Neutral Citation Number: [2011] EWCA Civ 838

Case No: A3/2010/1706 & (B)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(CHANCERY DIVISION)
MANN J
[2010] EWHC 1446 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

20th July 2011

B e f o r e :

LADY JUSTICE ARDEN
LORD JUSTICE AIKENS
and
LORD JUSTICE PATTEN

Between:

FRANCESCA DRAKE	**Appellant**
- and -	
(1) JACK HARVEY (deceased)) **(2) MARY ELIZABETH MAY HARVEY** **(a protected party by Jacqueline Harvey, her litigation friend)** **(3) CLARE HARVEY** **(as co-executrix of the estate of Aidan Harvey)** **(4) RICHARD JENKINS** **(as co-executrix of the estate of Aidan Harvey)**	**Respondents**

Mr Alan Steinfeld QC & Mrs Helen Galley (instructed by Burges Salmon LLP) for the Appellant
Mrs Elspeth Talbot Rice QC (instructed by Charles Russell LLP) for the 3rd & 4th Respondents.
The other respondents were not represented and did not appear
Hearing date : 6 April 2011

Lady Justice Arden

1. This appeal turns on the effect of clause 19 of a partnership deed dated 14 February 1989 with respect to the ascertainment of the amount to be paid to the personal representatives of a deceased partner for his partnership share. As commonly happens, the partnership deed provides for the deceased partner's personal representatives to receive the amount standing to his credit in the last accounts of the partnership, but contains no express direction as to the basis on which capital assets should be included in such accounts. There is now a dispute between the surviving partner and the executors of the deceased partner as to whether the capital assets should be included in the relevant partnership accounts at their book value, being the value at which it was shown in the partnership accounts, or at their fair value. Mann J held in favour of fair value.

2. At the date of the execution of the partnership deed, there were four partners, Mr and Mrs Harvey, their son, Aidan and their daughter, Francesca. Aidan died on 11 August 2006.

3. The deed recited that, at the time of the execution of the partnership deed, the parties had been carrying on the business of farming in partnership for some seven years. In the period prior to the execution of the partnership deed, another son, Paul, had also been a partner but he retired from the partnership on 30 April 1988.

4. Mr Harvey ceased to be a partner as a result of his ceasing to have mental capacity by reason of a stroke, and he died on 6 March 2011. Mrs Harvey also ceased to be a partner on ceasing to have mental capacity in 2008. Enduring powers of attorney were registered for Mr and Mrs Harvey, and this caused the partnership to determine as regards them. Francesca is the sole surviving partner.

5. The capital of the partnership was divided into A and B capital and additional capital. The A capital had originally been £150,000 but had been increased to £360,000, held as to 12.5% by each of Mr and Mrs Harvey, as to 48% by Aidan and as to 27% by Francesca. Clause 6(b) of the partnership deed recorded the shares in the A capital in these terms:

> "(b) The "A" capital of the partnership (which the Partners intend shall relate to monies required on a long term basis for the establishment consolidation and extension of the partnership business) shall be the sum of Three hundred and sixty thousand Pounds (£360,000.00) and at the date hereof belongs to the Partners in the following shares:

		£
Mr Harvey	12.5%	45,000.00
Mrs Harvey	12.5%	45,000.00
Aidan	48%	172,800.00
Francesca	27%	97,200.00
		£360,000.00"

6. Clause 6 thus treated the holders of shares in the A capital as the providers of long-term capital for the partnership business and, in this vein, it went on to provide that any change in the A capital had to be agreed unanimously:

> "(c) Subject to the subsequent provisions of this Deed no Partner shall be entitled to withdraw all or any part of his "A" capital nor shall there be any increase in the amount of the "A" capital or any alteration in the respective shares of the Partners therein without the

consent of all the Partners Provided that nothing in this Deed shall preclude the transfer by one Partner to another existing Partner of all or part of his share in the "A" capital."

7. Clause 6 also provided that no interest should be paid on the A capital.

8. The B capital was stated to be medium term capital, and interest could be paid on them. There was no B capital in issue. There was also provision for temporary additional capital to be issued, which would likewise carry interest and which was also redeemable.

9. Clause 9 provided for partnership profits to be divided between the partners in proportion to the percentage of A capital held. There were two qualifications to this. The first qualification is to be found in clause 9 itself and it was that Francesca's profit share was to be not less than her agreed salary:

"9. With effect from [1 May 1998] and until agreed otherwise by all the Partners the profits of the partnership shall belong to and shall continue to belong to the Partners in proportion to their holdings of "A" capital viz:–

Mr Harvey	12.5%
Mrs Harvey	12.5%
Aidan	48%
Francesca	27%

Excepting that Francesca's share of profits (excluding capital profits) shall not be less than such sums as may from time to time be agreed as her salary."

10. The second qualification to the general provision for sharing partnership profits rateably was in clause 10. This subordinated the parents' profit shares to the partners' salaries. Clause 10 can be seen as a further expression of the family nature of the partnership. Partners at arm's length do not generally agree this sort of clause.

11. Capital profits and losses were dealt with separately. A major asset of the partnership was the farmland, on which the partnership farmed. Subsequent to the execution of the partnership deed, this was consistently shown in the partnership accounts at cost with the addition of the cost of improvements, from which depreciation was deducted. The farmland had been revalued prior to the execution of the partnership deed but had not been revalued since that date. Its current value is estimated to be at least £5,500,000. Clause 11 of the partnership deed provided for capital profits and losses to belong exclusively to the holders of the A capital and to be shared by them in proportion to the percentage of A capital held. There were no qualifications to this provision.

12. The partnership had other assets, but the only amount which was revalued for the purposes of the partnership accounts was livestock. The profits arising on revaluation were taken to the current accounts of the partners and not capitalised, and so they were not reflected in the partners' holdings of A capital.

13. The partnership accounts were drawn up to 31 March in each year. Clause 13 dealt with accounting records and the production of annual accounts:

"13.(a) All necessary and proper books of account shall be kept by the firm and on [30 April] in each year a general account shall be taken of all the assets and liabilities and of the profits and losses of the partnership for the preceding year and shall be signed by each Partner.

....

(b) Such account when signed shall be conclusive and final between the Partners as to all matters stated therein unless some manifest error is discovered within three months of the signing hereof in which case such error shall be rectified."

14. The partnership could be determined by notice. A partner might leave the partnership without its being dissolved by giving notice of retirement from it. In addition, under clause 18, Mr and Mrs Harvey could require Aidan or Francesca to retire. I will call this "involuntary retirement". In this way, the parents could retain control of the farming business. Such a term is unlikely to have been agreed between commercial parties and is thus another expression of the family nature of this particular partnership.

15. The all-important clause 19 is the only other clause in the partnership deed that needs to be set out. It deals with the ascertainment of the amount to be paid on the death, bankruptcy, mental incapacity or retirement of a partner. Retirement for this purpose would include involuntary retirement as a result of a notice given by Mr and Mrs Harvey under clause 18. Accordingly clause 19 is a portmanteau provision for retirement – one that applied in a variety of different circumstances.

16. Clause 19 provides for there to be three elements in the amount to be paid to the retiring partner: first, an amount representing his share in the capital and his undrawn profits as at the date of the last general accounts; secondly, an amount representing further capital advanced by him to the partnership after the date of the last accounts; and, thirdly, an amount representing profits for the period since the date of the last accounts. Clause 19 is in these terms:

"19.(a) In the event of a Partner retiring, dying, becoming bankrupt, becoming a patient under the Mental Health Act, the share of that Partner in the capital and assets of the partnership shall accrue to the surviving partners in the same proportions as their respective shares in the "A" capital for the time being and there shall be paid to the outgoing Partner his personal representative trustee in bankruptcy or receiver as the case may be a sum equal to:

(i) The amount standing to the credit of the outgoing Partner as his share in the capital of the partnership and as undrawn profits belonging to him in the last annual general account prior to his retirement, death, bankruptcy or becoming a patient as aforesaid; and

(ii) The amount of any further capital brought by him into and credited to him in the books of the partnership after the taking of the last annual general account or commencement of the partnership as the case may be; and

(iii) An amount equal to the outgoing Partner's share of profits of the partnership in respect of the period from the taking of the last general annual account or the commencement of the partnership or less an amount equal to the outgoing Partner's share of losses of the partnership in respect of that period as the case may be after allowing for all expenses in accordance with the partnership's usual accounting practices.

(b) The said sum shall be paid by six half-yearly instalments the first of such instalments to be paid six months after the retirement, death, bankruptcy or mental capacity of the outgoing Partner. Any part of the said sum not paid within such period of six months shall carry interest at Barclays Bank Plc base rate from time to time from the date of such retirement, death, bankruptcy or mental capacity until payment which interest shall be paid half-yearly in arrear on the same dates as the instalments are due."

17. I will call the period to which the third element in clause 19(1)(a) applies "the broken period". We are not concerned with clause 19(b) which merely deals with the making of the payments for which clause 19(a) provides.

18. The rights of partners are not only to be found in the partnership deed because, under section 19 of the Partnership Act 1890, the partners may informally or formally agree to vary those terms:

> "19 Variation by consent of terms of partnership
>
> 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."

Judgement of Mann J

19. The judge had to resolve a number of issues. There was a threshold issue as to which partnership accounts should be used for the purposes of ascertaining the share to be paid to Aidan's executors, as the latest accounts, drawn up to 31 March 2006, had been signed by Francesca only. The judge held that, even though not all the partners had signed these accounts, they should be taken to be the last accounts for the purposes of clause 19. There is no appeal on this point. These accounts showed the sum of £172,800 as Aidan's share of the A capital. The judge found that the dealings of the parties threw no light on whether the method of accounting for the farmland used in these accounts should be adopted for the purposes of ascertaining the amount to be paid for Aidan's share of the A capital under clause 19. However, he held that the decision in *Cruikshank v Sutherland* (1923) 93 LJ Ch 126, HL provided considerable assistance. He rejected the argument that this case was distinguishable on its facts (judgement, paragraph 43), and summarised the principles which he drew from that decision in the following passage:

> "[42] I agree that this case is of considerable assistance. Although the wording of the partnership deed in that case was not the same as in the present case, and although the account to be drawn in that case was to the accounting date next after the retirement, and not before, the principles it expounds are nonetheless applicable because the provisions and situations are sufficiently similar. The principles are:
>
> (i) Where the partnership deed is silent as to the basis of valuation for the purposes of an account, the appropriate value is one which is fair.
>
> (ii) Fairness can be determined by agreement between the parties. If they sign accounts for any given year on a particular valuation basis, that obviously makes it fair for that year.
>
> (iii) A given basis can be enshrined and become binding if there is a consistent practice (usage) which demonstrates that the parties have actually agreed that as a consistent basis.
>
> (iv) A consistent usage, leading to an agreement, for an account operating in one situation does not necessarily mean that there is an agreement operating in another. Thus a pattern of conduct operating on the basis of a continuing partnership does not necessarily bind an outgoing partner in relation to the accounts drawn for the purposes of his retirement (or death).
>
> (v) A partner who sees his retirement coming or plans for it does not have to sign off on accounts prepared on a previously consistent basis if those accounts would not

provide for a fair value of assets vis-à-vis him and his retirement (see Lord Wrenbury's example).

(vi) A fair account, in the case of a death or retirement, is likely to require real, and not historic, values to be attributed to the partnership property, absent factors pointing the other way and requiring otherwise."

20. He held that later cases cited to him were consistent with these principles. He then held that the principles had the following consequences in their application to this case:

"[49] None of those authorities departs from the principles which I have extracted from *Cruickshank*; indeed they reinforce them. Applying those principles to the present case I find as follows:

(i) The partnership agreement is silent as to the basis of valuation for the purposes of drawing the accounts applicable to the death of Aidan and the retirements of the parents.

(ii) No accounts were agreed for the relevant year prior to Aidan's death (to 31 March 2006), or for any subsequent year relevant to the entitlement of the parents on their respective retirements.

(iii) The accounts to which the outgoing partners or their estates are entitled are accounts which reflect a fair value.

(iv) That fair value is the market value of the land (no other candidate other than the historic value has been proposed) unless there is an agreement otherwise, or unless there are other factors rendering such a value unfair. Historic valuations would be unfair because they are (for these purposes) unreal and do not reflect the real and full value of the outgoing partner's share.

(v) The fact that previous accounts contained historic values does not mean that the executors and parents are obliged to accept that for the accounts governing the payment out of Aidan's share. Those accounts were agreed on the apparent assumption of a continuing partnership. The death or retirement of a partner is a different circumstance requiring (or capable of requiring) a different valuation basis.

(vi) There is nothing in the partnership agreement which, as a matter of contract, requires the adoption of historic values.

(vii) The adoption of historic values has the potential to create considerable unfairness such that a clear case must be established for displacing that unfairness. The scope for unfairness is demonstrated by the facts of the present case. If historic values are applicable to all the departure events which have now left Francesca with the entirety of the partnership then she will have acquired the partnership at a very considerable undervalue indeed, mainly by dint of surviving (though I do not seek to minimise the actual work that she has done in the partnership)."

21. He held that there had to be clear reasons not to apply fair value. It was not enough that it might lead to break up of the farming business or that the partners might well have wished to avoid this. In addition, it was not an objection that there was an "element of chance" (judgement paragraph 51) and that a valuation using fair values could be used only if the last accounts had not been signed by all the partners. The partners' consistent use of historic values for the purposes of the annual accounts did not exclude the use of fair values in the accounts when

clause 19 was in point (judgement, paragraph 52). He referred to some discussions which had taken place during the negotiations for the partnership deed. I do not propose to set those out because it is not suggested that they were more than negotiations and they are therefore inadmissible on a question of interpretation (*Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101). The judge thus concluded that the accounts for the purpose of clause 19 should use fair values for the farmland. A profit arising on revaluation could be carried to a reserve of capital profits.

The appeal

22. The farmland belonging to the partnership is shown in its accounting records at cost, which means that no account is taken of the fact that it has appreciated in value. It was included at book value in the annual accounts of the partnership. Francesca contends on this appeal that the judge should have held, therefore, that book value should be used for the purpose of ascertaining the amount payable under clause 19 in respect of Aidan's share. I will call this approach to the valuation of the farmland "the accounts basis". Aidan's executors on the other hand contend that the judge's decision was correct and that the farmland should now be revalued and shown at its revalued amount in the accounts to 31 March 2006 (which have yet to be signed) or alternatively in the accounts for the broken period. I will call this approach "the fair value basis".

23. A fair value basis is often considered the fairer basis where the retirement is by reason of death, but it is not necessarily the fairer basis where the retirement is the result of the retiring partner simply wishing to set up business elsewhere or of the other partners having given him notice of compulsory retirement. But these considerations cannot play any part in the interpretation of clause 19 because it applies in both of those events. Nor is it relevant that in the event of bankruptcy, insolvency law may override whatever the parties have agreed and require the fair value basis to be adopted (see, for example, *Borland's Trustee v Steel Bros* [1901] 1 Ch 279).

24. With that introduction I turn to the issues arising on this appeal.

Is there a starting point, namely that the fair value basis should be adopted for the purposes of clause 1, unless otherwise agreed?

25. This issue lies at the heart of the appeal. I propose to consider it on the assumption (made only for the purposes of this issue) that, if the judge had not approached the question of interpretation in the way he did, and had applied normal principles of interpretation, he would have concluded that the partnership deed provided for the carrying values of the assets in the last general accounts to be used for the purposes of determining the amount to be paid to an outgoing partner on his retirement for his share in the partnership.

26. The judge's essential approach was to deduce from the decision of the House of Lords in *Cruikshank v Sutherland*, that, if the partnership deed was "silent", certain legal rules took over and among those rules was a rule that fair value be used. So, unless the partnership deed expressly stated that the outgoing partner's share was to be determined on the basis that assets were taken at book value, fair value had to be used. Put another way, the judge found, in effect, that there is a default rule in favour of a fair value basis of valuation. If there is a default rule, that rule will apply unless the parties' agreement shows a clear intention to depart from it.

27. A default rule involves a departure from the usual principle of party autonomy in contract. But, Mrs Elspeth Talbot Rice QC, for the respondents, Aidan's executors, submits that the judge was right to deduce this principle in paragraph 42 of his judgement (set out above). In particular she relies on the statement by Lord Wrenbury in *Cruikshank* that:

“It is not, I think, disputed – and if it were, I should be of the opinion that it could not be successfully disputed – that a full and general account of the property will be an account at which the property will be brought in at its true value. The articles are wholly silent on the principle to be adopted in preparing the full and general account of the property – and it remains simply that it must be a proper account of the property, whatever that is. “ (page 137)

28. The approach of the judge also has the support of the Law Commission of England and Wales and of the Scottish law Commission. In their recent joint report on *Partnership Law* (Law Com No 283 and Scots Law Com No 192) (2003 Com 6015) the Law Commission of England and Wales and the Scottish Law Commission recommended that there should be a default rule that on retirement the outgoing partner or his estate would receive:

“the value of his share in the partnership calculated on the hypothesis that the partnership had broken up and its assets were sold on the date of his withdrawal at a price equal to the greater of (i) the liquidation value and (ii) the value based on a sale of the entire business as a going concern without the outgoing partner.” (para 8.75)

29. The difficulty, however, is that this court in *Re White* [2001] Ch 393 considered the decision of the House of Lords in *Cruikshank* and rejected the notion that on the retirement of a partner that there was any presumption that the assets of the partnership should be taken at their fair value. I must explain that point in greater detail.

30. In *Re White*, the issue was whether, for the purpose of valuing the share of a partner who had died, the freehold property belonging to the partnership should be taken into account at its market value or at cost, which was the amount at which it was shown in the partnership accounts. The partnership deed specifically provided that the assets should be taken at their “just” value and that the value at which the freehold property was shown in the last account was to be taken to be its “just” value. Chadwick LJ, with whom Peter Gibson and Mance LJJ agreed, held, after an extensive consideration of the 1890 Act and the case law, that the method of valuation of a partnership share was a matter of the true interpretation of the partnership deed (unless the parties had agreed to vary it), and that there was no presumption that fair value was to be used:

“51 It is, I think, important to have in mind that the question in the present case is not (as it was in *Cruikshank v Sutherland*) “on what basis did the parties intend a post-event account to be taken, following a death or retirement?” The account on the basis of which the deceased partner’s share in the capital of the partnership is to be ascertained, in the present case, is a pre-event account. Nor is the relevant question “at what value is the Brantwood Road property to be taken for the purpose of ascertaining the deceased partner’s share?” That question is answered by clause 20 of the partnership deed; the value is the figure appearing in the partnership accounts. The relevant question in the present case is “what did the partners intend the expression ‘a just valuation’ to mean in relation to the Brantwood Road property?” That question arises in the context of the preparation of a general account under clause 15. The answer cannot depend on whether or not the general account turns out to be relevant for the purpose of ascertaining the share in the capital of the partnership of a partner who happens to die in the course of the year following the date of the account. The answer must be the same whenever the general account is taken. So, in the present case, the usage or course of dealing in relation to the general accounts which were prepared year by year does provide a relevant context in which to determine the question “what did the partners intend the expression ‘a just valuation’ to mean in relation to the Brantwood Road property”. Further, of course, in the present case the general account for 30 March 1950 was used as the basis for the payment out of Mr Bernard White’s estate; and the general account for 30 March 1961 was used in connection with Mrs Jessie Turner’s retirement.”

31. Chadwick LJ considered whether there was any presumption that the fair value basis should apply, and rejected that possibility:

> "67 For my part, I doubt whether it is correct to approach the construction of a partnership agreement—or any other document—on the basis that the court leans towards one conclusion rather than another. The correct approach, as it seems to me, is to seek to ascertain what the parties intended by the words which they actually used, having proper regard to the circumstances in which they made their agreement. Those circumstances will include the obvious fact that, as they must be taken to have appreciated, valuation of the share of a retiring or deceased partner on the basis that assets are taken at historic cost is likely (with past experience of inflation in mind) to lead to the result that the retiring or deceased partner receives less for his share than he would do if the assets were taken at current market value. The question, in any particular case, is whether that is a result which they must be taken to have intended. As the judge himself pointed out, at pp 2089-2090, it was not unusual in a family partnership to find provisions designed to ensure that the business passed from one generation."

32. In other words, the partnership deed made it clear that the carrying value in the last general accounts of the partnership was to be taken to be the fair value and the parties had, as they were entitled to do, adopted a special rule for themselves that this was to be the fair value.

33. Mrs Talbot Rice took us to a number of other authorities decided by the Inner House and the Outer House of the Court of Session, but these were all considered by Chadwick LJ. He held that they were consistent with his conclusion. As this court must in any event follow *Re White* little would be achieved by my considering these authorities again.

34. In *Cruikshank*, the partnership deed contained provisions on retirement that were different from those in this case. As I have said, clause 19 of the partnership deed in the present case was a portmanteau clause. In *Cruikshank*, the relevant valuation provision applied only on death. When a partner retired, the accounts used to value his share were the last general accounts, which had to be drawn up as at 30 April in each year. The partners had adopted book values for the purposes of the partnership's annual accounts. But, when a partner died, the partnership deed provided that the valuation was by reference to accounts drawn up as at 30 April next following his death. Lord Wrenbury described the partnership deed as silent as to the basis of valuation to be adopted in those accounts. However, there was a provision that a full and general account should be produced of the affairs of the partnership in the annual accounts. Lord Wrenbury, with whom the other members of the House agreed, noted that it was not disputed that this meant that the assets had to be brought into the accounts at their fair value (see the passage cited above). The contest before the House was again between two bases of valuation of the assets of the partnership: the surviving partners argued for the accounts basis and the executors of the deceased partner sought a fair value basis, as described above. It was established that it was the usage of the partners to adopt book values in the general accounts for each year, but it was held that the partners did not agree by this usage to the adoption of book values for the purposes of accounts drawn up following the death of a partner and for the purpose of purchasing his share. The fact that the relevant accounts were to be drawn up after the death of the partner gave a signal that some different basis of valuation was to be used. The partners had not agreed on a method of valuation for this purpose.

35. In those circumstances the House held that the fair value must be adopted. The partners had not reached any agreement as to the basis of valuation for the purposes of these accounts and those accounts, which were stated for a different purpose than that for which the ordinary general accounts were stated.

36. In *Re White*, Chadwick LJ considered that *Cruickshank* was distinguishable:

“47 Thus far, as it seems to me, the decision is that, as a matter of construction of the articles of partnership with which the House of Lords was concerned on that appeal, the requirement that a “full and general account” be taken was met by bringing assets in at a “fair value”. But, as Lord Wrenbury pointed out, the articles were “wholly silent as to the principle to be adopted”. In particular, there was nothing in those articles comparable to clause 20 of the 1949 deed in the present case.

48 Lord Wrenbury then went on to consider whether there was any usage or course of dealing “such as that an inference is to be drawn that on the death of a partner his share is to be paid out on the footing of book values?” He answered that question in the negative. He said, at p 138:

“How could there be a practice and usage uniform and without variation to pay a deceased partner’s share on the footing of book values and not of fair values, where no partner had died before and no partner had retired before? The only practice which existed—and that only on two occasions, namely, in April 1915 and April 1916—was to prepare the account—when the interest of all the partners was the same—on the footing of book values. When a partner died or retired, the interests of all parties were not the same. The executors of a deceased partner were, so to say, vendors whose interest it was to put the highest sustainable value on the assets—the continuing partners were, so to say, purchasers whose interest was the reverse. Where was the practice and usage evidencing a new agreement outside the written articles to found a right to buy out the deceased partner on the terms which were best for the purchasers? … The fact is, that in this partnership an account has never been stated with a view to fitting the case of a retiring partner, or a deceased partner, or a senior partner who is going to exercise an option of taking over all the assets. The partners have never had any such event in view in making the account which they have made. There has never been an account prepared which was intended to meet all the various contingencies of events such as these.”

49 It will be apparent from the views which I have already expressed that I do not regard the present as a case in which it is necessary to rely on usage or course of dealing as a foundation for an inference that the partners reached a new agreement, or varied an existing agreement by consent. In the present case, the relevant agreement was made on 28 July 1961. The usage or course of dealing prior to that date does not alter or vary the agreement then made. Rather, it provides a context in which to construe the agreement then made. To take account of the usage or course of dealing prior to the date of the agreement is simply to apply the ordinary principles of construction to the task of ascertaining what the parties meant by the words which they used.

50 Nevertheless, the observations of Lord Wrenbury—although directed to a rather different question—are pertinent to the present case. The usage or course of dealing prior to the date of the relevant agreement provides a context in which to construe that agreement only to the extent that it assists in providing the answer to the question “what did the parties mean by the words which they used”. If the pre-contract events have no relevance to the circumstances in relation to which that question has to be answered, they are unlikely to provide assistance.”

37. Chadwick LJ continues in paragraph 51 of his judgement, set out in paragraph 30 above. I agree that *Cruikshank* is distinguishable for the reasons which Chadwick LJ gives. It is clear from the structure of the partnership deed in that case that the partners did not intend the same basis of valuation as that adopted in the ordinary accounts should necessarily apply to the accounts drawn up following a death. The House resolved the contest before them by interpreting the partnership deed and in addition the parties’ usages on the basis that section 19 of the Partnership Act 1890 applied to them.

38. It follows that the judge was not in my judgement correct to dismiss *Re White* on the basis that it was heavily dependent on its facts and the terms of the partnership arrangements that the parties agreed in that case. It was dependent on a principled approach, and that principled approach was identified and applied in *Re White* and is applicable in this case also.

39. It follows, in my judgement, that the judge read *Re White* too narrowly and *Cruikshank* too widely. Both cases hold that it is crucial to examine the terms of the partnership deed and to interpret it in the normal way to ascertain whether it includes a provision as to the basis of valuation to be adopted on death. If it includes such a provision, that basis applies and the partnership deed does not have to displace a presumption, or default rule, that fair value applies. It follows that the first step is always to decide what the deed provides and whether the parties have agreed to vary any such provision. The partnership deed does not have to displace a presumption that fair value applies. Interpretation is conducted according to the normal principles of contractual interpretation. This was the thrust of Mr Steinfeld's submissions, which I accept.

40. Having reached the conclusion that the judge was wrong on his starting point, I need now to turn to the questions (1) what basis of valuation applies under clause 19, and (2) if the general accounts to 31 March 2006 must be used, whether Aidan, by his executors, has the right to insist on a revaluation in those accounts (which he did not sign) or in the accounts for the broken period.

What method of valuation of the farmland is to apply to the valuation of a share under clause 19?

41. Leaving aside for the present the question of whether a single partner or his personal representatives can insist on a revaluation of the farmland, the next question is whether the accounts basis or the fair value basis applies for the purpose of determining the amount to be paid in respect of a share under clause 19.

42. In my judgement, that amount is to be determined by reference to the last general accounts, which, subject to any revaluation of the farmland, have consistently shown the farmland at cost. In the circumstances, this was not a case where the partnership deed was silent as to the basis of valuation of the partnership assets in the accounts used for the purposes of valuing an outgoing partner's share. What has happened is that the parties have, in effect, bridged the gap, which was left open in *Cruikshank,* by agreeing to use the past general accounts. Accordingly (subject to any question of revaluation), whatever basis of valuation had been agreed for the purpose of those accounts would apply for the purpose of determining the amount payable in respect of the share of the retiring member. The partners had not agreed on any single basis of valuation but had agreed how it should be determined when the need arose, and that was by reference to the last general accounts of the partnership.

43. As previously explained, there is no rule of law preventing the partners from agreeing to clause 19 in these terms. Moreover, in the deceased partner's favour, the remaining partner has no right to deduct any losses not recognised in any accounts relevant for the purposes of clause 19. It follows that, in my judgement, the conclusion of the judge in paragraph 49 of his judgement (set out in paragraph 20 above) is not consistent with clause 19 on its true interpretation. This court cannot avoid the effect of clause 19 by restricting the agreement of the parties to use book values in the general accounts so that it does not apply to accounts used as the basis of determining the amount to be paid to a partner on his retirement. The parties have precluded any such enquiry by stipulating that the last general accounts should be used.

Could Aidan's executors insist on a revaluation for the purposes of the general accounts or for the purposes of the accounts for the broken period?

44. Mr Alan Steinfeld QC, for Francesca, submits that under the partnership deed a profit arising on revaluation would have to be capitalised, and this would require the consent of all the partners under clause 6(c). Accordingly no one partner could demand a revaluation. He submits that it is one thing to revalue a herd of livestock, which is a non-permanent asset, and treat the profit arising as undrawn profit capable of being divided among the partners. It is quite another to revalue the farmland, which is a fixed asset of the partnership and essential for its business, and to treat the profit arising as a divisible profit. The farmland was long-term capital, of a permanent nature, and the partners had agreed that the A capital represented long-term capital. By implication, the notion of revaluing the farmland and treating the profit as divisible, undrawn profit was excluded. The only way a profit arising on revaluation could be brought into the partnership accounts was by capitalisation as A capital and that, as already stated, required the consent of all partners.

45. Mrs Talbot Rice rejects Mr Steinfeld's argument and contends that any partner could insist on a revaluation since under clause 13 the accounts have to set out the assets at their values shown in "proper" books of account. Unless otherwise agreed, the fair value basis should be used. I would accept that it is not inevitable that the accounts for the broken period should be drawn up on the same basis as the general accounts. I would also accept that, if a single partner could insist on a revaluation, this could overcome the difficulty that clause 19 might otherwise be void as against a trustee in bankruptcy (see paragraph 23 above). However, I do not accept the premise of Mrs Talbot Rice's argument about revaluation. Books of account that set out assets on the historic cost basis are not thereby prevented from being "proper" books of account. Cost is the value that is appropriate where books of account use the historic cost convention. The expressions used in clause 13 of the partnership deed are entirely different from the provisions of the partnership deed in *Re White* where, in the taking of the annual account, a "just" valuation had to be made of all assets capable of valuation.

46. Moreover to interpret the partnership deed as conferring a right on a single partner to insist on a revaluation of all the assets produces the result that the executors of a deceased partner could insist on a valuation of the partnership assets on a fair value basis provided that the last general accounts had not been signed but not if they had been. This meant that when a partner died, there would, as the judge recognised, be an element of chance as to whether the effect of clause 19 was that the share had to be determined on the basis that partnership assets were taken at their fair values. The result of that interpretation is utterly capricious. As such, it can properly be treated as a contra-indication of the construction that produces it. I would accordingly reject that interpretation.

47. Mrs Talbot Rice submits as an alternative that the executors of a deceased partner could seek a revaluation of the assets of the partnership for the purposes of the accounts for the broken period. However, the purpose of the accounts for the broken period is to take account of profits in the broken period. They are ancillary to the accounts used under clause 19(1)(a). The partnership deed must be read as a harmonious whole, and accordingly the method of valuation used in the accounts for the broken period must not be one that produces a conflict with other parts of the partnership deed. On this basis I do not consider that a partner or his executors could require the accounts for the broken period to be drawn up on a basis that effectively imposes on the remaining partners the burden of a valuation from which all the partners have agreed that they are to be protected by the provisions of clause 19(1)(a).

48. In those circumstances, we do not have to decide whether Mr Steinfeld's attractive submissions about revaluation are correct. A further objection was raised to Mrs Talbot Rice's submission, namely that the profits arising on a revaluation of the farmland were not profits "in respect of" the broken period. The revaluation can only be sought by a deceased partner's executors

following his death. There must be a question as to whether such revaluation would necessarily give rise to a profit which ought to be recognised in accounts for the broken period since that period had by then already concluded. However, we had no evidence as to accounting practice on that and in those circumstances I propose to leave this question open.

49. There are arguments for and against giving a single partner the right to require a revaluation. It ensures that the outgoing partner receives the full value of his share, including value that accrues in the period between the date of the last accounts and the date of death. Some of the farmland might have received planning permission after the last year-end but before the death, and become extremely valuable in consequence so that the retiring partner's estate would be seriously disadvantaged if his executors could not require a revaluation. On the other hand, if such a revaluation could be required, it would impose a substantial financial burden on the surviving partner and the farmland might have to be sold. That would not necessarily follow if the farm had for example mature woodlands where the timber could be cut and sold to raise the necessary cash. Alternatively, deferred terms might be agreed.

50. There are, however, circumstances in which a revaluation could work to the disadvantage of the outgoing partner. The remaining partners might seek a revaluation in order to reflect a capital loss, perhaps arising because there had been severe inundation, subsidence or erosion, or because contamination of the farmland had been discovered. This loss would then have to be set against any profits shown in the accounts used for the purpose of clause 19.

51. These arguments put the issues into some form of context, but at the end of the day it was for the partners to decide how the amount to be paid for the share of a deceased partner was to be ascertained. They had freedom of contract.

52. It follows from my conclusions above that the amount payable in respect of Aidan's share falls to be determined by reference to the book value of the land. This cannot be said to be a result that the partners could not have intended. The partners might well have taken the view, that if a partner dies, he should receive his aliquot share of the value of the partnership assets. But, equally, they may all have agreed ahead of time that it was more important that the surviving partner should be able to continue the business. In those circumstances, the fair value of the farmland is almost a theoretical matter because it was likely that the business could not be carried on without the assets in question. It is possible that the farmland could be sold and leased back to the surviving partner but, unless the partnership deed enables or requires a fair value to be taken for the farmland, there is nothing to suggest that the partners intended the surviving partner to take the risk that in the event finance was not available at reasonable cost.

53. There is some evidence that the partnership had a commercial property in Southampton which was not necessary for the purpose of carrying on the partnership's farming business but there is likewise nothing to suggest that they intended to treat this asset in any different way from that in which they treated the farmland.

54. In the interpretation of this partnership deed, the fact that this was a farming partnership which owned the farmland on which it carried on business and the fact that it was a partnership set up by members of the same family rather than by commercial partners who negotiated the terms at arm's length are significant factors to be borne in mind.

55. Mrs Talbot Rice submits that clause 6(c) does not have the effect that profits arising on revaluation cannot be credited to shares in the A capital. She submits that clause 6(c) takes effect subject to clause 11, which provides that capital profits are to be divided between the partners in proportion to shares in the A capital held by them. She submits that there is no reason why the capitalised profit should not simply be added to the partners' shares in the A capital. However, clause 6 (c) would need to contain an exception for capital profits arising on a revaluation to enable this to happen and there is simply no such provision.

Did the partners agree subsequently to the execution of the partnership deed that the basis of valuing a share on death should be fair value?

56. Mrs Talbot Rice has adduced evidence on appeal that Mr and Mrs Harvey, Francesca and Aidan agreed at a meeting with their solicitors on 25 September 2005 to alter the partnership deed so that there should be a revaluation of the partnership assets on any change in the partnership. A further deed was necessary, which was drawn up in October 2005, and provided *inter alia* for the market value of the land to be used to value a share on the death of a partner. However, Francesca never signed it. In those circumstances Aidan's executors cannot, in my judgement, establish that clause 19 of the partnership deed was subsequently varied by the partners. In those circumstances, section 19 of the Partnership Act 1890, set out above, does not apply.

Conclusions

57. For the reasons given above, I would allow this appeal and dismiss the respondents' notice.

Lord Justice Aikens

58. I agree that this appeal should be allowed and I would also dismiss the respondent's notice. I will state my own reasons shortly because, first, I respectfully differ from the judge who gave a comprehensive and careful judgement and, secondly, this matter is of great importance to all the parties involved. Arden LJ has set out all the facts and the relevant clauses of the partnership deed and I therefore will not repeat them. I will adopt the definitions used in the partnership deed.

59. One of the partners, Aidan, died on 20 August 2006. His two parents subsequently retired as partners as a result of incapacity. It is agreed that the effect of these unfortunate events is that Francesca, the last remaining partner, has to make a payment to her late brother's estate for his 48% share of the family farming partnership business. The sole effective preliminary issue with which this appeal is concerned is: on what basis is that payment to be made? The answer to this question depends, in my view, on the correct construction of the partnership deed and, in particular, clauses 13 and 19.

60. Below there had been other issues, including the question of whether accounts for 2005 or for 2006 should be taken as the "last annual general account" for the purposes of deciding what was due to Aidan's estate pursuant to clause 19 of the deed. Mann J held, at [26 – 27] that it should be the accounts for the latter year. There is no cross-appeal on this point. But that does not solve the problem because, as Mann J said at [31], it leaves open the question of how, for the purposes of clause 19(a), the 2006 accounts between the partners ought to have been drawn up in accordance with clause 13(a), assuming that the court had to decide how the accounts were to be drawn up because there was some disagreement between the partners on the correct method.

Principles of construction of the partnership deed

61. On the general question of how partnership deeds should be construed in relation to issues of valuation of partnership assets, Mann J felt able to draw some general principles from the decision of the House of Lords in *Cruickshank v Sutherland* (1923) 92 LJ Ch 136, in particular from the speech of Lord Wrenbury. He set those principles out at [42] of his judgement and Arden LJ has reproduced them at [19] above.

62. Mann J then applied those principles to the present case. He concluded, at [49], that this partnership agreement is silent "as to the basis of the valuation" for the purposes of drawing the accounts applicable to the death of Aidan and, indeed, the retirement of the parents. He held

that, in the absence of any such guidance, the accounts to which the outgoing partners or their estates were entitled were "accounts which reflect a fair value". In relation to the land, in Mann J's view that "fair value" was the market value of the land unless there was some other agreement or there were factors that rendered such a value unfair. In his view there was no contrary indication. The fact that the partners had agreed previous accounts on a historic value basis was not relevant because they were drawn up on the assumption of a continuing partnership, whereas "the death or retirement of a partner is a different circumstance requiring (or capable of requiring) a different valuation basis". He also concluded that the adoption of historic values as the basis for the value of the land had the potential to create "considerable unfairness" because if they were used to value the amounts due to outgoing partners under clause 19(a)(i) and (ii) then the remaining partner, Francesca, would have acquired the partnership assets "at a very considerable undervalue indeed, mainly by dint of survivorship".

63. The first question to be considered, therefore, is whether the judge was correct to hold that there are general "default rules" or principles for ascertaining the basis of valuation of partnership assets for the purposes of an account if the partnership deed is "silent" as to the basis of such valuation.

64. Arden LJ has analysed in detail the decisions in *Cruickshank* and *Re White* which were the principal cases Mann J considered. I agree with her conclusions. The first is that *Cruickshank* does not lay down a general "default" principle that if a partnership deed is "silent" as to the basis on which an outgoing partner's share of the partnership assets was to be determined or valued, then certain legal rules take over and the "default rule" is that a "fair value" has to be used for the determination of the value of those assets. Secondly, both cases emphasise that the basis of valuation must be derived, at least in the first place, from a construction of the terms of the deed itself. I accept, of course, that relevant background material may be relevant to the proper construction of a partnership deed. I also accept that, whatever the construction of the deed, the position may be altered by a course of subsequent dealing between the partners: see section 19 of the Partnership Act 1890.

Construction of the partnership deed

65. In my opinion the question of what amounts are due to the estate of Aidan depends entirely on the construction of clause 19(a) of the partnership deed. The correct approach to the construction of a partnership deed was set out by Chadwick LJ in *Re White* at [67]. The court does not "lean" towards one conclusion rather than another; it must seek to ascertain what the parties intended by the words which they actually used, having proper regard to the circumstances in which they made their agreement. Chadwick LJ also pointed out at [67] that those circumstances:

> "…will include the obvious fact that, as they must be taken to have appreciated, valuation of the share of a retiring or deceased partner on the basis that assets are taken at historic cost is likely (with past experience of inflation in mind) to lean to the result that the retiring or deceased partner receives less for his share than he would do if the assets were taken at current market value".

66. With those principles of construction in mind I consider the construction of the partnership deed and clause 19(a)(i) in particular. The first point to note is that first part of clause 19 provides that in the event of a partner dying "…the share of that partner in the capital and assets of the partnership shall accrue to the surviving partners in the same proportions as their respective shares in the "A" capital for the time being". It follows, therefore, that the personal representatives of the deceased former partner has no entitlement to any of that former partner's share in the "capital and assets" of the partnership. That all goes to the remaining partners.

67. In exchange, under clause 19(a) the partners agree that the personal representatives of the "outgoing partner" shall be paid a sum of money. That is to be "equal to" the amounts described in clause 19(a)(i), (ii) and (iii). This appeal is concerned with the "amounts" referred to in clause 19(a)(i). That paragraph identifies two "amounts" which are to be paid to the "outgoing" partner. The first is "…the amount standing to the credit of the outgoing partner as his share of the capital of the partnership".

68. There can be no argument on what is comprised by that amount. Clause 5 declares that "the capital of the partnership shall consist of "A" capital, "B" capital and "additional capital". Clause 6(b) identifies what constitutes the "A" capital and the partners' shares in it. Therefore the outgoing partner is entitled to a sum equal to his share of the "A" capital as defined by clause 6(b). Clause 6(c) stipulates that there shall not be any increase in the amount of the "A" capital without the consent of all the partners, except as set out in subsequent provisions of the deed. It is agreed that there had been no increase in the "A" capital by agreement. There is nothing express in the partnership deed to suggest that an unrealised increase in the value of the land can somehow be reflected in an increase in the original "amount" of the "A" capital as set out in clause 6(b). In my view that was not contemplated by the partners as being a method by which the "A" capital amounts could be increased. So, I agree with Mann J (at [67] of his judgement), that the "A" capital was fixed.

69. Mann J accepted, at [67] of his judgement, that the "B" capital relates to something other than the value of the farming land. I agree. There is no suggestion that any "B" capital or other "additional" capital (see clause 8) is to be paid out to Aidan's estate.

70. The next point to note is reference to "…the last annual general account…". The reference to "annual general account" must mean the same type of account referred to in clause 13(a) of the deed, which provides that a "general account" has to be taken each year, i.e. there must be an "annual general account". This also accords with the phrase "annual general account" is used in clause 12, which permits sums to be taken on account of partners' respective share in "profits" and plainly contemplates that being done in any year. Therefore, it is necessary to see how the outgoing partner's share in the assets and liabilities and profits and loss of the partnership and his would be shown in the last annual general accounts in order to ascertain what "sum equal to" the outgoing partners share in the "capital of the partnership" and his "undrawn profits" is due under clause 19(a)(i).

71. It is known that the "annual general accounts" had always valued the land at cost and there had never been a revaluation of the land. So, as Mann J correctly observed, the only way that a market valuation of the land could become relevant would be if any one of the partners was entitled to demand a revaluation of the land at the time of any "annual general account" because that is what the partners were entitled to under clause 13(a). If a partner was so entitled then there would be a question of how that revaluation would be reflected in the accounts and where the unrealised "profit" on the revaluation would be shown in them.

72. Mann J concluded, at [67] of his judgement, that if the "annual general account" was properly prepared in accordance with clause 13(a) and on the basis of "fair accounting", then the account should show unrealised profits from a revaluation of the land. He held that those unrealised profits would be regarded as part of "capital profits" within clause 11 and must therefore, in his view, logically constitute "undrawn profits" for the purposes of clause 19(a)(i). Accordingly, Mann J concluded that Aidan's estate was entitled to be paid a sum equal to his share of the total unrealised capital profit resulting from the revaluation of the land, being Aidan's share of such "undrawn profits". Mann J must have concluded that any partner would be entitled, at the time any annual general account was drawn up, to demand that the land could be revalued and the unrealised capital profit that showed as a result would be shown as "capital profit" in those accounts, within the meaning of clause 11. That "capital profit" would then be treated as "undrawn profits" for the purposes of clause 19(a)(i).

73. I am unable to agree with that reasoning and conclusion. It all depends on how the partners intended the annual general account to deal with “assets and liabilities” and “profits and losses”. There is nothing in clause 13(a) that expressly or impliedly states that partners are entitled to a revaluation of “assets”, at least not fixed assets in the form of land, which are different from either temporary assets such as livestock or machinery. In this regard I have read the judgement of Patten LJ. I agree with the reasons that he has given which lead to the conclusion that a partner was not entitled to a revaluation of the land for the purposes of an annual general account produced in accordance with clause 13(a).

74. But even if there could be a revaluation, it would not be of use to an outgoing partner in fixing the sum due under clause 19(a)(i) He is only entitled to a sum equal to his share of “undrawn profits”. “Profits” are not further defined in the deed. Clause 9 simply states that, from 1 May 1988 and until otherwise agreed by all partners “the profits of the partnership shall belong to and shall continue to belong to the partners in proportion to their holdings of “A” capital”, subject to an exception in respect of Francesca, who is entitled to a minimum of salary. I accept, however, that clause 11 contemplated that both “capital profits” and “income profits” could be generated because of its express provision that “the capital profits and losses of the partnership shall be divided between and borne by the Partners in proportion to their respective shares in the “A” capital for the time being”.

75. Clause 13(a) stipulates that the “general account” must deal with “all the assets and liabilities and of the profits and losses of the partnership for the preceding year…”. It therefore distinguishes between “assets and liabilities” on one side and “profits and losses” on the other. To my mind four things are clear from this phraseology. First, “assets” must have the same meaning in clause 13(a) as in clause 19(a). Secondly, the “assets” in the case of this partnership deed must include the farmland. Thirdly, “profits” must include both “capital” and “income” profits. But fourthly and most importantly, I think that “profits” must refer only to realised profits, not unrealised ones.

76. I think this last conclusion must follow from the distinction drawn between “assets” and “profits” in clause 13. Given the distinction between “assets” and “profits” in that clause and the distinction between “assets”, “capital” and “undrawn profits” in clause 19(a), it seems to me more natural that unrealised capital profits should have their “accounting home” (to use Mann J’s phrase in [67] of his judgement) within the term “assets”. I think this conclusion is reinforced by two other clauses. First, clause 11, which refers to “capital profits” and contemplates the distribution of “capital profits” that have been realised, as Mann J himself accepted at [67] of his judgement. Secondly, clause 12 clearly contemplates that the partners can make drawings on account of their respective share of actual or realised profits, but it could not be contemplating drawings on account of unrealised profits, which would, as Patten LJ points out, force the partnership either to borrow significantly or to sell the very land on which the continuation of the partnership depends. Thirdly, clause 10, which deals with the situation where there is insufficient profit to pay partners’ salaries, reflects an intention that that “profits” means actual rather than unrealised profits.

77. Lastly, clause 13(a) stipulates that the “general account” must show “profits and losses of the partnership for the preceding year…”. An unrealised capital profit from a revaluation of the land in 2006 after a period of more than a year could not be a “profit ….of the partnership for the *preceding* year”; it would be an unrealised profit over several years or, perhaps, over the period of the life of the partnership.

78. The result of this analysis is that the phrase “undrawn profits” in clause 19(a)(i) must mean undrawn realised profits but it does not include undrawn, unrealised profits such as might been produced by a revaluation of the land in 2006. Therefore, even assuming that a partner could demand a revaluation of the land at the time of each annual general account, Aidan’s estate is

not entitled to claim, as “undrawn profits” under clause 19(a)(i) any unrealised profit from a revaluation of the land in 2006.

79. A similar analysis of clause 19(a)(iii) produces the same result, viz. that Aidan’s estate cannot claim any increased but unrealised value in the land as a “share of the profits of the partnership in respect of the period from the taking of the last general annual account….”. The exercise of calculating the “profits” has to be done “in accordance with the partnership’s usual practices” which could not be contrary to the methodology set out in clause 13(a) of the deed.

Conclusions

80. For these reasons I would allow the appeal.

Lord Justice Patten :

81. I also agree that the appeal should be allowed and the Respondent’s notice dismissed.

82. The preliminary issue ordered by the Master required the judge to decide the amount payable to Aidan’s estate under clause 19 of the partnership deed. That limits the payment to a sum equal to Aidan’s share in the capital of the partnership and the undrawn profits belonging to him as shown in the last annual general account prior to his death. The link made by clause 19 with that account confirms that the payment provisions for a deceased or retiring partner are parasitic on the provisions of clause 13 in the sense that they adopt an account drawn up in accordance with those provisions as providing the relevant measure of compensation. It follows from this that the partners did not intend to apply a different standard of accounting for clause 19 purposes in respect of their entitlement to capital and profits in the annual accounts of the partnership. As explained by Chadwick LJ in *Re White* (at para 51), the question of what would be a proper valuation of the land in the general account must be the same whenever the account is taken.

83. The issue for the judge was therefore whether clause 13 entitles a partner, whether continuing or deceased, to insist upon a re-valuation of the assets of the partnership and, in particular, the farm land. Because clause 6(c) makes any increase in “A” capital dependant upon the consent of all the partners, it was never open to Aidan to require a re-valuation to be reflected in the accounts as an increase in capital. The judge thought this difficulty could be overcome by treating the increase in value as a capital profit which, under clause 11 of the deed, would have been distributable in proportion to the partners’ shares in the “A” capital. But this, I think, gives insufficient effect to clause 6(c).

84. The deed is not, in my view, silent on the issue of re-valuation. On the contrary, the requirement for unanimity in respect of any increase in capital provides a strong indication that the partners did not intend the accounts to contain a regular re-valuation of significant assets. Clause 6(c) would be largely ineffective if a partner could insist upon a re-valuation of the capital assets and then obtain payment of the increase in value as profit free of the restriction on withdrawing his “A” capital. To meet the payment, the partnership would be forced either to borrow significantly or to sell the land on which the continuation of the partnership depends.

85. I do not therefore accept that this is a case in which it is possible to draw a distinction between the position obtaining on the death of a partner and the position of the continuing partners in relation to the drawing up of the general accounts. The structure of this partnership deed makes it clear in my view that no special treatment is to be employed when the last general account will be used for the purposes of clause 19. The judge thought that the history of accounting was inconclusive because it did not show that the partners had clearly set their faces against re-valuations for all purposes. But what it does show is that there were no re-valuations of the land and no re-valuations of the production herds since one was agreed in 1997. That was

accommodated in the accounts by being credited to the partners' current accounts. Apart from that, major assets were carried forward at book value and no entry appeared for unrealised profits.

86. In these circumstances, there was nothing in the partners' dealings and practice to contradict the inferences about the construction of clause 13 to be drawn from clause 6(c) and I think that the judge was wrong to assume that he had a free hand to determine what would be a proper valuation of the assets for the purposes of clause 19. I therefore agree with Arden LJ that the entry of the land at book value in the 2006 accounts was the correct accounting treatment under clause 13 and is therefore decisive of this appeal.