Neutral Citation Number: [2023] EWCA Civ 700

Case No: CA-2022-002010
CA-2022-002026

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURT IN MANCHESTER
BUSINESS LIST (ChD)
HIS HONOUR JUDGE HALLIWELL (sitting as a judge of the High Court)
[2022] EWHC 2689 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2023

Before :

LORD JUSTICE LEWISON
LADY JUSTICE KING
and
LORD JUSTICE NUGEE

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Between :

(1) SIMON NIGEL MORTON **(2) ALISON MARY MORTON**	**Appellants**
- and -	
JULIE ANNE MORTON **(AS EXECUTRIX OF THE ESTATE OF JENNIFER RUTH MORTON DECEASED)**	**Respondent**

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Thomas Dumont KC and Jonathan Edwards (instructed by **Quinn Barrow Solicitors**) for the **Appellants**
Giles Maynard-Connor KC and Alfred Weiss (instructed by **Aaron & Partners LLP**) for the **Respondent**

Hearing dates : 13/06/2023

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Approved Judgment

This judgment was handed down remotely at 11.00am on 20/06/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. Under section 42 (1) of the Partnership Act 1890, where a partner has ceased to be a partner, but the remaining partners carry on the firm's business, without any final settlement of accounts, then, in the absence of any contrary agreement, the outgoing partner is entitled to a share of the profits or to interest. But section 42 (1) may be excluded where section 42 (2) applies. That sub-section applies where, by the partnership contract the surviving or continuing partners have an option to purchase the interest of the outgoing partner and duly exercise that option. The issue raised by this appeal is the scope of section 42; and in particular, whether on the particular facts of this case the estate of a deceased partner is entitled to interest on any amount payable pursuant to the exercise of an option created in order to satisfy an equity arising under the principles of proprietary estoppel.

The background facts

2. The dispute is an unfortunate family dispute about a farming partnership. The protagonists are all members of the Morton family, and for ease of reference (and without meaning any discourtesy) it is convenient to refer to them by their given names, as the judge did below. The appellants, Simon and Alison, are husband and wife. The respondent, Julie, is Simon's younger sister and the executrix of their late mother, Jennifer. Their father was Geoffrey.

3. In the late 1950s Geoffrey bought Reddish Hall Farm in Cheshire. The farmhouse was the family home. In about 1975 Geoffrey and Jennifer farmed the land in partnership. Simon joined them as a partner in 1985. Julie did not, and never went into farming. Geoffrey died in 2001. Alison joined the partnership in 2012, and the three partners entered into a deed of partnership.

4. By the time of the deed of partnership the partners had acquired additional land and were proposing to acquire yet more. These various properties were defined in the deed as the "Partnership Freeholds". The deed went on to set out the terms on which the partnership business would be conducted. Clause 2 provided that any of those terms could be varied "by the unanimous written agreement of the parties". Clause 3 provided that the business would be carried on at the Partnership Freeholds. Those freeholds were declared to be assets of the partnership by clause 15; and were credited to the respective partnership shares in the proportions in which the partners owned them.

5. Clause 16 of the deed defined various determining events, which included the giving of three months' written notice. If a determining event occurred, the partnership was dissolved as regards the partner in question who was deemed to have retired. Clause 17 provided for the remaining partners to:

> "… have the option exercisable by written notice given within six months of the Determining Event to purchase by the end of such six months the interest of an Outgoing Partner in the

> profits capital and assets of the Partnership immediately prior to the Determining Event the purchase price being the value of such interest under Clause 19 below."

6. Clause 18 gave the option holders the right, when exercising the option, to indicate whether they wished to pay the purchase price by instalments. It went on to provide that:

> "If such indication is given at the time the option holder shall be entitled to pay for the interest of the Outgoing Partner by five equal instalments … with interest on the outstanding balance from time to time … at the base lending rate … of Barclays Bank Plc."

7. Clause 19 provided that:

> "The price payable under Clauses 17 and 18 above shall be the amount standing to the credit of the Outgoing Partner on the date of the Determining Event after there shall have been a re-valuation at that date of the Partnership's then assets."

8. Clause 23 provided that if the option in clause 17 had not been duly exercised, the partnership would be dissolved; and the partnership assets sold by public auction. Clause 26 provided for any valuation to be made, in default of agreement, by a surveyor appointed by the President of the RICS on the application of any of the partners.

9. In February 2015 Jennifer dissolved the partnership by notice expiring on 8 May 2015. On the expiry of that notice, she was deemed to have retired from the partnership. On 26 October 2015 Simon and Alison gave notice to Jennifer exercising their option under clause 17 of the deed. They did not opt to pay by instalments. But any contract constituted by the exercise of the option, which ought to have been completed by 8 November 2015, was not completed. One reason was that Simon and Alison became aware that they would be unable to raise the funds to buy Jennifer's share on the terms as stipulated by the partnership deed as drawn. But, in addition, no revaluation of the partnership assets had taken place, which would have been required before the purchase price could have been ascertained. Neither Jennifer on the one hand nor Simon and Alison on the other had taken any steps towards procuring a revaluation.

10. In September 2016 Jennifer died, and Julie became the executrix of her estate. There was a dispute about what was payable under the option, and Simon also put forward a claim in proprietary estoppel. Julie began proceedings in 2020, seeking to realise Jennifer's share in the partnership. She also claimed an order for specific performance of the contract constituted by the exercise of the option. But there had still been no revaluation of the partnership assets. Simon and Alison put forward a wide-ranging counterclaim. Among their claims was one based on proprietary estoppel claiming that in order to satisfy an equity that had arisen as a result of assurances made by Geoffrey, the entirety of the land farmed under the 2012 partnership should be transferred to them.

The first trial

11. HHJ Halliwell, sitting as a judge of the Business and Property Courts, conducted an 8 day trial in June 2021. His careful and meticulous judgment is at [2022] EWHC 163 (Ch). Many of Simon and Alison's counterclaims failed, but the claim based on proprietary estoppel succeeded in part. The judge discussed the scope of relief to give effect to an equity raised by proprietary estoppel. At [183] he said:

> "In my judgment, it is sufficiently wide to include an order varying the rights of a [promisor] and [promisee] under a partnership agreement or, more specifically, their share of the partnership assets and capital and setting aside or varying an executory agreement for the disposition of an interest in land so as to satisfy the [promisee's] equity in a way that is consistent with the [promisor's] assurances. I am not satisfied that, by entering into the 2012 Partnership Deed or serving the Option Notice, Simon has somehow given up his right to rely on the relevant assurances or, more specifically, his rights to relief under the doctrine of proprietary estoppel."

12. The judge then considered the facts in detail and found that Simon had established an equity, largely on the basis of assurances given by Geoffrey on which Simon had relied to his detriment. The relevant assurances, which the judge summarised at [198] and [199], were that Simon would inherit the farming business, but that Simon and Julie would ultimately become equally entitled to the farmland. Simon had relied on those assurances by working on the farms for decades, as the judge explained at [201]. Alison had also relied on them by giving up her career in banking to administer the farms. He went on to find at [202] that, given the length of the period over which Simon had acted to his detriment and its bearing on every aspect of his life, it was unconscionable for Jennifer to have gone back on those assurances by making a will in the terms that Julie had persuaded her to make without alerting Simon or Alison. Simon and Alison had therefore raised an equity binding on Julie as executrix of Jennifer's estate. The judge then considered how that equity should be satisfied. At [204] he said:

> "… the decision of Simon and Alison to serve the Option Notice was made in a state of panic as the deadline for service approached without properly appreciating the potential consequences. They did so in the hope they could thus ensure survival of their farming business consistently with Geoffrey's assurances. However, they now appreciate that they do not have sufficient funds to complete the purchase of Jennifer's share of the assets of the Fourth Partnership under the Option if calculated in the way the 2012 Partnership Deed requires. If the Option Notice and the Final Will dictate Simon's rights of succession to the farms, they have no realistic prospect of saving the business. The farms will thus have to be sold and the family connection with the farms will be lost. Whilst contrary to Geoffrey's assurances and the expectations on which Simon and his family farmed the land for upwards of thirty years, it is more than conceivable this cannot be avoided within the

> parameters of Simon's equity. However, that is not good reason to deny him the opportunity to avoid such an outcome."

13. At [208] he said:

> "… it would be inappropriate to give effect to Simon's expectations by varying the trusts on which the partnership assets are held *simpliciter*. However, it is possible to achieve a compensation-based solution which reflects Geoffrey's assurances by adjusting the amounts credited to Simon and Jennifer owing to the introduction of the partnership assets and extending the period for Simon and Alison to exercise the Option so as to accommodate the adjustment."

14. He continued at [209]:

> "On this basis, Simon's equity is best satisfied by setting aside the contract which came into being when Simon and Alison served the Option Notice, extending the period for Simon and Alison to serve a new option notice under Clause 17.3 of the 2012 Partnership Deed and providing for the 2012 Partnership Deed to be construed subject to the following proviso ("the Proviso") at the end of Clause 15.1.2 of the 2012 Partnership Deed in respect of the amounts to be credited or appropriated to Simon, Alison and Jennifer in respect of the Partnership Freeholds when each relevant property was introduced to the Fourth Partnership. Simon will thus be credited or deemed to have been credited with amounts consistent with Geoffrey's assurances."

15. The judge then set out the terms of the proviso (which apparently, he himself drafted) subject to which the partnership deed was to be construed. At [212] he said that for the avoidance of doubt the proviso should be deemed to operate with retrospective effect from the commencement date in the partnership deed. He then considered in meticulous detail how the partnership accounts should be varied, and where any tax liabilities should fall.

16. Summarising his conclusions at [220], the judge said:

> "Since Simon's share of the partnership assets shall thus be adjusted and enlarged, I am satisfied that Simon and Alison should be given another opportunity to exercise their option under Clause 17.3 to purchase Jennifer's share of the profits, capital and assets of the partnership. Under Geoffrey's assurances, Simon was entitled to buy out Julie's interest at market value. This was on the basis that they would each be equally entitled to the land. Under the 2012 Partnership Deed, an analogous outcome could now be achieved by providing for Simon to buy Jennifer's share of the profits, capital and assets of the Fourth Partnership under the provisions of Clause 17.3 at a purchase price reflecting the Proviso. In the exercise of my

> equitable discretion, I shall thus set aside the executory agreement to which the Option Notice has given rise and extend the period for Simon and Alison to serve a new option notice so as to expire after a period of three months. I shall fix the date for commencement of the three month period after hearing further submissions from counsel."

17. At [223] the judge tabulated the various freeholds and set out who had beneficial interests in each of them.

18. Finally, at [230] he said:

> "I shall make an order setting aside the executory agreement to which the Option Notice has given rise and extending the time for service of another option notice."

19. At [232] he said:

> "Simon and Alison have continued to carry on the farm business since the dissolution of the Fourth Partnership utilising its capital and assets without any final settlement of accounts. As Jennifer's executrix, Julie is entitled to post dissolution accounts under the provisions of Section 42 of the Partnership Act 1890 subject to the statutory proviso in Section 42(2) including a share of profits and, in the present case, an account of the use Simon and Alison have made of the partnership assets. Julie is also entitled to require the partnership property to be applied in the payment of partnership debts and liabilities under Section 39 of the 1890 Act and she is entitled to seek directions for the usual inquiries in relation to matters such as what has become of the partnership property, the extent to which partnership debts and liabilities have been paid and satisfied and, if so, out of what assets."

20. Paragraph 3 of his order made following that trial stated:

> "Notwithstanding the express terms of … the 2012 Deed the Defendants' option to purchase the Deceased Partner's interest in the profits capital and assets of the Partnership immediately prior to 8 May 2015 shall be extended (the "Extended Option") so that it is exercisable as if the words "*given within six months of the Determining Event to purchase by the end of such six months*" in clause 17 of the 2012 Deed instead read as "*given within three months of the determination by agreement or by the court, of the amount payable in exercise of this option to purchase by the end of three months from that determination*"."

21. Paragraph 4 of the order provided that "[n]otwithstanding any other provision in the 2012 Deed", if Simon and Alison exercised the extended option, they should pay the total sum determined by two instalments: the first instalment of £1.25 million 3 months after the determination of the total sum and the balance one year later.

Paragraph 4 of his order (unlike clause 18 of the partnership deed) made no provision for the payment of interest on the two instalments for which his order provided. The order also recited that Julie sought interest under section 42 (1) of the Partnership Act 1890; but that her entitlement to do so was disputed. That issue (together with others) was ordered to be determined at a separate hearing. The issue to be determined about interest was concerned solely with interest under section 42. It was not suggested in the order providing for the determination of outstanding issues that there was any other basis on which interest could or should be ordered.

The second hearing

22. The second hearing took place before HHJ Halliwell in September 2022. At the end of the hearing on 29 September 2022 he gave an extempore judgment. That judgment is at [2022] EWHC 2689 (Ch). It is the order made following that judgment which is the subject of this appeal. Although the judge decided a number of outstanding matters, the only one with which we are concerned is his decision that Julie (as Jennifer's executrix) was entitled to interest on the purchase price payable under the extended option pursuant to section 42 of the Partnership Act 1890. Section 42 of the Partnership Act 1890 provides:

> "(1) 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.
>
> (2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section."

23. The judge decided that section 42 (1) was not excluded by a contrary agreement, because such option rights as Simon and Alison had were not derived from an agreement. Rather, they were the "function of a judicial remedy" based on proprietary estoppel and the court order of 16 April 2022. Nor, for the same reason, did section 42 (2) bar Julie's right to interest. Since the judge set aside the original contract constituted by the option notice, their right to serve notice was, once again, based on a judicial remedy rather than a contract. In addition, it could not be said that Simon and Alison had "duly exercised" the option originally contained in clause 17.3 of the deed itself.

24. His order made following that hearing valued Jennifer's estate's share of the partnership assets at just over £2 million. Paragraph 3 declared that Julie was entitled to interest under section 42 (1) of the Partnership Act 1890 from 8 May 2015, except as regards a separate property, where interest was to run from 1 October 2016. 8 May 2015 was the date of dissolution of the partnership pursuant to Jennifer's notice. That interest was to be paid by 30 December 2022.

25. The judge was not asked either at that hearing, or indeed at the first trial, to award interest on any basis other than an alleged statutory entitlement under section 42. That is reflected in the terms of the order that he made following the second trial.

The grounds of appeal

26. Although presented as three separate grounds of appeal, in essence there is only one. Mr Dumont KC, for Simon and Alison, argues that what the judge did was to vary the terms of the original option in satisfaction of the successful claim in proprietary estoppel. The varied option took the place of the original option as if it had been contained in the partnership deed itself. It follows that if Simon and Alison exercise the option as varied, and comply with the terms as varied, section 42 (2) will apply so as to preclude an award of interest under section 42 (1). The judge was wrong to draw a rigid distinction between a judicial act and an agreement, where what the judge in fact did was to vary the written agreement so as to give effect to Simon's equity.

27. The opposing argument, presented by Mr Maynard-Connor KC for Julie, is that there is a fundamental difference between contract and the satisfaction of an equity raised by a claim in proprietary estoppel. The judge was therefore correct to hold that the remedy he created for Simon and Alison was a judicial function. Section 42 (2) is concerned with the original contract of partnership. Although such a contract may be varied by the partners, any variation must be consensual. Moreover, in the present case the partnership deed itself provides that any variation must be by unanimous written agreement of the partners. That condition is not satisfied in this case. The remedy fashioned by the judge in the present case was not a consensual matter at all; it was the result of a court decision.

The application to amend the Respondent's Notice

28. Before coming on to the substantive grounds of appeal, I must first deal with Julie's application to amend the Respondent's Notice. We heard both sides on the application; following which we informed the parties that we would refuse permission to amend for reasons to be given in writing. These are my reasons for joining in that decision.

29. Simon and Alison gave their Appellant's Notice on 18 October 2022; and I gave permission to appeal on limited grounds on 12 December 2022. One of the grounds of appeal sought to challenge the rate of interest awarded by the judge. It sought to argue that the judge ought to have exercised his equitable jurisdiction to exclude interest under section 42; and to award interest at a lower rate than the statutory rate prescribed by that section. I refused permission to appeal on that ground because it was an appeal against the judge's first order; and was made out of time.

30. Julie served a Respondent's Notice on 20 January 2023. On 5 April 2023 she applied to serve an amended Respondent's Notice. The additional point sought to be raised was the contention that if the judge was wrong about section 42, interest should in any event be awarded to Julie under the court's equitable jurisdiction either at the rate and for the period awarded by the judge; or at such rate and for such period as the court thinks fit. That point was, in effect, the mirror image of the ground on which I had refused permission to appeal on Simon and Alison's application.

31. CPR Part 52.13 (1) provides that a respondent who wishes to ask the appeal court to uphold the decision of the lower court for reasons different from or additional to those given by the lower court must file a respondent's notice. This is supplemented by PD 52C para 8 (2) which provides:

> "A respondent who seeks a variation of the order of the lower court must file an appeal notice and must obtain permission to appeal."

32. If we were to reverse the judge on the question of whether Julie is entitled to interest under section 42, we must, as it seems to me, discharge his declaration in paragraph 3 of the second order. The judge did not himself fix any rate of interest: that was a matter governed entirely by section 42. If we were to award interest under the equitable jurisdiction, we would be varying the terms of his order. It follows, in my judgment, that this is a case in which Julie needs permission to appeal in order to advance this argument. That is consistent with the general proposition that (subject to some exceptions) appeals are against orders, not reasons for decisions. I am fortified in this view by the judgment of Sir Timothy Lloyd (with whom Longmore and Newey LJJ agreed) in *Trinity Logistics USA Inc v Wolff* [2018] EWCA Civ 2765, [2019] 1 WLR 3997. At [89] he said this (referring to PD 52C in an earlier form):

> "Thus, in my judgment, if a claimant asserted two claims against the appellant of which one was successful and the other was dismissed (whether or not so stated in the resulting order) and the defendant appeals against the judgment on the first claim, then if the respondent wishes to argue that the court below was wrong to dismiss its other claim against the appellant and that the order below should be upheld on that basis, that assertion amounts to an appeal against the order, and is not within the category of seeking to contend that the order of the court below should be upheld for reasons other than those given by that court, *even if the relief sought would be the same on either claim*. Such a respondent falls within paragraph 8(1) of Practice Direction 52C, not within paragraph 8(3), and therefore requires permission to appeal." (Emphasis added)

33. Here the application, if treated as an application for permission to appeal against the judge's second order, is out of time by more than six months. Indeed, it could be viewed as an application for permission to appeal against paragraph 4 of the judge's first order, in which case it would be almost a year out of time. The three stage test in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 applies: see *Salford Estates (No 2) Ltd v Altomart Ltd* [2014] EWCA Civ 1408, [2015] 1 WLR 1825. On either basis the delay is lengthy. Mr Maynard-Connor argued that the new

ground arose out of Simon and Alison's appeal, and that it was an unforeseeable consequence of the judge's decision in the event that he was wrong about section 42. I did not understand why that was so. It was known when the judge made his order after the first trial that Julie's entitlement to interest under section 42 was disputed. It must have been entirely foreseeable that it was at least possible that Simon and Alison would succeed on that question. In those circumstances it would have been open to Julie to have advanced an alternative claim to interest under the equitable jurisdiction. Moreover, the very point was raised by Simon and Alison in their own application for permission to appeal. In truth the reason why the point was not taken before was that no one thought of it. So, I do not consider that there was a good reason for failure to comply with the timetable set by the rules. Mr Maynard-Connor stressed what he said would be the injustice if Julie received no interest at all, despite being kept out of her money for many years. There is, it must be said, some force in that argument, although we are not in a position to say why matters have taken so long to be resolved. But, perhaps more importantly, I agree with Mr Dumont that because I refused permission to appeal on very similar grounds advanced by Simon and Alison in relation to the substantive relief ordered at the first trial, it would be unfair to treat the parties differently in that respect. It would not be fair to allow Julie to open up the question of interest, having refused Simon and Alison permission to do so.

34. Second, this court will only allow an appeal where the decision of the lower court was wrong. It is difficult to contend that the judge was wrong not to exercise a discretion that he was never asked to exercise.

35. Third, this was not a point taken below, and if a court were to be asked to award interest in the exercise of its equitable jurisdiction, it would be unlikely simply to plump for the rate of 5 per cent during a period in which real interest rates were considerably lower. There would, therefore, need to be evidence about what interest rates were.

36. For all these reasons, I joined in the decision to refuse the application to amend the Respondent's Notice.

What is the effect of the judge's order on the first trial?

37. It is perfectly true, as the judge said, that contract differs from estoppel. The point was well made by Hoffmann LJ in characteristically lucid terms in *Walton v Walton* (unreported) 14 April 1994 (cited with approval in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [56]):

> "[20] But a contract, subject to the narrow doctrine of frustration, must be performed come what may. This is why Mr Jackson, who appeared for the plaintiff, has always accepted that Mrs Walton's promise could not have been intended to become a contract.
>
> "[21] But none of this reasoning applies to equitable estoppel, because it does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls due to be performed and asks whether, in the

> circumstances which have actually happened, it would be unconscionable for the promise not to be kept."

38. I do not, for a moment, question the distinction between the two, which is acutely relevant to the question whether the court will grant the claimant any relief at all; and to the further question, if any relief is granted, what that relief should be. But we are not concerned with either of those questions on this appeal. The judge decided what relief to grant in the first of the two trials. At the second trial he was not asked to grant any further discretionary relief. He was asked to decide what effect his order had on the application of section 42 of the Partnership Act 1890. That is the sole question for us.

39. Although the different forms of estoppel have different requirements, at a high level of generality their animating principle is the same.

40. The most recent authoritative discussion of proprietary estoppel is the decision of the Supreme Court in *Guest v Guest* [2022] UKSC 27, [2022] 3 WLR 911, in which Lord Briggs delivered the majority judgment. At [4] he said:

> "The remedy is called proprietary estoppel. The word "proprietary" reflects the fact that the remedy is all about promises to confer interests in property, usually land. The perhaps quaint word "estoppel" encapsulates the notion that the equitable wrong which has been threatened or done is the repudiation of the promise where it would be unconscionable for the promisor to do. So the equitable remedy is to restrain, or stop or "estop" the promisor from reneging on the promise."

41. At [13] he said:

> "The true purpose [of proprietary estoppel], as recognised by the Court of Appeal in the present case, is dealing with the unconscionability constituted by the promisor repudiating his promise…. In this context justice means remedying the unconscionability identified in the promisor's repudiation of his promise."

42. At [34] he quoted with approval a different part of Hoffmann LJ's judgment in *Walton v Walton*, in which Hoffmann LJ himself quoted with approval from the earlier judgment of Oliver J:

> "the question is—'whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment.'"

43. At [61] in his summary of principle Lord Briggs said:

> "For over a century, starting in the 1860s, the courts of equity developed an equitable estoppel-based remedy, the aim of

> which was to prevent the unconscionable repudiation of promises or assurances about property (usually land) upon which the promisee had relied to his detriment. The normal and natural remedy was to hold the promisor to his promise, because that was the simplest way to prevent the unconscionability inherent in repudiating it, but it was always discretionary, and liable to be tempered by circumstances which might make strict enforcement of the promise unjust, either between the parties or because of its effect on third parties. While reliant detriment was a necessary condition for the equity to arise, the court's focus on holding the promisor to his promise was not aimed at "protecting" the promisee from the detriment, still less compensating for it. It was aimed at preventing or remedying the unconscionability of the actual or threatened conduct of the promisor, with the effect, but not the aim, that it tended to satisfy the expectations of the promise."

44. So the animating principle of all kinds of estoppel is the prevention of the unconscionable repudiation of promises or assurances. As it is put in Spencer-Bower on Reliance-Based Estoppel (5th ed at 1.8):

> "We espouse the view that a single purpose underlies all forms of reliance-based estoppel on the basis that all aspects of the rules developed are examples of general principle applied so as to prevent [B] from refusing to recognise, or seeking unjustly to deny or avoid, an assumption or belief which he has induced, permitted or encouraged in [A] and on the basis of which [A] has acted or regulated his affairs, submitting that these doctrines are applications of the rule of law which operates if B is responsible for A so acting on a proposition that A will suffer if B denies it."

45. In determining how to best to protect the promisee against such conduct, the court must take into account a variety of different factors, but the usual assumption will be that the expectations of the promisee will be satisfied. In the case of an estoppel by convention the effect may be to alter contractual relations. In *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 Lord Denning MR put it this way:

> "When the parties to a contract are both under a common mistake as to the meaning or effect of it—and thereafter embark on a course of dealing on the footing of that mistake—thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it *just as if it had been expressly agreed between them.*" (Emphasis added)

46. I can see no principled reason why, on the facts of a particular case, a judge-made remedy should not have the same effect. In this case the judge fashioned a particular

remedy in his first judgment. That is not the subject of this appeal. In that judgment he began his discussion of the scope of relief by saying that it was sufficiently wide "to include an order varying the rights of a promisor and a promisee under a partnership agreement". In other words, what he was doing was varying contractual rights. At numerous points in his judgment he said that what he was doing was extending the period for serving notice "under clause 17.3" of the partnership deed; or that he was giving them "another opportunity to exercise their option under clause 17.3." The purchase price was to be that payable under the partnership deed as modified by the proviso drafted by the judge which, it will be recalled, was to have retrospective effect as from the beginning of the partnership. What he ordered reflects those passages in the judgment; in that he ordered that the partnership deed should be *read as if* the option were capable of exercise within three months of the determination of the amount payable. He made similar provision about the proviso. That, therefore, is how the partnership deed itself is to be read. That order is binding as between Simon and Alison on the one hand, and Julie (as Jennifer's executrix) on the other. Contrary to the submission advanced by Mr Maynard-Connor, I consider that this is indeed a deeming provision. By virtue of the deeming provision in that part of the order, the parties must read the partnership deed "as if" it contained the words inserted by the judge in place of the original wording. In my judgment it is legitimate to regard the effect of that judgment and order as precluding (or estopping) Julie from denying that the partnership deed was in that form.

47. That is consistent with the overall purpose underlying the satisfaction of an equity arising out of proprietary estoppel. On the judge's findings, Simon had been the victim of unconscionable conduct by Jennifer (and Julie) in repudiating the assurances made to him by Geoffrey. Had they abided by those assurances, they would have agreed to the variation of the partnership deed in the manner provided for by the judge's order. They should not be any better off by reason of their unconscionable conduct than they would have been had they abided by Geoffrey's assurances.

48. Seen in that way, if Simon and Alison exercise the contractual option (in the form as modified by the judge) they are deemed, as against Julie, to be exercising an option contained in the contract of partnership.

49. It follows, in my judgment, that the judge was wrong, on the particular facts of this case, to draw the rigid distinction that he did between the judicial function and the contract. Put simply, in the exercise of his judicial function he made an order which required the parties to read the partnership deed in a particular way.

Did the judge's first order preclude consideration of section 42?

50. The judge was not asked to consider whether to allow or disallow interest in the exercise of his equitable jurisdiction. He did not in terms award interest on the two instalments for payment of the option price. Instead, he noted (as his order following the first trial reflected in the recitals) the dispute about whether Julie was entitled to interest under section 42 of the Partnership Act 1890, but left that over to a subsequent hearing. Paragraph [232] of his first judgment also left that question open. The argument on this appeal that in some way his judgment following the first trial precluded Julie from even raising the argument at the second hearing was, in my judgment, misconceived. In principle, therefore, section 42 is engaged. It is, in my view, clear, both from his judgment and from paragraph 12 (c) of his first order, that

the judge was leaving open the question of Julie's entitlement to interest under section 42. He confirmed that at [35] of his second judgment.

51. It is equally clear, in my judgment, that his first order excluded contractual interest. He ordered that if Simon and Alison were to exercise the extended option, the option price (alone) should be paid in two instalments "notwithstanding any other provision in the 2012 Deed". Clause 18 of the deed (in its original form) gave the continuing partners the option to pay in instalments over five years and provided for interest on the unpaid balance. The judge's order *required* them to pay in *two* instalments and made no provision for interest. Necessarily, therefore, the judge's order overrode clause 18.

Is Julie entitled to interest under section 42?

52. That leads on to the second main issue on this appeal. Where section 42 (2) is engaged, and an option is duly exercised, and its terms complied with, does section 42 (2) preclude the outgoing partner from electing for interest, or does it only bar the outgoing partner's right to a share in the profits? As I have said, I approach this question on the basis that Simon and Alison are entitled to exercise the extended option as if it had been contained in the partnership deed; and that, therefore, as between them and Julie it is an option conferred by the partnership contract.

53. Section 42 (1) gives the outgoing partner:

> "in the absence of any agreement to the contrary… the option … 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"

54. This sub-section thus provides for a single option to be exercised in one of two different ways. Section 42 (2) then goes on to provide:

> "(2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section."

55. On the view that I take, this is a case in which the partnership contract is deemed to include the extended option. The question, then, is: if the option is exercised and complied with does the phrase "further or other share of profits" only bar an election to a share in profits; or does it also bar an election to have interest? The judge took the latter view. He said at [26]:

> "At one point in the argument, it was suggested that the statutory proviso in section 42(2) only applies if the outgoing

> partner elects to take a share of the profits as distinct from interest on the amount of her share of the partnership assets. In my judgment, that suggestion is unsound. Whilst it is true that section 42(2) refers in terms to the outgoing partner's right to a share of profits only, there can be no statutory right of election if the outgoing partner's right to a share of profits is itself barred by section 42(2). Had it been intended otherwise, the Act could reasonably have been expected to provide for this in clear and unambiguous terms given that the outgoing partner can have no meaningful election if and once her right to a share of profits has been statutorily excluded. Moreover, there could be no obvious reason to exclude the outgoing partner's share of profits but not her alternative right to interest in the event a contractual option is exercised. No doubt, the process of quantifying the outgoing partner's share of profits would potentially be more complex and time consuming than the calculation of interest but it is difficult to see why this would justify excluding altogether the right to a share of profit but not the right to statutory interest."

56. Mr Maynard-Connor revived that argument before us. He pointed out, correctly, that unlike section 42 (1), section 42 (2) does not specifically refer to interest. If Parliament had meant to exclude the right to interest under section 42 (2), the sub-section would have said so. Since there will inevitably be a delay between the exercise of an option and completion of the contract which comes into being on its exercise, it makes sense for an outgoing partner who is being kept out of their money, to be compensated by interest.

57. Commentators put the point in slightly different ways. Lindley & Banks on Partnership (21st ed) state at para 25-66:

> "Whilst section 42 (2) appears also to preserve the outgoing partner's right to *interest* even where there is an option which is duly exercised, the current editor considers that this right will normally be excluded by necessary implication." (Original emphasis)

58. The illustration that the editor gives in a footnote is an option which provides for the outgoing partner's share to be paid by instalments without interest. He considers that that would "clearly be a contrary agreement excluding the operation of section 42 (1)." On my reading of the judge's first order, that is what he did.

59. On the other hand, Blackett-Ord and Haren on Partnership Law (6th ed) state at para 18.20:

> "If the [continuing?] partners exercise an option in the partnership agreement to buy the share of the outgoing partner, the statutory right to post-dissolution profits (and implicitly interest) under section 42 (2) of the Partnership Act 1890 … is excluded."

60. The text in fact refers to the *outgoing* partners' option to buy the share of the outgoing partners, but that must be a textual misprint. The basis for the "implicit" exclusion of interest seems to me to be much the same as the view expressed in Lindley & Banks. Having quoted section 42 (2) they go on to say:

> "It has been held in Ireland that the court has no power to allow interest on the option price."

61. The Irish case to which they refer is the decision of the Irish Supreme Court in *Williams v Harris* (19 December 1980), shortly digested in [1980] ILRM 237. Counsel have, however, been able to provide us with a full copy of the judgments. That case concerned a partnership agreement clause 26 (a) of which provided that on the death or retirement of a partner "the share of such deceased or outgoing partner … shall, as from the time of his death or ceasing to be a partner, be purchased and belong to the remaining partners". Clause 26 (b) contained an option given to the continuing partners to wind up the partnership instead of buying the outgoing partner's share. The Irish Supreme Court held that the outgoing partner was not entitled to interest on the ultimate purchase price. Griffin J referred to:

> "A long line of authorities [which] show that where partnership articles contain a provision requiring the continuing or surviving partners to purchase the share of a retiring or deceased partner, the articles constitute a contract for the sale of the retiring or deceased partner's share to his partners, and this is a complete contract, binding all parties, for the purchase of the interest of the retiring or deceased partner on the sale provided for in the partnership articles."

62. The effect of such a contract was that as from the date when the outgoing partner retired, the remaining partners carried on the business "with capital and assets solely owned by them".

63. Kenny J (with whom O'Higgins CJ agreed) said:

> "In the instant case clause [26(a)] provides that when any partner ceases to be a partner, his share of the partnership business including the capital therein and assets thereof shall from the date when the partner ceases to be a partner, be purchased by and belong to the remaining partners. So from 30th July 1976, the defendants were the owners of all the capital and assets of the partnership. When the continuing partners continued to trade after 30th July 1976, they did so, not with any assets of the retiring partners but with capital and assets belonging to them solely."

64. He concluded, therefore, that there was no valid claim for interest and he added that, in his opinion:

> "… the plaintiffs have not a valid claim under s 42 of the Partnership Act 1890."

65. I consider that, with all respect, Blackett-Ord and Haren mis-state what *Williams v Harris* decided. It was not a case about an option at all. Under the terms of the partnership contract in that case a contract to purchase arose automatically when the outgoing partner left. It was for that reason that as from the date when that contract came into existence, the continuing partners were trading with their own assets, rather than assets that still belonged to the outgoing partner. It was in that respect on all fours with the decision of the House of Lords in *Vyse v Foster* (1874-75) LR 7 HL 318, which was one of the cases mentioned by Griffin J.

66. Nevertheless, the apparent difference between the two textbooks is more a matter of form than of substance. Both agree that if an option in the partnership contract is exercised, there is no entitlement to interest under section 42, although their routes to that conclusion are different. For my part, I find the judge's reasoning on this point wholly persuasive. The point can be put in a number of different ways, in addition to the reasons that led the judge to his view, but all lead to the same conclusion. First, there is a single option under section 42 (1). An option is a choice between two (or more) possibilities. If there is no choice there can be no option. As Nugee LJ suggested in argument, historically an entitlement to interest on partnership assets retained and used by continuing partners was seen as a proxy for an account of profits itself, which was a notoriously difficult process. Lord Brougham LC explained in *Docker v Somes* (1834) 2 My & K 656, 665:

> "The reason which has induced Judges to be satisfied with allowing interest only I take to have been this: they could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock; and the process became still more difficult, where a great proportion of the gains proceeded from skill or labour employed upon the capital."

67. As Lord Lindley tartly observed in an extract quoted in Lindley & Banks at 25-52:

> "Judgements for an account of profits after dissolution are fearfully oppressive; and the writer is not aware of any instance in which such a judgment has been worked out and has resulted beneficially to the person in whose favour it was made."

68. Neuberger LJ said in *Sandhu v Gill* [2005] EWCA Civ 1297, [2006] Ch 456 at [37], referring to section 42 (1): "it would be very surprising if the two options were based on different principles." If you do not have the one, it makes sense that you do not have the other. That, no doubt, is why Lindley & Banks states at para 25-44 that the option to elect between a share of profits or interest is exercisable only where it can be shown that the continuing partners have derived profit from the use of the outgoing partner's share of assets. In other words, profits and interest are treated on the same footing.

69. Second, the concluding part of section 42 (2) provides:

> "… if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is

> liable to account under the foregoing provisions of this section."

70. The logical corollary of this is that if he *does* comply in all material respects, then he is *not* liable to account under section 41 (1). That is consistent with Neuberger LJ's further observation in *Sandhu v Gill* at [40]:

> "It also seems to me that this conclusion receives a little indirect support from section 42(2), to which I have not so far referred. It provides that, where the continuing partners exercise an option to buy out an outgoing partner, the outgoing partner *cannot rely on section 42(1)* unless the continuing partners fail to comply with the terms of the option." (Emphasis added)

71. Third, the phrase "further or other share of profits" is imprecise. The most likely meaning is that if the option provides for the outgoing partner to receive something under the terms of the option, then that partner is not entitled to anything more.

72. In addition, it seems to me that the judge's order requiring the option price to be paid in two (rather than five) instalments and without providing for interest is itself to be treated as an agreement to the contrary.

73. In my judgment, therefore, Julie is not entitled to interest under section 42.

Result

74. I would allow the appeal.

Lady Justice King:

75. I agree.

Lord Justice Nugee:

76. I also agree.