

**IN THE COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM BRISTOL DISTRICT REGISTRY  
HIS HONOUR JUDGE MCCAHERN QC  
1BS30953**

Royal Courts of Justice  
Strand, London, WC2A 2LL

30/10/2013

**B e f o r e :**

**LORD JUSTICE RIMER  
LORD JUSTICE LEWISON  
and  
LORD JUSTICE BRIGGS**

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**Between:**

**JOHN RONALD HAM**

**Appellant**

**- and -**

**RONALD WILLIAM HAM &  
LORNA JEAN HAM**

**Respondent**

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**Mr Ian Partridge (instructed by Stokes Partners LLP) for the Appellant  
Mr Nathaniel Duckworth (instructed by Michelmores LLP) for the Respondent  
Hearing date: 15 October 2013**

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**Lord Justice Lewison:**

**Introduction**

1. In 1997 Mr and Mrs Ham, who were then established dairy farmers, took their son John, then aged 19, into partnership. At that time Mr and Mrs Ham were the owners of some 440 acres of land and a sizeable dairy herd together with farm machinery and other assets. The partnership began on 1 October 1997; and the partners' respective rights and obligations were reduced to writing in a partnership deed dated 15 December 1997. Clause 4.1 entitled any of the partners to

terminate the partnership by three months written notice. In that event the other partners were entitled to buy out the partner who gave the notice. John Ham gave such notice on 27 February 2009. The unfortunate dispute between him and his parents concerns the basis on which that buy-out is to take place.

2. HHJ McCahill QC decided that, as a matter of interpretation of the partnership deed, John's share was to be determined on the same basis as annual accounts were drawn during the continuation of the partnership, rather than on the basis of an up to date market valuation of the partnership assets. With the judge's permission John appeals.
3. Mr Ian Partridge presented John's case; and Mr Nathaniel Duckworth presented that of his parents.
4. At the conclusion of the hearing of the appeal my provisional view was that the judge was correct. However, upon further reflection, and with the inestimable benefit of having read the judgements of Rimer and Briggs LJJ in draft, I have reluctantly come to the conclusion that the appeal must be allowed. My reasons follow.

### **The approach**

5. John's entitlement is a contractual entitlement. What it is therefore depends on the correct interpretation of the partnership deed. There are no special rules applicable to interpreting deeds of partnership in this respect. In particular there are no presumptions or default rules which point towards one basis of valuation of an outgoing partner's share rather than another: *Re White (deceased)* [2001] Ch 393; *Drake v Harvey* [2011] EWCA Civ 838 [2012] 1 All ER (Comm) 617. As in the case of any other contract the interpreter must take into account any relevant and admissible background which would help an informed reader in understanding what the contract means. One of the important background facts is that this was a family partnership. Another is that it was a dairy farming partnership and that, in the nature of things, a farming partnership is likely to be asset rich but cash poor. In addition as Lord Hailsham explained in *Johnson v Moreton* [1980] AC 37, 59 in a very different context:

"... to build up a herd of dairy cattle, between whose conception and first lactation at least three years must elapse, takes time and planning, whilst to disperse the work of a lifetime of careful breeding is but the task of an afternoon by a qualified auctioneer."

### **The partnership deed**

6. A number of clauses in the partnership deed bear on this dispute:

"3.1 The capital of the partnership shall consist of the following items:

- (a) Such assets as are specified in a statement of affairs to be prepared by Messrs Hucker & Booker Chartered Accountants ... which assets shall be credited to the Partners as therein specified
- (b) Any further sums or assets which any Partner may with the consent of the others from time to time contribute for capital purposes which shall be credited to his or her capital account

- 3.2 The Partners shall keep books of account and such other records as are usual in a business of the same type as the partnership business and such accounts shall in addition show the account of each Partner in respect of his or her share of the capital and the profits of the partnership

...

- 3.5 The financial year of the partnership shall end on 28<sup>th</sup> February each year and an annual balance sheet and profit and loss account shall be prepared as at that date and as soon as possible afterwards showing what is due to all Partners in respect of the capital and profits of the partnership. Such balance sheet shall forthwith be signed by all Partners who shall be bound by the contents of the balance sheet and the profit and loss account unless some manifest error is found within 6 months after he or she has signed in which case such error shall be rectified
- 3.6 All Partners shall be entitled to draw out of the partnership bank account on account of his or her share of the profits such monthly sum as shall be agreed between the Partners. As soon as the Partners have signed the balance sheet they shall agree to make such further drawings (or repayments as the case may be) in respect of profits or capital or both as are prudent in the circumstances having regard to the requirements of the partnership business.”
- “4.1 The partnership may be terminated by any of the Partners giving to the others not less than three months’ notice in writing at any time
- 4.2 If the partnership is terminated in any way then the partners to whom notice is given or the surviving or solvent Partner or Partners on whose application an order for the dissolution of the partnership was made may within twenty-one days after the notice was given or the event occurred which gave rise to the termination give notice to the other Partner or Partners or his or her personal representatives trustee or receiver as the case may be electing either to have the partnership wound up under the Partnership Act 1890 or to purchase the share of the other Partner or Partners [at] the net value of such share
- 4.3 The net value for the purpose of clause 4.2 shall be agreed between the Partners or their respective successors (as the case may be) or in default of such agreement shall be determined by the partnership accountants. In so determining the accountants shall act as experts and not as arbitrators and their professional charges shall be borne by the Partners in equal shares”
7. The statement of affairs that was referred to in clause 3.1 (a) of the partnership deed was either not prepared as envisaged; or, if it was, it has not survived. But Hucker & Booker prepared accounts both before and after the inception of the partnership.
8. Clause 3.7 originally provided for the division of profits, but the division was changed by a supplemental agreement made in 2001. Under that agreement Mr and Mrs Ham were each to receive 30 per cent and John the remaining 40 per cent. Clause 3.7 (b) said that the Partners would bear “all losses including losses of capital” in the same proportions.
9. Most regrettably clause 4.3 does not contain clear instructions about the basis on which the “net value” is to be assessed. It is that omission which has given rise to this dispute.

#### **Some more relevant facts**

10. Before they took John into partnership Mr and Mrs Ham had themselves been business partners. Between them they owned the land on which the farming business was carried on, the buildings, all the live and dead stock and the farm machinery. John, understandably, had no capital of his own.
11. Hucker & Booker prepared accounts for Mr and Mrs Ham’s own partnership as at 28 February 1997 (that is some eight months before John became a partner). Those accounts showed:
- i) Fixed assets consisting of freehold property, plant & machinery, motor vehicles, agricultural buildings and milk quota;

- ii) Current assets and current liabilities;
  - iii) Long term liabilities.
12. After deducting the liabilities from the assets, the balance came to just over £1 million. The accounts recorded that that was financed by Mr and Mrs Ham's capital account, which recorded the same balance standing to their credit. The land was recorded at book value. It had clearly not been revalued, because the same figure was simply carried forward from the accounts for the previous year.
  13. The accounts for the following year (being the first year after John joined the partnership) were also prepared by Hucker & Booker. These accounts are as close as we come to the statement of affairs to which clause 3.1 (a) referred. They follow much the same format as the previous year's accounts. In other words having struck the balance between assets and liabilities, the net balance is shown. But this time, instead of simply being ascribed to Mr and Ham, part of the capital was ascribed to John. By reference to the notes to the accounts we can see that John's capital contribution was his share of profits after allowing for modest drawings. The bulk of the profits went towards increasing Mr and Mrs Ham's capital account. The land was, again, shown at book value. The same value was again carried forward from the previous two years' accounts. Clearly it had not been revalued.
  14. This pattern continued for subsequent years. From time to time milk quota was revalued, and the partners' capital accounts adjusted in accordance with the revaluation. In some years additional land was acquired and entered into the partnership accounts at book value. But the land has never been revalued in the annual accounts. However, in 2004, following a discussion with accountants, the bulk of the land farmed by the partners was removed from the partnership accounts, and the capital credited to Mr and Mrs Ham was correspondingly reduced. Whether this was done with John's knowledge or consent is in dispute; and will not be resolved by this appeal.

## Discussion

15. Mr Partridge's argument makes a radical distinction between a partner's "capital" and a partner's "share". His starting point is Lord Lindley's description of partnership capital quoted in Lindley and Banks on Partnership (19<sup>th</sup> ed para 17-01):

"By the capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business, and intended to be risked by them in the business. The capital of the partnership is not therefore the same as its property: the capital is a sum fixed by the agreement of the partners; whilst the actual assets of the firm vary from day to day, and include everything belonging to the firm and having any money value. ... The amount of each partner's capital ought...always to be accurately stated, in order to avoid disputes on a final adjustment of account; and this is more important where the capitals of the partners are unequal, for if there is no evidence as to the amounts contributed by them, the shares of the whole assets will be treated as equal."

16. Lindley & Banks go on to say in the next paragraph:

"As Lord Lindley pointed out there is a fundamental distinction between a firm's capital on the one hand and its assets (sometimes confusingly called its capital assets) on the other. That distinction is critical to an understanding of the true nature of capital and is, moreover, frequently overlooked by partners and their advisers. It has already been pointed out that a partner's capital should be expressed in cash terms, whether the contribution from which it derived took the form of cash or a specific asset, e.g. land or goodwill. ... Once a partner has brought in the asset and been credited with his agreed "capital" value in the firm's books, the asset as such will cease to be his property and will thereafter belong to the firm. Equally, the partner's capital will be

unaffected by fluctuations in the value of the asset, which will represent capital profits or losses potentially divisible between the partners in their capital profit/loss sharing ratios.”

17. The latter proposition is supported by the decision of Sir George Jessel MR in *Robinson v Ashton* (1875) LR 20 Eq 25. Robinson was the owner of a cotton mill in Oldham. He entered into partnership with Ashton (and another). The net value of the mill was entered into the partnership accounts as his capital. There was no written partnership agreement. The partnership was superseded by another partnership, and then a third partnership and capital was carried across into the books of the new partnerships. Again, there was no written partnership agreement. Ultimately Robinson and Ashton sold the mill at a price far exceeding the capital amount credited to Robinson in the partnership books. At the date of the sale Robinson and Ashton were entitled to equal shares of the profits of the partnership, Jessel MR held that Ashton was entitled to one half of the capital surplus arising on the sale of the mill. He said:

“... in the absence of special agreement the rise or fall in value of fixed plant or real estate belonging to a partnership was as much profit or loss of the partnership as anything else. If a man said “I bring in no money capital—I have not got money, but here is a mill and machinery worth £20,000 which I bring in,” and he was credited in the books with £20,000—then the mill and machinery became partnership property just as much as if the partner had brought in money, and the partnership had with that money bought the mill and machinery. It was suggested that the mill and machinery were *Robinson*’s, and that the partnership had only paid rent for them; but tenants did not generally lay out money on their landlords’ property, especially under circumstances such as those of the present case. There must be a declaration that *Ashton* was entitled to one-half of the proceeds of sale after payment thereout of the debts of the partnership and the capital appearing by the books to be due to each partner.”

18. As a general principle this cannot be doubted, but the question in our case is whether there was a “special agreement”. Moreover, as Lindley & Banks point out elsewhere (para 10-60):

“Nevertheless, agreements are encountered in which capital is treated as synonymous with the partnership’s assets, so that the value of the firm’s capital base, and thus of each partner’s contribution will constantly fluctuate.”

19. Sometimes this apparent solecism even creeps in to judgements of this court: see *Re White (deceased)* at [24].
20. So far as a partner’s “share” is concerned, Mr Partridge again relies on Lord Lindley’s definition, quoted in Lindley & Banks at 19-05:

“What is meant by the share of a partner is his proportion of the partnership assets after they have been realised and converted into money, and all the debts and liabilities have been discharged. That it is, and this only, which on the death of a partner passes to his representatives, or to a legatee of his share, which under the old law was considered as *bona notabilia*, which on his bankruptcy passes to his trustee...”

21. Mr Partridge points out that Lindley & Banks continue:

“Although it would be more accurate to speak of a partner’s entitlement to a proportion of the net proceeds of sale of the assets, the correctness of the statement of principle embodied in the above passage cannot seriously be questioned, reflecting as it does the proper application of sections 39 and 44 of the Partnership Act 1890.”

22. Sections 39 and 44, of course, deal with the position on a winding up of the firm, which is not our case. Thus it is that Lindley & Banks go on to say (para 19-06) that:

“... it is considered that Lord Lindley’s definition is, as such, incomplete and that a full understanding of the nature of a share... is only possible if that entitlement is analysed at three stages in the life of a firm, namely (1) whilst the partnership is continuing (2) on a general dissolution and (3) on the death, retirement or expulsion of a partner.”

23. As regards the second stage, Lindley & Banks observe that in the event of a general dissolution each partner will be entitled to insist on the partnership assets being applied towards payment of the firm’s debts and liabilities and a division of any surplus proceeds: para 19-09. As regards the third stage, they observe that where it is expressly or impliedly agreed that the partnership will continue notwithstanding the change in the firm, the precise nature and value of the deceased or outgoing partner’s share will depend on the terms of the partnership agreement: para 19-10. Moreover as Lindley & Banks also point out (para 19-01) the expression “share”:

“... is notoriously difficult to define, not least because its meaning differs according to the context in which it is used.”

24. Once again, therefore, it comes back to a question of interpretation of the partnership deed, rather than being simply the application of a well defined technical term.
25. Mr Partridge placed some reliance on the decision of the House of Lords in *Cruikshank v Sutherland* (1922) 92 93 LJ Ch 136. The partnership agreement in that case contained an express instruction that on the death or retirement of a partner “a full and general account” was to be taken. The House of Lords decided that a full and general account meant taking the fair value of the partnership assets (not, be it noted, their market value); and that since the account in question was a post-event account, that instruction had not been varied by usage in the preparation of the ordinary annual accounts. Our case, however, does not contain that explicit instruction. Indeed, the whole debate is about what instruction the partnership deed gives. The other main case on which Mr Partridge relied was the decision of the Court of Appeal of Northern Ireland in *McClelland v Hyde* [1941] NI 1. In that case the capital of the partnership consisted of stated sums of money; and once again the partnership agreement contained the instruction to take a “general account” on dissolution or termination of the partnership, which our case does not. It was in that context that Andrews LCJ distinguished between fixed capital (as stated in the partnership agreement) and a partner’s share in the underlying assets of the partnership. I do not consider that either of these cases helps to determine the issue in our case.
26. The first point to make about the partnership deed is that it does not follow the distinction made in Lindley & Banks or in *McClelland v Hyde* between capital and assets. Like others before them the drafters of the deed have overlooked the distinction. Clause 3.1 (a) envisages that the capital of the partnership will consist of *assets*; and that *assets* will be credited to each partner. Clause 3.1 (b) on the other hand envisages that additions may consist either of assets or of sums; but in either case the assets or sums are to be credited to the partner in question. Both Mr Partridge and Mr Duckworth agreed that in this respect the partnership deed was in error, and that what would have been shown in the statement of affairs would have been a sum of money, rather than assets *in specie*. The point about this, however, is that the drafters of the partnership deed cannot be assumed to have used terminology in the way in which Lord Lindley would have done. We must attempt to interpret the deed according to its own lights. The second point to make about clause 3.1 is that in order for additional capital to be introduced the consent of all partners is required. In *Drake v Harvey Patten* LJ (with whom Aikens LJ agreed) said at [84]:

“... 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.”

27. In my judgement the same point applies in our case.
28. Clause 3.2 introduces the accounts. The accounts are to show each partner's "share of the capital and profits" of the partnership. The "share" in question is a share of capital and profits and nothing else. One of the accounting documents is the balance sheet referred to in clause 3.5. This is to show "what is due" to each the partner in respect of the capital and profits of the partnership; and the partners are bound by the balance sheet once signed. The phrase "what is due" suggests that the balance sheet is to specify what each partner is entitled to require to be paid to him on some event; while the stipulation that the partners are to be bound by a signed balance sheet indicates that what is shown in the balance sheet is the limit of his entitlement. It is true that clause 3.6 envisages drawings against capital, but only to the extent that it is prudent having regard to the requirements of the business.
29. Thus we come to clause 4.2. It entitles the recipient of a notice to purchase the "share" of an outgoing partner. The first question must be: share of what? Mr Duckworth argues that the only previous mention of a "share" in the partnership deed is that in clause 3.2 which speaks of a "share in the capital and the profits" of the partnership. So the natural inference is that it is that share to which clause 4.2 refers. If it were meant to refer to anything else, one would expect the clause to have told the reader what it was. Clause 3.5, as noted, has already told us "what is due" to each partner as capital and profits. So one would expect that the buy-out would result in the partner in question being paid "what is due" to him. Since the partners are bound by the signed balance sheet, one would expect that the partnership accounts would supply the answer.
30. Mr Duckworth also submitted that if the departing partner's share was to be assessed otherwise than in accordance with the accounts, there was no indication of the basis of valuation. The cases contain illustrations of a variety of possible formulae: "market value", "fair value" and "just value" to give examples. How would one know which of these (if any) was the right basis? There is some force in this point, although I do not consider that it is a strong one.
31. Mr Duckworth placed some reliance on the fact that the clause required any dispute to be determined by "the partnership accountants" acting "as experts". There are two aspects to this point. The first is that the accountants are to act as experts. Where parties entrust resolution of their dispute to an expert, they contemplate that the expert will be able to resolve the dispute without the necessity of hearing evidence or delegating his function to an expert in a different discipline. Thus the parties must have contemplated that the accountants would have expertise in the subject matter of the dispute. If the subject matter of the dispute related to accounts and accounting, then the partnership accountants are obvious candidates to resolve the dispute. But if the dispute were to relate to the value of farmland or, for that matter, the value of livestock, the accountants could not have been expected to have the requisite expertise. The clause contains not only the positive instruction that the accountants are to act as experts, but also the negative instruction that they are not to act as arbitrators. Thus it can be fairly inferred that the parties did not contemplate that the accountants would make their decision based on receiving evidence from anyone else. I agree that the selection of the partnership accountants as the experts to resolve any dispute is a pointer to the correct basis of valuation. The second aspect of the point is that it was the partnership accountants who were the selected accountants. They would be expected to have familiarity with the partnership accounts, and with the way in which they had historically been drawn. Moreover they will have been selected by the partners and thus one could be confident that they are trusted by the partners. If, on the other hand, the real meat of the dispute is a dispute about land values or stock values, there is no machinery for selecting who, in practical terms, is to resolve that dispute.
32. Mr Duckworth submitted that the partnership's accountants would have had the experience of preparing the annual accounts, and the natural inference is that they would repeat the same exercise for the period ending with the termination. That, after all, is what their expertise is all about. If there was to be a departure from what had happened in the past one would expect some explicit instruction to be given to the accountants about their new role.

33. I was strongly attracted to Mr Duckworth's argument, but in the end I have concluded that I cannot accept it. The reasons are partly structural and partly textual. I deal with the structural arguments first.
34. Unlike many of the cases to which we were referred, clause 4 begins with an entitlement to terminate the partnership. Clause 4 is not therefore concerned with a partner leaving a continuing partnership (whether by death, retirement or expulsion). It is concerned, and concerned only, with the consequences of termination. Thus the basis on which accounts were prepared during the continuance of the partnership is no real indication of how the partners were to share in the partnership assets once the partnership had come to an end.
35. In addition the ability to buy out the departing partner's share is an alternative to winding up by the court on dissolution of the partnership. If the partnership were wound up then all the assets would be sold, and the realised profits on such a sale would be shared between the partners according to their shares in profits. Mr Partridge's point is two-fold. First, one would expect the buy-out to take place on the same basis, regardless of which machinery is used. It would be odd if one method of calculating the amount due to a departing partner were to differ radically from the other. Second, if there were to be a radical difference between the two then the election is illusory. The other partners would always choose the buy-out rather than the winding up, because that would always enable them to pocket any unrealised profits. I have considered whether the difference between the two ways in which a departing partner can be paid out is explicable by reference to the nature of the partnership. As I have said the type of partnership under consideration is likely to be asset rich but cash poor. There would be every reason not to compel continuing partners to realise capital profits by selling the very land on which the viability of the business depends. Arden LJ made this point in *Drake v Harvey* at [51]:

"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."

36. Mr Duckworth relied heavily on this approach to avoid what he called "the doomsday scenario". Although I was attracted by the proposition that this approach could be applied to our case, I do not think that it can. The reason is a simple one. *Drake v Harvey* was concerned with a continuing partnership. Our case, by contrast, is concerned with a partnership that has been terminated. Thus there are no continuing partners. I think that this is also the answer to the point that Patten LJ made in the same case, and which I have quoted above.
37. Mr Duckworth argued that it must not be forgotten that when the partnership began John was only 19, and his parents had been farmers for many years. John would have been entitled to terminate the partnership on short notice at any time. If, for example, he had decided on a career change, or had married someone who did not wish to live on the farm, it is difficult to suppose that the parties intended that he could compel his parents to sell up. On the other hand Mr and Mrs Ham might well have wished to leave the partnership on account of advancing age, and it would also be surprising if they could not have realised their full share of the value of the land which they had introduced into the partnership in the first place. This point, therefore, cuts both ways, and does not take the argument further. Moreover, as regards land acquired during the continuance of the partnership, presumably out of partnership profits, the argument has little force.

38. There are, in addition, textual reasons for preferring Mr Partridge's argument. First, as Briggs LJ points out, clause 4.2 is concerned with "value" rather than with accounting. Clause 3, which deals only with accounts, does not deal with value; so there is no reason to suppose a seamless transition from one clause to another. Second, clause 4.2 does not simply say that the outgoing partner is entitled to his capital and profits. He is entitled to the "net value" of his share. If the partnership were actually wound up on a dissolution, assets would be sold, and the costs of sale would be deducted from the sale proceeds. Thus each partner would receive his or her net share of assets. But if the option to buy out is exercised, the assets are not in fact sold (or at least not sold to third parties). The "net value" therefore requires the notional costs of sale to be deducted. Thus on Mr Partridge's interpretation the word "net" has some significance, whereas on Mr Duckworth's interpretation it does not.
39. There is, I think, some force in Mr Duckworth's point that the selection of the partnership accountants as experts to determine any dispute is a pointer towards his interpretation. But I agree with Briggs LJ that the substance of the formula is to be found in clause 4.2 rather than 4.3; and I agree with Rimer and Briggs LJ that to attribute significant weight to the selection of the partnership accountants is to let the tail wag the dog.

## Result

40. For these reasons I would allow the appeal. I reach this conclusion with some reluctance because on the particular facts it may well be thought that John will receive a substantial windfall (subject to the outcome of the dispute about whether the land initially brought into the partnership remains a partnership asset). But that cannot alter the correct interpretation of the partnership deed.

## Lord Justice Briggs:

41. I have, despite real sympathy for Mr. and Mrs. Ham, reached the same conclusion. I gratefully adopt Lewison LJ's summary of the facts, and indeed of the relevant law, which he extracts both from decided cases and from the leading textbook on partnership law, namely *Lindley and Banks* ...19<sup>th</sup> Edition). I agree that the answer to the difficult conundrum which this case presents is entirely to be found in the true interpretation of the partnership deed and, in particular, the phrase in clause 4.2 "to purchase the share of the other Partner or Partners at the net value of such share", read in the context of the partnership deed as a whole and with due regard being paid to admissible background fact, with no presumption being applied, one way or the other, on the question whether any payment is to be made for or in respect of the unrealised profit or gain attributable to any increase in the value of partnership property beyond the amount recorded in the partnership accounts.
42. In my judgement the central question to be resolved is not how the "share" of the partner being bought out is to be valued, although the phrase "net value of such share" does raise a subsidiary question of interpretation. The central question is, as Lewison LJ puts it: "share of what?" Does the word "share" in clause 4.2 mean share in the whole of the partnership property (including therefore unrealised profits or gains) or share in that part of the partnership property which is comprised within the phrase "capital and profits", in clause 3.2. In a firm in which the habitual accounting procedures do not include the regular revaluation of all its appreciating assets, it is an exercise in wilful blindness to think that the phrase "capital and profits of the partnership" as defined in detail in clause 3.2 is an equivalent of, or even a genuine approximation to, the partnership property as a whole. The partners' capital is a monetary amount which is, in summary, the aggregate of original monetary contributions, the agreed monetary equivalent of assets contributed, together with any other money or agreed financial equivalent of assets later contributed, and in the present case, simply the surplus of any partner's profits over his or her drawings, in any particular year. The profits of the partnership are, in any particular year, the surplus of income over expenditure, together with such accretions as are attributable to the revaluation of assets such as, in the present case, milk quota and livestock. Unrealised profits and

gains, such as any rise in the value of partnership's real property, simply do not feature in the accounts prepared under clause 3 but, for as long as no revaluation occurs, they are likely to form an increasingly valuable proportion of the partnership property taken as a whole. This is not surprising. For as long as both the partnership and its business continues, and the real property is not realised by sale, the unrealised profit or gain is not available for distribution to the partners as profit share. It is just a nest egg for the future.

43. In my judgement the starting point for solving the question "share of what?" in clause 4.2 is that, in stark contrast with clause 3, which concerns accounting while the partnership continues, clause 4.2 is entirely concerned with the parties' rights following dissolution, whether that dissolution is triggered by notice under clause 4.1, or by the obtaining of an order for dissolution, as mentioned in clause 4.2. The clause is therefore concerned not with the parties' continuing relations as partners, but with their rights in relation to the partnership property in circumstances where they have elected to go their separate ways. In that context there is no question of leaving unrealised profits and gains, unrecorded in the partnership accounts, to be realised for their mutual benefit at some future date. They must either be realised (by a sale and distribution, usually in a winding up) or allocated as between the partners for their separate use and enjoyment thereafter, in whatever manner they each may choose. In such circumstances partners are generally free to choose to share them between all the partners, or to confer the whole of them on the partner or partners to whom the dissolution notice is given. The question in the present case is: what does the buy-out formula in clause 4 show that these partners chose, in the agreement by which this partnership was established?
44. In that context I derive no particular assistance from the fact that, in the present case, it is John who has given the dissolution notice and his parents who wish to continue the farming business of the former firm, or even that clause 4.1 enabled John, had he wished to do so, to dissolve the partnership soon after his introduction, and after the introduction of the farmland by his very generous parents at a historic book value. Mr. and Mrs. Ham are, of course, much older than John and might themselves have wished to retire from active farming, and to realise their share of the partnership property for the purpose of providing for their retirement and old age, or for the large resources necessary to deal with unexpected ill health. On the judge's interpretation John would upon receipt of a notice of dissolution from his parents have been able to buy out their shares in the partnership for a fraction of their real value. Furthermore, he would have been under no obligation to continue the farming business, and could thereafter have realised the full value of the former partnership's property for his own use and enjoyment.
45. There are in my view a number of reasons why the presentation in clause 4 of the buy-out election as an alternative to winding up is a compelling point in favour of the appellant's construction. The first is (as I have already said) that the winding up option necessarily addresses the entirety of the property of the partnership, including unrealised profits or gains, so that it is natural to think that the alternative buy-out election, arising also on dissolution, is intended to do the same.
46. Secondly, the obvious purpose of the buy-out election is to enable the partner or partners to whom it is given to choose whether to take partnership assets in specie, or to take a monetary share of the net proceeds of their sale after a winding up. It is not obvious that the election is designed radically to alter the value of what the other partner or partners (giving the notice of dissolution) receive on dissolution. Either way, they (or he or she) receive money. That this is the meaning and effect of clause 4.2 is in my view powerfully reinforced by the use of the expression "net value of such share" at the end of the clause. I asked both counsel what "net" meant as part of that phrase. Mr. Partridge submitted that it meant the value of the share of the partnership property which would have been realised upon a notional winding up, i.e. net of the costs of the sale of the partnership assets. Thus on his submission the bought-out partner or partners would receive an amount approximating as nearly as possible to what would have been received as the result of a winding-up. By contrast, Mr. Duckworth was, as he frankly admitted, unable to point to any particular meaning of "net" in its context.

47. Thirdly, the judge's interpretation of clause 4.2 does indeed make the election illusory. In particular, the partner or partners with the benefit of election would inevitably elect for a buy-out even if they (or he or she) had no intention to continue the business, but rather to sell the partnership property thereafter as soon as possible and to use the proceeds for some completely different purpose.
48. Fourthly, the judge's interpretation also tends in my view to make the apparent right to dissolve the partnership upon notice illusory, or at least fraught with such uncertainties as to make it a very unattractive right indeed. The machinery of clause 4 contemplates an irrevocable decision to dissolve the partnership, in advance of the partner or partners giving that notice knowing whether or not the recipients of the dissolution notice will elect for a winding up or a buy-out. If the judge's interpretation is correct, this exposes the partner or partners giving the notice to a radical uncertainty as to the amount which they will receive upon dissolution, without any ability to withdraw that notice once the recipients' election is made. By contrast, on the appellant's interpretation, the intending giver or givers of the dissolution notice are exposed to no such crippling uncertainty. They (or he or she) will receive as near as possible the same monetary amount, regardless which way the recipients of the notice elect.
49. Those considerations, taken together, but leaving aside for the moment the necessary requirement to construe clause 4.2 in the context also of clause 3 and clause 4.3, lead me to the provisional conclusion that the answer to the "share of what?" question is "share in the partnership property", and therefore to a share in the whole of the partnership property, including unrealised profits and gains. Like Lewison LJ, I have not been persuaded that the context provided by those clauses leads to, or even points powerfully toward, a contrary conclusion.
50. Taking clause 3 first, I agree that it includes "share", but that word appears as a part of the phrase "share of the capital and the profits of the partnership" which, as is common ground, necessarily excludes unrealised profits or gains, because they are not recognised either as profits or as capital. It is in my view wrong to assume that the use of the word "share" in clause 4, concerned with dissolution, should slavishly be given the same meaning as it has in a different pre-dissolution context in clause 3, and when applied to a different and more limited species of property. Words take their meaning from the context in which they are used, unless they are provided with a single fixed meaning in a definition clause.
51. Furthermore, clause 4.2 speaks for the first time in the partnership deed of the concept of value, in the phrase "net value of such share", whereas the concept of value appears nowhere at all in clause 3. By contrast, clause 3 speaks not of the value of a share, but merely of "what is due to all Partners in respect of the capital and profits of the partnership". What is due at any time is not a matter of valuation, but accounting. It is only a matter of valuation if the partners choose from time to time to revalue assets for the purposes of partnership accounts, as they happen to have done in relation to the milk quota and the livestock, but not in relation to the land. Nothing in clause 3, which deals comprehensively with partnership accounts pre-dissolution, requires any process of valuation to be undertaken at all.
52. In my view therefore, setting clause 4 in the context of clause 3 reinforces rather than detracts from my provisional conclusion that, as Mr. Partridge submitted, the post dissolution buy-out process is concerned with the valuation of a share in the whole of the partnership property, rather than simply (as is so often expressly provided in partnership articles) the payment to an outgoing partner of what is then due to that partner in respect of capital and profits as recognised in the accounts.
53. I turn finally to clause 4.3. I acknowledge at once what appears at least at first sight to be some force in the proposition that, if valuation of property is the essence of the process, the partners might sensibly be thought to have chosen someone other than their accountant as their expert for the process. But in my view the analysis is by no means as straightforward as it may seem at first sight. The starting point must be the language of clause 4.3, which begins with the phrase "the net

value for the purposes of clause 4.2”. This suggests that the place in which to look closely for the identification of that which the bought out partner or partners are to receive is indeed clause 4.2, and that 4.3 is designed to do no more than to give practical effect to it. In short, the formula is in clause 4.2, and the machinery in clause 4.3.

54. Secondly, if as Mr. Partridge submits, and I have thus far provisionally concluded, the concept of “net value of such share” is designed to produce a fair approximation of that which the bought out partner would have received on a winding up, the choice of an accountant as the expert to carry out that process of approximation is by no means irrational or improbable. The winding up of a partnership involves all sorts of processes which require expenditure, falling to be deducted from the gross proceeds of the sale of the partnership property so as to achieve a “net value”. The winding up of partnerships is commonly conducted by accountants rather than, for example, chartered surveyors or agricultural, livestock or machinery valuers, still less auctioneers. In short, there is in my view no reason at all why the partners should not have thought that the partnership accountants would be best placed to carry out that process of approximation to winding up, with such assistance from other qualified professionals, including property valuers of different kinds, as they considered necessary. Accountants carrying out the winding up of a partnership habitually have recourse to such professionals for that purpose and I can see no good reason why the partners should not have chosen the firm’s accountants as, indeed, the best experts qualified to determine, in the absence of agreement, a fair approximation for the amount which the bought out partner would have received on a winding up.
55. In my view the real purpose behind clause 4.3 is to ensure that an absence of agreement between the partners (i.e. a dispute) about the value of the bought out partner or partners’ share should not lead to adversarial and potentially slow and expensive litigation between them. The same purpose underlies the common provision in pre-emption clauses concerning shareholdings in private companies, where the value of the shares being bought out is to be determined by the company’s accountants or auditors, whose decision is to be final: see e.g. *Arenson v Arenson* [1977] AC 405, where the articles provided that the auditors were indeed to act as experts. The partners in this case have chosen to achieve that result by treating their accountants as experts, rather than as arbitrators. There is nothing fundamentally different from the valuation of a shareholding in a private company and the valuation of a share in a partnership. To treat that technique in the machinery as sufficient to reverse what would otherwise be the meaning of the buy-out formula in clause 4.2 would to my mind be to allow the tail to wag the dog.
56. Accordingly, I have not found anything in clause 4.3 which points with any, or at least any sufficient, force away from the conclusion from clause 4.2 that what is to be valued is the bought out partner or partners’ share in the whole of the partnership property, fairly ascertained as the nearest reasonable approximation to what they, he or she would have received on a winding up.
57. It follows that I would allow the appeal.
58. I would add as a postscript that it is unfortunate that a matter of such importance should have to turn on an anxious and difficult consideration of factors pointing in different directions, in a context where it has throughout been common ground between counsel that the answer is by no means clear, and where reasonable minds have reached different conclusions. It is unhappily common for this type of issue not to be clearly dealt with in partnership agreements. It is an obvious problem in relation to farming partnerships, where the land forms an asset of the firm. It is to be hoped that, in future, those preparing such agreements will take note of the anxiety, expense and delay which such unnecessary uncertainty can cause.

**Lord Justice Rimer:**

59. In agreement with Lewison and Briggs LJ, and for the reasons they have given, I too would allow the appeal. I add some words of my own.

60. A central theme of Mr Duckworth's submissions was that the answer to the 'value of what' question posed by clause 4.2 is to be found in clause 3. The submission was that clause 4.2 does not explain its use of the word 'share', whereas clause 3.2 explains how the partnership's annual accounts are to identify each partner's 'share of the capital and profits of the partnership'. The sense of 'share' in clause 4.2 must therefore be the same as that in clause 3.2, and it follows that it cannot embrace the outgoing partner's interest in the partnership assets as a whole, including the unrealised profits in such assets, being profits which will not have been, and will not be, reflected in the amounts credited to the partners in the annual accounts.
61. That argument misses the point as to the different considerations with which clauses 3 and 4 are concerned. Clause 3 is about the drawing of the annual accounts of the partnership whilst it is a going concern. Clause 4 is about the determination of an outgoing partner's share – and therefore the division of the assets between the former partners – in consequence of the dissolution of the partnership. To that end, clause 4.1 provides that any partner ('the outgoing partner') can, by three months' notice to the other partners ('the other partners'), terminate (or, therefore, dissolve) the partnership; and clause 4.2 then gives an option to the other partners, exercisable within 21 days of the dissolution, to elect either (i) to have the partnership wound up under the Partnership Act 1890, or (ii) to buy the outgoing partner out.
62. I do not understand why the first such alternative was conferred, since if the other partners were to ignore the termination notice and exercise neither option, the outgoing partner would anyway be entitled to enforce a winding up under the Partnership Act 1890. That would require the realisation of the partnership assets by sale, with the proceeds of sale falling to be applied in accordance with section 44 of the Partnership Act 1890. After their application in paying the partnership's liabilities to third parties and any debts and capital owed and due to the partners, the residue would be divided between the partners in the shares in which profits are divisible. Upon the completion of such exercise, the outgoing and other partners would each have realised his and their respective 'shares' of the partnership according to the conventional meaning of such a 'share', as to which see paragraph 19-05 of *Lindley & Banks*, cited by Lewison LJ.
63. The point of the option given by clause 4.2 to the other partners is to entitle them within the 21-day period to avoid such a winding up by instead electing to buy out the outgoing partner's 'share'. They will wish to do that in order to retain the partnership assets intact and continue the partnership business themselves. Upon the exercise of such election, the price of the outgoing partner's 'share' is, by clause 4.2, fixed at 'the net value of such share'. It appears to me obvious that it cannot be the scheme of clause 4 that the outgoing partner's 'share' for the purposes of such a buy-out is something different in kind from his 'share' for the purposes of a winding up. It must be referring to the same interest, and it follows that the 'net value' of the outgoing partner's share is intended to be the equivalent of what he would realise on a winding up. As for the sense of 'net', what is being bought out is the outgoing partner's 'share', and so I doubt if it adds anything. I regard it as likely that the draftsman simply, but unnecessarily, used it as intended to reflect that the value of such 'share' has to be assessed after taking into account the liabilities to which the notional proceeds of the assets are subject other than those in favour of the outgoing partner.
64. In particular, I see no basis for interpreting the outgoing partner's 'share' in a buy-out context as meaning the share of capital and profits credited to that partner in accounts drawn on the like basis as the prior annual accounts of the partnership, but down to the date of the dissolution. Not only would that have the apparently unfair effect of depriving that partner of (at least) any share in the unrealised profits in the partnership's assets in which he has an interest, I can see nothing in the partnership agreement that indicates that this was the partners' intention.
65. No such intention can be derived from clause 4.2. It is said, however, that it is to be found in clause 4.3, which, in default of agreement, requires the partnership accountants to determine the relevant value. The heart of the dispute is whether the unrealised profits in the land have to be brought into account on a buy-out; and it is said that, if they do, the partnership accountants are

ill-qualified to do the valuation exercise, since they do not have the expertise to value land. It cannot, therefore, have been the intention that that should be their function. The obvious point of retaining them to determine the 'net value of such share' is because they can do so by simply drawing up a set of accounts as at the termination date.

66. That is an unconvincing explanation of clause 4.3. It seeks to make the procedural tail wag the substantive dog. If the scheme of clause 4 is that, upon the exercise of a buy-out election, all that is required is the production of termination accounts drawn in like form as the annual accounts, clause 4.3 could and would have said so, although it might have needed to add a provision for any dispute as to their content to be determined by the accountants as experts. But that is not how clause 4.3 works. It first expects the partners to agree the relevant value; and, in default of agreement, it then provides for the accountants to determine that value acting as experts. That is a very odd way of indicating an intention that the relevant share can and should simply be ascertained by a drawing up of termination accounts on the like basis as the prior annual accounts. On the contrary, clause 4.3 says nothing to that effect. Its sole function is to meet the problem that will arise if the partners cannot agree the value of the outgoing partner's clause 4.2 'share'; and in that event it designates the accountants as experts for the purpose of resolving the dispute. Their designation as 'experts' rather than 'arbitrators' for that purpose was, I consider, intended merely to go to the procedural manner in which they were to approach the task. It would not prevent them, so far as necessary, from enlisting the assistance of experts as to the values of particular assets that have to be valued, which might include not just the land, but the live and dead stock. The end task of the accountants as such 'experts' would be to arrive at the value of the outgoing partner's 'share' that the partners had been unable to agree; and I have explained what I consider such 'share' to mean. In my view, there is nothing in clause 4.3 that, upon a buy-out, results in the outgoing partner's 'share' meaning other than that which it conventionally means.
67. One should not leave a question of interpretation without first consulting the reasonable man for his view, for nowadays judges are in the fortunate position of being able ultimately to pass the buck to him. I consider that he would be surprised at the notion that, concealed in clause 4, was a provision to the effect that a potentially valuable element of the outgoing partner's interest in the assets of the partnership was to accrue to the other partners. His reaction would be that such a notion is intuitively unfair, and would prove to be particularly so if, say, (a) a month later the other partners decided that they wanted to call it a day and realise all the partnership assets for their own benefit, or (b) if they never had any intention of continuing to run the partnership business at all but had given a clause 4.2 counter-notice simply in order to be in a position promptly so to sell up as aforesaid. As to the latter, the reasonable man would point out that there is nothing in clause 4 indicating that the validity of the counter-notice is dependent on the particular intentions of its givers. He might also point out that equality is equity, that *jus accrescendi inter mercatores locum non habet* and that it would be odd if there are any special, and different, rules for family farming partnerships.
68. The reasonable man would, as usual, be right. If the parties to the present partnership agreement had wanted different, and special, rules to apply on the giving of a clause 4.2 counter-notice, it behoved them to provide for them expressly. They did not do so, and the attempt to derive such an intention from the language of clause 4.3 is one I regard as failing even to reach first base.
69. In my judgement, a consideration of the partnership agreement as a whole points to the conclusion that the judge's answer to the resolution of the issue was wrong. I would allow the appeal.