

ENGLAND AND WALES / JUDGMENT

Drake v Harvey & Ors

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Neutral Citation Number: [2010] EWHC 1446 (Ch) IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION Case No: HC08C03126 Royal Courts of Justice Strand, London, WC2A 2LL Date: 16/06/2010 Before : MR JUSTICE MANN

- ----- Between : Francesca Drake

- and -

(1) Jack Harvey (A Protected Party)

(2) Mary Elizabeth May Harvey (A Protected Party)

(3) Clare Harvey

(4) Richard Jenkins

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- ----- Claimant Defendants Mark Blackett-Ord (instructed by Burges Salmon LLP) for the Claimant Ulick Staunton (instructed by TWM) for the 1st & 2nd Defendant Elspeth Talbot-Rice QC (instructed by Charles Russell) for the 3rd & 4th Defendant Hearing dates: 8th – 9th March 2010

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Judgment

The Hon. Mr Justice Mann

Introduction

1. This is an unfortunate family dispute about the terms on which the members of a former four-member partnership are entitled to be paid out upon their ceasing to be partners. The essential question is whether or not they are entitled to have their shares or entitlements valued on the footing of a current as opposed to a historic valuation of the farming land. Essential Facts 2. The four partners were two parents (Jack Harvey and Mary Harvey) and two of their children, namely Aidan and Francesca. To avoid confusion I will use their first names in this judgment. Francesca is the Claimant in these proceedings; Jack and Mary are the first and second Defendants respectively appearing by their Litigation Friend. The third and fourth Defendants are Aidan's Personal Representatives. There were other children of

the family, but apart from another son (Paul) they did not engage in the family partnership. The partnership farmed land at Michelmersh Manor Farm, Hampshire ("the Farm"). 3. 4. 5. Until mid-August 2006 the four partners carried on the partnership. There then followed a series of highly unfortunate events. First, Aidan died of cancer on 20 th August 2006. This triggered a provision of the partnership under which his share in the partnership accrued to the other partners on terms which are now in dispute (so far as valuation is concerned). The next day his parents gave Enduring Powers of Attorney to Richard Jenkins, the husband of one of the other children. Shortly thereafter Jack had a stroke and lost mental capacity, and on 30 th December 2006 Richard registered his EPA and has acted as his Attorney ever since. Two years later, in mid-June 2008, Mary had a stroke and again lost capacityh, and Richard registered her Power of Attorney on 27th June 2008. Under the terms of the Partnership Deed, those last two events (or rather the disability which underlay them) caused successive forced retirements of the two parents from the partnership, again giving the continuing partners with their shares, acquired under the terms of the deed the effect of which is in dispute, ultimately leaving Francesca as the sole surviving partner. Before going back into the history a little more, it will be useful to set out the relevant terms of the Partnership Deed. Recital A is in the following terms: " (A) The parties hereto (hereinafter collectively called "the Partners") became partners in the trade or business of farmers on the Twenty-ninth day of November One thousand nine hundred and eighty-two and Paul Harvey ("Paul") was admitted to the partnership as an additional partner on the 31st day of May One thousand nine hundred and eighty-seven." 6. The next Recital deals with the historic and current capital: "The "A" capital of the partnership is and was the sum of One hundred and fifty thousand Pounds (£150,000.00) which was originally provided by and belonged to the Partners in the following shares: Original Following Valuation £ £ Mr Harvey 30% 45,000.00 12.5% 45,000.00 Mrs Harvey 30% 45,000.00 47.5% 171,000.00 Aidan 30% 45,000.00 Francesca 10% 15,000.00 30% 10% 108,000.00 36,000.00 ____ £150,000.00 £360,000.00 =====

===== 7. The remaining Recitals set out some further relevant history. They are as follows: "(C) On 30th April 1987 the partnership property was revalued and the increase of £210,000.00 was credited (D) (E) to the Partners in the above percentages excepting that Mr Harvey gifted to Mrs Harvey £63,000.00 On the 31st day of May One thousand nine hundred and eighty-seven Mrs Harvey assigned to Aidan 18% of the "A" capital of the partnership to Francesca 12% of the "A" capital of the partnership and to Paul 5% of the "A" capital of the partnership On the 30th day of April One thousand nine hundred and eighty-eight Paul assigned to Francesca his 5% of the "A" capital and retired from the partnership" 8. The Deed provides that the partners continue in the former partnership. Clause 1 provides that it started on 29th November 1982 and would continue "until determined as hereinafter provided". Clause 6 is an important provision for providing for capital. It reads: "(a) (b) Paul assigned the 5% "A" capital to Francesca on the 30thday of April One thousand nine hundred and eighty-eight and Paul retired by agreement from the partnership The "A" capital of the partnership (which the Partners intend shall relate to monies required on a long term basis for the establishment consolidation and extension of the partnership business) shall be the sum of Three hundred and sixty thousand Pounds (£360,000.00) and at the date hereof

belongs to the Partners in the following shares: MR JUSTICE MANN Approved Judgment Drake v Harvey Mr Harvey Mrs Harvey Aidan Francesca 12.5% 12.5% 48% 27% £ 45,000.00 45,000.00 172,800.00 97,200 .00 £360,000 .00 (c) Subject to the subsequent provisions of this Deed no Partner shall be entitled to withdraw all or any part of his "A" capital nor shall there by any increase in the amount of the "A" capital or any alteration in the respective shares of the Partners therein without the consent of all the Partners Provided that nothing in this Deed shall preclude the transfer by one Partner to another existing Partner of all or part of his share in the "A" capital (d) No interest shall be paid to the Partners on their respective shares of the "A" capital" 9. 10. Thus the "A" capital is a fixed amount and it cannot be increased without the consent of all Partners. It is common ground that no consent was given and that, in the events which have happened, that capital has not been increased. It was at all material times reflected in the partnership accounts in the amounts just referred to. Clause 7 provides for "B capital", which was intended to be monies required on a medium term basis. Although the accounts for one year (or draft accounts) show some "B" capital (and indeed some "C" capital, which is not expressly provided for in the Deed), at the date of the events which are material to this trial there was no "B" capital. 11. Clause 9 deals with profit shares: "With effect from the 1st day of May One thousand nine hundred and eighty-eight and until agreed otherwise by all the Partners the profits of the partnership shall belong to and shall continue to belong to the Partners in proportion to their holdings of "A" capital viz:- Mr Harvey 12.5% Mrs Harvey 12.5% Aidan 48% Draft 18 February 2025 20:38 Page 4 MR JUSTICE MANN Approved Judgment Francesca 27% Drake v Harvey Excepting that Francesca's share of profits (excluding capital profits) shall not be less than such sums as may from time to time be agreed as her salary" And Clause 11 deals with the cut of profits: The capital profits and losses of the partnership shall "11. be divided between and borne by the Partners in proportion to their respective shares in the "A" capital for the time being." 12. Clause 13 deals with accounts, and, as will appear, is important in this case. It reads: "13.

- (a) All necessary and proper books of account shall be kept by the firm and on the Thirtieth day of April in each year a general account shall be taken of all the assets and liabilities and of the profits and losses of the partnership for the preceding year and shall be signed by each Partner
- (b) Such account when signed shall be conclusive and final between the Partners as to all matters stated therein unless some manifest error is discovered within three months of the signing hereof in which case such error shall be rectified." 13. Clause 17 provided for the partnership to continue until certain events involving notice by the parents, or the death of the parents, in terms which I do not need to set out. Clause 18 provides that a partner should retire on giving 6 months notice, and the parents could force Aidan or Francesca to retire by giving notice to them. Again, I do not need to set it out. The departure of Partners is dealt with by Clause 19, and that is the Clause under which Francesca now claims the shares of her brother and her parents. It reads: "19. (a) In the event of a Partner retiring dying becoming bankrupt becoming a patient under the Mental Health Act the share of that

Partner in the capital and assets of the partnership shall accrue to the surviving partners in the same proportions as their respective shares in the “A” capital for the time being and there shall be paid to the outgoing Partner his personal representative trustee in bankruptcy or receiver as the case may be a sum equal to: (i) The amount standing to the credit of the outgoing Partner as his share in the capital of the partnership and as undrawn profits belonging to him in the last annual general account prior to his retirement death bankruptcy or becoming a patient as aforesaid; and Draft 18 February 2025 20:38 Page 5 MR JUSTICE MANN Approved Judgment Drake v Harvey (ii) (iii) The amount of any further capital brought by him into and credited to him in the books of the partnership after the taking of the last annual general account or commencement of the partnership as the case may be; and An amount equal to the outgoing Partner’s share of profits of the partnership in respect of the period from the taking of the last general annual account or the commencement of the partnership or [sic] less an amount equal to the outgoing Partner’s share of losses of the partnership in respect of that period as the case may be after allowing for all expenses in accordance with the partnership’s usual accounting practices 14. 15. (b) The said sum shall be paid by six equal half-yearly instalments the first of such instalments to be paid six months after the retirement death bankruptcy or mental incapacity of the outgoing Partner. Any part of the said sum not paid within such period of six months shall carry interest at Barclays Bank Plc base rate from time to time from the date of such retirement death bankruptcy or mental incapacity until payment which interest shall be paid half-yearly in arrear on the same dates as the instalments are due.” There was originally an issue as to the date on which the parents should be treated as having become patients, but that has now been dealt with by agreement and I do not need to deal with it in this judgment. It is accepted that this clause operates to pass the shares of the parents on the events of their respective incapacities. It also operates in relation to Aidan’s death. There are obviously three separate steps as a result of which the farming business and its assets have now ended up with Francesca, but I do not need to treat each of them separately. They all raise the same question. The partnership accounts were drawn to 30th March in each year. They were generally prepared by Grant Thornton and they were signed by the partners each year up until the death of Adrian. The 2005 accounts were probably thus signed. Signed versions were not available at the hearing, but there is a reference to signed accounts in certain contemporaneous correspondence. The 2006 accounts were signed by Francesca, and by Richard as attorney for each of his parents, on 30 th October 2008 (or at least that is the date on the signature page). No further accounts have been signed. In line with the preceding accounts, those 2006 accounts showed the partners’ capital accounts in the sums in which they had been shown for years, namely £45,000 to each of the parents, £172,000 for Adrian and £97,200 for Francesca, making a total of £360,000. The most valuable partnership asset, namely the land, was shown at cost. The nature of the dispute in this case 16. The issues before me are those issues which survive from an order of Master Price directing preliminary issues. Some of them have fallen away. The point which Draft 18 February 2025 20:38 Page 6 MR JUSTICE MANN Approved Judgment Drake v Harvey survives is as to the amount payable to Aidan’s executors (the third and fourth defendants) in respect of his

partnership share and arising out of his death and the amount payable to Jack and Mary arising out of their retirement from incapacity, and to the parents in the light of their enforced retirements through incapacity. In terms the remaining prescribed issues are as follows: “The following (issue) be directed to be determined by the judge:

- a. The amount payable to the Third and Fourth Defendants as executors of the estate of Aidan Harvey pursuant to clause 19 of the Partnership Deed ... Aidan Harvey having died on 20th August 2006.
- d. If the [parents] or both of them became a patient under the Mental Health Act within the meaning of clause 19 of the Partnership Deed, the amount payable to them pursuant to clause 19 of the Partnership Deed.” The argument of Francesca is that the entitlement is fixed by the deed as being the amount shown standing to his capital account, and unpaid profits, and that the appropriate amount in relation to capital account is the £172,000 figure referred to above. The principal effect of this for the purposes of this trial is that Aidan’s estate and the parents get no benefit from the increase in land value that has accrued over the years. The difference between the book value of the land and what its real value is thought to be may be £2.5m or even more. If this value were reflected in increased capital accounts (or were otherwise a sum for which Aidan’s estate received the benefit in the dissolution accounts) the estate would be entitled to a further £1.2m or more. The parents would each receive another £600,000 or so. These figures are not agreed; they are illustrative only. 17. The dispute in this case is as to whether Francesca should pay a sum based on the stated capital, or whether she should pay a greater sum which takes account of the real land value. It turns on what she has to pay under paragraph 19 of the partnership deed. Francesca’s case in outline 18. Francesca’s case, advanced on her behalf by Mr Blackett-Ord, is that the entitlement of the outgoing partner is determined by clause 19. That contains a mechanism which determines the price to be paid. It does not require valuation of assets; it proceeds from agreed accounts, and in the accounts of this partnership land was not revalued. The mechanism determines the price to be paid, and for that purpose one looks to how capital was dealt with in the accounts. The amount of the capital in the agreed accounts was agreed and fixed, and that is the basis of the outgoing partner’s entitlement. In support of that as being the correct position Mr Blackett- Ord relied on apparent previous expressions of intention and a previous Opinion of leading counsel which expressed the view that on a death the estate of the deceased partner would be paid capital sums which did not reflect a revaluation of the land. Mr Blackett-Ord said his approach was supported by authority, to which I will come. He also said that even if there were to be some sort of revaluation of the land Draft 18 February 2025 20:38 Page 7 MR JUSTICE MANN Approved Judgment Drake v Harvey for the purposes of drawing up the relevant accounts, it would not increase the capital of the outgoing partner, nor would it feed through into the profits, so it would not make a difference anyway. 19. So far as identifying the relevant accounts is concerned, he relied on the 2006 accounts, claiming alternatively that they bound the parties while accepting in another part of his submissions that they did not (because they were not signed on behalf of Aidan’s estate). If they were not binding, then one had to

ascertain what accounts should be drawn, and there was no reason why they should include a revaluation of partnership assets. The case of the defendants in outline

20. Mrs Talbot Rice QC, for the executors of Aidan, argued that the accounts should be taken on a basis that provided for a revaluation of assets (and particularly the land). She pointed to previous occasions when that had apparently been done in relation to some assets shown in the accounts, and she pointed to an apparent revaluation when Paul came into the partnership. Her case involved the construction of clause 19 and the meaning of the reference to accounts. Absent an express provision in a partnership agreement, a partner would, *prima facie*, be entitled to the benefit of increases in asset values on a dissolution, because in that event the outgoing partner would be entitled either to a sale (which would generate an actual surplus over capital) or to be bought out at a price which reflected his strict dissolution entitlement (which would again give him the benefit of the revaluation). The wording of the deed did not drive one to a different conclusion. A retiring partner would be entitled to have different accounts drawn from the last signed accounts if he saw fit, because the relevant accounts were dissolution accounts, not going concern accounts. A previous acceptance of accounts on the latter basis should not mean that a retiring partner cannot opt for the former because the basis of, and background to, the agreeing of accounts has changed.
21. For the parents Mr Ulick Staunton advanced much the same arguments. He also pointed out that clause 19 was capable of operating in circumstances which he described as “misfortune” – death, disability and so on – and it would require clear words to achieve the result contended for by Francesca. Those clear words were not there. The reference in clause 19(a)(i) merely threw one back to clause 13, and no basis of account was specified in the latter clause, so a proper basis (proper for the purpose in hand) could be adopted in the case of a compulsory retirement or death. An account taking current asset values into account would be proper in those circumstances, and the outgoing partner could insist on it unless he had bound himself not to. In the present case no-one had bound themselves not to. Like Miss Talbot Rice, he submitted that if one prepared an account on a current value basis, the benefits of any increase in value would feed through to the outgoing partner either as an accretion to capital account or as a capital profit. The proper construction of the partnership agreement
22. Francesca’s entitlement, and the obligations of an outgoing partner, are *prima facie* provided for by a written partnership agreement. The appropriate starting point is therefore not what the position would be absent an agreement, but the proper meaning of the terms of the agreement. That is where I shall start. Draft 18 February 2025 20:38 Page 8 MR JUSTICE MANN Approved Judgment Drake v Harvey
23. 24. 25. 26. 27. The relevant provision is clause 19. It seems to be clear in its terms. The events which trigger it are clearly set out. The accrual of “the share of that Partner in the capital and assets of the partnership” is clear in its meaning – it means the interest in the overall assets of the partnership. The capital is on the asset side for these purposes. That all passes to the continuing partners. Their shares are prescribed. The measure is their proportionate share in the A capital, which is apparently protected from alteration without consent by paragraph 6(c). Then we come to the price. The outgoing partner is entitled to “a

sum” calculated in accordance with the following subclauses. They seem to me to be clear in their meaning. The first element is a sum of money which is the outgoing partner’s capital. It is an “amount” standing to his credit as his share in the “capital and undrawn profits”. Then there is clear wording which tells you where you find those figures – “in the last annual general account prior to his retirement death bankruptcy or becoming a patient as aforesaid”. Those are important words. A different form of those words appears in subclause (ii) and (iii). Subclause (ii) refers to “the taking of the last annual general account”, as does subclause (iii), but they are all referring to the same thing – the process of the taking of an account. The root of each is the process and documentation referred to in clause 13. Clause 13 refers to the process of taking an account “in each year” to 30th April (in fact the partnership used the March date, but nothing turns on that), and then creates the binding nature of an account document when signed. So in order to ascertain the amount to be paid to the outgoing partner one looks to the “last annual general account prior to ... death”. In respect of Aidan that, in my view, means the account for the year ended 30th March 2006. That is the last accounting date, and a sensible and commercial construction of this document is that that is the date to be adopted. The only alternative which might be contended for is the last signed account, where the accounts for the last accounting date have not been signed (which, as will appear shortly, is the case here) but that does not seem to me to be a sensible construction, and no-one contended for it in this case. If one had a partnership in which accounts had not been signed for 2 or 3 years (which is not impossible) it would introduce an element of the random to say that one goes back to the last signed account. This approach is supported by the reasoning and decision in *Hunter v Dowling* [1893] 3 Ch 212. So the relevant account date in this case is 31 st March 2006. Had the accounts been signed by all the partners for that date then they would have been binding under clause 13(b), and I find it hard to see why those accounts, in that form, would not have been the basis of the calculation of the clause 19 price. That would have left Aidan’s estate and the parents losing out on increases in value because the accounts will have been drawn and agreed on a basis which would exclude that. The defendants advanced various arguments to the effect that even if they had been signed, Aidan’s estate and the parents could still have insisted on an account being taken on a different basis, relying on authority which I refer to below. I do not think that that can be right. The terms of clause 19 do not admit of such an alternative account. The reference to “the last annual general account” can only be a reference back to the accounting process previously referred to, and that provides for fixing the accounts when signed. It does not mean “a last general account”, thus opening Draft 18 February 2025 20:38 Page 9 MR JUSTICE MANN Approved Judgment Drake v Harvey up the possibility of a further account after a signed account, as submitted by Mrs Talbot Rice. What are the relevant accounts based on that construction? 28. However, on the facts of this case, I find that the accounts for the year ended 31st March 2006 were not signed so as to become binding. Francesca signed them, and Richard signed on behalf of the parents but neither he nor the 4 th defendant signed on behalf of Aidan’s estate. I do not know why that was (though I note that he had not obtained probate at the time), but it does not matter. The accounts were signed by or on behalf of only 3 of the four signatories.

29. Mr Blackett-Ord sought to say that when those accounts were signed they were signed by the only 3 then partners in the partnership (i.e. after Aidan's death), so that they were somehow binding across the partnership in a way which bound Aidan's estate. I confess to having some difficulty in understanding how this can be. Clause 13 provides for written accounts to be binding on those partners who sign them. If a partner, or his duly authorised representative, does not sign them then he is not bound. It is Aidan's estate that is bound by (or entitled to enforce) the provisions of clause 19 and if the personal representatives have not signed as such they cannot be bound by other partners (or their representatives) who sign themselves. Mr Blackett-Ord sought to put Richard's signing qua attorney of the parents in the context of his knowing there was a dispute about entitlement and nonetheless signing, suggesting that this somehow assisted his case in saying the accounts were signed in such a way as bound Aidan's estate. Again, I reject that submission. It simply does not work. 30. 31. 32. So the accounts for the period preceding Aidan's death were not signed in such a way as to bind his estate. I also find that the accounts do not bind even those parties who signed in the absence of agreement by all partners (or their estates). Clause 13(b) anticipates all the partners signing the accounts, and provides that they are binding when they do. If one or more partners do not sign, then I do not consider that the accounts bind even those who do sign. Subject to estoppels or something similar, they would be entitled to recall their approval. Otherwise you would never have a fully agreed set of accounts. Once those signing partners know that some partners dissent, they must be free to take a fresh view of their own willingness to agree the propounded accounts which they signed. Accordingly in this case the position is that there are no accounts signed which comply with the accounts required by clause 19. However, that cannot rob the clause of any effect. In my view the parties are still entitled to operate the clause on the basis of the accounts as they ought to be drawn up as between the partners. That involves a consideration of what the accounts would look like were the partners to disagree and were an account to be ordered by the court or, perhaps more accurately, what the court would say accounts would look like if drawn up and signed in accordance with the obligations in clause 13(a). This conclusion is in line with authority. Not only is it in line with *Hunter v Dowling*, it is also in line with the judgment of Chadwick LJ in *In re White (Dennis)* dec'd [2001] Ch 393. In that case the Court of Appeal had to consider the nature of the accounts (and in particular whether there should be a revaluation of real Draft 18 February 2025 20:38 Page 10 MR JUSTICE MANN Approved Judgment Drake v Harvey property) where a partner (Dennis) died in the course of an accounting year (in November 1993) and the survivor signed accounts for the last complete year (to 31st March 1993) which, if governing, did not give the deceased partner the benefit of a huge uplift in property values, because only historic values were included. The personal representatives of Dennis sought accounts which reflected that uplift. The case turns on the actual wording of the partnership agreement in question, which is materially different from the present, but some of the general principles enunciated by Chadwick LJ apply to this case. At paragraph 32 of his judgment he said: "32. For my part I have no doubt that the 1993 general account cannot bind the personal representatives of [Dennis] after his death unless it was prepared on a basis which [Dennis] could have been required to accept during his

lifetime. If it was not prepared on a basis which he could have been required to accept while he was still alive, then the account must be reopened.” 33. I do not think that the re-opening of the account is a concept which is directly applicable to the present case, because there are no finalised accounts which require reopening, but the thesis underlying Chadwick LJ’s reasoning still applies. The question is what accounts would the personal representatives of Aidan (or Aidan himself) and the parents be obliged to accept, or entitled to insist on? The converse is also an appropriate way of looking at it – what accounts is Francesca obliged to accept or entitled to insist on? That is the all-important question which I have to decide. 34. In determining this point I bear in mind a point made by Mr Blackett-Ord, namely that this is not a case where the agreement requires a fresh account to be taken as a result of a partner leaving. In *re White* Chadwick LJ said: “It is I think important to have in mind that the question in the present case is not ‘On what basis did the parties intend a post- event account to be taken, following a death or retirement?’ The account on the basis of which the deceased partner’s share in the capital of the partnership is to be ascertained in the present case is a pre-event account ...” Mr Blackett-Ord submitted that Aidan could not have insisted on accounts which brought in a revaluation of the land. He relied on the fact that the practice of this farming partnership had been to follow what is normal for such practices, and the fact that the history of the matter showed that it was not the intention of Jack, when the farming business was first acquired and set up, that that should happen. 35. So far as the first of those facts is concerned, it is true, as a matter of fact, that during the continuation of this partnership the partnership accounts did not revalue the land from time to time. The capital of the partnership was increased by £210,000 in 1987, prior to Paul being admitted, and documents show that that was Jack’s view of the amount of the increase in the value of the land over the preceding years. So that shows a sort of revaluation exercise, feeding through into the capital, but nothing like that has happened since, and the capital has remained the same. Draft 18 February 2025 20:38 Page 11 MR JUSTICE MANN Approved Judgment Drake v Harvey 36. 37. On the other hand, the accounts are not completely devoid of revaluation exercises. Evidence put in late by the partnership’s accountant, Mr Clive Buckland, stated that the accounts did from time to time contain revaluations of the production herds to reflect market value, though not since 1997. The extra sums arising were carried to the current accounts of the partners. His evidence was that apart from that, the accounts did not show unrealised profits; they only recorded a profit when an asset was actually sold. In my view this does not take the debate much further. It shows there were revaluations, but not recently, and not on a scale equivalent to that required by the defendants in this case. I do not know the circumstances of those revaluations. But they do not show that partners had clearly set their faces against revaluations for all purposes. It is also important to note that while the land had not been revalued in all the years of the partnership (since Paul’s introduction), the accounts which were signed were all signed at a time when all partners were apparently continuing. There was no occasion of a retirement or other departure which could be used to test the attitude of the partners on such an occasion. *Re White* indicates that the previous conduct of the partners in relation to the taking of accounts is relevant to the exercise of ascertaining how the critical unsigned

account should be taken. Chadwick LJ considered that history and, on the facts of that case, concluded that the “just valuation” required by the relevant clause was one which required a historic, not a current, valuation of the partnership property. His reasoning is heavily dependent the facts of that case and the terms of the partnership agreement, which are both very different from the present, but it is plain that one very material circumstance was that there had been previous dealings between the partners, on the occasion of departures of partners, which took place on the footing of historic values. That is always likely to be a compelling factor. There is no equivalent in the present case. The closest would be when Paul came in many years ago. On that occasion there was a revaluation. There was not one when he left, but there was not much time between the two. Since then there have been no admissions or departures until the unfortunate retirements which form the background to these proceedings. If Paul’s admission is at all relevant, it would support an entitlement to insist on a revaluation, but in fact I regard it as of little significance. 38. So the history of dealings between the partners tells us little. There is, however, some pre-partnership and pre-partnership agreement material to which I will have to revert, but before doing so I will deal with other authority which is said by one party or the other to bear on the question of the accounts on which a partner would be entitled to insist in these circumstances.

39. Mrs Talbot Rice placed heavy reliance on *Cruickshank v Sutherland* (1923) 92 LJ Ch 136. In that case partnership accounts were to be made up to 30 th April of each year, and the share of a retiring partner was to be ascertained by reference to accounts thus prepared (clause 15). The share of a deceased partner, with his share of profits calculated in the usual way, up to the 30th April next after the death, was to be ascertained as provided by clause 15. A partner died in October 1916, so his estate’s entitlement fell to be calculated by reference to the accounts made up for the following April. The accounts for the two preceding years (the first two years of the partnership) showed assets at book values; they had been taken in at the book value shown in a previous partnership. They were thus apparently historic. The Draft 18 February 2025 20:38 Page 12 MR JUSTICE MANN Approved Judgment *Drake v Harvey* executors of the deceased partner contended that notwithstanding that, they were entitled to have the April 1917 accounts drawn on the footing of assets shown at their fair value to the partnership. 40. Lord Wrenbury said that the account: “... is to be such as would be proper if he were a retiring partner.” (page 137). In determining what the proper basis of the account was Lord Wrenbury said: “It is not, I think, disputed – and if it were, I should be of opinion that it could not be successfully disputed – that a full and general account of the partnership property will be an account at which the property will be brought in at its fair value. The articles are wholly silent as to the principle to be adopted in preparing this full and general account of the property – it remains simply that it must be a proper account of the property, whatever that is. What are the values to be attributed to the several assets falls to be determined by the partners by agreement, and – in the case of dispute – is a matter for arbitration under clause 21 of the deed ... What the value is does not concern us. That is for an arbitrator, if there be a dispute. Your Lordships are concerned only to say what is the principle on which an arbitrator ought to act.” 41. He then went on to acknowledge that the

usage of the firm might demonstrate that the rights under the deed (which, as a starting point, seemed to be of value to the firm, and not necessarily the value in the accounts) had been varied and went on to consider: "Was there here any usage or course of dealing such as that an inference to be drawn that on the death of a partner his share is to be paid out on the footing of book values?" He then goes on to answer that question: "How could there be a practice and usage uniform and without variation to pay a deceased partner's share on the footing of book values and not of fair values, where no partner had died before and no partner had retired before? The only practice which existed -- and that only on two occasions, namely, in April 1915 and April 1916 -- was to prepare the account -- when the interest of all the partners was the same -- on the footing of book values. When a partner died or retired, the interests of all parties were not the same. The executors of a deceased partner were, so to say, vendors whose interest it was to put the highest sustainable value on the assets -- the continuing partners were, so to say, purchasers whose interest was the reverse. ... Draft 18 February 2025 20:38 Page 13 MR JUSTICE MANN Approved Judgment Drake v Harvey Even if there were a usage to state and account for one purpose in one way, that is not a usage to state it for another purpose in the same way ..." Having considered some hypothetical facts involving a partner who gives six months notice to retire at the end of a partnership year he asked rhetorically: "Is he bound to concur in stating an account on the footing of book values? Must he submit to being paid out at what may be less than his proportionate share in the partnership assets?" And then having considered other hypothetical facts he concluded: "These considerations make, to my mind, irresistible a conclusion to which I should have arrived at independently of them, and upon the language of clause 13 alone, and that conclusion is, that a full and general account of the property under clause 13 is a real, and not an arbitrary, ascertainment or valuation of the property, and that the fact that the partners have, in April 1915 and 1916, been content to take book values in no way makes an account on that footing compellable upon a partner who is leaving the partnership, and claims payment of his share on the footing of values in which he and his co-partner agree, or which, in default of agreement, an arbitrator shall ascertain. The declaration [made by the trial judge] that, for the purpose of ascertaining the share of the deceased, his executors are bound by the book values is, in my opinion, wrong." 42. I agree that this case is of considerable assistance. Although the wording of the partnership deed in that case was not the same as in the present case, and although the account to be drawn in that case was to the accounting date next after the retirement, and not before, the principles it expounds are nonetheless applicable because the provisions and situations are sufficiently similar. The principles are: i) ii) iii) iv) Where the partnership deed is silent as to the basis of valuation for the purposes of an account, the appropriate value is one which is fair. Fairness can be determined by agreement between the parties. If they sign accounts for any given year on a particular valuation basis, that obviously makes it fair for that year. A given basis can be enshrined and become binding if there is a consistent practice (usage) which demonstrates that the parties have actually agreed that as a consistent basis. A consistent usage, leading to an agreement, for an account operating in one situation does not necessarily mean that there is an agreement operating in another. Thus a pattern of

conduct operating on the basis of a continuing partnership does not necessarily bind an outgoing partner in relation to the accounts drawn for the purposes of his retirement (or death). Draft 18 February 2025 20:38 Page 14 MR JUSTICE MANN Approved Judgment Drake v Harvey 43. 44. v) vi) A partner who sees his retirement coming or plans for it does not have to sign off on accounts prepared on a previously consistent basis if those accounts would not provide for a fair value of assets vis-à-vis him and his retirement (see Lord Wrenbury's example). A fair account, in the case of a death or retirement, is likely to require real, and not historic, values to be attributed to the partnership property, absent factors pointing the other way and requiring otherwise. Those principles are all applicable to the present case. It is not a basis of distinguishing the case that its particular partnership agreement required the valuation of a share, whereas the present one involves the ascertainment of payment of capital and profits. Underlying both is the taking of an account and the principles applicable to that process. Nor is the case distinguishable on the footing that the accounts applicable to a deceased partner were those made up to the end of the year in which he died. It seems from the facts of the case (though it is not wholly clear) that the accounts applicable to a retiring partner were those previously made up, and Lord Wrenbury, in his examples, considered a case which is an equivalent (accounts drawn up at the year end on the same date as a retirement). In any event, even if it were the case that a retiring partner too has his entitlement based on accounts on the same basis as a deceased partner, that does not detract from the force of the general principles enunciated by Lord Wrenbury. In *Noble v Noble* [1965] SLT 415 a 1947 partnership agreement provided (in a recital, but not in the body of the agreement) that real ("heritable") property was to be taken at the value of £8000. It was thus entered into the accounts in every year up to 1963. Then one of the partners (the father of the other partners) sought a declaration that he was entitled to have the capital revalued in the accounts to its current market value. Lord Strachan found that there was an agreement to value the real property so as to put a money value on the capital of the partnership, but the question of whether that meant that the property had to be entered in the accounts at the same value thereafter irrespective of increases in value was "a difficult one". He considered *Cruickshank v Sutherland* and found that it established that where the partnership agreement was silent a full and general account should contain a real, and not an arbitrary, valuation of property. He considered that the same issues were raised, notwithstanding that his case, unlike *Cruickshank* (but like the case before me), required the taking of accounts as at a past, and not a future, date in relation to the triggering event. He decided, with some hesitation, that the "narrative references" to valuation in the contract could be taken to have meant that the £8,000 had to figure in every balance sheet thereafter: "If that were so, a retiring or deceased partner would have no share whatever in any increase in the market value of the property, and if such an apparently unfair result had been intended, I think it would have been provided for in the eight clauses in which the terms and conditions of the partnership were reduced to writing, and would not have been left to be inferred from the narrative clauses. In my opinion, therefore, the contract is silent as to the principle to be adopted in framing the balance sheet, and *Cruickshank* is not distinguishable on that ground." Draft 18 February 2025 20:38 Page 15 MR JUSTICE MANN

Approved Judgment Drake v Harvey He therefore started from the same starting point as Lord Wrenbury, that a silent deed prima facie required a fair account which in turn required current valuations, and did not require a rooting in historic values. 45. That decision was affirmed on appeal (see the report as a note to Thom's Executrix, below), in the course of which Lord Misdale said: "... the rule of current value must be applied unless the wording in the deed now under consideration requires that a different course be followed." 46. The same sort of result, adopting the same sort reasoning, occurred in Shaw v Shaw

[1968] SLT 94. A similar question arose in Clark v Watson [1982] SLT 450. That has a closer similarity to the present case in that a deceased partner was entitled to be paid out (inter alia) the "Capital standing at the credit of the deceased partner in the Accounts of the Partnership", and the question was whether the balance sheet required for that purpose required a fair value of assets, rather than a historic value, to be included. Lord Dunpark referred to a general rule: "Now the general rule, that the share of capital due to the estate of a deceased partner falls to be calculated on the basis of a fair valuation of the assets, applies whether that value has to be inserted in the last balance sheet prepared prior to his death or in the next balance sheet prepared after his death. The fact that partners have agreed to the insertion of book values in balance sheet prepared during the continuance of the partnership does not mean that they have agreed to the insertion of book values in the balance sheet which governs the distribution of the assets on dissolution of the partnership by death or retirement. For that result to follow there must be an agreement to that effect, either expressed or plainly to be implied. I find nothing in the terms of this contract which points to such an agreement." 47. 48. Thus again the court started from the position that the normal expectation would be a fair current valuation, and that an agreement would be necessary to displace it. It also expressed the view that there is no difference, for these purposes, between post- departure accounts and pre-departure accounts. I respectfully agree. The same general principle, or starting point, was the basis of the decision in Wilson v Dunbar [1988] SLR 93. In this jurisdiction Mr Jules Sher QC (sitting as a deputy judge of the Chancery Division) came to similar conclusion in Gadd v Gadd, unreported, 7th July 2002 (of which only brief All ER Reporter and Lawtel summaries were shown to me). The contrary result (i.e. a historic valuation) was reached in Thom's Executrix v Russell & Aitken [1983 SLT 335, but that was primarily on the basis that previous inter-partner dealings, as partners came and went, were on the footing of historic and not current values – see p 338 col. 2. The application of those principles to the present case 49. None of those authorities departs from the principles which I have extracted from Cruickshank; indeed they reinforce them. Applying those principles to the present Draft 18 February 2025 20:38 Page 16 MR JUSTICE MANN Approved Judgment case I find as follows: Drake v Harvey i) ii) iii) iv) v) vi) vii) The partnership agreement is silent as the basis of valuation for the purposes of drawing the accounts applicable to the death of Aidan and the retirements of the parents. No accounts were agreed for the relevant year prior to Aidan's death (to 31st March 2006), or for any subsequent year relevant to the entitlement of the parents on their respective retirements. The accounts to which the

outgoing partners or their estates are entitled are accounts which reflect a fair value. That fair value is the market value of the land (no other candidate other than the historic value has been proposed) unless there is an agreement otherwise, or unless there are other factors rendering such a value unfair. Historic valuations would be unfair because they are (for these purposes) unreal and do not reflect the real and full value of the outgoing partner's share. The fact that previous accounts contained historic values does not mean that the executors and parents are obliged to accept that for the accounts governing the payment out of Aidan's share. Those accounts were agreed on the apparent assumption of a continuing partnership. The death or retirement of a partner is a different circumstance requiring (or capable of requiring) a different valuation basis. There is nothing in the partnership agreement which, as a matter of contract, requires the adoption of historic values. The adoption of historic values has the potential to create considerable unfairness such that a clear case must be established for displacing that unfairness. The scope for unfairness is demonstrated by the facts of the present case. If historic values are applicable to all the departure events which have now left Francesca with the entirety of the partnership then she will have acquired the partnership at a very considerable undervalue indeed, mainly by dint of surviving (though I do not seek to minimise the actual work that she has done in the partnership). 50. I acknowledge that this last factor must be approached with some care. In the case of a family farming partnership there may be good reasons why the partners would wish to adopt a historic valuation on the departure of a partner. In many cases having to pay out on the basis of current land values would lead to a significant financial burden, which in turn could lead to a sale or break-up of the farm which the family, for personal reasons, would wish to avoid. In those circumstances adopting historic values may not be as odd as it might otherwise seem. It is also a way of carrying out some sensible estate planning. Elderly parent partners might be quite happy to leave on the basis of historic values, where the assets pass to their children anyway. So again there might be a good reason for it. Nevertheless, the unfairness which might be caused still causes one to look for clear reasons for departing from Lord Wrenbury's *prima facie* position. Draft 18 February 2025 20:38 Page 17 MR JUSTICE MANN Approved Judgment Drake v Harvey 51. I also acknowledge that, at least on the true construction of this partnership agreement as I have found it to be, there is an element of chance as to whether historic valuations get themselves adopted. My analysis allows a partner who can see his or her departure coming to produce a state of affairs which assists his/her claim to a revaluation. If he/she can postpone the event until the next following financial year, he/she can decline to sign the accounts for the current one, leaving the valuation question open. That opportunity might not be open to one who cannot plan or foresee a retirement event. Suppose a partner who signs the accounts for the previous year end, with historic valuations, in, say, November (as is entirely plausible) and who then unexpectedly dies in the next month. That partner's estate would be stuck with the accounts the partner had signed. Miss Talbot Rice said that Cruickshank and some of the other cases had the effect that the executors would nonetheless have the right to a different account with market values. Mr Staunton for the two parents supported that

position and drew my attention to paragraph 10- 74 of Lindley on Partnership which states that an account said to be binding on the partners was not necessarily binding for all purposes, with some examples. He did not take me to the cases referred to. I have difficulty with that argument on the facts of this case. I think that the agreement has provided that the partners are indeed to be bound, and Cruickshank and Lindley do not enable one to escape from that. So the operation of the provisions to produce “fair” values is to some extent a matter of chance (unless a full analysis of the Lindley cases supports Mr Staunton and proves otherwise). However, that does not deter me in reaching the conclusions that I have reached on the facts of this case. 52. 53. Since there is nothing in the agreement which prevents a fair account containing a current valuation of the land, I have to go on to consider whether there are other fairness factors which point against it. I have already dealt with the question of usage. The partners have previously signed accounts based on historic valuation figures, but that usage does not demonstrate an agreement that that should always be done because all previous accounts apparently assumed a continuing partnership with the same partners remaining (on the evidence before me). The current circumstances are different. So usage does not assist Francesca either. However, the fairness debate does not stop there. Mr Blackett-Ord took me back into history, to the genesis of this partnership, and said that the documents demonstrate that Jack, who was the founder, seems to have contemplated that historic values would always govern. Since this evidence went principally to the views of Jack and his advisers, and did not go to the acts of all the partners, it is of limited or questionable relevance, but I will consider it anyway.

54. The farm was acquired at the beginning of 1983, but discussions about an intended partnership had started in the previous year. Jack was involved in discussions about the terms and effect of the partnership with his then solicitors and accountants. A “partnership memorandum” prepared in December 1982 by one of the professionals (I am told it was the accountant, Mr Herdman) reflects that Aidan and Francesca would be going into partnership with their parents and contained outline partnership terms. Outline clause 14 referred to “Retiring Partner’s Capital” stated: “The amount due to a partner to be the total of his capital account, at date of last Balance Sheet adjusted for drawings etc and share of profits to date. (Being a family partnership for Draft 18 February 2025 20:38 Page 18 MR JUSTICE MANN Approved Judgment Drake v Harvey CTT planning purposes no revaluation of assets, as between partners, is necessary. In the event of death final profits will not then be determined by reference to a Probate Valuation, which will only be relevant for valuing capital stake. In the case of the son or daughter their premature retirement results in only being paid out on the Balance Sheet figures without any right to force a revaluation of assets.)”
55. A year later, by which time no partnership deed had yet been finalised, a letter from Mr Herdman to the solicitors on 7th December 1983, said: “‘A’ capital on retirement - ... The Deed does not provide for any revaluation of the farm property and therefore there would be no immediate entitlement for, say, Aidan or Francesca to call for valuation in order that

they can cash-in on the appreciation. This comes back to the point of the parents retaining control.” Thus the sort of events now under discussion seem to have been contemplated as giving rise to no revaluation.

56. A response from the solicitors contained this paragraph: “A’ Capital on retirement. No comment is called for on this point which is fundamental to the basis of the partnership.” 57. Thus at the outset, the professionals, at least, were contemplating the case which Francesca now propounds. The extent to which this reflects Jack’s thinking is not clear but it is likely that he was not antipathetic to it. There is no evidence that the children played any part in this thinking.
58. However, by 1988, when Paul had become a partner, this point was not so clear to the professionals. At some point at the beginning of the year the solicitors (George & George) reviewed the original draft partnership agreement (which had not been finalised and executed) and amended the draft to reflect “the present situation”. In a commentary on the draft they commented as follows: “9. Payment to outgoing partner This is dealt with in clause 19 which basically stands as originally drafted. The scheme is that any retiring Partner will simply be entitled to withdraw the capital standing to his credit in the books of the firm. Naturally these sums are expressed in cash and provided that in some way no re-valuation of assets is written into the actual partners’ accounts any retiring Partner’s entitlement will purely be related to the historic amounts of cash introduced or are left in the firm. Undrawn profits to the date of retirement will be paid in addition to share of capital. So far as the continuing partners are concerned provision has got to be made as to the basis on which the underlying partnership assets will accrue to them and we have provided Draft 18 February 2025 20:38 Page 19 MR JUSTICE MANN Approved Judgment Drake v Harvey that this will be in proportion to the shares of ‘A’ capital then held. In effect this will apply to any surpluses which would be thrown up on a re-valuation of the firm assets. The historical cost will be reflected in the cash balances standing to the credit of the partners. The sum being paid to the retiring Partner will have to be raised in cash and if money is introduced by partners for that purpose their accounts will be credited in the proportions in which the money is introduced. Equally if the partnership itself results to bank borrowing that will become a liability of the partnership. Attention needs to be focused on the surpluses on re-valuation of the assets because effectively that accrues to the ‘A’ capital. It seems to us that the partnership must provide for a solution to this problem and not leave it in the air to be agreed or negotiated at the time. It may be that express provisions will need to be made in the event of retirement of each particular partner. For example, if Aidan were to retire presumably Mr and Mrs Harvey would not wish to receive their shares of the surplus on re-valuation attributable to Aidan’s 48% share. It is probably a question of considering what should happen if Mr and Mrs Harvey died on the one hand or if one of the children die on the other. (It must be appreciated in the present context that ‘retirement’ covers both retirement in the normal sense or through an event such as death or bankruptcy). ” 59. 60. 61. Thus the solicitors seem to have contemplated the sort of situation which now arises. There is no evidence that this problem was fully addressed by the

partners at the time, or since. As appears above, Paul was introduced as a partner at this time. While this was going on the A capital was amended. This was done so that it roughly reflected the then value of the land. Various documents indicate that this was the case. I do not need to set them all out. By way of example, an undated draft of the partnership agreement shows someone working on an old draft containing the old original capital figures. Revised capital figures (eventually reflected in the final document) appear under a heading "Following Re-valuation". A note in the margin reads "30th April 87 - the partnership property was revalued and the increase of £210,000 was [remitted?] to the partners." A number of things were under discussion at this time, including the possible creation of some trusts whose purpose is not entirely clear to me. In this context the accountants met Jack and Mary on 22nd May 1987 and discussed "gifting proposals". Their note, subsequently sent to Jack and Mary and accepted by them as being accurate, covers a lot of ground, and refers to "Re-valuation of A Capital" and "Valuation of A Capital – this is represented by the property which now includes the milk quota!". Then it says this: "Aidan Life Cover General concern as to the position if Aidan were to die given that he will be owning 48% of the property. Advise that a 10 Draft 18 February 2025 20:38 Page 20 MR JUSTICE MANN Approved Judgment Drake v Harvey year cover, renewable should be taken out on his life to be written into discretionary trust for the benefit of his brother and sister, wife and children with the intention being that the money should be available for the remaining partners to purchase his share of the property, thus putting a cash sum in the hands of his widow. This benefits both Aidan's widow who then receives cash and the partners who have a means of retaining possession of that part of the property owned by him. " The reference to "the property" tends to suggest that the accountants were treating Aidan as owning an interest in the property rather than merely being limited to a prescribed amount of capital. A "Further Note" reads: "(a) The fact that the property has been financed substantially by B and C Capital and that A Capital does not represent the full value of the property was not properly discussed at the meeting and it does have implications in particular it means that Jack and Mary's share of the A Capital, though it may be 25% does not actually represents 25% of property value. This may not be of significance for the purposes of determining whether there is a retained benefit but it is of significance to them in as much that the stake in the farm was meant to relate to the value that they might wish to take out at some future date if they were to move out of the farm house and needed to find a house elsewhere, i.e. if Aidan died and there was a general desire to sell up.

- (b) Recommended that if Jack and Mary are to retain an interest, not less than the value of 25% of the property, they should retain sufficient C Capital to bring their present interest up to save £200,000 (25% of £800,000)." 62. Thus the accountants were demonstrating uncertainty as to how the full value of the land ought to be dealt with as between the partners. The parents responded to the various suggestions in terms which I do not need to set out, but none of which suggested that they were firmly of the view that arrangements ought to operate as Francesca now says they should operate, i.e. that partners should depart on the basis of an entitlement calculated by reference to very historic land values. 63. On 21st

February 1989 Mr Herdman (the accountant) wrote to a different solicitor about various tax planning matters, stating that there had been revaluation of partnership property as at 30th April 1987. This letter contemplates the departure of Paul as a partner (only recently admitted) and says: “ The fact that Paul is not to remain a partner must be dealt with as a resignation and it would be impossible and inappropriate to cancel Mary's gift. The correct way is for Jack to provide a current value of the property and milk quota at 30 th April 1989. This will provide an update on the value of the A Capital. Paul will be credited with 5% of the increase and can Draft 18 February 2025 20:38 Page 21 MR JUSTICE MANN Approved Judgment Drake v Harvey 64. 65. then transfer his capital to Aidan and Francesca as Jack and Mary advise.” This plainly does not demonstrate the application of the principles that Francesca propounds in this action. Jack commented on this letter that they would have to be careful about revaluation lest Paul exceed his capital gains tax allowance. He did not say that a revaluation would be contrary to the provisions which were intended to operate between the partners. In fact no revaluation took place. In 1998 leading counsel advised on a scheme to try to keep Aidan’s interest in the partnership for his family in the event of his death. In that context counsel proceeded on the footing that absent any change in the then current arrangements, Aidan’s estate would be entitled only to his capital as then fixed, and to undrawn profits, and that the estate would not have the benefit of any increase in value. While this was urged on me by Mr Blackett-Ord as being relevant, it is only a small part of the overall picture. There is no evidence that all the partners acted on it in some way which reflects on the fairness of the accounts which ought now to be taken. The overall effect of his background is that it does not provide a basis for departing from the principle that a fair value ought to be applied to the partnership assets, and that that fair value is not the historic cost amount used in the accounts up to the date of the last signed accounts. While the potentially adverse affects (looked at from the perspective of the outgoing partner) were apparently acknowledged (at least by Jack’s advisers) in the very early days of the first partnership (before Paul joined) there is no evidence that they were plainly acknowledged by all the partners and accepted as applying to all retirements, and that that lack of acknowledgement and acceptance continued up to Aidan’s death. If there had been such an acknowledgment and acceptance by all the partners then that would have been significant material in favour of the fairness of continuing the valuation convention that had hitherto applied. But that was not the case. Not only was it not apparent that the children acknowledged and accepted the effects, by the end of the 1980’s it was apparent that the possibility of a non-revaluation was causing concern at the parental level and was considered to be something that it was felt would need to be addressed. Particularly telling is the suggestion (referred to above) that the position might have to be different depending on who was leaving, and in what circumstances. It was suggested that the parents might want to take full value. One can also imagine circumstances in which the parents would not want to take full value, and would want to leave the value to the children. One of the documents seems to contemplate Aidan’s estate getting full value on his death. All this paints an equivocal picture as to what was perceived as being right, fair and proper from time to time, and is nothing like sufficient to render it fair, in the circumstances of Aidan’s

death and the parents' enforced retirement, that their estates should be confined to the historic value of the assets appearing the accounts up their respective departures. I consider that the accounts should take a figure which is fair, and that fairness requires full, not historic, valuations in order to render to Aidan's estate and his parents their respective fair entitlements. How would a revaluation be dealt with in the accounts?

66. Mr Blackett-Ord took a point as to how the revaluation could or could not be dealt with in any accounts prepared for the relevant year before Aidan's death. He said that a preparation of the accounts in accordance with the deed, taking proper account of Draft 18 February 2025 20:38 Page 22 MR JUSTICE MANN Approved Judgment Drake v Harvey how capital was dealt with and referred to, would not give Aidan the benefit of the increase in value anyway. The same applies to the parents. The capital was fixed, and could not be increased without the agreement of all the partners, so it would not be proper to carry out the sort of exercise that was carried out on Paul's admission. The proper treatment of any revaluation, and the question of whether it could be properly catered for (absent agreement) was a matter of expert accounting evidence and none had been adduced. If the land were revalued, any increase would, at best, be an unrealised profit, and there was nowhere where that could be properly posted in the accounts. Aidan was entitled under clause 19(a) to be paid his capital (properly identified as such) and profits, and nothing else, and the revaluation would increase neither the capital nor the profits.
67. Mr Blackett-Ord does not succeed on this point either. I accept that the effects of a revaluation upwards cannot be reflected in an increase in the A capital, because there is an agreement that that is fixed. Nor can it be attributed to B capital, which is prescribed as being something different. I do not see, however, why it should not be brought within the expression "capital profits" in clause 11. It would almost certainly be possible to bring in the profits under that heading if the land had been sold during the currency of the partnership. The increase in value would be a profit on a capital item. Mr Blackett-Ord said that that expression could not apply to unrealised profits, which is the most that a revaluation of the land would generate. I must say that I do not see why not. What is required is a fair accounting, within the confines of the deed. A fair accounting requires the adoption of something other than the historic cost, and no-one has suggested anything other than the market value would be the fair alternative. If one is looking for an accounting home for the revaluation surplus, "capital profits" would seem to me to be perfectly adequate. 68. 69. In those circumstances there is nothing in the agreement which demonstrates that any increase in valuation cannot be catered for within its accounting provisions. As in Cruickshank, there is an arbitration provision (clause 23) which can be invoked to resolve any deadlock over the correct valuation figures to be applied.

Conclusion

70. I therefore provisionally answer the surviving preliminary issues (the only ones that survive) in the following terms: “The amount payable in all cases is an amount found due on taking the account required by the deed and which reflects a fair value of the partnership assets, and in particular a fair value of the land which is a partnership asset.” I use the word “provisionally” because the parties may wish to propose an alternative wording, and if they do I will consider it on the handing down of this judgment. Draft 18 February 2025 20:38
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