

# Partnership case law

[Life, Relationships](#)



This section of the website provides access to all cases summarised in the Partnership Law Updates which have been issued since January 2000 to date. Therefore this Archive operates as a guide to some of the interesting partnership cases decided in common law jurisdictions in recent years.

Special thanks are due to Professor Dick Webb (Emeritus Professor of Law in the University of Auckland) for alerting me to many developments contained in this section and to Dr Keith Fletcher of the University of Queensland.

Partnership by Holding out  
Plaintiffs instructed first-named defendant as their solicitor - Plaintiffs' funds dissipated by the first-named defendant - First-named defendant's wife also worked as a solicitor in the practice - Plaintiffs instructed the defendant as a result of their friendship with his wife - Husband and wife conducted themselves as partners in everything they did socially - Whether wife was a partner in the practice - Whether wife was liable as a partner by holding out  
*Palter v Zeller and Lieberman (1997)* .

In this case, the Court of Justice of Ontario considered both the allegation of a partnership between the two defendants, and the allegation that the second-named defendant had held herself out to be a partner with the first-named defendant. The first-named defendant, Zeller, had set up in practice as a lawyer and after his marriage to the second-named defendant, Lieberman, she joined him in practice. This fact was advertised by an announcement which was published by Zeller to the effect that Lieberman had “ joined me in the practice of law”.

There was no indication given in the firm's stationery or business cards that they were partners in this practice. The plaintiffs had been friendly with

Lieberman before she met Zeller and arising out of this friendship they instructed Zeller on a number of occasions. After Lieberman joined the practice, the plaintiffs entrusted their savings to Zeller and signed blank documents in connection with the use of the funds.

When Zeller dissipated this money, the plaintiffs sought to make Lieberman jointly liable with Zeller for the loss on the grounds that either she was Zeller's partner or that she had allowed herself to be held out as his partner under the Ontario equivalent of s 14(1) of the Partnership Act 1890. The plaintiffs' sought to support their claim that the husband and wife were partners as a matter of law by the fact that the plaintiffs had a social relationship with both defendants and it was clear from this relationship that the defendants were partners in everything they did, in the sense that they treated each other as equals.

In the work context, the plaintiffs claimed that the defendants were equals since they looked totally equal at work, having equal-sized offices. Wilkins J rejected this claim out of hand since he could find not even a scintilla of evidence to support a finding of a partnership between the defendants. He noted that, although the plaintiffs presumed that the defendants were partners, the mere fact that lawyers may be married and behave in an equal social and marital relationship has no impact upon the question of whether they are partners as a matter of law.

He held that what is important to this issue is how they conduct their business affairs together, not how they conduct their personal affairs. The plaintiffs' second claim was that even if Lieberman was not a partner as a matter of law, she allowed herself to be held out as a partner in the firm and

therefore should be liable under the Ontario equivalent of s 14(1) of the Partnership Act 1890 since the plaintiffs had relied on this fact. Again the plaintiffs supported their claim of a holding out by the fact that the defendants treated each other as equals in everything they did.

The plaintiffs alleged that they had relied on this holding out of partnership by virtue of the fact that they would not have entrusted all of their savings to Zeller and signed blank documents for him, were it not for his relationship with Lieberman, since this relationship gave Zeller a credibility in their eyes. Again, Wilkins J rejected this claim, finding that the plaintiffs belief that the defendants were partners was ill-founded since the defendant's social activities was not sufficient to constitute a holding out by Lieberman of herself as a partner.

He concluded that since Lieberman was Zeller's employee as a matter of law and was also not liable as a partner by holding out, the case should proceed against Zeller alone. Sharing of Profits by Partners Partnership agreement - presumption of equality of sharing of profits - s 24 of the Partnership Act 1890 - attempt to vary this ratio without the express consent of all the partners.

In this case, the English Court of Appeal considered a dispute between the four members of the rock band, The Smiths, regarding the sharing of the band's profits. Since their inception, the four band members had carried on business as a partnership. In the High Court, it had been held that Joyce, the drummer in the band, was entitled to a quarter share of the profits since under s 24 of the Partnership Act 1890, partners are entitled to an equal

share of the profits of the partnership, in the absence of any contrary agreement.

The lead singer (Morrissey) and the lead guitarist (Johnny Marr) appealed the High Court decision on the basis that they were the prime movers behind the band and alleged that it had been understood that they would be entitled to 40% of the profits each, with 10% going to the drummer and bass guitarist. They supported their claim by the fact that the group's accountants, Ossie Kilkenny & Co, had sent accounts to Joyce showing this split of 40/40/10/10, yet Joyce had made no objection at that time.

In the Court of Appeal, Waller LJ (Gibson and Thorpe LJJ, concurring) upheld the High Court's decision that s 24(1) of the Partnership Act 1890 applied to the facts of the case and consequently that the four band-members were entitled to an equal share of the profits. He held that any change in this profit-sharing ratio could not be achieved by simply sending partnership accounts to one partner and assuming that his silence constituted his acceptance of the new terms.

This was particularly so where, as in this case, the partner might not be expected to understand the accounts without some explanation. Waller LJ observed that Morrissey undoubtedly felt that because of the more major contribution which he and Johnnie Marr were making to the band, he ought to be able to dictate the terms on which the partnership continued. With considerable understatement, Waller LJ noted that Morrissey might not have appreciated certain fundamentals of partnership law. Expulsion of a Partner

Expulsion of two partners from a solicitors' firm - One resolution passed at a partners' meeting to expel both partners - Partner to be expelled

not entitled to be present at meeting under terms of partnership agreement - Whether partner to be expelled entitled to notice of meeting - Whether two meetings or two resolutions required where there was an expulsion of two partners - Interpretation of the terms of a partnership agreement - Hanlon v Brookes (1997) 15 Australian Company Law Cases 1626.

In this case, the Victorian Court of Appeal (Ormiston, Callaway and Batt, JJ) considered the expulsion of two partners from a law firm. Under the terms of the written partnership agreement, a special resolution (ie 75% of the votes) was sufficient to expel a partner and the partnership agreement contained a clause which provided that the singular included the plural and vice-versa. The agreement also provided that a partner could vote to expel his co-partner at his absolute discretion and the partner to be expelled was not entitled to be present at the meeting at which the decision was to be taken.

However the partnership agreement also provided that a partner was entitled to at least seven days' notice of a general meeting at which a special resolution was to be passed. The partners in the firm wished to expel Hanlon and Ross since Hanlon's department, the Property and Probate Department, was not well run and on two occasions he had pocketed executor's commissions for work done. In Ross' case, he was the partner in charge of the Litigation Department but his psychological condition prevented him from making court appearances.

At a meeting of the partners of the law firm, a single resolution was passed by over 75% of the partners to expel both Hanlon and Ross as partners in the firm. Neither Hanlon nor Ross were present at this meeting, nor had they been given notice of the meeting. Hanlon challenged his expulsion on the <https://assignbuster.com/partnership-case-law/>

grounds that he was not given notice of the meeting. Interestingly, the Court of Appeal did not regard the failure of the partners to accord natural justice to Hanlon as a basis for invalidating the expulsion. Rather the court restricted its decision to the terms of the partnership agreement.

It held that the expulsion clause in the partnership agreement was to be strictly interpreted. However, even with such an interpretation, it held that it under the express terms of the agreement, Hanlon was not entitled to be present at the meeting and therefore it concluded that he was not entitled to notice of that meeting or to vote at that meeting. The court also decided that by virtue of the clause which provided for the "singular to include the plural", it was possible for more than one partner to be expelled at the one meeting by the passing of a special resolution.

This case appears to be the first case in partnership law which confirms that two partners may be expelled by the one resolution. \_\_\_\_\_ Existence of a partnership  
Partnership between a number of groups of people in a hotel - One of the groups was a sister and two brothers - Dispute between the sister and brothers regarding the distribution between the three of the profits of the hotel partnership - Whether the relationship between the three regarding their share in the hotel partnership was also a partnership - s 1(1) of the Partnership Act 1890 - *Hitchins v Hitchins and Another* (1998)

In this case the plaintiff and her two brothers entered into a hotel partnership with a number of other individuals. The hotel property and business was jointly owned by all the hotel partners and the joint share of the three siblings in the hotel partnership was 18%. This share of the profit of the hotel

partnership was paid to the three Hitchins jointly. A dispute arose amongst the three of them regarding the treatment of these co-owned profits.

The plaintiff alleged that the hotel profits should have been divided equally between the three but she alleged that the first defendant had failed to do so. As part of her claim, she alleged that the relationship between the siblings in these co-owned profits, itself constituted a separate partnership between the three of them. As a partnership, she claimed that under partnership law, the three would be required to share these profits equally and that in addition she was entitled to an account of the dealings of this alleged partnership .

In the Supreme Court of New South Wales, Bryson J considered s 1(1) of the Partnership Act 1891 (the equivalent of the Partnership Act 1890) which provides that partnership is “ the relation which exists between persons carrying on business in common with a view of profit” , s 2(1) of the Partnership Act 1891 (which provides that co-ownership of property does not of itself create a partnership in the property so held) and s 2(2) of the Partnership Act 1890 (which provides that the sharing of gross returns does not of itself create a partnership whether or not the persons have a common interest in the property from which the returns are derived). Relying of these statutory provisions, Bryson J held that the activity of the three, namely investing in a share in the hotel partnership and receiving drawings from it, did not constitute the carrying on of a ‘ business in common’. Instead he categorised this activity as simply an investment, since there were no elements of engaging in trade or a flow of transactions which amount to the carrying on of a business.



He held that while the three Hitchins were clearly partners in the hotel partnership, they were not partners in a separate partnership of which the business was the joint ownership of a share in the hotel partnership. Although there was no partnership between the three siblings, Bryson J was able to find for the plaintiff on the grounds that the relationship between the three was a fiduciary. He supported this conclusion on the grounds, inter alia, that they were in a close family relationship and that they were common members of the hotel partnership. On this basis, he relied on the equitable principle that 'equality is equity' to hold that the hotel profits should be distributed evenly between the three siblings and he therefore ordered that an account of the distribution of the hotel partnership profits should be taken.

Liability of partners  
Liability of a partner for the actions of his co-partner - Co-partners settle with plaintiff - Action for contribution against concurrent wrongdoers of errant partner - Defence to contribution that co-partners were not originally liable under s 10 of the Partnership Act 1890 - Whether partners liable under s 10 for breach of constructive trust by co-partner - Dubai Aluminium Company Ltd v Salaam and Others [1998] TLR 543. In this case the chief executive of the plaintiff company had conspired with Salaam and his solicitor, Amhurst, to steal \$50 million from the plaintiff by using a series of sham contracts.

Amhurst was sued on the basis that he had knowingly assisted the chief executive to breach his fiduciary duty. The issue before the court was whether Amhurst's partners in the law firm were also liable to the plaintiff for their partner's actions under s 10 of the Partnership Act 1890. Section 10

provides that “[w]here, by any wrongful act or omission of any partner acting in the ordinary course of business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act. During the course of the trial against Amhurst, the partners in his firm had settled with the plaintiff for a payment of \$10m.

The present action concerned a contribution which these partners sought to this settlement from Salaam and the chief executive of the plaintiff company. However their defence to the action for a contribution was that the partners were not in fact liable to the plaintiff under s 10 of the Partnership Act 1890. This defence was grounded on the claim that Amhurst’s liability was for dishonest assistance which was a liability in constructive trust, while s 10 was concerned with liability in tort or by reason of agency. However in the English High Court,

Rix J held that s 10 was expressed in the widest terms, referring to ‘ any wrongful omission’ causing ‘ loss or injury’ or in the incurring of a penalty. Accordingly, he held that the section extended beyond torts to wrongs such as in this case, accessory liability in equity and he therefore allowed the action for contribution. Post-dissolution Profits Departure of one partner from a law firm - Continuing partners carrying on business without a final settlement with former partner - Post-dissolution profits - Entitlement of former partner to a share of post-dissolution profits attributable to his share of the partnership assets - s 42 of the Partnership Act 1890 - Fry v Oddy [1998].

In this case, the continuing partners in a nine person law firm claimed that their former partner, Oddy, was not entitled to any of the firm's post-dissolution profits under s 46 of the Partnership Act 1958, the Australian equivalent of s 42 of the Partnership Act 1890. Section 42 provides that where a partner leaves a firm and there is no settlement between him and the continuing partners, the former partner has a right to that share of the profits of the firm which have been made since his departure and which are attributable to his share of the partnership assets. The rationale for the rule is that it provides an incentive for the continuing partners to buy-out the former partner's share rather than to leave it in the firm.

In this case, the continuing partners argued that the post-dissolution profits in the law firm were attributable solely to the skill and exertions of the continuing partners, rather than to the use of Oddy's share of the partnership assets. The Victoria Court of Appeal (Brooking, Ormiston and Callaway JJ) rejected this argument and held that, after deducting a notional salary for each of the continuing partners' for their exertions in generating these profits, Oddy was entitled to one ninth of the post-dissolution profits. The court's reasoning highlights that in determining what share, if any, of the post-dissolution profits are attributable to the former partner's share of the partnership assets, each case depends on its own facts.

In particular, in the context of modern professional partnerships, it is interesting to note Brooking J's statement regarding the use of modern technology in those firms: " Now the pen has been replaced by the word processor, if not by voice recognition software. The new technology is used both for communication and for management of information and

activities. With technological change, no large firm could now prosper without its computer on every desk, its giant photocopiers (themselves a source of revenue), its computer notebooks, its fax machines and answering machines, its mobile telephones and pagers, its dictation equipment, its video conferencing facilities. Its library will be to a considerable extent in electronic format. Its drafting will be done with the aid of artificial intelligence.

Its requirements in terms of human resources will range from caterers to librarians. Outsourcing may be used. The firm will need a managing partner or general manager or office manager to carry the cares of the practice. It may be so large that some partners hardly know one another[... ]All this makes the practice of at least the bigger legal firms resemble a manufacturing business, producing and selling at a profit a range of legal and at times related services. ” On this basis, the Court of Appeal concluded that all the assets of the partnership contributed to its profits in the sense that they provided the apparatus which enabled the practice to be carried on.

Accordingly, when the continuing partners had simply denied that any of the post-dissolution profits were attributable to the use of Oddy’s share of the assets and in particular since the continuing partners had not put forward any other basis for determining what share of the profits might be attributable to the use of Oddy’s share, the court concluded that Oddy was entitled to one ninth of these profits, after account had been taken of a notional salary of AUS\$130, 000 per partner for the continuing partners’ exertions in generating those profits. Liability of Partners Liability of partners

for wrong of co-partner - Sexual harassment of employee of partnership - s 10 of the Partnership Act 1890 - Proceedings Commissioner v Ali Hatem. [1999] In this case, one partner in a garage partnership, who was in charge of the firm's staffing, was held to have been guilty of the sexual harassment of an employee of the firm. This case examines the liability of the other partner in the firm for this sexual harassment.

Section 13 of the Partnership Act 1908 (the New Zealand equivalent of s 10 of the Partnership Act 1890) provides that “[w]here, by any wrongful act or omission of any partner acting in the ordinary course of business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.” The act of sexual harassment, which was a statutory tort under the Human Rights Commission Act 1977 in New Zealand, was not part of the ordinary course of business of a garage in a literal sense. However, it was held to be within the meaning of this term in the legal sense, since the partner was acting in the ordinary course of business when he performed this wrongful act. On this basis his co-partners were held liable for this tort.

The words of Tipping J are instructive: “ Although sexual harassment cannot be regarded as part of the ordinary course of the firm's business, we are of the view that, when acting as he did, the perpetrator was acting in the ordinary course of the firm's business. The first acts of sexual harassment occurred when he was interviewing one of the complainants for a job. There were numerous instances of sexually loaded remarks[... ]In this case, the perpetrator was doing something within the ordinary course of business of

the firm, ie dealing with staff members in the workenvironment. In so doing, he committed the statutory tort of sexual harassment. He thereby did tortiously something which he was generally authorised to do. The firm is liable for his conduct.

International Partnerships  
Breach of duty of care owed by accountancy firm to plaintiff - Accountancy firm was member of national group of accountants throughout Australia - Whether other firms in that association were liable under partnership law to the plaintiff - Section 1(1) of the Partnership Act 1890 - Whether other members of the association were liable as partners by holding out - Section 14(1) of the Partnership Act 1890 - Duke Group Ltd (in liquidation) v Pilmer [1999]. In this case, the plaintiff company was involved in a takeover of another company. As part of the takeover process, it commissioned the Australian accountancy firm of Nelson Wheeler (Perth), the first named defendants, to advise on the proposed price for the target company. It was established that this report was negligently prepared in overvaluing the share price of the target company.

The plaintiff alleged that Nelson Wheeler Perth were part of a national partnership of which the fifth named defendants, a number of accountancy firms throughout Australia, were the other members. On this basis, the plaintiff alleged that the fifth named defendants were jointly liable with the first named defendants for the damage caused by the negligent valuation report. The relationship between Nelson Wheeler (Perth) and the other accountancy firms was that they were all members of Nelson Wheeler National. This was an association of accountancy firms throughout Australia, whereby all the member firms referred business to other member firms

throughout Australia. In addition, Nelson Wheeler Perth and the other firms described themselves as a ‘national partnership’ and as a ‘national firm’ in their letterheads and advertising material.

Nonetheless, the Supreme Court of South Australia (Doyle CJ, Duggan and Bleby JJ) held that the members of this national association did not in fact carry on business in common as required by s 1(1) of the Partnership Act 1891 (the equivalent of s 1(1) of the Partnership Act 1890). In particular, it was held that this association operated primarily as a means of referring business between firms in different parts of Australia. It did not thereby constitute the member firms partners with each other, since they all carried on practice in their locations and did not share fees or profits (except in a limited way in relation to work referred between them). The court also noted that the relationship of partnership cannot be created by persons simply stating that a partnership exists.

The court noted that although there were substantial benefits to be gained by the association of the firms, crucially there was never any intention of deriving profits from any common business. Rather this association resembled a club, the intention being that the members would benefit by work referrals, sharing of client lists and the sharing of costs, but this was not an association where the members were carrying on business in common as required by the definition of partnership. The plaintiff also alleged that the fifth named defendants were liable on the basis of a holding out under s 14 of the Partnership Act 1891 (the equivalent of s 14 of the Partnership Act 1890).

The Supreme Court of South Australia accepted that the members of Nelson Wheeler National allowed themselves to be generally represented as partners of each other. However, to establish partnership by estoppel, there must be a representation to the claimant that a particular person or persons is a partner. It is not sufficient for the plaintiff to simply rely on the fact that Nelson Wheeler indicated in its valuation report that it was a member of a national partnership. The court held that this was not a sufficient representation under s 14 since the persons purportedly held out, ie the fifth named defendants, were neither named or identified. On this basis, the court held that there was no liability on the fifth named defendants on the basis of holding out.

Liability of firm for partner's acts Authority of a partner to bind his firm - Bare assurance by partner to third party that within the ordinary course of business - s 5 of the Partnership Act 1890 - *Hirst v Etherington and Another* [1999] . In this case, Etherington, a partner in a law firm, was acting for the borrower of money from a bank. He gave an undertaking to the bank guaranteeing the loan. The bank's solicitor requested and received confirmation from Etherington that this undertaking was given in the ordinary course of the business of the firm. When the loan was not paid by the client, the bank sued Etherington's partner, as Etherington had been adjudicated bankrupt.

Section 5 of the Partnership Act 1890 provides that “[e]very partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is



a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not believe him to be a partner. ” The Court of Appeal held that it was not within the ordinary course of business of a solicitor, without more, to give a guarantee to a third party regarding a debt incurred by a client. The question under s 5 was whether a reasonably careful and competent lender would have concluded that there was an underlying transaction of a kind which was part of the usual business of a solicitor.

It was not open to the lender to accept the bare assurance of the partner that the undertaking was within the ordinary course of business of the firm. Accordingly, Etherington’s partner was held not to be liable on the undertaking. Existence of a Partnership Parties agree to establish a partnership – Partnership business is then conducted through company – Action brought under s 205 of the Companies Act 1963 by plaintiff – Plaintiff also alleges that partnership exists as separate and anterior to shareholding in company – Partnership action brought by plaintiff against other two partners for injunction restraining dissipation of assets of partnership business and damages for breach of contract – Horgan v Murray and Milton High Court, unreported, 17 December 1999.

This case concerned the long running dispute between three shareholders in Murray Consultants Limited. In addition to bringing an action against his two fellow shareholders under company law, the plaintiff brought a partnership action against them in which he sought an injunction restraining them from dissipating the assets of the business of the partnership and damages for

breach of contract. His partnership action was based on the fact that when the parties initially decided to start a public relations business, it was agreed to establish a partnership. However, it was then agreed that the partnership business would be conducted through the medium of a company (Murray Consultants Limited).

The relationship between the three broke down and in addition to seeking company law remedies, the plaintiff alleged that the three were in partnership together, a partnership which existed independently of and was anterior to the setting up of the company. The defendants denied that there was such a separate partnership and relied in part on s 1(2) of the Partnership Act 1890 which states that “ the relation between members of any company or association which is registered as a company[...]is not a partnership within the meaning of this Act. ” O’Sullivan J struck out the plaintiff’s statement of claim on the basis that the three parties agreed that their public relations business would be conducted through the medium of a company and this was entire of their relationship and there was no other relationship between the three which could constitute a partnership.

He relied in part on the High Court judgment of Murphy J in *Crinkle Investments v Wymes* [1998] that where it was held that “ the undertaking was conceived and consciously promoted in the form of a company incorporated under the Companies Act, 1963, and it was the requirements of that legislation which governed the relationship between the parties”. Partnership Property Partnership property - Whether an asset could be partnership property if it is incapable of assignment - Section 20 of the Partnership Act 1890 - *Don King Productions v Warren* [1999]. In this case,

the question arose as to whether the benefit of non-assignable choses in action could be transferred to a partnership.

The action involved a partnership that was formed between the well-known boxing promoters Don King and Frank Warren for the promotion of boxing in Europe. Following a dispute between the parties the partnership was dissolved. However, their partnership agreement had provided that each was to assign to the partnership certain boxing promotion contracts to which they were separately a party. However, these contracts were promotion contracts that had been entered into by Don King and Frank Warren respectively with various boxers. Each of these contracts was for personal services and contained non-assignment provisions and therefore could not be assigned.

In the English High Court ([1998] 2 All ER 608), Lightman J held that effect could be given to their agreement in equity as a declaration of trust of those contracts for the benefit of the partnership and in this way the contracts were held to be partnership property. Section 20 of the Partnership Act 1890 deals with partnership property and it provides that “[a]ll 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.

Frank Warren appealed on the grounds that the boxing promotion contracts were not property within the meaning of s 20 of the Partnership Act 1890

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and even if they were, they could not be ‘brought into the partnership stock’ or “acquired[...]on account of the firm” so as to become partnership property within the terms of s 20. The Court of Appeal rejected this appeal and held that property which was not capable of assignment could still be partnership property for the purposes of s 20 of the Partnership Act 1890. In addition, Frank Warren had claimed that boxing promotion contracts concluded by him and Don King between the time of the dissolution and the winding up of the partnership were not partnership property. This argument was also rejected by the Court of Appeal, which held that such contracts were also to be held on trust for the partnership.

Claim for court interest on sums owed to deceased partner  
Partnership at will  
- Dissolution of partnership by the death of a partner - Claim for court interest on sums owing to the deceased partner’s estate - Section 42 of the Partnership Act 1890 - Williams v Williams, English High Court, unrep, 16 July 1998. In this case a partnership at will existed between a father and his son. The partnership was automatically dissolved by the death of the father pursuant to the terms of s 33(1) of the Partnership Act 1890 (“Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner”). Under s 42 of the Partnership Act 1890, a deceased partner’s estate is entitled to that share of the firm’s post-dissolution profits which are attributable to the deceased’s share of the partnership assets or to interest at the rate of five per cent per annum on the amount of his share of the partnership assets since the dissolution. The father’s personal representative brought an action under s 42 of the Partnership Act 1890.

However, he also sought court interest pursuant to s 35A of the Supreme Court Act 1981. Maddocks J held that the claim for court interest could not properly be formulated since interest was already running at the rate of five per cent under s 42 of the Partnership Act 1890. He held that the sum which was found to be due to the estate should carry interest at the rate of five per cent per annum from the date of dissolution to the date of payment.

Liability of a Partnership for Partner's Actions  
Liability of a firm for the actions of a partner – Section 10 of the Partnership Act 1890 – Assault by a partner in law firm on another solicitor in precincts of courthouse and in the courtroom – Whether the first assault was within the ordinary course of business of the firm – Whether the second assault was within the ordinary course of business of the firm - Flynn v Robin Thompson & Partners and Wallen, The Times, 14 March 2000. This case involved the application of the rules on the liability of a partner for the actions of his co-partner. Under s 10 of the Partnership Act 1890 a firm is liable for the acts or omissions of a partner that are committed in the ordinary course of business of the firm. The plaintiff, John Flynn, was a solicitor and he took an action against the law firm of Robin Thompson & Partners for damages as a result of an assault which he suffered.

The facts were that Thomas Wallen was a solicitor and a partner in the firm of Robin Thompson & Partners and he was conducting litigation on behalf of a client of his firm. Representing the other litigant in the case was the plaintiff. The original case in which the two solicitors were involved became fairly heated, so much so that on the steps of the court there was a scuffle between them and there was an assault by Wallen on Flynn. Even more

amazing was the fact that while Wallen was presenting his case to the court, it appears that Flynn tried to take papers from Wallen and it was alleged that Wallen assaulted Flynn in his attempt to prevent him taking his papers.

Flynn took an action for damages against both Wallen and against his firm on the basis that the firm was liable for the actions of Wallen since they were committed during the ordinary course of business of the firm. The English Court of Appeal considered the two alleged assaults under s 10 of the Partnership Act 1890. As regards the assault in the precincts of the court, it was held that the assault by Wallen was so extraordinary and so far removed from the ordinary conduct of an advocate that it could not be within the ordinary course of business of the firm and therefore the firm was not liable under s 10 of the Partnership Act 1890 for this assault. As regards the minor scuffle in the court, the issue was less clear cut as to whether this was outside the ordinary course of business of the firm.

However on procedural grounds (i. e. on the principle of ‘proportionality’ under para 1. 3. 5 of the UK Civil Procedure Rules (October 1999)), it was held that this second assault should not go to trial. In an interesting article on this case in the Journal of Criminal Law (2000) at p 368 the argument is made in relation to the minor scuffle that all Wallen was doing was representing his firm’s interest and surely his co-partners would expect him not to allow the other side take his papers without a fight. On this basis it is argued in the article that the court should have held that the assault in the court was within the firm’s ordinary course of business.

Joint and Several Guarantee by PartnersPartners in property development –  
One partner also had substantial personal debts to Bank – Bank obtained  
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guarantee from partners for the repayment of loans to the Bank – Wording of guarantee was such that partners were guaranteeing both their joint obligations to the bank and their several obligations – AIB Group v Martin and another [2000] 2 All ER (Comm) 686. The first defendant, Mr Martin, was a property developer and the second defendant, Gold, was a dentist. They bought a number of rental properties in partnership together as an investment. Funding for the properties was obtained from the plaintiff bank. Mr Martin was also involved in a number of other property deals and he had a significant level of personal borrowings from the bank in respect of these other ventures.

The Bank re-structured their financing to the partnership and as part to the restructuring, the Bank entered into a mortgage with Mr Martin and Mr Gold. This deed was between the Bank of the one part and Mr Martin and Mr Gold of the other part. Mr Martin and Mr Gold were defined in the deed as the ‘Mortgagor’ and the deed also provided that where the term ‘Mortgagor’ referred to more than one person, it was to be construed as referring to all and/or any of those persons and that the obligation of those persons was to be construed as joint and several. The deed went on to provide that the Mortgagor would, inter alia, pay all other indebtedness of the Mortgagor to the Bank.

It became apparent that Mr Gold had signed this deed without appreciating that he was assuming liability for the personal debts of Mr Martin, as well as the debt owing by the partnership to the Bank. In the Court of Appeal, the claim that this deed should not be interpreted so as to make Mr Gold liable for the personal obligations of Mr Martin to the Bank was rejected

unanimously, Sedley LJ noting that “ if I could be persuaded that there was any intellectually respectable way of relieving Mr Gold of the liability with which he has been burdened, I would at least have to hear...why we should not adopt it..... With regret, I agree that this appeal has to fail.

Post -dissolution claims between Partners Lease held by partners in trust for partnership – Indemnity from all the partners in favour of trustees – Partnership dissolved – Action by trustees against partner for rent under terms of indemnity – Whether this debt could be set-off against amounts which might be owed to partner once partnership account on dissolution had been taken. *Hurst v Bryk and others* [2000] 2 WLR 740. The plaintiff, Hurst, was a partner in a firm of solicitors. The firm carried on business from leasehold premises held by four partners as trustees for the partnership. The partnership deed provided that the trustees were entitled to an indemnity from the partnership in respect of their liability for rent under the lease. In 1990 the partnership was dissolved but the premises were not disposed of until 2000.

In 1997 the trustees of the lease served a statutory demand on Hurst for his share of the rent under the indemnity. At this stage, although the partnership had long since been dissolved, the partnership accounts had not yet been finalised between the former partners. On this basis, Hurst sought to set aside the statutory demand under the United Kingdom’s Insolvency Rules 1986 (r 6. 5(4)(a)). He claimed that the statutory demand should be set aside since he had a counterclaim which would exceed the amount of the statutory demand. In the High Court, Ferris J dismissed Hurst’s claim on the



grounds that it was unlikely that on the taking of the full partnership accounts it would be found that a balance was due to Hurst.

Ferris J also held that the trustees' claim against Hurst was under the indemnity and not in their capacity as partners so that his claim against them as trustees lacked the necessary mutuality for a counterclaim or cross-demand. Hurst appealed. The appeal was dismissed by the Court of Appeal. It was held that until the final partnership account was drawn up it could not be said that there would or might be a balance in favour of the plaintiff which would be due from the trustees as partners. In addition, there was no prospect of the account being taken in the foreseeable future, if at all, and accordingly there was no triable issue resulting from the plaintiff's cross-demand which would justify setting aside the demand. In addition, the Court of Appeal considered the mutuality issue.

It held that mutuality was lacking because the debt on which the statutory demand was based was one to which the trustees alone were entitled whereas the proposed cross-claim would be against all the partners jointly.

Breach of Constructive Trust by Partner  
Liability of a partner for the actions of his co-partner - Co-partners settle with plaintiff - Action for contribution against concurrent wrongdoers of errant partner - Defence to contribution that co-partners were not originally liable under s 10 of the Partnership Act 1890 - Whether partners liable under s 10 for breach of constructive trust by co-partner - Dubai Aluminium Company Ltd v Salaam and Others [2000] 3 WLR 910.

In this case the chief executive of the plaintiff company had conspired with Salaam and his solicitor, Amhurst, to steal \$50 million from the plaintiff by

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using a series of sham contracts. Amhurst was sued on the basis that he had knowingly assisted the chief executive to breach his fiduciary duty. The issue before the court was whether Amhurst's partners in the law firm were also liable to the plaintiff for their partner's actions under s 10 of the Partnership Act 1890. Section 10 provides that "[w]here, by any wrongful act or omission of any partner acting in the ordinary course of business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or mitting to act.

" During the course of the trial against Amhurst, the partners in his firm had settled with the plaintiff for a payment of \$10m. The present action concerned a contribution which these partners sought to this settlement from Salaam and the chief executive of the plaintiff company. However their defence to the action for a contribution was that the partners were not in fact liable to the plaintiff under s 10 of the Partnership Act 1890. This defence was grounded on the claim that Amhurst's liability was for dishonest assistance which was a liability in constructive trust, while s 10 was concerned with liability in tort or by reason of agency.

In the English High Court, Rix J held that s 10 was expressed in the widest terms, referring to ' any wrongful omission' causing ' loss or injury' or in the incurring of a penalty. Accordingly, he held that the section extended beyond torts to wrongs such as in this case, accessory liability in equity and he therefore allowed the action for contribution. This judgment was appealed to the Court of Appeal where it was reversed. The Court of Appeal agreed with Rix J that s 10 of the Partnership Act 1890 extended to all wrongs and not

just torts. However, on the facts of the case, the court held that the actions of Amhurst were not ‘ within the ordinary course of business’ of the firm and therefore the partners in the firm were not liable therefor.

Mr Amhurst had taken a very active part in planning and instigating a dishonest scheme whereby the plaintiff company would be defrauded of large sums of money, including drafting sham agreements. The Court of Appeal held that there was no evidence to suggest that Amhurst’s partners authorised him to act as he did and as it was not part of the ordinary business of a firm to plan and draft sham agreements, these actions were not binding on the firm. Evans LJ argued that as vicarious liability under s 13 of the Partnership Act 1890 requires notice on the part of the partners in question, it would be anomalous if a partner was to be vicariously liable for the accessory liability of a partner who was a constructive trustee for giving knowing assistance to a breach of trust or fiduciary duty where there is no notice.

The result would have been different according to Evans LJ if the firm’s clients had not been involved in the breach of fiduciary duty in question. Aldous LJ held that if Amhurst’s involvement had been restricted to drafting agreements, his actions would have been within the ordinary course of business of the firm. However, his role was to plan, draft and sign sham agreements which were known to be dishonest and this was not within the ordinary course of business of a firm. The participants in the scam were not his clients or clients of the firm. These wrongdoers could not have believed that Mr Amhurst was acting with the apparent authority of his partners, because they knew him to be acting dishonestly.

On this basis the Court of Appeal held that the ‘innocent’ partners would not have been held liable to the plaintiff for Mr Amhurst’s actions and therefore they were not entitled to claim a contribution from the Salaam and the chief executive in respect of the sum which they had paid in settlement of the plaintiff’s claim against them for vicarious liability for the actions of Mr Amhurst. Breach of Trust by Partner Breach of trust by a partner – Solicitors’ partnership - Liability of firm for breach – Whether partner acting in the ‘ordinary course of business’ – Whether firm liable – Section 10 of the Partnership Act 1890 – Walker and others v Stones and others [2000]. This case involved an action for breach of trust against Mr Stones, a trustee. Unlike the case of Dubai Aluminium Co Ltd v Salaam [2000], this case did not involve a constructive trust, but rather a situation where a partner in a law firm agreed to become a trustee of a family trust.

When this partner allegedly breached this trust by benefiting the father who set up the trust, rather than the beneficiaries of the trust, the issue arose as to whether his partners were vicariously liable for the alleged breach of trust. In the Court of Appeal, Sir Christopher Slade considered sections 10-13 of the Partnership Act 1890 as they apply to breaches of trust. On the one hand, s 10 of the Partnership Act 1890 provides that a firm is liable for the wrongs committed by a partner in the ordinary course of business of the firm, while on the other hand s 13 of the Partnership Act 1890 deals with breaches of trust by a partner. This latter section provides that where a partner is a trustee, liability does not attach to his co-partners if there is a breach of trust unless the co-partners have notice of the breach of trust.

On this basis, Sir Christopher Slade concluded that s 13 deals with a situation where a partner agrees to be a trustee (a trustee partner) while s 10 would apply to a situation where a partner, not already being a trustee, conducts himself as an accessory to a breach of trust so as to constitute himself a constructive trustee. Section 13 assumes that the individual trusteeship which a partner undertakes is not something undertaken in the ordinary course of business of the firm, since otherwise it would be inconsistent with s 11 (which provides for the firm to be liable where there is a misapplication of property received by a firm or a partner where the property is received within the ordinary course of business of the firm).

He thus concluded that s 10 had no application to breaches of trust committed by a partner, who agrees to be a partner (a trustee partner) since the legislature assumed in drafting the Partnership Act 1890 that breaches of trust committed by a trustee partner fell outside the ordinary business of a partnership and therefore did not give rise to liability on the part of the firm, under s 10. He observed that sections 10-13 of the Partnership Act 1890 applied to all partnerships, and not just solicitors' partnerships, and for this reason one should not be surprised that individual trusteeship by a partner was not within the ordinary course of business of a firm. On this basis, he held that the innocent partners in the law firm could not be vicariously liable for the alleged breach of trust by Mr Stones under s 10 nor under s 13, since the innocent partners were not aware of the alleged breach.

Duty of Care between Partners  
Negligence by partner in law firm causing loss to client – Also causes financial loss to his co-partners since they are liable to pay excess on insurance policy – Whether negligent partner owes duty of

care to his co-partners - Ross Harper & Murphy v Banks Outer House, Court of Session, Scotland, unrep, 11 May 2000. The defendant had been a partner in the plaintiff firm. He had negligently advised a client of the firm in relation to a conveyancing transaction and the firm had been successfully sued by the client for the damages caused by this negligence. The firm's insurance policy covered the firm's liability in this regard, save for the excess of ? 20,000 which had to be paid by the partners in the firm. The partners in the plaintiff firm now wished to recover this excess from the defendant partner.

They claimed that they were owed a duty by the defendant that he would exercise reasonable care in his duties as a partner so as not to expose the partnership to claims for professional negligence, which he had breached by not examining the title of the property in this case with sufficient care. In view of the limited authority on this area, this was an important judgment by Lord Hamilton. He concluded that a " partner may in certain circumstances be liable in damages to his firm (and secondarily to his co-partners) for loss sustained by reason of liability incurred to a third party and these circumstances are not restricted to those where the offending partner has been responsible for fraudulent or illegal activity; the duty extends, in my view, to a duty of care.... In the absence of clear and binding authority I favour a standard which requires the exercise of reasonable care in all the relevant circumstances.

Those circumstances will include recognition that the relationship is one of partnership (which may import some mutual tolerance of error), the nature of the particular business conducted by that partnership (including any risks or hazards attendant on it) and any practices adopted by that partnership in

the conduct of that business.... In respect of liabilities incurred by the firm to a third party, it is, however, important to notice that breach of a duty of reasonable care to the third party will not of itself import a breach by the “delinquent” partner of his obligation to the firm. ” For this reason, the court held that the issue should be put out for a hearing by order on further procedure. | |