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# Partnership

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# Refresher on Law Relating to Partnership

This bulletin relates only to traditional partnerships and not the very different creature of limited liability partnerships (LLPs) governed by the Limited Liability Partnerships Act 2000 (which, unlike traditional partnerships, are separate entities) - that may be for another bulletin if sufficient interest is expressed. Obviously this Refresher can be no more than a quick guide to some of the more important principles.

## A. The Legislation

1. The Partnership Act 1890 ("the Act") contains most of the relevant principles of partnership law (other than those relating specifically to limited partnerships which are governed by the Limited Partnerships Act 1907) and references to section numbers are to sections in the Act. Unlike modern legislation with its lack of clarity, verbosity and endless schedules frequently criticised by the courts which have the unenviable task of interpreting the same (copyright- grumpy old lawyer!), it is a concise (only 50 sections originally, 3 now repealed) and clear piece of legislation which has stood the test of time (thank you - Sir Frederick Pollock!). Whilst not a complete code of partnership law (for example, it contains no provisions relevant to goodwill or the procedure for legal proceedings by or against a firm), it largely reduced previous law into a codified form with conspicuous success.

2. Although in November 2003 the Law Commission and the Scottish Law Commission produced a joint report running to several hundred pages identifying a number of areas for a possible partnership reform bill, including an exciting amendment to The Hovercraft (General) Order 1972 relating to the ownership of hovercraft by English partnerships, on 20th July 2006 the DTI published a statement that the Government had decided not to take forward the recommendations for the reform of general partnership law, but will implement those for the reform of limited partnership law. Obviously not a vote winner, although the government's interest in spin might have made the amendment relating to hovercraft appealing! Apparently the Government intends to publish a consultation document with draft clauses shortly and to legislate by means of a Regulatory Reform Order when Parliamentary time allows. It should be emphasised that limited partnerships (to be distinguished from LLPs) are ordinary partnerships save that they may include partners who can limit their liability, provided that they take no part in the management of the business. They are used particularly in the field of venture capital.

## **B. What is a Partnership?**

3. "...the relation which subsists between persons carrying on a business in common with a view of profit" - Section 1(1).

4. So there are 3 elements:
- (1) A business. This is widely defined in Section 45 as including every trade, occupation or profession. Thus it can include a one-off trading venture.
  - (2) Carried on by 2 or more persons (which can include companies) in common. Therefore a partnership can consist entirely of corporate partners.
  - (3) With a view of profit (even if there are other motives, such as tax avoidance, provided that they are not the only motives). Note that the definition does not say that all partners have to share profits.
5. Section 2 contains certain rules in determining whether a partnership does or does not exist. They include:
- (1) Joint ownership of property does not of itself create a partnership as regards the property, even if the owners share any profits made by the use of the property (for example, from letting the property). Of course, the ownership/management of a property or properties may give rise to a partnership, depending on the intention of the parties.
  - (2) The sharing of gross returns does not of itself create a partnership, even if those sharing the returns have a joint/common right or interest in any property from which the returns are derived.

- (3) The receipt by a person of a share of the profits of a business is prima facie (Latin was allowed in 1890!) evidence that he is a partner in the business, but the receipt of such a share or of a payment contingent on or varying with the profits of a business does not of itself make him a partner in the business; and examples of this are given.

6. Those examples include:

- (1) Remuneration of an employee/agent by a share of profits does not of itself make him a partner.
- (2) A loan to a person engaged in a business in return for the lender's share of the profits does not of itself make the lender a partner.
- (3) The seller of the goodwill of a business who receives as consideration a portion of the profits is not by reason of that alone a partner. This obviously makes sense since the purpose of selling is to divest himself of ownership.

7. Note that:

- (1) A business may exist for partnership purposes even before the commencement of actual trading: see the restaurant case of *Khan v Miah* [2000] 1 WLR 2123. The test is whether the parties have done enough to be found to have commenced the joint enterprise in which they had agreed to engage (see Lord Millett at p. 2128E). Not all preparatory acts will be sufficient for this purpose,

but in *Khan v Miah* a partnership was held to exist even though the restaurant never opened.

- (2) Joint venturers are not necessarily partners. Indeed, formal joint venture agreements frequently contain express provision negating the existence of a partnership.
- (3) A partnership (unlike an LLP) is not a separate legal entity.
- (4) It is possible (albeit unusual) for someone to be a partner even if he receives payment of a specific sum irrespective of profits and is not required to contribute capital: see the Court of Appeal decision in *M Young Legal Associates Ltd. v Zahid* [2006] 1 WLR 2562. Therefore it is not a requirement that partners should actually share profits, although the *Zahid* case was unusual in that the solicitors could not have practised if both of them had not been partners since only the solicitor who did not share in profits had been qualified for long enough to comply with the Solicitors' Practice Rules 1990.

## C. Who is a Partner?

8. In addition to those who are clearly partners in the full sense:

- (1) Under Section 14, a person may be liable as a partner to third parties by way of estoppel even if not in fact a partner, if he represents himself or knowingly suffers himself to be represented as

a partner. In that event he is liable as a partner to anyone who has on the faith of any such representation given credit to the firm, even if the representation to the person giving credit has not been by or with the knowledge of the apparent partner. Therefore a general holding out by the person in question is sufficient to give rise to liability. There does not need to be a specific holding out by him to a specific third party.

- (2) So-called "salaried partners" may or may not be partners in the true sense - it depends on the substance of the relationship on the facts and not on the label: see e.g. Megarry J. in *Stekel v Ellice* [1973] 1 WLR 191 at pp.198-9. It is therefore very important to clarify in any written agreement whether a "salaried partner" is or is not a partner in the true sense. However even if only employees within the partnership, they may nevertheless be liable as partners to third parties under Section 14.

## D. Formalities

9. An oral agreement is sufficient, even if partnership property includes land, so that such an agreement is not precluded by Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. However, there are obvious dangers in not committing the agreed terms into writing, not least the likelihood of disputes as to what was or was not agreed.

10. In such circumstances, the Courts will nevertheless attach weight to any documents which may cast light upon what were in fact the agreed terms, for example minutes of meetings, internal memoranda, accounts, draft written agreements, stationery etc.
11. Under Section 19, the rights and duties of partners (whether agreed or defined by the 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. Thus a written agreement can be varied orally or by conduct, although unanimity is required unless the partnership agreement otherwise provides. Therefore it is important that any incoming partners should be made aware of and agree to any such variations, otherwise such variations may lapse if not in a written document accepted by the incoming partner.

## E. Duration of Partnership

12. A partnership is a partnership at will unless a fixed term has been agreed and, if a partnership at will, any partner can dissolve the partnership at any time simply by giving notice of intention to do so to his fellow partner(s): see Sections 26(1) and 32(c). In the absence of agreement, there is no requirement to give notice of any particular length nor to give reasonable notice. Therefore any partner can, in the absence of agreement to the contrary, dissolve a partnership instantaneously (leaving only the process

of winding up) which can obviously cause devastating consequences for an ongoing business and may require the appointment of a Receiver. Suddenly no partner has the right to carry on the business save for limited purposes and this will be at a time when partners are likely to be at loggerheads and therefore unlikely to agree anything.

13. Accordingly consideration needs always to be given to agreeing a fixed term or at least a requirement for a specified period of notice. Joint lives of at least 2 of the partners is often a suitable period for a partnership so as to exclude what would otherwise be a partnership at will.
14. If a partnership for a fixed term continues beyond the fixed term (and therefore is not dissolved upon the expiry of the term under Section 32(a)), it will, in the absence of contrary agreement, then become a partnership at will but otherwise on the previous terms of the partnership insofar as not consistent with a partnership at will (Section 27(1)). Continuation of the previous partnership business without settlement of the partnership affairs is presumed a continuance of the partnership: Section 27(2).
15. A partnership for a single venture is dissolved by the termination of that venture: Section 32(b).
16. After much academic debate, it is now well-established (at least at first instance) that the doctrine of contractual repudiation has no application to partnerships, so that a repudiatory breach of the partnership agreement cannot of itself be treated as a dissolution of the partnership: *Mullins v*

*Laughton* [2003] Ch. 250, followed in subsequent cases. However, the same facts may justify a dissolution by the Court (as in fact occurred in *Mullins v Laughton*), as to which see Section L below.

17. It is important to note that there is no implied right to expel a partner (Section 25) or to require him to retire while the partnership continues, even if he or she commits murder or, worse, is rude to the senior partner. However, an express right of expulsion (carried over from a previous partnership agreement) is not necessarily inconsistent with a partnership at will: *Walters v Bingham* [1988] 1 FTLR 260 at 268. Conversely, no partner has a right (in the absence of express agreement) to retire from a partnership other than by general dissolution. However, under Section 33(1), a partnership is automatically dissolved by the death or bankruptcy of any partner unless the contrary is agreed.

## F. Partnership Property

18. Under Section 20(1), all property originally brought into the partnership stock or acquired on account of the firm, or for the purposes and in the course of the partnership business, constitutes partnership property and must be held and applied exclusively for the purposes of the partnership and in accordance with the partnership agreement. Moreover, unless the contrary intention appears, if property is bought with money belonging to the firm, it is deemed to have been bought on account of the firm (Section 21).

19. Goodwill of the business will usually be deemed to be partnership property unless the contrary appears from express or implied agreement. Obviously it is desirable to make clear the question of what is partnership property by express agreement/declaration of trust.

## G. Partnership Decisions

20. Under Section 24 (and subject to any express/implied agreement to the contrary):
- (1) Every partner is entitled to take part in the management of the partnership business (sub-section (5)). Accordingly there is no implied right to require a partner to take garden leave, not that he or she is likely to spend it tending begonias anyway. Also note the different position regarding limited partnerships (see para. 2 above).
  - (2) Decisions as to ordinary matters connected with the partnership business may be decided by majority decision but no change may be made in the nature of the partnership business without the consent of all partners: sub-section (8). It is sometimes difficult to decide whether a particular decision relates to “ordinary matters”, for example whether something is a change in the nature of the partnership business or just a natural development of the existing business.

## H. Profits and Losses

21. Subject to any express/implied agreement to the contrary, under Section 24:
- (1) Capital, profits and losses are shared equally: sub-section (1).
  - (2) A partner making payments or advances beyond his agreed capital is entitled to 5% per annum interest: sub-section (3).
  - (3) No entitlement to interest on capital arises before ascertainment of profits: sub-section (4).
  - (4) No partner is entitled to remuneration for acting in the partnership business: sub-section (6).

## I. Duties of Partners

22. All partners owe fiduciary duties to each other. Bacon V-C stated in *Helmore v Smith* (1886) 35 Ch D 436 at p.444 that he could not conceive a stronger case of fiduciary relation than that which exists between partners and that their mutual confidence was the life blood of the concern (sometimes hard to believe when asked to advise after a dispute has arisen). Note that the duty of good faith exists between persons who are merely negotiating their entry into partnership and also (see *Don King Productions Inc. v Warren* [2000] Ch. 291) between partners of a dissolved firm until the winding up

is concluded. Therefore in negotiating a partnership agreement, a party owes a duty to the other negotiating parties not merely not to make misrepresentations but positively to disclose all material facts of which he has knowledge and of which the other negotiating parties may not be aware. Although a breach of this duty of disclosure will usually give rise merely to a right of rescission, damages can be claimed if the breach of the duty of disclosure is fraudulent: see *Conlon v Simms* [2006] EWCA Civ 1749 at paras. [127] - [130].

23. Specific duties of every partner provided for by the Act are as follows:
- (1) A duty to render true accounts and full information of all things affecting the partnership to his partners (Section 28).
  - (2) A duty to account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership or from any use by him of the partnership property name or business connexion (Section 29(1)). This is of wide scope - it may include using partnership facilities to run a separate business or appropriation of business opportunities which originally came to him qua partner; and also (sub-section (2)) applies to transactions undertaken after a partnership has been dissolved by a partner's death and before the completion of the winding up. Consent can be oral or implied and whether such consent exists is often an area of dispute.
  - (3) A duty, if without the consent of the other partners he carries on any business of the same nature as and competing with that of the firm,

to account for and pay over all profits to the firm (Section 30). There may be a partial breach if he runs a separate office from which he conducts both competing and non-competing businesses.

## J. Other Rights of Partners

24. There is a right to be indemnified in respect of payments made and personal liabilities incurred in the ordinary and proper conduct of the business of the firm or in or about anything necessarily done for the preservation of the business or property of the firm: Section 24(2).
25. There is further a right to access and inspect and copy any of the partnership books: Section 24(9).
26. There is still further a right after dissolution to bind the firm as far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise (underlining added!): Section 38. Therefore this continuing authority is very limited.

## K. Liabilities

27. Any act of a partner for carrying on in the usual way business of the kind carried on by the firm binds all partners unless the partner has no authority

and the party with whom he deals knows of the absence of authority or does not know/believe him to be a partner (Section 5). There is a good deal of authority on the question of whether, for example, a solicitor is acting "in the usual way". The decided cases are fact specific and there is no simple or easy answer to the question, for example in relation to the giving of solicitors' undertakings having regard to the nature of any underlying transaction. This has frequently arisen in mortgage fraud cases.

28. However, the unauthorised pledging of credit by a partner for a purpose apparently not connected with the firm's ordinary course of business does not bind other partners (Section 7).
29. Partners are similarly bound by all acts and documents relevant to the firm's business done/executed in the name of or on behalf of the firm by any authorised person, whether a partner or not (Section 6).
30. Every partner is jointly liable with the other partners for all debts and obligations of the firm incurred while a partner (Section 9). Similarly, the firm (and every partner jointly and severally - see Section 12) is liable for any wrongful act or omission of any partner in the ordinary course of the firm's business or with the authority of his co-partners causing loss or injury to a third party and for misapplication by a partner of money or property of a third party where this is within the scope of the partner's apparent authority or the money or property had been received by the firm (Sections 10 and 11).

31. For something to be done in the ordinary course of the firm's business requires that the wrongful conduct is so clearly connected with acts the partner was authorised to do that, for the purpose of the liability of the firm to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of business: *Dubai Aluminium Co. Ltd. v Salaam* [2003] 2 AC 366 at para. [23], a case which involved the drafting of agreements as part of a fraudulent scheme.
32. However, partners are not liable for misappropriation by any trustee/partner of trust property in the business or on account of the partnership in the absence of any notice of a breach of trust but without prejudice to tracing remedies by the beneficiaries (Section 13). Similarly incoming partners are not liable for matters occurring before admission, whereas conversely retiring partners do not automatically become discharged from pre-retirement debts or obligations unless the creditors so agree (Section 17). Note the need for third parties to be notified of retirement before a retiring partner is safe from post-retirement obligations (Section 36).

## L. Judicial Dissolution

33. Section 35 sets out grounds upon which the Court may (so it is discretionary) decree a dissolution even if the partnership is for a fixed term that has not yet expired. The grounds most commonly relied upon are:

- (c) When a partner, other than the Claimant(s), has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business (split infinitive Sir Frederick - tut tut). This statutory language is often included in partnership agreements as an express ground for expulsion.
- (d) (Similarly often included as a ground for expulsion) when a partner, other than the Claimant(s), wilfully or persistently commits a breach of the partnership agreement or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him.
- (e) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved. This is, of course, the same ground which entitles the Companies Court to wind up a company on what has become known as the "just and equitable" ground when perhaps, though nobody is at fault, the relationship of trust and confidence has simply broken down irretrievably.

upon partners remains *Bridge v Deacons* [1984] AC 705, which upheld a 5 year restriction throughout Hong Kong imposed upon a solicitor partner against acting for clients who had been clients during the period of 3 years prior to his leaving the partnership, although there must be some doubt whether it would be decided the same way today.

- 35. Thus a retiring partner may set up a similar business in the same locality and deal with customers of the firm. However, if he has been paid for his share of the partnership, including his interest in goodwill, he may not solicit such customers as long as they remain customers of the firm, even if they have had dealings with him post-retirement. It is often a moot point whether dealings with a customer amount to solicitation or not: a nod is as good as a wink etc.
- 36. Nor may a retiring partner carry on business under the firm name or a name so similar as to lead people to believe that it is the same business unless, of course, it is only the name of the outgoing partner: *Trego v Hunt* [1896] 1 AC 7.

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## M. Post-Retirement Restrictions

- 34. In the absence of express covenants, there are no implied restrictions on competition as such. The leading authority on express restrictions imposed

# Clauses to Look out for in Partnership Agreements

Unlike the situation a century ago, partnership is not the dominant legal arrangement for commercial undertakings save, perhaps, very small undertakings such as the running of a shop. The latter type of partnership is often conducted without a written agreement at all.

Practitioners are most likely to encounter partnership agreements in the context of professional firms. The most comprehensive partnership agreements tend to be those of firms of solicitors.

Partnership agreements contain many clauses which are relatively standard, albeit long and complicated; for example those relating to the name of the partnership business, ownership of partnership property, and the partnership's banking arrangements. The terms of these clauses do not generally vary very much between agreements, and they are unlikely to be the focus of concern when taking instructions in relation to a potential partnership dispute.

There is usually an interpretation and definition clause, which should be read with particular care. Definitions of intellectual property and know-how (usually specified in the agreement as partnership assets) can vary. There may be a definition of retirement age, which is likely to be unenforceable by virtue of the Employment Equality (Age) Regulations 2006. A number of other definitions, such as the notice period, are important.

There may be a "no-variation" clause, i.e a clause providing that there is to be no variation of the agreement save in writing signed by all the partners. It must be borne in mind that this can in appropriate circumstances be overridden by Section 19 of the Partnership Act, which provides that "*The mutual rights and duties of the 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 express or inferred from a course of dealing*".

The "clauses to look for" of the title are those which are found in some agreements but not others, those which deal with points of potential difficulty, and those in relation to which there can be significant variations between different partnership agreements.

The following is a general guide to such clauses, arranged in the context of a typical agreement between the partners of a small-to-medium-sized firm of solicitors. The clause headings are set out to give an idea of the overall content of the agreement, and the clauses to look out for are commented on and in the most important instances set out in full :-

## 1. Definition and interpretation

## 2. Commencement, duration and constitution

- > Should contain a provision that every person becoming a partner shall sign this agreement and agree to be bound by any variations thereto, a list of which shall be provided to him or her

- > should contain a provision that the partnership shall subsist until wound up in accordance with the agreement or the provisions of the Act

### **3. Name**

### **4. Partnership assets and place of business**

- > Should include the partnership's intellectual property (which should be defined in the definition clause to include all information relating to the running of the partnership business) computer equipment etc.

### **5. Accounts**

- > Check whether goodwill is to be treated as an asset in the balance sheet. It is very difficult to value, and is often omitted.
- > There should be a provision that the accounts are binding on all the partners once approved

### **6. Banking arrangements**

### **7. Partnership Capital**

### **8. Current Accounts**

### **9. Revaluations**

### **10. Drawings**

### **11. Profits and Losses**

### **12. Partners' obligations and duties**

- > This and the following clause as to limitations on partners' authority are the heart of the agreement. Specimens of the most important sections of clauses 12 and 13 are therefore set out in full:

#### 12.1 Each Partner shall at all times:

**12.1.1** *devote to the Business (except during incapacity due to Leave or illness, injury or other substantial cause) his full time and attention and in the event of any breach of this sub-clause the Partner shall account to the Partnership for any profit derived by him from any activity giving rise to such breach;*

**12.1.2** *be just and faithful to the other Partners and give them at all times full information and explanation of all matters relating to*

*the Partnership;*

12.1.3 *conduct himself in a proper and responsible manner and use his best skill and endeavour to promote the Business;*

12.1.4 *comply with the Regulations and all statutes, professional standards and other provisions as may from time to time govern the conduct of the Business;*

12.1.5 *comply with the policies which the Partnership shall adopt in relation to*

*Health and Safety*

*Equal Opportunities*

*Non-harassment*

*Computer use, Internet and communications*

*Date protection*

*Staff manual*

*and it is specifically recognised and agreed that a substantial breach by a Partner of any such policy including any standard of behaviour required by any such policy shall be a breach of this Agreement;*

12.1.6 *use his best endeavours to ensure that the policies listed in*

*12.1.5 hereof are complied with by all employees of the Partnership;*

12.1.7 *take all steps necessary to ensure that he continues to be the holder of a current Practising Certificate.*

### **13 Limitations on Partners' authority**

13.1 *No Partner shall at any time:*

13.1.1 *without the consent of the Partnership derive any benefit from the use of the Name or the property or the business connection of the Partnership; and in the event of any breach of this sub-clause the Partner shall account to the Partnership for any profit derived by him from the use in question;*

13.1.2 *assign, mortgage or charge his share of the Partnership or any part of it or allow the same to be so charged; or*

13.1.3 *pledge the credit of the Partnership otherwise than in the ordinary course of business and for the benefit of the Partnership;*

13.1.4 *without the consent of the Partnership, compromise or release any debt due to the Partnership;*

13.1.5 *lend money or give credit on behalf of the Partnership;*

- 13.1.6 *give any guarantee on behalf of the Partnership;*
- 13.1.7 *buy or contract to buy any goods services or property on behalf of the Partnership involving a total liability of more than [£10,000], or lease any asset for an amount involving more than [£.....] per annum or [£.....] over the term of the lease;*
- 13.1.8 *enter into any bond or become bail, surety or security with or for any person, firm or company or do or knowingly cause or permit to be done anything if, as a result, any Partnership property may be taken in execution or otherwise endangered;*
- 13.1.9 *without the consent of the Partnership engage in any business other than the Business or accept any office or appointment including in particular, but without limitation, any appointment as a member of any governmental or public authority or any agency of any such body, or a director of a limited company, or a member of a limited liability partnership, or a partner in a partnership or a limited partnership, or a trustee of a trust; and in the event of any breach of this sub-clause the Partner shall account to the Partnership for any profit derived by him from the business office or appointment in question.*
- 13.1.10 *without the consent of the Partnership engage or dismiss any employee of the Partnership;*

## **14. Holiday Leave**

## **15. Maternity Leave**

## **16. Family Leave and Parental Leave**

## **17. Management**

## **18. Indemnity and expenses**

## **19. Loans from E Partners**

## **20. Expenses in relation to cars**

## **21. Insurances**

## **22. Retirement**

- > This clause governs the right of a partner to leave the partnership. The notice period is often set at a number of months; some agreements require the expiry of that period to coincide with the end of a trading year, which

avoids the necessity of a cessation account specific to the retirement, but this is very restrictive. Most agreements provide for retirement to occur on expiry of the notice whenever it is given.

- > A well-drawn agreement will contain provisions whereby retirement is deemed to have occurred after a period of absence from work due to persistent ill-health, or if a partner is sectioned under the Mental Health Act 1983.

### **23. Continuation of Partnership**

- > Provides for the partnership to continue when a partner retires - otherwise it will be dissolved, by the operation of Section 32(c) of the Act, when notice of intended retirement is given.

### **24. Expulsion**

- > Expulsion clauses usually provide for a notice mechanism, and for the putative expellee to have the right to be heard at the meeting which is to decide on his expulsion. Some agreements provide that in reaching any decision to expel, the partners shall not discriminate against the putative expellee on grounds of race, sex, age, or even, in one agreement the author has seen, gender reassignment.

- > A well-drafted expulsion clause will contain a provision entitling the

partners to insist that the putative expellee takes garden leave until the matter is resolved.

- > There will often be provision for referral to arbitration. If there is not, an intractable expulsion dispute (eg if the putative expellee denies the allegations against him) will have to be resolved by the court.
- > The following is a list of common grounds for expulsion in a solicitors' firm:

#### **24.4 If any Partner shall:**

- 24.4.1 commit any grave or persistent breaches of this Agreement;**  
**or**
- 24.4.2 have a bankruptcy order made against him; or**
- 24.4.3 fail to pay monies owing by him to the Partnership within 14 days of being requested in writing by the E Partners to do so; or**
- 24.4.4 be guilty of conduct likely to have a serious adverse effect upon the Business; or**
- 24.4.5 cease to hold a current Practising Certificate; or**
- 24.4.6 suffer his share in the Partnership to be subjected to a Charging Order under the Act**

*then the Partners may by notice in writing ("notice of expulsion") given*

*to him be entitled to expel him forthwith or upon such subsequent date as they may specify.*

- > There is an increasing tendency in large solicitors' firms to include a clause enabling the firm to expel a partner without any fault on his or her part. Arguably these clauses are contrary to the whole spirit of a partnership, but they are well established. They have never been tested in the courts, perhaps because (i) there are often generous compensation packages, and (ii) it would do a partner so expelled no good in terms of reputation to contest the expulsion.

An example of such a clause is as follows:

*24.13 Any E partner may be expelled by the other E Partners acting in good faith if they decide that it is in the best interests of the Partnership to do so (regardless of the fact that the E Partner may not be in breach of any provision of this agreement) and they serve notice of expulsion upon that E Partner taking effect either forthwith or upon such future date as they may specify in the notice.*

## **25. Cessation Accounts**

## **26. Other provisions following retirement or expulsion**

## **27. Restriction on Outgoing E Partner**

- > This is where the non-solicitation and non-competition clauses will be found, if there are any. The Court will strike down clauses which it deems to be in restraint of trade; the cases are fact-specific and it can be difficult to predict whether or not a clause will be upheld. This is a specialist and quite complicated topic. The following is, in the author's view, right on the borderline:

*27.1 Any Partner who shall have retired or been deemed to retire or shall have been expelled shall*

*27.1.1 not during the period of twelve months beginning with the Cessation Date*

*27.1.1.1 solicit business from, canvass for or accept instructions to supply goods and services to or for any person, firm or company which has habitually introduced clients or customers to the Partnership or was a client or customer of the Partnership during the period of one year preceding the Cessation Date;*

*27.1.1.2 solicit or induce or endeavour to solicit or induce any person who is at the Cessation Date a Partner, or any employee in any capacity whatsoever of the Partnership to cease working for or providing services to the Partnership whether or not any such person would thereby commit a breach of contract; or*

27.1.1.3 employ or otherwise engage anyone who is at the Cessation Date an employee in any capacity whatsoever or a Partner of the Partnership,

*provided that each of the separate paragraphs of this sub-clause 27.1.1 shall constitute an entirely separate and independent restriction so that if one or more of them are held to be invalid for any reason whatsoever then the remaining paragraphs shall nonetheless be valid;*

27.2 not at any time use the Name or any other trading or practising name capable of being confused with it.

## 28 Dissolution

## 29 Notices

## 30 Dispute Resolution

> It is becoming increasingly common for partners to commit themselves to mediation in terms similar to the following

30.1 *Without prejudice to the provisions of clause 24 [expulsion], in the event of a dispute arising out of or in connection with this Agreement which has not been resolved following discussions between the Partners, they*

*will attempt to settle the dispute by engaging in good faith in a process of mediation by application to [insert preferred mediation provider]*

> Such clauses are enforceable. An attempt to challenge a clause in similar terms, on the grounds that its terms were not sufficiently certain, and that an agreement to negotiate is unenforceable, failed in *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] 2 All ER (Comm) 1041

## 31 Arbitration

> NB the comments on the pros and cons of arbitration in the section of this bulletin dealing with peculiarities of partnership litigation.

*Don McCue*

## Peculiarities of Litigation Between Partners

### A General

1. Partnership actions are likely to be more acrimonious than many other types of litigation. They usually arise either (i) as the culmination of a long process of festering resentment between people who work together or (ii)

where one partner is accused of breaching his fiduciary duties towards his fellow partners in some way. In either event, there is likely to be extreme hostility between the parties, who are also facing, whatever the outcome, a huge upheaval in their lives.

***“Partnership disputes are invariably tinged with bitterness and recrimination. It is a class of litigation so frequently fought to the death. If these parties had any sense at all, they would take time to lick their wounds and then invite the help of a mediator to bring this sorry litigation to an end” [Ward LJ in *Conlon vs Simms* [2006] EWCA Civ 1749, para 179]***

2. Partnership litigation has, therefore, some similarity to divorce litigation, especially where the number of partners is small. Moreover, as with divorce, partners are interlocked with one another, and partnership actions involve disentanglement, not a straight fight. This is ultimately because the relation of a partner to his or her firm is not simply contractual.

***“By entering into the relationship of partnership, the parties submit themselves to the jurisdiction of the court of equity, and the general principles developed by the court in the exercise of its equitable jurisdiction in relation to partnerships. There is much to be said for the view that they thereby renounce their right by unilateral action to bring about the automatic dissolution of their relationship by acceptance of a repudiatory***

***breach of the partnership contract, and instead submit the question to the discretion of the Court”***

(Lord Millett in *Hurst vs Bryk* [2002] 1 AC 185 at 196C)

3. Partners owe each other mutual fiduciary duties. They share profits and losses. They have joint liability to creditors. Their respective capital accounts are inchoate in that the final amount due to a partner cannot be computed until accounts are taken.
4. The consequence is that a partner cannot simply be amputated from the firm, either by the firm or by him; the relationship has to be unravelled.

## **B The relief available**

5. The fiduciary nature of partnership invokes the equitable jurisdiction of the court. A corollary of this is that a claimant partner is not entitled to damages. Just as the nature of partnership prevents a wronged partner from treating the relationship as terminated by accepting a repudiation (as he could if he were simply a party to a contract -see above) it also precludes, save in certain exceptional circumstances, a right to claim damages. The general rule is that partners cannot claim damages from each other; the claim is for an account.

***“In an action by one or more partners...against a co-partner***

*alleging that money is due from the plaintiffs in connection with the affairs of the firm...the only relief which the plaintiff could obtain would be an account of the dealings and transactions of the parties”*

(Warrington LJ in *Meyer & Co vs Faber*(No 2) [1923] 2 CH 421 at 429) repeated verbatim in *Hanak vs Green* [1958] 2QB 9 at 23.

6. This principle has been reaffirmed many times, most recently by Leggatt LJ (with whom Millett and Simon Brown LJ agreed) in *Robert Render vs Crech* (24.1.1996, unrep).
7. Therefore if, for example, a partner has been secretly competing with the firm, the firm is entitled to an account of the profits he has made by so doing, which are then paid over to the firm: section 30 PA 1890.
8. This does not mean that a partner who alleges he has been treated unfairly or oppressively by his co-partners is prevented from receiving a money award in respect of such behaviour. If he proves the conduct he alleges, and loss caused by that conduct, he will receive **equitable compensation**. This is awarded on a more generous basis than damages for breach of contract or in tort, in that all the Claimant partner has to show is that his loss was actually caused by the breach of fiduciary duty; he does not have to show that the type of loss he suffered was a reasonably foreseeable result of the breach: *Swindle v Harrison* [1997] 4 All ER 705.

9. In *Simms vs Conlon* [2006] EWCA Civ 1749 the Court of Appeal held that prospective partners when negotiating the terms of a partnership agreement owed one another a duty to disclose all material facts. A partner who fraudulently breaches this duty is liable for damages in the tort of deceit. However, the basis on which damages for fraud is measured is the same as the measure in equitable compensation as set out in *Swindle*. Therefore, while it is right to say that “damages” can in some circumstances be awarded to a claimant partner this may be no more than a restatement of the right to equitable compensation.
10. Even a sum payable by way of equitable compensation is, once ascertained, treated as one of the items in the account. The guiding principle is to think in terms of an account.

## **C Matters to be considered before proceedings are launched**

11. For the reasons given above, partnership litigation embodies a paradox in that the client will usually feel very adversarial, but the process is the opposite of adversarial. This requires a solicitor to give a particularly comprehensive and patient explanation to the client as to where he stands and what the options are.

12. What is the objective? Any litigator considers this, of course, but when instructed in relation to potential partnership litigation an immediate distinction presents itself between those disputes which result in the dissolution of the partnership and those which do not. If you are instructed by a professional firm which wishes to expel one partner, or a partner who wishes to leave and have an account taken and/or claim equitable compensation to rectify alleged wrongs done to him by the firm, the partnership will continue. If your client is one of two partners who dislike and distrust one another, the outcome will inevitably involve dissolution.

13. If the partnership is not going to be dissolved, negotiations must be aimed at disentangling the outgoing partner from the partnership as quickly and cost-effectively as possible. At one end of the spectrum a partner may accept that if the remaining partners wish to expel him there is no point in staying; his interest will be in receiving his proper entitlement, in terms of his capital and current account on the day of his departure. The issues which arise are likely to be accounting issues eg how to value his capital account if real property is stated in the balance sheet at acquisition cost but its value has greatly increased. At the other end of the spectrum the partner may vigorously deny the alleged wrongdoing and wish to have it tried as a matter of fact.

14. If the partnership is going to be dissolved additional considerations arise:

(i) What is to happen to the business carried on by the partnership?

Is it to be sold, either at arms length or to all or some of the existing partners?

(ii) What is the appropriate regime pending disposal of the business? Is there a need for injunctive relief to preserve the business pending disposal?

(iii) Should the partnership be dissolved at once? If the interim regime pending disposal has been settled, it may as well be dissolved as soon as possible.

### ***Injunctive relief***

15. Where the dispute is disrupting the business early injunctive relief may have to be sought in order to preserve it. A dispute between one partner and the rest in a multi-partner professional firm is unlikely to disrupt the partnership business, especially if the firm has the power to suspend the partner concerned pending resolution. But in a small firm, particularly a two-partner firm, the level of antipathy may have reached the point where the partners simply cannot run the business together pending sale of the partnership business as a going concern. Therefore one partner has to run it and the other has to take a back seat. The only alternative is to appoint a receiver to run the business, but this is enormously expensive and should be avoided unless there really is no other interim solution.

16. Applications for injunctive relief are costly, and can bring problems with

them, so they should only be attempted if all efforts to negotiate an interim regime have failed. In a dispute which is disrupting the business of a two-partner firm, breakdown of negotiations often leads to a tug-of-war with each partner applying to the Court to restrain the other from taking any part in the business. Such situations invariably involve a multiplicity of hearings, and substantial expenditure on documents, preparation of evidence etc.

17. The outcome of a tug-of-war is a regime put in place by agreement or order of the court, in which one of the partners runs the business pending sale or buyout whilst providing full financial information to the other. This can create problems when the know-how or qualifications of the excluded partner are central to the running of the business.

## D Alternatives to litigation

### Negotiation

18. Litigation will usually lead to an account being taken by the court. This is very expensive, so it is all the more important to explore other alternatives first. Every partnership has annual trading accounts; they are the starting-point when attempting to negotiate a settlement. They are seldom a complete solution, because the dispute is unlikely to arise exactly at the end of a trading year, and because partnership accounts often need

updating (eg in relation to the value of fixed assets) if they are to be used as the basis of settlement. If all partners trust the partnership accountant, he or she can do the updating.

### Mediation

19. Mediation is particularly suited to partnership disputes and is usually well worth trying. It is best to go for a highly qualified and experienced mediator. Cheaper alternatives, such as the Central London Civil Justice Centre 2-hour mediation, are unlikely to work.

### Arbitration

20. Arbitration can work well, but it is very dependent on the quality of the arbitrator. Once arbitration is chosen the parties are stuck with it. Neither party can go to the court to complain about the arbitrator save in extremely limited circumstances, and the courts are currently dedicated to discouraging use of these limited avenues.
21. This can be very frustrating if the arbitrator is incompetent, and some are. In particular, the court will never interfere with the arbitrator's findings of fact, even if they are plainly wrong. It is as well to keep in mind the chilling words of the Court of Appeal in the *Geogas* case:

***“The arbitrators are masters of the facts. On an appeal the Court must decide any questions of law arising from an award***

*on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake of fact by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be”*

*Geogas SA vs Trammo Gas Ltd (“The Baleares”)* [1993] 1 Lloyd’s LR 215 at p 228, Court of Appeal

## **E Procedural points if proceedings are launched**

22. Venue - High Court or County Court? The County Court jurisdiction is quite limited - only if partnership assets total less than £30,000 (County Courts Act 1984 Section 23(f)). In the High Court, partnership actions are assigned to the Chancery Division.
23. No Legal Aid is available for partnership disputes.
24. If injunctive relief is needed, then save in the unlikely event that the application is consented to, it must be to the Judge: CPR 25PD1.
25. If no injunctive relief is needed the relief sought will be an account and the

case will usually be dealt with by a Master in the Chancery Division, or a District Judge in the County Court.

26. Bear in mind that until both sides are aware of the dispute any correspondence you have with your client is not privileged. Suppose a firm consults you about expelling a partner. Until that partner is on notice of the proposed expulsion, your communications with the firm constitute partnership business and must be disclosed to the putative expellee. See *CAS (Nominees) Ltd vs Nottingham Forest Plc* [2001] 1 All ER 954.

## **F Limitation**

27. The limitation position is not straightforward:
  - (i) A claim for an account between partners, if the partnership continues between them, is an equitable claim, therefore there is no statutory limitation period. However the courts of equity will apply, by analogy, a limitation period identical to that prescribed by the Limitation Act to actions at law (see the line of authorities from *Knox vs Gye* (1872) LR 5 HL 656 onward, recently summarised by Moore-Bick LJ in *P&O Nedlloyd BV vs Arab Metals Co and others* [2006] EWCA Civ 1717). Hence the period will be six years (by analogy with section 5 of the Limitation Act 1980), or twelve years if the partnership agreement is under seal (by analogy with section 8);

- (ii) Actions by or against a partner who has left the firm (or by and against his personal representatives) are claims in debt. This is specifically provided by section 43 of the Partnership Act 1890. The period is thus six years, or twelve if the partnership agreement is under seal;
- (iii) A claim for equitable compensation will have a limitation period of six years (or twelve if the agreement is under seal) applied to it by analogy: *Cia de Seguros Imperio v Heath (REBX) Ltd and others* [2001] 1WLR 112;
- (iv) these time limits, whether applied directly or by analogy, can be extended, as provided for in the Limitation Act 1980 (a) under section 28, if the person to whom the cause of action accrued was then under a disability; (b) under sections 29, 30 and 31, by acknowledgment or part payment of a debt; and (c) under section 32, where there has been fraud, concealment or mistake;
- (v) the equitable defences of laches, waiver and acquiescence only fall to be considered in the (rare) cases where the relief claimed does not rise out of facts which would also support a claim in law for which a period is prescribed by statute (thus invoking application of the same period by analogy). The authorities are numerous and not easy to reconcile. The basic test is founded on unconscionability; is it unconscionable to allow the claimant to proceed, given the length of the delay and the acts done or not done by the claimant or

defendant during that period? There is no doubt that if this test is satisfied a claim can be barred by laches inside the six-year limit which might otherwise be applicable directly or by analogy.

*Don McCue*

## Issues Relating to Ordering of Accounts and Inquiries

### A. Procedure

1. An order directing an account to be taken or inquiry to be made can be made by the Court as an interim remedy (CPR 25.1(o)) as well as by way of order after a trial. A summary order may be made under para. 6 of the CPR Part 24 Practice Direction.
2. Detailed provisions for implementing an order for an account or inquiry are contained in the first Practice Direction supplementing Part 40 of the CPR.
3. Particular points to note are as follows:
  - (1) Each distinct account and inquiry is to be given its own separate number (this follows the traditional Chancery practice): para. 1.4.

- (2) The accounting party must first make, verify and file his account (para. 2) and it is then for any objecting party to notify in writing particulars of objections (para. 3).
- (3) Hearings may be ordered to resolve any particular issue: para. 5. Therefore everything need not be decided in one go. There may be one crucial issue which, after determination, causes everything else to fall into place.
- (4) Undue delay is to be remedied by case management directions: para. 6. That, at least, is the theory.
- (5) The general rule is for accounts and inquiries to be conducted by a Master or District Judge: para. 9. However, particular matters can be referred to a Judge.

## **B. Accounts and Inquiries During the Continuation of the Partnership**

4. Traditionally the Court has been reluctant to interfere in partnerships unless the partnership has been dissolved or dissolution from the Court is sought, on the basis that either the partners should be able to sort out their differences or the partnership should be dissolved. However, despite its continued reluctance, the Court is now much more willing to grant relief if considered appropriate to do so.

5. Cases where the Court is likelier to order an account or inquiry in such circumstances include:
  - (1) Where one partner seeks to withhold some private profits in which his co-partners are interested.
  - (2) Where the partnership is for a fixed term and one partner has sought to exclude or expel his co-partner or otherwise to drive him into a dissolution.

In both cases it can be said to be wrong that the guilty partner should be allowed to force the other partners into a dissolution.

## **C. Situations Commonly Resulting in the Need for an Account/Inquiry**

### **6. Disputes as to Ownership of Property**

- (1) Unless the matter is clearly documented, issues often arise as to whether any particular property is owned by the partnership as a whole or is owned by an individual partner or partners so that there has to be an inquiry to determine the same. Before that happens, the extent of partnership assets or liabilities (and hence what is to be distributed to each partner) cannot be determined. This arises particularly in relation to commercial leases which are often vested

in the name of one partner (or at least not all of the partners) and the issue is whether the individuals retained ownership (but allowed the partnership to use the premises on particular terms, for example payment of a licence fee) or whether the lease has become partnership property by virtue of Sections 20 and 21 (as to which see para. 18 of the first section of this bulletin). Similar issues may also arise in relation to more mundane items, such as the desks of individual partners. In *Don King Productions Inc. v Warren*, the issue was as to whether certain boxing promotion and management agreements constituted partnership property.

- (2) Whether the named lessees are likely to argue for or against the lease being partnership property may depend on whether the lease is at a rental which is above or below market rent and the existence and terms of any rent reviews. It was the above-market rent payable under the lease of the Malkin Janners offices which led to the (unsuccessful) attempt by the redoubtable (his former partners may have had other descriptions) Mr Hurst to avoid liability for the same all the way to the House of Lords: *Hurst v Bryk* [2002] 1 AC 185.

## 7. Detailed Accounting Matters

These may cover a number of issues, including each partner's share of capital, profits and losses; to what extent a partner is entitled to be indemnified in respect of payments made and personal liabilities incurred;

and any interest entitlement. It is not appropriate to have regard to the partners' conduct when taking the dissolution account, since no matter how badly a partner may have behaved towards his partners, he is not to be deprived of his accrued property rights: see *Hurst v Bryk* at pp. 197-8.

## 8. Account for Private Profits

This arises under Section 29(1) in relation to any benefits derived by a partner without consent from any transaction concerning the partnership or from any use of the partnership property, name or business connexion. Typically this will arise where a partner has made use of partnership facilities, premises or staff to run another business for his own private benefit or where information has been acquired qua partner which has enabled him to participate in a venture from which the partnership as a whole should have profited.

## 9. Competing Businesses

Carrying on without consent a business of the same nature as and competing with that of the firm gives rise to an obligation to account for profits under Section 30. This may arise particularly in the field of property dealing and development, since often at the outset the parameters of the partnership are not made plain - what projects should be inside the partnership and what projects need not be.

## 10. Ascertainment of Debts and Liabilities

- (1) Where there are disputes as to whether any alleged debts or liabilities are true liabilities of the partnership, then such issues may have to be determined on an inquiry. In this regard Section 39 entitles every partner on dissolution to have the partnership property 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 after deducting what may be due from them to the firm.
- (2) The rules for distribution of assets are, subject to agreement, set out in Section 44, a provision considered in detail by the House of Lords in *Hurst v Bryk* at p. 197. Note, however, the important power of the Court to make what is known as a *Syers v Syers* ((1876) 1 App. Cas. 174) order. This permits the Court to order one partner to be bought out rather than requiring a full winding up, which would involve the sale of the business and appropriate application of the sale proceeds. It is particularly appropriate where only one partner wishes to leave and/or where the outgoing partner is responsible for the break-up. Such an order was made in *Mullins v Laughton*.

## 11. Accounting for Post-Dissolution Profits

- (1) Section 42(1) provides that where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing

partners carry on the business of the firm with its capital or assets without any final settlement of accounts then, in the absence of any agreement to the contrary, the 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.

- (2) However, this is subject to Section 42(2) which contains the proviso that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner and that option is duly exercised, then the estate of the deceased partner or the outgoing partner or his estate as the case may be is not entitled to any further or other share of the profits.
- (3) It is frequently the case that after a partner has left a partnership without any final agreement as to the terms of his leaving, the other partners simply continue running the business for their own benefit. Although it may come to a head much earlier, this can go on for years without any final accounting taking place and the issue that often arises is as to the financial entitlement of the outgoing partner under this provision (what his entitlement is in return for the other partners using all the partnership assets for their sole benefit) which has to be determined on the taking of an account.

- (4) It has recently been decided by the Court of Appeal (overruling both the Master and Lightman J.) in *Sandhu v Gill* [2006] Ch. 456 that the reference in Section 42(1) to “the partnership assets” was to the net partnership assets, that is to say what remained out of the gross assets, for distribution between the partners, after all debts and other liabilities of the partnership had been met. It followed that the “share” for the purposes of Section 42(1) was to be assessed by reference to the share which the partner in question was entitled to receive at the conclusion of the winding-up process. Therefore the correct approach involved ascertaining, in accordance with the partnership accounting rules what, on the dissolution and winding up, were the net assets of the partnership that fell to be divided between the partners in equal shares. It was for the use of that “share” of the outgoing partner after dissolution of the partnership, not for the use of the share of the pre-dissolution gross partnership assets of the partnership while it had been carried on as a going concern, that the Claimant was entitled to claim a proportionate share of the post-dissolution revenue profits made by the Defendant (in that case an old people’s residential home).
- (5) Therefore this reduces any potential liability under Section 42(1) from what many had previously thought was the position and which would have entitled an outgoing partner to have a substantial share of the profits of a business which was profitable, subject only to a deduction

for the benefit of the services of the continuing partner. It does, however, make the accounting exercise far more complicated.

## 12. Valuation of Share of Outgoing Partner

- (1) Apart from detailed accounting matters which may arise, a thorny problem that often arises and which has to be the subject of an inquiry is the valuation of the goodwill of the partnership business (and, therefore, of the outgoing partner’s share of such goodwill). Often this requires expert evidence and differing bases for valuing goodwill are put forward by experts. If the amount involved is not substantial, consideration should be given to the use of a single expert jointly instructed by the parties.
- (2) Goodwill is of an intrinsically intangible nature, which is why its value (if any) often cannot be agreed, but a classic statement by Scrutton L.J. in *Whiteman Smith Motor Co. v Chaplin* [1934] 2 KB 35 at p.42 divides the elements of goodwill into a cat, rat and dog basis.
- (3) This statement (whilst not very complimentary about feline fidelity) bears repeating:  
“A division of the elements of goodwill was referred to during the argument and appears in Mr. Merlin’s book as the “cat, rat and dog” basis. The cat prefers the old home to the person who keeps it, and

stays in the old home though the person who has kept the house leaves. The cat represents that part of the customers who continue to go to the old shop, though the old shopkeeper has gone; the probability of their custom may be regarded as an additional value given to the premises by the tenant's trading. The dog represents that part of the customers who follow the person rather than the place; these the tenant may take away with him if he does not go too far. There remains a class of customer who may neither follow the place nor the person, but drift away elsewhere. They are neither a benefit to the landlord nor the tenant and have been called "the rat" for no particular reason except to keep the epigram in the animal kingdom. I believe my brother Maugham has introduced the rabbit, but I will leave him to explain the position of the rabbit. It is obvious that the division of the customers, into "cat, rat and dog" must vary enormously in different cases and different circumstances."

- (4) For those desperate to know what Brother (L.J.)Maugham had to say about the rabbit, you need remain in suspense no longer. He said at p.50:

"If the cat metaphor is to be used, I would say that the cat may be attracted away by a gentle stroke on the back and the promise of a bowl of milk. But really there should be a fourth animal, the rabbit, to indicate the customers who come simply from propinquity to the premises; and, if this is borne in mind, it will be apparent that the

rabbit may be much bigger than the cat, who (if indeed it does not wholly vanish) may well shrink to the dimensions of a mouse."

Make of that what you will - but would that modern judgments were as entertaining!

## D. General Points

13. Although general partnership accounts and inquiries can be ordered in traditional terms (an example of a general order is Form 29 on page 179 of Vol. 30(2) of Atkin's Court Forms), it is far better to try and identify precisely what matters are in issue and therefore to restrict the taking of accounts and the making of inquiries to those issues. Otherwise costs can easily escalate unnecessarily.
14. In an effort to put pressure upon the other side to resolve the outstanding issues without expensive accounts and inquiries, a suitable Part 36 Offer should always be considered. Similarly, in order to avoid detailed and expensive accounts and inquiries, mediation (which can adopt a rather more robust approach) may be particularly appropriate or, in the alternative, determination by a jointly instructed accountant: see the latest Chancery Guide at para. 22.4. where these are recommended. In *Mullins v Laughton*, Neuberger J. made it plain at paras. [134]-[136] that he would not tolerate the defendant dragging out the taking of the account; and that if a mediation was not successful but there was a dragging of feet on the part of one party,

the case should be brought back before the Judge in short order with a view to appropriate action being taken.

15. If a sum is definitely due to one partner(s) from the other(s), consideration should be given to an application for an interim payment on account of such prospective entitlement on the taking of the accounts.
16. Previously settled accounts (for example, accounts agreed for previous years) can be re-opened only if fraud, misrepresentation or mistake can be proved and, in the case of mistake, the most which the Court will do will be to give permission to “surcharge and falsify”, that is to say permission to challenge specific items which were the subject of mistake.

### **Edward Cohen**

**Spring 2007**

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**Edward Cohen** practises in commercial and chancery litigation and advisory work, including commercial contracts of all kinds, partnerships and LLPs, company law issues including shareholder disputes, media, entertainment and sport including recording, publishing, agency and management contracts, professional negligence, civil fraud, including injunction proceedings, banking, guarantees and other securities, arbitration law and practice, commercial property, corporate and personal insolvency, breach of employment duties and IT disputes. His wide-ranging practice enables him to advise and act in individual cases involving simultaneously different areas of law. He is known for his meticulous preparation, paperwork and advocacy and he has appeared in reported decisions ranging from the House of Lords through to the Court of Appeal and Courts of first instance involving diverse legal issues. He appeared as junior counsel at all stages up to and including the House of Lords in the leading contract case of *Walford v Miles* [1992] 2 AC 128, a decision establishing the unenforceability under English law of agreements to negotiate/agreements to agree. More recently he led the successful resistance to an appeal before the Privy Council in *Knox v Deane* [2005] UKPC 25, a case involving a pre-emption clause in a company’s articles of association. Edward is well known for his dedicated support of Newcastle United FC.



Edward has been recommended as a leading Commercial Chancery practitioner in Chambers & Partners for several years.

**Don McCue** conducts contract litigation of all kinds, particularly building and engineering, motor industry and sale of goods cases. He also specialises in partnership disputes, professional negligence actions against lawyers, accountants, architects and surveyors, and disputes between former cohabitants about beneficial interests in property. Other recent cases involve undue influence, unjust enrichment and estoppel. He is client friendly and known for his ability to assimilate a complex brief and respond rapidly with tactics and strategy.



In 2006-2007 he advised and represented Opel AG and Renault SA, who manufacture the Vivaro van, in relation to a demand for £500,000 by a disgruntled parts supplier which was not entitled to the money but was threatening to cease supply of the part unless it was paid. Since that would have brought the production line to a halt within hours, causing loss of £1 million per day, Opel/Renault paid up; but they brought an action for recovery of the money based on economic duress, which was contested. Opel/Renault succeeded at trial in December 2007.

Don has been involved recently in a number of Supreme Court Costs Office cases involving challenges to the validity of Conditional Fee Agreements, the most recent of which went by "leapfrog" to the Court of Appeal.

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