Neutral Citation Number: [2010] EWHC 2720 (Ch)

Case No: 9BM30148

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 4 November 2010

Before :

HHJ DAVID COOKE

- -

Between :

Trevor John Brooks	**Claimant**
- and -	
AH Brooks & Co (a Firm)	**Defendant**
- and -	
Elizabeth Anne Winter Morris	**Third Party**
- and -	
Paul Winter Morris	**Fourth Party**
- and -	
Roger Brooks	**Fifth Party**
- and -	
Judith Parkin (Executrix of the will of Stephen Short, Deceased)	**Sixth Party**

- -

Anthony de Freitas (instructed by **Tinsdills**) for the **Claimant**
Gregory Pipe (instructed by **Taylor & Emmett LLP**) for **Simon Chiverton and Greta Williamson (partners in the firm AH Brooks & Co)**
Mark Halliwell for the **Third Party**
Mr Paul Morris appeared in person
The Fifth Party did not appear and was not represented
Henry Bankes- Jones (instructed by **Taylor Vintners**) for the **Sixth Party**

Hearing dates: 7 October 2010

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ DAVID COOKE

HHJ David Cooke:

1. This judgment follows a hearing on 7 October 2010. In it, I give my reasons for the decision I announced at that hearing that the claim form and particulars of claim had been served, or are deemed to have been served, effectively upon the third party ("Mrs Morris") and the fourth party ("Mr Morris"), and my decision on the order that should be made to record the fact that, as is now clear, the claimant brings no claim against Mr Simon Chiverton and Miss Greta Williamson, the present partners in the solicitors' firm AH Brooks & Co which is the named defendant. I also deal with consequential matters relating to the part 20 proceedings Mr Chiverton and Mrs Williamson have brought against the third to sixth parties, and their application for their costs to be paid by the claimant.

Background

2. This claim was issued in March 2009, naming the defendant as "AH Brooks & Co (a firm)", and served by post under cover of a letter dated 2 April 2009 addressed to the Managing Partner of that firm at its office in Leek, Staffordshire. It relates to events as long ago as 1990. At that time, the partners in the firm were Mr and Mrs Morris (who were and are married to each other), Mr Roger Brooks and Mr Stephen Short. The claimant, Mr Trevor Brooks, is a cousin of Mrs Morris. He alleges that on the advice of Mr Morris, acting in the course of the firm's business, he paid £25,000 to the firm to be invested in an investment scheme in the United States based on dealing in precious metals and commodities. Over the years since, he says that he was assured first by Mr Morris and more recently by Mrs Morris that his investment was doing well and had grown substantially in value. However, he was never told exactly what form the investment took, or given any documentary evidence of it such as a share or unit certificate. When he retired and pressed for this information, and for the return of some or all of the funds he was told were held on his behalf, neither firm information, nor funds, were forthcoming. He was given explanations to the effect that the American administrators of the fund could not respond until satisfied that the claimant's tax affairs in the United Kingdom were in order, which he regards as specious excuses.

3. The claimant's case is, in broad terms, that either there never was a genuine investment and his monies were misapplied in 1990, or that if there was, there has been a failure to advise him appropriately and account to him for the proceeds since then. Various causes of action are pleaded, which it is not necessary for present purposes to set out in detail. They are said to have arisen at different dates between the original payment in 1990, and a date in 2007 which is the most recent date on which it is said that the defendant firm failed to account. The position of Mr and Mrs Morris is, equally broadly, that the investment was a genuine one and remains a valuable asset available to be realised, and that the sole or main reason why funds cannot be remitted to the claimant is that he has not provided information to the satisfaction of the American administrators that to do so would not result in any criminal offence relating to evasion of United Kingdom tax. They deny that the firm was involved in the investment, which they say was a private matter between the claimant and Mr Morris. There has been no decision on any element of the merits of the claim, and nothing in this judgment is intended to express any view on that subject.

4. Since at least 1990 and up to the present day there has been a firm of solicitors practising from the same address in Leek under the business name "AH Brooks &

Co". It has never been incorporated, and the identity of the individuals constituting the principals of the firm has changed over time. So far as is relevant for present purposes:

i) In 1990, there were four equity partners as set out above; Mr and Mrs Morris, Mr Roger Brooks, and Mr Stephen Short.

ii) Roger Brooks ceased to be a partner in or about 1995. Mr Short died in 2004. The claimant has reached terms with both Mr Roger Brooks and the personal representatives of Mr Short as a result of which he does not pursue the claim against them and there are no outstanding matters as between them. They remain for the present parties to the action, pursuant to the part 20 proceedings which have been brought against them as referred to below.

iii) Mr Morris ceased to be a partner on 19 March 2003, on his conviction for an offence involving the fraudulent evasion of VAT.

iv) On the death of Mr Short in 2004, therefore, the sole remaining principal of the business was Mrs Morris. She carried on business as a sole trader until she sold it to Mr Simon Chiverton and Miss Greta Williamson, completion taking place on 13 March 2008. On that date, Mrs Morris became an employee of the firm, described on the firm's letterhead as a consultant, and continued in that role for 12 months, her employment terminating on 12 March 2009, shortly before the proceedings were issued and served.

v) Since 13 March 2008, Mr Chiverton and Mrs Williamson have carried on the business in partnership.

vi) Prior to purchasing the business, Mr Chiverton and Mrs Williamson had been salaried partners of the firm. Contractually, they were employees, but they were named on the letterhead as partners in the firm, without any indication to distinguish them from the equity partners. This was the case for Mr Chiverton from 2005, and for Mrs Williamson from 2001.

5. In English law, of course, a partnership is not a separate legal entity. A claim brought against a partnership is, therefore, in law a claim against all the individuals who are partners in the firm at the time the cause of action accrued. For convenience, it has long been the case that such a claim may be brought using the firm's business name as that of the defendant, but this has always been merely a matter of form, the substance of the action being one against the individuals (or other entities) who together constituted the partnership at the relevant time. This rule of course is of assistance to claimants, who may not be aware of the names of the relevant partners. A consequence of adopting this convenience is that the court's procedure must provide mechanisms to ensure that those partners are identified, that the proceedings can be effective against all of them, that each of them has the opportunity to defend, that enforcement of any judgment may be made against the assets of relevant individual partners, and in particular to deal with the difficulties which can arise if the composition of the firm has changed between the time when the cause of action accrues and the time when the claim is served.

6. For instance, proceedings served at one address, even if that is a business address of the firm and the proceedings are served on a partner, may or may not come to the attention of others who are then partners in the firm, or previous partners, depending

on whether the person served is able to, and does in fact, communicate with them. It is not necessarily the case that all the partners potentially liable will take the same stance in response to the pleadings; for instance some may be prepared to make admissions that others are not, or some may take the position that the liability asserted is a private liability of one or more of the partners and not one for which all the partners are liable, usually because they say it is not one incurred in the conduct of the partnership business.

7. The present provisions dealing with these questions are set out in the CPR, which I shall come to in a moment. Until recently however an interlocking code to deal with these problems was contained in RSC Order 81 (as retained in schedule 1 to the CPR), which I summarise as follows, for purposes of brevity dealing only with claims against partnerships within the jurisdiction:

   i) The claimant was entitled to use the business name of the firm as that of the defendant, in an action against all persons alleged to be liable as partners in the firm, without naming them individually (Rule 1)

   ii) The onus was effectively placed on the defendant firm to disclose the names of the individuals who were partners at the relevant time. Thus, Rule 4 required that acknowledgment of service must not be made in the business name of the firm, but must specify the names of the individual partners on behalf of whom it was made. By Rule 2, any of those persons could be required to declare the names and addresses of all other persons who were partners in the firm, so that the claimant could then set about serving them individually.

   iii) It was in his interest to do so, because by Rule 5, if judgment was given against a firm sued under its business name, the judgment could be enforced against the property of the firm, but not against the property of an individual partner unless he had individually acknowledged service as a partner or service on him as a partner was proved, or he had admitted or been found to be a partner.

8. RSC Order 81 has now disappeared from Schedule 1 to the CPR, and its former provisions are now distributed amongst the CPR themselves and the Practice Directions, with some changes that are of significance. The relevant provisions as in force now and at the date of issue of this claim are as follows:

   i) by PD 7A:

   "**Claims by and against partnerships within the jurisdiction**

   5A.1 Paragraphs 5A and 5B apply to claims that are brought by or against two or more persons who –

   (1) were partners…

   at the time when the cause of action accrued…

   5A.3 Where that partnership has a name, unless it is inappropriate to do so, claims must be brought in or against the name under which that partnership carried on business at the time the cause of action accrued.

Partnership membership statements

5B.1 In this paragraph a 'partnership membership statement' is a written statement of the names and last known places of residence of all the persons who were partners in the partnership at the time when the cause of action accrued, being the date specified for this purpose in accordance with paragraph 5B.3.

5B.2 If the partners are requested to provide a copy of a partnership membership statement by any party to a claim, the partners must do so within 14 days of receipt of the request.

5B.3 In that request the party seeking a copy of a partnership membership statement must specify the date when the relevant cause of action accrued."

Thus, it is now normally obligatory, rather than merely permissible, to use the partnership's business name as that of the defendant. It is not suggested in this case that it would have been "inappropriate" to do so.

ii) CPR 6 contains the following provisions dealing with service of claim forms on a partnership:

"**Personal service**

6.5(1) Where required by another Part, any other enactment, a practice direction or a court order, a claim form must be served personally.

(2) In other cases, a claim form may be served personally …

(3) A claim form is served personally on …

(c) a partnership (where partners are being sued in the name of their firm) by leaving it with –

(i) a partner; or

(ii) a person who, at the time of service, has the control or management of the partnership business at its principal place of business…

Service of the claim form where the defendant does not give an address at which the defendant may be served

6.9(1) This rule applies where –

(a) rule 6.5(1) (personal service);

(b) rule 6.7 (service of claim form on solicitor); and

(c) rule 6.8 (defendant gives address at which the defendant may be served),

do not apply and the claimant does not wish to effect personal service under rule 6.5(2).

(2) Subject to paragraphs (3) to (6), the claim form must be served on the defendant at the place shown in the following table…

Nature of defendant to be served	**Place of service**
3. Individual being sued in the business name of a partnership	Usual or last known residence of the individual; or
	principal or last known place of business of the partnership.

…

(3) Where a claimant has reason to believe that the address of the defendant referred to in entries 1, 2 or 3 in the table in paragraph (2) is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business ('current address').

(4) Where, having taken the reasonable steps required by paragraph (3), the claimant –

(a) ascertains the defendant's current address, the claim form must be served at that address; or

(b) is unable to ascertain the defendant's current address, the claimant must consider whether there is –

(i) an alternative place where; or

(ii) an alternative method by which,

service may be effected.

(5) If, under paragraph (4)(b), there is such a place where or a method by which service may be effected, the claimant must make an application under rule 6.15.

(6) Where paragraph (3) applies, the claimant may serve on the defendant's usual or last known address in accordance with the table in paragraph (2) where the claimant –

(a) cannot ascertain the defendant's current residence or place of business; and

(b) cannot ascertain an alternative place or an alternative method under paragraph (4)(b)."

Thus, personal service is in most cases optional. It is not suggested that it was required in this case. If the claimant does not wish to effect personal service, he may serve by post at the relevant address set out in the table in paragraph 6.9(2). In a claim in which a number of partners are sued in the name of the firm, it seems to me that the effect of the third entry in the table is that the starting position is that the claimant has the option to serve all or any of them at the usual or last known place of business of the firm. No doubt it will be normally more convenient to do so, particularly if the claimant does not know the identities of all the partners, because by naming the defendant as the firm, proceedings are instituted against all those who were in fact partners at the relevant time, whether or not known to the claimant, and, subject to what follows, service at the business address constitutes service on all of them.

What then is the effect of the qualifying regime set out in paragraphs (3) to (6), in a case where the claimant does in fact know the names of one or more persons who were partners at the date the cause of action accrued, but also knows or has reason to believe that they have ceased to be partners at the date of service? The learned author of Lindley & Banks on Partnership at paragraph 14-16 (eighteenth edition, 2002, as updated in the second cumulative supplement issued in 2008 after the above provisions came into effect) notes that "under [RSC 3(3)] it was a requirement that proceedings against a firm which was known to have been dissolved should be served on all the partners within the jurisdiction. Unaccountably, this requirement has not been replicated in the CPR. It follows that… good service can be effected in a manner which may, inevitably, result in the existence of the proceedings failing to come to the attention of all the former partners… It must be assumed that this is deliberate."

It seems to me however that CPR 6.9 is to be construed on the footing that an action against a partnership is in substance an action against individual partners. Each such partner is a defendant in the action, and his position requires to be considered individually in determining the permissible address or addresses for service in the table. Each of them is an "individual being sued in the business name of a partnership". Equally, each of them is "the defendant" for the purposes of paragraph (3). If the claimant knows or has reason to believe that a particular person is no longer a partner, it seems to me that on the face of it he is likely also to have reason to believe that the usual or last known place of business of the firm "is an address at which the defendant no longer… carries on business". If so (and if he wishes to ensure that the former partner is effectively served) he will therefore be required to follow the procedure set out in paragraphs (3) to (6) to seek to identify an alternative address or method of service in relation to that person. In practice, there will not always be a need to serve all former partners; the claimant may for instance be content if at least one partner with joint liability has been served and is insured.

iii) PD 10 which deals with acknowledgment of service provides as follows:

> "**Signing the Acknowledgment of Service**
>
> 4.1 An acknowledgment of service must be signed by the defendant or by his legal representative…
>
> 4.4 Where a claim is brought against a partnership –

> (1) service must be acknowledged in the name of the partnership on behalf of all persons who were partners at the time when the cause of action accrued; and
>
> (2) the acknowledgment of service may be signed by any of those partners, or by any person authorised by any of those partners to sign it…
>
> **General**
>
> 5.1 The defendant's name should be set out in full on the acknowledgment of service…
>
> 5.3 If two or more defendants to a claim acknowledge service of a claim through the same legal representative at the same time, only one acknowledgment of service need be used.
>
> 5.4 An acknowledgment of service may be amended or withdrawn only with the permission of the court."

The requirement that service "must" be acknowledged in the name of the partnership constitutes a reversal of the position under the RSC, which provided in Rule 4(1) that "service may not be acknowledged in the name of the firm but only by the partners thereof in their own names". Presumably "the defendant's name" for the purposes of paragraph 5.1 is the name of the firm, and although there may be two or more partners, pursuant to paragraph 5.3 only one acknowledgment of service is required.

What is the effect of paragraph 4.4(1)? If service "must be acknowledged in the name of the partnership on behalf of all persons who were partners at the time when the cause of action accrued", what is to happen if the partner ("partner A") to whose attention the claim comes is not in fact in a position to acknowledge service on behalf of all his present and/or former partners? He may not have their authority to do so. If he previously had such authority, it may have been expressly terminated, for instance if a former partner wishes to conduct a separate defence. Is partner A prevented from acknowledging service at all? Before me, counsel for the claimant and for Mrs Morris agreed that this could not be the position, and that it must still be open to a partner acknowledging service to do so expressly on the basis that he does so only on behalf of specified partners. I agree. It seems to me however that in the absence of any such express qualification, the acknowledgment will be taken to be made on behalf of all the relevant partners, including former partners. Further, if the person signing it comes within paragraph 4.4(2) as being one of the partners at the time a cause of action accrued, or a person authorised by any such partner, the acknowledgment will by virtue of that paragraph be effective on behalf of those who were partners at that time, notwithstanding any lack of actual authority as between themselves, unless and until any of them is given permission to withdraw it pursuant to paragraph 5.4.

Further still, since the acknowledgment is given "in the name of the partnership", it seems that it is no longer required to specify the names of the partners on whose behalf it is made. The claimant therefore if he wishes to identify those partners must request a partnership membership statement under PD 7A para 5B; see above.

iv) The provisions limiting enforcement of a judgment given against a partnership against the assets of individual partners are now contained in PD 70 paragraph 6A. This substantially reproduces the provisions of the RSC as follows:

> "**Enforcing a judgment or order against a partnership**
>
> 6A.1 A judgment or order made against a partnership may be enforced against any property of the partnership within the jurisdiction.
>
> 6A.2 Subject to paragraph 6A.3, a judgment or order made against a partnership may be enforced against any person who is not a limited partner and who –
>
> (1) acknowledged service of the claim form as a partner;
>
> (2) having been served as a partner with the claim form, failed to acknowledge service of it;
>
> (3) admitted in his statement of case that he is or was a partner at a material time; or
>
> (4) was found by the court to have been a partner at a material time…"

If a valid unqualified acknowledgment of service is given in the name of the firm, by a person within PD10 par 4.4(2), on the view that I have taken above each person who was in fact a partner at the accrual of the cause of action will be a person who has "acknowledged service of the claim form as a partner". It would still be open to a person who denies that he was a partner at the relevant date to dispute that as a question of fact in any enforcement proceedings against him, at least unless a specific admission or finding has already been made in the main proceedings. If he is successful, a finding that he was not a partner goes beyond issues of enforcement, for it will follow that the acknowledgment of service was not deemed to have been made on his behalf, he was never a party to the action and is not liable under the judgment against the firm. The practical effect of the above provision would now seem to be limited to cases where, notwithstanding the provisions of PD10, service is expressly acknowledged on behalf of some partners but not others.

Service on Mr & Mrs Morris

9. Returning to the facts of the present case, the claim form and particulars of claim were as I have said served under cover of a letter from the claimant's solicitors dated 2 April 2009 addressed to "the Managing Partner, A H Brooks & Co" and sent to the firm's office in Leek (page 205 of the bundle). The acknowledgment of service (page 58a) was dated 9 April 2009 and signed by a person identified only as "defendant's solicitor". The defendant's name was stated, as on the claim form, as "AH Brooks & Co". It was sent under cover of a letter of the same date from Kennedys, the firm of solicitors, which stated that "we have been instructed to act on behalf of the Defendants, A H Brooks & Co and enclose by way of service a copy of our client's acknowledgment of service."

10. Both Mr and Mrs Morris denied that this constituted service upon them. For Mrs Morris, Mr Halliwell submitted that given the letter addressed to "the Managing Partner" and the contents of the particulars of claim, in particular paragraph 1.1 which states that "the Defendants are and have been a firm of solicitors practising from premises… at Derby House, Derby Street, Leek, in Staffordshire" I should find that the intention and effect of service was only to serve the partners of the firm presently using that business name. I do not accept that submission; it is plain from the particulars of claim that they assert causes of action going back to 1990, and therefore that the claim is made against all those persons who were partners in the firm at the dates when those causes of action respectively accrued, specifically including Mr Morris and Mrs Morris who are named as partners in those particulars. It follows that the service made must be construed as being intended to serve all those persons, and the question for me is whether that intention was achieved in relation to Mr and Mrs Morris.

11. There is no doubt that prior to the service of the claim form the claimant and his solicitors were aware that Mr and Mrs Morris had ceased to be partners in A H Brooks & Co; see for instance the letters at pages 268 and 275 of the bundle. Whilst the address of the firm as constituted in 2009 was no doubt "the last known business address" of the firm as it existed when they had been partners (until 2003 and 2008 respectively), on the view that I have expressed above in relation to the effect of CPR 6.9(3) it is necessary also to consider whether it remained an appropriate address for service on them in April 2009.

12. So far as Mr Morris is concerned, the position seems to me clear; it was not suggested that the claimant considered him to be carrying on business at that address in any respect and accordingly in my view the claimant was required by that paragraph to take reasonable steps to ascertain a current address (such as his residential address which was well known to the claimant) at which the proceedings could be served.

13. The position in relation to Mrs Morris is not quite so straightforward. Mr de Freitas submitted that since she remained an employee of the firm she was "carrying on business" at its address. Mrs Morris in turn gave evidence that she ceased to be an employee on 12 March 2009, before the claim was issued, and that her retirement on that date had attracted significant publicity in the local press, including newspapers circulating in the area where the claimant lived. She did not go so far as to say that her retirement was in fact known to him. In my judgment however an employee is not a person who "carries on business" since he has no business of his own to carry on. Since Mrs Morris was known to be an employee, it follows in my judgment that the address of her employer was known to be an address at which she no longer carried on business, and in her case also therefore the claimant should have considered an alternative address for service.

14. Since the claimant did not comply with his obligations under paragraphs 6.9 (3) and (4), in my judgment service of the claim form at the firm's address did not constitute good service on either of them. The matter does not end there however, as I am required to consider the effect of the acknowledgment of service. On behalf of Mrs Morris, Mr Halliwell submitted that the acknowledgment had no effect whatever if Mrs Morris had not in fact been duly served. I do not accept that submission either; a party who has acknowledged service is to be taken as having been served, even if there would have been procedural defects that he could have objected to in the absence of the acknowledgment.

15. By PD 10 paragraph 4.4(2) an acknowledgment of service may be signed by any of the persons who were partners at the date the cause of action accrued, or any person authorised by any such partner. Mr and Mrs Morris both objected that they had not authorised Kennedys to sign any acknowledgment of service. It was their case that any authority to Kennedys could only have come from Mr Chiverton and Mrs Williamson. If so, that would not be sufficient since (as is now clear) neither of them were partners at the date of accrual of any of the pleaded causes of action. But in cross-examination by Mr de Freitas Mrs Morris accepted that Kennedys were instructed on behalf of the underwriters of the professional indemnity insurance policy for the insurance year 1 October 2007 to 30 September 2008 (see the letter at page 307; that was the relevant year because the claim was first notified in that year even though not issued or served until the following insurance year), and that she was a party to that contract of insurance which was made when she was the sole principal of the business. She further accepted that it was a term of that contract that the insurers were authorised to conduct the defence of any proceedings against the firm, including claims against former as well as present partners. It follows in my judgment that Kennedys were authorised by Mrs Morris to sign the acknowledgment of service.

16. So far as Mr Morris is concerned, his position is that he gave no authority to Kennedys to sign an acknowledgment of service on his behalf. But since Kennedys were authorised by Mrs Morris who was a partner at the times when all the pleaded causes of action arose, the effect of PD 10 paragraph 4.4(2) is that they are also authorised to sign on behalf of all other partners.

17. Mr Halliwell also submitted that the form of acknowledgment sent must be construed only to have been intended to be an acknowledgment on behalf of the present partners. This submission largely relied on his submission as to the identity of the parties intended to be served. I reject it for the same reasons. The claim was brought against all persons who were partners at the dates at which the various causes of action accrued. An acknowledgment of service on behalf of the defendant firm named in such a claim is to be construed as an acknowledgment on behalf of all such persons. The position might be different if, for the reasons such as those I canvassed earlier in this judgment, an acknowledgment was made on the express basis that it was only on behalf of a named partner or partners.

18. I should make clear that I have reached these conclusions, as all counsel agreed that I should, solely as a matter of construction of the documents served and the acknowledgment of service, together with their respective covering letters. I have not taken account of any evidence of the subjective intentions either of the claimant or his solicitors on the one hand, or Kennedys on the other, although it is for instance clear from such correspondence that Kennedys did consider themselves to be acknowledging service on behalf of all the former partners including Mr and Mrs Morris.

19. The position therefore is that Kennedys were entitled to, and did, acknowledge service on behalf of both Mr Morris and Mrs Morris, and in my judgment both of them are bound by that acknowledgment, which waives any defects in service.

20. I also indicated at the hearing that had it been necessary to do so I would have acceded to Mr de Freitas' application for an order pursuant to CPR 6.15(2) that the steps taken to bring the claim form to the attention of Mr and Mrs Morris be deemed to be good service. Mrs Morris accepted in cross-examination that she knew the

proceedings had been issued in April 2009, because the solicitors then instructed by Mr Chiverton and Mrs Williamson had sent her a copy of the claim form and particulars of claim. She prepared, but did not sign, a statement which she said was intended to assist them in relation to the claim. Given that the particulars of claim make clear that the claim was intended to be brought against her and Mr Morris, that Mr Morris was well aware that a claim was in the offing, having engaged over several months in some rather ill tempered correspondence with the claimant's solicitors about it, and that Mr and Mrs Morris have at all times lived together at the same address, it is impossible to believe (and it was not suggested) that the claim did not come to his attention at the same time.

21. The court is required, when considering an application under CPR 6.15 to consider whether there is "good reason" to authorise service by a method or at a place not otherwise permitted by CPR 6, and separately whether it is appropriate to make a retrospective order. On the view that I have taken, disregarding the effect of the acknowledgment, the business address of the present partnership was not a place at which service on Mr or Mrs Morris was authorised by the rules. The fact that such service nevertheless had the effect of bringing it to their attention within a very short time so that they have had every opportunity to participate in its defence since then constitutes, in my judgment, both good reason to make an order permitting service at that address and sufficient reason to direct that the steps already taken by way of posting to that address be deemed to be good service.

22. I did not receive any application by Mr or Mrs Morris to set aside the acknowledgment of service which I have held to be binding on them. Had any such application been made, I would have refused it for the same reasons.

23. I record that I directed at the hearing that I would adjourn it for the purposes of considering any application to me for permission to appeal against the above decisions until these written reasons were handed down, and also that I would extend time for any similar application to be made to the appeal court until 21 days after that date.

Costs of the present partners, and disposal of the Part 20 proceedings

24. The next set of issues, on which I reserved judgment at the hearing, relates to the participation in the proceedings of the present partners, Mr Chiverton and Mrs Williamson. They have filed an amended defence on their own behalf, pleading amongst other things that they were not partners in the firm until they purchased the business in March 2008 but nevertheless "the claimant's position appears to be that all persons who have from time to time treated as A H Brooks & Co are defendants". In those circumstances they respond, on their own behalf, to the substantive allegations made. They have also issued part 20 proceedings claiming an indemnity or contribution from Mr and Mrs Morris, Roger Brooks and the estate of Stephen Short, the partners in 1990, and Mr David Hallen, who became a salaried partner for a period. In the case of Mrs Morris, an indemnity is claimed pursuant to the terms of the agreement for purchase of the business. In the case of all the part 20 defendants, a contribution or indemnity is sought on the basis that they were or held themselves out as being partners at the material dates.

25. Now that the claimant has accepted that it has no claim against the present partners, Mr Pipe seeks an order that formally dismisses the claim against them, together with an order that their costs should be paid by the claimant. So far as the part 20

proceedings are concerned, he accepts that they should be dismissed, save for the claim for a contractual indemnity against Mrs Morris. I adjourned his application for summary judgment on that part of the part 20 claim. So far as the other part 20 defendants are concerned, Mr Pipe accepts that they should have an order for their costs. His principal submission was that the claimant should be ordered to pay those costs, but he did not resist an order that the present partners as part 20 claimants should be ordered to pay those costs, provided that they should then form part of the costs recoverable from the claimant. As between these two, Mr Bankes-Jones would prefer an order that his costs be paid by the part 20 claimants. Mr Morris said that he would prefer to pursue the claimant rather than the present partners for any costs to which he was entitled.

26. Mr de Freitas' submission was that since the present partners were not partners at the time when any of the pleaded causes of action accrued, the claim had never been brought against them and did not stand to be dismissed. The costs they had incurred, including the costs of the part 20 proceedings, were the result of the present partners voluntarily and unnecessarily involving themselves in the proceedings, which they should not be entitled to recover from his client.

27. CPR 44.3 provides that "the court has discretion as to… whether costs are payable by one party to another…" and goes on to set out a general rule that an unsuccessful party would be ordered to pay the costs of a successful party, and factors which the court must have regard to in exercising its discretion, including the conduct of the parties. Where a claim is brought giving the business name of the partnership as the defendant, it is as I have said in substance of claim against those who were partners at the material date, and an inevitable consequence of the convenience that is given to the claimant to bring his claim without having to name those partners separately is that there may be some uncertainty as to who they are, or as to whom the claimant alleges them to be. The procedure now provided by the CPR for acknowledgment of service in the name of the firm potentially extends that period of uncertainty. RSC Order 81 provided (rule 4(2)) that where a claim form was "served on a person as a partner" he could acknowledge service but at the same time deny that he was a partner. I have not been able to find this provision reproduced in the CPR, but in any event it seems to me that it is of limited use in a situation where the claimant serves his claim form at a business address without specifying the persons whom he contends to be partners.

28. It seems to me that for the purposes of CPR 44.3, the reference to a "party" must be taken to include a person who is alleged to be a partner, even if ultimately he successfully shows that he was not a partner. It cannot be an answer to his claim for costs that since the substance of the claim is that it is made against those who were in fact partners, and he has established that he was not, he was never a party to the claim at all and an order for costs cannot or should not be made in his favour. Furthermore, if the claimant uses the name of an unincorporated firm as the defendant, without making clear whom it is he regards to be the relevant partners or otherwise liable for it, it seems to me that a person who reasonably takes the view that the claim is intended to be pursued against him is entitled to require the claimant to clarify whether this is the case or not, and if the claimant is unable or unwilling to confirm that no claim is made against him, and in consequence he takes part in the proceedings with a view to establishing that no claim lies against him, he is to be regarded as a party in doing so, for the purpose of an order for costs.

29. In this case, Mr Pipe submits that although the claimant has now made clear that no claim is pursued against the present partners, it is only recently that he has done so and indeed for a long time both before and after the issue of the claim he intentionally gave the impression that a claim was asserted against Mr Chiverton and Mrs Williamson, in particular that they were in some way liable for the actions of the previous owners of business by virtue of having purchased the goodwill and assets and carried on business under the same name. The present partners have, he says, repeatedly asserted that they are not liable and invited the claimant to concede this, but until recently he has not been prepared to do so and has expressly kept open his options against them.

30. In my judgment, that submission was amply made out. On 17 June 2008, the claimant's solicitors wrote a letter personally addressed to Mrs Williamson making allegations about the investment and the involvement of Mr and Mrs Morris, and requiring information and an up-to-date valuation of the investment (page 268). On receiving this, she telephoned the solicitor dealing with the matter, Mr Whitehouse, and asking why he thought that she was involved (witness statement beginning at page 254, paragraph 8). She says that "Mr Whitehouse intimated that he knew full well that it was nothing personally to do with me but as the partnership employed [Mrs Morris] as a consultant he felt that I was in a position to 'put pressure on [her]' to get the information…[and that if it was not forthcoming]… in all likelihood there would be a claim against [Mr and Mrs Morris] (as individuals) and against the firm of A H Brooks & Co (meaning [Mr Chiverton] and [me] as partners) under s10 of the Partnership Act 1890. I specifically made a note of the reference to the statute."

31. On 25 June 2008 Mr Chiverton wrote a letter (page 271) saying that after a thorough search of the archives no file relating to the matter could be found, and suggesting that Mr Whitehouse direct his enquiries to Mr Morris. On 10 July 2008 Mr Whitehouse replied (page 275) to the effect that enquiries of Mr Morris had not been fruitful and saying "the current partners, it seems to us, are liable to account to our client for the monies which were paid over and accrued interest pursuant to the provisions of section 10 of the Partnership Act. Accordingly we look to you to assist us in establishing just what has occurred." Thus, although the claimant now accepts that the present partners cannot be liable merely because they hold that position, at the time this letter was written he was expressly asserting that they were so liable, seemingly as if "the firm" were a continuing entity, with the partners from time to time being responsible for all liabilities incurred by it. This letter does not, in particular, read as an assertion that the present partners are liable because they either were or were held out to be partners at the date at which the cause of action accrued.

32. In a further letter dated 16 July 2008 addressed to Mr Chiverton (page 278) Mr Whitehouse said that he had no intention of corresponding further with Mr Morris and threatened proceedings. In the context, this letter can only be construed as a threat of proceedings against the present partners. In response dated 23 July 2008 (page 280a) Mr Chiverton asked "on what basis are you… proposing to issue proceedings? If you are intending to issue alleging negligence against the current partners of the practice, then we are surprised that you have failed to provide us with a protocol compliant letter of claim" Mr Whitehouse in turn responded the next day (page 282) saying "unfortunately, we seem to be on a completely different wavelength… the claim against the firm is not based on allegations of negligence against the present partners. The claim has a statutory basis, namely sections 10 and 11 of the Partnership Act [which he then set out]. The liability to account is a primary liability imposed on the

partners of the firm and not a vicarious liability for breach of duty on the part of the defaulting partner." In my judgment, it is again clear in the context that this letter was asserting a liability on the part of the present partners as if "the firm" were a continuing entity.

33. Mr Chiverton and Mrs Williamson then instructed separate solicitors, Taylor & Emmett. Their reply, expressed to be made on behalf of "A H Brooks & Co" unfortunately did not make any distinction between the potential liabilities of the present and former partners (page 285) but asserted that whatever Mr Morris had done had not been in the course of the firm's business. In subsequent correspondence, the claimant's solicitors did in fact make further enquiries of Mr Morris, but got nowhere, and notified Taylor & Emmett that their client's claim was now funded by a CFA supported by an insurance policy.

34. In March and April 2009, the claim was issued and service acknowledged by Kennedys, instructed by insurers. On 13 August 2009 however those insurers repudiated liability under the policy (page 307) and the present partners instructed Taylor & Emmett to conduct their defence. On 27 August 2009 Taylor & Emmett wrote to the claimant's solicitors (page 311) saying:

> "We have noted that your client's claim has been issued against A H Brooks & Co (a firm). You will be aware that we act for … Mr Simon Chiverton and Ms Greta Williamson trading as AH Brooks & Co Solicitors (a partnership). Our client[s] purchased the business of A H Brooks & Co from [Mrs Morris] in March 2008… [T]he particulars of alleged negligence set out [in the particulars of claim] all relate to alleged acts prior to our client[s] purchasing AH Brooks & Co in March 2008. [Mrs Morris] was at that stage a sole practitioner although historically we are aware that she had traded in partnership with her husband … [W]e require you to confirm by return against whom the claim is being brought and why. We are firmly of the opinion that your client's alleged claim is against [Mrs Morris] and/or [Mr Morris] individually. Our client[s] did not purchase any of the liabilities of AH Brooks & Co and as such (sic) we require confirmation that the claim is not being brought against our clients individually. "

35. In response, on 3 September 2009, the claimant's solicitors wrote:

> "… it seems to us that you are currently on the record as acting on behalf of all those persons who have been partners in the firm since 1990.
>
> It is entirely proper for the claimant to have commenced proceedings in the name of the firm. It is simply not within the claimant's knowledge as to the comings and goings within the partnership nor of any distinction (which is not made on the letterhead) between equity and salaried partners. "

The letter went on to request a copy of the agreement for purchase of the business, and details of the names and status of all the salaried and equity partners since 1990.

It seems to have been the first mention of the possible relevance of any person being a salaried partner.

36. The information requested was provided in a letter dated 21 September 2009 which went on to say "in the light of the above information please could you identify those individuals whom you consider to be defendants in this case." The claimant's solicitors considered their position and on 27 October 2009 replied:

> " it is perfectly in order, and common practice, for proceedings to be issued against a firm rather than the individual partners.
>
> It is a matter for the partners, current and former, to determine between themselves as to how they defend the proceedings and which of them are potentially liable to settle any judgment which might be obtained.
>
> The CPR provides a mechanism for a partnership defendant to provide, post judgment, a partnership management statement setting out who was a partner and for what period, which will of course be relevant for the purposes of enforcement. We do accept, of course, that any judgment obtained in these proceedings would not be enforceable against those who were not partners at time of accrual of the causes of action in question. ..
>
> The current partners names appeared, we understand, on the Partnership letterhead notwithstanding that they may at the time had been salaried rather than equity partners. It is for the current partners to set out why they say they have no liability and why they said they were not held out as equity partners at the time the causes of action accrued. As things stand we are not persuaded that they have done the latter...
>
> Finally, we agree that the issue of whom this claim is brought against is something that will need to be discussed at the forthcoming CMC. Our position, however, is that it is an internal matter to be dealt with by your client and that it is not for our client to amend his statement of case. "

37. The CMC referred to took place on 20 November 2009. At it, Mr Picton, who then appeared for the claimant, referred to "those parties who are current partners but may or may not have been partners at the date the cause of action I rely on accrued" and told the district judge that Mr Pipe's position for the current partners was that he wanted to amend the defence "because he wants to show me why I should somehow or other as it were exonerate his two partners from his liability in relation to my claim." In fact, Mr Pipe said that Mrs Williamson and Mr Chiverton were only salaried partners, i.e. employees, from 2001 and 2005 respectively and that so far as they were concerned "Everything prior to that date, because they are not partners… should be knocked out." Mr Picton appeared to treat the question whether or not those individuals were partners at the date of accrual of the cause of action as relevant only to enforcement, and in any event, following the line taken in the solicitors' correspondence, that this was an internal matter for the defendants. In the end, the district judge accepted his suggestion made in the following submission: "… if he [Mr

Pipe] wants to put forward arguments to the effect that I cannot enforce a judgment against the people he represents, then the appropriate way would be not to amend the existing defence on behalf of the firm… but to join his people as defendants… and put in a pleading on behalf of those individuals."

38. There was then a further hearing before me in two parts on 21 December 2009. In the first part, I granted an application that Taylor & Emmet be removed from the record as acting on behalf of anyone other than Mr Chiverton and Mrs Williamson, and made directions designed to ensure that Mr and Mrs Morris, among others, were aware that they would need to take steps to defend the proceedings themselves or by separate representation. In the second part, Mr Picton appeared and the following exchange took place:

> " Judge Cooke: Mr Picton, do you accept that your claim is only against the former partners or do you maintain a claim against the present partners as well?
>
> Mr Picton: My Lord, the only issue in relation to current partners relates to holding out… it is probably a minor issue in relation to holding out, if I can be reassured about that, I certainly have no ambition to pursue the existing partners for the sake of it. My Lord, my aim has throughout being to bring proceedings against those partners who were liable based on when the cause of action accrued, that is what I have sought to do.
>
> Judge Cooke: Well you have to show not just that they were held out as partners, but that you relied on the fact that they were held out as partners.
>
> Mr Picton: My Lord, I would certainly have to show that, quite so… I stress my primary targets are not those people who are now the partners of the firm …"

39. At that date, therefore, the claimant was still maintaining that there might be a claim against the present partners. I gave directions at that hearing for an amended defence on their behalf, and for a reply to it, and permitting the Part 20 proceedings. That reply was served in February 2010, and admitted that the present partners were not partners in the firm prior to March 2008. It also contained a heavily qualified admission as follows:

> " if as the Part 20 claimants allege, they were not partners in the firm of A H Brooks & Co at the date on which the claimant's cause of action accrued and if, as the Part 20 claimants contend, they have assumed no liability, contractual or otherwise, for the acts or defaults of former partners, then the Part 20 claimant have no reason to participate in these proceedings. "

This plainly did not amount to an acknowledgment that there was no claim against the present partners; it was not specific as to when the cause of action was said to have accrued, did not admit when the present partners became partners and appeared to hold out the possibility of a claim on the basis that the present partners had in some way assumed liability for the acts or defaults of their predecessors.

40. The claimant did not state his position unambiguously until 18 May 2010 when he served, at my direction, a written statement of his case as to limitation. In that document (page 158) he said "for the avoidance of doubt, the claimant's claim is not directed against the firm of A H Brooks & Co as presently constituted or against the individuals who became equity partners in the firm pursuant to a sale agreement entered into on or about 13 March 2008".

41. This sequence of events seems to me to show that the claimant's solicitors went out of their way to indicate in the initial correspondence that the claim was being asserted against the present partners. The impression is given that they believed, mistakenly, that the present partners would be liable for any obligations incurred by the firm, even if they were not partners at the time.

42. They hinted that they were involving the present partners to put pressure on them to get information from Mr & Mrs Morris. When they began to enquire as to whether the present partners were equity or salaried partners at particular dates, they did not for a long time accept that the information they were given meant that no claim could be made against those partners. Although they never positively asserted a claim based on salaried partners being held out as equity partners, and certainly did not plead such a claim, the possibility of it was clearly hinted at in the correspondence, and maintained as late as the hearing before me in December 2009. Although Mr Picton accepted at that hearing that it would be necessary to show reliance, no such recognition appears anywhere in the correspondence, and no suggestion has ever been made, let alone pleaded, that the claimant took any step in reliance on it having been held out that Mr Chiverton or Mrs Williamson was a partner in the firm. At the hearing before the district judge, the claimant appeared to treat the question whether the present partners were partners at the date of accrual of the cause of action as relevant only to enforcement, stating wrongly that a partnership membership statement was obtainable only after judgment. Far from making it clear that no claim was pursued against the present partners, the claimant's advisers did everything they could to hold out the possibility that it would be, until they finally could do so no longer and accepted the inevitable in May 2010.

43. In such circumstances, it was clearly reasonable for the present partners to take steps to ensure that a defence was filed that would protect their position. Further, the claimant expressly sought directions that they should become parties to the action, and cannot now complain that costs were incurred in so doing. So far as the Part 20 proceedings are concerned, it was reasonable for the present partners to seek an indemnity or contribution from those who were equity partners at the time any of the relevant causes of action accrued, namely Mr & Mrs Morris, Roger Brooks and the estate of Mr Short. A Part 20 claim was also made against Mr Hallen, who was only ever a salaried partner. This in my view was less obviously reasonable, but after some consideration I have come to the view that it was, because if a claim had succeeded against Mr Chiverton and Mrs Williamson on the basis that they were held out as partners, a contribution might have been claimed from Mr Hallen on the basis that he would have been also liable for the same loss, had a similar claim been made against him.

44. For these reasons, I will make an order that the claimant pays the costs of the present partners reasonably incurred in relation to the claim, on the standard basis. Mr Pipe accepted that this would be subject to a qualification in respect of the order I made previously in respect of the costs of and occasioned by the amendment to his clients'

defence. I do accept Mr de Freitas' submission that it is not appropriate to make any order striking out proceedings against the present partners, since the effect of the concessions that have now been made is that it is clear that they are not after all parties to the main claim. It is sufficient that my order made in May of this year recites that the claimant accepts that the causes of action asserted in the particulars of claim do not lie against Mr Chiverton and Mrs Williamson.

45. So far as the Part 20 proceedings are concerned, since it is clear that the present partners cannot be made liable in the main action, subject to what I say below the Part 20 proceedings brought by them should be dismissed. It would be appropriate to state expressly that this order is made on the footing of the acceptance by the claimant referred to above.

46. The exception is in relation to the Part 20 proceedings against Mrs Morris, insofar as an indemnity is claimed against her pursuant to the business sale agreement. That claim is in principle maintainable in respect of the costs which the present partners have incurred, even though it has been established that they are not in fact under any liability in the main claim.

47. So far as the costs of the Part 20 claims are concerned, and subject to the exception above, the Part 20 defendants are entitled to their costs. An order could be made on one of two bases, either that those costs be paid by the present partners as the Part 20 claimants, and recovered by them as part of the costs order against the claimant in the main action, or alternatively an order could be made directly against the claimant. In my judgment, the normal order in such cases should be that costs of the Part 20 proceedings are in the first instance to be paid by the parties to those proceedings, and accordingly the appropriate order would normally be on the first basis. That is the order that I will make in respect of the Part 20 defendants other than Mr and Mrs Morris, the costs to be assessed in detail on the standard basis if not agreed and to form part of the costs ordered against the claimant in favour of the present partners.

48. In the case of Mr Morris, he indicated that he would prefer to pursue his costs directly against the claimant. In doing so, of course, he would forgo the opportunity to recover against the present partners, should they turn out to be better able to pay. Such an order is in my view available in principle and given that it was Mr Morris's preference, that is the order that I will make in his case. Those costs also will be assessed in detail, on the standard basis, if not agreed.

49. So far as Mrs Morris is concerned, her costs in relation to the Part 20 proceedings will relate partly to the contractual claim against her, and partly to the claim for a contribution or indemnity on general principles. The order for costs in her favour is limited to the latter element. There will be questions of apportionment of her costs, and other issues between her and the present partners which will not be resolved until the contractual claim against her is resolved. The order I am minded to make is that assessment of the costs ordered in favour of Mrs Morris be deferred until the conclusion of the Part 20 claims against her, and that the order in her favour is without prejudice to the claim for a contractual indemnity from her in respect of the same costs, but I will hear submissions if the parties say I should make a different order.

50. I will list a short hearing in Birmingham at which this judgment can be handed down. If the parties are able to agree the resulting order, then there need be no attendance. If they are not, or if substantial argument is required on any matters arising, the parties

should seek to agree a time estimate and I will list a separate, later, hearing for those matters to be dealt with. It will be convenient to deal with the adjourned summary judgment application against Mrs Morris at the same time.