OUTER HOUSE, COURT OF SESSION

[2021] CSOH 64

CA120/20

OPINION OF LORD ERICHT

In the cause

JOHANN MAXIMILIAN HERBERSTEIN

Pursuer

against

(FIRST) TDR CAPITAL GENERAL PARTNER II LP; (SECOND) TDR CAPITAL GENERAL PARTNER II LIMITED; (THIRD) TDR CAPITAL GP LLP; (FOURTH) TDR CAPITAL LLP

Defenders

Pursuer: Lindsay QC; Addleshaw Goddard
Defenders: Thomson QC; Burness Paull LLP

18 June 2021

Introduction

[1] The pursuer is a limited partner in a limited partnership registered in Scotland under the Limited Partnerships Act 1907. The pursuer is concerned that he has not received all of the allocations and distributions that he is entitled to receive in terms of the Limited Partnership Agreement, and that the value of his interest in the limited partnership has not been valued in accordance with the relevant provisions of the Limited Partnership Agreement. He has brought an action of count, reckoning and payment against the limited partnership (the first defender) and the general partners (the second, third and fourth

defenders). The pursuer seeks count and reckoning by the general partners for their intromissions with the assets of the limited partnership in order that the true value of the pursuer's interest in the limited partnership may be ascertained and the true balance of allocations and distributions due to the pursuer in terms of the Limited Partnership Agreement may be ascertained and for payment of the balance due, and alternatively for payment of €2,756,693.

[2] The cause called before me for debate on the defenders' motion to dismiss the action and the pursuer's motion to ordain the second, third and fourth defenders to lodge an accounting.

Statutory provisions

Partnership Act 1890

[3] Section 19 provides:

> "**19. Variation by consent of terms of partnership**
> The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either by express or inferred from a course of dealing."

[4] Section 28 provides:

> **"28. Duty of partners to render accounts, &c**
> Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives."

[5] Section 46 provides:

> "**46. Saving for rules of equity and common law**
> The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act."

The Limited Partnerships Act 1907

[6] Section 6 of the Limited Partnerships Act 1907 provides:

> "**6. Modifications of general law in case of limited partnerships**
> (1) A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm:
>
> Provided that a limited partner may by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business, and may advise with the partners thereon.
>
> If a limited partner takes part in the management of the partnership business he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner."

[7] Section 7 provides:

> "**7. Law as to private partnerships to apply where not excluded by this Act.** Subject to the provisions of this Act, the Partnership Act 1890, and the rules of equity and of common law applicable to partnerships, except so far as they are inconsistent with the express provisions of the last-mentioned Act, shall apply to limited partnerships."

[8] The provisions of the 1907 Act were modified in certain respects by the *Legislative Reform (Private Fund Limited Partnerships) Order 2017*. The modifications disapply certain provisions of the 1890 and 1907 Acts to a "private fund limited partnership" which is defined in section 3 of the Act as a limited partnership that is designated under section 8(2) as a private fund limited partnership. The first defender has not been so designated, and accordingly the 1890 and 1907 Acts apply to the first defender without such modifications.

Limited Partnership Agreement

[9] The pursuer and the second, third and fourth defenders are parties to a Limited Partnership Agreement (the LPA) dated 2 June 2006 and amended and restated on 20 March 2007, 23 December 2009, 2 February 2012 and 16 October 2013.

[10] The LPA states:

> **"1.1 Nature**
>
> The Partnership is a limited partnership and has been registered in Scotland pursuant to the Act and accordingly section 6(5)(c) of the Act and section 33(2) of the Partnership Act 1890 shall not apply to the Partnership and are expressly excluded."

[11] Clause 1.2 provides:

> "**1.2 Purpose**
>
> The purpose of the Partnership is to carry on in Scotland and elsewhere the business of a general partner in the Fund Partnerships, to hold and benefit from an investment as Founder Partner in each of the Fund Partnerships (subject to and in accordance with the Fund Partnership Agreements), to hold and benefit from an investment as a Co-Investor pursuant to the Co-investment Agreement and any additional business which the Manager considers appropriate business for the Partnership. The business of the Partnership shall be carried on with a view to producing profits for distribution in accordance with this Agreement. Subject to the terms of this Agreement, the Partnership may execute, deliver and perform all contracts and other undertakings and engage in all activities and transactions as may in the opinion of the Manager be necessary or advisable in order to carry out the foregoing purposes and objectives."

[12] Clause 2.3 provides:

> "**2.3 Restriction on the Limited Partners**
>
> The Limited Partners shall take no part in the operation of the Partnership or the management or control of its business and affairs, and shall have no right or authority to act for the Partnership or to take any part in or in any way to interfere in the conduct or management of the Partnership or to vote on matters relating to the Partnership other than as provided in the Act or as set forth in this Agreement but they shall at all reasonable times, have access to and the right to inspect the books and accounts of the Partnership."

[13] Clause 7.2 provides:

> "**Clause 7.2 Accounts of the Partnership and the Fund Partnerships**
>
> **7.2.1** The Manager shall prepare accounts of the Partnership for each Accounting Period, including a balance sheet, profit and loss account, a statement of the sources and applications of funds, a statement of the amount of the income accounts, capital accounts, loan accounts and capital contribution accounts of each Partner and a summary of movements in such accounts. The Manager shall cause such accounts to be audited by the Auditors. If requested by a Limited Partner a copy of the audited accounts as set out above including the report of the Auditors and a statement of

accounting policies shall be despatched to such Limited Partner as soon as reasonably possible following the finalisation such audited accounts.

7.2.2 A copy of the audited accounts for the Fund Partnerships prepared by the Manager in accordance with the relevant Fund Partnership Agreement (including the report of the auditors) and a statement of accounting policies (if any) shall also be made available to each Limited Partner who requests a copy as soon as reasonably practicable following the finalisation of such audited accounts."

[14] Clause 7.3 provides:

"**7.3 Accounts of the Partners**

The Manager shall maintain separate accounts in respect of each of the Partners. Such accounts shall (if applicable) include a capital account, an income account, a capital contribution account and, where appropriate, a loan account."

Submissions for the defenders

[15] Senior counsel for the defenders submitted that while the defenders accepted that they were under an obligation to account to the pursuer, the nature of that obligation to account was clearly delineated by the terms of the Limited Partnership Agreement, and the pursuer required to establish the nature and scope of the particular obligation to account upon which he founded. The action should be dismissed for want of relevant averments concerning the nature and scope of the obligation to account. The real dispute between the parties was as to what documents and information properly fell within the scope of the obligation to account. In the absence of relevant and specific averments as to the nature and scope of the obligation to account the accounting sought by the pursuer would be a "futile proceeding" (*Hutcheson & Co's Administrator* v *Taylor's Executrix* 1931 SC 484, 492, Walker, *Civil Remedies*, 304; MacFadyen, *Court of Session Practice*, para [2052], *Mitchell* v *Glasgow City Council* 2009 SC (HL), 21, 26-27, *Davidson & Begg Antiques Limited* v *Davidson* 1997 SLT 301, 305). *Coxall* v *Stewart* 1976 SLT 275, 278 should not be followed as it is contradicted by *Davidson & Begg Antiques* and *Cunningham-Jardine* v *Cunningham-Jardine's Trustees* 1979

SLT 298, and the authorities relied on by the Lord Ordinary in *Coxall* v *Stewart* do not support the Lord Ordinary's proposition.

[16] Counsel further submitted that clauses 7.2 and 7.3 of the Limited Partnership Agreement set out the limit of the pursuer's contractual entitlement to the provision of information and documentation. It was a fundamentally important aspect of the context that the pursuer is a limited partner in an investment fund, and the pursuer has no role, or right to be involved in or question, the investment strategy. The defenders had produced certain documents to the pursuer without obligation to do so. The pursuer was requiring the defenders to create documents which did not otherwise exist in order to satisfy his wish to be placed in a position to question and interrogate the investment strategy.

[17] Counsel also criticised a number of particular averments and submitted that they should not be admitted to probation.

[18] Further, counsel submitted that the pursuer's averments concerning the Limited Partnerships Act 1907 and the Partnership Act 1890, section 28 were irrelevant as the accounting which the pursuer seeks is under the Limited Partnership Agreement, not under either of these acts. In any event, the agreement makes specific provision about the nature of the parties' rights and obligations in relation to documentation and information, which take effect in priority to the default statutory provision.

[19] Counsel further submitted that *Sim* v *Howat* [2012] CSOH 171 and *Inversiones Frieira SL and another* v *Colyzeo Investors* II LP [2012] BUS LR 1136 were not binding on this court. In any event *Inversiones* should be distinguished as a case on its own facts, and was in any event wrongly decided. *Sim* v *Howat* was not authority for the proposition advanced by the pursuer. In any event, *Inversiones* does not support the pursuer's case. The pursuer's assertion that it is not possible to "contract out" of the 1890 Act and 1907 Act is at odds with

the scheme of these statutes and the general principles of statutory construction (Bennion, Bailey and Norbury, *On Statutory Interpretation*, section 9.6). It is possible for parties to contract out of the 1890 and 1907 Acts and that is precisely what the parties did in terms of the Limited Partnership Agreement. Were it otherwise, the very purpose of using limited partnerships (especially Scottish limited partnerships) as the vehicle for investment funds would be put at risk. It was not legitimate to use the *Legislative Reform (Private Fund Limited Partnerships) Order 2017* for the purpose of construing the Acts (*Knight* v *Goulandris* [2018] 1 WLR 3345), and if it was this favoured the defenders.

[20] Counsel further submitted that his averment that the pursuer was motivated by the manifestly improper purpose of seeking to have his interest in the first defender bought out at a more advantageous price than would otherwise be available to him, or which would be available to other limited partners in the same or a comparable position was relevant: it could not be said that the defenders are bound to fail in establishing improper purpose. Even if *Inversione*s correctly states the English law, it does not follow that the position is the same in Scots law. An action of accounting is a mixture of an action *ad factum praestandum* with an action for a payment (Walker, *Civil Remedies* page 304) and the court should exercise its equitable discretion to refuse a decree *ad factum praestandum* (Walker, *Civil Remedies*, pp 280-282, *Highland and Universal Properties Ltd* v *Safeway Properties Ltd* 2000 SC 297).

Submissions for the pursuer

[21] Senior counsel for the pursuer submitted that as the defenders admit they are under an obligation to account and assert they have fulfilled this obligation by producing certain documents in lieu of accounts, the "second stage" of procedure in an act of count, reckoning and payment had been reached. Further, the defenders' averments relating to the allegedly

limited scope of their obligation to account and to the pursuer's alleged "manifestly improper" purpose in seeking an accounting were wholly irrelevant and ought not to be admitted to further enquiry, whatever form that may take.

[22] Counsel submitted that the defences were wholly irrelevant because they proceeded on the legally erroneous basis that the defenders' obligation to account was restricted to the contractual obligations in clauses 7.2 and 7.3. It was not possible for parties to a limited partnership agreement to contract out section (6)(1) of the 1907 Act and section 28 of the 1890 Act. In any event, clauses 7.2 and 7.3 impose obligations to prepare and produce documents and do not deal with the underlying obligation to account for intromissions. A partnership is a contract of the utmost good faith and section 28 and 6(1) required to be interpreted in that context (*Sim* v *Howat* at para [39]). The pursuer's position gained support from *Inversiones*. The 2017 Order could be used as an aid to interpretation (*Stair Memorial Encyclopeadia* vol 12 paragraph 1160) and the inference from the 2017 Order, which expressly disapplied section 28 in respect of private fund limited partnerships, was that it was not disapplied in respect of other limited partnerships.

[23] Counsel further submitted that *esto* the defenders' obligation to account was limited to the contractual obligations in clauses 7.2 and 7.3 of the LPA the pursuer did not accept that the defenders had fulfilled these obligations and therefore had the right to raise objections to the documents produced.

[24] Counsel further submitted that a defenders' averments relating to the pursuer allegedly being motivated by a manifestly improper purpose were irrelevant. The question of motive or purpose is irrelevant to the exercise of a statutory right of access to the partnership books and a right to an accounting (*Linley & Banks on Partnership*, paragraph 22-19; *Inversiones*).

[25] Counsel further submitted that there was no merit in the defenders' submissions relating to the alleged irrelevancy and lack of specification of certain of the pursuer's averments. The condescendence and answers in the first stage of an action of count, reckoning and payment are concerned only with the defenders' liability to account (MacFadyen *Court of Session Practice* para [2061]) and the pursuer's pleadings complied with that.

Analysis and decision

[26] An action for count, reckoning and payment is a procedure in the Scottish courts whereby a person can compel payment of sums due to him in circumstances where he is not aware precisely what sum is due. The defender is required to account for his intromissions and to pay the balance found due. It is typically used in situations where the defender has been intromitting with funds the income or capital of which should (in whole or part) have been transferred to the pursuer. For example, a beneficiary may seek payment of the correct amount due from an estate controlled by executors, or a partner may seek payment of the correct amount due from a partnership. Title to sue is restricted to persons, such as trust beneficiaries or partners, who have a financial interest in the accuracy and honesty of the intromissions by the defender (Walker, *Civil Remedies* p 305).

[27] There are two stages to the procedure. In the first stage, which proceeds by way of summons and defences, the pursuer asks the court to order the defender to produce an account of his intromissions so that the true balance due to the pursuer may be ascertained. The summons in the first stage is concerned only with whether the defender is liable to account to the pursuer: the summons should not contain averments anticipating objections to an account (*Worbey* v *Elliott* [2014] CSOH 19). If, at debate or proof on the summons, the

pursuer establishes an obligation to account, then the court will order the defender to lodge what accounting he can of his intromissions and procedure moves to the second stage. The purpose of the second stage is to ascertain what (if any) sum is due to the pursuer so that the court can grant decree for payment of a specified sum. As Walker puts it "The real question is how much, if any sum, the defender justly owes the pursuer not whether the books were properly kept" (p 306). If the pursuer is not content with the accounting lodged by the defender, then the pursuer may challenge the accounting. The pursuer does so by lodging a Note of Objections to which the defender lodges Answers and the court then rules on the objections and ascertains the precise amount due.

[28] Although the partnership in question in this case is a fund, it does not fall within the special statutory regime for private fund limited partnerships as it has not been designated as such in terms of the 1907 Act. The general law of Scottish limited partnerships applies, including the Scots common law which has been preserved by section 46 of the 1890 Act and section 7 of the 1907 Act. In support of his submission that the action should be dismissed, senior counsel for the defenders advanced an argument that otherwise the very purpose of using limited partnerships (especially Scottish limited partnerships) as the vehicle for investment funds would be put at risk. I find that argument unpersuasive. In structuring a fund, there can be advantages in choosing to use a Scottish limited partnership vehicle because under Scots law, unlike English law, partnerships have separate legal personality. Where parties choose to use a Scottish limited partnership vehicle, then Scots law applies to that vehicle and the investors must accept the consequences of that choice. It is fundamental to the Scottish law of partnership that partners must act with what is traditionally referred to as "exuberant trust" (Clark on *Partnership* p 182), although modern authorities often use the phrase "utmost good faith". A Scottish limited partnership is subject to the jurisdiction

of the Scottish courts and an action of count, reckoning and payment can be brought in order to determine the amount due to a partner.

[29] The purpose of an action for count, reckoning and payment is not the provision of documents, but the payment of sums due. The provision of an accounting by the defender is not the be all and end all of the action, but only a procedural step which provides the pursuer with a document or documents which he can challenge by way of a Note of Objections as a starting point to the process of the ascertainment by the court of what (if any) payment is due. That is a different purpose from the *Inversiones* case, where the issue before the court was "to what documents can a general partner be ordered to provide access to limited partners in order that they may understand the business in which they have invested" (*Inversiones*, second judgment, paragraph 1). Here the pursuer is not seeking to understand the business, but to be paid what is due to him.

[30] I do not see any advantage in this case in departing from the normal two stage procedure. This is not a situation such as that discussed in *Cunninghame-Jardine* at p 299 where the pursuer has received accounts and is in as good a position to formulate his claim in the summons as after the formal lodging of accounts: in the current case the defenders did not make available certain of the pursuer's individual capital accounts until after the end of the adjustment period. The pursuer is following the normal and proper course of not setting out his challenges in the summons but instead bringing focussed challenges in the form of objections in the Note of Objections. Until these objections (whatever they may be) are before the court it would be premature for the court to deal substantively with matters relating to them.

[31] The only question for me at this stage is whether the defenders owe a duty to account to the pursuer. In my opinion they do. It is trite law that partners in a partnership,

including a limited partnership, owe a duty to account to the other partners. The issue in this case is whether the partners have contracted out of that duty in terms of the LPA, and in particular clauses 7.2 and 7.3. In my opinion the contractual wording in the LPA does not have that effect. These clauses regulate the administrative accounting procedures of the partnership and the mechanics of producing partnership accounts and making them available to the partners. The wording of clause 7.2 merely provides for the preparation and auditing of partnership accounts and for partnership accounts to be available to a limited partner on request. The wording of clause 7.3 merely provides for the maintenance of separate accounts for each partner. The wording of these clauses does not displace the legal obligation of a partner at common law to account to the other partners. It does not displace the legal obligation of the partners under section 28 to render to each other accounts that are true. A partner has an interest in the accuracy and honesty of his partners' intromissions with partnership funds. The real question in this action is not whether partnership accounts and his individual partner accounts were prepared and made available to the pursuer, but what sum (if any) the defenders justly owe to the pursuer. Accordingly I shall allow this action to proceed to the second stage. I reserve my opinion on whether it is ever competent to contract out of section 28 or the common law obligation to account, as that issue does not arise on the wording of this particular partnership agreement.

[32] I do not require to consider whether to exclude particular averments in the summons from probation as no proof will take place on the summons. If parties are of the view that any of the issues raised in these particular averments are of relevance in determining what sum (if any) the defenders owe to the pursuer, then they should raise them in due course in the Note of Objections or Answers.

[33] I shall ordain the second, third and fourth defenders to intimate and lodge in process an Accounting within 2 weeks, allow the pursuer 3 weeks thereafter to lodge a Note of Objections to the Accounting and then allow the defenders 3 weeks to lodge Answers to the Note of Objections, after which there will be a By Order hearing to discuss further procedure. I reserve all questions of expenses in the meantime.