

“PESKY PARTNERSHIP PROPERTY PROBLEMS SOLVED”

- (... probably...) -

NIC TAGGART

Landmark
CHAMBERS

*“Doctor, doctor, please
Oh, the mess I’m in;
Doctor, doctor, please
Ohh, the mess I’m in!”*

Doctor, Doctor
- Michael Schenker, “UFO”

1. INTRODUCTION:

1.1 For me, partnership law is something that comes up less and less in practice. When I was starting out, it was something that potted across my desk in the context of commercial property in general and in 1954 Act cases in particular. Then, the Limited Liability Partnerships Act 2000 came along and I had a mad few years getting assignments and lease renewals put together to facilitate true partnerships turning themselves into LLPs. After that, cases getting into a pother over partnership largely went away.

1.2 Recently, I have been asked to look at a few matters involving partnerships between General Practitioners. For reasons which, I believe, are connected to the way that GPs are funded and regulated, their medical practice has to be conducted through true partnerships. This gives rise to a number of partnership property problems and caused me to brush up my partnership law and put together this paper.

1.3 Before we get any further, some terminology: in this paper, I shall use different terms to distinguish the various classes of partner that we need to distinguish between. Thus:

1.3.1 the **“Property Partners”**: the members of the partnership who own the real property assets, freehold or leasehold, whether or not those are “partnership property”;

1.3.2 the **“Operative Partners”**: the members of the partnership who are not retired and presently undertake the business of the partnership;

- 1.3.3 the “**Hybrid Partners**”: the members of the partnership who are both Property Partners and Operative Partners.
- 1.4 I shall also use the expression “land” in its broadest sense, meaning any estate or interest therein.
- 1.5 If I were to start with the big “take-away” points, there are two.
- 1.5.1 First, the answer to most questions about partnership is, actually, “it depends”. There is a reason for this: the law of partnership is almost entirely contractual, so it is driven by identifying and giving effect to the contractual relationship between the partners. The law of partnership itself imposes no special rules as to formality, so identifying whether there is a partnership and, if so, what property is held for the benefit of the partnership from time to time is always a question of fact. This question can often be very difficult to answer with any certainty, as the lack of any requirement for formalities means that agreements can be made -and unmade- informally. One will often have to weigh up “all the circumstances” to answer the most basic questions about a partnership and its assets.
- 1.5.2 The second big point is that, where there is a partnership, such assets as belong to the partnership (which may not actually be vested in some, all or any of the current partners) are held subject to strong but slightly ill-defined duties of mutual good faith and fiduciary duty. These duties can endure in respect of property which was held for the benefit of a partnership even *after* a partnership has ended by the retirement of a partner and/or the admission of a new partner. These duties are, on the whole, owed to each other because they are matters of mutual agreement, but the Partnership Act 1890 gives these duties real meaning, by making all partners *jointly* liable for the partnership’s debts and other obligations to the outside world.
- 1.6 In other words, any inquiry into partnership property rights is inherently uncertain, as most answers are fact-sensitive: it all depends on what has been agreed between the partners.

1.7 There is a really simple solution to all of this fact-sensitive uncertainty, which is to encourage true partnerships to convert to Limited Liability Partnerships: they provide a corporate vehicle into which property interests can be vested, which behaves like a company, at least as far as the outside world is concerned.¹ As between the Members of the LLP, it can be operated in pretty much the same way as a partnership, with almost the same level of flexibility of profit sharing. So, partners can have most of the commercial flexibility and none of the legal headaches associated with property assignment on individual retirement. This, after all, is one reason why there are very few solicitors' firms still out there which have *not* converted to LLPs. The lawyers have given themselves some good medicine.

1.8 I do not profess to understand anything about NHS funding requirements, but I am told that there is nothing to stop GPs forming LLP's for the purposes of holding property interests: they can do this, apparently, even though their medical practices must be conducted as true partnerships. However, as the GPs appear to be resistant to even that prescription, we had better carry out some obs. in more detail.

2. ***THE BASICS 1 - WHAT IS PARTNERSHIP?***

Some limitations:

2.1 What follows under this main heading is a very basic introduction to a very big and quite complicated area of law: think of this as the basic anatomy. To put flesh on these bones, one needs to have a lengthy consultation with *Lindley & Banks on Partnership*.²

What is a partnership?

2.2 A "true" partnership, as opposed to an LLP, is treated in law as having *no* separate legal personality: it is not a separate entity from the partners who are members of it.³ Accordingly,

¹ Other than this brief mention, I am not going to consider further Limited Liability Partnerships entered into under the Limited Liability Partnerships Act 2000 or Limited Partnerships created under the Limited Partnerships Act 1907.

² 20th edition, 2017.

³ See *Sadler v. Whiteman* [1910] 1 KB 868, 889 (CA) *per* Farwell LJ, interpreting the Partnership Act 1890, section 4(1).

as with any other unincorporated association, it cannot hold any form of property interest in its own right and name.⁴

2.3 This lack of separate personality is the roundabout effect of the Partnership Act 1890, section 4(1):

Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

There are three conditions precedent to the existence of a partnership, which must be satisfied each time a partnership is created and at any time that there is a change in the membership of the firm:⁵

2.3.1 A “business” (which includes an “occupation or profession”);⁶

2.3.2 carried on between two or more persons acting in common,

2.3.3 with a “view to profit”.

These conditions arise by reason of the Partnership Act 1890, section 1(1):⁷

Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

2.4 A partnership arises only from a contractual relationship between partners at any given time: either expressly or impliedly, they have to have agreed to undertake a common business venture with a view to profit.⁸ The existence of a formal partnership deed is evidence that the

⁴ *Jarrot v. Ackerley* (1916) 85 LJ Ch 135 (Eve J); *London Borough of Camden v. Shortlife Community Housing Association* (1992) 25 HLR 330 (Millet J). A purported grant of a transfer or lease to a firm might, on its true construction, be a lease to the first four partners signing the transfer or lease, to be held on trust for the members from time to time: *In Re Horley Town Football Club* [2006] EWHC 2386 (Ch) (Lawrence Collins J). The magic of four is explained in footnote 37. If, on the other hand, the document is signed in the name of the firm, the transfer or grant is ineffective, even if there are fewer than four partners: *Vanquish Properties (UK) Ltd. v. Brook Street (UK) Ltd.* [2016] L&TR 33 (Chief Master Marsh), although *obiter* on the facts.

⁵ *Samarkand Films Partnership N°.3 v. Commissioners for Inland Revenue* [2017] EWCA Civ 77; [2017] STC 926 (CA).

⁶ Partnership Act 1890, section 45.

⁷ As interpreted in *Samarkand Films Partnership*.

⁸ *Philips v. Symes* [2002] 1 WLR 853, [43] *per* Hart J; *Dutia v. Geldof* [2016] 2 BCLC 252 [5] and [93]–[96] *per* Nugee J.

conditions precedent to the existence of a partnership are met, but goes no further than that: there can be a partnership without a deed and there can be no partnership in law, despite the existence of a formal deed.⁹

2.5 The carrying on of “a business in common” means that there has to be a single business, even if it comprises different and disparate activities. The test can be applied by looking at whether the persons who might be partners act together for their common benefit, recognising mutual rights and obligations as between themselves.¹⁰

2.6 This latter point is important, as partnership involves a continuing mutual personal duty of good faith and “mutual trust and understanding”, as well as a fiduciary duty to one’s fellow partners.¹¹ Here is Sir James Bacon V-C in *Helmore v. Smith (N^o. 1)*, telling it like it is:¹²

If fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on.

Sir John Pennycuik V-C expanded on this point in *Thompson’s Trustee in Bankruptcy v. Heaton*:¹³

Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. He is bound in all transactions affecting the partnership, to do his best for the common body, and to share with his co-partners any benefit which he may have been able to obtain from other people and in which the firm is in honour and conscience entitled to participate: ... In accordance with this principle it was established by numerous decisions before the Partnership Act 1890 was passed, that one partner was not at liberty to acquire gain at the expense of his co-partners without their full knowledge and consent, either by directly making a profit out of them or by appropriating to himself benefits which he ought to have acquired, if at all, for the common advantage of the firm.

⁹ *Walker West Developments Ltd. v. FJ Emmett Ltd.* [1979] 2 EGLR 118 (CA); *Samarkand Films Partnership.*

¹⁰ *Walker West Developments; Campbell v. Campbell* [2017] EWHC 182 (Ch) (Mr. Murray Rosen QC, sitting as a Deputy High Court Judge).

¹¹ *Hurst v. Bryk* [2002] 1 AC 185, 194 (HL) *per* Lord Millett; *Ingenious Games LLP v. HM Revenue & Customs Commissioners* [2016] UKFTT 521 (TC) at [1173] *per* Tribunal Judge Charles Hellier.

¹² (1887) 35 ChD 436, 444 (Sir James Bacon V-C). The judgment was upheld by the CA, including Lindley LJ, as reported at the same location.

¹³ [1974] 1 WLR 605, 612 (Sir John Pennycuik V-C).

- 2.7 This mutual personal duty of good faith is particularly important where you have Hybrid Partners: their personal duty of good faith to the rest of the firm means that these Partners cannot use their property interests to prejudice the overall commercial interests of the firm as a whole, or the Operative Partners.¹⁴ Once retired from the firm, however, the retiring partners may think that the gloves can come off. As will be seen, this is not the case: far from it.¹⁵ However, as prevention is better than cure, it is highly desirable for partnership deeds to make provision for dealings with property assets on retirement or create a structure for either assigning or otherwise dealing with the land held as partnership property on the retirement of a Hybrid Partner.
- 2.8 The requirement that there is “a view to profit” means what it says: it must be the intention of the partners to make a net profit, which is to be shared between some or all of them.¹⁶ As between the partners themselves, there is no requirement that profits or losses have to be shared equally or at all, although a lack of mutuality may cause speculation as to the existence of a true partnership.¹⁷ It does not matter that the firm is not, in fact, profitable, provided that the partners hope and intend the venture to become profitable in the future.¹⁸
- 2.9 A partnership does not automatically cease if the common business activity ceases: if the business is not active for a period for some reason, such as relocation to new premises or even a temporary cessation of paying work being available, the firm continues as long as the partners are looking to continue the same business and are taking some steps to do so.¹⁹

¹⁴ This duty of good faith itself imports a strong fiduciary duty in respect of partnership property: see footnote 24. This duty in respect of partnership property is reinforced by statutory controls over the use of that property imposed by the Partnership Act 1890, section 20: see paragraph 3.11 below.

¹⁵ See paragraph 4.6 *et seq.* below.

¹⁶ *Mollwo, March & Co. v. Court of Wards* (1872) LR4PC 419 (PC); Partnership Act 1890, section 1; *Ingenious Games* at [492].

¹⁷ *Walker West; Ingenious Games*.

¹⁸ *Samarkand Films Partnership*.

¹⁹ *Chahal v. Mahal* [2005] 2 BCLC 655 (CA); *Barber v. Rasco International Ltd.* [2012] EWHC 269 (QB), [29], [39] (HH Judge Anthony Thornton QC, sitting as a Deputy High Court Judge).

- 2.10 The mere common ownership of property, whether as joint tenants or tenants in common, does not cause a partnership to arise between the co-owners: there has to be some other element of common business activity.²⁰

The incidents of partnership:

- 2.11 Where a partnership exists, a practical manifestation of that continuing mutual personal duty of good faith and “mutual trust and understanding”²¹ is a mutual duty of agency.²² Each partner acts both as principal and as agent for the other partners, binding the firm and his partners in all matters which lie within his authority.²³ What constitutes a partner’s authority, against the outside world, is defined by section 5 of the 1890 Act:²⁴

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

- 2.12 Moreover, against the outside world, partners are jointly liable for the firm’s debts, by reason of section 9 of the 1890 Act:

Every partner in a firm is liable jointly with the other partners ... for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

The partners may have agreed to indemnities between themselves that mean some partners have agreed to hold other partners harmless from claims, but that is a matter between

²⁰ Partnership Act 1890, section 2(1).

²¹ *Hurst v. Bryk; Ingenious Games*.

²² *Clyde & Co. LLP v. Bates van Winkelhof* [2012] IRLR 992 (CA) at [65] *per* Elias LJ. This point was not addressed on the subsequent appeal, [2014] 1 WLR 2047 (UKSC).

²³ Partnership Act 1890, sections 5 and 9; *Memec v. Inland Revenue Commissioners* [1998] STC 754, 764 *per* Peter Gibson LJ.

²⁴ As a partner is both principal and agent, a partner has a limited fiduciary duty to his partners in respect of money he receives on behalf of the partnership: *Piddocke v. Burt* [1894] 1 Ch 343 (Chitty J). However, the duty of good faith itself creates a strong fiduciary duty as between Property Partners and Operational Partners as regards the partnership assets: see *Helmore* and *Thompson’s Trustee*, both quoted in paragraph 2.6.

themselves. To third parties, the partners are jointly liable to meet the firm's debts and obligations from their own pockets, if necessary, not just from the assets of the firm itself.²⁵

3. **THE BASICS 2 - WHAT IS "PARTNERSHIP PROPERTY"?**

How does land become "partnership property"?

3.1 As I have already noted, a partnership cannot own property, including land, in its own right and title as it is an unincorporated association.²⁶ It follows that:

3.1.1 any land occupied by the firm as "partnership property" has to be owned by one or more partners; however

3.1.2 not all land occupied by the firm is "partnership property", even if it is owned by one or more partners.

3.2 In his famous textbook, Lord Lindley made it clear that not all property used by a firm was "partnership property".²⁷

The expressions partnership property, partnership stock, partnership assets, joint stock, and joint estate, are used indiscriminately to denote everything to which the firm, or in other words all the partners composing it, can be considered to be entitled as such. The qualification as such is important; for persons may be entitled jointly or in common to property, and the same persons may be partners, and yet that property may not be partnership property; e.g. if several persons are partners in trade, and land is [conveyed] ... to them jointly or in common, it will not necessarily become partnership property and form part of the common stock in which they are interested as partners.

So, whether or not any given estate in land is held by a partner for the benefit of the firm as a whole is always a question of the objectively identified intentions of the parties. When it comes to what assets are to *become* partnership assets, the partners are given full legal autonomy to arrange their affairs as they see fit.²⁸

²⁵ *Piddocke v. Burt.*

²⁶ See paragraph 2.2.

²⁷ This text is now paragraph 18-02 of the 20th edition.

²⁸ *Ham v. Bell* [2016] EWHC 1791 (Ch) (HH Judge Mackie QC, sitting as a High Court Judge); *Yafai v. Muthana* [2012] EWCA Civ 289.

- 3.3 This agreement between partners is not in itself a disposition of an interest in land, therefore the law of formalities in the Law of Property (Miscellaneous Provisions) Act 1989 and the Law of Property Act 1925 do not apply.²⁹ It follows that such an agreement can be express or implied from conduct or from a course of dealing. Even if it could be so described in particular circumstances, the effect of the Partnership Act 1890, section 20(1) would seem to have the same effect as a declaration of trust, without the formalities needed to satisfy the Law of Property Act 1925, section 53.³⁰ Because this section regulates the relationship of the partners to the property, it is effective to make even an interest in land which is inalienable “partnership property”.³¹
- 3.4 Indeed, subject to a couple of statutory exceptions,³² the Partnership Act 1890, section 20(2) provides that real property held by partners for the purposes of their firm is not subject to any special rules relating to transfer and assignment, as between them and the outside world.³³ In other words, the 1890 Act permits partners to change the status of property as between themselves without that changing the general law on the devolution of titles to land.
- 3.5 What partners can do by agreement, they can also undo by agreement: by reason of the Partnership Act 1890, section 19, property which is held by Property Partners or Hybrid Partners for the benefit of the firm can be removed from the firm’s assets, at any time, by an agreement between the partners.³⁴ As section 19 states, whether this decision requires unanimity or a majority vote is to be determined by the partnership agreement, whether it is an express deed or an implied agreement. Equally, the agreement that some property should no longer be partnership property can be express or implied.

²⁹ *Rye v. Rye* [1962] AC 496 (HL); *Barton v. Morris* [1985] 1 WLR 1257 (Nicholls J).

³⁰ *Hussain v. Iqbal* [2015] EWHC 1551 (Ch), [37] (Paul Girolami QC, sitting as a High Court Judge), albeit *obiter*. The text of section 20(1) is set out in paragraph 3.11.

³¹ *Don King Productions, Inc v. Warren (Nº. 1)* [2000] Ch 291 (CA).

³² The most important are the Partnership Act 1890, section 20(3) and the Landlord and Tenant Act 1954, section 41A.

³³ “Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.”

³⁴ “The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.”

- 3.6 A brief aside: it may be that a partnership deed will contain a provision intended to close down the risk of subsequent conduct amounting to an implied agreement to vary the terms of the formal deed. An example might be a clause stating that the deed can only be varied by an agreement in signed writing. On the present state of the law, these clauses are of limited value, because the Court of Appeal has held that such a clause can itself be varied or abrogated by an implied agreement: *MWB Business Exchange Centres Ltd. v. Rock Advertising Ltd.*³⁵ An appeal to the Supreme Court is pending, but if I were a betting man, I would say that the appeal will fail: absent the law of formalities, freedom of contract must include freedom to vary a contract in any way the parties see fit.
- 3.7 Where a parcel of land is bought with money belonging to the firm, there is a *rebuttable* presumption that it is an asset of the firm, imposed by section 21 of the 1890 Act.³⁶ This presumption is not rebutted simply by the title being acquired in the name of only one or two partners, as all partnership property has to be vested in some members of the firm, but not necessarily all of them.³⁷ Conversely, the presumption may be rebutted by showing that the partner had bought the property with money either loaned to him by the firm, or drawn by him from the firm: in either case, the money is his at the point of the purchase of the land.³⁸
- 3.8 Whether land acquired by a partner has, in truth, been acquired “on account of the firm, or for the purposes and in the course of its business”,³⁹ is an open question of fact: was there an agreement by the partners that the land was to be treated as partnership property?⁴⁰ Unless

³⁵ [2017] QB 604 (CA).

³⁶ “Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.”

³⁷ *Marshall v. Marshall* [2007] FamLR 48 (OH). This is a Scottish case, but the Act applies in Scotland as it does in England. The presumption is not rebutted this way, even where there are fewer than four partners, so they *could* all be co-owners of the land. The legal title to land can be vested in no more than four persons, as a result of the combined effect of the Law of Property Act 1925, sections 1(6) and 36(2) together with the Trustee Act 1925, section 34. Another example is *Hodson v. Cashmore* [1973] EGD 485 (Brightman J), in which the fact that lease renewal proceedings had been conducted by one partner alone in respect of the firm’s premises did not prevent the new lease from being partnership property.

³⁸ *Smith v Smith* (1800) 5 Ves Jr 189; (1800) 31 ER 539 (Lord Loughborough LC); *Re Lye, ex parte Emly* (1811) 1 Rose 61 (Lord Eldon LC); *Walton v. Butler* (1861) 29 Beav 248 (Sir John Romilly MR).

³⁹ These are the words of the Partnership Act 1890, section 20(1), of which more in paragraph 3.11.

⁴⁰ *Casson Beckman & Partners v. Papi* [1991] BCC 68 (CA); *Don King Productions, Inc v. Warren (Nº. 1)* [2000] Ch 291 (CA).

section 21 applies, because the land was bought with the firm's money, there are no presumptions as to whether any property bought by a partner is to be partnership property.⁴¹

3.9 In order to determine that question of fact, all the circumstances must, inevitably, be taken into account.⁴² These circumstances will include:

3.9.1 The terms of any formal partnership deed or agreement will, of course, be strong evidence if it is drafted in clear terms. It cannot be decisive, however: as section 19 of the 1890 Act makes clear, whatever a partnership may have agreed about any asset, it retains its autonomy to agree something else about it.⁴³

3.9.2 Any course of dealings between the partners in respect of similar assets.⁴⁴

3.9.3 The partners' conduct before and after the acquisition: evidence that land was treated as partnership property can be taken as evidence of the prior agreement, although the cases suggest that the subsequent *use* of land by the firm is a remarkably unreliable guide to whether it is partnership property.⁴⁵ As Lewison LJ remarked in *Geary v. Rankine*:

[15] ... The mere fact that there is a partnership in profits produced by a particular asset does not indicate that the asset itself is partnership property. It is a common place that one partner may own the property in which a partnership business is carried on.

3.9.4 The importance of the asset to the firm's core business activities, although, like all of these factors, this is not a decisive consideration.⁴⁶

⁴¹ *Casson Beckman; Don King Productions.*

⁴² This is a statement of the obvious, but *Harwood v. Harwood* [1991] 2 FLR 274 (CA) is an example.

⁴³ Section 19 is set out in paragraph 3.5. See also *MWB Business Exchange*, as discussed in paragraph 3.6.

⁴⁴ *Hodson v. Cashmore* [1973] EGD 485 (Brightman J).

⁴⁵ *Miles v. Clarke* [1953] 1 WLR 537 (Harman J); *Gian Singh v. Devraj Nahar* [1965] 1 WLR 412 (PC); *Eardley v. Broad* [1970] EGD 646 (Nield J); *Barton v. Morris* [1985] 1 WLR 1257 (Nicholls J); *Geary v. Rankine* [2012] 2 FCR 461 (CA); *Ham v. Bell* [2016] EWHC 1791 (Ch) (HH Judge Mackie QC, sitting as a High Court Judge);

⁴⁶ *Coward v. Phaestos Ltd.* [2013] EWHC 1292 (Ch) (Asplin J). The later appeal was only in respect of the order for costs: [2014] EWCA Civ 1256 (CA).

3.9.5 Also important, but not decisive, is whether the business of the firm can be severed from the land upon which it is conducted. For example, the business might be literally rooted to the land, as in the case of *Waterer v. Waterer*, which concerned a market garden.⁴⁷ Or, it may be that the business could, in fact, be severed from the land, but only with great disruption and cost: thus, in *Jackson v. Jackson*, a workshop which was particularly adapted to the specific trade undertaken by the firm was held to be partnership property.⁴⁸

3.9.6 That said, even where the land and the business are inseparable, the totality of the evidence can show that the land is not partnership property: an extreme case is *Eardley v. Broad*, where a lease of a farm owned by one partner was held not to be partnership property on the true construction of the partnership deed, even though the firm could not carry on business without the farm and the partnership had paid the rent.⁴⁹

3.9.7 It may well be the case that the partnership's accounts and the tax affairs of the individual partners will give a very clear indication as to whether the land has been treated as partnership property.⁵⁰ However, even this evidence may not be decisive if other evidence outweighs the probative value of the partnership accounts.⁵¹

3.10 Where profits from the use of land, which land is *not* itself partnership property, are invested by the partners in acquiring additional land, section 20(3) of the 1890 Act provides for a *rebuttable* presumption that this after-acquired land is held as their personal property, not as partnership property.⁵² This is the opposite of the presumption in section 20(2). In both cases,

⁴⁷ (1873) LR15Eq 401 (Sir William James LJ, sitting alone).

⁴⁸ (1804) 9 Ves Jr 591 (Lord Eldon).

⁴⁹ [1970] EGD 646 (Nield J).

⁵⁰ *Khan v. Khan* [2006] EWHC 1477 (Ch), [56] (Hart J); *Marshall v. Marshall* [2007] FamLR 48 (OH); *Goldup v. Cobb* [2017] EWHC 526 (Ch) (Roger Wyand QC, sitting as a Deputy High Court Judge).

⁵¹ *Barton v. Morris* [1985] 1 WLR 1257 (Nicholls J); *Amin v. Amin* [2009] EWHC 3356 (Ch) (Warren J).

⁵² "Where co-owners of an estate or interest in any land, ... not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase."

the surrounding facts and circumstances can rebut the presumption: as always, the law of partnership has the express or implied agreement of the partners at its centre.

What is the effect of real property being “partnership property”?

- 3.11 Actually, this is simply stated. Once a parcel of land has been designated as a “partnership property”, and for as long as it remains partnership property, the way in which it must be treated by all the partners is controlled (up to a point) by the Partnership Act 1890, section 20(1):

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

Even here, the requirement that partnership property must be held and applied by the partners exclusively for the purposes of the firm is tempered by reference to the provisions of the partnership agreement.

- 3.12 Moreover, the ability of all the partners, including the Property Partners, to deal with partnership property which is held in their name is heavily constrained by those implied duties to act as a fiduciary and in mutual good faith which I referred to in paragraph 2.6.

Partners and land held apart from the partnership:

- 3.13 As Lewison LJ noted in *Geary v. Rankine*, there is nothing intrinsically unusual in some partners holding land apart from the partnership, even if the firm occupies the land.⁵³ It is also possible that there are two partnerships, with different but overlapping membership: one partnership which owns the land as a business venture in and of itself, and another partnership which occupies the land for the purposes of another, separate business.

- 3.14 There is not much else to say here that has not been already said, so in summary:

⁵³ See paragraph 3.9.3.

3.14.1 the test for deciding whether land held by a partner is *not* “partnership property” is the obverse of the test for deciding whether it is; and

3.14.2 Even where a partner holds land apart from the partnership, where it is used or occupied by the firm, he has to act consistently with the partnership deed and his duties of good faith, even though he will not have a fiduciary duty over his own property.⁵⁴

4. THE BASICS 3 - PARTNERSHIP PROPERTY AND RETIRING PARTNERS:

Overview - it is all about the agreements:

4.1 As I have already noted, the relationship between partners is, essentially, driven by first identifying and applying the express or implied partnership agreement between the partners⁵⁵ and secondly by those fiduciary duties of mutual good faith which arise between partners.⁵⁶ As I have also said, section 19 of the Partnership Act 1890 makes it plain that the partners are free to agree that partnership property can cease to be partnership property, if they so wish.⁵⁷

4.2 It follows that what happens to partnership property on the retirement of one or more of the partners may be determined by identifying the express or implied agreement between the partners, including the outgoing partners. One needs to keep that in mind when thinking about everything that follows under this heading.

Changes in the constitution of the partnership:

4.3 Because of section 4 of the Partnership Act 1890, it is legally correct to refer to a partnership as a “firm”.⁵⁸ What is not correct is to treat a firm as an independent legal entity as if it were a company. This is easily done, as many firms adopt a distinctive name, which is unrelated to the names of the current partners, and maintain a separate bank account in the firm name. Changes in the membership of a firm often have no visible effect on its existence or on the continuity of its business; in short, partners may come and go but the firm appears to go on.

⁵⁴ See paragraph 2.6.

⁵⁵ See paragraph 2.4.

⁵⁶ See, in particular, paragraph 2.6.

⁵⁷ See paragraph 3.5.

⁵⁸ Section 4 is quoted in my paragraph 2.3.

4.4 The law takes a different view: in law, the firm is no more than the sum of its constituent partners. It therefore follows that the retirement of an existing partner, or the admission of a new partner, as a matter of law constitutes the dissolution of the old partnership, and the formation of a new partnership.⁵⁹ Lord Lindley expressed the law this way:⁶⁰

The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities.

4.5 Where there is any change in the partners, the members of the “new” firm may quite properly agree with the members of the “old” firm that the partnership should be treated as continuing, with that all existing rights and obligations should be effectively taken over by the new firm: this is sometimes referred to as a “continuing partnership”. However, so far as concerns third parties, such a contractual agreement between the partners is *res inter alios acta*, unless they consent to be bound thereby.⁶¹ There can only be a new partnership.

Changes in the constitution of the partnership and partnership property:

4.6 It does not follow from the creation of a new firm that there *has* to be a change in the status of partnership property belonging to the old firm. Where a partner holds land which is partnership property, its status as such does *not* automatically change when he (or anyone else) ceases to be a member of the firm. Unless there is some agreement which entitles him to take full beneficial ownership of the land, the property remains partnership property. Indeed, if anything, the fiduciary duties of the outgoing partner intensify when he leaves the firm holding partnership property.⁶²

4.7 In other words, mere retirement from the firm does not cause partnership property to cease to be partnership property, even where the property concerned is land the legal title to which is

⁵⁹ *Brace v. Calder* [1895] 2 QB 253 (CA); *Inland Revenue Commissioners v. Gibbs* [1942] AC 402 (HL); *HLB Kidsons v. Lloyd's Underwriters* [2009] 1 All ER (Comm) 760, [16] (HH Judge Mackie QC sitting as a judge of the Division). The Westlaw catchwords for the *Gibbs* case are awesome: “Adultery; Business cessation; Income tax; Incoming partners; Murder; Partnerships; Provocation”.

⁶⁰ The passage is now contained in paragraph 3-04 of the 20th edition. The words were approved, *inter alia*, in *Byford v Oliver* [2003] EMLR 20, [26] (Laddie J).

⁶¹ This is the general position: contracts with the NHS might impose special rules.

⁶² *Simmons Gainsford LLP v. Shah* [2008] EWHC 2554 (Ch) (Sales J): strictly *obiter*.

vested in the outgoing partner. As ever, the question is one of agreement: is there an express or implied agreement that the status of the land should change so that it is no longer partnership property? As section 19 of the Partnership Act 1890 states, the partners have autonomy to agree that property which is held by some or all partners as partnership property is no longer to be treated as such.⁶³

4.8 In the same way that no formalities are needed for land to be declared partnership property, the general law requires no formalities where it is agreed that land ceases to be partnership property. Obviously, if a change in the constitution of the partnership results in an agreement to change the identity of the partner holding the legal title to the land, the usual formalities imposed by the Law of Property (Miscellaneous Provisions) Act 1989 and, in due course, by the Law of Property Act 1925 have to be respected.⁶⁴

4.9 Two old cases with similar facts demonstrate both the highly fact-sensitive nature of the inquiry and the relatively modest effect of formality.

4.9.1 In *ex parte Ruffin*, two partners agreed to dissolve their partnership, one retiring from the business and the other continuing as a sole trader, taking an assignment of the former firm's buildings, premises, stock in trade, debts and effects.⁶⁵ The partner who continued the business was then bankrupted and some of the *former* firm's debts remained unpaid. The creditors argued that the partnership assets which had been assigned to the bankrupt partner should be applied towards meeting those debts, but Lord Eldon LC held that such assets no longer constituted partnership property, the assignments having converted them into the separate property of the bankrupt partner.

⁶³ See paragraph 3.5 above, where this section is quoted and the discussion of *MWB Business Exchange* in paragraph 3.6.

⁶⁴ If the partnership property is leasehold and there is provision for a lease to be surrendered in change in the partnership, the additional formalities for a valid agreement to surrender in the Landlord and Tenant Act 1954, sections 38 and 38A also need to be complied with.

⁶⁵ (1801) 6 Ves Jr 119 (Lord Eldon LC).

4.9.2 The facts of *ex parte Williams* were the same, save that there was neither a written agreement nor an assignment of the relevant assets.⁶⁶ There was, however, circumstantial evidence to show that the former partner who continued the business was intended to take over all the stock and effects of the defunct firm and, on that basis, former partnership property was held by Lord Eldon LC to have become the separate property of the “continuing” partner.

Where there is a formal agreement:

4.10 Well-drafted partnership agreements provide that, in the event of a partner’s death, retirement or expulsion, the other partners will, as against him, become entitled to all the partnership assets for such new firm as they may form. Similar terms can, of course, be negotiated on an *ad hoc* basis, prior to or following a dissolution. It is also possible for the partners to agree to a division of the partnership assets, with a view to carrying on a number of separate businesses.

4.11 In each of these cases, assets which were partnership property will, on a true analysis, become the separate property of one or more of the partners, even though, as between the acquiring partners, the assets immediately become the property of the new firm. Conversely, where a new partnership is formed, which includes the case of a new partner admitted to an existing firm, and the merger of two or more existing firms, assets which were the separate property of one or more of the partners may become the property of the new, enlarged or merged firm. It is all a matter of agreement.

Where there is no formal agreement:

4.12 Difficult questions may arise where an implied agreement to transfer an asset into or out of the partnership is sought to be proved merely by reference to the partners’ conduct. It is always a question of detecting the agreement between the parties, whatever it may be: this can include a tacit agreement not to have an agreement, in which case the usual rules of property law will apply. As ever, it all depends....

⁶⁶ (1805) 11 Ves Jr 3 (Lord Eldon LC).

- 4.13 Take *Barton v. Morris* as an example.⁶⁷ Two partners purchased a farmhouse to use as a guest house, which was conveyed to them as beneficial joint tenants. One partner, Miss. Barton, contributed the greater part of the purchase price and prepared the partnership accounts, showing the property as a partnership asset for tax purposes. After Miss. Barton died, thus terminating the partnership, her administratrix claimed that the beneficial joint tenancy had been severed by the property becoming a partnership asset.
- 4.14 Nicholls J rejected that argument, holding that the inclusion of the property in the accounts was not, in itself, sufficient evidence of an agreement or course of dealing which would alter the status of the property, when other evidence of the dealings with the property was taken into account. The Judge accepted that the totality of the evidence proved that the property was recorded as a partnership asset “for the sake of completeness”, as part of a desire to disclose everything to the Revenue which could be material.
- 4.15 On the other hand, in *Ham v. Bell*, the family farm had been shown as an asset in a number of unsigned sets of annual accounts as a result of an error by the partnership accountants, but this was then corrected in subsequent years.⁶⁸ On the termination of the partnership, an attempt by one of the partners to argue that the earlier accounts demonstrated an implied agreement to bring the farm into the partnership failed: a key factor was that the evidence was that he had seen and approved the *corrected* accounts.
- 4.16 On the third hand, the exclusion of an asset from the balance sheet is more equivocal. A number of cases suggest a practice of omitting certain assets, such as goodwill and rack-rent tenancies with no capital value, from the partnership balance sheet, even though no partner would seek to question their status as partnership property.⁶⁹

⁶⁷ [1985] 1 WLR 1257 (Nicholls J).

⁶⁸ [2016] EWHC 1791 (Ch) (HH Judge Mackie QC, sitting as a High Court Judge).

⁶⁹ Examples include *Anand v Inland Revenue Commissioners* [1997] STC (SCD) 58 (Special Commissioners); *Mehra v. Shah* [2004] EWCA Civ 632; *Castledine v. RSM Bentley Jennison* [2011] EWHC 2363 (Ch), [12] (HH Judge Cooke, sitting as a Judge of the Division).

4.17 That probably just covers the overview, so now I am going to turn to the specific issues and questions I am asked to discuss.⁷⁰

5. **THE JOINT LIABILITY OF PARTNERS WHO ARE NOT NAMED ON A LEASE:**

The issues:

5.1 As I have mentioned above, partners have joint liability imposed on them under the Partnership Act 1890, section 9.⁷¹ Imagine that we have Dr. Pierce, Dr. McIntyre, Dr. Burns and Dr. Winchester, who all practice medicine in partnership,⁷² but only Dr. Burns and Dr. Winchester hold the lease of the practice premises. If Dr. Burns and Dr. Winchester default on the payment of rent, can the landlord pursue Dr. Pierce and Dr. McIntyre?

Analysis -claims in debt:

5.2 The answer is: maybe. If the lease is Dr. Burns' and Dr. Winchester's personal property, held apart from the partnership, then the liability arises in respect of an obligation which does not relate to partnership property. Accordingly, there is no legal basis for suing Dr. Pierce and Dr. McIntyre for the arrears of rent: so far as the landlord is concerned, Dr. Pierce and Dr. McIntyre are mere occupiers of property which is held solely by Dr. Burns and Dr. Winchester.

5.3 However, where the lease is partnership property, the effect of the 1890 Act is that "all partners are liable *jointly* with the other partners ... for all *debts and obligations* of the firm incurred while he is a partner". It follows that the landlord can proceed against Pierce and McIntyre, by reason of the Act, provided it can show the rent to be a debt of the partnership, incurred during their membership thereof.⁷³

5.4 That said, it is not very sensible for a landlord to thus proceed: generally, it is simpler, and therefore cheaper, to sue the Property Partners, as named on the lease, and let them concern

⁷⁰ I have been asked to look at some issues arising on the termination of the partnership. This discussion of the general principles covers most of those issues; the remaining issues are bound up with issues relating to tax, which are way above my pay-grade and tax-band...

⁷¹ This is set out in my paragraph 2.12 above.

⁷² If the reference to these doctors is not now on your Radar, then you're too young to explain it to.

⁷³ This is the general rule with debts arising from contracts made by or on behalf of a firm: see *Bonfield v. Richard Smith* (1844) 12 M&W 405 (Exch Ch) and *Robinson v Geisel* [1894] 2 QB 685 (CA).

themselves with seeking a contribution from their Operative Partners. If, however, there is some doubt that the Property Partners are sufficiently solvent to meet the claim, it would be prudent to join all the partners: the Operative Partners may have a good defence, namely that the lease is not partnership property, but swallowing the costs of that might be better than pursuing the Property Partners to judgment and only then discovering that they have no money: in those circumstances, although the right to make a claim against the other partners on the basis of section 9 is no longer treated as extinguished,⁷⁴ it hands the other partners a potential defence based on abuse of process.⁷⁵

5.5 There is also an additional risk here, which the well-advised landlord should seek to avoid: where there is a claim against joint debtors, a compromise of the claim with only one of them will release all of them, if the compromise has the effect of releasing the debt.⁷⁶ The landlord can avoid this problem, by insisting on a settlement which makes clear that he is not releasing the debt, or any part thereof, but is taking a payment for agreeing not to further pursue the partner he is compromising with, whilst reserving his rights to pursue the others.⁷⁷

5.6 This, of course, puts the partner who wants to settle in a difficult position: if he settles with the landlord, the only protection he has is an agreement that he will not be further pursued by the landlord. If the other partners are then pursued by the landlord for the outstanding debt, depending on his liability to them under the terms of the partnership agreement, the other partners can still join him to the action and seek a contribution from him in respect of the liability,⁷⁸ which is a continuing and joint one. All the partners can then do, is to rely on any terms in the partnership agreement that moderate his liability *inter se*.

⁷⁴ Until the enactment of Civil Liability (Contribution) Act 1978, section 3, entering judgment against one joint debtor extinguished all claims for the same debt against the other joint debtors.

⁷⁵ It can be an abuse of process to start a second claim on a cause of action against a different defendant to that in the first action: *Electra Private Equity Partners v. KPMG Peat Marwick* [2000] BCC 36 (CA).

⁷⁶ *Deanplan Ltd. v. Mahmoud* [1993] Ch 151 (HH Judge Paul Baker QC, sitting as a Judge of the Division).

⁷⁷ *Johnson v. Davies* [1999] Ch 117 (CA); *Sun Life Assurance Society plc v. Tantofex (Engineers) Ltd.* [1999] 2 EGLR 135 (John Martin QC, sitting as a Deputy High Court Judge).

⁷⁸ This claim would either be based on the partnership agreement or the Civil Liability (Contribution) Act 1978.

Analysis -claims in specific performance:

- 5.7 Now let us take another scenario. Imagine that the partnership of Dr. Pierce, Dr. McIntyre, Dr. Burns and Dr. Winchester occupies premises but, as before, only Dr. Burns and Dr. Winchester hold the lease, but as partnership property. The partners agree and use the firm's funds to undertake unauthorised alterations to the premises, much to the annoyance of the landlord. Can the landlord seek an injunction against all the partners and an order for specific performance of the alterations covenant by reinstating the premises?
- 5.8 I have framed this example this way, because Dr. Pierce and Dr. McIntyre cannot be liable on the covenants in the Lease at all, if they are not parties to the lease and the lease is not held as partnership property. They may, in such circumstances, be liable to the landlord for the tort of inducing a breach of contract, but that is another matter.⁷⁹
- 5.9 In this case, the answer is still "yes and no". Because section 9 is engaged by the breach of an obligation by the firm, the landlord can seek an equitable remedy against all the partners. The result would be the same, even if the Property Partners, Dr. Burns and Dr. Winchester, had decided to do the works off their own bat, without reference to their Operative Partners, or indeed *vice versa*. If the landlord is seeking an interim injunction to stop ongoing works, it obviously makes sense to make the claim against all the partners and see whether the Operative Partners dispute whether the lease is a partnership asset.
- 5.10 So far, so good. Where it comes to the claim for specific performance, the claim gets a little more difficult.
- 5.11 It is one thing to enjoin the Operative Partners from carrying out work on Premises held by the Property Partners at the request of the landlord because, as against the landlord, they have no independent rights to undertake work to the premises anyway. When it comes to making them undertake works to the premises held by a lease vested in the Property Partners, the considerations are different because the Partnership Act 1980 section 9 spreads liabilities under

⁷⁹ *Crestfort Ltd. v. Tesco Stores Ltd.* [2005] L&TR 20 (Lightman J) is a well-known example of this which involved an unauthorised sub-letting.

the lease, but not rights.⁸⁰ In those circumstances, the Court may well refuse to exercise its discretion to order specific performance against the Operative Partners, because they may have no independent right to make alterations to the premises.⁸¹

5.12 There is an analogy in *Carpenters' Estates Ltd. v. Davies*, where the seller of land had contracted with a purchaser of part to build an access road on her retained land.⁸² Farwell J explained that he would grant the purchaser an order for specific performance in respect of land she was in legal possession of, but would not have done so if the claim had been made by the vendor against the purchaser over the land to be sold, even if the purchaser was in occupation pending completion. He thought it wrong in principle to order even an equitable owner to undertake work on land he had no title to.

6. LEASE OR LICENCE; PERIODIC TENANCY OR TENANCY-AT-WILL?

The issues:

6.1 Imagine a situation in which all Property Partners have retired, but the premises are still occupied by the Operative Partners. Imagine also that either there is no partnership deed, or that the partnership deed itself is either silent or ambiguous on whether the property is a partnership asset. The Operative Partners wish to assert that they are periodic tenants with the benefit of the Landlord and Tenant Act 1954. What are the factors which identify whether or not that argument will work? Note that there are three interlinked limbs to this argument:

6.1.1 was, or is, the lease “partnership property”;

6.1.2 is there a tenancy at all; and

6.1.3 is there a tenancy to which the 1954 Act will apply?

What is the Partnership Property?

6.2 This is always the first step in any analysis of a property dispute either between partners or between former partners: is the land in question partnership property? As I have already explained, the absence of a *formal* agreement between the parties about the land is anything

⁸⁰ The material text of section 9 is set out in my paragraph 2.12 above.

⁸¹ The terms of the general powers of partners to deal with partnership property in section 20, as set out in my paragraph 3.11 above may be restricted by the terms of the partnership agreement.

⁸² [1940] 1 Ch 160, 164-5 (Farwell J).

but decisive. So, the departure point where there is no formal agreement has to be whether there is a continuing tacit agreement to treat the land as “partnership property”.⁸³ The answer to this question will colour the answers to the next two questions.

Tenancy or licence?

6.3 Starting with the argument as to whether there is a tenancy or not, the leading modern statement of what distinguishes a tenancy from any other right to be in occupation of land is, of course, to be found in the speech of Lord Templeman in *Street v. Mountford*.⁸⁴

There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. To constitute a tenancy **the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments.** The grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier.

The words in bold are mine, and represent the key words of the test. Whilst this is the leading modern statement of the law, it has since been shown to be obviously wrong on two counts:

6.3.1 first, Lord Templeman’s use of the word “possession” obscures as much as it illuminates, because the term “possession” carries with it the concept of *legal* ownership and control.⁸⁵ Read literally, his test amounts to “if you are a tenant, then you are a tenant”. Lord Templeman’s words have been reinterpreted to mean “exclusive physical or factual occupation or control”.⁸⁶

6.3.2 Secondly, the payment of a monetary rent or premium is not necessary either. As long as the occupier is giving, or has given, something of even notional benefit to the landowner, there can be a tenancy.⁸⁷

⁸³ The wide scope of the inquiry is discussed in my paragraphs 3.8 and 3.9 above.

⁸⁴ [1985] 1 AC 800, 818 (HL).

⁸⁵ *JA Pye (Oxford) Ltd. v. Graham* [2003] 1 AC 419 (HL) at [38]-[40], *per* Lord Browne-Wilkinson and [68]-[70] *per* Lord Hope. See also *Akici v. LR Butlin Ltd.* [2006] 1 WLR 201 at [31]-[36] *per* Neuberger LJ (CA).

⁸⁶ *JA Pye (Oxford)* at [61], *per* Lord Browne-Wilkinson and [71]-[72] *per* Lord Hope and [75]-[76] *per* Lord Hutton.

⁸⁷ Law of Property Act 1925, section 205(1)(xxvii); *Ashburn Anstalt v. Arnold* [1989] Ch 1 at 9-10 *per* Fox LJ, overruled on another point in *Prudential Assurance Co. Ltd. v. London Residuary Body* [1992] 2 AC 386 (HL). Rent can include providing a service: for example, the rent in *Montagu v. Browning* [1954] 1 WLR 1039 (CA)

6.4 Leaving those points aside, it is useful to consider rent and term together. There cannot be a tenancy for a term of years uncertain, save for a periodic tenancy or a tenancy at will.⁸⁸ So, unless there is some evidence of the recurring performance of an obligation to the Property Partners by the Operative Partners which could be in the nature of rent, the argument that there is a tenancy is to be marked “not for resuscitation”.

6.5 If there is some recurring payment of something in the nature of “rent”, the argument can proceed to the next stage. As the nature of a periodic payment is often the central issue in the debate as to whether an agreement is a periodic tenancy or a tenancy at will, I shall leave this issue to one side for now.

6.6 Turning now to exclusive occupation, Lord Templeman then explained the methodology by which the Court determined whether the relevant occupier held a tenancy or some other right. The Court must have regard to any document which may confer a right to occupy:⁸⁹

But in my opinion in order to ascertain the nature and quality of the occupancy and to see whether the occupier has or has not a stake in the room or only permission for himself personally to occupy, the court must decide whether upon its true construction the agreement confers on the occupier exclusive possession.

The Court must not be too concerned with the labels used by the parties, such as “licence” or “tenancy”, as Lord Templeman famously observed:⁹⁰

If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.

⁸⁸ comprised an obligation to clean a synagogue.
Lace v. Chantler [1944] KB 368 (CA); *Prudential Assurance Co. v. London Residuary Body* [1992] 2 AC 386 (HL).

⁸⁹ At page 825.

⁹⁰ At page 819.

That said, the Court “should not award marks for drafting”,⁹¹ or be overly impressed with the labels that the parties have used in their agreement: the words used in the document still matter a great deal.⁹²

6.7 Having considered the effect of any material documents as a matter of construction, the court must then look to the reality of the circumstances surrounding the agreement. If there are no documents at all, the court goes straight to this stage: the analysis of the facts. Where there is a document, the court is seeking to ensure that any terms which negative an intention to create a tenancy are genuine, rather than intended to create a sham.⁹³ A sham is where the parties’ documents suggest they are doing one thing, but in reality they are doing another.⁹⁴

6.8 Whether there is a document or not, the court is also looking for some other explanation for the grant of exclusive possession, which is nevertheless inconsistent with the grant of a tenancy. For example, some occupiers can be genuine residential lodgers.⁹⁵ There are cases where there was no intention to create legal relations, such as family arrangements.⁹⁶ There are also cases where the legal relationship was a different one to that of landlord and tenant, such as trustee and beneficiary,⁹⁷ or vendor and purchaser,⁹⁸ or employer and employee.⁹⁹

⁹¹ At page 826.

⁹² *Clear Channel UK Ltd. v. Manchester City Council* [2006] 1 EGLR 27 (CA) per Jonathan Parker LJ. It is, with great respect, very difficult to see how the learned Judge’s comments can stand with the approach on *Street v. Mountford*, beyond an allocation as to where the benefit of the doubt might lie.

⁹³ *Street v. Mountford* per Lord Templeman at page 825. By way of example, see *Aslan v. Murphy* (N^o. 1) [1989] 2 All ER 130 (CA), in which a clause preventing residential occupiers from using the premises for 90 minutes a day was held to be a sham. Examples of the *Street v. Mountford* test being deployed in cases involving non-residential premises include: *Smith v. Northside Development Ltd.* (1988) 55 P&CR 164 (CA); *Essex Plan Ltd. v. Broadminster* (1988) 55 P&CR 164 (Hoffmann J); *Vandersteen v. Agius* [1992] 65 P&CR 266 (CA); *Esso Petroleum Co.Ltd. v. Fumegrange Ltd.* [1994] 2 EGLR 90 (CA); *Hunts Refuse Disposals Ltd. v. Norfolk Environmental Waste Services Ltd.* [1997] 1 EGLR 16 (CA); *National Car Parks Ltd. v. Trinity Development Co. (Banbury) Ltd.* [2001] L&TR 22 (HH Judge Rich QC, sitting as a Judge of the Chancery Division); and *Clear Channel UK Ltd. v. Manchester City Council* [2006] 1 EGLR 27 (CA).

⁹⁴ *Snook v. London and West Riding Investments Ltd.* [1967] 2 QB 786 (CA); *Hitch v. Stone (Inspector of Taxes)* [2001] EWCA Civ 63; *JSC Bank v. Pugachev* [2017] EWHC 2426 (Ch) (Birss J).

⁹⁵ *Allan v. Liverpool Overseers* (1874) LR 9 QB 180 (QBDC).

⁹⁶ *Cobb v. Lane* [1952] 1 TLR 1037 (CA).

⁹⁷ *Gray v. Taylor* [1988] 1 WLR 1093 (CA).

⁹⁸ *Isaac v. Hotel de Paris Ltd.* [1960] 1 WLR 239 (CA).

⁹⁹ *Mayhew v. Suttle* (1854) 4 El & Bl 347.

6.9 In the context of a partnership or a former partnership, this will be the point at which the argument for the Operative Partners is likely to develop complications:

6.9.1 If the land was partnership property until the Property Partners retired from the partnership, then nothing prior to the dissolution of the partnership can be evidence of an implied tenancy, even if the Property Partners had gone out of physical occupation before the partnership was formally ended. There is no tenancy here, because the Operative Partners' occupation will not be legally exclusive but will be a nonexclusive licence, referable to their rights in the ongoing partnership business and the mutual fiduciary duties and duties of good faith.¹⁰⁰

6.9.2 The same is true if the land was not itself partnership property: even there, it seems that each partner occupies pursuant to that same nonexclusive licence, still referable to their rights in the ongoing partnership business and the mutual fiduciary duties and duties of good faith.¹⁰¹ This licence is, it appears, treated as part of the partner's personal property, held apart from the partnership property.¹⁰²

6.9.3 Where the partnership has been terminated, and the land was partnership property, the cessation of the partnership does not entitle the former partners to simply treat it as their own. One has to look to see what, if anything, was agreed, either formally or informally about what would happen to the partnership property. As noted above, the cessation of the partnership, if anything, intensifies the former Property Partners' fiduciary duties in respect of partnership property they hold, so the absence of any discernable agreement means that the property continues to be partnership property and the Operational Partners' occupation to be referable to a continuation of the *status quo*, so they are occupying pursuant to their rights to partnership property.¹⁰³

¹⁰⁰ *Harrison-Broadley v. Smith* [1964] 1 WLR 456 (CA), approved *Bahamas International Trust Co.Ltd v. Threadgold* [1974] 1 WLR 1514 (HL). On partners' duties to each other, see my paragraph 2.6.

¹⁰¹ *Rye v. Rye* [1962] AC 496 (HL); *Harrison-Broadley*; *Bahamas International*.

¹⁰² *Rye v. Rye*; *Harrison-Broadley*; *Bahamas International*

¹⁰³ See my paragraph 4.6 above.

6.9.4 So, it is only where the land in question was held *apart* from the partnership, and that the partnership has been terminated and there is no evidence of an agreement to deal with the ongoing relationship between the former partners in relation to the land that one gets to the traditional landlord and tenant analysis. It is only here that one asks whether it is right to imply a periodic tenancy, to which the 1954 Act applies, which the newly formed partnership of Operative Partners can assert against the now retired Property Partners.

Periodic tenancy or tenancy-at-will?

6.10 Focussing on that last scenario, it is worth stating the obvious: the Landlord and Tenant Act 1954 can apply to a periodic tenancy, but cannot apply to a tenancy-at-will.¹⁰⁴

6.11 Another statement of the obvious worth making here is this: the creation of a landlord and tenant relationship is always a matter of contract, save where a statute like the 1954 Act imposes a relationship. Moreover, the legal nature of the agreement - periodic tenancy or tenancy-at-will - is also a matter of agreement between the parties. In *Javad v. Aqil*, Nicholls LJ made the point this way:¹⁰⁵

As with other consensually-based arrangements, parties frequently proceed with an arrangement whereby one person takes possession of another's land for payment without having agreed or directed their minds to one or more fundamental aspects of their transaction. In such cases the law, where appropriate, has to step in and fill the gaps in a way which is sensible and reasonable. The law will imply, from what was agreed and all the surrounding circumstances, the terms the parties are to be taken to have intended to apply. Thus if one party permits another to go into possession of his land on payment of a rent of so much per week or month, failing more the inference sensibly and reasonably to be drawn is that the parties intended that there should be a weekly or monthly tenancy. Likewise, if one party permits another to remain in possession after the expiration of his tenancy. But I emphasise the qualification "**failing more**". Frequently there will be more. Indeed, nowadays there normally will be other material surrounding circumstances. The simple situation is unlikely to arise often, not least because of the extent to which statute has intervened in landlord-tenant relationships. Where there is more than the simple situation, the inference sensibly and reasonably to be drawn will depend upon a fair consideration of all the circumstances, of which the payment of rent on a periodical basis is only one, albeit a very important one. This is so, however large or small may be the amount of the payment.

¹⁰⁴ *Wheeler v. Mercer* [1957] AC 416 (HL).

¹⁰⁵ At [1991] 1 WLR 1007, 1012. This passage was expressly followed by the Court of Appeal in *Mattey Securities Ltd. v. Ervin* [1998] 2 EGLR 66, 69. See also *Cardiothoracic Institute v. Shrewdcrest Ltd.* [1986] 1 WLR 386 (Knox J).

The emphasis is mine.

6.12 The qualification, “failing more” is of no little importance. The inference or imputation that a tenancy has been created by the acceptance of rent from a third party should only be made where there is no other realistic explanation available. So, in *Marcroft Wagons v. Smith*, the daughter of a statutory tenant by succession of a dwelling-house continued to live in the house after the statutory tenant’s death.¹⁰⁶ In March 1950, the daughter asked the landlords’ agent to have the tenancy transferred into her own name, which he refused, because the landlords would require the house for an employee. However, he accepted a sum from the daughter equal to two weeks’ rent, and she continued thereafter to pay each week the same sum as the widow had paid for rent until September 1950, when possession proceedings were brought. In the Court of Appeal, Denning LJ held that:

... it is no longer proper for the courts to infer a tenancy at will, or a weekly tenancy, as they would previously have done from the mere acceptance of rent. They should only infer a new tenancy when the facts truly warrant it. ... If the acceptance of rent can be explained on some other footing than that a contractual tenancy existed, as, for instance, by reason of an existing or possible statutory right to remain, then a new tenancy should not be inferred.

Thus, for example, it is permissible to adduce evidence that rent was accepted by mistake or accepted as damages for use and occupation.¹⁰⁷ It is also possible to show that the payments were made pursuant to some other legal arrangement, such as an ongoing commercial relationship between the parties, other than a landlord and tenant relationship: see *Mattey Securities Ltd. v. Ervin*, where the payments were made pursuant to a guarantee the parties thought was valid, even though, as a matter of law it was not.¹⁰⁸

6.13 In the case of former partners, even where the land was not partnership property, it seems likely that a continuation of occupation will fall within the “failing more” exception, meaning that even if a tenancy is to be implied, it will at best be a tenancy-at-will. As the most recent case on implied tenancies, *Barclays Wealth Trustees (Jersey) Ltd. v. Erimus Housing Ltd.*, shows, it

¹⁰⁶ [1951] 2 KB 496, per Denning LJ at 506-7 (CA).

¹⁰⁷ See *Clarke v. Grant* [1950] 1 KB 104 and *Westminster City Council v. Basson* (1990) 62 P & CR 953, respectively.

¹⁰⁸ (1999) 77 P & CR 160; [1998] 2 EGLR 66 (CA).

takes an awful lot to prove an implied periodic tenancy: almost every claim by a would-be periodic tenant fails.¹⁰⁹

7. IMPROVEMENTS TO PARTNERSHIP PROPERTY AND EQUITIES:

The issues:

- 7.1 What happens when land occupied by the partners is improved by expenditure by only some partners? Imagine again that we have Dr. Pierce, Dr. McIntyre, Dr. Burns and Dr. Winchester, who all practise medicine in partnership, but only Dr. Burns owns the practice premises, this time as a freehold. The partnership deed grants the partners a licence to use the premises. Over the years, the partnership has funded some improvements to the premises and Dr. Burns has funded others. Dr. Burns now wishes to retire and sell the property to Practice Nurse Houlihan, who hates all doctors and will seek to redevelop the premises. Do the Operative Partners have any arguments in equity?

Analysis:

- 7.2 The formal grant of a licence in the partnership deed is an indication that the premises were Dr. Burns' personal property, held apart from the partnership. However, that is not itself decisive of the open, factual question: were the premises "brought into the partnership" at the outset?¹¹⁰ Nor is the partnership deed determinative of the second, equally open, question of whether the premises have become or ceased to be partnership property.
- 7.3 The fact that the partnership paid for some improvements is a factor indicating the land is partnership property and the fact that Dr. Burns funded others might point the other way: the question might depend on whether the distribution of profits reflected who paid for works. Neither is decisive, as can be seen from two interesting cases:

¹⁰⁹ [2014] 2 P&CR 4 (CA). There is, I think, only one reported case of an occupier succeeding in establishing a periodic tenancy in the last forty years: *Walji v. Mount Cook Land Ltd.* [2002] 1 P&CR 13 (CA), a case on extreme facts.

¹¹⁰ This reflects the language of the Partnership Act 1890, section 20(1) as set out in paragraph 3.11. For authority that the question is an open one, save where the land was acquired with partnership funds, see paragraph 3.8; a list of some relevant factors is set out in paragraph 3.9.

- 7.3.1 In *Ham v. Bell*, improvements to land occupied and farmed by a family farming partnership were all paid for by the partnership, but the Court held that the farm was not partnership property.¹¹¹ Indeed, the Judge found that the improvements benefited the partnership as a whole, by making the land more productive. Although no equitable claim was raised in that case, it would seem possible that such a finding of fact would put paid to any equitable claim, on the basis of no detriment.
- 7.3.2 Much the same factual scenario came before Blackburne J in *Davies v. H&R Ecroyd Ltd.*, where the partnership funded a new milking parlour and associated apparatus, which enhanced the value of the milk quota.¹¹² In rejecting the claim that the milk quota was partnership property, the Judge rejected the value added by the improvements as having any relevance, as the refurbishment was “not exceptional expenditure ... incurred by the partnership over and above what was inherent in running a dairy enterprise on the farm”.
- 7.4 Either way, the existence of the partnership itself, both at the time the improvements are made and at the time when Dr. Burns seeks to retire is a material factor: the mutual duties of good faith prevent Dr. Burns from feathering his nest at the expense of the partnership as a whole and *vice versa*.
- 7.5 Moreover, land which is partnership property does not automatically cease to be partnership property on the dissolution of the partnership: it remains an asset that has to be dealt with as a part of the termination of the existing partnership, even if the other partners decide to carry on in practice together.¹¹³
- 7.6 So, the answer to the questions raised here is the usual one: it all depends:

¹¹¹ [2016] EWHC 1791 (Ch) (HH Judge Mackie QC, sitting as a High Court Judge).

¹¹² [1996] 2 EGLR 5, 8-9 (Blackburne J).

¹¹³ See paragraph 4.6.

7.6.1 on the true nature of the agreement or agreements made between the partners, whether formally or not; and

7.6.2 on the implied duties of good faith between partners imposed both during the continuation of the partnership and, where there is undistributed partnership property, even after it has ended.

7.7 That said, there are two overall points about equities arising between partners. First, because of the mutual duties they owe each other during the continuation of the partnership, it may be very difficult to show that any equity arises independently of that duty. These mutual duties mean that members of a firm probably cannot raise a proprietary estoppel against each other from expenditure made during the partnership on partnership property or property held apart from the partnership.¹¹⁴ It might be different if the expenditure was made at a time *after* the partnership had ceased, even if the status of the premises as trust property had not been resolved.¹¹⁵

7.8 Secondly, another reason that there may be no room for a proprietary equity in this situation is that the real remedy between the partners, or former partners, lies in the jurisdiction of the court to take account of that expenditure when a partnership is dissolved.¹¹⁶ In another case of a partnership funding improvements to a property held by only some partners, *Faulks v. Faulks*, Chadwick J said:¹¹⁷

The principle in those cases appears to me to be this: that where partnership money has been expended in maintaining or enhancing the value of land which is the exclusive property of one partner, then in taking partnership accounts on a dissolution it may be fair and right to make some allowance to the partnership against that partner for the money which has been so expended or, perhaps, for a portion of the enhanced value. In making such an allowance the court does not, I think, treat the land or anything on it as an asset of the partnership which is to be valued as such; rather, it adjusts the accounts between the partners by debiting the account of the partner who benefited from the expenditure in order to do what is just and equitable.

¹¹⁴ This is the view of the editor of *Lindley & Banks*, at paragraph 18-44.

¹¹⁵ See *Strover v. Strover* [2005] EWHC 860 (Ch) (Hart J).

¹¹⁶ This is another big issue beyond the scope of this paper.

¹¹⁷ [1992] EGLR 9, 17 (Chadwick J). This is not a new principle, just a convenient restatement of existing law: see *Burdon v. Barkus* (1862) 4 De GF&J 42 (CA); *Pawsey v. Armstrong* (1881) 18 ChD 698 (Kay J) and *Miles v. Clarke* [1953] 1 WLR 537 (Harman J).

Blackburne J followed this in *Davies v. H&R Ecroyd Ltd.*, adding:¹¹⁸

That principle is not in doubt. It arises where a partnership expends money for the benefit of a partner in circumstances where justice requires that, in taking the partnership accounts, some allowance should be made to the partnership against that partner for some or all of the amount of the expenditure or of the enhanced value brought about by the expenditure.

As the first extract shows, whether or not an adjustment should be made is ... a question of what is just and equitable on all the facts.

8. ALIENATION OF LEASES AND PARTNERS AS GUARANTORS:

The issues:

8.1 Imagine that Dr. Pierce, Dr. McIntyre, Dr. Burns and Dr. Winchester all practise medicine in partnership. Dr. Burns and Dr. Winchester hold the lease of the practice premises, with the benefit of guarantees from Dr. Pierce and Dr. McIntyre. Dr. Burns and Dr. Winchester wish to retire and assign the lease to Dr. Pierce and Dr. McIntyre. The landlord objects, on the basis of the effect of the Landlord and Tenant Covenants Act 1995: is it reasonable for the landlord to do so?

Analysis:

8.2 The core of the problem is this:

8.2.1 Under the Landlord and Tenant Covenants Act 1995, section 5(2), a tenant is automatically released from all liability following an assignment of a lease to which the Act applies.

8.2.2 There is one exception: the tenant may choose voluntarily to enter into an Authorised Guarantee Agreement, under section 16, if it is reasonable for the landlord to ask for one.

¹¹⁸ [1996] 2 EGLR 5, 8-9 (Blackburne J).

8.2.3 This is the only route by which a tenant's liabilities on a lawful assignment can survive an assignment, as any other method of imposing liability is rendered void by section 25.

8.2.4 Therefore:

8.2.4.1 An existing or contracting guarantor of the original tenant cannot validly commit himself, in advance, to guarantee the liability of a future assignee or assignees. Nor can he validly commit himself, in advance, to guarantee the liability of any further assignees of the immediate assignee.

8.2.4.2 An existing or contracting guarantor of the original tenant cannot choose, even wholly voluntarily, to directly guarantee the liability of the immediate assignee from the tenant whose liabilities he has guaranteed, because his motives and intentions in giving the guarantee are irrelevant.

8.2.4.3 Notwithstanding the foregoing, a guarantor of an assignor tenant can validly give a subsequent guarantee of the liability of a further assignee, not the immediate one, provided he has not contractually bound himself to do so.

8.3 This analysis was adopted by the Court of Appeal in *K/S Victoria Street v. House of Fraser (Stores Management) Ltd.*¹¹⁹ So far, so good. However, the Court lobbed in this bombshell:

[37] ... even where it suited the assignor, the assignee and the guarantor that the assignee should have the same guarantor as the assignor (because, for instance, the assignor and the assignee had the same parent company, or shared a common bank, which was the guarantor), they could not offer that guarantor. **It would also appear to mean that the lease could not be assigned to the guarantor, even where both tenant and guarantor wanted it.** Lord Nicholls said, in *London Diocesan Fund*, in [16], that section 5 was "intended to benefit tenants ... That is [its] purpose. That is how [it is] meant to operate". So, too, section 24(2) is meant to benefit guarantors. ...

¹¹⁹ [2012] Ch 497 (CA). The judgment is a judgment of the Court (Lord Neuberger MR, Thomas and Etherton LJ), "to which all members have made substantial contributions": see paragraph [1]. The above analysis appears in paragraphs [22]-[24], [41]-[44] and summarised in paragraph [53].

My emphasis. Does that sentence mean that, if a tenant assigns to his guarantor, the lease is rendered void? Does it mean that the assignment is void? The Court of Appeal did not say.

8.4 It fell to Miss. Amanda Tipples QC, sitting as a Deputy Judge of the High Court in *EMI Group Ltd. v. O&H Q1 Ltd.* to work it out.¹²⁰ She held that the whole thrust of the Act was that no person should remain liable under the covenants in a tenancy after the tenant with whose liability he was associated had been released from liability. In practical terms, the guarantor was not released from the covenants if he himself assumed those liabilities directly, as tenant. Thus, an assignment to a guarantor was rendered void by the wide anti-avoidance provision in section 25.

8.5 Miss. Tipples' decision has not been without its detractors,¹²¹ and there is a detailed paper to be written as to whether her decision is right or wrong. For the purposes of this paper, I only have space to say that I respectfully agree with Miss. Tipples. To my mind, the device of insisting on an assignment to a guarantor is exactly the type of mischief the anti-avoidance provision was aimed at. As the decision in *K/S* then shows, the fact that any given proposed transaction might be the *bona fide* desire of all parties to enter into it for their own freely chosen aims is immaterial. If a transaction *can* be a device to get around the Act, section 25 makes it void.

8.6 Even if one assumes that Miss. Tipples might be wrong, a landlord who refuses consent to an application to assign to an existing guarantor is acting well within his discretion in declining to take the risk that she is wrong.¹²² A refusal of consent is clearly lawful.

8.7 An assignment between partners, where the intended assignees are currently guarantors of the intended assignors is obviously caught by the Act, as construed in *K/S*. There is nothing in the language of the Act to indicate there to be any exceptions to the rule of release.

¹²⁰ [2016] Ch. 586 (Miss. Amanda Tipples QC, sitting as a Deputy Judge of the High Court).

¹²¹ See, for instance, [2016] Conv. 387 (Kester Lees Esq.) and [2017] Conv. 330 (Paul Clark Esq.).

¹²² *Shanly v. Ward* (1913) 29 TLR 714 (CA); *Ashworth Frazer Ltd. v. Gloucester City Council* [2001] 1 WLR 1280, *per* Lord Bingham at [5].

8.8 Nor does there seem to be any legitimate way around this rule. An agreement that, say, Dr. Burns and Dr. Winchester would assign to Dr. Hunnicutt, who is not a guarantor, who would then assign to Dr. Pierce and Dr. McIntyre is itself an agreement which would fall foul of section 25, as in reality there was a pre-existing agreement under which the guarantors would assume the obligations of the tenants whose liability they had guaranteed. If those assignments “just happened”, the landlord successors may have good grounds to cry “sham” and render the assignments void under section 25.¹²³

8.9 It is probably the case that the landlord could even cry “sham” and pursue Dr. Burns and Dr. Winchester for breaches of the lease following an assignment, *even if* he was fully aware of the device or consented to the assignment carelessly, without realising the effect of section 25. Although the effect of participating in a sham can include getting stuck with the consequence of the sham,¹²⁴ this is *not* the case where a statute renders the transaction void: if Parliament says a transaction is void, no agreement or equity can give effect to it.¹²⁵ Void means void.

9. **UNAUTHORISED ASSIGNMENTS BETWEEN PARTNERS:**

The issues:

9.1 Now imagine this: Dr. Burns and Dr. Winchester hold a lease of the practice premises but, on their retirement assign the lease to their partners, Dr. Pierce and Dr. McIntyre without the landlord’s consent. In this case, there is no guarantee. Who is the tenant? Can Dr. Pierce and Dr. McIntyre get a declaration that the landlord has unreasonably withheld consent without the assistance of Dr. Burns and Dr. Winchester? If the landlord forfeits, can they seek relief from forfeiture?

Analysis:

9.2 In this situation, there are two reasonably simple guiding principles:

¹²³ The classic cases of sham include *Snook v. London and West Riding Investments Ltd.* [1967] 2 QB 786 (CA); *Hitch v. Stone (Inspector of Taxes)* [2001] EWCA Civ 63, [2001] STC 214 and *Secretary of State for Business, Enterprise and Regulatory Reform v. Neufeld* [2009] 3 All ER 790 (CA). Section 25 would bite, as a sham transaction takes effect as the “real” transaction.

¹²⁴ *Hilton v. Plustitle Ltd.* [1989] 1 WLR 149 (CA).

¹²⁵ *Yaxley v. Gotts* [2000] Ch 162 (CA).

- 9.2.1 The common law and, unless the contrary is stated by any given act, statute law treat the “tenant” as being the person in whom, from time to time, the legal title is vested.¹²⁶
- 9.2.2 An unlawful assignment is, nevertheless, effective to vest the legal estate in the assignee, in law and in equity,¹²⁷ provided it satisfies the law of formalities.¹²⁸
- 9.3 It therefore follows that, where Dr. Pierce and Dr. McIntyre are the assignees in law:
- 9.3.1 they are “the tenants”;
- 9.3.2 they are the persons on whom the section 146 notice must be served by the landlord;
- 9.3.3 they are entitled to seek relief from forfeiture;
- 9.3.4 if appropriate, they are entitled to seek a declaration that the landlord has unreasonably withheld his consent to the assignment,¹²⁹ and
- 9.3.5 they do not need any co-operation from Dr. Burns and Dr. Winchester.
- 9.4 Where the lease is registered land, there may be a “registration gap” during which the lease remains registered in the names of Dr. Burns and Dr. Winchester, pending the registration of

¹²⁶ On the common law, see *Brown & Root Technology Ltd. v. Sun Alliance and London Assurance Co.Ltd.* [2001] Ch 733 (CA) *Stodday Land Ltd. v. Pye* [2016] 4 WLR 168 (Norris J) and *Sackville UK Property Select II (GP) N^o.1 Ltd. v. Robertson Taylor Insurance Brokers Ltd.* [2018] EWHC 122 (Ch) (Fancourt J) as examples. On statutory regimes, see *Pearson v. Aloy* [1990] 1 EGLR 114 (CA) as an example where equitable ownership is disregarded and *Scribes West Ltd. v. Relsa Anstalt (N^o.3)* [2005] 1 WLR 1847 as an example where the statute regards equitable ownership.

¹²⁷ *Old Grovebury Manor Farm Ltd. v. W Seymour Plant Sales and Hire Ltd. (N^o.2)* [1979] 1 WLR 1397 (CA), as applied, *inter alia*, in *Fuller v. Judy Properties Ltd.* (1992) 64 P&CR 176 (CA) and *Sanctuary Housing Association v. Baker (N^o.1)* (1998) 30 HLR 809 (CA).

¹²⁸ An assignment of a legal estate must be by deed:

¹²⁹ As the jurisdiction to grant declarations is an equitable one, Dr. Pierce and Dr. McIntyre would have standing to bring a claim for a declaration that consent had been unreasonably withheld, even if they were only the tenants in equity. The effect of the Landlord and Tenant Act 1954, section 53, is merely to confer jurisdiction on the County Court comparable to that of the High Court.

the assignment.¹³⁰ In the registration gap, Dr. Burns and Dr. Winchester will remain the tenants in law but Dr. Pierce and Dr. McIntyre will be the tenants in equity, with Dr. Burns and Dr. Winchester holding the legal title on bare trust for them.¹³¹

9.5 Here, the equitable owners will require their trustees to take steps to protect the trust property in dealing with the receipt of any notices and any claim for forfeiture. The equitable owners can compel the legal owners to take steps to protect the trust property, including making a claim for relief from forfeiture.¹³² Their ability to require the legal owners to act is now brought to bear by the Trusts of Land and Appointment of Trustees Act 1996.

9.6 On top of those rights, Dr. Pierce and Dr. McIntyre as equitable owners still may have rights to require Dr. Burns and Dr. Winchester to preserve the lease by reason of their duties as former partners still holding partnership property: it all depends on what the parties have agreed as to *when* the lease ceases to be partnership property.

10. UNCONTESTED LEASE RENEWALS UNDER THE 1954 ACT:

The issue:

10.1 Imagine Dr. Pierce, Dr. McIntyre, Dr. Burns and Dr. Winchester are continuing in partnership with each other, but only Dr. Burns and Dr. Winchester hold the lease of the practice premises. They are winding down to retirement, so they do not want a renewal lease pursuant to the Landlord and Tenant Act 1954. How does that affect the rights of Dr. Pierce and Dr. McIntyre? Let us also assume that, for some reason, the partners do not or cannot assign the lease to Dr. Pierce and Dr. McIntyre, so that they can renew as tenants in their own right.

¹³⁰ Land Registration Act 2002, section 27.

¹³¹ *Lysaght v. Edwards* (1876) 2 ChD 499 (Sir George Jessell MR); *Rayner v. Preston* (1881) 18 ChD 1 (CA); *Capital Finance Co.Ltd. v. Stokes* [1969] 1 Ch 261 (CA) and *Jerome v. Kelly (Inspector of Taxes)* [2004] 1 WLR 1409 (HL).

¹³² *Clarke v. Ramuz* [1891] 2 QB 456 (CA); *Golden Bread Co. v. Hemmings* [1922] 1 Ch 162 (Sargant J); *Englewood Properties Ltd. v. Patel & Cornberry Ltd.* [2005] EWHC 128 (Lawrence Collins J).

Analysis:

- 10.2 The basic position under the 1954 Act is that the only persons entitled to operate the Act are the persons in whom the legal title to the relevant lease and reversion are vested: no one else. It is, therefore, the occupation of the premises by the tenant in law for the purposes of its business which drives both the statutory continuation tenancy under section 24 and the right to a renewal lease under section 29. As Nourse LJ observed in *Pearson v. Aloy*, "The Act would be unworkable if it were otherwise".¹³³
- 10.3 There are, however, two statutory exceptions to the basic provision, which relate to trusts (section 41) and partnerships (section 41A). For present purposes, I shall just consider the position of a partnership under section 41A.
- 10.4 Section 41A allows partnerships to operate the Act in a way which would not otherwise be permitted, but *only* where the tenants conduct their business through a partnership. Indeed, section 41A only operates in very limited circumstances. These circumstances are that, on the termination of the current tenancy:
- 10.4.1 there must be a tenancy, which is held jointly by two or more persons;
- 10.4.2 the property comprised in the tenancy must be or include premises occupied for the purposes of a business;
- 10.4.3 that business (or some other business) must, at some time during the existence of the tenancy, have been carried on in partnership by all the persons who were then the joint tenants (either alone or with others) and the tenancy must at that time have been partnership property;

¹³³

At 115. Bingham LJ agreed; there was no third member of the Court. see also *Prudential Assurance Co.Ltd. v. Eden Restaurants (Holborn) Ltd.* [2000] L&TR 480, 485 per Mummery LJ (CA). Mance and Stuart-Smith LJJ agreed.

10.4.4 the business for the purposes of which the property is now occupied must now be carried on by one or some of the original joint tenants (although not necessarily in partnership); and

10.4.5 none of the *other* original joint tenants must now be in occupation in right of the tenancy, carrying on his own, separate business.

10.5 Going back to the example, say the lease was granted to Dr. Burns and Dr. Winchester in 2008, for a ten-year term. At the time, they were in partnership with Dr. Hunnicutt, and the lease was partnership property. In 2014, Dr. Hunnicutt decided to retire from the partnership and move to Korea, so the partnership then extant was dissolved and the new, now familiar, four-doctor partnership entered into.

10.6 If all four partners are still in occupation and practising together in partnership, Dr. Burns and Dr. Winchester can seek a lease renewal in their own right, as tenants in occupation for the purposes of a business carried on by them, in partnership with Dr. Pierce and Dr. McIntyre. Indeed, they can do that even if the lease was never partnership property.

10.7 When all four current partners are in occupation, section 41A(2) additionally *entitles* all four of them to be the “tenant” for the purposes of serving a section 26 Request under the Act and section 41A(6) also *entitles* them to make an application for a renewal lease and have it granted to them all, even if the lease is not the partnership property of the current partnership.¹³⁴ However, to take advantage of that, all of the partners who are in occupation for the purposes of the partnership business must act in concert.¹³⁵ So:

¹³⁴ This is because it was partnership property during the previous partnership of Dr. Burns, Dr. Winchester and Dr. Hunnicutt.

¹³⁵ *Lie v. Mohile* [2014] 2 P&CR 13 (CA).

10.7.1 If any partner is in occupation for the purposes of the partnership business, but does not want to be a tenant under the lease, his refusal to co-operate is fatal to reliance on section 41A.¹³⁶

10.7.2 If, say, Dr. Burns has already retired from practice and no longer occupies the premises for the purposes of the partnership's business, then:

10.7.2.1 Dr. Winchester can unilaterally request that the renewal lease be granted to himself alone or

10.7.2.2 Dr. Winchester can ask for the lease to be granted jointly to himself with the other Operative Partners, Dr. Pierce and Dr. McIntyre, provided that they agree to this.

10.7.3 If Dr. Burns and Dr. Winchester have *both* retired from practice, so that they are no longer in occupation for the purposes of a business carried on by the practice:

10.7.3.1 section 41A cannot be relied upon; and so

10.7.3.2 because Dr. Pierce and Dr. McIntyre are not the tenants, the lease will not have the protection of the 1954 Act.

11. CONTESTED LEASE RENEWALS UNDER THE 1954 ACT AND "GROUND (G)":

The issue:

11.1 Lastly, imagine that Dr. Pierce, Dr. McIntyre, Dr. Burns and Dr. Winchester are the present freeholders of the practice premises, and have sublet an area to Dr. Hunnicutt, who has returned from Korea and is practising oriental medicine on his own account. The partners wish to terminate his tenancy by relying on the "own occupation" ground, Ground (g).

Analysis:

11.2 If the current partners have been the freeholders for more than a period of five years, which period ends with the termination of Dr. Hunnicutt's tenancy, then there is no problem. However, what if the freehold was originally held by Dr. Burns and Dr. Winchester, but the legal title was

¹³⁶ The unco-operative partner may have issues to address by reason of the mutual duties of partners.

transferred to all four partners when Dr. Pierce and Dr. McIntyre joined the partnership two years ago?

11.3 In that case, there may be a problem. Section 30(2) of the 1953 Act prevents a landlord from relying on Ground (g) if “the interest of the landlord ... was purchased or created” within that five-year period. There are three elements which need examining here: “the interest of the landlord”, “purchased” and “created”.

11.4 The reference to the “interest of the landlord” and “created” are best considered together. The “interest of the landlord” has been interpreted as meaning the estate or interest in land which the landlord holds, which in this scenario is the freehold.¹³⁷ It is “created” when that freehold title first comes into existence, not when the current landlords acquired it.¹³⁸

11.5 In *HL Bolton (Engineering) Co.Ltd. v. TJ Graham & Sons Ltd.*, Denning LJ concluded that the word “purchased” in section 30(2) has.¹³⁹

... the same meaning as in the Rent Acts. It has its popular meaning of buying for money and not the technical legal meaning of acquisition otherwise than by descent or escheat.

In *Frederick Lawrence Ltd. v. Freeman Hardy & Willis Ltd. (N^o.1)*, Romer LJ added to that definition, saying:¹⁴⁰

... “Money” in this context is not confined to cash in its strict sense, for a man who bought something and paid for it by cheque would popularly be said to have bought it for money.

11.6 Going back to the example, whether or not the current partners can rely on Ground (g) depends on whether the transfer of the freehold, considered in conjunction with any associated new

¹³⁷ *Frederick Lawrence Ltd. v. Freeman Hardy & Willis Ltd. (N^o.1)* [1959] Ch 731 (CA).

¹³⁸ *Frederick Lawrence* at 743 per Romer LJ. This was followed in *Artemiou v. Procopiou* [1966] 1 QB 878, 888, where Danckwerts LJ said, “In my view, ‘the interest of the landlord’ means the interest of the landlord in the holding from the time when it originally arose by purchase or creation” and again in *Morar v. Chauhan* [1985] 1 WLR 1263 (CA).

¹³⁹ *HL Bolton Engineering Co.Ltd. v. TJ Graham & Sons Ltd.* [1957] 1 QB 159, 170 (CA). Hodson and Morris LJ agreed.

¹⁴⁰ At 744-5. *Inland Revenue Commissioners v. Gribble* [1913] 3 QB 212, 218 (CA).

partnership agreement between the current partners, caused the freehold to be “bought for money”. If it was, then Dr. Hunnicutt is saved by the five-year bar. If not, he will have to fight the partners on Ground (g).

12. CONCLUSIONS:

12.1 To be honest, I think I have said enough in my opening remarks to identify the big “take-away” points from this paper: these issues usually turn on the agreement and the duties the law imposes on partners. I also think that, if you read any more about Dr. Pierce from me, you’ll be driven to drinking homemade hootch...



N. TAGGART
12th April 2018

Landmark
CHAMBERS

ntaggart@landmarkchambers.co.uk

www.landmarkchambers.co.uk

© Nicholas Taggart, 12.iv.18



This paper is made available for educational purposes only. The views expressed in it are those of the author and are expressed in a manner intended to both entertain and inform. The contents of this paper do not constitute legal advice and should not be relied on as such advice. The author and Landmark Chambers accept no responsibility for the accuracy and/or continuing accuracy of the contents.