

ENGLAND AND WALES / JUDGMENT

Hammonds (A Firm) v Jones

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Neutral Citation Number: [2009] EWCA Civ 1400 IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE CHANCERY DIVISION MR JUSTICE WARREN

[2009] EWHC 216 (Ch) Case No: A3 2009/0873 Royal Courts of Justice Strand, London, WC2A 2LL
Date: 21 December 2009 Before: LORD JUSTICE SEDLEY LORD JUSTICE LLOYD and LORD
JUSTICE SULLIVAN

- ----- Between: HAMMONDS (a firm)
- and - DAVID JONES Claimant Respondent Defendant Appellant
- ----- (Transcript of the Handed Down Judgment of WordWave
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- ----- Ian Croxford Q. C. and Andrew Mold (instructed by Aaron &
Partners) for the Appellant Alan Steinfeld Q. C. and Richard Ritchie (instructed by
Hammonds LLP) for the Respondent Hearing date: 2 December 2009
- -----

Judgment

Lord Justice Lloyd: 1. 2. 3. 4. 5. Mr Jones, the appellant, was a partner in the respondent firm, Hammonds, until 30 April 2005. On that date he took early retirement under the terms of the partnership deed, and became a consultant. At that time, the partnership accounts for the year ending on that date remained outstanding (of course) but the same was also true of the accounts for the year to 30 April 2004. The appellant's entitlement on his retirement as between himself and his former partners depends on how those two years' accounts turn out, when they are properly settled. He contends that he is not bound by the accounts as they have been established by the firm, and he seeks to have the accounts for those years taken by the court. In the course of these proceedings, in which the firm seeks to recover sums of money from him as having been drawn by him in excess of his entitlement, a preliminary issue was ordered to be decided as to whether the effect of the partnership deed is that the accounts referred to in the deed are binding as a matter of contract on the appellant as a retiring partner. The appeal is against the decision of Mr Justice Warren on that preliminary issue, on which he gave judgment on 13 February 2009 but made his order on 30 March 2009. Permission to appeal was granted, though only on one of two grounds, by Aikens LJ. At the stage of the hearing before the judge, other former partners were

also in dispute with the firm, but they have all settled their differences with the firm. The appellant was a partner in the UK partnership called Hammonds. There were, however, other partnerships elsewhere which all formed part of the business conducted under the name of Hammonds. For this reason the judge had regard both to the UK Partnership Deed and also to an Overriding World-wide Deed (OWW Deed) which provided for the pooling of the profits of each of the constituent partnerships and for the distribution of total profits. The UK Partnership Deed dated from 30 July 2000, at the time of a merger between two firms, but was amended from time to time. The version in issue before the judge and on this appeal contains amendments up to 9 December 2004. Nothing turns on the process of amendment up to that date. In essence the dispute is as to the effect of the provisions of the partnership deed which deal with the partnership accounts, and in particular with the process by which they come to be binding on the partners. In a large partnership such as Hammonds it is very likely that there will be changes in the partners every year, with some leaving, for one reason or another, and others being admitted to the partnership for the first time. This may tend to happen at the turn of the partnership year, but it can also happen at other times. In any such case, provision has to be made for the settling of accounts as between the continuing partners and the former partners. That provision needs to be compatible with the ongoing process as between continuing and new partners as well. Although any change in the identity of the persons constituting the partnership meant, as a matter of English law, that a new partnership came into being, the partnership deed included the normal provision by which the fact that a person ceased to be a partner for whatever reason did not determine the partnership as between the other partners, except as expressly so provided: clause 4.2. The Partnership Deed 6. 7. 8. 9. Since the issue turns on the proper interpretation of the Partnership Deed, I will proceed at once to the main relevant provisions. In his clear and full judgment,

[2009] EWHC 216 Ch, Warren J set many of the provisions of the Deed out at length, more of them being relevant to the argument before him than are on the appeal. I will not set them all out, but will focus on the most relevant provisions. Changes in the partnership are covered from clause 21 onwards, first with the provision about new partners. They must execute a deed of accession so as to become bound by the provisions of the Partnership Deed as it then stands. Resignation is dealt with at clause 25, retirement at clause 26, early retirement at clause 27 (under which the appellant left), expulsion at clause 28, and retirement and death generally at clause 29. Under clause 29, Schedule 5 to the deed applied on the death of a partner, and its provisions also applied as and when a partner retired, resigned or was deemed to have resigned, or was expelled. No payment was to be made in respect of any share of goodwill or work in progress, which was to vest in the continuing partners. The continuing partners were to take responsibility for debts and liabilities with certain exceptions. The payments to be made to or in respect of the former partner were governed by paragraph 3 of Schedule 5. Warren J summarised these as follows: “29. Thirdly, the Continuing Partners are to pay various amounts to the Outgoing Partner. It is clear that these amounts are intended to be in full and final settlement of the Outgoing Partners’ claims in respect of his entitlement in respect of the

partnership of which he was a partner, that is to say the Partnership as it existed on the day before the Succession Date. The amounts described are these:

- a. Under paragraph 3.1.1, a capital sum (payable within 30 days) equal to the aggregate of (i) Fixed Capital (ii) the balance on the Outgoing Partner's Deferred Drawings Account (excluding a tax reserve).
 - b. Under paragraph 3.1.2, any undrawn balance on the Current Account of the Outgoing Partner for the Partnership Year in which the Succession Date occurs and from any previous Partnership Year. This undrawn balance (it seems in respect of both the year of departure and earlier years) is payable on the earlier of (i) 30 days after the date on which the same has been determined and (ii) 180 days from the end of the Partnership Year in which the Succession Date occurs." Nothing in those provisions deals with either the process of settling the accounts or the possibility that the account may show money due from, rather than to, the former partner, as may occur if there have been what turn out to be overdrawings.
- Clause 16 of the Partnership Deed is at the heart of the appeal. It deals with partnership accounts, and reads as follows: "16.1 The Partnership Accounts of the Partnership in respect of each Partnership Year shall be made up annually and audited as at the close of business on the last day of such Partnership Year. A copy of the Partnership Accounts shall be delivered to each 16.2 of the Partners after the same have been audited. All objections (if any) to such Partnership Accounts shall be stated in writing by the Partner concerned to the Senior Partner within 10 days of his receiving such copy and (subject to any objections so stated) such Partnership Accounts shall at the expiration of such period (or earlier if agreed by all the Partners) be binding on all the Partners. Any objections to such Partnership Accounts by a Partner shall be duly considered by the Partnership Board and its decision thereon shall be binding on such Partner unless within 5 days of receiving such decision he shall notify in writing to the Senior Partner his desire to refer the matters in dispute to a Partners' Meeting in which event the determination of the Partners by Ordinary Resolution shall be binding on all Partners." 10. 11. 12. 13. Hammonds contend that "all Partners" at the end of that clause means the persons who were partners at any time during the accounting year to which the particular accounts relate, whether or not, by the relevant time, they are still partners in the firm. This, they say, is the case even if the immediately previous use of the word "Partners" means the persons who are partners at the time of the relevant resolution. The judge held that this was correct. Mr Croxford Q. C. for the appellant submitted that it would be extraordinary to find the same word (especially one which is defined in the deed) used in a different sense in two successive lines of the same clause. Both for that reason, and because it means that the former partner can take no part in the final decision as to the settling of the accounts by which he or she is to be bound, he argued that this cannot be the right construction. Instead, he said, the clause provides for the binding effect of the account as between continuing and new partners, but not as regards former partners so that, if they do not agree to the accounts, either they or the continuing and new partners may have resort to the court. In order to see the effect of clause 16, I must now refer to some of the definitions in the deed. The Partnership is the partnership

constituted by the Partnership Deed. Partnership Year is 1 May to 30 April or such other period as may be adopted as the accounting period for the business of the Partnership. Partnership Accounts means the profit and loss account of the Partnership for each Partnership Year. Partner means an Equity Partner and (unless the context otherwise requires) any Fixed Share Equity Partner and any Junior Equity Partner. An Equity Partner is “any person who is appointed an equity partner of the Partnership” and whose share is determined in accordance with certain principles set out in Clauses 7.2, 7.3 and Schedule 2. In turn “Partners” is defined as “each of the signatories to this Deed and such other persons as shall become Partners during the subsistence of the Partnership for so long as in each case any such person remains a Partner in the Partnership”. As Warren J said, it is odd that the definition contains a use of the word defined, but “such other persons as shall become Partners” is no doubt to be read as if it were, for example, “every other person who shall become a Partner”. The Partnership Deed provided in clause 23 for consultants, which the appellant became on his retirement. A Consultant is, correspondingly, defined as “any person appointed a Consultant to the Partnership in accordance with clause 23”. By clause 23 the Partners may invite any person to be a Consultant, in particular a Partner as from his Normal or Permitted Retirement Date. A Consultant is normally to be invited to attend and speak at Partners’ Meetings, but is not entitled to vote on any matter or be counted as part of the quorum at such a meeting. Under clause 27, a partner who elects to take early retirement is to become a consultant for a period not exceeding 5 years, in accordance with Schedule 7 (which also provides for the payments to be made to the consultant) and is to provide such consultancy services as the outgoing partner and the partnership agree. There are also other definitions of incidental relevance, such as “Outgoing Partner”: any Partner who: (i) has died; (ii) has retired, or resigned; or (iii) is deemed to have resigned, or who has been expelled as a Partner. “Continuing Partners” are (relevantly) all the Partners at the Succession Date other than an Outgoing Partner or Partners. The “Succession Date” is the day following the date of (i) death (ii) retirement, or resignation or (iii) deemed resignation, or expulsion of a Partner, so that, as Warren J pointed out, a person who was a partner but has retired or otherwise ceased to be one, is no longer within the definition of Partners by the time the Succession Date arrives. Clause 16 also mentions the Senior Partner (for whom see clause 10), the Partnership Board (see clause 12.2) and the Partners’ Meeting, which means a formal meeting of the Partners held in accordance with the provisions of Clause 9.1 or 9.2. An Ordinary Resolution is a resolution of the Partners passed in accordance with clause 9.11.2. The issue arises because, according to the appellant, shortly before he retired he was told for the first time that he would owe a substantial sum in respect of overdrawn profits for the year 2004/5, and after he retired he was told that he also owed significant sums for overdrawings in the year 2003/4. He does not accept the correctness of the accounts on which these figures are based. 14. 15. 16.

17. Without prejudice to his primary case that he is not bound by the accounts in any event, he notified Hammonds in writing of his objections to the basis of the accounts before they went to a partners’ meeting at which they were approved. He does not regard the accounts as

properly drawn in accordance with the Partnership Deed, and because his objections were not heeded, he maintains his principal position which is that he is not and cannot be bound, absent his own agreement, to the accounts, despite their having been approved at a partners' meeting held, or purportedly held, in accordance with clause 16.2. The parties' contentions 18. For Hammonds, Mr Steinfeld Q. C. argued that all references to Partner or Partners in clause 16.2, except the last but one, in the phrase "the determination of the Partners by Ordinary Resolution", refer to those persons (or any of them, when in the singular) who were partners at any time during the financial year of the partnership to which the particular accounts under consideration relate. The one exception, in the context of a Partners' Meeting, refers to the persons who are partners at the time of the meeting. That interpretation, he contends, achieves the objective of making the accounts binding on the persons who need to be bound by them, and gives former partners (a) a right to receive the accounts before they are finalised, (b) a right to state objections to the Senior Partner, which have to be considered by the Partnership Board and (c) the right, if he is still not satisfied, to refer the matter to a Partners' 19. 20. 21. Meeting. What he does not have is a right to attend, speak or vote at, the meeting. The judge accepted those submissions. Hammonds served a Respondent's Notice by which it was argued that the Partners' Meeting should be read as consisting of the persons who had been Partners during the relevant accounting year. For the appellant Mr Croxford argued that Hammonds' construction was objectionable in principle, because it left the outgoing partner at the mercy of his former partners, who might not be well disposed towards him, especially in some of the cases in which a person might cease to be a partner. It was also objectionable as a matter of construction because it required the words Partner and Partners to be read in a sense other than those given to them by the definitions in the Partnership Deed, and to mean one thing in most of the clause, but quite another at the penultimate use of the word Partner. According to his submission, the words should be read in clause 16 strictly in accordance with their definition in the deed. Thus, an outgoing partner, such as the appellant was after 1 May 2005, would have no right to receive accounts prepared after the Succession Date, nor to make objections to them, but this would not matter because he would not be bound by the accounts, unless he specifically agreed to them. If he did not, one side or the other could always have recourse to the court to have the accounts settled. The judge's judgment 22. Although Mr Croxford contended that the judge's conclusion was wrong, he did rely on some passages in the judgment as being in his favour. In particular he showed us paragraph 45 in which the judge said that he regarded the appellant's contention as making perfectly good sense: "45. I do not consider that it is commercially nonsensical to reach either of the results for which the parties contend. It would make perfectly good sense for a partnership deed to provide unambiguously that partnership accounts prepared for a partnership year should be binding on all the persons who were partners at any time during that year, albeit that in such a case one might expect to find some mechanism within the deed for an outgoing partner to challenge the account. But it would also make perfectly good sense for accounts to be prepared by, and be binding only on, the continuing partners, with an outgoing partner being left to a remedy through the courts if the continuing partners were unable to satisfy

any objection which the outgoing partner might have to the account prepared by them.” 23. The judge made those comments in the context of a proposition that words which the parties have not used can only be introduced into an agreement if the words used produce a commercially nonsensical result which cannot have been intended, and if it is clear what purpose they did intend. However, he said that he was unable to detect a clear literal meaning to the relevant provisions of the deed, and he therefore had to approach the question of interpretation in the normal way, primarily by considering the rival contentions and the effects that each would have. He pointed out a number of practical difficulties which might arise from the clause in any event, such as the application of the ten day period in the second sentence if, as seems likely, different recipients received the accounts on different dates. That does not help either party. 24. He then considered the difficulties that arise on the rival constructions according to who is meant by “Partner” by each use of the word. He said at paragraph 67 that the difficulties arising from the different uses of the word, in different contexts, were such that: “It is impossible to think that the draftsman of the provision had the situation which now arises in mind at all for, if he had done, he would surely have addressed it directly. Instead, he has drafted the whole of clause 16 without considering the consequences of a change of the membership of the Partnership either during the Partnership Year in question or thereafter. Quite clearly, however, the provision has to be applied more widely than the limited situation where there is no change in the membership of the Partnership from the beginning of a Partnership Year until the accounts for that year have become binding, under clause 16, on all the Partners. The issue, in reality, is the meaning to be given to the words which the draftsman has used in circumstances which he has not expressly dealt with and where it is not, therefore, surprising that whatever approach is adopted, difficulties of construction arise.” 25. He referred to Mr Steinfeld’s argument that the partners’ meeting was a meeting of the people who had been partners during the relevant year. Later (at paragraph 84) he rejected that. Next he mentioned a passage from Lindley & Banks on Partnership, 18th ed, at 10-72, relied on by Mr Croxford: “It must be remembered that the accounts may cover a period during which an outgoing partner was a member of the firm. If such a partner is to be bound by accounts approved by the continuing partners, this should be expressly stated in the agreement.” 26. 27. He regarded this as wise advice, but held that a proposition in Lindley & Banks to the effect that “a court will be reluctant to find, as a matter of implication, that an outgoing partner has been deprived of his right to object to the contents of the accounts” was not borne out by the one (Scottish) authority cited for it. He considered and rejected an argument of Mr Steinfeld, not renewed before us, as to an implied term. In that context he came back to the sense of the rival constructions, at paragraph 73, where he said this: “73. In any event, neither Mr Steinfeld’s approach nor that of Mr Flint and Mr Croxford is without its difficulties of construction as I hope my analysis of the different consequences indicates. But each of the overarching results for which each side contends makes perfectly good commercial sense. If the UK Partnership Deed had made clear that an Outgoing Partner was not bound by the accounts prepared by the members of the Partnership of which he was not a member, that could not be met with an astonished reaction by the reasonable

commercially-minded solicitor. As Mr Croxford points out, there may be perfectly good reasons why the partners concerned would decide to combine together on that basis. On the other hand, if the UK Partnership Deed had made it clear beyond doubt that an Outgoing Partner would be bound by such accounts – even though he may have no right to attend a meeting at which any objection fell to be considered or, though he had a right to attend, he had no vote – then, again, that would also be seen as a perfectly unexceptional way of proceeding. In those circumstances, there is no scope pursuant to the law as I understand it for implying a term.” 28. He then referred to some of the provisions of the OWW Deed, from which he found support for Mr Steinfeld’s reading of clause 16, but, as Mr Croxford pointed out, in the end he did not base his decision on those provisions. As a matter of the proper reading of the Partnership Deed by itself he held in favour of Hammonds, except, as I say, on the point in the Respondent’s Notice as to how the Partners’ Meeting was to be constituted. 29. Because it was not decisive for the judge nor, as I see it, in the submissions of either side, I can refrain from any further reference to the OWW Deed. Discussion

30. Mr Croxford’s essential argument was as outlined above, focussing on (a) the unnatural reading of clause 16.2 required by Mr Steinfeld’s contentions and (b) what he said was the unfairness and lack of commercial sense in subjecting any and all outgoing partners (of whom there might at a given time be a significant number) to a decision of his or their former partners in which he and they could not participate except to the extent, at most, of written objections. 31. 32. A separate theme of Mr Croxford’s submissions was that the judge’s reading of “partners” in clause 16.2, as meaning (except in one instance) those who had been partners during the relevant year, would exclude new partners, but that they have almost as much of an interest in the accounts (because they will set out the opening position for the new partners’ admission to the partnership) as do the outgoing partners, and it is as desirable that they should be bound from the point of view of the ongoing partnership, as that outgoing partners should be bound. I cannot accept that this is significant. In practice new partners may, no doubt, become involved in or at least aware of the process, but it seems to me that they take the partnership as they find it, and it is not for them to query the opening accounts. I therefore find no particular oddity in a reading of clause 16.2 which includes former (i.e. outgoing) partners, but excludes (strictly speaking) new partners. I accept that the judge’s reading has the apparently odd consequence that the definition of “Partner” applies only to one use of the word in clause 16.2, and that in all other cases it means something different, namely someone who was a partner during a previous period, that period being that to which the accounts relate which are under consideration under the clause. The definitions in the Partnership Deed apply “unless the context otherwise requires”. This does enable the definition to give way to the context if necessary. I accept Mr Croxford’s point that it must be necessary, rather than merely sensible or reasonable.
33. Mr Croxford’s interpretation of clause 16.2 would itself produce some odd results, in the event of changes in the partnership during the process provided for by the clause. The persons falling within the definition of Partner and Partners might change from one stage to the next, which does not seem likely to have been intended. 34. The purpose of clause 16.2 is

obviously to provide a mechanism and a procedure for getting to the position in which the partnership accounts for each successive year are binding on the partners. It is in that light that it needs to be read and understood. The people who need to be bound by the accounts are those whose rights and liabilities are affected by them, namely the people who were members of the partnership during the relevant accounting period. In the absence of such a provision it would be necessary to reach an ad hoc agreement between all the affected persons each year. This clause is intended to avoid that necessity. It can only do so if all relevant parties would be bound by the result of the process. A situation in which some of them are bound and others are not is most unlikely to have been intended.

35. My only real disagreement with the judge is as to his acceptance of the proposition that Mr Croxford's contention was commercially perfectly sensible: see paragraphs 45 and 73, both quoted above. It seems to me that the opposite is the case. There would be no point at all in having a procedure which made the accounts binding on some of the people interested in them but not on all members of that class. 36. 37. In that context, I find no great difficulty in applying the temporal aspect of the deed's definition of "Partner" and "Partners", in this clause, by reference not to the current situation but to the period to which the particular relevant accounts relate. There is one exception to this, namely that which the judge accepted (contrary to Mr Steinfeld's primary argument): the context of the partners' meeting. I agree with the judge that this must consist of those who are Partners at the time when the meeting is held. The Senior Partner and the Partnership Board refer to the currently relevant persons, not those who had been Senior Partner and members of the Partnership Board in the earlier relevant accounting year. Equally, the Partners' Meeting, the other organ of the partnership referred to in the clause, must, as it seems to me, be a meeting of those who are currently partners, not of those who were so at some previous date or during a previous period. I accept that it is odd to find "Partners" used in that sense at that point in the clause, but in a different sense elsewhere. In my judgment that is what the context requires. I also accept that it may seem odd for the outgoing partner to be limited to a right to put in written objections on the accounts, and not have the right to attend, speak at, or vote at the final meeting which would bind him. If the former partner is a consultant he may be invited to attend and allowed to speak at the meeting, under clause 23.2, but he cannot be sure of that, and it is only a limited provision in any event, not available to other former partners. The former partner is protected, of course, by the continuing reciprocal duty of good faith, but I can see that some would prefer something more tangible. It may be that, in a given case, the duty of good faith would require the partnership to allow the former partner more than just a right to put in written objections. I do not see that it could extend to allowing him a right to vote on the decisive resolution. 38. Notwithstanding the limits of the protection afforded to a former partner if the clause is read in this way, it seems to me plain that this is the correct interpretation of clause 16.2 of the Partnership Deed. 39. For that reason I would dismiss the appeal. Lord Justice Sullivan 40. I agree. Lord Justice Sedley 41. I also agree.

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Prepared on 29 October 2026 · Esheria