serlespeak
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Chambers news

People
We are delighted to welcome Sophia Hurst, Eleni Dinenis and Charlotte Beynon as tenants following successful completion of their pupillage. We are also pleased to introduce our three pupils for 2016/17: Katharine Elliot, Gregor Hogan and Usman Roohani.

Conferences and seminars
We hosted two very successful conferences in the second half of 2016. The Serle Court Litigation Conference was held in London in September. The Rt. Hon. Lord Justice Briggs delivered the keynote address and a series of topics were covered, including: Commercial Law and Litigation after Brexit; Commercial Litigation; Company Law; Trusts; Fraud and Asset Recovery; Probate; Charities; and Property. In November, we held the first Serle Court International Trusts and Commercial Litigation Conference in New York, attracting an audience from the UK, the US, Jersey, Guernsey, Cayman Islands, Bermuda, BVI and the Bahamas. 22 members of chambers were joined by 16 guest speakers and a number of topical issues were covered, including: Asset Tracing; Freezing Injunctions; Private International Law; Investment Structures; Trustees, PTCs and Charitable Status; Limited Liability; Cross-border Insolvency; Litigation Funding; Company Law; Anti-Suit Injunctions and Challenging Firewalls.

Thank you to our clients who attended these conferences and gave such positive feedback.

We will be running a series of seminars in 2017 including: a joint seminar with Enyo Law on 18th January, focussing on the *Avonwick Holdings v Shlosberg* decision and its implications; a Property Law seminar on 28th February where Andrew Bruce, Tom Braithwaite, Jonathan Fowles and Amy Proferes will speak; a seminar following the *Ilott v Mitson* judgment where Constance McDonnell, along with other members, will discuss the case and its significance; and a Company Law seminar in May featuring Daniel Lightman QC and Timothy Collingwood.

We are again sponsoring the Legal Week Trust & Estates Litigation Forum in Provence. Richard Wilson QC and Prof Jonathan Harris QC (Hon.) will be participating on two key panels during the event in March 2017.

Awards and directories
We have been shortlisted for and received a number of awards:

- We won Set of the year for Private client: trusts and probate at The Legal 500 UK awards, and also received nominations as a set for Commercial litigation and John Machell QC as Silk of the year in Private client: trusts and probate.
- We received 2 nominations for the Chambers UK Bar Awards: Elizabeth Jones QC for Chancery Silk of the Year and David Blayney QC for Banking Silk of the Year.
- We were one of only 8 chambers shortlisted for Chambers of the Year at this year's British Legal Awards.

The latest editions of the two major legal directories have now been published and we continue to be highly recommended, described as *"one of the very best commercial chancery sets, and one of the few that genuinely competes in both traditional chancery and commercial litigation"*. In Chambers & Partners, we are ranked as a set in 10 practice areas, including 4 areas in band one, and in the Legal 500 directory, we are ranked as a leading set in 9 practice areas, including 3 in tier one.

LinkedIn
We have 4 discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues in Partnership and LLP Law, Fraud and Asset Tracing, Contentious Trusts and Probate, and Competition Law; please join us.

Serlespeak is edited by JONATHAN FOWLES

I am delighted to introduce this new edition of Serlespeak on topics in company and partnership law. In the lead article I discuss the flexibility of the court's powers to grant relief on an unfair prejudice petition. Later in the edition, in the field of company law Jennifer Haywood considers whether the doctrine of repudiatory breach may apply to shareholders' agreements and Paul Adams notes the limits on the general principle that the law governing a derivative claim is the law of the place of incorporation. On the partnership side, Philip Jones QC and Sophia Hurst assess the approaching reform of the Limited Partnership Act 1907 in respect of collective investment schemes of the kind used in private equity. Finally, John Machell QC considers the extent to which the profit share of a partner or member of an LLP may be subject to forfeiture for breach of fiduciary duty. **Daniel Lightman QC**

Section 994: a minority shareholder's flexible friend

RECENT CASE LAW HAS EMPHASIZED JUST HOW VERSATILE A WEAPON THE POWER TO PRESENT AN UNFAIR PREJUDICE PETITION UNDER SECTION 994 OF THE COMPANIES ACT 2006 CAN BE FOR A MINORITY SHAREHOLDER.

By section 994(1), the petitioning shareholder has to show either (i) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself/herself) or (ii) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. Mindful that Parliament intended the courts to adopt a flexible approach to proceedings under section 994, and to be flexible in the exercise of their powers in relation to such proceedings, the courts have taken the view that (in the words of Arden LJ) the jurisdiction under section 994 *"has an elastic quality which enables the courts to mould the concepts of unfair prejudice according to the circumstances of the case" (In re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, at 404).

Accordingly, the courts have persistently stressed that the expressions *"the company's affairs", "conducted", "unfairly prejudicial"* and *"the interests of members"* should each be given a broad interpretation. So, for instance, the phrase *"the company's affairs are being or have been conducted"* has been found to be wide enough to cover unfairly prejudicial conduct by *anyone* who is taking part in the conduct of the affairs of the company, whether *de facto* or *de jure* – and conduct of the affairs

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> the court can even grant relief which the petitioner has not sought

of a subsidiary company can, where appropriate, be regarded as part of the conduct of the affairs of its holding company.

Just as much flexibility has been shown by the courts in exercising the extremely wide powers granted to them by section 996 as to what relief they can grant and against whom. Under section 996(1) the court has a general power, if satisfied that a petition is well founded, to *"make such order as it thinks fit for giving relief in respect of the matters complained of"*. Indeed, the court is obliged, if it makes a finding of unfair prejudice, to consider the whole range of possible remedies provided for in section 996 and choose the one(s) (if any) which in its assessment is or are most likely to remedy the unfair prejudice and to deal fairly with the situation which has occurred. In the exercise of its wide discretion, the court must take into account all of the circumstances of the case.

The breadth of the court's powers under section 996 is such that it can even grant relief which the petitioner has not sought – and does not actually want. As Stanley Burnton LJ pointed out in *Re Neath Rugby Ltd (No 2)* [2009] 2 BCLC 427, at 455: *"The terms of s. 996 are clear: once the court is satisfied that a petition is well founded, "it may make such order as it thinks fit", not "such order as is sought by the petitioner""*. In *Patel v Ferdinand* [2016] EWHC 1524 (Ch), HHJ Purle QC stated, at [29]: *"I have a wide discretion under s.996 of the Act to make such order as I think fit for giving relief in respect of the matters complained of. In my judgment, though neither side is asking for this, the unfair prejudice of which Miss Patel complains would be properly and fairly dealt with by a winding up order, given that both parties have another company through which their respective legal aid practices can now be carried on. This company was a vehicle for their joint enterprise, which has now come to an end."*

Where there has been significant unfairly prejudicial conduct, especially if accompanied by a breakdown in trust and confidence between the company's shareholders, in most cases the court will make a share purchase order. *"Ultimately, in a breakdown of relations between a majority and a minority shareholder"*, as HHJ David Cooke stated in *Harborne Road Nominees Ltd v Karvaski* [2012] 2 BCLC 420, at 431, *"the solution is likely to be that the minority shareholder must exit the company, or be offered the opportunity to do so on fair terms..."*

Nonetheless, there is a growing body of authorities pointing out the significance of, and involving the actual exercise of, the wide powers given to the court to grant relief under section 996 other than a share purchase order. For example, in *Sikorski v Sikorski* [2012] EWHC 1613 (Ch), Briggs J stated, at [75], that *"the court should not close its mind to a bespoke solution to a particular form of unfair prejudice, other than by ordering a buy-out, at least in cases where a remedy that leaves the warring parties as shareholders in the same company does not of itself perpetuate an impossible relationship of joint management, or otherwise risk aggravating an existing dispute."*

Accordingly, in an appropriate case a shareholder can seek to persuade the court to adopt a bespoke solution to the matters of which he/she complains and not instead to make a share purchase order, especially if he/she can show that his/her complaints relate to their treatment as a minority shareholder and that allowing him/her to remain a shareholder in the company would not *"of itself perpetuate an impossible relationship of joint management, or otherwise risk aggravating an existing dispute."* Making a bespoke order would accord with the wide and flexible remedy which section 996 is intended to provide to minority shareholders and the importance of the court exercising its wide powers to produce a just result.

The flexibility of the unfair prejudice regime was most recently illustrated in *Wootliff v Rushton-Turner* [2016] EWHC 2802 (Ch), where Mr Registrar Briggs refused to strike out a wrongful dismissal head of claim included in a section 994 petition. He stated (at [34]), with respect to what he described as a *"novel"* point: *"...The court may make such order as it thinks fit to grant relief. As the language is so wide it cannot be said in my judgment, it shuts out relief for compensation for breach of a service agreement."*

DANIEL LIGHTMAN QC has a broad commercial chancery practice, with a particular expertise in shareholder litigation. He contributes the chapters on derivative claims and section 994 procedure to Joffe, *Minority Shareholders: Law, Practice, and Procedure.*

Does the doctrine of repudiatory breach apply to company shareholders' agreements?

THE DECISION IN *FLANAGAN v LIONTRUST PARTNERS LLP* [2015] EWHC 2171 (CH) RESOLVED THE HOTLY DEBATED ISSUE AS TO WHETHER AN LLP MEMBERS' AGREEMENT CAN BE REPUDIATED OR NOT: HENDERSON J HELD THAT THE STATUTORY SCHEME APPLICABLE TO LLPs SHOULD BE CONSTRUED SUCH THAT THE DOCTRINE OF REPUDIATORY BREACH COULD NOT APPLY TO AN AGREEMENT WITHIN SECTION 5 OF THE LLP ACT 2000 WHEN THERE WERE MORE THAN TWO MEMBERS. THE IMPACT OF THE DECISION ON LLP DISPUTES HAS BEEN WIDELY DISCUSSED.

But do the judgment and the principles discussed therein have relevance for company shareholders or for parties to other contracts? At first glance, no. The judge acknowledged that it has never been suggested that the doctrine could apply to the articles of association of a company – they have constitutional and public significance which means that many aspects of the ordinary law of contract cannot apply – but he suggested that there would normally be nothing to prevent the doctrine from applying to a shareholders' agreement. It is suggested that this is wrong, at least in some instances.

First, the constitution of a company is not confined to the articles, but includes resolutions and agreements binding all of the members that, but for the agreement, would not be effective unless passed as a special resolution. (Sections 17 and 29 of the Companies Act 2006)

Second, although this argument was dismissed by the judge in relation to LLPs, the same remedy that was relied upon heavily by Lord Millett when he provisionally decided that the doctrine could not apply to partnerships in *Hurst v Bryk* [2002] 1 AC 185, an order for just and equitable winding up, is available for company disputes. There are also the additional remedies available under section 994 of the Companies Act 2006, rendering a doctrine which can have unworkable consequences unnecessary to allow an aggrieved party to exit the relationship and be relieved of his obligations.

Third, a share in a company is, like a share in an LLP, the bundle of rights and obligations of a member of the company derived from a series of mutual covenants, and it would be artificial, and inconsistent with the principle that a person cannot approbate and reprobate, to separate the mutual rights and obligations from the share.

Fourth, there is a fundamental problem with applying to the doctrine to multi-party contracts, where one cannot properly disentangle a series of intertwined rights and obligations. In two instances judges have held that the doctrine cannot apply to multi-party contracts where it would produce wholly unreasonable results. The first, *Artistic Upholstery Ltd v Art Forma (Furniture) Ltd* [1999] 4 All ER 277, concerned an unincorporated association, a purely contractual creation. Lawrence Collins QC said that it would *"fly in the face of practicality and common sense that one member could, even if invalidly excluded, bring to an end all the relations* inter se *between the members"*. (289) The second, *Tanner v Everitt* [2004] EWHC 1130 (Ch) concerned an IVA, and in that case Mann J commented that he could not see how the doctrine could apply to a multi-party contract.

On their own, or taken together, these factors should persuade the court that the doctrine of repudiatory breach should not inevitably apply to shareholder agreements.

JENNIFER HAYWOOD has an extensive partnership and company practice and appeared in *Flanagan v Liontrust*, led by John Machell QC.

Foreign law in derivative claims

DERIVATIVE CLAIMS ON BEHALF OF FOREIGN COMPANIES ARE POSSIBLE BUT REQUIRE CAREFUL ANALYSIS AT THE OUTSET.

It has been clear for some time that at common law there is no jurisdictional bar to the bringing of a derivative claim on behalf of a company incorporated abroad.

As Lawrence Collins J explained in *Konamaneni v Rolls Royce* [2002] 1 WLR 1269, the company's place of incorporation is a very important factor when assessing which is the appropriate forum, but if on the facts there are good reasons for suing in a forum other than the place of incorporation then this may be permitted.

But what of the question of governing law? Once again we can take the basic principle from *Konamaneni*: the rights of members to sue on behalf of a company are governed by the law of the place of incorporation. So if, for example, your client wants to bring a derivative claim in England on behalf of a BVI company, you need to look to BVI law when considering whether your client is entitled to bring the claim.

A more difficult question, however, is how this choice of law rule interacts with the equally well established rule that issues of procedure are governed by the law of the forum. An example of the problem is provided by subsections 184C(1) and (6) of the BVI Business Companies Act 2004, which state that the BVI court may grant a member of a company leave to bring proceedings on behalf of that company and that a member of a company is not otherwise entitled to bring such proceedings. If a member of a BVI company seeks to bring a derivative claim on behalf of that company in England, should the English court apply subsections 184C(1) and (6) and hold that the permission of the BVI court is required, or should it treat those subsections as procedural, ignore them, and apply only its own permission regime under CPR rule 19.9C?

This issue was considered by HHJ Pelling QC in *Novatrust Ltd v Kea Investments Ltd* [2014] EWHC 4061 (Ch). Following US authority, he distinguished between *"procedural requirements extraneous to the substance of [the] claim"* and requirements which concern *"the very nature and quality of [the members'] substantive rights, powers and privileges"*. [41] Requirements of the latter type in the law of incorporation will be applied by the English court when faced with a derivative claim in respect of a foreign company, but requirements of the former type will not. To put the point another way, requirements of the law of the place of incorporation will be applied if they concern *"not just 'who' may maintain an action or 'how' it will be brought but 'if' it will be brought"*. [41]

Applying these tests, HHJ Pelling QC considered that subsections 184C(1) and (6) of the BVI Business Companies Act were substantive, meaning that a derivative claim in respect of a BVI company brought in England without the permission of the BVI court could not proceed.

Other legislative provisions will fall on the other side of the line, but the *Novatrust* case illustrates the importance of at least considering the applicability of any requirements of the law of the place of incorporation before starting derivative proceedings in England on behalf of a foreign company.

PAUL ADAMS has acted in a number of high profile company law cases. In *Novatrust Ltd v Kea Investments Ltd* he acted for the defendants (led by Philip Marshall QC and Prof Jonathan Harris QC (Hon.)).

Modernising limited partnership legislation for private funds

IN MARCH 2016, HM TREASURY COMPLETED A CONSULTATION ON PROPOSALS TO CHANGE THE LAW OF LIMITED PARTNERSHIPS FOR PRIVATE INVESTMENT FUNDS. DRAFT LEGISLATION DESIGNED TO ENSURE UK LIMITED PARTNERSHIPS ARE THE VEHICLE OF CHOICE FOR PRIVATE EQUITY AND VENTURE CAPITAL FUNDS WILL BE BROUGHT INTO FORCE IN THE COMING YEAR.

The reforms to the Limited Partnership Act 1907 apply to "private fund limited partnerships" only; essentially, those which fall under the definition of "collective investment scheme" in the Financial Services and Markets Act 2000.

The predominant private equity model is a collective investment scheme whereby investors commit funds as "limited partners" to a limited partnership, since the liability of a "limited partner" is limited and the partnership structure is tax transparent. However, the 1907 Act has not always adapted well to modern use in private fund structures. In particular, section 6 of the Act prohibits a limited partner from taking part in the management of the partnership business; a limited partner found to participate in management loses its limited liability for the debts and obligations of the partnership. Yet it is not clear which activities will constitute participation in the management of the partnership. Fund managers have therefore struggled to meet increased investor demands for approval and consultation rights. Consultation respondents unanimously agreed this was an area of confusion, on which they often sought legal advice.

To address this, the reforms introduce a "white list" of permitted activities that limited partners can undertake without being treated as participating in the management of the partnership and thereby jeopardising their limited status. Similar white lists feature in the limited partnership legislation in Delaware, Cayman Islands, Guernsey, Jersey and Luxembourg.

However, the Government's white list arguably goes beyond what had previously been accepted in the courts and in the markets as the limits on the extent of a partner's involvement in the partnership's affairs.

In *Inversiones Frieira SL v Colyzeo Investors II LP* [2012] Bus LR 1136, Norris J explained that if a limited partner expresses to the general partner a view about the performance, strategy or future direction of the partnership or a preference about how a particular asset should be dealt with, it does not become involved in the management of the partnership. But, *"if [it] seeks to participate in the decision-making process by requiring notice of individual decisions and the ability to make representations about individual decisions, if it seeks to scrutinise and to comment upon the operational business decisions...then it would become* "involved" *in the management of the partnership."* (1150) Cooke J approved these observations in *Certain Limited Partners in Henderson Fund II LP v Henderson Fund II LP* [2013] QB 934, noting it *"shows just how limited the limited partner's involvement can be without...participating."* (953)

Nevertheless, the white list is drafted in broad terms; permitting, for example *"taking part in a decision about whether to allow...a particular investment by the partnership"* (paragraph 6A(2)(b)(ii)), or *"consulting or advising a general partner...about the affairs of a partnership"* (paragraph 6A(2)(s)). Both go beyond Norris J's formulation and pose difficult questions of interpretation. Additionally, the white list is explicitly non-exhaustive, so that the scope for argument over whether a particular activity is permitted is not entirely removed.

The consultation process also highlighted potential confusion for limited partnerships that do not qualify for the new scheme, and to which the white list will not apply. The Government has said it will include in the legislation *"clarification that the white list does not create any adverse presumptions for limited partners in other limited partnerships."* However, the extent to which the courts will have regard to the white list in cases falling outside its scope remains to be seen.

Overall, the white list is to be welcomed in providing some clarity to a difficult practical question. Time will tell whether the reforms bring greater certainty in practice.

- PHILIP JONES QC has extensive experience in advising on all aspects of general partnerships, limited partnerships and limited liability partnerships and is recommended in both Chambers & Partners and Legal 500 for partnership and LLP work.
- SOPHIA HURST is developing a broad commercial chancery practice with an interest in partnership and LLP work.

The fiduciary forfeiture rule and partnership profit shares

ONCE IN A WHILE A CASE COMES ALONG THAT HAS THE POTENTIAL TO CHANGE FAIRLY RADICALLY THE ARGUMENTS DEPLOYED IN PARTICULAR TYPES OF DISPUTE. *HOSKING v MARATHON ASSET MANAGEMENT LLP* [2016] EWHC 2418 (CH) IS ONE OF THOSE CASES.

There is a line of cases which holds that a fiduciary who commits a breach of fiduciary duty may forfeit the remuneration that is due for his or her services: see, for example, *Imageview Management Ltd v Jack* [2009] EWCA Civ 63. So, an agent who is appointed to sell a property forfeits his or her entitlement to remuneration from the principal if he or she accepts a bribe.

But it has – until now – never been suggested that a partner may forfeit all or part of his or her profit share in the event that he or she commits a breach of fiduciary duty. Indeed, there is Commonwealth authority which, whilst not precisely on point, is inconsistent with there being any forfeiture principle in relation to profit share: see *Olson v Gullo* (1994) 17 OR (3d) 790.

Mr Hosking, a member of the LLP, was accused of breach of fiduciary duty. The dispute was dealt with by arbitration and the arbitrator found that he had, in some respects, acted in breach of fiduciary duty and that the LLP was entitled to equitable compensation of £1.38m as compensation for the loss that it suffered. The arbitrator also acceded to an argument that Mr Hosking should forfeit £10,389,957.50. Mr Hosking appealed to the High Court and Newey J rejected his appeal, holding that the profit share of a partner or member can potentially be subject to forfeiture. Although Newey J's reasoning is not entirely clear, he would appear to take the view that profit share is only forfeitable if it, in substance, represents remuneration for the provision of services.

The writer would respectfully disagree. Profit share is conceptually distinct from remuneration for services (which is payable regardless of profit) and the forfeiture principle (which is conceptually uncertain and anomalous) should, it is suggested, be confined to circumstances where a fiduciary actually receives remuneration.

Quite how far the principle applies to partnerships and LLPs is left unclear. Newey J suggests that it will typically be impossible to characterise all or any particular part of the profit share of a partner or LLP member as *"remuneration"* and the implication appears to be that the principle will not apply in typical cases. If it is right, as Newey J held, that the forfeiture rules applies in principle to profit share, it is, in the writer's view, to be hoped that the operation of the rule in LLP and partnership cases will be confined to the rare cases in which there is an express link between the provision of particular services and profit share.

- JOHN MACHELL QC acted for Jeremy Hosking.