

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
The Hon Mr Justice Briggs**

Royal Courts of Justice
Strand, London, WC2A 2LL
12 December 2008

B e f o r e :

**LORD JUSTICE THOMAS
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE ETHERTON**

Between:

**Robert John Hopper
Lyn Patricia Hopper
- and -
June Lillian Hopper**

Appellant

Respondent

**Mr Mark Blackett-Ord (instructed by Messrs William Sturges) for the Appellant
Mr Richard Mawhinney (instructed by Clarke Wilmott) for the Respondent
Hearing dates : 28th October 2008**

Lord Justice Etherton :

1. Robert Edward Hopper (“Mr Hopper”), his wife June Lillian Hopper (“Mrs Hopper”), their son Robert John Hopper (“Robert”) and his wife Lyn Patricia Hopper (“Lyn”) were formerly partners in a fruit and vegetable wholesale business (“the Market Partnership”) and, separately, a farm business. Both partnerships, being partnerships at will, were automatically terminated by the death of Mr Hopper on 3 December 2003. In January 2007 Mrs. Hopper commenced proceedings against Robert and Lyn for various heads of relief in relation to those partnerships, including a declaration as to dissolution of the Market Partnership and an account of its profits. This is an appeal against declarations made by Mr Justice Briggs by order dated 17 March 2008 on the trial of preliminary issues in the proceedings (“the Preliminary Issues”).
2. At the same time as hearing the Preliminary Issues, Mr. Justice Briggs conducted the trial of other proceedings brought by Robert in relation to the land on which the farm business was conducted. He gave a single judgment in respect of both sets of proceedings. This appeal is not concerned with Robert’s proceedings or the orders Mr. Justice Briggs made in respect of them.

3. The issues on this appeal concern entitlement to undrawn partnership profits, the application of the Limitation Act 1980 and the equitable doctrine of laches to a claim for such undrawn profits, and entitlement to the profits of post-dissolution trading.

Relevant facts

4. Mr Hopper developed a successful fruit and vegetable wholesale business in the Western Market in Southall, Middlesex, during the 1970s and 1980s. By about 1985 that business was being run by Mr and Mrs Hopper, Robert and Lyn in partnership (“the RE Hopper Partnership”). In about 1989 the assets, liabilities and goodwill of the RE Hopper Partnership were transferred to the Market Partnership. That was a partnership at will, with no written partnership agreement, in which each of Mr. and Mrs. Hopper, Robert and Lyn were entitled to 25 per cent of the partnership profits.
5. The earliest accounts of the new business, entitled “Mr and Mrs R J Hopper and Mr and Mrs R E Hopper trading as R J Hopper”, were for the year ended 31 December 1989, and include prior year entries for an undefined period in 1988. It is common ground that at about this time Robert took over the day to day running of the market business from his father. Mr Hopper played no active part of any kind in the running of the Market Partnership or in the giving of instructions to its accountants. Although they were each entitled to 25 per cent of the Market Partnership’s profits, Mr and Mrs Hopper never drew their full share of the profits. Mr Hopper drew £250.00, rising to £300.00, per week. In addition, they were paid an amount equal to their mortgage instalments, and additional specific sums from time to time. The income tax on the shares of all four partners was also paid out of the main trading account.
6. Following Mr Hopper’s death, Robert continued to run the Market Partnership’s business. The weekly payments continued to be made to Mrs Hopper at the same rate until they ceased at the end of December 2005.
7. Mrs Hopper claims, on her own behalf and, as personal representative of her late husband, on behalf of his estate (“the Estate”), to recover a sum slightly less than £300,000.00 as at December 2005 in respect of the shortfall between the actual drawings of Mr and Mrs Hopper and their respective 25 per cent shares of the Market Partnership’s profits. Mrs Hopper also claims that, following her husband’s death, she, in her personal capacity and also on behalf of the Estate, continued to be entitled to half the profits of the Market Partnership’s business. Robert disputes both those claims.
8. Mr. Justice Briggs held that Mr. and Mrs Hopper’s undrawn profit shares since the inception of the Market Partnership were added each year to their share of the capital of the Market Partnership; that share of capital was held by them jointly, and was separate from the share of capital of Robert and Lyn; and there was no bar by limitation or laches to Mrs. Hopper’s claim, in her own right and on behalf of the Estate, to the capitalised undrawn profits shares. He further held that Mrs. Hopper, on her own behalf and on behalf of the Estate, continued to be entitled, after the dissolution triggered by Mr. Hopper’s death, to the same shares of profit as before dissolution.
9. By his order, so far as relevant to this appeal, Mr Justice Briggs declared that Mrs Hopper and the Estate are each entitled to the undrawn balance of the 25 per cent profit shares of Mr and Mrs Hopper in respect of each accounting year of the Market Partnership back to 1989; that they are to be treated as having a separate capital entitlement (jointly between them) in the Market Partnership; that, following the death of her husband, Mrs Hopper was not an “outgoing partner” of the Market Partnership within the meaning of s.42 (1) of the Partnership Act 1890 (“the 1890 Act”); and that the payments of £300.00 per week made by Robert to Mr and Mrs Hopper, and after Mr Hopper’s death to Mrs Hopper alone, were drawings on account of their profit share entitlements.

The appeal

10. Both Robert and Lyn have appealed the order of Mr Justice Briggs. For convenience, I shall refer in the rest of this judgment only to the submissions of Robert, reflecting the manner in which the appeal was conducted before us.
11. Robert contends that there was no evidence on which Mr Justice Briggs could hold that undrawn profit shares had become capitalised so that no limitation period applied to them. He also contends that there was no evidence on which the Judge could find that Mr and Mrs Hopper ought to be treated as having a separate capital account. He contends that all the partners had a single joint account. He further maintains that, in any event, a claim to set aside and reopen the accounts would be barred for any accounts signed more than six years before the present action was brought in January 2007. If the undrawn profit shares of Mr and Mrs Hopper are not to be regarded as capital, but rather as undrawn profits, he claims that the limitation period applicable is six years, and the claim in relation to any period before the accounting year to 31 December 2000 is, therefore, statute barred. Finally he claims that Mrs Hopper was an “outgoing partner” within the meaning of s.42 of the 1890 Act and that, following Mr Hopper’s death, there was not a continuing partnership with Mrs Hopper either in her personal capacity or as personal representative of her husband.

Addition of undrawn profits to capital

12. The first issue is whether Mr and Mrs Hopper’s undrawn share of profits was added to capital. This turns on whether or not there was an agreement between the partners to that effect. Mr Blackett-Ord, for Robert and Lyn, emphasised that partnership capital contributed by the partners cannot be increased or withdrawn without agreement of all the partners. Subject to any such agreement, the capital is repayable only on dissolution of the partnership (subject to the priorities specified in s.44 of the 1890 Act). The position is explained in Lindley & Banks on Partnership (2002) (18th edn) at paras 17-10 to 17-11 as follows:

“In the absence of some contrary agreement, the capital of a firm cannot be increased or reduced without the consent of all the partners...A partner who agrees to contribute a sum of capital is not only bound to bring that sum into the firm but he will be prevented from withdrawing any part of it for so long as he remains a partner. Whether he will be entitled to the return of his capital once he has ceased to be a partner will depend on the terms of the agreement and/or the proper application of section 44 of the Partnership Act 1890...”.

13. By contrast, partnership profit belongs to the partners as soon as it has been ascertained, and the partners are entitled to take it as of right. Mr. Blackett-Ord submitted that, in properly drawn partnership accounts, each partner has a current account and a capital account. If a partner does not withdraw profit from the firm, it is, in the absence of agreement, part of the partner’s current account, which, in the absence of agreement to the contrary, he or she can take when they wish. It can only be turned into capital by express or implied agreement of the partners, whereupon it can be paid out prior to dissolution only if all the partners agree. In *Bouche v Sproule* (1887) 12 App Cas 385 at 402 Lord Bramwell said:

“Where there is a partnership, whether an ordinary partnership or an incorporated partnership... There the undivided profits of any period, a year or shorter or longer time, continue to be undivided profits unless something in the articles of partnership or some agreement by all the partners make them capital. They do not become capital by effluxion of time or by their being used in the trading.”

14. The significance of this analysis is that Robert contends that a claim for undrawn profits will be subject to a six year limitation period unless acknowledgement of it is given, as is usual, in the annual accounts as forming part of the partner’s current account. The limitation period in respect of capital, however, only begins to run on dissolution of the partnership.

15. Mr Blackett-Ord emphasised that, on the evidence, Mrs Hopper was well aware that she and her husband were leaving substantial sums in the Market Partnership. He submits that she was building up a current account which she could withdraw at anytime. Robert's case is that Mrs Hopper did not regard her undrawn profit as giving rise to capital which she could not withdraw prior to dissolution.
16. In my judgment, Mr Justice Briggs was entitled to conclude, on the evidence, that there was an agreement between the partners of the Market Partnership that undrawn profits would be added to capital. There was no evidence of any express agreement. On the other hand, the annual accounts for each year show that the capital was adjusted by the difference between the net profit for the period and drawings. None of the accounts show undrawn profits being allocated to a current account.
17. Mr Williams, who was the accountant responsible for preparing the accounts, was not called to give evidence by either side. Further, the working papers of the Market Partnership's accountants were not seen by any of the parties prior to the dissolution of the Partnership, and so, in the absence of any explanation by Mr. Williams, are of no assistance. On the other hand, the Judge found that Robert was responsible for liaison with the Partnership's accountants, so that the format of the accounts may be said to derive from implementation of his instructions. As I have said, Mr Hopper never played any active part in the running of the Market Partnership, and he did not give any instructions to its accountants as to the form of the accounts.
18. The Judge found as a fact that Mr and Mrs Hopper never expressly or impliedly agreed to vary their profit share entitlements. He rejected Robert's allegation in his Rejoinder that, after he took over the running of the Market Partnership, he agreed with his father that his parents' profit share would be limited to a weekly sum (£250.00 rising to £300.00), payment of their mortgage instalments and their income tax liabilities, and occasional payments of much larger lump sums on request. There is no challenge to that finding on this appeal. He also rejected Robert's alternative cases that there was by conduct an implied agreement to limit their profit shares to the amount of the payments to them under those four headings, or there was an annual waiver by his parents of any entitlement to undrawn profits.
19. As the Judge observed, every set of signed accounts of the Partnership in and after 1998 explicitly recognises that Mr and Mrs Hopper continued to be entitled to 25 per cent of the profit.
20. Further, the 1990 and 1991 accounts (for the years ending 31 December 1990 and 31 December 1991 respectively) show separate capital accounts for Mr and Mrs Hopper jointly, on the one hand, and Robert and Lyn, jointly, on the other hand. They show that Mr and Mrs Hopper withdrew considerably less than their share of the Partnership profits during those years and that the difference was credited to, and augmented, their capital account.
21. In my judgment, the Judge was plainly entitled to conclude, in the light of the evidence as a whole, and especially the evidence to which I have referred, that the signed accounts clearly point to an implied agreement by the partners of the Market Partnership to add undrawn profits to capital.

Entitlement to capital

22. The next issue is whether there was, as Roberts contends, a single joint capital account between all the partners, rather than, as the Judge found, separate capital accounts (jointly between Mr and Mrs Hopper, on the one hand, and Robert and Lyn, on the other hand). In my judgment, Mr Justice Briggs plainly had adequate material on which to reach his finding on this issue.
23. This issue turns on whether there was an agreement between the partners for a single joint account. There is no evidence of any express agreement on the point. The question is whether an agreement is to be implied.

24. Save in respect of the accounts for 1990 and 1991, the accounts show a single figure for capital, which is the aggregate of the capital balance brought forward from the previous year and new capital introduced in the year adjusted upwards or down for the difference between profits and drawings, and which makes no differentiation between the entitlement of the individual partners.
25. Mr. Blackett-Ord submitted that a joint capital account was not surprising since Robert, and not Mr or Mrs Hopper, was running the Market Partnership's business and responsible for its success, and he was their son, and it would be natural in the circumstances for them to wish the capital to pass to Robert. He pointed out that a joint capital account is not unusual in a family partnership business, particularly in the case of a husband and wife. He emphasised that neither Mr nor Mrs Hopper claimed prior to Mr. Hopper's death that they were entitled to their undrawn share of the Partnership's profits, and that nothing in the accounts, signed by all partners annually, indicated that a substantial sum was building up in favour of Mr and Mrs Hopper. Mr Blackett-Ord further submitted that the very purpose of recording capital in the accounts was to show the entitlements of the partners on dissolution.
26. The evidence at the trial on this issue was not altogether satisfactory. I have already commented that the accountant responsible for preparing the accounts of the Market Partnership, Mr Williams, was not called to give evidence by either side, and, for the reasons I have given, the accountants' working papers carry no weight. Furthermore, while Mr. Hopper was alive, capital was introduced into the Market Partnership from time to time, apparently by Robert, but there is no evidence as to what effect the partners or the accountants thought that had on the capital entitlements of the partners at the time.
27. In rejecting the arguments advanced for Robert on this issue, Mr Justice Briggs, rightly in my judgment, placed considerable weight on the 1990 and 1991 accounts. As I have said, those accounts show separate capital accounts for Mr and Mrs Hopper jointly, on the one hand, and Robert and Lyn jointly, on the other hand. They show that, in both those years, Robert and Lyn withdrew in excess of their profit share and their capital balance was reduced by the amount of the excess, and Mr and Mrs Hopper withdrew less than their profit share and their capital balance was increased by the difference. The signing by the partners of those accounts, prepared by the accountants on the instructions of Robert, or at least with his consent, is good evidence of the partners' agreed treatment of Mr and Mrs Hopper's undrawn profit shares. It has never been suggested that the 1990 and 1991 accounts were improperly drawn
28. It is true, as Robert has emphasised, that in subsequent years the accounts were drawn up showing only a single figure in respect of capital, without allocating that capital to separate accounts of the partners. On the other hand, as noted by the Judge, the accounts for each year from 1992 to 1997 show the capital balance, after adjustment for the difference between net profits for the period and drawings, under the heading "Capital Accounts", and the accounts for each year from and including 1998 (when the format changed) contain notes referring to "Capital Accounts" (my emphasis). Mr Blackett-Ord submitted that the reference to "Accounts" must have been a mistake, merely continuing the template from the 1991 accounts. Indeed, he contends that the change of format in and from 1992 leads to the inference of a deliberate change of policy by the accountants. There is no evidence, however, of any express agreement to change the policy of separate capital accounts. On the contrary, Robert accepted in cross-examination that there was probably no reason not to assume that the reference to capital accounts, in the plural, in 1992 was a reference to the same capital accounts as had been mentioned in the 1990 and 1991 accounts.
29. The Judge, having heard the evidence, including the evidence of Mr Nicholas Cowan FCA, who gave expert accountancy evidence for Mrs. Hopper, concluded that the change in the format of the accounts for 1992 and the following years was for presentational reasons rather than as a consequence of an agreed change of policy that for the future there should be a single joint capital account. He also rejected an alternative argument by Robert that Mr. and Mrs. Hopper

waived any entitlement in excess of 25 per cent each of the capital account balance shown in the signed accounts for every year after 1991.

30. In my judgment, in the light of the evidence to which I have referred, the Judge was plainly entitled to reach those findings. In effect, having seen and heard all the evidence, he accepted Mrs Hopper's case and evidence that she always knew that Robert and Lyn were taking out more than she and her husband were receiving; she was happy to let Mr Hopper decide those matters while he was alive but saw no reason to continue in the same way after his death; neither she nor Mr Hopper varied or abandoned their entitlement to a 25 per cent profit share; and, in her mind, her husband's and her own undrawn profits were accumulating every year in what she described as a "pot". It follows that the proper analysis is, as the Judge found, that after 1991 the signed accounts are merely silent as to the partners' mutual rights and liabilities on capital accounts, those rights and liabilities lying behind, but neither identified nor contradicted by, those accounts.

Limitation and laches

31. It is common ground that Mrs Hopper's claim, both in her own right and on behalf of the Estate, to their share of capital on dissolution is not barred by limitation. The six year period will only have begun to run on dissolution. Robert claims, however, that adjustment of their capital entitlement is precluded by limitation or the equitable doctrine of laches in so far as it would involve re-opening accounts signed more than more than six years prior to the commencement of the proceedings in January 2007.
32. The Judge held that no limitation bar applies, and that there is no room for the doctrine of laches. I agree. As I have said, and as the Judge found, save in respect of the 1990 and 1991 accounts, the accounts simply do not deal with the partners' respective capital accounts. It is true that, on proper analysis, the accounts are defective in that they fail to record the true amount of the capital of the Market Partnership, since they do not include, as an asset, the value of the sums owed by Robert and Lyn to the Partnership in respect of excessive drawings. I see no reason, however, why, for the purposes of a claim for payment of what is due to Mrs Hopper and the Estate in respect of capital on dissolution, that should give rise to any limitation bar in circumstances where: the proceedings have been brought within six years of dissolution, there has been no earlier request for repayment of any sums overdrawn by Robert, the accounts do not themselves purport to deal with the accounting of what is due individually to partners in respect of capital, and there is no dispute as to what is due to Mrs. Hopper and the Estate in respect of capital as at dissolution if calculated on a proper basis.
33. In those circumstances, as Mr Justice Briggs recognised, it is difficult in principle to see any scope for the application of the equitable doctrine of laches. Even if that is wrong, I would reject laches as a bar to Mrs Hopper's claim on the facts. Robert places weight, in this context, on Mrs Hopper's own evidence that she was at all times aware that she and her husband were drawing less than their profit share each year, and she was content for that to happen during Mr Hopper's lifetime. Mr. Blackett-Ord also relies on Robert's evidence that, since he was running the business entirely on his own, if he had been aware that a large amount of undrawn profits was building up in favour of Mr and Mrs Hopper, he perhaps would have drawn up a partnership agreement on different terms. On the other hand, as Mr Mawhinney, for Mrs Hopper, pointed out, Robert said subsequently in his cross-examination that, until he had sat down with his father to discuss the position, he could not say precisely what he would have done.
34. In my judgment, there is no inequity in permitting Mrs Hopper's claim for payment of the share of capital due to her and the Estate on the basis of the true position from the inception of the Partnership. Robert was fully aware during the entire period that he was drawing considerably in excess of his profit share, and that Mr and Mrs Hopper were drawing considerably less. He never reached or tried to reach any agreement with them under which he and Lyn would, in effect, acquire Mr and Mrs Hopper's undrawn share of the profits. The accounts at all times refer to "Capital Accounts" (in the plural). Robert complied with Mr and Mrs Hopper's requests from

time to time for lump sum payments. As Mr. Blackett-Ord accepted in argument, the difference between capital and undrawn profits was not likely to be appreciated by Mrs. Hopper. There was no reason for Robert to believe that Mr and Mrs Hopper had voluntarily given up their undrawn share of profits which had been added to capital.

1890 Act s.42

35. I turn, now, to the last issue on the appeal, namely whether Mr. Justice Briggs was correct to declare (on Preliminary Issue (4)) that Mrs. Hopper is not an “outgoing partner” of the Market Partnership within the meaning of s.42 of the 1890 Act. What is really at issue between the parties, on this aspect of the case, is whether the Judge was correct to hold, as Mrs Hopper contends, that she is entitled to the same 25 per cent share of the profits of the business of the Partnership after Mr. Hopper’s death as she had been entitled to receive before his death. In so holding, the Judge rejected Robert’s case that Mrs. Hopper’s entitlement is restricted to such share of the profits made since Mr Hopper’s death as the Court may find to be attributable to the use of her share of the Partnership’s assets or, at her option, to interest at 5 per cent per annum on the amount of such share, pursuant to s.42(1) of the 1890 Act.
36. Section 42(1) is in the following terms:

“Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent per annum on the amount of his share of the partnership assets”.
37. Robert’s case is that, following dissolution of the Market Partnership on the death of Mr Hopper on 3 December 2003, he continued to run the Partnership’s business on his own, and so, in accordance with s.42(1), Mrs Hopper and the Estate are entitled, at Mrs Hopper’s option, only to such share of the profits made since dissolution as are attributable to the use of their share of the Partnership assets or to interest at the rate of 5 per cent per annum on that share. He maintains that there was no “agreement to the contrary” within s.42(1), but nevertheless does not seek to go behind the 2004 accounts for the period ending 31 December 2004 which show an equal division of the profits for that period.
38. Mrs. Hopper contends that, on Mr Hopper’s death, she was not an “outgoing partner” within s. 42(1) because she, Robert and Lyn continued to carry on the business of the Market Partnership. Before Mr Justice Briggs she submitted that, following her husband’s death, a new partnership was established under which she, in her personal capacity, and the Estate (through her, as personal representative) continued to be entitled to 25 per cent shares of the profits of the business. She advanced before the Judge, and has advanced on this appeal, several alternative arguments in support the entitlement of herself and the Estate to 25 per cent of the profits after Mr. Hopper’s death, including that she, Robert and Lyn made an “agreement to the contrary” to that effect within s.42(1). Mrs Hopper relies on the fact that no steps were taken to wind up the business; that she continued to receive the same payment of £300.00 per week as before Mr Hopper’s death (until the end of 2005 when Robert stopped the payments); that her and the Estate’s share of capital was left in the business; and that she, Robert and Lyn signed the 2004 accounts of the business, which were prepared on the same basis as before dissolution, showing an equal division of the profits between each of the three of them and the Estate.
39. In order to understand the Judge’s reasoning and decision, and to determine this part of the appeal, it is necessary to refer to s.38 of the 1890 Act which, so far as relevant, is in the following terms:

“After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution as far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise...”

40. Mr. Justice Briggs rejected Mrs Hopper’s contention that a new partnership was established following dissolution. He held (in para [150] of his judgment) that the facts only supported an inference that Robert was authorised to continue the business of the Market Partnership in dissolution, without an immediate winding up, pursuant to an extension of the limited authority conferred by s.38 of the 1890 Act. He said that he reached that conclusion for the following three reasons. Mrs. Hopper signed the 2004 accounts as executor, rather than as the inheritor of her late husband’s share. The 2004 accounts appear to reflect a mere continuation of the business of the old firm, and had no entries reflecting the winding up of the old firm and the introduction of its net assets by way of a capital contribution to the assets of the new firm. The reality was that the business of the old firm was simply continued by Robert with Lyn’s and Mrs Hopper’s authority while the parties faced up to the consequences of Mr. Hopper’s death, but in the absence of any wider agreement as to those consequences.
41. Next, he said (in para [152] of his judgment) that it was common ground that, if no new partnership was created, s.42 of the 1890 Act was, in the absence of any agreement to the contrary, triggered by Mr. Hopper’s death, and by the carrying on of the firm by the surviving or continuing partners with its capital or assets without any final settlement of accounts as between the firm and the Estate.
42. He then observed (in para. [153] of his judgment) that it was purely academic whether Mrs. Hopper should be regarded as an “outgoing partner” within s.42(1) since the signing of the 2004 accounts by Robert, Lyn and Mrs Hopper discloses the clearest possible “agreement to the contrary” within the meaning of s.42(1), displacing the default provisions there set out. He said that those accounts unmistakeably provided that the continuing profit shares should be 25 per cent for Robert, Lyn and Mrs. Hopper (in her own right) and 25 per cent for the Estate; and that, furthermore, they showed that the ongoing business was carried on by Robert with both Lyn’s and Mrs. Hopper’s authority.
43. The Judge, nevertheless, because pressed by the parties to do so, went on to give his analysis of the “outgoing partner” issue. His conclusions are set out in para. [155] of his judgment as follows:

In the present case, by signing the 2004 accounts, Mrs Hopper became (albeit possibly retrospectively) a party to the carrying on of the business of the firm following her husband’s death. She probably acquired that status as soon as she continued to accept her weekly receipts of £300. She did not therefore become an “outgoing partner” within the meaning of section 42(1) upon her husband’s death. On the contrary, she was a surviving partner of a dissolved, but as yet not wound up partnership, as between which and her husband’s estate there has yet to be any final settlement of accounts. For the reasons which I have already given, the practical effect of section 42(1) has been displaced by an agreement to the contrary, namely that pending that final winding up, the continuing profits of the market partnership are to be divided in the same shares as those which subsisted before Mr Hopper’s death.”
44. I disagree with that analysis and those conclusions. I would allow Robert’s appeal on this part of the appeal.
45. The meaning and operation of s.42 must be seen in the context of the overall legal framework of dissolution of a partnership. Furthermore, although we were not referred at the hearing of the appeal to the common law and and equitable principles against the background of which the 1890 Act was enacted, that background is helpful in setting the legislative context. The 1890 Act was not, and was never intended to be, a complete code of partnership law or a precise legislative

enactment of existing case law and legal and equitable principles. On the other hand, it is clear that much of the Act, and in particular the statutory provisions relevant to this part of the appeal, broadly reflect the pre-existing law: see generally the 15th edition of Lindley on Partnership, and especially the commentary at pp.719 ff, much of which is omitted from the 18th edition of Lindley & Banks on Partnership.

46. A partnership at will is dissolved as regards all the partners by the death of any partner: 1890 Act s. 33. Prior to that dissolution, every partner is an agent of the partnership and of the other partners for the purpose of the business of the partnership: 1890 Act s.5. On dissolution of the partnership, the authority of each partner to bind the partnership, and the other rights and obligations of the partners, continue only so far as is necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of dissolution: 1890 Act s. 38. Save to that extent the partnership contract is at an end. In the absence of agreement to the contrary by all the surviving partners and by the personal representatives of the deceased partner, nothing is to be done with regard to the business save with a view to winding it up and, for that purpose, realising the value of all the assets, by sale if necessary, and applying the assets in payment of the partnership's debts, and paying the surplus to the partners and the personal representatives of the deceased partner in accordance with the provisions of the 1890 Act s.44.
47. When a partnership at will is dissolved by the death of a partner, the surviving partner or partners, and the personal representatives of the deceased partner, may all agree, solely for the purpose of the winding up, to continue the business of the former partnership in order best to maximise the value of its business and goodwill on sale or other realisation. If they do all so agree, their rights and obligations, including their shares of any profit from the continued trading, and the authority of each former partner to bind the others continue as before: 1890 Act s.38. The surviving partners and the personal representatives of the deceased partner put themselves at risk if they take that course. The surviving partners, and possibly the personal representatives, will be personally liable for any losses incurred in the continued trading, and any such losses will diminish their and the deceased's respective partnership shares.
48. Section 42 governs what happens in relation to post-dissolution profits if (1) the business of the former partnership is continued by one or more of the former partners, not for the purposes of winding up the former partnership, but for the personal benefit of those continuing to run the business, and (2) those persons do not include all the former partners and the personal representatives of the deceased partner, but (3) there are retained within the continuing business all or part of the shares of the assets of the former partnership to which those non-participants in the continuing business were entitled (in their personal capacity or as personal representatives) on dissolution of the former partnership. In summary, this is a familiar situation, well covered by the cases and equitable principles which applied both before and after enactment of the 1890 Act, where one person's property is employed in the business of another, who may or may not be in breach of trust in retaining that property, and the question arises what rights the owner of that property has in respect of profits of the business: see Lindley on Partnership (15th ed) pp. 719-723.
49. Against that background, the meaning and effect of s.42 are clear. All such non-participant former partners are "outgoing partners"; and they and the estate of the deceased partner are entitled, in the absence of agreement to the contrary, to such share of the profits made since the dissolution as the Court may find to be attributable to the use of their shares of the partnership assets or, at their option, to five per cent per annum on the amount of their shares. If they have reached agreement as to some other entitlement (an "agreement to the contrary" within s.42(1)), then they will be entitled to what they have agreed. Such an agreement may, for example, be contained in the partnership contract if it contains provisions anticipating that that one or more partners may continue to trade after dissolution. Alternatively, an agreement may be reached expressly for the purpose after dissolution.

50. I now turn to the application of these principles to the facts of the present case, and the analysis of the Judge. Upon Mr. Hopper's death and the consequent dissolution of the Market Partnership, the authority of Robert, Lyn and Mrs. Hopper, as agents of the Partnership and each other for the purposes of the Partnership's business, and their other rights and obligations as partners, ceased except to the extent necessary to wind up the affairs of the Market Partnership and to complete transactions begun but unfinished at the time of dissolution.
51. As I have said, the Judge found that Robert was authorised by Lyn and Mrs Hopper "to continue the business of the market partnership in dissolution, without an immediate winding up". On that footing, s.42 has no relevance. If the continued trading was agreed by all the former partners and by Mrs. Hopper, as personal representative of her husband, for the purpose of the winding up, and it was in fact carried on for that purpose, the rights and obligations of the former partners will have continued as before. They continued to share post-dissolution profits and were liable to bear post dissolution losses in the same proportions as before dissolution.
52. There was no evidence, however, on which the Judge could properly have come to the conclusion that all the former partners and Mrs Hopper, as personal representative, agreed to the continuation of the business by Robert for the purpose of winding up the Market Partnership and that the business was in fact continued for that purpose. It is clear that none of them appreciated that Mr. Hopper's death had caused a dissolution of the Market Partnership or brought about an obligation to wind it up. Robert continued to run the business, not with a view to better realisation of the value of the business and its goodwill for the purpose of winding up the Market Partnership, but because he regarded it as his business and he derived his livelihood from it and he fully intended to keep running it for his own benefit.
53. Mr. Justice Briggs was clearly correct on the evidence to reject Mrs. Hopper's contention that a new partnership, in which she was a partner, was established following Mr. Hopper's death. The payment of money to Mrs. Hopper from the business, her signing of the 2004 accounts and her failure to demand payment of her partnership share are incapable of forming a cogent evidential basis for implying a new contractual agreement with Robert for carrying on the business together. It is plain that they were all the result of the former partners' lack of appreciation that the Market Partnership was automatically dissolved on the death of Mr. Hopper and replaced with an obligation to wind it up. There was no intention to create new contractual relations, one of the consequences of which would have been that Mrs. Hopper, and possibly the Estate, were exposed to the risk of bearing losses incurred by the business. The Judge's finding of fact that, after Mr. Hopper's death, there was no new partnership, in which Mrs. Hopper was a partner, has not been challenged on this appeal.
54. Notwithstanding that finding of fact by the Judge, he concluded that Mrs Hopper was a party to the carrying on of the business of the Market Partnership following her husband's death, and for that reason is not an "outgoing partner" within s.42(1). In my judgment, there is no evidential support for that conclusion. It is inconsistent with the Judge's decision that there was no new partnership, in which Mrs. Hopper was a partner, after Mr Hopper's death. The only relevant possibilities are that (1) Mrs. Hopper and the other surviving partners agreed to continue the business with a view to winding up the Market Partnership, and the business was in fact continued for that purpose, with the consequence that the rights and obligations of the former partners continued as before, or (2) some new contractual arrangement for continuing the business by Mrs Hopper as well as Robert arose after Mr. Hopper's death, with the consequence that Mrs Hopper's entitlement to post-dissolution profits was governed by that new contract, or (3) neither of those alternatives applies, with the consequence that s.42(1) is engaged. I have explained why there is no evidential support for the first of those alternatives. The contractual arrangement in the second alternative could only have been a new partnership, since the Market Partnership had been dissolved, the business was not carried on with a view to winding up the Market Partnership, and the arrangement would have been one under which Mrs. Hopper and Robert were carrying on business in common with a view of profit (and so satisfying the

definition of a partnership in the 1890 Act s.1(1)). The Judge, however, rightly held that there was no such new partnership. That only leaves the third alternative.

55. It follows that I agree with the Judge, although for different reasons, that s.42(1) was engaged on Mr Hopper's death. It also follows that, in my judgment, Mrs Hopper is an "outgoing partner" within that section.
56. The Judge held that "the practical effect of section 42(1) [was] displaced by an agreement to the contrary, namely that pending [the] final winding up, the continuing profits of the market partnership are to be divided in the same shares as those which subsisted before Mr Hopper's death". The issue of a such an agreement only arises if, as I have concluded, contrary to the view of the Judge, Mrs. Hopper is an "outgoing partner" within s.42(1). As I have said, the effect of "an agreement to the contrary" in s.42(1) is merely to displace the default provisions in s.42(1) for the benefit of an "outgoing partner".
57. Neither the declarations in Mr. Justice Briggs' order nor the Grounds of Appeal reflect the Judge's finding of an "agreement to the contrary" in s.42(1). Nevertheless, since I have concluded that Mrs. Hopper is an "outgoing partner" within s.42(1), and the Judge did in fact find that there was an "agreement to the contrary" within s.42(1), and that finding has been challenged by Robert on the appeal without objection by Mr. Mawhinney, I consider it is appropriate to deal with that issue.
58. The Judge held that the signatures of Robert, Lyn and Mrs Hopper on the 2004 accounts disclose such an "agreement to the contrary" since those accounts clearly show the continuing profit shares divided equally between Robert, Lyn and Mrs Hopper (in her own right) and the Estate, and those accounts, the Judge said, show that the ongoing business was carried on by Robert with both Lyn's and Mrs Hopper's authority. As I have said, Robert does not seek to go behind those accounts for the period ending 31 December 2004, but he does in respect of subsequent periods.
59. The 2004 accounts were signed on 25 May 2005. At that time, as I have said, the business was not being continued for the winding up of the Market Partnership, but nor was there a new contractual arrangement for the continuation of the business by Robert and Mrs. Hopper. There is no evidence that, when they signed the 2004 accounts, any of the surviving partners was aware of the legal implications of Mr Hopper's death. In the circumstances, there is no reason to suppose that the signatures were intended to be any more than a formal acknowledgement of the figures produced by the accountants rather than a specific post-dissolution agreement to treat past and future partnership profits in a particular manner. Even if that is wrong, then, at most, there was an agreement to the contrary for the year ended 31 December 2004, but not generally in respect of all periods after Mr. Hopper's death until the conclusion of the winding up of the Market Partnership.

Conclusion

60. For the reasons I have given, I would substitute for the Judge's declaration on Preliminary Issue (4) a declaration that Mrs Hopper and the Estate are entitled to such share of the profits of the business of the Market Partnership since 31 December 2004 as is specified in s.42(1) of the Partnership Act 1890 for an outgoing partner or his estate. Save in that respect, I would dismiss this appeal.

Lord Justice Moore-Bick

61. I agree

Lord Justice Thomas

62. I also agree