THE HIGH COURT

[2012 No. 291 COS]

IN THE MATTER OF BLOXHAM (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACT, 1963 to 2012

AND IN THE MATTER OF THE INVESTOR COMPENSATION ACT 1998

JUDGMENT of Mr. Justice David Keane delivered on the 3rd November 2017

Introduction

1. Kieran Wallace ('the liquidator') is the official liquidator and administrator of Bloxham. Prior to entering provisional liquidation on 31 May 2012, followed by official liquidation on 25 June 2012, Bloxham was a limited partnership operating a well-known and long-established stock broking and investment services business.

2. George Maloney ('the receiver') is the receiver and manager appointed on 19 October 2012 by Danske Bank AS trading as National Irish Bank ('the bank') under seven different debentures, each of which had been granted by one of seven separate unlimited companies. Each of those seven companies ('the corporate partners') was controlled and directed by a different general partner in Bloxham ('the individual partners') and each was a general partner in Bloxham in its own right. Each individual partner had sold his partner's interest in, or partner's share of, Bloxham's business to the corporate general partner under his control.

3. The liquidator and the receiver are in dispute in the winding up of the partnership and the liquidator seeks the Court's directions. The dispute concerns whether the effect of the said debentures is to give the bank security over certain of Bloxham's assets, as the receiver contends or merely over the partnership interest of each of the corporate partners in those assets, as the liquidator asserts.

4. Differently put, the question is whether the said debentures entitle the receiver on behalf of the bank to claim first priority over certain Bloxham assets as the property, cumulatively, of the corporate partners or merely entitle the receiver to each corporate partner's share in any residue of Bloxham's assets, after the payment of all debts and liabilities and the repayment of the firm's capital, on the basis that each of the corporate partners holds no more than a partner's share or interest in Bloxham.

Background

i. the 2001 partnership agreement

5. Bloxham was a limited partnership within the meaning of that term under the Limited Partnerships Act 1907 ('the 1907 Act'). Prior to a restructuring that took place in 2011, Bloxham had seven general partners - the individual partners - and one limited partner - FBD Securities Limited ('FBD'), operating under a partnership agreement dated 29 January 2001, as amended by a further agreement dated 19 October 2006 ('the 2001 partnership agreement').

6. Clause 2.4 of the 2001 partnership agreement stipulated:

> 'The premises referred to [in Dublin, Limerick and Cork] and all other lands and premises for the time being occupied by [Bloxham] with all equipment, furniture and other fittings for the time being used for the practice of [Bloxham] and [Bloxham's] name and goodwill will be assets of [Bloxham] and will accordingly belong to the [p]artners in the proportions in which they are for the time being entitled to share the [n]et [p]rofits…, and no [p]artner will have any separate interest in such assets.'

7. Under clause 15.1.6 of the 2001 agreement, none of the general partners could, without prior approval by special resolution, '[a]ssign, mortgage or charge his share in the [p]artnership or any part thereof'.

8. Clause 27.3 of the 2001 agreement was careful to state:

> 'This agreement may not be released, discharged, supplemented, amended, varied or modified in any manner except by instrument in writing signed by each of the parties hereto.'

ii. 2011 restructuring

9. In 2011, the partnership was restructured in a quite complicated way, designed: (a) to allow the individual partners to pay less tax on the profits they extracted from it; (b) to enhance the personal debt repayment capacity of the individual partners on the borrowings each had incurred to fund the partnership through the increased proportion of the profits thus available to each after tax; and (c) to enhance the pension provision available to the partners.

10. The method chosen to achieve this aim was the creation of a new partnership to include the corporate partners - each controlled and directed by a different individual partner - through the execution of a new partnership agreement. The idea was to route the new partnership's profits through the corporate partners, where they would be liable to the lower rate of corporation tax, instead of paying them out directly to the individual partners, who would each be liable to pay income tax on them at a significantly higher rate. The payment of less tax on those profits would leave a greater portion of them available for the repayment of the personal borrowings incurred by the partners to fund the partnership. It would also mean that each of the corporate partners could then establish a director's pension fund, with greater tax relief on contributions for both the corporate partners, as employers, and the individual partners, as directors, than would be available to the individual partners on the contributions of each to a personal private pension fund.

11. The liquidator has exhibited, as a representative sample, the restructuring transaction documentation involving one of the individual partners, as well as a copy of the new partnership agreement.

iii. sale of each partner's interest or share in the business of Bloxham

12. The first such document is a letter of offer dated 10 June 2011, from one of the individual partners to the proposed corporate partner under his control. In it, the relevant individual partner offers to sell his interest in or share of the business of Bloxham (as a going concern) together with its goodwill, property and assets, other than its capital. The accompanying terms of that offer define

the assets for sale to include the individual partner's '*interest in or share of*':

> (a) the goodwill of the business;
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> (b) the customer, supplier, employee and financial information of the business;
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> (c) the intellectual property rights of the business;
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> (d) both the benefit and the burden of the pending contracts, engagements and orders of the business;
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> (e) the miscellaneous assets, computer systems and other chattels situated in the individual partner's place of business or used by the individual partner in connection with the business.
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> (f) the book debts of the business.
>
> (g) all of the other property to which the individual partner is entitled or in which he has an interest in connection with the business and cash in hand and at the bank but excluding the individual partner's interest in the capital of Bloxham represented by cash on deposit on an account or accounts of Bloxham.

13. The following paragraph of the terms of that offer is headed 'Liabilities.' It states that the proposed corporate partner 'shall assume the [individual partner's] share of the creditors, accruals and bank overdraft of the [b]usiness.'

14. The next document is a minute, dated 28 June 2011, of a meeting of the directors of the proposed corporate partner. It records that those directors (being the relevant individual partner and one other person) resolved to accept the relevant individual partner's offer on the terms proposed (including the provision of a large portion of the consideration for the sale in the form of shares in the company) and to cause the company to enter an agreement to become a general partner in Bloxham. It is common case that each of those steps was subsequently taken on behalf of each of the proposed corporate partners.

15. Thus, the letter of offer ('the offer to sell') and the accompanying terms and conditions ('the terms') furnished to each proposed corporate partner by each individual partner together comprise the sale and purchase contract in respect of each individual partner's share or interest in the business of Bloxham ('the sale and purchase agreement').

iv. loan facility obtained by each of the corporate partners to finance the restructuring

16. A further material document is the loan facility offer letter, dated 20 January 2011, from the bank to the proposed corporate partner concerned. The letter states that the purpose of the loan is to fund the cash element of the acquisition by that company of the individual partner's interest in the partnership and to discharge in full that individual partner's existing indebtedness to the bank in respect of his prior funding of the partnership. As security, in addition to the provision of a personal guarantee from the individual partner concerned in respect of all of the obligations of the company to the bank and the assignment to the bank of the benefit of a life insurance policy on the individual partner in the full amount of the facility, the company was to execute a debenture over all of its assets and its undertaking, including a specific first legal charge or assignment over the company's right to receive money from Bloxham.

v. the 2011 partnership agreement

17. The individual partners, the corporate partners and FBD, as a limited partner, executed a new limited partnership agreement ('the 2011 partnership agreement') on 9 August 2011. Paragraph 3.1 of that agreement states:

> 'All leases or tenancy agreements in respect of premises occupied by and for the purposes of [Bloxham] and all other assets of every character and nature of [Bloxham] may be held in the names of one or more persons (who need not be a [p]artner) and each such asset not held in the names of all the [p]artners shall be held by the person(s) in whose name(s) it stands in trust for the [p]artners and upon the condition that if so required by the [p]artners it shall be assigned or transferred into the names of all the [p]artners or such of them as the [p]artners shall decide. Any liabilities arising for any person(s) in whose name(s) is held any lease or tenancy agreement or other commitment entered into for the purposes of [Bloxham] shall be a liability of [Bloxham].'

18. Paragraph 3.3 states:

> 'All property of whatever nature used in the business of [Bloxham] and [Bloxham's] name and goodwill shall be assets of [Bloxham] and will belong to the [p]artners in the [p]rofit [s]haring [r]atios, and except with respect to the [f]ixed [c]apital no [p]artner shall have any separate interest in such assets.'

19. The profit sharing ratios scheduled to the agreement accorded various percentage shares to the corporate partners and the limited partner but none to the individual partners. The providers of Bloxham's fixed capital were identified in another schedule to the agreement as its seven individual partners.

vi. the debenture issued by each corporate partner in favour of the bank

20. The liquidator has exhibited the debenture executed on 12 September 2011 by the corporate partner concerned in favour of the bank. In it, the property charged is identified as 'all the [c]ompany's rights, title and interest that it has or may be entitled to in the assets of the [p]artnership, including for the avoidance of doubt...that part of the goodwill in the [p]artnership in which the [c]ompany has an interest….'

21. The liquidator avers that, on 23 May 2012, the partners of Bloxham became aware that the capital position of the partnership had been overstated by a sum of more than five million euros. At that time, by reference to financial returns that it had previously made, Bloxham was required by the Central Bank of Ireland to hold regulatory capital of no less than €5.6 million and in the circumstances, it was apparent that the partnership was in breach of that obligation. In consequence, on 31 May 2012, the partners of Bloxham petitioned this Court for an order, pursuant to s. 345 of the Companies Act 1963, winding up the partnership as an unregistered company. As already noted, Bloxham entered provisional liquidation on that date and official liquidation less than a month later.

Relevant provisions of the 1890 Act

22. Section 7 of the 1907 Act provides that, subject to the provisions of that Act, the Partnership Act 1890 ('the 1890 Act') applies to limited partnerships.

23. In many ways the fundamental rule governing the conduct of partnerships is that set out in s. 19 of the 1890 Act, which states:

> '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.'

24. The basic rules of the rights and duties of partners, subject to agreement, are set out in s. 24 of the 1890 Act. It provides as follows:

> 'The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners; by the following rules:
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> (1) All the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses, whether of capital or otherwise sustained by the firm.
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> (2) The firm must indemnify every partner in respect of payments made and personal liability incurred by him-
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> (a) In the ordinary and proper conduct of the business of the firm; or,
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> (b) In or about anything necessarily done for the preservation of the business or the property of the firm.
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> (3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of fiver per cent. per annum from the date of payment or advance.
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> (4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.
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> (5) Every partner may take part in the management of the partnership business.
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> (6) No partner shall be entitled to remuneration for acting in the partnership business.
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> (7) No person may be introduced as a partner without the consent of all existing partners.
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> (8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.
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> (9) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.'

25. Four provisions of the 1890 Act are of particular importance in relation to partnership property. The first is s. 20(1), which provides:

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

26. The second is s. 21, which states:

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

27. The next is s. 39, which provides:

> '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 deducting what may 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.'

28. The fourth is s. 44, which provides:

> 'In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:
>
> (a) Losses, including losses and deficiencies of capital, shall be paid firstly out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits;
>
> (b) The assets of the firm including the sums, if any, contributed by the partners to make up losses and deficiencies in capital, shall be applied in the following manner and order:
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> 1. In paying the debts and liabilities of the firm to persons who are not partners therein;
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> 2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:

3. In paying to each partner rateably what is due from the firm to him in respect of capital;

4. The ultimate residue, if any, shall be divided among the partners in the proportion in which the profits are divisible.'

29. Section 31 of the 1890 Act is a significant provision governing partnership shares. It provides:

> '(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of the profits to which the assigning partner would otherwise have been entitled, and the assignee must accept the account of profits agreed by the partners.
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> (2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners and, for the purposes of ascertaining that share, to an account as from the date of the dissolution.'

Applicable principles of partnership law

30. The relevant principles of partnership law are not in issue between the parties. The dispute concerns the proper application of those principles on the facts of the present case. Nevertheless, to elucidate the arguments that follow and the Court's analysis of them, it is necessary to provide a short summary.

i. concerning a partner's share or interest

31. According to Twomey, *Partnership Law,* (Dublin, 2000), ('Twomey') (at para. 16.70), it follows from the terms of ss. 39 and 44 of the 1890 Act that '[t]he share of a partner in a partnership is, in fact, simply his proportion of the partnership property after that property has been turned into money and applied to pay off the partnership debts.' In the words of Joy CB in *Stuart v Ferguson* (1832) Hayes (Ir. Ex.) 452 (at 473), 'the share of each partner is only the share of the clear surplus which would remain after the payment of all of the debts.' The most recent edition of *Lindley & Banks on Partnership*, 19th edn, (London, 2010), ('Lindley & Banks'), also citing ss. 39 and 44 of the 1890 Act, harks back (at para. 19-05) to Lord Lindley's classic definition that '[w]hat is meant by the *share* of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities have been paid and discharged', adding the qualification that it would be more accurate to speak of a partner's entitlement to a proportion of the *net proceeds of sale* of the assets, before concluding (at para. 19-06) that 'to speak of a share in financial terms *otherwise* than by reference to a partner's net entitlement (whether calculated in the above way or in some other manner prescribed by the partnership agreement) is both misleading and legally incorrect.'

32. Twomey points out (at para. 19.03) that the term 'a partner's share' can be misleading since, in the absence of any agreement, a partner is not entitled to a share in the partnership, in the sense of being entitled to any particular item of partnership property, before noting that the distinction is sometimes blurred by the use in both the jurisprudence and the 1890 Act of the phrase 'a partner's share in the partnership property'. Twomey goes on to observe (at para. 19.04) that

> 'While taxation legislation refers to a partnership share in this manner for convenience, in truth, a partner cannot be said to be entitled to any item of partnership property. Instead, each partner has a beneficial interest in the entirety of the partnership property and in this sense a partnership share is a bundle of the different property rights included within the assets of the firm, such as real property, personal property, choses in action etc. However, a partner does not have a right to any particular partnership asset, to the exclusion of the other partners. '

33. The ability of a partner to transfer his or her share to a third party is expressly recognised under s. 31 of the 1890 Act but derives from the common law. Twomey comments (at para. 19.11) that, although a share in a partnership is not commonly assigned, the 1890 Act does specifically deal with the rights of the assignee of a partner's share *vis à vis* the continuing partners and that, since the share of a partner in a successful partnership may involve the right to a valuable income stream, it may become the subject of a mortgage and the mortgagee of a partnership share would be entitled to the rights of an assignee under the 1890 Act.

ii. concerning a partner's proprietary interest and beneficial interest

34. In giving judgment for the Court of Appeal for England and Wales in *Inland Revenue Commissioners v Gray* [1994] STC 360, Hoffman LJ explained (at 377c-d):

> 'As between themselves, partners are not entitled individually to exercise proprietary rights over any of the partnership assets. This is because they have subjected their proprietary interests to the terms of the partnership deed which provides that the assets shall be employed in the partnership business, and on dissolution realised for the purposes of paying debts and distributing any surplus. As regards the outside world, however, the partnership deed is irrelevant. The partners are collectively entitled to each and every asset of the partnership, in which each of them therefore has an undivided share.'

35. Citing the combined effect of ss. 24(1) and 44(b)(4) of the 1890 Act, *Lindley & Banks* describe the essential nature of a partner's proprietary interest as follows (at para. 19-04):

> 'It is clear that, in the absence of some other agreement (express or implied) all the members of an ordinary partnership have identical and equal interests in its assets and that no partner is entitled, without the concurrence of all his co-partners, to insist that a particular asset (or an interest therein) is vested in him, either during the continuance of the partnership or following its dissolution.'

36. In an analysis that was accepted by the Judicial Committee of the Privy Council in *Hadlee v Commissioner of Inland Revenue* [1993] A.C. 524 (at 532G) and, in substance, by the Court of Appeal for England and Wales in *Popat v Shonchhatra* [1997] 1 W.L.R. 1367 (at 1372C-E) , the same authors observe (at para. 19-08) that, while the nature of each partner's beneficial interest in the partnership assets will to an extent depend on the contents of the partnership agreement, nevertheless, irrespective of the terms of

that agreement, each partner's share will display two characteristics, which may be regarded as constants:

> 'First, each partner's beneficial interest, expressed in terms of its realisability, is in the nature of a *future* interest taking effect in possession on (and not before) the determination of the partnership, whether brought about by his departure or by a general dissolution. The limitation on his entitlement may be explained by reference to the fact that, as long as the partnership continues, each partner is entitled to require the partnership assets to be applied for partnership purposes and no partner is entitled to use or enjoy his share of those assets to the exclusion of his co-partners. Secondly, when the partnership is determined and the partner's beneficial interest in the partnership assets notionally falls into possession, it will take effect subject to the right of the other partners to have those assets applied towards payment of the firm's debts and liabilities and any surplus divided between the partners in the manner prescribed by [the 1890 Act]. This will normally entail a sale of such property. Thus, in the absence of any agreement to the contrary, the share of a partner will represent (and should always be stated in terms of) his proportionate share of the net proceeds of sale of the partnership assets, after all the firm's debts and liabilities have been paid or provided for.'

37. As Twomey describes the position (at para. 19.02), '[l]ike a share in a company, a share in a partnership confers no interest in the partnership assets, it is in the nature of personalty, it is a chose in action and it confers certain implied rights and obligations.'

iii. concerning partnership property

38. It is presumed that property brought into a partnership business or acquired for the purposes, and in the course, of that business is partnership property; s. 20(1) of the 1890 Act. It is further presumed that property purchased with partnership funds is partnership property; s. 21 of the 1890 Act. Each presumption is rebuttable since, under s. 19 of the 1890 Act, the mutual rights and duties of the partners defined by the Act may be varied by the consent of all the partners and such consent may be either express or inferred by a course of dealing.

39. Twomey points out (at para. 16.84) that 'there is nothing to prevent the partners in a firm converting an item of partnership property into the separate property of one or more of the partners', on the authorities of *Ex p Rowlandson* (1811) 1 Rose 416 and *Stuart v Ferguson*, already cited, before continuing:

> 'Thus, if a firm is solvent and all the partners agree, partnership property may be removed from the firm and the capital of the firm may be reduced.'

The requirement that all of the partners must agree on the conversion of partnership property into the separate property of a member or members of the firm arises, under s. 24(8) of the 1890 Act, where that conversion occurs as a change in the nature of the partnership business, rather than simply as an ordinary matter connected with the conduct of that business.

The position of each of the parties

40. Against the factual and legal background just described, the liquidator's position, as I understand it, can be summarised as follows.

> (a) Under the 2001 agreement, Bloxham's assets were partnership property.
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> (b) The meaning and effect of each of the sale and purchase agreements concluded in early Summer 2011 was to sell or assign each individual partner's share or interest in the partnership to the company concerned (other than the share of each in its capital). It was not, and could not have been, to sell a vested portion of the partnership's other assets and its liabilities to that company.
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> (c) Hence, the only relevant asset that each corporate partner owned at the time of the execution of the 2011 partnership agreement was the relevant partner's share in Bloxham (other than in its capital) under the 2001 agreement.
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> (d) Upon the execution of the 2011 partnership agreement, all property used in Bloxham's business became partnership property under that agreement.
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> (e) Thus, insofar as each corporate partner had, or has, any right, title or interest in the assets of the partnership available to charge when the debentures were executed in Autumn 2011, it was never more than, at best, a partner's share or interest and could not then, and cannot now, amount to a vested interest in any portion of the assets of the partnership.

41. The receiver's position, in summary, is this.

> (a) In executing the sale and purchase agreements, the individual partners acted in 'a co-ordinated and collective' fashion to sell the 'entire assets and liabilities' of the partnership (other than its capital), and not merely to assign each partner's share or interest in the partnership (other than the share of each in its capital).
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> (b) Those assets and liabilities were, thereafter, held by the corporate partners 'jointly' and did not become partnership assets under the 2011 partnership agreement.
>
> (c) Thus, ownership of the partnership assets was vested in the corporate partners jointly at the time when each executed a debenture over its assets in favour of the bank in early Autumn 2011, with the result that the bank obtained a valid security over all of those assets.

Analysis

i. the parties to the sale and purchase agreements

42. It is common case that the parties to the seven, separate sale and purchase agreements were, in each instance, the individual partner concerned, acting in his personal capacity, and the corporate entity under that partner's control. The limited partner, FBD, was not a party to any of those agreements.

43. The liquidator submits that this demonstrates that the property being sold in each case was the relevant individual partner's share

in the partnership.

44. The receiver contends for the more elaborate proposition that, because the seven individual partners (though not the limited partner) acted in a co-ordinated way by each entering into the same type of agreement with a separate corporate entity under his or her control at broadly the same time in pursuit of the same objective (reducing the tax payable on the partnership's profits, enhancing the personal debt repayment capacity of the partners, and securing greater tax allowances on their pension contributions), these separate transactions of the individual partners not only can but must be construed as a collective transaction of the partnership whereby the purported sale by each individual partner of a vested interest in, or share of, the partnership's assets other than capital, which he did not then possess as a matter of partnership law, nonetheless amounted to the lawful and effective sale by the partnership of those assets.

45. The first difficulty with the receiver's argument on this point is that the most obvious way for the partnership to sell its assets, whether in whole or in various parts, would have been for it to do so by directly entering into the necessary agreement (or agreements). If the partnership had sold the relevant assets in the relevant proportions to the individual or proposed corporate partners, that would have had the virtue, not only of simplicity, but also of demonstrating the partnership's involvement or participation in the relevant scheme. Of course, whether that would, or could, have produced the desired tax, debt repayment and pension contribution advantages for the individual partners I do not know. If not, that might in itself have highlighted the danger of assuming that tax law and partnership law treat dealings in partnership assets in the same way.

46. The second difficulty is that the sale and purchase agreements were entered into by each of the individual partners at a time when the conduct of the partnership was governed by the 2001 partnership agreement. Clause 2.4 of that agreement, whereby Bloxham's premises, equipment, furniture, fittings, name and goodwill were deemed assets of the partnership, could only have been amended, varied or modified under clause 27.3, by an instrument in writing signed by each of the partners (including FBD). There is no evidence that either clause 2.4 or, for that matter, clause 27.3 were ever varied in that way, at least prior to the execution of the 2011 partnership agreement, which was subsequent to the conclusion of the sale and purchase agreements. And quite separately as a matter of partnership law, the agreement of all of the partners would have been necessary to effect the sale of partnership property generally (see para. 39 above). The receiver's position in this regard is that the agreement of all of the partners (including FBD) to sell the relevant partnership assets should simply be inferred.

xiii. proper construction of the sale and purchase agreements

47. The Supreme Court restated the applicable principles of law on the interpretation of express contractual terms in *ICDL v European Computer Driving Licence Foundation Ltd.* [2012] 3 I.R. 327. The judgments of both Fennelly J and O'Donnell J confirm that the best modern statement of those principles is to be found in the following passage from the judgment of Lord Hoffman in *I.C.S. Ltd. v. West Bromwich B.S.* [1998] 1 W.L.R. 896 at pp. 912-3:

> '(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as 'the matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonable have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason have used the wrong words or syntax; See *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd*. [1977] A.C. 749.
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> (5) The "rule" that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one nevertheless concludes from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania S.A. naviera v. Salen Rederiena A.B.* [1985] A.C. 191, 201:-
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> > "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense".'

48. Fennelly J prefaced his endorsement of the foregoing principles by noting that they had been approbated in the judgment that Geoghegan J delivered on behalf of the Supreme Court in *Analog Devices B.V. v. Zurich Insurance Company* [2005] IESC 12, [2005] 1 I.R. 274, which had also referenced the well known 'matrix of fact' dictum of Lord Wilberforce in *Reardon Smith Line v. Young Hansen-Tangen* [1976] 1 W.L.R. 989. Fennelly J then commented (at pp. 350-1 of the report). :

> '[66] These various dicta are notable for their emphasis on the potential admissibility of background knowledge or what Lord Wilberforce famously described as the 'matrix of fact'. Emphasis on those admissible aids to interpretation should not, however, mislead us into forgetting that a contract is, in the first instance, composed of the words used by the parties. It is of note that Geoghegan J. in his judgment in *Analog Devices B.V. v. Zurich Insurance Company* [2005] IESC 12, [2005] 1 I.R. 274 cited at p. 280 a passage from the judgment of Griffin J. in *Rohan Construction v. I.C.I.* [1988] I.L.R.M. 373 at p. 377, a case concerning an insurance policy, to the following effect:-
>
> > "It is well established that in construing the terms of a policy the cardinal rule is that the intention of the parties

must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The court must not speculate as to their intention apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at and not merely a particular clause."

[67] Geoghegan J. went on to note that Griffin J. had explained his reference to 'surrounding circumstances' and that he had cited the following passage from the speech of Lord Wilberforce in *Reardon Smith Line v. Young Hansen-Tangen* [1976] 1 W.L.R. 989 at p. 996:-

"When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have had in mind in the situation of the parties….What the court must do is place itself in thought in the same factual matrix as that in which the parties were."'

49. Having endorsed Lord Hoffman's five principles, Fennelly J then added the following helpful gloss (at p. 352):-

'[69] This passage, particularly para. 4, should not be misunderstood as advocating a loose and unpredictable path to interpretation. A court will always commence with an examination of the words used in the contract. Moreover, words will, as Lord Hoffman emphasises, normally be interpreted in accordance with their "natural and ordinary meaning…". Business people will be assumed to know what they are doing and will normally be bound by what they have signed. The exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract. Keane J. summarised the law briefly but comprehensively in the High Court in *Lac Minerals Ltd. v. Chevron Mineral* [1995] 1 I.L.R.M. 161.

[70] Evidence of the surrounding circumstances, but not of subjective intentions, may be admitted to explain the subject-matter and even what particular words should be understood as referring to. Such evidence will not normally be allowed to alter the plain meaning of words.'

xiv. the natural and ordinary meaning of the words used

50. The liquidator contends that the natural and ordinary meaning of the words 'interest or share in the [b]usiness of Bloxham', when applied in each sale and purchase agreement to the subject matter of the proposed transaction involving each individual partner, can only be construed as denoting the partnership share of each individual partner and cannot be construed as a reference to a vested interest in any item, or portion, of partnership property.

51. The receiver submits that those words are irrelevant because they appear only in the 'covering letter' attached to each 'offer for sale', which does not form part of the contract and cannot be considered as an aid to the interpretation of the contract. The receiver asserts that the said letter makes clear on its face that what is to be considered are the terms and conditions of the offer for sale.

52. I am quite satisfied that the receiver's submission on this point is incorrect for two reasons. First, the letter concerned describes itself on its face as an 'Offer to Sell' in accordance with the accompanying 'purchase terms and conditions.' The letter is undoubtedly, in substance, an offer to sell and the accompanying 'purchase terms and conditions' are precisely that and not, as the receiver suggests a distinct and free standing 'Offer for Sale'. Indeed, in clause 1.1. of the purchase terms and conditions, headed 'Definitions', 'Offer to Sell' is defined to mean 'the written offer made by the [o]fferor to the [o]fferee to sell the [b]usiness on the terms set out in these [terms].' Clause 1.2 recites at paragraph (f)

'These terms shall have no force and effect unless and until the Offer to Sell expressly and specifically incorporating these terms therein is accepted in accordance with the Offer to Sell and these Terms shall only have force and effect in relation to such Offer to Sell when so incorporated into such Offer to Sell.'

53. I conclude that the letter identified as the 'Offer to Sell' forms part of the sale and purchase agreement and falls to be construed as such.

54. Second, even if I am wrong in that analysis it cannot assist the receiver's argument because precisely the same words – *i.e.* 'interest or share in the [b]usiness of Bloxham' – appear again in the opening paragraph of the purchase terms and conditions.

55. The receiver next submits that the specific words used in Clause 2 of the sale and purchase agreement are fundamentally inconsistent with the construction of that clause contended for by the liquidator.

56. Clause 2.1 of the sale and purchase agreement is headed 'Offer To Sell The Assets'. As already noted, it recites that the offeror shall sell as beneficial owner and the offeree shall purchase the offeror's 'interest in or share of' Bloxham's goodwill; information; intellectual property rights; pending contracts, engagements and orders; and book debts, together will all other property to which the offeror is entitled or in which he has an interest in connection with the business, but excluding his interest in Bloxham's capital represented by cash on deposit.

57. Clause 2.2 stipulates that the offeree shall assume the offeror's share of the creditors, accruals and bank overdraft of Bloxham.

58. The receiver submits that the second sub-clause in particular cannot be reconciled with the construction the liquidator contends for because it obliges the offeree to assume the offeror's share of the creditors, accruals and bank overdraft. The receiver argues that this would involve the double counting of those liabilities on the basis that, if Clause 2.1 refers to the sale of a partner's share (and a partner's share comprises simply his proportion of the partnership property after that property has been turned into money and applied to pay off the partnership debts), then requiring the partner concerned to assume a share of the partnership's liabilities separately thereafter is to fix him with a share of the same debts or liabilities twice over.

59. I am unable to accept that submission. Clause 2.1 operates to transfer the relevant individual partner's share of, or interest in, all of the assets of Bloxham except its capital. Clause 2.2 requires the purchaser of that share or interest in those assets to assume that partner's share of the creditors, accruals and bank overdraft. It is those two clauses together that operate to transfer the relevant portion of the partner's share as a matter of contract law.

60. As Twomey points out (at para. 19.22), the legal relationship between the assignor and the assignee of a partnership share is not directly dealt with under the 1890 Act and, thus, falls to be determined under the general law. Under the terms of s. 31(1) of the 1890 Act, direct liability is not imposed upon an assignee of a partnership share for the liabilities of the firm and the assignor is not relieved of any of his obligations to the firm. The judgment of Farwell J at the turn of the last century in Dodson v Downey [1901] 2 Ch. 620 provides authority for the proposition that the vendor of a partnership share holds his partnership in trust for the purchaser as *cestui que* trust and that the purchaser, as such, is personally bound to indemnify the vendor, as trustee, from any liabilities attaching to the trust property – *i.e*. the partnership share or interest. Farwell J considered the proposition that the purchaser of a partnership share is entitled to the associated profits while the vendor remains responsible for any associated losses to be 'absolutely untenable' in equity. Nonetheless, it does not seem to me to be unreasonable or illogical for the vendor of a partnership share to take the precaution of securing through contract an indemnity only otherwise available in equity, if at all.

xv. a technical term or 'term of art'?

61. The receiver next submits that it is significant that the sale and purchase agreement does not expressly state that the term 'interest in or share of [each asset]' is being used in the context of its meaning under the 1890 Act or in the context of partnership law generally. The receiver suggests that this is particularly significant in circumstances where a variety of other pieces of legislation – such as the Companies Acts, Competition Act and VAT Acts - are expressly referred to in those agreements and suggests that the term 'interest in or share of' should not be viewed as a term of art.

62. In my judgment, this submission entails two separate propositions, neither of which is persuasive. The first is that it is for the parties to a contract to identify the principles of law that should apply to its subject matter or to its interpretation. The incontrovertible fact is that Bloxham was a limited partnership and, as such, subject to the applicable provisions of partnership law. That is so whether or not an individual partner chose to expressly acknowledge that fact in the terms of an agreement for the sale of his or her 'interest in the [b]usiness of Bloxham'.

63. The second proposition is that to construe the term 'interest in or share of [a partnership asset]' in the light of the applicable principles of partnership law is to construe those words wrongly in a technical sense or as 'a term of art', rather than according them their natural and ordinary meaning. I do not understand it to be the liquidator's submission that those words should be treated as a term of art with a particular technical or statutory meaning under partnership law, at odds with their natural and ordinary meaning. Rather, it is my understanding that the liquidator urges the Court to give those words their natural and ordinary meaning and to consider the result in light of the applicable principles of partnership law.

v. conclusion on the natural and ordinary meaning of the words used

64. In my judgment, the relevant words and, in particular, the words 'interest in or share of' in connection with the relevant partnership assets and 'share' in connection with the relevant partnership liabilities, bear, as their natural and ordinary meaning, a partnership interest or share in those assets and liabilities and not the vested ownership of a portion of them equivalent to the relevant partnership share. That seems to me to reflect the intention of the parties – professional partners and commercial actors in receipt of professional advice – as disclosed by the plain words of the sale and purchase agreement.

xvi. background knowledge or 'the matrix of fact'

65. A reasonable person in the position of the parties must be taken to know the law (including the applicable principles of partnership law) and to know what he is doing. This was an artificial transaction, the aim or purpose of which was to facilitate a change in the structure or nature of the Bloxham business to reduce the liability to tax of the profits extracted from it, without affecting the day to day conduct or control of its professional or commercial activities in any way. In the circumstances, I have considerable doubt whether, in the usual sense of that term, the transaction had any 'commercial' purpose, which, as a requirement of public policy, the Court might be expected to strive to implement through a purposive, rather than literal, construction of the terms of the sale and purchase agreements at issue. Is there a public interest in straining the interpretation of contracts solely to ensure the legal efficacy of tax mitigation strategies? I strongly doubt it.

xvii. business efficacy

66. Even if the Court were to accept the position as otherwise, that would only lead to a further question, namely; to what extent was the transfer of certain partnership property rather than the transfer of the individual partners' respective partnership shares, a necessary feature of the relevant restructuring transaction, so that only the latter (necessarily, strained) interpretation of the relevant terms and effect of each sale and purchase agreement could ensure the business efficacy of that agreement or, differently put, avoid flouting business commonsense?

67. In answer to that question, the receiver suggests the application of a form of inductive reasoning, whereby this Court is invited to accept each of three separate factual premises as supplying, individually or cumulatively, strong evidence for the truth of the conclusion that the transfer by each individual partner of the vested ownership of a portion of certain partnership assets, and not simply the transfer by each individual partner of his partnership share in that portion of those assets, was a necessary feature of the broader Bloxham restructuring transaction.

xviii. accounting and taxation advice on the restructuring

68. The first factual premise is that Bloxham's professional financial advisers took that view. However, based on the evidence before the Court, I do not accept that premise as correct. It is clear that, in their presentation to the managing partner on the proposed restructuring of the partnership for tax, debt-repayment capacity and pension purposes, those advisers referred to the sale of 'your goodwill' and 'your share of the partnership assets and liabilities' as part of the proposed transaction and that, in the correspondence that passed between them and both Bloxham and (when writing on Bloxham's behalf) the Central Bank, several similar references appear. But that does not necessarily mean that it was the view of those advisers that the sale by each partner of a portion of certain of the partnership's assets and liabilities, and not simply the sale by each of his or her partnership share in those assets and liabilities, was strictly required for that purpose. Rather, it suggests to me that, on the balance of probabilities, Bloxham's professional financial advisers, no doubt perfectly understandably, simply failed to discriminate between those two separate concepts as a matter of partnership law, in view of the limited significance of the relevant distinction for the purposes of tax law.

xix. tax relief on capital gains under the sale and purchase agreements

69. I am reinforced in that conclusion by a consideration of the second and third factual premises contended for by the receiver. The

second is that the restructuring transaction was to a large extent tax driven and that the eligibility for tax relief that the individual partners sought and obtained from the Revenue Commissioners was contingent on the sale by each of a portion of the partnership assets rather than the partnership share of each in those assets. There are several reasons why I do not accept that premise.

70. The first is that tax law treats the business of a partnership differently than partnership law does. The tax relief sought and obtained by virtue of the restructuring transaction at issue included relief from capital gains tax on the transfer of a business as a going concern from an individual to a company, together with the whole of the assets of the business or the whole of those assets other than cash, pursuant to the provisions of s. 600 of the Taxes Consolidation Act 1997 ('the TCA'). The tax cases accord a flexible definition to the term 'business'. As Lord Diplock put it in *Town Investments Limited v Department of the Environment* [1978] AC 359 (at 383):

> 'The word "business" is an etymological chameleon: it suits its meaning to the context in which it is found. It is not a legal term of art.'

71. More significantly, s. 30 of the TCA is a deeming provision in respect of partnerships, whereby:

> 'Where 2 or more persons carry on a trade, business or profession in partnership-
>
> (a) capital gains tax in respect of chargeable gains accruing to those persons on the disposal of any partnership assets shall be assessed and charged on them separately, and
>
> (b) any partnership dealings in assets shall be treated as dealings by the partners and not by the firm as such.'

72. As regards income tax, s. 1008 of the TCA effectively deems a partner's share in any profits or losses derived from that partnership in a given period to be a profit or loss sustained in the course of that person's several, or 'sole', trade.

73. It is not, therefore, that the eligibility requirements for the relevant tax relief require individual partners to deal in partnership assets as their own property (and to contract with others on that basis). Rather, it is that the relevant provisions of the TCA and the applicable principles of taxation law deem partnership dealings in assets in certain circumstances to be dealings by the partners, and not the firm, in those assets Neither partnership law nor the law of contract contains any equivalent deeming provision or principle of which I am aware.

xx. a digression on tax law, partnership law, contract law and accounting practice

74. Accordingly, the position of partnership dealings in assets for the purpose of tax law is significantly different from the position of such dealings for the purpose of both contract law and partnership law. As noted earlier, Twomey points out (at para. 19.03) that this can be misleading. Indeed, it seems to me more likely than not that a regrettable failure to advert to that distinction at the time of the restructuring transaction lies at the heart of the present dispute.

75. The distinction between the treatment of partnership assets under tax law and under the general law illuminates two other disputes ventilated at some length in the various affidavits filed on behalf of each of the parties to the present application. 76. The first, already alluded to, concerns the extent to which the restructuring transaction that Bloxham entered into on the advice of a particular firm of financial advisers envisaged or required the sale by each individual partner of his share of certain partnership assets, as opposed to his partnership share in those assets. The receiver points out, as has already been noted, that the documentation and correspondence generated by those financial advisers in that regard is replete with references to the proposed sale by each individual partner of his portion of various partnership assets (rather than of his partner's share in those assets). The receiver invites the Court to conclude that each of the individual partners was therefore in receipt of financial advice to the effect that he should enter into a sale and purchase agreement in respect of his share of the relevant partnership assets and liabilities, rather than of his share in the partnership, as part of the background knowledge which was reasonably available to each in the situation in which he was at the time of the contract.

77. It should be noted that the managing partner of the firm of financial advisers concerned has deposed on affidavit that 'it was never the intention that the ownership of underlying partnership assets would be transferred from the individual partners to the new unlimited companies.' The receiver submits that this averment must be excluded from the admissible background to the interpretation of each of the sale and purchase agreements as a declaration of the parties' subjective intent. I do not think that is correct. I understand the intention concerned to be that of the relevant financial advisers concerning the restructuring transaction they were recommending to Bloxham, rather than the intention of each or any of the individual partners in entering into the relevant sale and purchase agreements. However, I do accept that the subjective intention of Bloxham's financial advisers concerning the precise details of the restructuring plan that they were recommending to Bloxham is of less probative value than that of the words actually used in the various documents in which that plan was outlined to Bloxham by those advisers.

78. In my judgment, while the material just described forms part of the admissible background, it is background material of little or no assistance in the proper construction of the sale and purchase agreements. The relevant advice was financial advice proffered to professional persons who might reasonably be expected to supplement it with any necessary legal advice in respect of the nature and effect of the transaction they were proposing to enter into. There is no suggestion that the financial advisers concerned were purporting to provide legal advice or that they either drafted, or advised on the drafting, of the relevant contracts as a matter of partnership or contract law. As I view the relevant background, it seems to me more likely than not that, perfectly understandably in light of their particular expertise, those advisers were approaching the proposed transaction, the purpose of which was primarily the creation of a more tax-efficient structure for the business of Bloxham, solely from the perspective of tax law and without regard to the requirements or constraints of the general law.

79. The second dispute, which was addressed at some length in various affidavits exchanged on behalf of the parties, concerns the extent to which goodwill was, or was not, an asset of the partnership. The issue, which I consider to be a sterile one in the context of the resolution of the present dispute, revolved around the extent to which goodwill was ever an asset of Bloxham. The liquidator adopted the position that it was not, because it was never recorded in Bloxham's reports and financial statements. The receiver submitted that it was, because its existence as such was recognised under the 2001 partnership agreement, as amended in 2006.

80. Here, I believe, the liquidator fell into a trap similar to that of failing to acknowledge that partnership assets may be differently treated under tax law and the general law. Twomey (at para. 18.06) points out that while it is common for the goodwill of a firm to be stated in the accounts as having a nil value or indeed to be excluded from the accounts, that does not mean that goodwill does not exist as partnership property or that it is valueless. As Twomey puts it, '[t]his is because there is a clear distinction to be made

between the accountancy treatment of an asset and its status as partnership property or its real value under partnership law.' Thus, it is important to acknowledge that the goodwill of a partnership may be treated entirely differently for accountancy and partnership law purposes, just as partnership assets generally may be treated differently for the purposes of tax law and partnership law.

81. Before leaving these issues, it is appropriate to note that the receiver relies upon the contents of an expert report from a chartered accountant with significant experience in insolvency matters, which addresses both the restructuring and the goodwill issues in support of the position on each that the receiver has adopted. Since the real issue in this case is one of partnership law, rather than one of tax planning or accounting practice, I have found that report of limited assistance. For completeness, I should acknowledge that the same expert swore a supplemental affidavit in which he expressed the view that the sale by each individual partner of his interest in Bloxham (rather than the purported sale by each of any portion of the partnership assets) to the various separate unlimited companies under the control of each, operated to dispose of 'the entire assets' of the partnership to those companies. How that proposition accounts for the interest in the partnership of the limited partner FBD and whether that alchemical process is asserted to operate as a matter of accounting practice or of partnership law was not made entirely clear. Nor is it made clear what the significance is of the subsequent entry by each of the unlimited companies concerned into the 2011 partnership agreement whereby each of them acknowledged (along with each of the other partners) that 'all property of whatever nature used in the business of [Bloxham] and [Bloxham's] name and goodwill' were thereafter to be assets of Bloxham.

xxi. the significance of regulatory approval

82. The third premise upon which the liquidator appears to rely in suggesting that the business efficacy of the restructuring transaction was contingent upon the transfer by each individual partner of the vested ownership of a portion of certain partnership assets to the relevant proposed corporate partner is that it was on that basis that the regulatory consent of the Central Bank to that transaction was obtained.

83. Once again, that premise does not seem to me to be correct.

84. The relevant regulation at the material time was that provided for by the European Communities (Markets in Financial Instruments) Regulations 2007 ('the 2007 Regulations'), which gave effect within the State to Directive 2004/39/EC on markets in financial instruments ('MiFID'). Under the 2007 Regulations, the Central Bank was the competent authority within the State for the purpose of MiFID. Part 14 of the 2007 Regulations deals with 'acquiring transactions' in authorised investment firms. Regulation 178 defines an 'acquiring transaction' to mean any direct or indirect acquisition by a person or more than one person acting in concert of shares or other interest in an authorised investment firm in certain defined circumstances. Under Regulation 180 such transactions are subject to Central Bank approval.

85. The receiver points to the terms of a letter, dated 5 July 2010, from Bloxham's financial advisers to the Central Bank, in which those advisers state that they are responding to queries raised by the Central Bank in response to an earlier letter from Bloxham's managing partner. That letter purports to provide a summary or 'recap' of the proposed restructuring transaction. The receiver relies on the following statement included in that summary:

> 'The existing partners will sell their interest in the Bloxham Partnership which includes all assets and liabilities of the Partnership excluding the cash on deposit and financial assets, which represents (*sic*) the current capital of the Bloxham Partnership.'

In so far as I can tell, the 'interest' of each of the partners in the Bloxham partnership is nowhere defined in that letter, but it is difficult to accept that the Central Bank should be taken to have been unaware of the nature of a partner's share as a matter of partnership law.

86. Indeed, although the receiver does not refer to it, the said letter also contains diagrammatic representations of both the current and proposed structure of Bloxham. The first diagram very simply describes each partner as holding a '14.89% shareholding' in Bloxham (although it is not clear to me where that percentage figure derives from, being slightly more than a one seventh fraction of the whole and, more particularly, not corresponding to any of the existing partner's profit share ratios under the then extant 2001 partnership agreement, as amended). The second diagram depicts each individual partner holding a 100% shareholding in the relevant corporate partner, which is in turn depicted as holding a 14.89% shareholding in Bloxham. It is a striking feature of each diagram that the term 'shareholding' is used.

87. In those circumstances, I cannot accept the receiver's bald assertion that those advisers represented to the Central Bank that 'all assets of the partnership were to be owned by the Unlimited Companies.' It follows that I do not accept that the approval of the Central Bank was obtained on the express or implied basis that Bloxham's assets (as opposed to the share or interest of each partner in those assets) were to be directly transferred to the proposed corporate partners, so that only the strained construction of the sale and purchase agreement in that way could then operate to give business efficacy to the restructuring transaction from a regulatory perspective.

xxii. conclusion on the proper construction of the sale and purchase agreements

88. For all of the reasons already set out, I conclude: first, that that the words at issue would convey nothing other than their natural and ordinary meaning to a reasonable person having all the background knowledge that would have been reasonably available to the parties to the sale and purchase agreements; and second, that, since the natural and ordinary meaning of the words used was perfectly capable of giving business efficacy to the agreements concerned and does not flout business commonsense, no question arises of striving to give those words the quite different meaning contended for by the receiver.

xxiii. property transfers from a partnership

89. Although it is perhaps superfluous, in circumstances where I have already found that the sale and purchase agreements did not operate to transfer any partnership assets – as opposed to a partnership share in certain assets - to the proposed corporate partners, it is convenient at this point, as well as necessary for the sake of completeness, to deal briefly with the receiver's submission on the circumstances in which partners can lawfully transfer property out of a partnership.

90. The receiver first accepts, correctly in my view, that the following passage from the judgment of Nourse L.J. for the England and Wales Court of Appeal in *Popat v Shonchhatra*, already cited, represents a correct statement of the law (at 1372 B-E):

> 'Although it is both customary and convenient to speak of a partner's "share" of the partnership assets, that is not a truly

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

91. In accepting the foregoing principles, the liquidator submits that what occurred in fact in this case is that, in relation to each share and purchase agreement properly construed, the subject of the agreement was the relevant individual partner's vested share of particular partnership assets, and the consent of each of the other partners (including FBD) to that vesting of those assets in that partner, as well as to that partner's dealing in those assets by selling them to the proposed corporate partner, though nowhere communicated by any of the other partners either orally or in writing, is simply to be presumed or inferred in respect of all of the partners.

92. In the submissions made on his behalf, the receiver repeatedly criticises the liquidator for failing to acknowledge that the partners, acting collectively, could transfer partnership assets. I do not think that criticism is fair. It fails to acknowledge the essential nature and quality of a partnership. As s. 1(1) of the 1890 Act states, it is 'the relation which subsists between persons carrying on a business in common with a view to profit.' In other words, the partnership is the collective and, at the material time, the terms of the 2001 partnership agreement provided the agreed mechanism under which the partnership (or collective) was to act if it wished to transfer partnership assets.

93. In this case, while there was certainly co-ordinated action on the part of the individual partners (thought not the limited partner) in entering into a number of separate - though similar - individual contracts with the proposed corporate partners (who were then third parties), there was no collective action by the partnership. I do not accept that it is appropriate to draw the inference that the former implies the latter. Rather, I think the inference runs the other way since, as I have already noted, if the Bloxham partnership wished to vest partnership property in the individual partners for the purpose of allowing each to transfer it onwards to a third party, the obvious – indeed, necessary - way to do that at the material time was in the manner prescribed under the 2001 partnership agreement.

94. The receiver goes on to cite and to address at length the decision of the Inner House of the Court of Session in Scotland in *Gordon v Inland Revenue Commissioners* [1991] STC 174 as, in his submission, a case very much on point in relation to the circumstances in which partnership property can be validly transferred to a partner. While, as noted earlier in this judgment, there is ample authority for the proposition that there is nothing to prevent the partners in a firm converting an item of partnership property into the separate property of one or more of the partners, there are three reasons why the case relied on by the receiver is of little or no assistance in that context.

95. The first reason is that it is not on point at all. It involved the transfer of a business engaged in farming an estate in Scotland as a going concern (though without ownership of the estate itself), from the recently formed husband and wife partnership that operated that business to an unlimited company that the couple had recently incorporated and to which the husband, as owner of the estate, had recently agreed to transfer it. There was no question in that case, as far as I can see, of the husband and wife entering separate contracts with the unlimited company under their control for the sale by each separately of his or her respective interest or share in the partnership's assets and arguing thereafter that this should be construed as the sale by the partnership of the assets of the business. As the terms of the case stated in *Gordon* make clear (at 177 e-f of the report), the transfer of the business was effected by the partnership firm, together with the husband and wife, both as the only two partners in the firm and as individuals (together, referred to in the judgment as 'the transferors').

96. This rather unusual description of the transferors of the partnership business in that case brings me to the second reason why it really is of no assistance to the resolution of the present application. As s. 4(2) of the 1890 Act makes plain, 'In Scotland, a firm is a legal person distinct from the partners of whom it is composed'. Of course, that is not the position in this jurisdiction or, indeed, in England and Wales, where, one of the crucial features of a partnership and one which clearly distinguishes it from a company is that a partnership is not a separate legal entity. Accordingly, as Twomey puts it (at para. 3.04), Scottish decisions on the nature of a partnership do not have the same persuasive authority in this jurisdiction as other decisions of the Scottish courts.

97. The third reason why I can derive no assistance from that case is that it is a tax case, in which the judgment of the Lord President (Lord Hope) is plainly not directed towards the relevant principles of partnership law. The case concerns the proper interpretation and application of s. 123(1) of the United Kingdom Capital Gains Tax Act 1979, a provision very similar, if not identical, in its terms to s. 600(2) of the TCA. The main issue in the case was whether, in circumstances where it was intended from the outset that the unlimited company would sell the estate (and, obviously, the business of farming the estate) immediately after those interests were transferred to it (by the taxpayer and the partnership firm, respectively), the business had been transferred to the unlimited company as 'a going concern', such that the taxpayer was entitled to the relevant 'roll-over' relief from capital gains tax. It was in that context that Lord Hope observed (at 183a):

> 'It is not disputed that what the taxpayer and his wife transferred to the company on the relevant date was the business that had previously been carried on by them in partnership. The point at issue is whether they transferred that business as a going concern.'

98. I read Lord Hope's reference to the transfer by the taxpayer and his wife of the business that had previously been carried on by them as nothing more than the use in passing of a convenient form of shorthand to describe the vendors of a partnership business under Scots law in that case. It would be grossly misleading to seek to interpret that reference out of context as representing a considered dictum on the entitlement of individual partners to transfer partnership property to a third party under either the 1890 Act or the common law more generally.

xv. subsequent transactions

99. Having concluded that each of the corporate partners obtained no more than the benefit of a partnership share under the sale and purchase agreements, I turn now to deal with the subsequent agreements entered into as part of the overall restructuring transaction.

100. Shortly after the execution of the sale and purchase agreements, the individual partners, FBD (as a limited partner), and the corporate partners entered into the 2011 partnership agreement on 9 August 2011. As already noted, it contains a clause whereby any assets of Bloxham held in the names of other persons (whether partners or not) are deemed to be held in trust for the partnership and another clause whereby all property used in Bloxham's business, including its name and goodwill, is an asset of Bloxham, which will belong to the partners in the profit sharing ratios. Since the latter clause can only reasonably be construed to mean that all of the property concerned represents partnership property to which the partners will only be entitled (in the profit sharing ratios) upon dissolution, it follows that, even if I am incorrect in some or all of the preceding analysis and the relevant portion of Bloxham's assets under the 2001 partnership agreement (rather than the relevant partnership share or interest in those assets) passed to the unlimited companies under the sale and purchase agreements, those unlimited companies would have transferred those assets back to Bloxham by entering into the 2011 partnership agreement.

101. I therefore conclude that when each of the unlimited companies executed a debenture in favour of the bank in September 2011 in respect of all of its assets, to include all of its rights, title and interest in the assets of the Bloxham partnership it had either already transferred any vested interest it once had in a portion of Bloxham's assets back to the Bloxham partnership or, more likely, had never obtained any vested interest in any portion of those assets in the first place. Accordingly, I am satisfied that, in September 2011 and afterwards, each of the corporate partners had no vested interest whatsoever in any part of Bloxham's assets capable of being charged. It did have a partner's share in Bloxham and, based upon the evidence before the Court, that interest was charged in favour of the bank on foot of that debenture. Any other conclusion would be inconsistent with the principle nemo dat qui non habet (no one gives who does not possess).

102. Finally, the receiver has placed some emphasis on the nature and significance of the subsequent sale of large parts of the Bloxham business to another stock broking and investment services firm between March and May 2012. That reliance is misplaced in circumstances where any view later formed by the partnership or any or all of its partners concerning ownership of partnership assets (or any part of them) or, indeed, any such view formed by the purchaser of any such assets, to the extent (if any) that it is inconsistent with the preceding analysis, cannot prevail over that analysis for the purpose of the present judgment.

Conclusion

103. For the reasons given, I find that, in September 2011, each of the corporate partners held no more than a partnership share or interest in Bloxham and none held any vested ownership interest in any portion of Bloxham's assets. The benefit of the said partnership share or interest in Bloxham was the only asset relative to Bloxham capable of being charged in favour of the bank by each of the corporate partners at that time or subsequently.