Neutral Citation Number: [2024] EWCA Civ 605

Case No: CA-2024-000114

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Chancery Division)
NICHOLAS THOMPSELL (sitting as a Deputy High Court Judge)
[2023] EWHC 3028 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

LORD JUSTICE ARNOLD
LADY JUSTICE ANDREWS
and
LORD JUSTICE NUGEE

- -

Between :

JASWINDER SINGH BAHIA	**Claimant/ Respondent**
- and –	
(1) INDERDEEP SINGH SIDHU (as personal representative of the Estate of TARA SINGH SIDHU) **(2) A STAR LIQUOR MART LTD**	**Defendants/ Appellants**
-and between -	
(1) INDERDEEP SINGH SIDHU (as personal representative of the Estate of TARA SINGH SIDHU) **(2) SATPAL KAUR SIDHU (in her personal capacity and as personal representative of the Estate of TARA SINGH SIDHU)**	**Part 20 Claimants/ Appellants**
- and –	
(1) JASWINDER SINGH BAHIA **(2) BALIBER KAUR BAHIA**	**Part 20 Defendants/ Appellants**

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- -

Peter Knox KC and John Carl Townsend (instructed by **Anthony Gold Solicitors**) for the **Appellants**
Robert-Jan Temmink KC and Gabriel Buttimore (instructed by **Hill Dickinson LLP**) for the **Respondents**

Hearing date: **8 May 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3rd June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

Introduction

1. When a business partnership is dissolved, on the winding up of its affairs, each partner is entitled to receive his or her proportionate share of the realised value of the partnership assets after the partnership liabilities have been discharged. To that end, after the conclusion of any necessary inquiries, an account will be taken of the assets and liabilities, including any liabilities of the partners to and from the partnership. The value of the assets will be realised and the proceeds applied in the first instance to settle the partnership debts. If any of the assets is incapable of being sold, then its value will be brought into account by the partner who retains it. Any surplus will be distributed between the partners pro rata to their respective partnership interests.

2. Sometimes the partners will agree how the assets are to be valued and distributed or accounted for between them, and when they do, the court will give effect to that agreement. But sadly, all too often a partnership will terminate in circumstances as acrimonious as many divorces. In cases of that nature (of which this is a paradigm example) the prospects of the former partners being able to agree on anything are fanciful. In the absence of agreement, the court has to do its best to achieve a fair outcome, which involves seeking to maximise the realised value of the partnership assets for the benefit of all the former partners.

3. The way in which this is normally achieved, if the assets are capable of being sold, is by directing a sale in the open market, usually at auction, but sometimes by private treaty. In this case, Mr Nicholas Thompsell, sitting as a Deputy High Court Judge ("the Judge"), departed from that practice, and instead directed the outright transfer to one of the partners of four of the properties owned by the partnership, ("the Schedule A properties") treating him as having received the higher of the values ascribed (or to be ascribed) to each property by surveyors and an expert valuer.

4. The Appellants (to whom I shall refer, as in the court below, as "the Sidhus") did not seek a stay of execution, though they did seek an order for expedition of the hearing of the appeal. The Judge's order was executed without waiting for the outcome of the application for permission to appeal on the papers. On 26 January 2024, Lewison LJ directed that the application for permission to appeal against that aspect of the Judge's order be adjourned into court with the appeal to follow if permission were granted. He accepted that a degree of expedition was desirable, but refused to direct that this case should take precedence over other appeals. He subsequently permitted the Respondent ("Mr Bahia"), the partner to whom the Schedule A properties were transferred, to adduce in evidence a witness statement from his son which sets out what happened to those properties in the period between the date the order was sealed and 12 March 2024 (the date of that statement).

5. The issue for us is not, as might at first appear, whether there are circumstances which would justify an appellate court in interfering with an evaluative judgment. It is whether the Judge erred in law. For the reasons I shall explain, I have concluded that he did. Although I have no doubt that the Judge considered his solution to be both pragmatic and fair, it was not in accordance with established legal principles, and his justification for adopting it was based upon irrelevant considerations.

6. There may be circumstances in which a realisation of the assets in the open market is not feasible or would produce an unjust outcome, but this was not that type of case. Indeed, the Judge himself accepted that selling the properties at auction was workable and could be done without causing unfairness to Mr Bahia, the surviving partner who wished to acquire them. In the light of that assessment, there was no basis for departing from the normal practice, let alone for making an order in the terms that he did. In those circumstances, I would grant permission to appeal and allow the appeal.

Background

7. It is unnecessary to set out the factual background in detail; the full history of the dispute between the parties is to be found in the judgment of Joanna Smith J. [2022] EWHC 875 (Ch), which preceded the judgment and order giving rise to this appeal. The following summary will suffice for the purposes of this judgment.

8. Mr Bahia and the late Mr Tara Singh Sidhu ("Mr Sidhu") formed a partnership in 1972 ("the Partnership") which, over the years, acquired a sizeable investment property portfolio comprising both residential and retail premises, situated mostly in and around Greater London. In 1976 the partners formed a company, A Star Liquormart Ltd. ("ASL"), in which they were equal shareholders and directors, and which was treated as a Partnership asset. ASL carried on an off-licence business from one of the Partnership properties, 8 King Street, Southall, until March 2020. It was joined as second defendant to these proceedings for enforcement purposes, and has never taken any active part in them.

9. The Partnership was a partnership at will, and it was dissolved on 28 October 2016. Mr Bahia and Mr Sidhu were equal partners, and thus each was entitled to 50% of the net proceeds of a winding up.

10. In 1990 Mr Bahia and Mr Sidhu and their respective wives entered into a second partnership, known as "the Greatway Partnership". That partnership was dissolved on 20 November 2018, which coincidentally was the date on which Mr Sidhu died (notice of dissolution under section 32 of the Partnership Act 1890 had already been served.) This appeal is not directly concerned with the Greatway Partnership.

11. The relationship between Mr Bahia and Mr Sidhu had begun to deteriorate in around 2007/2008, when each began to harbour suspicions about the other in respect of the collection of and accounting for rental income from Partnership properties, and the unauthorised use of Partnership monies. The relationship between the two families had irretrievably broken down by 2012, long before the dissolution of the Partnership. For many years, no proper partnership accounts were drawn up; the last set of signed accounts for the Partnership property were signed in April 2011. The record-keeping in relation to both parties was described by Joanna Smith J. as "wholly inadequate."

12. The underlying legal proceedings had already been commenced by Mr Bahia before Mr Sidhu died. He sought, among other matters, declarations as to the existence and dissolution of the Partnership, an order for the taking of a dissolution account, an order for payments out to or in by each party as were found to be due on the taking of such account, an order that the affairs of the Partnership be wound up, and "such directions as to the sale under Court direction of the assets of the Partnership (including to the parties or either of them) as the Court thinks fit."

13. On 8 November 2019, Chief Master Marsh gave summary judgment confirming the existence and dissolution of both partnerships. He ordered that both partnerships be wound up and that there would be the taking of a dissolution account and such inquiries as may be necessary, with the scope of those inquiries to be determined at a separate hearing. The court subsequently ordered a trial of 17 separate inquiries arising in the dispute, some of which were resolved and others adjourned before the trial took place.

14. Following the trial of the remaining issues in January and February 2022, Joanna Smith J. resolved the disputed matters substantially in favour of the Bahias and against the Sidhus. She was highly critical of the evidence of Mrs Satpal Kaur Sidhu and Mr Inderdeep ("Andy") Sidhu, respectively the wife and son of the late Mr Sidhu, who are the personal representatives of his Estate, and largely accepted the evidence of Mr Bahia, whom she found to be an honest witness. She appointed a Receiver and manager over all the assets of the two partnerships, and directed a hearing for the taking of a dissolution account of the Partnership from 6 April 2011. She subsequently directed that at that hearing, the court would determine, among other matters:

> "whether the properties of the Partnership should be sold or whether they should be dealt with, or disposed of, in a different manner ..."

15. By the time that hearing took place before the Judge on 2 November 2023, the amount owed by Mr Sidhu's Estate to the Partnership in consequence of the order of Joanna Smith J. (including accumulated interest) was around £3.6 million, and there was also an indebtedness to Mr Bahia personally of around £50,000. Interest continued to run on both debts at the judgment rate of 8%. As the Judge recorded at [5], the Sidhus contended that they did not have the liquid resources to pay the judgment debts unless and until there was a disposal of the Partnership assets and a distribution of the net proceeds of the winding up of the Partnership. They therefore proposed that the Partnership properties be put up for sale at auction.

16. This state of affairs had arisen because, apart from the unrealised shares in the two partnerships, all the assets in Mr Sidhu's Estate, which included eight unencumbered investment properties, had been distributed in 2020. As a result, all the assets from which the Estate might otherwise have satisfied the judgment debts were in the hands of Andy Sidhu, or companies which he controlled. Mr Bahia could have pursued the Executors, but the obvious means of discharging the indebtedness would be to take it out of the Estate's share of the Partnership. It is not in dispute that the value of the Partnership assets is in excess of £11.5 million, and that the Estate's half share on a final taking of the Partnership accounts would be sufficient to meet the indebtedness.

17. On 23 May 2023, Mr Bahia made an application seeking an interim transfer to him of sufficient of the Partnership properties "to restore him to the position he would have been in but for the Sidhus' stripping of the partnership assets". This application fell to be determined by the Judge on the same occasion. Mr Bahia complained that a sale of the properties in the open market would be unfair to him and constitute a very substantial advantage to the Sidhus, because in consequence of the retention of the partnership money that Mr Sidhu had taken but failed to restore, they were in a far better financial position to acquire the Partnership properties than he was.

18. The Partnership properties had been valued by Alexander Lawson Surveyors Ltd (the firm which has been managing the properties on behalf of the Receiver) in the summer of 2022, on the instructions of the Receiver. Mr Bahia proposed that two properties which, on the basis of the Alexander Lawson valuation reports, were together worth around £3.2 million, be transferred to him immediately at those valuations.

19. At the time of the hearing, there were ten properties in the Partnership property portfolio. These are itemised in Schedules A and B to the Judge's order of 30 November 2023, in which the value derived from the Alexander Lawson valuation reports is ascribed to each of the Schedule A properties. The Schedule A properties are:

    1. 44-48 King Street Southall (value £2,000,000)

    2. 99-101 High Road East Finchley (value £1,625,000)

    3. 47 Stroud Green Finsbury Park (value £750,000)

    4. 2/2a The Broadway, Ealing (value £1,200,000).

    The total value ascribed to the Schedule A properties is £5,575,000. It will readily be seen that on those figures, properties 1 and 2 together would satisfy the judgment debt to the Partnership. However, Mr Bahia's application was for properties 1 and 4 to be transferred to him immediately, and that the remaining Schedule A properties be transferred to him thereafter by the Receiver at a consideration of half the Alexander Lawson valuations, with consequential balancing payments and adjustments.

20. The Sidhus raised no dispute about the Alexander Lawson valuations until very shortly before the hearing. Nevertheless, the concerns which they did raise, which are set out in the Judge's judgment at [49], were legitimate. He said he would have given them considerable weight had the original iteration of Mr Bahia's proposal been maintained. During the hearing, however, both parties' positions were modified. Mr Bahia proposed that the valuations to be ascribed to each of the transferred properties be the higher of the Alexander Lawson valuation or a valuation to be carried out in future by an independent expert. The Sidhus proposed that the potential unfairness to Mr Bahia in bidding for the Partnership properties at auction be eliminated by allowing him to bid on credit to the extent of the Estate's indebtedness to the Partnership. If the bid were successful, the transaction would be documented in the same way as if Mr Bahia had acquired the relevant property by way of a distribution in specie out of the Partnership estate. This was intended to mitigate or eliminate any adverse tax consequences.

21. The Judge ordered that <u>all</u> the Schedule A properties be transferred immediately to Mr Bahia, and that Mr Bahia was to be treated as having received an interim distribution, in respect of each property, of the higher of the value ascribed to it in the Alexander Lawson valuation or the value ascribed to it (as at 30 November 2023) in a valuation to be carried out by a jointly appointed independent expert, whose report as to valuations would be final except in the event of manifest error (and thus in practice virtually impossible to challenge). He directed that the Schedule B properties be sold by the Receiver, who would have a discretion as to whether sale would best be

achieved by private treaty or public auction, and that as each of these properties was sold, the Receiver would have the power to make interim distributions to the parties with a view to ensuring equality between them. No complaint is made about that aspect of his order.

22. As Mr Temmink KC, leading counsel for Mr Bahia, readily accepted, the Judge gave Mr Bahia more than he was asking for, since even on the Alexander Lawson valuations the total value of the properties in Schedule A that were the subject of the order for immediate transfer to him was some £1.9 million in excess of the indebtedness of the Estate of Mr Sidhu to the Partnership. The Judge's order made provision for this to be counterbalanced by the accrual of interest on the surplus, and by the Receiver making equalising payments to the Sidhus from the proceeds of sale of the Schedule B properties.

23. The court was informed that, as a result of the sales and interim distributions thus far, the latest of which was on 3 April 2024, equality has been achieved. This is a matter on which Mr Temmink placed considerable reliance at the hearing of this rolled-up application.

The applicable legal principles

24. Section 39 of the Partnership Act 1890 provides:

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

25. The current (21st) edition of Lindley & Banks on Partnership summarises the key principles in these terms:

> "25-98
>
> *Principle 1*: Each partner is, in general, entitled to have dissolution accounts taken as between him and his co-partners.
>
> 25-99
>
> *Principle 2*: Each partner is entitled to have the partnership property applied in liquidation of the partnership debts, and to have any surplus assets divided.
>
> 25-100

> *Principle 3*: Each partner is, in general, entitled to force a sale of all partnership assets which are capable of being sold and to have the value of any unsaleable asset brought into account by the partner who retains it.
>
> 25-101
>
> *Principle 4*: As a corollary of Principle 2, save in special circumstances, no partner can insist on taking the share of any other partner at a valuation or to insist on a division of the partnership assets in specie."

26. There is no absolute rule that partnership assets be sold upon dissolution, but it is the normal means of ascertaining the value of the partnership assets if they are capable of being sold. Lindley & Banks encapsulates the position at 23-188:

> "This mode of ascertaining the value of the partnership effects is adopted by the Courts, unless some other course can be followed consistently with the agreement between the partners. And even where the partners have provided that their shares shall be ascertained in some other way, still, if owing to any circumstances their agreement in this respect cannot be carried out, or if their agreement does not extend to the event which has in fact arisen, realisation of the property by a sale is the only alternative which a Court can adopt."

27. The rationale which underlies the normal practice is that a sale on the open market will usually be the best means by which to achieve a full and fair value for the partnership assets. The partners can test the market with competing bidders in just the same way as they would if they were selling their own property. If one of the partners has a particular interest in acquiring any of the partnership property, an open market sale will ensure that he pays a fair price for it.

28. However, there may be cases in which an open market sale would not be the best means of achieving full value, or would be unfair. As Hoffmann LJ observed in *Hammond v Brearley* (unreported) [1992] 12 WLUK 185:

> "There is nothing in the Partnership Act 1890 which positively requires that the winding-up of a partnership shall be effected by a sale. It is true that a sale by auction is the normal way of realising the assets for the payment of debts and distribution to the partners. But the decision of the House of Lords in *Syers v Syers* [1876] 1 AC 174 … shows that in exceptional cases the court has a discretion to take a different course, such as allowing partners who wish to continue the business to acquire the share of another partner at a valuation. It is I think notorious in the Chancery Division that *Syers v Syers* is an authority far more frequently cited by counsel than applied. But the discretion which it gives seems to me a valuable one which I think judges should not hesitate to use when it suits the justice of the case."

29. Hoffmann LJ referred to the court "allowing" partners who wish to continue a business to acquire the share of another partner at a valuation, because in the absence

of agreement, no partner is entitled to insist on keeping any partnership property at an ascribed valuation, or on buying out the other partner's share: principle 4 in the passage from Lindley & Banks quoted above. This principle was perhaps most clearly articulated by Sir Richard Kindersley V-C in *Darby v Darby* (1856) 3 Drew 495 at page 503, cited with approval by Lord Atkinson in *Hugh Stevenson & Sons Ltd v AG für Cartonnagen-Industrie* [1918] AC 239 at page 254:

> "What is the clear principle of this Court as to the law of partnership? It is, that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners, according to their respective shares in the capital. That is the general rule; it requires no special stipulation; it is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property is beyond all question, and no partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie."

30. As Lord Atkinson observed in an earlier passage, at page 252:

> "In the present case the articles do not empower the appellants to purchase the share of the defendants at a valuation, nor to take that share for themselves at its value. In the absence of special provisions of that kind no partner can in ordinary times, with a view to dissolution or after dissolution, force another partner against his will to submit to anything of that kind."

Likewise Viscount Haldane stated at page 246:

> "In the absence of a special agreement to the contrary, and there is none such in the contract before us, the rule is that on a dissolution of partnership all the property of the partnership shall be converted into money by a sale, and that the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their shares. If there is a special stipulation giving any partner the right to purchase another partner's share, it must, of course, receive effect. Here there is no such special stipulation, and the general principle prima facie applies."

31. There are very few examples of "exceptional" cases in which the discretion to depart from the general principle has arisen. *Syers v Syers* [1876] 1 AC 174, the case in which the discretion was first referred to, concerned a music hall and tavern operating from adjacent premises in Oxford Street in London. Daniel Syers had loaned his brother Morris (who was running both businesses) £250 on the basis of a written promise to execute a deed of co-partnership to him under the Limited Partnership Act (28 &29 Vict. c.86) for one-eighth of the profits of the music hall and tavern. That statute (subsequently repealed by the Partnership Act 1890) provided a means by which a lender could share in the profits of a business or trade without being exposed

to liability to outside creditors for a share of the losses, but the agreement had to satisfy certain formalities. A deed was drawn up, but Morris refused to execute it. A dispute ensued as to whether the agreement between the brothers was a contract of loan or a contract of partnership. There were numerous difficulties of contractual interpretation, made worse by the inability of the court to have regard to parol evidence. The House of Lords eventually decided that the brothers had created a partnership at will which had been dissolved.

32. The Lord Chancellor, Lord Cairns, acknowledged at page 183 that on dissolving a partnership of this kind, the ordinary course would be for the Court to direct a sale of the assets, and if necessary, a sale of the business as a going concern, and to give liberty for proposals to be made by either party to purchase it before the Judge in Chambers. However, he went on to say that:

> "these provisions are moulded in every case by the Court to meet the circumstances of the particular case; and it appears to me that, looking at the nature of this business, and looking at the very small interest which was taken in it by [Daniel], it would certainly not be desirable in this case to have a sale, or to bring these premises to the hammer for the purpose of ascertaining what sum ought to be given for them."

33. He therefore proposed that an account be taken of the receipts and payments of the music hall and tavern during the relevant period, so as to ascertain how much Daniel's one-eighth share was worth; then there should be an inquiry into what sum would represent his one-eighth share in the business if it were sold as a going concern, after deduction of all charges and liabilities of the business, and that on payment of those sums to him by Morris, together with the £250 and certain costs, there would be no further accounts. However, if those payments were not made, the business would be sold as a going concern and there would be a division of the assets of the partnership in the usual way.

34. That means of resolving the dispute was accepted by all the remaining members of the House, on the basis that it appeared the most effective solution to the difficulties of the case *and* best reflected what the contracting parties had intended. Lord Chelmsford said at page 185 that the case "must be determined entirely upon the written contract between the parties." Lord Hatherley said (at pages 190-191):

> "I think, my Lords, that the valuation proposed is all that under the circumstances of this case the Plaintiff is entitled to ask. I do not think he is entitled, under the engagement he has entered into, to ask for a sale of the concern, regard being had to the amount of his interest in it and to the nature and character of that concern, which of course the Court of Chancery is always bound to look to, and the injury that might result from having a sale of a business of such a description as this is."

35. In his concurring speech, Lord O'Hagan made it clear that, whilst he accepted the Lord Chancellor's proposed solution to the difficulties identified, he did not regard it as entirely satisfactory. He described that solution (at page 192) as "the most acceptable, being most in accordance with the language of the parties, and best calculated to do justice to both."

36. *Hammond v Brearley* (above) was an interlocutory appeal in partnership winding-up proceedings, in which the issue was whether the judge at first instance should have ordered the sale of partnership assets (including three freehold properties) by way of interim relief. The Court of Appeal (Mann, Neill and Hoffmann LJJ) unanimously decided that the order must be set aside.

37. The extraordinary feature of that case was that the partner who was making the claim to wind up the partnership had no interest in the goodwill of the partnership business, but only a share in minor assets used in the business (computers, office furniture, and the like). They had very little value when detached from the business as a going concern. Therefore, as Hoffmann LJ pointed out at [8], he was unlikely to do better and could well do worse by sharing the prices realised by public auction than by receiving his share of a valuation in which the position of the other two partners as special purchasers could be taken into account. Moreover, an auction sale of the business's assets would be disruptive to the business and damaging to its reputation. For those reasons, he considered that a trial judge might well decide that an order for sale should be suspended until the continuing partners had been given the chance to buy the plaintiff's shares at a valuation. In this situation, which he described as "highly unusual," the judge should not have ordered the immediate sale of the partnership property by way of interim relief.

38. *Hammond v Brearley* is therefore not a case in which the court departed from the usual practice of ordering a sale on the open market, but rather, a case in which it was envisaged that a judge might do so when the matter came to trial, because the circumstances were sufficiently out of the ordinary to engage the discretion to take a different course.

39. In *Mullins v Laughton* [2003] Ch 250 Neuberger J directed a buy-out of the share of the minority partner, instead of a sale of the business, notwithstanding that three of the majority partners had behaved very badly towards the minority partner by removing him peremptorily. If they had gone about removing him in the right way, they would have been entitled to buy him out under the terms of the partnership agreement. Neuberger J considered that forcing them to sell the business would be a disproportionate manifestation of the court's displeasure at their behaviour. The innocent partner had a relatively small stake in the business (there were 13 other partners) and it appeared that it would be "an uncertain, difficult, and unsatisfactory exercise for a professional insolvency practice to be sold, especially where that practice has different offices in many different cities." Any such sale would also have had an adverse impact on employees, creditors and insolvent persons under the substantial number of insolvencies for which the firm's partners were responsible.

40. Although that case could be viewed as an application of the exercise of the discretion in *Syers v Syers*, it can equally be explained as an example of the court giving effect to the intention of the contracting parties as to what should happen upon dissolution.

41. *Malik v Mahboob Hussain Junior and others* [2021] EWHC 1405 concerned the dissolution of an equal partnership. HH Judge Stephen Davies ordered a sale at auction (but with a specified reserve at an approved court valuation). The judge made these comments (at [34]-[35]) referring to a statement in Lindley & Banks at 23-195(c) to the effect that an order for a buy out between two equal partners would be "extremely rare":

> "Insofar as the rationale is that *it would normally be unfair to prevent an equal partner from bidding to buy out his co-partner or to see whether a third party would pay more than the valuation price to acquire the interest,* I can see the rationale for this observation.
>
> However, if the only objective of the objecting partner is an attempt to increase the price *by engaging in a bidding war with no genuine intention or ability to purchase*, then for my part I see less force in the observation." [Emphasis added].

42. Finally, some comments about the underlying rationale for the general practice of ordering a sale at auction were made by Mr Murray Rosen QC, sitting as a Deputy High Court Judge, in *Benge v Benge* and another [2017] EWHC 2124 (Ch), a case in which, ultimately, he refused to depart from that practice. He made the observation at [46] that:

> "the general rule as regards the sale of partnership property in the open market is merely adopted in order that justice may be done to all parties when no other course has been or can be agreed on".

He then went on to sound a note of caution about adopting a different course, even when one of the partners is running the business and wishes to continue to use the relevant assets. He explained that whilst it may be just to order that partner to pay for his purchase so long as the "selling partner" does not lose out financially, this requires the court to be:

> "very certain as regards what would be a fair value in those circumstances, and in my opinion the only way to do that is to judge the value of the asset against what would be achieved in the open market."

43. Mr Rosen also indicated that, in a case in which the aim of the partnership was that all the partners should share in the development potential of real estate, the court should be slow to force the minority partner(s) to sell their interest to the other partner(s) at a pre-ordained price, however fair the offer might appear, instead of putting the property on the open market (and thereby giving the minority partner an opportunity to buy it themselves). That caution appears to me to be particularly apposite in a case such as the present.

44. Drawing all those threads together, it seems to me that the types of case in which "exceptional circumstances" have been found to exist, or where it has been envisaged there might be justification for departing from the general practice of ordering a sale, are: (i) where one partner has a very small stake in the partnership, and selling the partnership business as a going concern would create disproportionate injury to the majority partner(s) and/or to third parties such as customers of the business; (ii) where, as in *Hammond v Brearley*, a sale in the open market is obviously not going to maximise the value of anyone's share in the partnership, because the assets are worth little or nothing if sold separately from the goodwill, and selling both together would be disproportionate; (iii) where, even if its terms were breached, the partnership

agreement makes provision for a buy-out on termination of the partnership, or it can properly be inferred that this is what the contracting parties intended, and (iv) (possibly) where it is established that one partner intends to use the auction process to drive up the price artificially, to the detriment of the other partner who wants to buy the property.

45. All those are examples of situations in which a sale by auction would not serve the interests of justice. It would not maximise the value of the assets or, even if it would, it would unduly favour one of the parties or unduly disadvantage the other(s).

46. On the other hand, there is no reported authority in which the discretion recognised in *Syers v Syers* has been exercised, or even recognised as arising, in the normal situation where the assets can be sold in the open market without creating any unfairness, and the partners are unable to agree on an alternative. There is nothing in the cases to which we were referred (nor in Lindley & Banks) that suggests that the wishes of one partner to acquire a property or certain of the properties held by the partnership, or their wish to continue running the partnership business, or even their willingness to buy out the other partner at a valuation based on the opinion of an independent expert, would alone suffice to take the case into the exceptional category. On the contrary, the application of the four principles cited above suggests the opposite.

47. Nor would it be enough in itself for one partner to complain that the other partner had more money or greater liquidity, and therefore would be more likely to outbid them for any property they both wished to acquire. So long as a fair price can be achieved, it should not matter whether the purchaser is a third party or one of the former partners. I can see that things might be different if the partner who was better off had achieved an unfair financial advantage by taking monies from the partnership account and using them for his personal benefit. However, if that unfairness could be overcome in any bidding process by allowing the other partner to bid on credit up to an amount represented by the debt owed to the partnership by the defaulting partner or his representatives (as was proposed in this case) then it would not provide a sufficient justification for departing from the general practice.

The Judge's justification for making the order that he did

48. The Judge set out the applicable legal principles and considered the authorities at [16] to [25]. He concluded by asking the question, "what order does the justice of this case demand?" In so doing, it appears to me that he placed far too much weight on Hoffmann LJ's comment in *Hammond v Brearley* that the court "should not hesitate to use [its discretion to depart from the normal practice] when it suits the justice of the case", ignoring the very specific context in which that comment was made. Hoffmann LJ had explained, earlier in the same passage, that the discretion only arose in an exceptional case. The Judge, however, treated the discretion as an overarching discretion to make whatever order the court considered to be just, (even if there was nothing exceptional about the case, and a sale on the open market would produce a just result) and not as a discretion to depart from the normal practice in circumstances when adopting that practice would *not* do justice between the parties, which was the situation that Hoffmann LJ was addressing.

49. The error in the Judge's approach is apparent from the next section of the judgment, where he set out the rival proposals of the parties and weighed them up against each other, instead of beginning by asking himself whether selling the properties at auction would produce an unjust result, and then, if it would, whether the alternative course proposed by Mr Bahia would produce a fairer outcome. This may explain how it was that the Judge did not even consider the proposition that sale by auction is the normal course, and offers the best evidence of market value, until paragraph [53].

50. He then rejected the proposition that an auction will *always* provide the market price as "essentially tautological" (because it depends on defining the market price as the price that is achieved at that particular auction). He said he could take judicial notice of the fact that in many cases, property sellers prefer to obtain a professional valuation and then accept offers for the property at or by reference to that valuation. But a professional valuation, however expert the valuer, is simply one person's view as to what the property would fetch on the open market. The only way to find out for certain what the property will fetch on the open market is to put it up for sale (no doubt using the valuation as guidance as to an appropriate asking price), and see what prospective buyers are willing to offer for it.

51. I would not quarrel with the proposition that one might sometimes obtain a better offer for the property by selling it privately than at auction, but the Judge was overlooking the important fact that transferring the properties to Mr Bahia at a predetermined value, particularly one which the Sidhus would have little prospect of challenging, meant that the Sidhus would be denied the opportunity to test the market. It was therefore possible that they were being forced to sell at an undervalue. At the end of the day, the Judge's approach meant they would have no idea whether the Receiver could have got a better price for the property in an auction at which Mr Bahia would be free to bid for it if he wanted to.

52. The heart of the Judge's reasoning is at [59]-[64]. He said that both proposals were workable and it would *not be unfair to order either of them*, but that Mr Bahia's proposal had a number of advantages and therefore "the circumstances render it just that I should *choose* this proposal." [Emphasis added]. That betrays the fallacy in the Judge's approach: this was not a question of choice. He identified three advantages. First, it would allow a swift repayment of the judgment debts owed by the Estate to the partnership. He said "Mr Bahia is entitled to see the Judgment Debts repaid and I should pay special attention to his preference as to the best way to achieve this." Secondly, it avoided the additional costs of an auction (though, as he recognised, the costs of the expert valuation, about which there was no evidence, would temper that supposed advantage). Thirdly, Mr Bahia as the only (surviving) former partner was "entitled to have a say in the means of disposal of the properties". Finally, the Judge acknowledged that departure from the normal order of a sale by auction was exceptional, but said he had the discretion to make such an exceptional order and (applying Hoffmann LJ's dictum) the order he proposed suited the justice of the case and he should not hesitate in making it.

Discussion

53. As will already be apparent, that analysis is fatally flawed. It is self-evident that in a case such as this, where the property can be readily sold at auction, the amount that an arms' length purchaser is willing to bid for it will be a better measure of the value of

the property in the open market than a virtually unchallengeable expert opinion as to what it might have fetched had it been put up for sale. Any concerns about it being sold at too low a price could easily be met by placing a reserve on the property at the valuation obtained from Alexander Lawson, and by giving the Receiver a discretion to sell by private treaty, including to Mr Bahia, if it did not meet the reserve.

54. If saving the costs of going to auction were a legitimate basis for departing from the usual practice, that practice would not exist, let alone be the norm. In any event, the Judge had no evidence that Mr Bahia's proposal would result in any cost saving, let alone any substantial cost saving. As well as the fees of the valuation expert for their services, one would need to factor in the additional legal costs of the valuation exercise, as each party would have the right to ask questions of the expert and make submissions to them before a final value was set, and they would be likely to engage their lawyers to carry out that exercise. Mr Temmink submitted that by reason of his own specialist practice, the Judge was entitled to take judicial notice of the fact that the valuation route would be less costly, but that is not what the Judge said. On the contrary, he rightly treated the costs of the valuation as an unknown.

55. As for delay, the fact that an auction might not take place immediately would not generally be a good reason for departing from the normal practice, at least in the absence of evidence of extreme market volatility or some other special factor which might cause the value to drop substantially if there was an appreciable delay. In the present case, there was no real concern about getting the Schedule A properties into auction within a reasonable time; the evidence showed that Allsops could put them into an auction in December 2023 or February 2024. Moreover, Mr Bahia's financial position was fully protected against delay in repaying the judgment debt by interest continuing to accrue at the judgment rate. The Sidhus were plainly willing to take the risk of further interest accruing in order to ensure that the best price was achieved for the properties.

56. Whilst it is true that the right to wind up the partnership is a personal right, that does not mean that when the Court (rather than the partners) is carrying out the winding up, the wishes of a surviving partner as to how the value of the assets should be realised should prevail, nor even that they should be allowed to carry any greater weight than the wishes of the personal representatives of the deceased partner. Such an approach is antithetical to the general principle that one partner cannot insist on a distribution in specie, and that the position in default of agreement, save in exceptional circumstances, is a sale on the open market, irrespective of the wishes of one of the partners or even the wishes of a majority. The objective of the court is to maximise the value of the partnership assets for the benefit of all, not to allow the wishes of one equal partner to prevail because the other is no longer able to express their wishes.

57. The driving factor behind the Judge's decision appears to have been the perceived desirability of early repayment of the substantial judgment debt. I do not accept Mr Temmink's characterisation of the satisfaction of that debt as something the Judge simply regarded as "killing two birds with one stone". Without it, there was nothing in the Judge's list of "advantages" that came close to being identified as an exceptional circumstance taking this case out of the ordinary run of partnership windings-up. It was plainly at the heart of the Judge's reasoning, but it was not a relevant consideration, let alone something which would justify treating this case as "exceptional".

58. As Mr Knox KC, on behalf of the Sidhus, pointed out, it is not particularly unusual for partners to be indebted to the partnership upon dissolution. Such debts are usually taken into account after the assets are realised, and before the net proceeds are divided and distributed. If interest continues to accrue, the debtor's share of the net proceeds will be correspondingly reduced when the final accounts are taken. In this case, as I have already said, Mr Bahia was fully protected because the Estate's share was enough to meet the debt and accruing interest. Allowing him to take some of the properties without a sale put him in a better position than he would have been in had he obtained a charging order over the Estate's share of the partnership by way of execution of the judgment debt.

59. The judgment debt, regardless of its size and how it arose, was not and could not be regarded as an "exceptional circumstance," save possibly to the extent that it put the Sidhus in a better financial position to bid for the properties that Mr Bahia wanted. Leaving aside the Sidhus' disavowal of any interest in bidding for the properties themselves, and their own alleged liquidity issues (which the Judge seemed disposed to accept), once it was proposed that Mr Bahia could bid on credit, that potential difficulty was surmounted. Moreover, as the Judge accepted, taking the normal course would not produce any injustice to either party.

60. In any event, even on the Judge's own reasoning, there was no justification for ordering the immediate transfer to Mr Bahia of four properties at a valuation which was around £1.9 million in excess of the Estate's indebtedness to the Partnership. As Mr Knox pointed out, the steps taken to counterbalance this by providing that the Sidhus would get the first £1.9 million from the net proceeds of sale of the Schedule B properties do not address the problem that they were exposed to the risk of having to transfer their half share in all of the Schedule A properties to Mr Bahia at what could prove to be an undervalue, without having been given any opportunity to test the market.

61. Mr Temmink sought to meet this point by demonstrating that, in the event, most of the Schedule B properties were sold for sums which were close to the Alexander Lawson valuations (some fetched slightly more, some slightly less) and there was only one outlier - which was eventually sold for a much lower price. The reasons for that discrepancy were not in evidence before us. Mr Temmink pointed out that the Sidhus had the safety net of the independent valuations which would be used only if they were higher than the Alexander Lawson figures. There would be no corresponding adjustment if they were lower. He said that two of the Schedule A properties were ascribed values taken from the Alexander Lawson reports which were higher than the values currently placed on them by the single joint expert (whose report had not yet been finalised). This meant that Mr Bahia could well have overpaid more than £250,000 for those properties.

62. Quite apart from the use of hindsight to justify something the Judge could not have known, the problem with that submission is that, with one exception, Mr Bahia was not particularly interested in the Schedule B properties. The Schedule A properties were those which produced the highest rental income. A sale at auction would reveal the price that he was prepared to pay for the ones that he really wanted, as well as potentially attracting bids from third party investors.

Conclusion

63. If the Judge had correctly applied the principles set out in the authorities and summarised in Lindley & Banks, he would have refused Mr Bahia's application for the transfer of any of the properties to him in specie, as there were no circumstances which would justify taking that exceptional course. A sale at auction would achieve a just outcome, as the Judge accepted. In those circumstances the Judge was wrong to have made the order that he did. The properties should have been put into auction and Mr Bahia should have been allowed to bid on credit up to the amount of the judgment debt owed by the Estate to the Partnership. It would have been prudent for the Judge to direct that a reserve be put on the properties at the valuations ascribed to them by Alexander Lawson, and to have given the Receiver a discretion to sell them by private treaty in the event that they did not make the reserve.

64. Mr Temmink submitted that even if the court were to conclude that the Judge's order was wrong in principle, it should not disturb it, or that at the very least it should not require the sale of Properties 1 and 2. The Sidhus would have to achieve prices more than 7.5% higher than the ascribed valuations to be better off than they currently are. It was entirely realistic to suppose that a sale in the open market could result in both parties being worse off. Seeking to unwind the court order would not be straightforward and could generate further disputes. These arguments were largely, though not exclusively, directed to the question whether we should grant permission to appeal.

65. However, it seems to me that these are not good reasons to justify allowing a direction of the lower court to stand which should never have been made in the first place. It is unfortunate that no application was made for a stay of the order, and that it was executed with such alacrity. But neither of those factors would justify refusal of permission to appeal when the grounds are not only arguable but demonstrably correct, at least when it is accepted that the order could be unwound, albeit at the risk of further dispute and expense. Any consequential practical difficulties can no doubt be overcome, if necessary, with the assistance of further directions from the court. Currently I see no reason, for example, why it should be necessary to unwind the transfers.

66. The Schedule A properties should be put into auction as soon as practicable. It is only fair that Mr Bahia should purchase the properties at the price he truly attaches to them; if that is less than the value ascribed to them by virtue of the Judge's order, he will be better off, and cannot complain. If it is higher, then the partnership as a whole will benefit. If he succeeds in bidding for the properties, the value he has received can be adjusted upwards or downwards if need be, but he will retain title to them and matters can no doubt be arranged in such a way that he will not be fiscally disadvantaged. If he loses to a third party bidder, then he can transfer the property to the successful purchaser either directly or, if necessary, via the Receiver.

67. Finally, there is a Respondent's notice which sought to argue that the Judge's decision was justified for other reasons, namely, (i) the unedifying conduct of the Sidhus in hastily distributing all the realisable assets in Mr Sidhu's Estate and failing to pay the judgment debts, and (ii) Mr Bahia's alleged personal attachment to the Schedule A properties and the difficulties of his building up an equivalent property portfolio at the age of 76. Wisely, neither party sought to develop their written arguments on the Respondent's notice at the hearing.

68. There is no substance in either of these points, both of which the Judge rejected for reasons which cannot be faulted. The wrongful conduct of the Sidhus has already been reflected in the various orders made against them, and, as the Judge observed at [38], the fair division of partnership property after dissolution does not depend on which of the partners occupies the moral high ground.

69. The Judge treated Mr Bahia's claim to have an emotional attachment to the properties with some scepticism [43]. The property portfolio was an unexceptionable portfolio of investment properties and, as he found, if Mr Bahia lost in the bidding he could easily replace them with comparable properties. In any event, an emotional attachment by one of the partners to a particular property is not a good reason for departing from the usual practice; if that partner really wants the property he can bid for it and keep it that way.

70. For the reasons I have set out, having granted the necessary permission to appeal, I would allow this appeal.

Lord Justice Nugee:

71. I agree.

Lord Justice Arnold:

72. I also agree.