example of monies due to the partner within the contemplation of clause 21 is to be found in paragraph 3 of the schedule, namely: 'any undrawn balance of the outgoing partner share of the net profits of the business for the financial year of the partnership in which the succession date occurs…' There is also the amount of capital standing to the credit of the partners capital account which is referred to in paragraph 4."

40. The third authority was *Popat v Shonchhatra* [1997] 1 WLR 1367, another decision of the Court of Appeal. In this case, the parties carried on a business together in leasehold premises by way of a partnership at will. The defendant contributed £23,064 to the working capital, whereas the plaintiff contributed only £4,564 (of which £2,700 had been lent to him). The partnership was terminated when the plaintiff left, and the defendant carried on the business on his own. Subsequently, the defendant bought the

freehold in his own name. Later still he sold the premises and other partnership assets at a profit. The plaintiff claimed 50% of the capital profits on the sale. The judge awarded him a (lesser) share on the basis of his capital contribution, and he appealed. The Court of Appeal allowed the appeal.

41. Nourse LJ, with whom Evans LJ and Sir Ralph Gibson agreed, said (at 1371E-1372E):

> "The principal relief sought by the plaintiff's notice of appeal is the discharge of the declarations contained in paragraphs 3 and 5 of the judge's order and the substitution therefor of declarations that the freehold of the partnership premises and the post-dissolution capital profits are held and are to be apportioned respectively between the partners in equal shares. He also seeks a discharge of the declaration contained in paragraph 1(b), so that the loan of £2,700 is not taken into account for the purpose of settling the partnership accounts between the parties. He does not seek the discharge or variation of the declaration contained in paragraph 4 relating to the post-dissolution revenue profits of the business, a topic to which I will return in due course.
>
> The relevant principles of partnership law are well settled. I start with the distinction between the capital of a partnership and its assets. As I said at first instance in *Reed* v *Young* (1983) 59 TC 196, 215:
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> > 'The capital of a partnership is the aggregate of the contributions made by the partners, either in cash or in kind, for the purpose of commencing or carrying on the partnership business and intended to be risked by them therein. Each contribution must be of a fixed amount. If it is in cash, it speaks for itself. If it is in kind, it must be valued at a stated amount. It is important to distinguish between the capital of a partnership, a fixed sum, on the one hand and its assets, which may vary from day to day and include everything belonging to the firm having any money value, on the other: see generally *Lindley on Partnership,* 14th ed. (1979), p. 442.'
>
> When that case reached the House of Lords the last sentence in the passage quoted was expressly approved (I believe that the earlier sentences were impliedly approved) by Lord Oliver of Aylmerton, with whose speech the others of their Lordships agreed: see [1986] 1 WLR 649, 654. The reference to Lindley should now be to *Lindley & Banks on Partnership,* 17th ed. (1995), p. 497.
>
> In the present case the judge treated the contributions of £4,564 and £23,064 made by the plaintiff and defendant respectively to the cost of acquiring the partnership assets as contributions to the capital of the partnership. In that he was right. But he proceeded from there to treat those contributions as determinative of the size of the partners' respective shares of the assets. In that he was wrong, although it must at once be said that it seems probable that his attention was not fully directed to the correct legal principles.
>
> On 29 September 1989, when the leasehold premises, fixtures and fittings and the goodwill of the business were acquired, they became 'partnership property' to be held and applied exclusively for the purposes of the partnership pursuant to section 20(1) of the Act of 1890. Although it is both customary and convenient to

> speak of a partner's 'share' of the partnership assets, that is not a truly accurate description of his interest in them, at all events so long as the partnership is a going concern. While each partner has a proprietary interest in each and every asset, he has no entitlement to any specific asset and, in consequence, no right, without the consent of the other partners or partner, to require the whole or even a share of any particular asset to be vested in him. On dissolution the position is in substance not much different, the partnership property falling to be applied, subject to sections 40 to 43 (if and so far as applicable), in accordance with sections 39 and 44 of the Act of 1890. As part of that process, each partner in a solvent partnership is presumptively entitled to payment of what is due from the firm to him in respect of capital before division of the ultimate residue in the shares in which profits are divisible: see section 44*(b)* 3 and 4. It is only at that stage that a partner can accurately be said to be entitled to a share of anything, which, in the absence of agreement to the contrary, will be a share of cash."

42. Section 20(1) of the Partnership Act, to which the judge referred in the above passage, provides:

> "All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement."

43. Accordingly, although the parties were entitled to share in the capital of the partnership in proportion to their respective contributions, the plaintiff was entitled to a half share in the post-dissolution revenue and capital profits subject to an allowance for the defendant's work in the post-dissolution period, and to a one half share of the freehold.

44. The final authority was *Sandhu v Gill* [2006] Ch 456, where the leading judgment was given by Neuberger LJ, who coincidentally had been the judge at first instance in *Popat*, and whose judgment had been varied by the Court of Appeal. The parties had been partners at will of a business which purchased and converted a property. The partnership deed provided that the claimant should be paid a salary and that, subject to that, net profits should be equally divided. Partnership assets, including the property, were to belong to them equally. The partnership was later dissolved and the defendant took over the business. The claimant sought a winding-up and a one half share of post-dissolution profits. The master so ordered, subject to the defendant's entitlement to payment for managing the business. The judge dismissed the defendant's appeal. But a second appeal by the defendant to the Court of Appeal was allowed.

45. Neuberger LJ referred to section 42(1) of the Partnership Act 1890, which provides as follows:

> "Where any member of the firm has died or otherwise ceased to be a member, and the surviving or continuing partners carry on the business of the firm with its capital assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, outgoing partner or his estate is entitled at the option of himself or his

> representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5% per annum on the amount of his share of the partnership assets."

46. He also referred to section 44(b), dealing with the application of assets:

> "The assets … shall be applied in the following manner and order: 1. In paying the debts and liabilities of the firm to persons who are not partners therein: 2. In paying to each partner rateably what is due … to him for advances … 3. In paying to each partner rateably what is due … to him in respect of capital: 4. The ultimate residue, if any, shall be divided among the partners in the proportions in which profits are divisible."

47. He then went on (repeating with apparent approval a passage already quoted from *Popat*):

> "17. The only other provision of the 1890 Act to which I should make reference is section 24 which, according to its title, sets out certain 'Rules as to interests and duties of partners subject to special agreement'. As the title indicates this section sets out some rules which are to apply, save where something different has been expressly or impliedly agreed. Section 24(1) provides that 'all the partners are entitled to share equally in the capital and profits of the business…'
>
> 18. With that, I now turn to the meaning of section 42(1). The concept of 'a partner's share of the partnership assets', at any time before the end of the winding up process in accordance with section 44, is conceptually somewhat opaque. In a case to which I will have to return, *Popat v Shonchhatra* [1997] 1 WLR 1367, in an uncontroversial passage Nourse LJ said, at p 1372:
>
> > "Although it is both customary and convenient to speak of a partner's 'share' of the partnership assets, that is not a truly accurate description of his interest in them, at all events so long as the partnership is a going concern. While each partner has a proprietary interest in each and every asset, he has no entitlement to any specific asset and, in consequence, no right, without the consent of the other partners or partner, to require the whole or even a share of any particular asset to be vested in him. On dissolution the position is in substance not much different, the partnership property falling to be applied, subject to sections 40 to 43 (if and so far as applicable), in accordance with sections 39 and 44 … . As part of that process, each partner in a solvent partnership is presumptively entitled to payment of what is due from the firm to him in respect of capital before division of the ultimate residue in the shares in which profits are divisible: see section 44*(b)* 3 and 4. It is only at that stage that a partner can accurately be said to be entitled to a share of anything, which, in the absence of agreement to the contrary, will be a share of cash."

48. The phrase "in the absence of agreement to the contrary", used there by Nourse LJ, is important. Section 19 of the 1890 Act provides:

> "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."

Indeed, the case of *Brown v Rivlin* was in part about whether there was a contrary provision in a partnership agreement.

49. Accordingly, the *general* position, but always subject to contrary agreement between the partners, express or implied, is as follows. A retiring partner is entitled to the *value* of his or her share in the partnership (including partnership assets) as at the date of retirement. This (once ascertained) is a *debt* due to him or her from the continuing partners. The usual remedy for such ascertainment is an inquiry, a valuation, and an account.

The parties' contentions

50. In this state of affairs, the claimant says that the premises are expressly agreed to be partnership property, by clause 8.3 of the partnership agreement. Their *value* is brought into account in determining what is to be paid to a retiring partner under clause 27. The effect of this clause is to convert the share in the partnership into a personal debt, whereas the benefit of the partnership property enures for the benefit of the continuing partners. Although clause 10 declares in what shares the partnership *premises* are to be owned by the partners, this is subject to the prior collective interest of the partnership, and it is only on completion of the winding up of the partnership estate that the partners would obtain vested interests in the premises, if they were not required for the purpose of paying debts and costs. The only sum or sums which the defendant is entitled to be paid is the purchase price for his share together with interest, under clause 27.5 of the partnership agreement.

51. The defendant, on the other hand, points to the express declaration of shares *in the premises* in clause 10 of the partnership agreement, and submits that there is nothing in that agreement which terminates that ownership upon his retirement from the partnership. Thus, so long as he remains a co-owner of the premises, he is entitled to receive his share of payments made in respect of it, as an incident of that ownership. The defendant also relies on the last sentence of clause 27.1 of the partnership agreement, which refers to an obligation of the outgoing partner to transfer his or her share *in the premises* as the continuing partners direct, but only once the option has been exercised to purchase the outgoing partner's share in the partnership and the price has been paid to the outgoing partner. Whilst the defendant accepts that in the present case the option has been validly exercised, he points out (correctly) that the price has not so far been paid, and no direction has been given by the claimant as the continuing partner as to the transfer of the defendant's share in the premises. So, he says, no obligation has yet arisen to transfer his share in the premises to the claimant.

Decision

52. In my judgment, there is undoubtedly a tension between clause 8 and clause 10 of the partnership agreement. Clause 8.3 makes clear that the property of the partnership includes "such lease or licence of the Premises subject to which the Practice currently occupies the Premises". Yet clause 10 states expressly that the partners own the shares in the *premises* as set out in Schedule 3. And these shares are different from the

partners' shares in the *partnership*, which are as set out in Schedule 2. But that difference in itself does not demonstrate the premises are not a partnership asset. There is nothing in partnership law to prevent partners agreeing that, subject to use for partnership purposes, their ultimate shares in one part of the capital should be different from their ultimate shares in other parts of the capital.

53. On the other hand, clause 10.2 shows that Dr Masters and the claimant had each mortgaged their shares of the premises, so that, to that extent, they were not available to pay debts of the partnership and costs of any winding up. The claimant's submission, that only on completion of the winding up of the partnership estate would the partners obtain vested interests in the premises, is thereby weakened, because the partners must have owned their individual shares in the premises, in order to be able to mortgage them. But, even after mortgaging them, each mortgagor still each had the equity of redemption (with its all-important right to use the premises for business purposes) to contribute to the partnership. So again these provisions do not prevent the premises (or at least the un-mortgaged shares and the equity of redemption in mortgaged shares) being a partnership asset.

54. It will be seen that clauses 10.3 and 10.4 grant indemnities by Dr Masters and the claimant respectively, each in respect of his or her own mortgage, to the other partners. This is consistent with the existence of the mortgages being intended to affect only those shares. But it also looks a little like the position where each partner contributes a *different* parcel of land to create a conglomerate on which the partnership business is carried on, each partner granting a licence to the other partners for that purpose. That would be consistent with clause 8.3, because the lease would belong to the partners as individuals in the stated shares outside the partnership, but the partnership could use the land. But, again, these provisions are also consistent with the equity of redemption in a mortgaged share being a partnership asset.

55. Then there is also the last sentence of clause 27.1 of the partnership agreement. This imposes an obligation on a retiring partner to transfer his or her share of *the premises* as the continuing partners may direct. This might be thought to imply that, without such an obligation, the retiring partner would be able to retain such share. But it is to be noted that there is no express vesting provision in this agreement. Instead there is an option to purchase the outgoing partner's share *in the partnership*. If that share did not include the outgoing partner's interest in *the lease* (*ie* because the premises were held *outside* the partnership) the provision for transfer of the share of the premises would be meaningless, because the option to purchase would not cover the premises, and therefore the obligation to transfer could never attach to anything.

56. Overall, therefore, I am not satisfied that the defendant has demonstrated an agreement between the partners contrary to the general law position, as shown by the authorities cited. In other words, the defendant as outgoing partner is entitled to a *debt*, rather than to *assets in specie*. It may be (but this was not argued before me) that the defendant is in the position of the vendor under a contract of sale of land formed by the exercise of the option to purchase contained in the partnership agreement. If so, he would be entitled to the usual unpaid vendor's lien. But, subject to that, his only entitlement would be to the purchase price, calculated in accordance with clause 27 of the partnership agreement, and paid in accordance with clause 27.5, including interest where applicable.

57. Under the general partnership law, it is clear that the retiring partner's entitlement is calculated as at the date of retirement, although if profits are made after retirement using the retiring partner's capital he or she is entitled to a rateable share of them or to interest on that sum: see Partnership Act 1890, ss 42(1), 44(b) 3 and 4, *Sobell v Boston* [1975] 1 WLR 1587, 1591E, *Popat v Shonchhatra* [1997] 1 WLR 1367, 1372, *Sandhu v Gill* [2006] Ch 456, [18]. The partnership agreement in any event by clause 27 provides for the valuation of the partnership share of the outgoing partner as at the date of retirement.

58. It follows in my judgment that in circumstances where the defendant is not entitled to claim any assets in specie, but only the debt due under clause 27 of the partnership agreement, there are no other sums which he is entitled to be paid in respect of the practice premises, and I so answer question 2.2.

Conclusion

59. For the reasons given above, I respond to the questions as follows:

Question 1.1: First part, Yes; second part, not answered.

Question 1.2: Not answered.

Question 1.3: Not answered.

Question 1.4: Not answered.

Question 2.1: None, except (perhaps) an unpaid vendor's lien.

Question 2.2: No.

I am very grateful to both counsel for their interesting and engaging arguments, and their assistance overall in this case.