

ENGLAND AND WALES / JUDGMENT

Robin Steve Harry Holden v David Andrew Holden & Anor

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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES BUSINESS LIST (ChD)
Claim No: BL-2021-002290
Rolls Building
Fetter Lane
London, EC4A 1NL
20th December 2023

Before : MR NICHOLAS THOMPSELL
sitting as a Deputy Judge of the High Court

Between : ROBIN STEVE HARRY HOLDEN
Claimant
- and -
(1) DAVID ANDREW HOLDEN
Defendants
(2) NICHOLAS CHARLES HOLDEN

Ms Tiffany Scott KC (instructed by Howes Percival LLP) appeared for the Claimant
Mr Andrew Marsden (instructed by Greene & Greene Solicitors)
appeared for the First Defendant
Hearing dates: 23rd – 27th October 2023

JUDGMENT

Approved Judgment Holden v Holden and Holden Mr Nicholas Thompsell: 1. 1. 2. 3. 4. 2. 5.

INTRODUCTION

This case concerns the dissolution of a farming partnership (the "Partnership") that subsisted among three brothers. The partners were the Claimant, Mr Robin Holden; the First Defendant, Mr David Holden; and the Second Defendant, Mr Nicholas Holden. For convenience, and intending no disrespect, I will refer to the three brothers by the names they use amongst themselves: "Robin", "David" and "Nick". Nick was not represented at the trial. He had served a limited Defence and otherwise had taken no active part in these proceedings. It is understood that he wishes to remain neutral. Following the Order of Deputy Master Collaço Moraes (the "CCMC Order") made on 6 October 2022 following a Costs and Case Management Conference held on 28 September 2022, the matters before me at this trial include the following preliminary issues as to liability: i) ii) Robin's claims for a declaration that the Partnership was a partnership at will and David's counterclaim that the terms governing the Partnership are those set out in a written draft partnership deed (the "1990 Draft Deed") (as later amended in manuscript); and Robin's claim that he is entitled to an amendment of the revenue accounts of the partnership and David's counterclaim that Robin is bound by those accounts. The CCMC Order also ordered for this trial to deal with a number of subsidiary matters that were or may have been relevant principally to the issue of reopening accounts. On the first day of the trial, counsel on each side raised arguments as to the extent that such matters should be dealt with at this stage. I gave a short judgment on this at the commencement of the second day of the trial and this is summarised in section 2 below. At the trial the Claimant was ably represented by Tiffany Scott KC of counsel, and the First Defendant was no less ably represented by Mr Andrew Marsden. The court is obliged to both counsel for their learned and helpful submissions both orally and in writing. FIRST DEFENDANT'S INFORMAL APPLICATION Before commencing with evidence in this trial, I was required to rule on matters arising from an informal application made on behalf of the First Defendant in Mr Marsden's Supplementary Skeleton Argument. This was the subject of substantial representations from both sides on the first day of trial. Page 2 Approved Judgment Holden v Holden and Holden 6. The First Defendant had complained of two problems which he had said arose from the Claimant's Skeleton Argument. These were as follows: i) ii) it did not deal with any of the so-called subsidiary issues to be tried – only the main ones; and it made submissions on issues that had not been pleaded and it included allegations of fraud and dishonourable concealment. In a considered judgment that I delivered orally at the beginning of the second day of the hearing, I dealt with these two points, in summary, as follows. The subsidiary issues As regards the so-called subsidiary issues, I considered these items individually as I explain further below. Overall, I accepted the Claimant's submission that, notwithstanding the terms of the CCMC Order, which provided that the issues arising from those paragraphs should be dealt with at this trial, these matters ought to be considered only insofar as they are relevant to liability in respect of what I described as the two "principal issues". The first of the

principal issues is the question whether the Partnership was a partnership at will, governed by the Partnership Act 1890 and the terms agreed at a meeting on 10 October 1989, rather than under the terms of the 1990 Draft Deed that had been produced but was not signed. I will call this the "governing terms issue". 7. 8. 9.

10. The second principal issue was the relief sought by the Claimant for the accounts to be reopened and drawn up on the basis of the correct governing terms. I will call this the "reopening accounts issue". 11. I dealt with the individual subsidiary issues as follows: The improvements issue
12. Robin had complained that the Partnership had paid for improvements to David's land including a borehole. The nub of the complaint seemed to be that David had agreed to grant a perpetual easement attaching to the partnership land in return for these payments. This was a point that Robin had not pleaded. I agreed with Ms Scott, that this issue was not relevant to the governing terms issue. If it is relevant at all, it goes to quantum rather than liability in relation to the reopening accounts issue. Therefore, it was not directly relevant to the liability issues that I was to decide at this stage. Page 3 Approved Judgment Holden v Holden and Holden The sugar beet issue
13. A second issue related to whether the final accounts dealt with the correct acreage of sugar beet being farmed. This issue was not relevant to the governing terms issue. On examination, it seemed it was not even relevant to the reopening accounts issue since the accounts where this may be relevant to have not yet been settled. The Claimant may wish to pursue this issue in relation to the settling of the final accounts for the Partnership, but there was no need for me to deal with this at this hearing. The holding of funds issue
14. Robin had complained that David had placed partnership money in accounts in his own name. David (with some corroboration from the partnership accountant, Mr Boreham) argued that these amounts and any interest on them had been fully accounted for to the Partnership.
15. There was no evidence before the court that the Partnership had suffered from this issue or that this issue had caused the accounts to be misstated.
16. David also had made the point that Robin had had all the bank statements, accounts and accountant's working papers and has had several years to check whether all the monies placed in a sole account had been properly accounted for.
17. This issue potentially had two points of relevance to the dispute. 18. 19. 20. First, it potentially went to liability in relation to the reopening accounts issue through the possibility that the Claimant could use these issues to demonstrate a multiplicity of errors in the previous partnership accounts, and that this might have bolstered the case for those accounts to be reopened. Secondly, it went to quantum in relation to the effect they might have on the previous accounts if they are to be reopened. I ruled that, if Robin was intending to use the holding of funds issue at this trial to bolster his case at this hearing on the

reopening of accounts issue, the arguments and evidence relied upon to establish this point should have been dealt with properly in the Claimant's Skeleton Argument or otherwise put clearly in evidence. The Claimant should have been much clearer in explaining the evidence that this issue has led to the accounts being based on an error. Whilst I did not accept the First Defendant's invitation to strike out the references in the Particulars of Claim to this matter, I considered that it should not be dealt with substantively during this stage of the proceedings. Page 4 Approved Judgment Holden v Holden and Holden 21. I explained, however, that if the result of the liability trial were to be that I were to order the partnership accounts to be reopened, then there was no reason why the Claimant may not make arguments based on this issue at that stage. The invoices issue

22. The final subsidiary issue was the invoices issue. This was the Claimant's allegation that invoices paid by the Partnership to the First Defendant's company were improperly issued as they did not reflect any practice agreed among the partners and therefore caused the profits to be misstated and misallocated. 23. In relation to this issue, I considered that the Claimant had advanced a clear enough case that the First Defendant would understand so that he would be able to prepare properly to defend himself against the allegation. As with the holding of funds issue, this point was potentially relevant both to liability in relation to the reopening of accounts issue and in relation to quantum if the accounts are to be reopened. I ruled that the point could be argued at this stage of the trial as a liability issue in relation to the second of the principal issues. If the Claimant demonstrated that the account should be reopened, then the quantum of this issue would fall to be determined at the next stage of the proceedings when quantum matters were to be determined. Generally 24. I clarified that, where I had stated that I would not expect an issue to be dealt with substantively during this stage of the proceedings, that did not prevent the issue being discussed at all at this stage. It could still be discussed, where appropriate, for the purposes of testing the credibility and consistency of witnesses, but just not for the purpose of establishing these points as part of the case relating to liability. The unpleaded points
25. There were three points in the Claimant's skeleton argument that the First Defendant claimed were new unpleaded points. On examination, I did not see that there was anything new in two of these points: they were natural developments of the Claimant's pleaded case and there was no need for me to make any finding in relation to them.
26. The third point was that there seemed to be a suggestion in the Claimant's skeleton argument that the Claimant might wish to pursue arguments based on fraud. I agreed with Mr Marsden that allegations of fraud had not been sufficiently particularised for this point to be argued at trial. Any allegations of fraud, or fraudulent misrepresentation or dishonourable concealment amounted to new, unpleaded points and should not be pursued without the court approving Page 5 Approved Judgment Holden v Holden and Holden an amendment to the Particulars of Claim - which the court would be unlikely to approve at this stage. 3. THE EVIDENCE AND THE COURT'S APPROACH TO IT Evidence before the court

27. The court had before it a substantial trial bundle that included, as well as the pleadings and procedural documents relating to the earlier stages of this matter, witness statements from Robin, David, Malcolm Boreham (the accountant who dealt with the accounts of the Partnership), and Linda Dyer, who had the role of Assistant Finance Officer at David's company, Holden Plant Hire Limited and who also served as Farm Secretary for the Partnership. The bundle included also financial statements including partnership bank statements, partnership accounts and nominal ledgers, expert reports relating to the valuation of Flint Hall Farm; correspondence including contemporaneous correspondence and documentation and correspondence between the parties' solicitors.
28. Unfortunately, the bundle was missing some documents that would have been helpful so that there remained gaps that needed to be filled.
29. Robin, David and Malcolm Boreham all gave evidence orally. Linda Dyer was not required to attend to give oral evidence but there was no objection to her witness statement standing as her unchallenged evidence-in-chief. The court's approach to evidence
30. The facts in question that will determine the principal issues go back to 1989 and earlier. In such cases the court has to have regard to the fallibility of human memory and to consider how to deal with gaps in the documentation.
31. The approach that the court should follow in such cases was recently considered by Joanna Smith J at [18] onwards in *Bahia v Sidhu* [2022] EWHC 875 (Ch). This was a similar case relating to the dissolution of a partnership that had been formed decades earlier. I cannot do better than to set out in full her explanation of the court's approach. "18. In the circumstances, my assessment of the individual witnesses is particularly important in this case and, at the outset, I must have regard to the warnings as to the fallibility of human memory given by Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15]-[22], including the unreliability of memory when it comes to recalling past beliefs, the considerable interference with memory that may be introduced in civil litigation by the process of preparing for trial and the potential for powerful biases where witnesses have a stake in a Page 6 Approved Judgment *Holden v Holden* and *Holden* particular version of events. I bear in mind that the passage of time can cloud or distort memory and that it is unlikely to be the case that individual witnesses will be consistently reliable or unreliable. I also bear in mind that some witnesses may, for whatever reason, have better (or less fallible) recollections than others. 19 Given the lack of documentation in relation to various of the Inquiries, the approach advocated in *Gestmin* of testing the evidence against the contemporaneous documents is not always open to me in this case, or is of limited assistance. Instead, I must follow the guidance given by the Court of Appeal in *Natwest Markets Plc v Bilta (UK) Ltd (In Liquidation)* [2021] EWCA Civ 680 at [51] to the effect that faced with a documentary lacuna: "...the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and

the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was being challenged in cross-examination."

20. Mr Temmink QC, on behalf of the Bahias, also directed my attention to a passage in Phipson on Evidence 20th Ed. at 45-18 as to the approach to adopt when considering whether a witness is lying. The factors to be taken into account overlap with those that apply in assessing the reliability of a witness's account and are: "(1) the consistency or otherwise of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
- (2) the internal consistency of the witness's evidence;
- (3) consistency with what the witness has said or deposed on other occasions;
- (4) the credit of the witness in relation to matters not germane to the litigation;
- (5) lies established in evidence or in the context of the proceedings; Page 7 Approved Judgment Holden v Holden and Holden
- (6) the demeanour of the witness;
- (7) the inherent probabilities of the witness's account being true".
21. As to the demeanour of a witness, however, I accept Mr Clarke QC's submission, on behalf of the Sidhus, that it will generally be dangerous for the court to determine the reliability of a witness's evidence principally by reference to the impression created by his or her demeanour (see Phipson on Evidence at 45-22). There are numerous reasons for this which I need not elucidate further here, save to say that I bear in mind that peoples' mannerisms may differ as between individuals and as between cultures."
32. With these principles firmly in mind, I turn to consider the evidence of the witnesses.
Robin's witness evidence
33. Robin's witness evidence was of limited assistance to the court. His response to many, indeed perhaps the majority, of the questions put to him in cross-examination was that he could not remember. On a number of occasions he answered, "no comment", with the suggestion that he might have an answer but was choosing not to give it. He was ill at ease in the witness box, and allowances may be made for this causing him to be more guarded than he might be in other contexts.
34. The one point on which he was adamant was that he would only agree to a partnership that was "fair", but when challenged as to what he meant by this was unable to give very much of an explanation other than that he did not regard the termination provisions of the 1990 Draft Deed to be fair. 35. It was notable that some of Robin's oral evidence seemed to contradict the record. For example, he denied understanding or having been told the basis on which he had been allowed to occupy with his family the bungalow which David owned and had built

whilst there was clear documentary evidence that he had agreed the terms of a licence for this. David's witness evidence

36. David presented better as a witness, and clearly had a better grasp than Robin as to how the Partnership had been run from a financial position. It was clear that he had taken on himself the financial management of the Partnership, whilst Robin and Nick attended to the physical running of the farm. This was natural as he was clearly the more accomplished businessman certainly and he was in a Page 8 Approved Judgment Holden v Holden and Holden more solvent position to be able to support the Partnership with loans when this was needed from time to time.
37. David, I think on the whole credibly, could remember discussions about various aspects of the Partnership's running. His memory was far from perfect (as was understandable after so many years) and generally it was lacking in detail in relation to specific discussions, for example not being able to give a time or place where discussions that he remembered had taken place. This lack of detail, coupled with the observations in Gestmin, points to a need for caution in accepting his witness evidence, but I have no reason to believe he was not giving his evidence honestly. Malcolm Boreham's witness evidence
38. Malcolm Boreham was the accountant to the Partnership. He gave his evidence with generally quite good recall of detail. It was clear that he had been instructed in his role as partnership accountant by David and that he regarded David as the principal partner within the Partnership, rather than one partner amongst equals. There was a telling slip of the tongue where he referred to Robin as "the opposition", and it is appropriate that I regard him as David's witness, rather than as a neutral party.
39. Nevertheless, I formed the view that he gave his evidence honestly and to the best of his recall.
40. Having made these general comments, I turn to the agreed and disputed facts that were put before the court in relation to the formation and governance of the Partnership. 4. FORMATION OF THE PARTNERSHIP Events leading up to the Partnership 41. In July 1976, Mr Harry Eaton Holden, the father of the parties, died. There followed a lengthy dispute involving the parties and their three older half- brothers concerning his estate and in particular the fate of the farm, which he had been farming in partnership with other members of the family including Robin.
42. The parties, with the intention of forming a partnership to farm the family land, acquired from their father's estate Flint Hall Farm including the farmhouse, buildings and land. This was owned by Robin, David and Nick as tenants in common in equal shares. 43. It was some time, however before they could start farming the land. This was because the land was subject to a lease in favour of the former farming Page 9 Approved Judgment Holden v Holden and Holden partnership and there was a necessity to buy out this leasehold interest. This was partly financed by David's agreeing to purchase the farmhouse for his own use. David also allowed the Partnership to use 80 or 90 acres of adjacent land belonging to him

which he had separately acquired from the estate of Mr Holden senior. David makes the point that these three brothers' interests under their father's will did not allow them to secure all of Flint Hall Farm. That was only achieved because of David's extra financial resources and his willingness to risk his personal assets to secure the farmhouse and the 90 acres. Much later, in 1998 the Partnership purchased a further 100 acres of land known as Middle Harling Farm.

44. The parties agree that they were working together in partnership by November 1989.
1989. The contractual provisions relating to this partnership, however, are hotly disputed between the Claimant and the First Defendant. The 10 October 1989 meeting
45. On 10 October 1989 there was an important meeting involving the three brothers with the aim of agreeing the terms of the Partnership. The meeting was attended by the three brothers and by their respective solicitors. These were Mr Richard Freeman of Bankes Ashton on behalf of David; and Mr White of Cunningham, John & Co on behalf of Nick and Robin. Mr White was standing in for their usual representative, Mr David Cunningham of that firm. Mr White was accompanied by his assistant Louise (we do not have the assistant's second name).
46. Mr Freeman took a handwritten note of the meeting (the "Meeting Note"). The Claimant's case is that the terms agreed in the Meeting Note, taken together with the default terms for a partnership included in the Partnership Act 1890, governed and govern the Partnership as its constitution.
47. The Meeting Note was signed by each of the three partners and underneath their signature there was a rubric (in the handwriting of Mr Freeman) stating that: "This note together with my letter to White of 6 October 89 constitutes the agreed heads of terms between the parties, having contractual effect."
48. Mr Freeman and Mr White then signed underneath that rubric. It is unfortunate that there is no existing copy of the letter to Mr White referred to in the rubric.
49. David agrees that the Meeting Note was intended to govern the relationship between the Partners pending the drafting of a formal partnership agreement or deed. However, he argues that this was essentially to "hold the ring" while that agreement was prepared. It clearly was intended that there should be a proper Partnership Agreement. David's case is that a replacement Partnership Page 10 Approved Judgment Holden v Holden and Holden Agreement, in the form of the 1990 Draft Deed was indeed agreed. Although it was not signed it was, on David's case, agreed and adopted by the three Partners in 1990 with some minor adjustments being made which David says were orally agreed between them.

50. Robin's case is that it simply was never agreed. I will expand later on the evidence and arguments supporting the parties' differing assertions on this point. The creation of the 1990 Draft Deed 51. It had been agreed that Mr Freeman of Bankes Ashton would prepare the Partnership Deed. He circulated a draft deed in early 1990. It has been assumed on all sides that this draft is the 1990 Draft Deed that was before the court.
52. Robin had no recollection of receiving the draft, but I think it is clear that he did receive it, or at the very least his solicitor received it and explained it to him. I think this because there is evidence that the solicitor had received instructions from Robin.
53. A fair copy of the draft Partnership Deed itself was kept by Malcolm Boreham, who was from an early point the partnership accountant. His evidence was that he was the person who made some handwritten annotations on that copy that varied some of the details of how the Partnership would operate. He appears to have done so on the instructions of David and without himself consulting with the other partners. However, it was his understanding (based on what he had been told by David) that the amendments he was making were or would be agreed by the other partners. I will consider the individual amended provisions further below.
5. DIFFERENCES BETWEEN THE MEETING NOTE AND THE DRAFT DEED
54. Whilst, as one would expect, there was a large degree of overlap between the provisions for the running of the partnership contained in the Meeting Note and those contained in the 1990 Draft Deed, there were a number of important differences. Division of profits
55. The Meeting Note records agreement that before division of profits David would receive £5,000 each year for the use of the land and buildings that were owned by him. Robin and Nick would each receive a salary of £9,100 each, being the minimum agricultural wage of the time. Although not recorded in the Meeting Note, it was the common understanding of the partners that this remuneration was in return for Robin and Nick working full time on the farm whereas David, although he would contribute to the financial management of Page 11 Approved Judgment Holden v Holden and Holden the farm, would be free to pursue his own business interests (primarily through his company).
56. These terms were similarly dealt with within the 1990 Draft Deed, although later there was (in David's case) some amendment as discussed below and in the 1990 Draft Deed David's £5,000 a year was described as a salary rather than a payment for use of his land and it was treated as a first charge on profits, ahead of the salaries payable to Robin and Nick. Interest on capital
57. No term relating to payment of interest on capital introduced into the Partnership is in the Meeting Note, but such a term did appear in the 1990 Draft Deed. Partition and pre-emption provisions in the Meeting Note
58. The Meeting Note records a discussion as to the right of each partner to call for a partition of the partnership land and a right of pre-emption.

59. The Meeting Note deals with these points (insofar as I can interpret the handwriting) as follows: "Partition. R & N can prepare a plan dividing up to 390 acres - as long as David's part adjoins his present land. Any of 3 can insist on this partition on 12 months [sic] notice. If there is a disagreement on partition terms this will be settled by a valuer. If there are inequalities any adjustment can be decided by the valuer. Partition will not be conditional upon planning permission being forthcoming for any new homes. There will be cross rights of pre-emption [full or possibly "still"]? uncertainty. I stressed that the partition plan must be settled quickly. N suggests this evening. In answer to a question by David I say that the Bank will not be bound by any partition and its charge will be over the whole acreage. Page 12 Approved Judgment Holden v Holden and Holden White [Robin's solicitor] wants it stated in the partnership deed that on a dissolution the land will be partitioned and not sold. I point out that this is effectively agreed already. I point out that we could not then say who had a right of pre-emption over whom. I warn that pre-emption rights can only run for 21 years. Pre-emption. Valuation on a VP [I assume vacant possession] basis with professional fees paid equally. If no agreement chartered surveyor expert and not arbitrator – appointed by President of RICS has no agreement. Share of land and distribution in event of partner dying or retiring. Pre-emption explained – effectively a right of first refusal. 21 year period again mentioned."
60. There was some debate at trial as to what was meant by the provisions in the Meeting Note as regards partition and pre-emption. It seemed to me that partition and pre-emption were naturally alternatives. With partition, each partner would (assuming that the partners could do so while still satisfying the claims of creditors) leave with an agreed portion of the Partnership land, whereas pre-emption would suggest someone (probably the other partners if they were continuing with the Partnership after its technical dissolution) would have a right to buy the land at a valuation.
61. Ms Scott put forward a view on behalf of the Claimant the proposal that the partition would always operate first and the right of pre-emption would arise not on the termination of the Partnership, but rather in the event that one of the partners wished to sell the portion of the land accruing to him on termination of the Partnership. On this basis the pre-emption right would have no meaning unless there were first a partition of the land.
62. There is a substantial degree of uncertainty in construing these provisions on partition and pre-emption in the Meeting Note. This is compounded by the fact that no scheme of partition was ever agreed. It is common ground that in the absence of the partners having agreed on a partition of land, there is no argument that there is any enforceable right for any such partition. This uncertainty is further compounded by the absence of the 6 October letter referred to in the rubric underneath the signatures.

63. Taking all these points together, I think it is clear that, if the Meeting Note (alongside the provisions in the Partnership Act 1890) still governs the affairs of the Partnership (notwithstanding the presentation of the 1990 Draft Deed or further versions of the Draft Deed later presented), these terms relating to Page 13 Approved Judgment Holden v Holden and Holden partition and pre-emption are too uncertain to give rise to enforceable obligations between the parties. Dissolution provisions in the 1990 Draft Deed
64. David's case is that the Meeting Note, does not determine the terms on which the Partnership operates: it has been overtaken by the terms of the 1990 Draft Deed. The most important issue in this trial is whether the 1990 Draft Deed (or any further version of the 1990 Draft Deed presented later) now governs the Partnership to the exclusion of the arrangements recorded as agreed in the Meeting Note.
65. The terms of the 1990 Draft Deed as to what happens to the property of the Partnership on dissolution are set out in clause 13 of that document. Clause 13 is lengthy and is difficult to follow. However, in essence it provides that: i) ii) If David dies or becomes bankrupt, then Robin and Nick have the option by notice in writing to acquire his partnership share at a valuation. By contrast, in any other circumstances, including if Robin or Nick dies or becomes bankrupt or if any of the partners (including David) gives 6 months' notice to terminate the Partnership or breaches the agreement or becomes permanently incapacitated and as a result is served with notice of expulsion, then David (alone) has the option to acquire the partnership share of Robin and/or Nick at a valuation. iii) The person or persons exercising such rights are referred to as the "Continuing Partners" (even if it is just David) and the Continuing Partners have an option to pay the amount due for the purchase of the partnership shares in 10 equal annual instalments with interest at the base rate of Lloyds Bank plc. iv) If the relevant options are not exercised, then under Clause 13(j) the Partnership is to be wound up in accordance with the provisions of the Partnership Act 1890.
66. These terms greatly favour David, who in most circumstances is likely to have the option to buy out the other partners - and is able to bring about such circumstances by serving a notice. He would have the right to pay over an extended period.
67. Whatever the interpretation of the Meeting Note, it is clear that what is put forward here is different. Of course, David points out that there were reasons from his point of view why this should be the case. As by far the wealthiest of the three brothers he was putting forward a greater financial contribution Page 14 Approved Judgment Holden v Holden and Holden towards the Partnership and had more to lose. Also, he was the only partner likely to have the means to exercise a right of pre-emption.
6. LATER PUTATIVE AMENDMENTS TO THE PARTNERSHIP TERMS
68. A second issue, which is mostly pertinent to the reopening accounts issue, relates to amendments which David says were agreed and are recorded in the handwritten notes on the version of the 1990 Draft Deed that has been retained by Mr Boreham.

69. The amendments move away both from the terms set out in the Meeting Note and those originally set out in the 1990 Draft Deed. They are as follows: Interest on capital differences
70. At clause 4 of the 1990 Draft Deed there is a provision relating to interest on capital. There was no discussion of any such provision recorded in the Meeting Note. The original version of the 1990 Draft Deed included a provision for interest to be payable on initial capital at the rate of 2% above the base rate of Lloyds Bank plc. This was amended by means of the handwritten amendments to relate to interest being paid on the capital difference and for the base rate of Lloyds Bank plc being averaged.
71. These amendments were made according to the evidence of David and of Mr Boreham at the suggestion of Mr Boreham as a more streamlined way of dealing with interest on capital. 72. I note in passing that there seems to be a drafting mistake in that the amendments, taken literally, failed to achieve what I think was the intention of this provision and certainly how it was applied by Mr Boreham when he compiled the accounts. Mr Boreham's intention in proposing the amendment was for the Partnership to pay interest on the difference between the partners' respective capital balances from time to time, and on the assumption that undrawn profits were to be treated as additions to capital. By contrast, the clause as drafted, even with the manuscript amendments, refers to interest being payable by reference to the opening capital introduced into the business by the partners at the commencement of the Partnership. This was clearly a mistake as there would be no point providing for interest on the difference in the partners' respective initial capital balances as there was no such difference - and could never be one except if a new partner were to join and to contribute capital. Changes to salaries
73. At clause 6 of the 1990 Draft Deed there is a provision relating to "salaries" to be paid out of profits before division of any excess profit. This originally provided payments of £5,000 to David as a first charge and then to Robin and Page 15 Approved Judgment Holden v Holden and Holden Nicholas £9,100 and then with the remainder of profits to be shared equally. These provisions broadly reflected the arrangement recorded in the Meeting Note, although in the Meeting Note David's share was described as being in respect of rent for the use of his buildings and land, rather than a salary and there was no indication that this share took precedence over his brothers' salary payments.
74. The manuscript amendments changed the provision for Robin and Nicholas to receive £9,100 salaries each, so that instead they were to be paid £16,000 between them to be divided equally (i.e., £8,000 each).
75. The evidence from David was that this amendment had been agreed with Robin and Nicholas in return for the Partnership taking over running expenses in relation to their motor vehicles. Mr Boreham understood this to be the case also, but he obtained this understanding from David. Repayment of drawings

76. At clause 9 of the 1990 Draft Deed there is a provision allowing Robin and Nick each to draw out of the partnership bank account on account of their respective shares of accruing profits £150.00 per month or such other sum as the partners may from time to time agree. Originally this clause went on to provide that if the drawings taken exceeded the relevant partner's annual income from the Partnership, when the annual account was taken at the end of the accounting period, any such overdraw was to be repaid. This latter part of the definition was deleted as one of the manuscript amendments.
7. FACTS RELEVANT TO THE GOVERNING TERMS QUESTION
77. Having discussed this background, I will set out facts that are relevant to the central question as to whether the 1990 Draft Deed (or any later iteration of it) was ever agreed. The correspondence in 1990-1991
78. 79. It is common ground that the 1990 Draft Deed was never signed. The key contemporaneous correspondence was between Mr Freeman, who had been tasked with drafting the partnership agreement and otherwise represented David, and Mr Cunningham, who was representing Robin and Nicholas in relation to this. In a letter dated 12 October 1989, Mr Freeman wrote to David confirming that he had agreed with Mr White (also representing Robin and Nicholas) that formal documentation should be prepared and completed as soon as possible. On 8 December 1989, Mr Freeman wrote to David to say that he had agreed with Mr Cunningham that: Page 16 Approved Judgment Holden v Holden and Holden "it would be best if I [i.e. Mr Freeman], take over from him [i.e. Mr Cunningham] at this stage, on the basis that the instructions are coming from you and must do so I should be doing the work."
80. Mr Freeman wrote again to David on 20 December 1989 confirming that he would act for the Partnership and Mr Cunningham would continue to act for Robin in his personal capacity. He said: "In view of the fact that you are financing the operation and effectively taking all the important decisions, this does make sense to me."
81. Whilst in that letter Mr Freeman was clearly alive to issues of conflict of interest, he did not consider that there would be a difficulty if he acted for the partnership as long as Robin was "being sensible". He dealt with the question of conflicts of interest further in his letter to Mr Cunningham of 22 December 1989 where he confirmed the arrangement that he would act for the Partnership and Mr Cunningham would act for Robin in his personal affairs but on the basis that, if there were any problems within the new partnership, David would be free to instruct Mr Freeman to act for him alone and to request Nicholas and Robin to transfer their instructions elsewhere.
82. On 8 January 1990, Mr Freeman wrote to David enclosing a copy of a draft partnership agreement and stating that he had sent a copy to Mr Faiers, who at that stage was the proposed accountant for the Partnership.
83. On 12 January 1990, Mr Freeman asked David for comments on the draft deed and pointed out that he had omitted any reference to the proposed partition and pre-emption arrangements as the proposed partition had not been defined.

84. On 13 February 1990, David wrote to Mr Freeman stating that he was happy with Mr Freeman's "suggested partnership formulation" but would leave it to Mr Freeman to finalise it in the way that he felt best. It was clear at this point that no draft partnership agreement had yet been agreed by Robin and Nicholas. 85. It appears that sometime after this Mr Freeman must have sent a draft Partnership Deed (which I think all sides assume was in the form of the 1990 Draft Deed) to Mr Cunningham (or to Mr Cunningham and Robin and Nick) since on 2 March 1990 Mr Cunningham wrote to Mr Freeman and said: "Obviously the Partnership Agreement must be dealt with at an early date but I must get some further instructions from my client before this is dealt with." 86. It appears that Mr Cunningham did obtain instructions since, in his letter to Mr Cunningham of 22 March 1990 (the "22 March Letter"), Mr Freeman referred Page 17 Approved Judgment Holden v Holden and Holden to a telephone conversation he had had with Mr Cunningham which clearly involved Mr Cunningham stating that Robin had not agreed to the dissolution provisions in the 1990 Draft Deed. Mr Freeman stated in this letter that: "I have spoken to David again regarding my Draft Partnership Deed and he would like the dissolution provisions to stay in their present form. I accept that they are unusual, but the reality of the matter is that David must be in firm control of this partnership is to stand any chance of commercial success". 87. I note in passing that there is a certain lack of logic in an argument that the dissolution provisions must stand because David must be in firm control of the Partnership for the Partnership to enjoy commercial success. The termination provisions would arise only at the point that the Partnership was being discontinued. In my view David's real reason for wanting the termination provisions was that he was taking more financial risk than the other partners and wanted to have the ability to keep the farm together: if on dissolution of the Partnership its land was sold to someone else, this would leave David holding agricultural land of too small an acreage to be a viable farm.
88. This paragraph of this letter is key to David's argument. Essentially his argument boils down to this. His brothers were given copies of the 1990 Draft Deed. Whilst it appears that Robin had pushed back on the dissolution provisions (in relation to some point which is not now known) he must have understood from the above paragraph (which the court should infer would have been reported to him by Mr Cunningham) that David would only go ahead with the Partnership on these terms. In going forward with the Partnership, therefore, he must have accepted these terms.
89. Whilst this is David's central argument, I should be clear that other arguments were raised on behalf of David to support this central proposition, including: i) ii) the relative position of the parties (Robin was clearly in financial difficulties and faced having nowhere to live unless the Partnership went ahead); the commercial realities for David, who was to a very large extent financing the Partnership and would have been alive to the danger of being left holding a small piece of land that was not a viable farming proposition by itself; iii) the evidence of later conduct of the parties, which I will come onto. 90. It appears that there was no further substantive correspondence concerning the 1990 Draft Deed among the parties or among the solicitors, although on 27 Page 18 Approved Judgment Holden v Holden and

Holden April 1990 Mr Freeman wrote to Mr Cunningham regarding conveyancing and reported that David had asked him: "to delay completion whilst he talked to his brothers in an attempt to agree a partition of the land which they would own in common" but had now authorised Mr Freeman to complete. This provides some evidence that the idea of a partition that had been documented in the Meeting Note was still being pursued until some point not long before 27 April 1990. It points against the proposition that the 1990 Draft Deed was known by Mr Freeman to have been accepted by this point.

91. On 1 May 1991 Mr Freeman wrote to David. He referred back to the 22 March Letter. He referred also to an earlier conversation he had had with David where David had said he would speak to the partnership accountants about the clauses dealing with profit sharing and payment of salaries and would provide written instructions on these matters. Mr Freeman said once he received these, he would prepare a revised draft and when David and the partnership accountants were happy with this, he would send it to Mr Cunningham again making it clear to him that David must stay in a controlling position. 92. It would appear, therefore, at this point that Mr Freeman at least did not understand that Nick and Robin had agreed the partnership deed previously seen by Mr Cunningham (and, in my view probably also by Nick and Robin).
93. On 16 February 1993 Mr Freeman wrote to Stuart Boreham & Co (the accountancy firm by then dealing with the Partnership's affairs) justifying Mr Freeman's firm's fees relating to the drafting of the partnership deed. In that letter he states: "As you are aware, this was drafted, but never completed, as we did not receive the necessary instructions." The renewed attempt to get an agreement signed in 1995
94. On 9 and 10 May 1995 Mr Wybar, a solicitor who had taken over from Mr Freeman on the latter's retirement, wrote two letters to David, Robin and Nick. The first of these dealt with his terms of business. The second of these dealt with an update to the 1990 Draft Deed.
95. Robin does not recall receiving these letters, but it is more likely than not that he did receive them. The first letter was addressed to the three partners at the partnership office Flint Hall Farm. The "cc" indication at the foot of the letter makes it clear that further copies were sent to Robin and Nick at their homes. Robin's address is described as "Barnfield", whereas this should have been "Barnfield Bungalow", but I expect that a postman serving this rural area would Page 19 Approved Judgment Holden v Holden and Holden have recognised that this must have meant Barnfield Bungalow. The second letter was also addressed to the partners at the partnership office with a "cc" note that copies were sent to them individually also. In this case, the specific address was not mentioned on the face of the letter, but there is no reason to believe that the same address would not be used.
96. Mr Wybar's letter of 10 May 1995 recorded that David had come to see Mr Freeman and Mr Wybar asking them to update the draft partnership agreement prepared in 1990 "so that you can have a written record of the terms of the partnership". Mr Wybar stressed the importance of having a written partnership agreement and suggested that he come to Flint

Hall Farm in order to meet all the partners to discuss a draft partnership deed. He asked each partner to let him know if they considered there might be a conflict of interest so that they could agree how to proceed.

97. There is no record of this attempt to agree an updated partnership agreement progressing any further. Nick's divorce
98. The next potentially relevant incident relates to divorce proceedings that took place between Nick and his wife in the Summer of 2004. There is a record that David sent by fax on 2 July 2004 a copy of what was described as a "deed of partnership" to Mark Merriam, a solicitor at Ashton Graham (which I assume to be the successor firm to Bankes Ashton) representing David in a litigation matter. David again sent what was described as the "farm deed of partnership" to Jonathan Long at Ashton Graham on 7 July 2004 (and this was received on 9 July). It may be assumed that this was passed to Ian Winterbourne, who was also at the same firm and was representing Nick in his divorce. 99. It appears that the copy that was sent to Ashton Graham was the copy that had been held (and annotated) by Mr Boreham, since that firm later wrote to Mr Boreham on 20 July 2004 asking if he had a copy of the Deed of Partnership under which the partners were operating (as Ashton Graham had only an unsigned copy). Mr Boreham wrote back stating that he had recently returned this copy to the client (presumably meaning David). Mr Boreham also confirmed that this copy was unsigned and as far as he was aware no final copy had ever been prepared and signed by the partners.
100. It is not entirely clear whether or to what extent this draft partnership deed was used during the divorce proceedings.
101. Clearly it was received by Nick's solicitor and Nick's solicitor was told by Nick that these were the terms under which the Partnership operated. Page 20 Approved Judgment Holden v Holden and Holden
102. From the correspondence it appears that an order made by District Judge Hamilton on 28 June 2004 had ordered the production of the partnership agreement. The correspondence shows that Mr and Mrs Holden had reached an amicable settlement by 4 August 2004, and it appears that at that point Nick's solicitors had not disclosed the unsigned partnership agreement. However, I would not have expected that the District Judge would have approved an order confirming the settlement without understanding the financial position of the parties. Therefore, I consider it most likely that a copy of the unsigned partnership deed was provided to the court. This view also has some support from a mention of a partnership deed in one of the costs schedules prepared by Nick's wife's solicitors.
103. Mr Marsden has put forward the proposition that Robin must have participated in a decision to send the 1990 Draft Deed to Nick's wife's solicitors, but the evidence for this is extremely thin. It is principally based on a letter from Nick's solicitor to Nick on 16 August 2004 which related to title deeds. The letter stated that access to the title deeds could only be gained if Nick and his partners agree. It seems likely that Nick would have asked Robin for his

agreement to send title deeds (and would have received it), but it is not at all clear whether he definitely would also have asked for Robin's permission to send the 1990 Draft Deed. It appears that the route for the 1990 Draft Deed coming into Nick's solicitor's hands was separate to the route to that by which the solicitor obtained the property deeds.

104. Beyond this documentary evidence, the evidence that Robin took an active role in encouraging Nick to present the 1990 Draft Deed is based on David's witness evidence that the divorce was a "hot topic" among partners and that during those discussions neither Nick nor Robin stated that the 1990 Draft Deed did not apply. This account was contradicted by Robin's evidence which was that he did not discuss the detail of Nick's divorce proceedings.
105. I consider, having regard to Robin's poor memory generally, that it was more likely than not that there were discussions among the partners concerning Nick's divorce. I am also alive to the possibility that Robin may not be entirely truthful, given his unsatisfactory responses to questions put to him during the trial where his responses were sometimes inconsistent with the documentary evidence and internally inconsistent. Nevertheless, I do not consider that there is sufficient evidence for me to find that Robin was acting in concert in putting the 1990 Draft Deed before the court. There is insufficient evidence to establish this precise point.
106. In addition, whilst I can believe David's evidence that Nick did not in this period state that the 1990 Draft Deed did not apply, it is telling that David does not go so far as stating that Robin agreed that these provisions did apply. It is thus difficult to conclude that he was active in any decision to represent to the Page 21 Approved Judgment Holden v Holden and Holden court that the 1990 Draft Deed governed the Partnership, certainly in relation to the disputed termination provisions.
107. I will discuss below the arguments that David raises in relation to the sending of this document for use in Nick's divorce proceedings. The attempt to get an agreement signed in 2004
108. It appears that there were around the same time as Nick's divorce discussions about the deed of partnership between David and Jonathan Long of Ashton Graham. Mr Long wrote on 13 July 2004 thanking David for lending the 1990 draft of the partnership deed prepared by Richard Freeman. He said that this was "fairly good evidence of what the terms of the partnership are insofar as you follow them in practice". He advised that ideally a final version of the document needed to be prepared and signed by all partners. He enclosed a revised draft closely based on the 1990 draft describing it as a "discussion document". He said that most of the provisions were fairly standard but the ones giving David additional rights were not. He advised as to the need to be clear about the ownership of property.
109. The draft is in very similar terms to the 1990 Draft Deed as amended by Mr Boreham, although not all of Mr Boreham's amendments were replicated. Robin's discussions when making his will

110. During 2006 Robin and his wife were dealing with Ashton Graham for the purpose of making wills. According to an attendance note made by Ms Teresa Pearson, a legal executive at that firm: "Mr Holden [Robin] requested a copy of the partnership deed that we hold as we act for the partnership as he has not been able to locate his copy."
111. Robin's recollection is that this file note is incorrect and that it was his wife rather than he who had made this request.
112. Ms Pearson later in 2006 wrote to Robin and his wife, amongst other things, responding to the request for a copy of the Partnership Deed and stating that it appeared from her firm's records that this had never been signed. She advised asking the accountant if he has the signed version. The renewed attempt to get an agreement signed in 2014
113. Mr Long appears again in our story in 2014. By this point his firm changed its name to "Ashton KCJ". On 5 February 2014 he wrote to Robin and Nick, at the instigation of David. He explained his understanding that there was no signed Page 22 Approved Judgment Holden v Holden and Holden deed of partnership but he enclosed a copy of the 1990 Draft Deed which he said he gathered had been the basis of the arrangements between the partners. He explained that David had asked him to explain how the deed of partnership works and he gave a short explanation of the effect of clause 13(b)(ii), under which David can give six months' notice to terminate the Partnership. He explained also that David wanted to bring his son into the business in a way that would not change the position of Robin and Nick as partners. For some reason he sent a letter in identical terms on 11 February 2014, but this time apparently just to Nick (unless there is another copy that he sent to Robin that is now lost).
114. It appears there was no response to this letter. Nearly 12 months later David wrote letters to Nick and Robin respectively on 23 rd of January 2015, repeating his desire for his son to be introduced to the Partnership and suggesting arrangements for this but warning that, if they could not come to an agreement, he would consider dissolving the Partnership by giving notice under the "existing 1990 Partnership Agreement".
115. David later in 2017 did terminate the Partnership by notice. 6. LAW RELEVANT TO THE GOVERNING TERMS QUESTION
116. The governing terms question is essentially the question of whether the parties have agreed to adopt the 1990 Draft Deed.
117. Whilst partnership itself is not just a contract – it is also a relationship - the agreement governing a partnership, where there is one, is a form of contract and the general principles applicable to contracts apply. It is trite law that a contract requires offer and acceptance and an intention to form legal relations.
118. That is not to say that there must be a written offer and written acceptance – oral communications can create a contract and acceptance of an offer can sometimes be inferred by conduct. In particular, there are many cases where an unexecuted partnership deed that

has been acted upon by the parties has been found to bind them. Mr Marsden cited a passage from Lindley and Banks on Partnership 21st edition paragraphs at paragraph 7-37/38: "A partnership may be proved by means of a written agreement or by other, less formal, documents, e.g. an unsigned memorandum or draft agreement acted on by the partner or a series of letters."

119. The cases cited in support of the binding nature of an unsigned agreement acted on date back to Worts v Pern (1707) 3 Bro. P. C. 548; Williams v Williams (1867) L. R. 2 Ch. App. 294; Baxter v West (1858) 1 Dr. & Sm. 173; Munro v Stein, 1961 S. C. 362. It may be noted however, that these cases were all cases relating to the evidence for the formation of a partnership on a particular set of terms. None of them related to a position where there was an existing partnership on Page 23 Approved Judgment Holden v Holden and Holden existing terms and an unsigned agreement was to be relied upon as evidence of variation of the existing terms.
120. As Mr Marsden has pointed out, with the support of ample authority, the courts apply an objective test when considering whether a contract has been formed. The subjective intentions or mental reservations of one party are not relevant. This may be illustrated, for example, by the dicta of Lord Clarke of Stone-cum- Ebony, delivering the judgment of the Supreme Court in RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG [2010] UKSC 14, [2010] 3 All ER 1, [2010] 1 WLR 753, particularly at [45] where he said: "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."
121. When applying this objective test, it is important that I do so having regard to the nature of the putative contract in dispute - in this case, the 1990 Draft Deed - as well as considering the legal relations between partners prior to the proffering of that draft contract.
122. There is no doubt that the partners entered into partnership by or on 10 October 1989 and on the meeting on that date they agreed basic terms for their partnership, being the terms recorded in the Meeting Note. By signing the Meeting Note and having their solicitors sign to say that this note was intended to have contractual effect, it is clear that each of the brothers agreed to be bound by the terms recorded in the Meeting Note.
123. From that point the Meeting Note was the agreement governing their relationship as partners insofar as it dealt with any aspects of that relationship. Insofar as the Meeting Note did not deal with a point that was necessary to be dealt with, that point would be governed by the statutory default provision set out in the Partnership Act 1890.

124. I have already mentioned, however, that I do not consider that the Meeting Note was adequately clear in setting out arrangements for partition and pre-emption rights. The lack of clarity (particularly in reliance on a partition to be decided in the future) on those issues is such that I consider that the discussion in the Meeting Note regarding those issues cannot be said to have created enforceable obligations in relation to those issues. Page 24 Approved Judgment Holden v Holden and Holden
125. The Meeting Note records that it was envisaged by the parties that the informal agreement evidenced by the Meeting Note should, in time, be replaced by a properly drawn up formal agreement. However, that aim of the parties was of itself a mere agreement to agree and did not in my view itself create a legally binding obligation.
126. Pending any such replacement agreement the terms of the Meeting Note, together with the default provisions within the Partnership Act 1890, in respect of any matters not dealt with in the Meeting Note would continue to govern the operation of the Partnership.
127. When we are considering, therefore, whether the 1990 Draft Deed was adopted as the agreement governing the Partnership, superseding the Meeting Note, the question is whether there is evidence that shows that the parties intended to vary or replace the terms that they had already agreed with new terms in the form of the 1990 Draft Deed. This is a point of difference between the case before me and the authorities referred to at [119] above. Importantly, when we are considering whether any conduct can be interpreted as demonstrating acceptance of the terms in the 1990 Draft Deed, that conduct would be inconclusive if it also was compatible with the parties continuing with the terms recorded in the Meeting Note.
128. With these points in mind, I turn to the question to whether the 1990 Draft Deed (or any later iteration of it) was ever agreed. 9. WAS THE 1990 DRAFT DEED AGREED?
129. Both sides of the argument recognise that one key to this question is found in the discussions between Mr Freeman and Mr Cunningham in March 1990, as I have summarised them at [84] to [87] above
130. Robin invites the court to take from this exchange that Robin, through his solicitor, expressed his disagreement with the dissolution provisions in the 1990 Draft Deed, and has never indicated that he has withdrawn those objections.
131. By contrast, David invites the Court to take from this exchange that he, through his solicitor, was clear that he would not carry on with the Partnership unless these dissolution provisions were agreed. Robin, by carrying on with the Partnership must be considered to have agreed this.
132. I find David's argument on this central point unconvincing for a number of

reasons.

- i) First, the passage in Mr Freeman's letter set out at paragraph [86] was not at all clear that David was insisting on the dissolution provisions in the Page 25 Approved Judgment Holden v Holden and Holden 1990 Draft Deed as a price of his continuing in partnership. It merely says that he would like them to stay in their present form. ii) Secondly, as I have already observed, the comment that David must be in firm control of the Partnership for it to stand any chance of commercial success was not a good reason for the dissolution provisions to remain. iii) Thirdly, and most importantly, I do not think that Robin's conduct in carrying on in the Partnership is compatible only with the view that he must have agreed to the 1990 Draft Deed as replacing the previous arrangements based on the Meeting Note. It is equally compatible with the interpretation that he was content with the arrangements based on the Meeting Note and was happy to continue on that basis.
133. I must then ask myself whether there is anything else in Robin's later conduct that demonstrates that he must have accepted the terms of the 1990 Draft Deed. I do not think that there is.
134. First, the correspondence mentioned at [90] suggests that discussions regarding partition (which would be contrary to the terms of the 1990 Draft Deed) were still being considered until some point not long before 27 April 1990. Therefore, the 22 March Letter had not, as David claims, terminated the debate about the dissolution provisions.
135. Secondly, the letter referred to at [91] suggests that on 1 May 1991 Mr Freeman at least did not understand that the partnership deed that had been proffered had been agreed by Nick and Robin.
136. Thirdly, the fact that there were further attempts in 1995, 2004 and 2014 to get a partnership deed containing the dissolution provisions of the 1990 Draft Deed signed but each of these attempts failed, can scarcely be regarded as support for the proposition that these matters were agreed.
137. The facts surrounding Nick's divorce do not, in my view advance the matter any further. I think it is clear that David, with his superior grasp of financial and legal matters, may have seen the benefit to Nick, and by extension to the partners, of putting forward the 1990 Draft Deed as part of the divorce papers. He might also have seen this as a chance finally to get the 1990 Draft Deed, or an update of it, agreed.
138. However, the evidence that Robin was involved in this and somehow can be taken as having joined in a representation to the court that the 1990 Draft Deed, and in particular its termination provisions, were binding on the partners is far too scant. Page 26 Approved Judgment Holden v Holden and Holden

139. I do not consider it has been established that Robin was involved in the decision to send the 1990 Draft Deed to the court. It is more likely than not that he did join in a release form agreeing to allow deeds relating to property to be sent to Nick's wife's solicitors, but I was not taken to any document that demonstrated these property deeds included the 1990 Draft Deed.
140. David witness evidence that Nick's divorce was a "hot topic" is not sufficiently cogent or detailed to establish that Robin had any active involvement in putting the 1990 Partnership Deed before the court or even that his permission was sought for this. Robin and Nick worked together and most likely did have some discussion about Nick's divorce, but this is insufficient to establish that Robin knowingly participated in a decision to put the 1990 Draft Deed before the court or that he was asked for and gave his permission for this. Mr Marsden argues that it is implausible that he would not have been asked for such permission, but I do not accept this. I do not see why Nick or David would have thought it necessary to get Robin's permission to do this. I also have some doubts whether David would necessarily want to have asked Robin to confirm that he agreed that the 1990 Draft Deed applied to govern the Partnership and should be sent to the court., He had been relying on Robin's silence in relation to the termination provisions in the 1990 Draft Deed as signifying Robin's consent to them, and he may not have wanted to force the issue at this juncture by asking for a more positive affirmation of the status of the 1990 Draft Deed.
141. Even if Robin had some awareness that the 1990 Draft Deed was to be put before the court, given Robin's poor memory and extremely limited engagement with the partnership terms – I accept his evidence that he left this to his solicitor
- I doubt whether his doing so would have meant that he had understood that the document that David and Nick were proposing to send included the dissolution terms that he had objected to in 1990.
142. Given these findings of fact, I do not need to consider in any further detail one of the arguments advanced by Mr Marsden. This is the argument that Robin has been estopped in some manner from denying the applicability of the 1990 Draft Deed as a result of his involvement in putting forward a different case during Nick's divorce proceedings. It is stretching the evidence far too greatly to suggest that there was anything in Robin's conduct that amounted to a representation in those proceedings.
143. Neither do I accept the argument that in using partnership funds (deducted from Nick's capital share) to make a payment to Nick's wife, this payment amounted to a detriment to David based on a representation by Robin that he agreed the dissolution provisions of the 1990 Draft Deed.
144. The only other conduct of Robin that might be said to point to his having accepted the dissolution provisions of the 1990 Draft Deed relates to the Page 27 Approved Judgment Holden v Holden and Holden occasion in 2006 when he (or according to his own witness evidence, his wife) requested a copy of the partnership deed as he had not been able to

locate his copy. In my view nothing turns on the question whether it was he or his wife who requested a copy of the deed. In either case the same question arises: if he had not agreed the 1990 Draft Deed, why did he not state that there was no point in asking Ashton Graham to find it since it did not represent the terms under which the Partnership was operating?

145. David's case is that the only explanation for this must be that he had accepted that the Partnership was operating under the 1990 Draft Deed. I do not agree. I think it is far more likely, given Robin's low level of engagement with the legal processes involved, that 16 years later he had simply forgotten how the Partnership had been documented. It is true that he would have been reminded of the provisions of the 1990 Draft Deed had he engaged with the efforts made on behalf of David to get a version of this signed in 1995 or 2004, but there is no evidence that he did. I think that it was most likely in each case that on receiving new drafts he simply wished not to engage with the matter -he felt himself happy with the status quo as he understood it, felt unable himself to engage with the matter and wanted to avoid the expense of a solicitor.
146. In my view the truth of the matter is this. Both David and Robin were content to carry on in partnership without having signed the 1990 Draft Deed. Most likely this was because their respective understandings of the status quo suited each of them. Robin now argues that having (through his solicitor) said that he did not accept the draft partnership deed that had been proffered, he considers that the Partnership has proceeded on the terms recorded in the Meeting Note. I think it likely that, if he thought about the matter at all, he assumed this throughout. Most likely, David was proceeding on the basis that, having through his solicitor insisted on the dissolution provisions in the 1990 Draft Deed, these must have been accepted. It might alternatively be (perhaps more likely in relation to Robin than David) because they had lost focus on the differing proposals as to what should happen on dissolution of the Partnership.
147. However, as I have already mentioned, the issue is not what they thought had been agreed but what an independent observer would make of their oral discussions and actions. This point is key when considering the supporting arguments raised on David's behalf that I have mentioned at [89] above.
148. The first of these points was the relative position of the parties. It is true that in 1990 Robin was clearly in financial difficulties and faced having nowhere to live unless the Partnership went ahead, this meant that David was in a good position to insist that he accept the 1990 Draft Deed, with its one-sided termination provisions, but it does not provide any evidence that David did insist on this or that Robin said or did anything to accept the point. Page 28 Approved Judgment Holden v Holden and Holden

149. The second of these points related to the commercial realities for David. I agree that as the person who was to a very large extent financing the Partnership, he would have been alive to the danger of being left holding a small piece of land that was not a viable farming proposition by itself. This, no doubt, is why he arranged for the 1990 Draft Deed to include the one-sided pre-emption provisions. However, the fact that he was motivated to want these provisions does not provide any evidence that his brothers agreed them.
150. This then brings us onto the third point, the evidence of later conduct of the parties. As I have analysed above, there is nothing in the conduct of Robin that can be pointed to as demonstrating that he had agreed to accept the 1990 Draft Deed as the Partnership's constitution. His conduct in carrying on the Partnership is equally compatible with his being content to continue on the basis of the provisions recorded in the Meeting Note.
151. Neither is there any good evidence of Robin having agreed orally to accept the 1990 Draft Deed. Certainly no one suggests that he ever agreed in writing to accept it. David does not go so far as to say there was an oral agreement to accept the Deed – he merely construed acceptance from Robin's failure to speak against the draft (except once through his lawyer). David assumed silence meant acceptance but, in the circumstances where there were existing arrangements that the 1990 Draft Deed would need to displace, silence cannot be taken to mean this.
152. In the absence of any written or oral agreement or of any conduct that unambiguously demonstrated he had accepted the 1990 Draft Deed, I must conclude that there was never a settled agreement for the 1990 Draft Deed to replace the arrangements under which the Partnership was originally operating - those set out in the Meeting Note as supplemented by the Partnership Act 1890.
9. WERE VARIATIONS MADE TO THE PARTNERSHIP TERMS?
153. Having determined that the 1990 Draft Deed was not adopted as the terms governing the Partnership, I must consider the questions relating to Robin's proposal that the settled accounts of the Partnership should be reopened.
154. Robin's argument is that various matters reflected in the accounts had been included as a result of instructions that David gave to Mr Boreham, or discussions between David and Mr Boreham and did not reflect the understanding recorded in the Meeting Note or any further agreement among the partners.
155. To take the most salient example, as I have found, the terms of the 1990 Draft Deed do not govern the Partnership, interest on capital originally would be governed by the default provision in section 24 of the Partnership Act 1890 Page 29 Approved Judgment Holden v Holden and Holden which do not provide for interest on capital. Was a change away from that position agreed by the partners?

156. It is not in dispute that Mr Boreham recorded a change to this matter and various other matters by making manuscript amendments in his copy of the 1990 Draft Deed and then proceeded to produce accounts reflecting these amendments (or, more accurately, his understanding of the intention of the amendments). However, the fact that he recorded these changes on his copy of the 1990 Draft Deed is not particularly relevant to the real questions here. The real questions are: i) ii) whether Robin and Nick were aware of and agreed to these matters where they represented a change to the understanding recorded in the Meeting Note, and if they did not, whether it is now too late for Robin to seek to reopen the accounts on these matters.
157. The specific items I am considering here (which I will refer to below as the "Disputed Matters") are: i) ii) The reduction in the "salary" element of partner remuneration for Robin and Nick from £9,100 to £8,000 (which David says was agreed in return for their being able to put expenses relating to their motor vehicles through the Partnership). The introduction of interest being paid on the difference between partners' respective capital accounts. This was a change from the default provision in section 24 of the Partnership Act 1890 which provides that a partner is not entitled to interest on his capital contribution to a partnership. Neither was there anything in the Meeting Note or in the Partnership Act 1890 to indicate that interest would be payable on undrawn profits or that undrawn profits would be regarded as a contribution of capital at least for this purpose, which also is something that would have required the agreement of the partners - see *Bouch v Sproule* (1887) 12 App Cas 385 at 402 where in a passage cited at [12] in *Hopper v Hopper* [2008] EWCA Civ 1417 ("Hopper") Lord Bramwell said: "Where there is a partnership, whether an ordinary partnership or an incorporated partnership... There the undivided profits of any period, a year or shorter or longer time, continue to be undivided profits unless something in the articles of partnership or some agreement by all the partners make them capital. They do not become capital by effluxion of time or by their being used in the trading." Page 30 Approved Judgment *Holden v Holden and Holden* iii) What I have described as the "invoices" issue - whether the partners had agreed that David's company could invoice the Partnership for fuel put through the partnership accounts and to do so on the basis of a 50% markup. This mark-up was explained by David as a way of ensuring equity among the brothers whilst allowing fuel to be expensed via the Partnership. The reduction in partnership share suffered by David in allowing his brothers to take their fuel through the Partnership (whilst he was not himself taking fuel in this in this way) would be compensated by the profit made by his company on the sale.
158. As I have already discussed, a change to the terms of a partnership need not necessarily be documented in writing. Under section 19 of the Partnership Act 1890: "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 express or inferred from a course of dealing."

159. In determining whether there has been such a consent on each of the Disputed Matters I need to apply the principles which I referred to at [30] above. Documentary evidence
160. I look then first to the documentary evidence. There is little documentary evidence relating to these points.
161. The principal documentary evidence was the partnership accounts themselves and the tax returns prepared for the partners individually. These all reflect David's account that these matters had been agreed. Robin and Nick had had these accounts. It was plain on the face of these accounts that they reflected the lowered level of salary and the introduction of interest being paid on the difference between partners' respective capital accounts.
162. The accounts were not however clear in showing that fuel had been invoiced to the Partnership – fuel is not itemised, and it must be assumed that this was dealt with as one of the expenses under the heading "Motor and Machinery" in the expenses listed in the profit and loss account for each year (unless it was under "Sundries"). Certainly, it would not have been clear from the accounts that the fuel had been invoiced at a 50% markup.
163. Another part of the contemporaneous documentary evidence as we have seen is the record kept at the office which served jointly as the partnership office and the office for David's company) of the fuel being signed for. From this I think it is demonstrated that they were aware, however, that fuel taken from David's Page 31 Approved Judgment Holden v Holden and Holden company was being signed for. They must have understood from this either that fuel would be billed to the Partnership or to them individually as partners.
164. The other contemporaneous documentary evidence was the invoices relating to the fuel. It seems that various of these invoices misdescribed the transactions, not describing a sale of fuel, but instead describing a sale of equipment. However, the evidence is weak that Robin or Nick saw these invoices, and therefore they cannot be relied upon as demonstrating that they had agreed the invoices and in particular the 50% mark-up (which in any case probably was not clear from the invoices). Witness evidence
165. Turning next to the witness evidence. Reductions in salaries
166. David's evidence is that the reduction in salaries in return for the Partnership taking over running costs relating to Nick and Robin's vehicles had been agreed, although he could not recall the circumstances of the meeting where this was discussed. Robin does not recall any discussion of these matters and essentially it is his evidence that he left it to David, the accountants and the office staff to deal with financial matters.

167. As regards the changes in salaries I have no reason to disbelieve David when he says that these were discussed and agreed. Robin does not deny this – he merely says that he does not remember. It seems hardly likely that David would bring about this change unilaterally since it would be immediately noticed by his brothers. I consider also that he did tell Mr Boreham that this matter was agreed, and again I do not think he would have done so without having agreed the point with his brothers.
168. I consider it is more likely than not therefore that this point was orally agreed amongst the partners.
169. Even if it was not, then I think the consent of Robin and Nick to this point can be inferred from a course of dealing (to borrow the language from section 19 of the Partnership Act 1890) in that they signed accounts and tax returns over many years clearly reflecting this point. Interest on capital differences
170. As regards the changes to interest arrangements, Robin does not recall any discussion on this point, but it must be acknowledged that he remembers very little about the financial side of the Partnership, and clearly took little interest in it. David does not, in his witness statement or his oral evidence identify a point Page 32 Approved Judgment Holden v Holden and Holden when this was specifically agreed, although he thinks it was understood. His principal point is that this matter also was plain from the accounts and neither Robin nor Nick had complained about this until they fell out in 2018. Essentially it remained his case that agreement could be inferred from his partners' failure to object.
171. The evidence before the court that interest on capital and on undrawn profits was specifically orally agreed among the partners is weak. I think it was originally something which (for understandable reasons) David and Malcolm Boreham thought was fair in the context that David was supporting the finances of the Partnership to a much greater extent than his brothers. David may have mentioned it to his brothers. More likely than not he did, as once again it seems unlikely that David would bring about this change unilaterally since it would be immediately noticed by his brothers. It remains unclear however whether there was a point where this was specifically orally agreed as opposed to being mentioned and not objected to.
172. The treatment of interest on capital (and that for these purposes capital was being deemed to include undrawn profits) would have been clear from the partnership accounts, and the fact that neither Nick nor Robin queried this over many years and repeatedly signed accounts and tax returns that clearly reflected this treatment of interest again creates a course of dealing from which their consent may be, and in my view, should be inferred.
173. Further, even if they did not consent, the fact that they chose not to challenge this is relevant to the question whether it is equitable to allow them to challenge it now. This point is discussed further below. Invoices point

174. In relation to the invoices point, David's evidence was that this arrangement was agreed with his brothers, but again Robin has no recollection of this agreement and states that he was unaware of the uplift. In this case, I am again disposed to accept David's evidence on the point as being the most likely and credible explanation. The brothers were signing for fuel and must have understood that the reason for this was that the fuel would be invoiced.
175. It is less clear that they understood that David's company was applying a markup to the cost of fuel. However, I find David's explanation for why he was doing this cogent and he would have had every reason to explain this to his brothers, to avoid a later falling out, and no reason not to do so – if his brothers objected he could cease selling the fuel. As with the salaries point, I consider that both the balance of the evidence, and the most likely interpretation of events, is that this matter was discussed with his brothers and that they did assent to it. Page 33 Approved Judgment Holden v Holden and Holden Summary on the question of what was agreed
176. In my view both the balance of the evidence, and the most likely interpretation of events, is that the matters that David goes as far as saying were discussed with his brothers (the salaries point and the invoices point) were discussed with them and they orally consented to these arrangements, even if Robin cannot now remember doing so. I do not think that David would have wanted to fall out with his partners and brothers over these matters and, I think he would have raised these points with his brothers. In the case of the salaries point (but arguably not the invoices point) even if this matter was not discussed, Robin and Nick's conduct in signing off accounts reflecting this amounted to agreement by conduct.
177. As regards the point concerning on interest on capital (and that capital for these purposes was to include undrawn profit), I consider that there is doubt whether David did obtain a specific consent to this arrangement before agreeing with Mr Boreham to implement this change. However, I think any independent observer, would construe Robin and Nick's conduct as demonstrating that they had agreed the point when they, year after year, signed accounts and submitted tax returns reflecting the point. 10. EFFECT OF THE DELAY IN CHALLENGING THE ACCOUNTS
178. If I am wrong, and Robin should not be taken as having agreed to these Disputed Matters or any of them, then the question arises whether it is equitable at this stage to allow him to reopen the accounts reflecting these matters. There are a number of legal and equitable principles to consider. Restrictions on reopening settled accounts
179. An account which has been agreed between partners is conventionally referred to as a settled account. To be a settled account there is no requirement for the account to be signed: it is enough that the partners have acquiesced in it. A settled account naturally constitutes a good defence to the transactions or dealings covered by this (see Lindley & Banks on Partnership 21st Edition ("Lindley") at [23-183].

180. A settled account will not be disturbed in the absence of a specific direction from the court. Such direction will not normally be given where an account has remained open for many years except in cases of fraud or undue influence (see Lindley at [23-188]). Fraud has not been pleaded in this case and I therefore ruled it could not be argued at trial. Undue influence has not been argued.
181. In the absence of fraud or undue influence the courts also will not reopen a specific matter in settled accounts. The court will infer that if the partners knew Page 34 Approved Judgment Holden v Holden and Holden about these matters and no fraud or undue influence can be proved, the matter was dealt with in an approved manner (see Lindley at [23-189]). Estoppel
182. Another approach to the question is to consider the doctrine of estoppel.
183. David argues that Robin is estopped from reopening the accounts by his own representation that he agreed the accounts, and also because he submitted tax returns based on them.
184. In my view, all required elements for an estoppel by representation are there on the facts: i) Robin (and Nick) had made representations by signing the accounts that they accepted these accounts, and did so in circumstances where both the treatment of interest and the salaries allowed were plain on the face of the accounts. ii) David may be considered to have changed his position in reliance on such representations. In particular: a) by: (i) not taking any drawings until 2018; (ii) investing or putting at risk more of his money in the purchase of land for the Partnership; (iii) paying tax and submitting partnership accounts as well as his own tax returns, including returns where there is now no chance of reopening these with HMRC; (iv) allowing Nick to borrow for his divorce settlement from the Partnership (essentially financed by his own undrawn partnership share), all in reliance on the understanding that he would receive interest on his capital balances (including undrawn earnings); and b) by allowing the Partnership to pay the private motoring expenses of Nick and Robin on the understanding that basis that they had accepted a lower salary. iii) Robin and Nick must have realised (or at least a reasonable person would have realised) that David in changing his position on the above points was Page 35 Approved Judgment Holden v Holden and Holden relying on the representations that the accounts were correct in reflecting practices agreed within the Partnership as regards interest and salaries.
185. Estoppel by convention is another variety of estoppel – arguably a sub-species of estoppel by representation. The doctrine is summarised in Halsbury's Laws of England (Volume 47 (2021) at [383]) as follows: "Where two parties act, or negotiate, or operate a contract, each to the knowledge of the other on the basis of a particular belief, assumption or agreement (for example about a state of fact or of law, or about the interpretation of a contract), such that it would be unfair to resile from it, they may be estopped from resiling from that belief, assumption or agreement. This is known as 'estoppel by convention', reliance being based on common assumption or agreement between the parties (the 'convention'). There can be no estoppel by convention where, although both parties are labouring under a common

mistaken apprehension, it cannot be said that they have acted on the basis of that apprehension. Nor can the doctrine be invoked to deny a party the protection of a statute from the terms of which contracting out is not possible. In order for an estoppel by convention to arise, the relevant assumption or agreement must be communicated by one party to the other, either by words or conduct, and the estoppel raiser must have acted in reliance on the subscription of the other to it, such that it would be unfair for the other now to resile from it, by reason of the adverse effect his reliance would have on him if the other resiles, by comparison with the position that would obtain if he had not been induced thus to rely on the convention. An unfounded assumption may form the basis of estoppel where, although neither party believed it to be true, both have knowingly acted upon a conventional hypothesis. Where two parties agree that a commercial instrument is to be taken as founded on a certain fact, and the position of one by that agreement is altered, the other ought not to be allowed to deny it. Estoppel by convention is not confined to an agreed assumption as to fact, but may be as to law."

186. Lord Steyn summarised estoppel by convention rather more pithily in the House of Lords' decision in *Republic of India v India Steamship* [1998] AC 878 at page 913; [1997] 4 All ER 380 at page 391: "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention Page 36 Approved Judgment *Holden v Holden and Holden* is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption."
187. In my view, to the extent that the interest issue and/or the salaries were not in fact agreed by the parties orally or by conduct, an estoppel by convention has arisen here. The accounts have reflected an assumption that certain matters were agreed between the parties and Nick and Robin acquiesced in these assumptions. David has placed reliance on this assumption, and it would be unconscionable and unjust now at this late stage for Robin or Nick to resile from the assumption. If I am wrong that that there was express oral agreement and/or that their conduct was sufficient to evidence their agreement to such matters, there was at least acquiescence and David relied on that acquiescence to his detriment. In such circumstances the court should not allow them to renege on that acquiescence many years later.
188. This analysis applies to the interest issue and also to the salaries issue. I do not however think that it applies to the issue concerning the mark-up in fuel as signing the accounts could not be seen as an acquiescence in that point as the accounts were not clear in showing that fuel was put through the partnership accounts or that it had been sold at a mark-up.
- Statutory Limitation

189. Finally, there is the question of statutory limitations. David argues that Robin is entirely prevented from reopening accounts more than 6 years old by reason of section 23 of the Limitation Act 1980, which provides that "An action for an account shall not be brought after the expiration of any time limit under this Act which is applicable to the claim which is the basis of the duty to account."
190. Quoting Lord Lindley in *Noyes v Crawley* (1978) L. R. 10 Ch. D 31, Lindley at [23-45] explains the general principle that limitation does not bar the reopening of settled accounts, as time does not begin to run until a partnership is dissolved.
191. There remains unresolved an interesting debate as to whether this principle holds good for all elements of accounts or only in relation to the determination of capital balances. The current editor of Lindley notes (at [32-192] and at [23- 43]) that some doubt was placed on this principle by dicta in *Hopper*, which rejected statutory limitation applying but in doing so appeared to place reliance on the facts in that case and on section 32(1)(c) of the Limitation Act 1980 (see further below), and so apparently was working on the assumption that this principle does not apply in all cases. The current editor of Lindley doubts the correctness of this assumption. Page 37 Approved Judgment *Holden v Holden and Holden*
192. Robin also places reliance on section 32(1)(c) of the Limitation Act 1980, which delays the time from which a limitation period starts to run where the action is for relief from the consequences of a mistake. In such cases time does not begin to run until the claimant discovered the mistake or could with reasonable diligence have discovered it.
193. I consider that, with reasonable diligence, Robin could have discovered the treatment in the accounts of salaries and of interest on balances. I doubt however, whether he could have discovered the uplift on fuel purchases. Conclusion on the effect of delay
194. However analysed, if (contrary to my findings above) Robin did not accept the Disputed Matters as regards interest on balances and the salaries issue, it is in my view unconscionable for Robin to have signed or otherwise accepted the partnership accounts and tax returns every year, whilst accepting the benefits to him that are the obverse of the detriments to David that I have listed at [184(ii)] above. It would be unjust now to allow him to re-open the accounts on the basis of a disagreement that Robin had not communicated.
195. My primary finding is that in accepting the accounts Robin signified agreement, if not orally at least by conduct, to the Disputed Matters as regards interest on balances and the salaries issue. This had the effect that the accounts were correct in reflecting this treatment. However, even if this finding is not correct, then I consider that these facts underline the fairness in my determination that the settled accounts should not be reopened either generally or in respect of these two issues. This, I consider, follows both the usual approach of the court and also is justified by the doctrine of estoppel by representation and/or estoppel by convention.

196. As regards statutory limitation, as this point was not fully argued before me, and in view of my findings above which make this unnecessary, I shall resist the temptation to comment on the application of Hopper.
197. I will, however, state my finding that section 32(1)(c) of the Limitation Act 1980 does not assist Robin in relation to the treatment in the accounts of salaries and of interest on balances.
198. In view of my finding that on the balance of probabilities Robin did orally agree the approach relating to fuel, the limitation point does not arise and there is no need for David to rely on an estoppel. However, if I am wrong, and the practice of applying an uplift to fuel purchases was not agreed, I do not think that the treatment of fuel purchases was clear on the face of the accounts and therefore by signing the accounts Robin cannot be considered to have demonstrated the acceptance of this point by conduct or to have made any representation about Page 38 Approved Judgment Holden v Holden and Holden this matter so as to create an estoppel. However, the issue that the courts will not usually reopen settled accounts in the absence of fraud or undue influence would still apply. 11.

CONCLUSION

199. From the analysis above it is clear that: i) ii) I consider that the governing terms issue needs to be resolved in favour of Robin: the Partnership is a partnership at will, governed by the terms set out in the Meeting Note (except those relating to partition and pre-emption) and the default provisions in the Partnership Act 1890: the 1990 Draft Deed was never adopted; and The Disputed Matters however were agreed either orally or by conduct and in any case the partnership accounts should not be reopened on these points.
200. The above findings deal with the principal issues and thereby with the bulk of the matters referred to this court under the CCMC Order. This leaves a few matters of detail referred to in the CCMC Order: i) ii) Paragraph 3.4 of the Particulars of Claim. I make no finding on the matters averred here which relate to improvements on David's land at the expense of the Partnership including the creation of a borehole and which I have defined above as the "improvements issue". They are not relevant to the liability issues in relation to the principal matters. It is possible that they may become relevant in relation to the settlement of the final accounts or in relation to the valuation of the partnership land if one takes place. They possibly also might found the basis of some separate future action to establish an easement over David's land in favour of the Partnership land. However, none of these are matters that I have considered. Paragraph 14 of the Particulars of Claim. This relates to what I have described as the "holding of funds issue". There was no evidence before the court at present that the Partnership had suffered from this issue or that this issue had caused the accounts to be misstated. Accordingly, this issue has not affected my determination as to whether the partnership accounts should be re-opened. As I have determined that the accounts should not be re-opened it has no further bearing on these proceedings. iii) Paragraph 15 of the Particulars of Claim. This relates to what I have described as the "invoices issue". I have

found that the balance of evidence is that David agreed with his brothers the basis for charging of diesel from his company at a 50% mark-up. To the extent that the invoices Page 39 Approved Judgment Holden v Holden and Holden reflect this treatment, then the partnership accounts should not be re-opened on this point. iv) Paragraph 16 of the Particulars of Claim. This relates to what I have described as the "sugar beet issue". This issue was not relevant to the principal issues, and I have made no finding concerning it. Robin may wish to pursue this issue in relation to the settling of the final accounts for the Partnership, but there was no need for me to deal with this at this trial of liability issues. v) Paragraph 19 of the Particulars of Claim. I agree that the notices provided by David to Robin were effective to dissolve the Partnership under section 32(c) of the Partnership Act 1890.

201. The next step will be for this judgment to be reflected in the winding up of the Partnership. My findings above resolve the issues concerning liability but there will remain an issue as to what should happen to the partnership property on dissolution of the partnership.
202. This will be determined by applying section 39 Partnership Act 1890. This provides as follows: "39. Rights of partners as to application of partnership property. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm." 203. This section does not require surplus assets after creditors have been paid to be sold. It requires merely that they be "applied in payment of what may be due to the partners respectively".
204. In the event of a general dissolution, each partner is normally entitled to insist that all the partnership property is sold even if the firm's debts and liabilities could be discharged without such a sale. However, as was found in the case of *Benge v Benge* [2017] EWHC 2124 at [46-47], summarising the effect of *Syers v Syers* (1876) 1 App Cas 174, this normal position is usually adopted in order Page 40 Approved Judgment Holden v Holden and Holden that justice may be done to all parties when no other course has been or can be agreed on. As was said in that case at [47] (drawing on a quotation from Lord Lindley in the then current edition of Lindley & Banks): "47. It is not an arbitrary rule, inflexibly applied in all cases whether it is necessary or not, and although if one partner or his representatives insist on a sale, the court may not be able to refuse to enforce that right, still the court is always inclined to accede to any other mode of settlement which may be fair and just between the parties. The court should always consider what alternatives there are as to a sale."
205. I considered very recently in another judgment, *Bahia v Sidhu* [2023] EWHC 3028 (Ch) some circumstances where the justice of the case in my view argued for a different approach to that of a sale at auction.

206. In view of the history of this matter, and the nature of the farm as a family farm, there may be arguments that a solution other than sale by auction should be found to deal with the disposal of the partnership property. Such a solution might be for one or other of the partners to buy the partnership land at a valuation or for a partition of the land. No application has yet been made for the court to approve any such arrangement. However, if the partners cannot decide the way forward between them, and any of the partners wishes to ask the court to approve an alternative to a sale to a third party, then this may become a matter to be determined at a further hearing.
207. I hope however that, with the guidance provided by this judgment, the parties now have sufficient certainty of the basis governing their relationship amongst themselves to agree a way forward.
208. I hope also that time will heal any animosity that has arisen between them as a result of this litigation. Page 41

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