Neutral Citation Number: [2021] EWHC 598 (Ch)

Case No: D30MA777

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN MANCHESTER**
**BUSINESS LIST (ChD)**

Manchester Civil Justice Centre
Date handed down: 16 March 2021

**Before His Honour Judge Stephen Davies sitting as a High Court Judge**

**Between :**

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|---|---|
| **DR ANANT PRASAD** | **Claimant** |
| **- and -** | |
| **DR SHAISTA HANIF** | **Defendant** |

**Mr Ghazan Mahmood** (instructed by **Lexadeen Solicitors Ltd, Bolton**) for the **Claimant**
**Mr Ben Harding** (instructed by **JMW Solicitors LLP, Manchester**) for the **Defendant**

Hearing dates: 8 - 12 February 2021
Date draft judgment circulated: 9 March 2021
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# APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be 10 a.m. on 16 March 2021.

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

**His Honour Judge Stephen Davies**

**Sections**



## Introduction and summary of decision

1. This is a dispute between two partners in a two-person partnership. The claimant, Dr Prasad, and the defendant, Dr Hanif, are both medical doctor general practitioners who were, until its dissolution by court order, partners in a medical practice known as the Shanti Medical Practice, Bolton.

2. According to a partnership deed made on 28 November 2013 the partnership commenced on 1 April 2011. The defendant, however, contends that the partnership had begun much earlier, in 2002, pursuant to an oral agreement made that year.

3. It is common ground that even prior to November 2013 the relationship between the claimant and the defendant was not a good one. It had been hoped that entry into the partnership deed would improve matters, but it did not, and by 2017 the relationship had broken down irretrievably. By these proceedings, issued in July 2017, the claimant sought an order dissolving the partnership. An order for dissolution in default of a defence was duly made in July 2018, however the production of the consequential final account has been delayed by ongoing disputes, generating a number of contested interlocutory hearings and, now, this trial of preliminary issues to determine a number of disputed matters which must be resolved before the final account can be completed.

4. The claimant and the defendant were both ably represented at trial by counsel who argued their respective client's cases will skill and determination. I heard oral evidence over 4 days with oral submissions on day 5 and now produce this judgment.

5. In short, I am satisfied that:
   - 5.1. The claimant is entitled to a declaration that the defendant should indemnify the partnership against its liability to three dismissed employees which it has paid in the sum of £401,435.
   - 5.2. The claimant is entitled to a declaration that the defendant is liable to indemnify the partnership against any additional liability to Dr Anupama Prasad and to Dr Anicatt for which it would not have been liable but for the defendant's breaches of duty as pleaded in paragraph 8 of the Particulars of Claim which she is debarred from defending.
   - 5.3. There should be a declaration that neither the defendant nor the partnership has any legal or equitable interest in the practice property known as the Shanti Medical Centre, 160 St Helens Road, Bolton BL3 3PH nor any other claims in relation to or arising out of any expenditure on such property as alleged in paragraphs 5 or 6 of the Schedule.
   - 5.4. There should be a declaration that the partnership accounts for the YE 31/3/16 should be adjusted by the partnership accountant to take account of the partnership income paid into the claimant's RBS bank account from 28 September 2015 to 31 March 2016, insofar as not already taken into account, otherwise there should be no adjustments to the partnership accounts as alleged in paragraphs 9 or 10 of the Schedule.

5.5. There should be a declaration that the claimant is not obliged to indemnify the partnership in respect of any payments made to Peninsula, to Dr Anupama Patel, to the claimant's wife, in respect of family expenses, or to Dr Anicatt as alleged in paragraphs 11 or 12 of the Schedule or at all.

6. Suitable directions will also have to be given to ensure that this long-running partnership dispute is brought to an end as soon as possible and without unnecessary further financial outlay.

## Procedural issues

7. In order to understand some of the issues which I shall need to determine it is necessary to refer first to some of the procedural issues which have bedevilled this case.

8. In the Particulars of Claim the claimant pleaded that the partnership was regulated by the partnership deed of November 2013 and, at paragraph 8, pleaded particulars of the defendant's conduct and breaches relied upon as justifying dissolution under a number of sub-paragraphs from (a) through to (p).

9. These included allegations in sub-paragraphs (c) through to (i) that the defendant had acted improperly in relation to various members of staff, namely: (i) three members of staff who she had dismissed notwithstanding the claimant's objections and who subsequently brought complaints of unfair dismissal against the partnership which were successful in the Employment Tribunal (**ET**); (ii) the claimant's daughter, a salaried GP, Dr Anupama Prasad (who I shall refer to as **Dr Anupama** to distinguish her from the claimant Dr Prasad); (iii) a locum GP, Dr Anicatt; and (iv) a further employee, Mr Varsani. By paragraphs 18 onwards these allegations were repeated as allegations supporting the claimant's claim for an indemnity and/or damages in respect of the partnership liability to those employees and locums.

10. The defendant failed to file a defence in proper form despite a number of opportunities afforded her to do so. As a result, by an order made by DJ Obodai on 10 July 2018 (**the Obodai order**) it was ordered: (1) that the partnership be dissolved from such date; (2) that the defendant was debarred from challenging the issue of liability particularised in paragraph 8; (3) that there should be a default judgment against the defendant in respect of certain loans made to her by the claimant; and (4) that the partnership accountant should prepare a final account and that on receipt further directions should be given.

11. The defendant subsequently applied to set aside the Obodai order and to file a Defence and Counterclaim, raising wide ranging allegations, however on 3 May 2019 HHJ Khan (sitting at first instance and not on appeal) dismissed that application (**the Khan order**). HHJ Khan also ordered that "if the defendant wishes for any factual matters to be taken into account on the taking of the account" she should file and serve "a schedule setting out a concise statement of facts giving rise to those matters".

12. The defendant duly filed and served a schedule of matters. The claimant responded by way of letter, in which he contended amongst other things that some matters went beyond the scope of the permission granted by HHJ Khan and also sought to re-argue the issues of liability as pleaded in paragraph 8 of the Particulars of Claim which had already been conclusively decided against her by the Obodai order.

13. This dispute was eventually resolved by DDJ Watkin in an order made at a hearing held on 3 December 2019 (**the Watkin order**) where she ruled that the defendant was permitted to rely on all of the issues raised in her schedule, subject only to the provision of further particulars in certain respects. I have been provided with a transcript of her judgment from which it is clear that she decided that: (a) the matters raised were all matters which were proper matters to be raised on the taking of an account and, hence, fell within the scope of the previous orders; but (b) insofar as any such matters raised positive allegations which might properly be the subject of binding declaratory relief the defendant was not entitled to obtain such relief unless she also applied for and obtained permission to bring a counterclaim seeking such relief. There was no appeal from the Watkin order by either party and: (i) although the claimant made an application for summary judgment, he eventually withdrew it; (ii) the defendant did not make any further application for permission to bring a counterclaim seeking declaratory relief.

14. Finally, by an order made on 31 July 2020 DJ Richmond gave directions for the trial before a section 9 authorised Business and Property Court Circuit Judge of preliminary issues arising from the defendant's schedule which required resolution before the partnership account could be finalised, with those issues to be agreed or in default directed by the court. Happily, the parties were able to agree those issues, although rather less happily they now disagree as to the consequences of such agreement.

15. At trial a number of preliminary procedural objections were taken before me arising out of the effect of and interplay between these various orders which, insofar as they remain extant, I need to resolve.

16. The first is that, in response to the claimant's claim for an indemnity in relation to the dismissed employees, the defendant in her schedule sought to argue that the claimant had himself "wrongfully caused or is otherwise responsible for the partnership's failure to utilise insurance or other facility for the defence of employee claims". This is said to arise on the basis that the defendant had refused to permit the partnership from using its legal expenses cover to assist with the defence of the claims and, had he done so, any award would have been paid by the insurance policy, thus increasing the partnership assets. In her witness statement and in her oral evidence the defendant went further and contended that with legal representation the partnership could have successfully defeated the claims. In closing submissions Mr Harding submitted that at the very least the partnership could have obtained a better outcome by settlement or by contesting the claim at the tribunal than it in fact did had it had the benefit of legal representation and indemnity under the insurance policy.

17. Mr Mahmood submitted that: (a) these arguments cut across the liability debarring provisions of the Obodai order and also constituted an illegitimate attempt to re-open the findings of the ET, made after a full substantive hearing; (b) the defendant could not seek to hold the claimant responsible for the whole loss (the "reverse indemnity") without having pleaded such a claim by way of counterclaim.

18. I am not persuaded by these arguments, ably though they were argued. In short: (a) I do not consider that the arguments advanced are illegitimate, so long as they do not contradict the facts and matters alleged in the Particulars of Claim, and there can be no issue estoppel as between the partners arising from the ET decision; (b) I do not consider that it is necessary for there to be a counterclaim before the defendant can argue the reverse indemnity on the taking of an account.

19. However, I am satisfied, as Mr Mahmood also submitted, that as a matter of case management the defendant should not be permitted to argue that with the benefit of legal representation the partnership could have successfully defeated the claims, in circumstances where such argument was

not advanced in the schedule and there is no good reason to permit her to do so at trial. In any event, this is all academic anyway since I do not consider that the defendant's various claims in this regard have any merit anyway.

20. The second is that the defendant sought to argue in her schedule that she has a legal or equitable interest in the property from which the practice practised, because partnership monies were used to fund the costs of the building, including two substantial extensions thereto, and because there was allegedly an oral agreement that the defendant would own 50% of the property on becoming a 50% partner. In his opening skeleton for trial Mr Harding submitted that: (a) either the defendant obtained a 50% interest under a constructive trust, based on the oral agreement and the subsequent detrimental reliance in allowing the partnership monies to be used to fund the property; or (b) the property, or at least the extensions to the property, became partnership property and in the circumstances such interest ought to be ascertained and brought into the taking of the account.

21. Mr Mahmood submitted that these arguments could not be advanced, since they necessarily involved seeking declaratory relief as to ownership of the property, when there was no counterclaim formally pleading the matters as a positive case as opposed to matters which could be advanced on the taking of an account. Mr Harding riposted that, as DDJ Watkin had found, it was open to the defendant to advance these matters as proper matters to raise on the taking of an account notwithstanding the absence of a pleaded counterclaim and that it was too late for the claimant to object in circumstances where: (a) there was no appeal against the Watkin order; and (b) these matters were included in the agreed list of issues as directed by DJ Richmond.

22. On balance I prefer and agree with, subject to certain qualifications, Mr Harding's submissions on this point. In my judgment the defendant can raise these matters at this hearing, insofar as they are proper matters to be taken into account on the taking of a partnership account, but cannot obtain declaratory relief without having issued a counterclaim. Whilst I am satisfied that a claim to the effect that the property or some of it is owned by the partnership is a proper matter to be taken into account on the taking of a partnership account, I see no possible basis for an argument that a claim that the property is owned by the defendant is a proper matter for the account. Hence, although it may not make a practical difference, especially since I conclude that the case fails on the merits anyway, I am not prepared to allow that claim to be advanced.

23. Finally, in relation to the above claim and to the other claims advanced by the defendant which depend on her being a partner from 2002 rather than from 2011, the claimant had formally advanced for the first time in his witness statement and in Mr Mahmood's opening skeleton for trial the argument that the partnership deed had involved the compromise of any claim the defendant may have had to be a partner before 2011 or for her or the partnership to have a share in the property. Mr Harding objected to this defence being advanced without being formally pleaded or included in the agreed list of issues.

24. Whilst normally I would have had some sympathy for such an argument I am not satisfied that it should prevail here because: (a) there was no order for the claimant to serve a formal response to the defendant's schedule; (b) the matter was raised in the claimant's witness statement and in Mr Mahmood's opening skeleton; (c) the matter was raised, at least to some extent, in correspondence dating back to May 2017; (d) the argument depends not upon disputed factual issues but upon the proper construction of the partnership deed in the light of the relevant factual matrix, which cannot seriously be disputed; (e) the agreed list of issues includes all matters relevant to the proper determination of the defendant's claim to be a partner from 2002 and for the partnership to have an interest in the property; and finally (f) it would be wrong in the exercise of my discretion whether or

not to allow the point to be raised late to ignore the fact that under the Watkin order and under my rulings as above the defendant has effectively been allowed rather more latitude to advance her case than she might have done, given the background of the Obodai and Khan orders, so that it would be unfair to subject the claimant to too strict a procedural straightjacket in resisting this case.

## The witnesses

25. The claimant and the defendant, as the two principal protagonists, were the two most important witnesses in the case. They were giving evidence about their dealings over an extended period from 2002 through to 2017, in circumstances where from around 2011 onwards they were in dispute about key aspects of their relationship and from around 2015 increasingly hostile towards each other on a personal, professional and business level. They have both invested significant time and money in this litigation and believe that the other has behaved improperly in many respects. It is entirely unsurprising that in such circumstances they were both unable to avoid giving evidence in a partisan way. At times the oral evidence of both was entirely inconsistent with what they had written in previous communications and with their statements of case and/or witness statements. They have both persuaded themselves of the rightness of their case such that, whilst not consciously telling deliberate untruths, their evidence cannot be relied upon. In the circumstances it would be wrong to place any real weight on their recollection where uncorroborated by reliable contemporaneous documents or the evidence of other reliable witnesses. I will have to do my best by reference to such documents, the evidence of the witnesses which I can accept as reliable and my assessment of the inherent probabilities.

26. Mr Khimji Patel was the practice manager of the practice from around 2000 to around 2005, when he was dismissed by the claimant and the defendant in circumstances where Mr Patel blamed the defendant for persuading the claimant into agreeing to his dismissal, but where it also followed that the claimant had been willing to go along with it, either because he genuinely believed that Mr Patel had acted deviously or worse in relation to his involvement with a company which entered into a building contract with the practice, or because he was happy to use that excuse as a device to avoid paying what was due under the building contract. Whilst Mr Patel had clearly reached a rapprochement with the claimant he was also still clearly motivated by animosity towards the defendant. In the circumstances, I consider that his evidence, which supported the claimant's case, cannot be accepted as independent or reliable, particularly given that it was only last year that he was asked for the first time to recall details of his involvement in their discussions some 18 years previously in 2002.

27. Mr Mark Sheen was the accountant who took over the practice accounts at the defendant's instigation following entry into the partnership deed. As well as dealing with the accounts going forwards, he was asked to investigate and reconcile the accounts for the two previous years, in circumstances where the defendant was asserting that they would reveal that she was due more than she had received and that the claimant had been paid more than he was due. As it transpired, his investigation and reconciliation revealed the opposite conclusion and showed that in fact the defendant had been paid more than she was due. Although his evidence, therefore, tended to support the claimant's case, nonetheless he was a manifestly independent, honest and reliable witness, and in closing submissions Mr Harding rightly did not suggest to the contrary.

28. Dr Falouji is a medical doctor who was previously married to the defendant and friendly with the claimant, introducing the defendant to the claimant in 2002 as a prospective addition to the practice. Having undergone an acrimonious divorce with the defendant, he then acted as an informal mediator between the claimant and the defendant in respect of their disputes until around 2015, when his

relationship with the defendant went through a difficult patch again, before later reaching a rapprochement with her which prevails today. In such circumstances, he had written a number of communications over the years which were diametrically at odds with the evidence which he gave orally as to his assessment of their respective characters, truthfulness and conduct. Whilst his opinion evidence on such matters was, as Mr Harding rightly reminded me, of no relevance to my own assessment of their credibility, nonetheless the extent to which his evidence varied according to whether or not he was on good terms with his former wife was clearly relevant to the weight which I can place on his oral recollection of the events of 2002 on which, I am afraid to say, I can place no weight.

## Relevant legal principles

29. This case involves the application of established legal principles to the particular facts of the case, so that it is sufficient for me to summarise the relevant principles and only to address in more detail particular points where it is necessary to do so in order to deal with points of dispute which are directly relevant to my decision.

### The essential characteristics of a partnership

30. A partnership is the "relation which subsists between persons carrying on a business in common with a view to profit": s1(1) Partnership Act 1890. It is necessary therefore to have (1) a business; (2) carried on in common; (iii) with a profit motive.

31. Where there is no agreement in writing the intention of the parties must be ascertained from their words and conduct. The fact that the parties have, or have not, expressly used the words "partners" and/or "partnership" is not determinative.

### Salaried partners

32. As discussed in *Lindley & Banks on Partnership* 20th edition at 5-54 ff, the term salaried partner is a term capable of causing confusion, since it may mean either: (a) someone who as between the other partner(s) and himself is a true partner, but who receives only a fixed salary, as opposed to an equity partner who receives a share of the profits (and is liable to contribute to the losses); or (b) someone who as between the partner(s) and himself or herself is only an employee, but who is held out to the world as a partner. The same person cannot the same time be both a partner vis-a-vis the other partners and an employee of the partnership. A further complication can be caused by the use of the term fixed share partner. Ordinarily this would mean someone who receives a fixed payment, i.e. a payment for a relevant period which does not vary dependent on the actual profits made by the partnership over that period, rather than a specified proportion of the actual profits made by the partnership in the relevant period. Again, therefore, they are not true equity partners in the sense used above.

### Partnership agreements

33. Where, as here, it is admitted that the parties entered into a written partnership agreement, and there is no case advanced to the effect that the agreement is invalidated by some legally relevant factor such as mistake or duress or misrepresentation, then the partnership agreement takes effect according to its terms as properly construed.

34. So far as the process of construction of written partnership agreements is concerned, there are no special rules applicable to the construction of such contracts; the rules to be applied are the same as those to be adopted when construing written contracts generally, which are well-established. Regard

must always be had to the relevant factual matrix in which the written contract was executed, and the agreement is to be construed by reference to the parties' objectives, so far as revealed from the contract and the relevant factual matrix. However, the relevant factual matrix does not include the negotiations which preceded the agreement or the private intentions or beliefs of the parties.

35. Where, as here, the written partnership agreement is executed as a deed, it may operate so as to have the effect of an estoppel against one or more of the parties to the deed, preventing them from alleging facts or matters inconsistent with clear and unambiguous statements in the deed. The essential principles are summarised in *Chitty on Contracts* 33rd edition at 1-147. Even outside the categories of contracts by deed, where contracting parties have, in their contract, agreed that a specified state of affairs is to form the basis on which they are contracting or is to be taken, for the purposes of the contract, to exist, the effect of such "contractual estoppel" is that it precludes a party to the contract from alleging that the actual facts are inconsistent with the state of affairs so specified in the contract: *Chitty on Contracts* at 4-116, citing *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386.

36. Moreover, a partnership agreement, like any other agreement, may contain a statement to the effect that the relationship (of partnership) has existed from a date preceding the execution of the agreement itself. As a matter of law it is perfectly possible for parties to agree as between themselves to treat themselves as having been partners from an earlier date than the date of the agreement.

**Ascertaining whether or not the partnership deed effects a compromise of previous disputes**

37. The same principles of contract construction as stated above apply, so that evidence of the pre-contractual negotiations as an aid to construction is inadmissible and the intention of the parties must be determined by reference to the contract itself: extrinsic evidence of what may or may not have been in the minds of the parties at the time of their agreement is not admissible for this purpose. Nonetheless, extrinsic evidence may be admitted to assist in identifying the commercial purpose of the contract and in the context of compromise such evidence has been admitted (a) to explain the meaning to be attached to an ambiguous word or expression and (b) to identify the disputes which the parties, by their agreement, were endeavouring to resolve. These principles are taken from the summary in *Foskett on Compromise* 9th edition at 5-10, 5-14 and 6-04.

**Partnership property**

38. It not infrequently happens that, as here, one party owns real property which is used for his own business which then becomes a partnership business which continues to use the property. The question may then arise whether such property remains the personal property of the party or becomes partnership property. The crucial question is whether the asset was both used and treated as partnership property: *Lindley & Banks* paras.18-06, 18-07, 18-13. The question will commonly be resolved by the terms of a written partnership agreement or by the subsequent treatment of the property in subsequent partnership accounts. The accounts are important, but not necessarily determinative - for example if the other partner has not agreed to the asset becoming partnership property: see *Wild v. Wild* [2018] EWHC 2197 referred to in the Supplement to *Lindley & Banks* para.18-06. Otherwise, the question will have to be determined by reference to an analysis of the totality of the relevant evidence.

39. Further, it is possible that to the extent that partnership monies were used to extend and improve such real property, then any increase in value of the property attributable to such extension and improvement belongs to the partnership pursuant to s.21 PA 1890, even if the property as a whole did not become partnership property.

**Co-owned property**

40. A further possibility is that such real property may become beneficially owned by both partners in their personal capacity and outside of the terms of the partnership. In such a case where there is no conveyance into joint names or express written declaration of trust then the party claiming an interest may establish a right on the basis of a common intention constructive trust or on the basis of a resulting trust.

41. As to the former in his written opening Mr Harding helpfully summarised the position by reference to *Halsburys Laws of England - Trusts and Powers* vol.98 (2019) para.117 as follows:

(a) Where A is the legal owner of land and has so conducted himself that it would be inequitable to allow him to deny B a beneficial interest in the property, a common intention constructive trust will arise where (1) there is a common intention that A and B should both have a beneficial interest; and (2) B has acted to his detriment or significantly altered his position in reliance upon that common intention.

(b) The Court may find the requisite common intention either in an actual agreement arrangement of understanding between A and B that the property is to be shared beneficially.

(c) The Court may, absent such agreement etc. infer an actual common intention from the conduct of the parties – including what financial contributions are made and the purposes for which the property is to be used.

(d) Such trusts do not arise only where the common intention is formed prior to acquisition of the property in question, but may arise from an agreement about a property which A already owns.

**Holding one partner wholly liable for losses suffered by the firm**

42. Where a partner is in culpable breach of his duty to the firm, the general principle (under s.24(1) of the Partnership Act 1890) that a loss suffered by the firm should be borne by all the partners may be displaced: *Lindley & Banks* para.20-08, 20-10ff.

## My findings in relation to the issues for determination

43. The agreed list of issues is as follows:

**Employee Claims**

l. Whether the Claimant is entitled to an indemnity in respect of any of the matters at 8(e) to (i) of the Particulars of Claim.

2. Whether the Claimant wrongfully caused or is otherwise responsible for the partnership's failure to utilise insurance or other facility for the defence of the employee's claims.

3. Whether the said insurance company would have agreed to represent and/or indemnify the partnership against any claims brought by the employees referred to in the Particulars of Claim.

4. Whether any judgment awards against the Partnership would have been paid by the said insurance policy.

**Equitable Claim to a share in the Property**

5. Whether and to what extent Partnership's monies were used to make mortgage payments and associated expenses in respect of the Property between 2002-2012.

6. Whether the Defendant was appointed a Partner in 2002

7. Whether the Defendant has a 50% interest (or any interest) in the Property based on an alleged oral agreement and/or the matters referred to in Para.5-6 of the Schedule.

8. Whether the Defendant agreed that either she or her share of the Partnership would pay 50% of the costs of the Property based on any alleged oral agreement.
9. Whether the Defendant or the Partnership repaid any part of the sums loaned to effect renovation/extension work on the Property.
10. Whether the Claimant or the Partnership has a legal or equitable interest in the Property.

**Alleged Diversion of Partnership Receipts**

11. Whether the Claimant improperly diverted partnership receipts away from the Partnership account in May 2015.
12. Whether the monies were diverted into a new account, and if so the amount, and how was that expended.

**Alleged Unauthorised expenses**

13. Whether the Claimant made unauthorized payments as alleged at para. 10 and 12 of the Schedule.

44. I shall deal with the issues in the same broad order, albeit that it is not necessary to answer each separate issue separately.

## Employee claims: issues 1 to 4

45. I have already summarised above the pleaded case against the defendant in relation to the employee claims and recorded that by virtue of the Obodai order as confirmed by the subsequent Khan order the defendant is debarred from defending the issues of liability in those pleaded respects.

46. Both because of this debarring order and more generally, in relation to the most significant claim for indemnity, being the claim brought by the three dismissed employees against the partnership, which succeeded in the ET where the employees were awarded substantial sums which the partnership has satisfied in the sum of £401,435 as recorded in the partnership accounts for YE 31/3/18, the claimant has satisfied me that by reason of the defendant's breaches of the partnership deed the partnership has incurred this expense and that she ought to indemnify the partnership against this liability in full.

47. I say more generally because it is clear from the documents to which I have been taken, most pertinently the contemporaneous documents, that the defendant was determined to undertake a disciplinary procedure against these employees and to summarily dismiss them for gross misconduct because they had the temerity, as she saw it, to report their concerns about her to the General Medical Council (**GMC**) as her professional regulator. Essentially her case was that the complaints had been shown to be "false and malicious", since the GMC had decided not to take any formal disciplinary proceedings against her in relation to the matters referred to it. She ignored the obvious point that just because the GMC had decided not to take matters further that did not mean that the complaints had been false or malicious. There was no basis for this conclusion from the GMC letter which explained the decision not to take matters further. It is clear that the defendant believed that the claimant had orchestrated these complaints as part of their ongoing dispute that the employees were siding with him in his dispute with her. The defendant was determined to and did railroad the disciplinary process through in the face of consistent opposition from the claimant, writing on 31 October 2016 to the employees inviting them to attend a disciplinary hearing. She pushed on with disciplinary hearings in the face of objections from the defendant and, the employees not attending on advice from their union, dismissed them on 30 November 2016. However, the claimant then upheld appeals from her decision. She refused to accept this and arranged for the appeals to be re-

heard by an independent party, who dismissed the appeals on 28 December 2016 in circumstances where, as the ET Judge was to find, the way in which the procedure had been conducted left the employees in an impossible position by the time the matter came to that appeal.

48. It can come as no surprise to anyone that the three employees duly made claims against the partnership in the ET, by claim form presented in March 2017, to the effect that that they had been unfairly dismissed due to their having made legally protected "whistleblower" disclosures to the GMC. Nor can it come as any surprise to anyone that they succeeded in those claims before the ET, at a full hearing before Employment Judge Franey, who gave a conspicuously thorough and lucid judgment. Although the defendant complains that she did not have the opportunity to test the claims or to give or to adduce evidence because neither she nor the partnership had legal representation, she has no reasonable excuse in my judgment for her failure to re-instruct lawyers at her own expense or to contest the claim in person, giving evidence herself and from such witnesses as she could persuade to do so. Finally, nor can it have come as any surprise that the employees received substantial awards not least, in the case of Mr Asani, a substantial claim for pension loss as a longstanding employee of the practice.

49. Thus, the only questions for me to determine are:
    (a) whether or not the claimant was also in breach of duty vis-à-vis the partnership by not consenting to the solicitors nominated by the legal expenses insurers acting for the partnership in defence of the employee claims; and if so
    (b) whether that would have resulted in the partnership being indemnified by the policy against the employee claims, whether against the actual award, any reduced award obtained as a result of the solicitors being able successfully to advance before the ET arguments which are independent of the liability issues which the defendant is debarred from defending in this case, or by securing a reduced settlement; and
    (c) whether in all the circumstances it is just to make an order either that the claimant should indemnify the partnership against such award or, alternatively, that some other proportionate indemnity should be ordered, or that the award ought simply to be treated as a partnership liability (in which case, of course, it would effectively be shared by the parties equally).

*The key facts*

50. In determining this issue I shall refer to the key facts as briefly as possible, bearing in mind that they almost all appear from the contemporaneous documents and there is little need for me to make factual findings based on oral evidence.

51. The starting point is that once the ET proceedings were issued against the partnership the defendant instructed solicitors and put in a defence in April 2017. The claimant, however, wrote to the ET at the same time indicating, not surprisingly in the light of the above, that in his view the dismissals were unfair and he supported the employees' claims. Although Mr Harding suggested that this in itself was unreasonable and in breach of the claimant's duty as partner to the partnership, I reject this submission. In my judgment the partner's duty to the partnership cannot require the partner either to refrain from stating his own genuine position (which it clearly was in this case) or to acquiesce in the submission of a defence by the defendant which not only contradicted his own position but also sought to blame him for the whole affair. Whilst the insurance policy did contain a condition that the insured should make no admission of liability without its consent, there is no suggestion that the claimant was aware of this when he wrote to the ET setting out his position and in any event there is no indication that he was purporting to write to make an admission of liability on behalf of the partnership.

52. By June 2017 the defendant had discovered that the office and surgery insurance policy taken out by the practice through RBS with the insurance company NIG included commercial legal expenses cover and specifically cover in relation to employment disputes of up to £1M for compensation awards and up to £100,000 for legal expenses. This cover was administered by a separate company, DAS Legal Expenses Insurance Company Ltd (**DAS**). It was subject to any number of conditions and exclusions, both specific to this particular cover and general to all cover provided under the policy. It would be unduly time-consuming to refer to all of the terms referred to by counsel. I shall limit myself to referring to those two which I have found material, which are as follows:

(a) It was a condition of cover that the insured was required to follow the ACAS disciplinary code. This is material because the ET Judge specifically found that the defendant did not do so.

(b) In order for there to be cover the insured had to have throughout a reasonable prospect of successfully defending the claim, meaning at least 51%. This is material because the advice obtained by counsel instructed by the insurers showed that the defence did not meet this threshold.

53. Although there were also a number of conditions requiring notification of potential claims either immediately or within 180 days, I disregard these because there is no evidence that the 180 days limit was not followed and because there is no evidence that the insurers ever took late notification as a point or would have done so.

54. Furthermore, although there was an exclusion where an insured person did anything which would hinder the insurers or the appointed representatives, and a condition of co-operation, a condition to give instructions, and a further condition of giving suitable instructions, I do not consider that the claimant's conduct in refusing to agree to the solicitors instructed by DAS acting on behalf of the partnership falls within these provisions.

55. DAS instructed Irwin Mitchell solicitors (**IM**) to act on their behalf. Having reviewed the papers IM indicated that they had concerns as to the prospects, but were willing to instruct a barrister to conduct an assessment. On 26 June 2017 IM reported that the barrister had concluded that the partnership was more likely to lose than win the claim. IM enclosed his advice which, for some reason, the defendant has been unable to disclose. IM did however say that the insurers would fund representation with a view to trying to settle the claims. The defendant accepted this advice which, I note, was consistent with the advice from her previous solicitors (see the email from them dated 27 June 2017 at G1705). IM then clarified that the insurers would normally fund settlement only if the claim had been fought and lost at a hearing, but might be willing to fund a settlement in this case, in whole or in part; presumably on the basis that if the contribution to a settlement was less than the costs of the defence of the claim it would represent a sensible outcome for the insurers.

56. In July 2017 the ET had regularised the position in the light of the legal status of a partnership and the differences between the claimant and the defendant by directing that they should be individual respondents to the claim, rather than the partnership being sued as one discrete entity. This is important in that it permitted the claimant and the defendant to have separate representation and to advance separate defences if they so wished, notwithstanding that they would be jointly and severally liable to the employees for any liability established against the partnership.

57. By 23 August 2017 IM had received instructions from DAS and informed the defendant that DAS was willing to fund some costs to achieve a settlement and to contribute something to the settlement figure. IM suggested a settlement of up to £40,500 in total. It was clear from this email that DAS

would not be willing to fund the defence of the claim. As can be seen in the light of the eventual award, this was far too low and the offer made was rejected by the employees' representatives with no counter-offer made. It appears that IM's strategy at this stage was to seek to comply with the directions given in relation to disclosure and to prepare for a preliminary hearing that was scheduled for September 2017, whilst waiting to speak to ACAS to see if any proposals towards settlement might be forthcoming.

58. On 18 September 2017 IM emailed the claimant to say that it had recently been instructed on behalf of the practice under the terms of the legal expenses policy and, having received instructions from the defendant, needed confirmation from him as equal partner that it was authorised to act. Importantly, it continued:
"I understand there is currently a partnership dispute ongoing and therefore there may be circumstances where you disagree what is in the best interests of the Shanti Medical Practice. Please be aware that should this occur and we receive conflicting instructions then we will be unable to act for the Shanti Medical and this may invalidate your legal expenses cover."
It made no reference to the advice given to the defendant as to the prospects of success or as to the position as regards settlement.

59. On 19 September 2017 IM reported back to the defendant to say that the claimant had spoken to them, confirmed that he believed that the employees were unfairly dismissed and would not instruct them to act for the partnership. They said that in such circumstances IM could not act for the partnership and would need to recommend to the insurers that separate legal representatives were appointed. They also explained that there was a preliminary hearing listed for the end of that week which the defendant would need to prepare for and attend.

60. The note of the telephone conversation prepared by IM records that the claimant was not entirely clear by whom IM had been instructed and that he was not informed in terms that IM was instructed under the office and surgery policy. It also indicates that the claimant was under the misapprehension that the claim was being brought against the defendant alone rather than against the partnership. Nonetheless, there is no basis for a suggestion that the claimant could reasonably have believed that IM had been appointed by Peninsula who, at that time, he believed had been instructed by the defendant after the dismissals with a view to obtaining retrospective cover and nor is there any basis for contesting the accuracy of the file note.

61. Significantly, in my view, there is no indication in the email or in the file note that he was being asked by IM to give instructions to it on the basis that: (a) its advice was that the partnership would probably lose the claim; (b) it was only instructed at the present time by insurers to seek to achieve a settlement to which they might be prepared to make some contribution and, in the meantime, only to do what was necessary to comply with directions given by the ET; and (c) it would not seek to advance a case on behalf of the partnership which conflicted with his instructions.

62. The case was duly listed for a final hearing in January 2018. The defendant did not re-instruct her previous solicitors. She said in cross-examination that she was unable to afford to do so, although there is no documentary evidence from her to this effect. The ET refused to stay the hearing at the defendant's request until the instant litigation was concluded. In November 2017 the defendant informed the ET that she did not have legal representation and would not be attending, submitting written representations instead.

63. The hearing proceeded in her absence and the ET Judge made his determination as already indicated. I should mention that the defendant also complained that she was unable to attend to represent

herself, because the claimant had already booked leave to attend, and it was impossible for her to be absent as well. Whilst this is not strictly a matter for determination, I am satisfied - as Mr Mahmood submitted - that it would have been possible for locum cover to be arranged, failing which the defendant could have asked the ET to make some suitable accommodation to allow her to present her case which - as the ET said when it refused her subsequent request for reconsideration - the ET would have sought to accommodate. The fact that she did not do so at the time indicates in my view that this is a retrospective attempt to explain and justify her non-participation.

64. The defendant subsequently attempted to have the ET reconsider its decision and, when that failed, to appeal the decision, but both attempts were unsuccessful.

65. Having referred to the evidence I can now give my decision and reasons.

*Decision and reasons*

66. In my judgment the evidence shows that at no time was the claimant asked in terms to consent to IM being instructed solely to seek to secure a settlement on the best possible terms on the basis that the insurers would not be prepared to fund the defence of the case, given their assessment of the prospects, but would be prepared to make some contribution towards any settlement and towards costs. Instead, it appears that he was being asked to consent to IM being instructed on the basis that it would be putting forward a defence on the basis of the defendant's case and instructions with which he profoundly - and rightly - disagreed. I do not see how he can possibly be criticised for breaching his duty to the partnership by refusing to consent on that basis. No authority has been cited for such a proposition and I do not believe that the duty which a partner has towards his fellow partners could extend thus far. In the circumstances the reverse indemnity claim fails at the first hurdle.

67. If he had been asked to give instructions on the clear and explicit basis that IM would act solely to seek to secure a settlement on the best possible terms on the basis that: (a) if the claims could not be settled IM would have to withdraw; and (b) any settlement on behalf of the partnership would not prejudice the claimant's right to argue that the defendant should indemnify him against his share of such liability, then I can see the force of the argument that acting reasonably he should have given instructions to IM on that basis. However: (i) that is not what happened; and (ii) even then, on the evidence before me, there would have been insuperable arguments as regards causation.

68. In particular, there is no indication that any settlement on any terms which would have been acceptable to the employees, to the claimant, to the defendant and to the insurers would or could have been achieved within the narrow window of opportunity available for settlement on this basis. It is frankly inconceivable that the employees who were, after all, represented by very competent trades union solicitors, would have been willing to settle for anything like the sums proposed by IM or that the defendant would have been willing to concede defeat and settle at a significantly higher level. Even if she had, there is no indication that the insurers would have been willing to offer to contribute anything more than a modest amount. In closing submissions Mr Harding submitted that the court should proceed to assess the reverse indemnity on the basis of the loss of the chance of achieving a settlement and a contribution. Ingenious though the argument was, I see no basis for doing so in the particular circumstances of this case, even if it was appropriate in principle to do so in a case such as the present. I do not consider this to be a case where there was anything more than the most speculative and outside of chances of achieving any settlement, let alone one in respect of which the insurers would have paid out anything more than a modest contribution.

69. Furthermore, it is apparent from what I have already said that the parties had no basis under the insurance policy for seeking to compel the insurers either to defend the case or to indemnify the partnership in full against any liability, whether incurred as a result of a settlement or a decision of the ET. It is clear that the insurers could and would have declined to defend or indemnify due to the clear advice that the reasonable prospects condition was not satisfied, in circumstances where, as I have already said, one can see very clearly why that advice was given, in my view clearly correctly. Even if it had been open to the defendant to contest the issues of liability in this case, it is apparent from the conclusions I have reached that there is no merit in her arguments as to the prospects of successfully defending the ET claims, since the fact is that - whatever the truth about her complaints that the claimant and the employees concerned had ganged up against her - it is apparent that these were not frivolous or dishonest disclosures to the GMC, so that the protected disclosure regime plainly applied, and the defendant had no proper basis for responding to those disclosures by subjecting the employees to a disciplinary process where she was prosecutor and judge and where she had plainly already decided in advance that the outcome should be immediate dismissal for gross misconduct.

70. I am also inclined to agree that insurers could also have relied upon the failure to follow the ACAS disciplinary code, although it is unnecessary for me to express an opinion as to whether that would have justified complete repudiation or only a refusal to indemnify against the additional award made in this case on that very ground.

71. Further, neither the defendant in her schedule or evidence nor Mr Harding in his submissions were able to identify any legal defence which might have been advanced by IM or any other legal representative which would have enabled the claims to have been successfully defended or the size of the award to have been reduced on any basis which would not have cut across the liability issues which the defendant is debarred from defending. This is not surprising, given the consensus of opinion as to the prospects of the defence being successful.

72. Finally, if there had been a meritorious defence then the defendant ought to have continued to defend the claim in her own personal capacity, whether by re-instructing the previous lawyers or by representing herself. The defendant has presented no convincing explanation backed by convincing evidence as to why she did neither.

73. It follows that in my judgment the defendant must indemnify the partnership against its liability to the employees in respect of their successful ET claims.

74. As regards the other claims, in relation to the claimant's daughter, Dr Anupama, no question of any argument based upon reverse indemnity applies. She made an ET claim she made based upon constructive unfair dismissal by the defendant in preventing the partnership from paying her salary whilst on maternity leave. The defendant is debarred from contesting that her conduct in this respect was not a breach of duty vis-à-vis the partnership. Having subsequently withdrawn the ET claim, the only financial claim she might still bring against the partnership could be a claim for unlawfully withheld salary. However, as Mr Harding submitted, it is difficult to see any basis for holding the defendant liable to indemnify the partnership against such liability, when the liability to pay her was always a liability of the partnership itself. In my judgment the most the claimant can obtain is a declaration that the defendant is liable to indemnify the partnership against any additional liability to Dr Anupama which it would not have been liable for but for the defendant's pleaded breaches of duty which she is debarred from defending.

75. In relation to Dr Anicatt precisely the same arguments arise and the same conclusion follows. The complaint as regards Dr Anicatt is that the defendant prevented the partnership from paying her for locum services provided by her. The defendant is unable to contest that this was a breach by her of her duty to the partnership. However again the liability is that of the partnership anyway. In my judgment the claimant is entitled to a similar declaration but to no more in the absence of evidence that the liability has been or could be inflated by reason of the defendant's pleaded breaches of duty which she is debarred from defending.

76. In relation to Mr Varsani, there is no possible claim which can still be made against the partnership and hence no basis for any declaratory or other relief.

## Equitable claim to share in the property: issues 5 to 10

77. The defendant's case is based on her case that in 2002 it was agreed that she should become an equity partner, since: (a) this explains why, on her case, it was also agreed at that time that she should have an equal interest in what would become the partnership practice premises; and (b) her being an equity partner provides the basis for the payments made in respect of the practice premises from practice income being treated as having been made from partnership income.

78. It is therefore necessary to consider the events of 2002, as to which there is little if any common ground, save that it is agreed that the defendant began working in the practice as a GP from 1 October 2002. Given my assessment of the witnesses, I shall need to make findings primarily by reference to the documentary evidence and my assessment of the totality of the evidence and inherent probabilities.

79. One of the difficulties in this case has been caused by the confusion between a salaried partner and a salaried GP. Whilst there is, as I have said, an important difference in legal status between the two, on the facts of this case it would not assist the defendant to prove that she was a salaried partner, since it would not entitle her to claim the benefits of equity partnership, which is what she must do to succeed in her claims for the reasons discussed above. Moreover, when considering the contemporaneous documents and the witness evidence I must be alert to the fact that those responsible for such documents did not always either understand or maintain the distinction. Not only was there reference to a salaried GP and a salaried partner but also occasionally to a fixed share partner. It is also of note that the claimant had contended in his witness statement that the defendant was employed as a salaried GP, whereas under cross-examination when taken to the contemporaneous documents he readily admitted that she was employed as a salaried partner. In my judgment that was a (sadly, all too common) example of a witness, possibly encouraged by misguided legal advice, adopting a position in a witness statement which did not really reflect his true position, and which could not be maintained when taken to the contemporaneous documentation. It was thus more a misconceived attempt to over-state his case in his witness statement than a serious attempt to mislead which only ended up as having the effect of damaging his overall credibility.

80. However, notwithstanding the terminological inexactitude, it is clear that at all relevant times the parties understood full well the fundamental difference between someone who only received a fixed salary, even though a partner in the practice, and someone who was a full equity partner and shared in the profits. I do not consider this to be a case where the parties were at cross purposes as to the defendant's status.

81. Some time was also taken at trial by investigating the position of the defendant's predecessor, another female GP of South Asian heritage. The sex and origin of this predecessor is relevant only in

that the defendant contended that the claimant positively needed a partner with those attributes to serve a practice list where many patients of the same sex and origin preferred to deal with a female GP who could communicate in their native language. Whilst I accept the general proposition, it does not follow that the female GP also had to be an equity partner. Although there was some confusion in his evidence, there is no basis for a suggestion that the defendant's predecessor had herself been made an equity partner and every reason to think she had not, because she left the practice after a fairly short time.

82. The defendant's case and evidence is that it was agreed in the course of either the first or the second meeting that she should become an equal equity partner on the expiry of a 3 month probationary period.

83. The claimant's case is that she was only ever employed as a salaried GP or salaried partner until 2013, when they entered into the partnership deed already referred to.

84. As regards the contemporaneous documentation, the starting point is to note the (rather unhelpful) absence of any formal contract of employment or partnership, any written statement of terms of employment or partnership, or any written offer of employment or partnership. Whilst this absence is at first blush neutral, on reflection it is more likely that the simple offer and acceptance of a salaried position at a fixed salary would go unrecorded than would an agreement for an equity partnership especially if, as contended by the defendant, it included a provision for a probationary period and also included agreement about her acquiring an equal interest in the practice property.

85. The most contemporaneous document is a completed form, signed by both parties and dated 9 September 2002, which was produced by and sent to the local Bolton Primary Care Trust (**PCT**) to notify the commencement of employment of a new post-holder (**the notification form**). The claimant contends that this was a 6-page form and that page 6 of the form made clear that the defendant was a fixed salary partner. The defendant contends that this page (**the superannuation form**) is in fact the first page of a 2-page form and that the version she has in her possession and which is signed by her does not contain the relevant details.

86. Since I am unable to derive any real assistance from the witness evidence on this point it is necessary for me to resolve this dispute on the basis of inference, and I do so in favour of the defendant, for the following reasons:
    (1) Pages 1 to 5 of the notification form have a common appearance, content and purpose, whereas the superannuation form has a different appearance, content and purpose, intended to ensure that the superannuation remuneration of the partners in a medical partnership is apportioned by the PCT in the agreed partnership profit share. This strongly suggests that they are two separate documents.
    (2) Although difficult to be categoric in the absence of a forensic examination of the originals, the pattern of markings on the two versions of the superannuation form are more consistent with the relevant details having been added later than with an attempt having been made to remove the relevant details.
    (3) This explanation is more consistent with my assessment of the witnesses as fundamentally honest but unreliable than dishonest. The most plausible explanation in my judgment is that the defendant did indeed sign the superannuation form in blank, leaving it to be completed by the claimant or Mr Patel, who subsequently completed it and sent it to the PCT at the time, since without it the PCT would not have known how to apportion the superannuation remuneration as between the two.

87. The consequence of this finding is that, whilst it cannot be concluded that the defendant signed the superannuation form when it contained the clear statement that the claimant was the sole equity partner and she was a partner with a fixed salary of £60,000, it can be concluded that this was the contemporaneous understanding of Mr Patel who completed these details. He can only have done so in my judgment on the basis that - in accordance with his evidence and that of the claimant - he was present at the relevant meeting, or alternatively that he was relayed this information by the claimant subsequently. Since I confidently acquit the claimant of an intention to agree an equity partnership with the defendant whilst secretly planning to record her as only a salaried partner, I am satisfied on the balance of probabilities that this is an accurate record of what was discussed and agreed at the time.

88. The notification form itself provides little hard assistance. Whilst the first page is ticked to record the defendant as being a salaried employee, as she said in evidence the same entry also incorrectly records her as only providing a restricted range of services when the evidence is clear that this was not the case (see in particular the form signed by the defendant on 25 September 2002). It does however also state her gross rate of pay as being £60,000, consistent with the superannuation form.

89. The final relevant document submitted to the PCT at the time was a form entitled "declaration of partnership" (**the partnership declaration**) signed by both parties on 26 September 2002 to confirm that their "proposed partnership" would become effective on 1 October 2002. I have no doubt that the purpose of this form was indeed to enable the PCT to be satisfied as to the relationship between the two GPs and not, as was suggested by or on behalf of the claimant, to support an application by the defendant for inclusion on the medical list. However, there is no suggestion from the content of the form that it was intended only to be used where the partners were equity partners nor is there any basis for contending that the entries on the form were in any way inconsistent with the defendant being only a salaried partner.

90. Based on these findings that I am satisfied that the agreement reached at the time was that the defendant was to be taken on as a salaried partner with effect from 1 October 2002. I am supported in this finding by a number of supporting points:

    (1) First, it is consistent with my assessment of the claimant, which is that he has always viewed the practice as "his" practice to run and do with as he wished. Indeed, in my view it was clearly this approach which so frustrated the defendant many years later that she attempted to pressurise him into agreeing to accept her as an equity partner in a letter dated 15 July 2013, of which more below. If the defendant had genuinely believed that she had become an equal equity partner with effect from 1 January 2003 (assuming the 3-month probationary period expired on that day) then, given my assessment of her as a confident person who has no difficulty in asserting herself, I regard it as inconceivable that she would have acquiesced for a prolonged period of time in the claimant having effectively run the practice as his own, financially speaking, without reference to her. Even on her own evidence she appears to have accepted the claimant managing the majority of financial matters with little involvement from her.

    (2) Second, it is consistent with the practice accounts from 2002 onwards not recording the defendant as having become an equity partner in the financial year ending April 2003. Whilst it is true that the accounts for the period from 1 July 2002 to 31 March 2004 are headed "Dr A Prasad & Dr S Hanif Shanti Medical Centre", there is no section showing the respective capital shares of claimant and defendant or their respective profit share and drawings. Instead, the accounts are signed off by the claimant alone under the confirmation that they are

a "true record of all my business transactions" (emphasis added). Whilst it is also true that the accounts for the following year are said to have been prepared from the accounting records of the claimant and the defendant, again there is no allocation of capital or income as between the two and again they are signed only by the claimant below the same confirmation.

(3) Third, although it is apparently the case that the defendant submitted returns to the Inland Revenue as a self-employed person rather than as an employee, there is no evidence which she has produced to the effect that she did in fact receive an equal profit share as opposed to a fixed salary. It is the gist of the claimant's evidence (see his witness statement at paragraph 45) that she always received a fixed salary and this has not been expressly contradicted by the defendant in her own evidence or more relevantly by reference to her own tax returns or other contemporaneous documents. It is true that her salary was increased over the years and also because there were also various loans made by the claimant to the defendant over the years which may have caused some confusion. However, there is no clear evidence to suggest that she received an equal share in the profits from 2002/03 onwards.

(4) Fourth, there is no evidence either that the business bank account was converted into a partnership bank account so that she became a signatory on the account or personally liable for the bank borrowings or that she was a named party to the loan agreements entered into under which the practice took on substantial loans in order to finance extensions to the practice property. The most that can be said is that some of the formal letters confirming overdraft facilities and the like are addressed to them as "Dr A Prasad & Dr S Hanif, Shanti Medical Centre", consistent with the practice letterheading. However this is entirely consistent with the defendant being held out as a partner whilst as between herself and the claimant she remained solely a salaried partner.

91. I am prepared to accept that some years after 2002/03 the defendant did begin to seek to persuade the claimant to make her an equity partner. I suspect that after the defendant obtained her divorce in 2009 she began exerting more pressure on the claimant to make her an equity partner, on the basis that before that she did not want to run the risk of complicating the financial arrangements regarding the divorce by becoming an equity partner. I am also prepared to accept that the claimant probably made encouraging noises from time to time, which may have led to the defendant convincing herself that she did become an equity partner at some point in time prior to November 2013. However, there is no clear evidence that there ever came a point prior to November 2013 where there was a clear agreement or a clear course of conduct from which it could be inferred that the defendant's status had changed from salaried partner to equal equity partner.

92. In my view these conclusions, which are fatal to the defendant's case that she was an equity partner from the outset, are equally fatal to her case either that the practice property ever became a partnership asset or that she acquired any beneficial interest in the practice property, whether in her own right or in her capacity as partner. There are essentially three reasons for this:

(1) First, the sole basis for her case that the practice property ever became a partnership asset is that partnership monies were used to fund the monies spent over the years on extensions and improvements to the practice property and on its maintenance and upkeep. However, the practice property was always held in the claimant's sole name. Moreover, it is apparent from the accounts to which I have referred that from at least 1 July 2002 onwards the property, including the new surgery and improvements, was treated as an asset of the practice. It follows that if, as I have found, the defendant was not an equity partner in the practice from 2002/03 onwards, then all that happened was that the claimant used his income from his

practice to fund extensions and improvements to his practice property and to fund its maintenance and upkeep. If no partnership monies were used, then the defendant's case has no traction.

(2) Second, at no time was the practice property ever transferred into joint names. The defendant initially suggested that this was because she did not want to have any property in her own name at a time when she was going through an extended divorce process with Dr Falouji, which did not end until 2009. However, her evidence in court was that the divorce process was only protracted and contentious because of disputes regarding the arrangements for their two children rather than as a result of any financial disputes. If so, then it follows that this would not be an explanation for the position not being regularised from the outset, had there been an oral agreement at the outset that she would have a 50% interest in the property. It is worth noting that the claimant himself obviously did not believe that he had agreed to the property becoming an asset of any partnership, since in April 2003 he entered into a lease whereby he leased in his private capacity the property to himself in his capacity as proprietor of the medical practice for a term of 3 years. Whilst it may be debateable as to whether such a lease was legally valid, it is nonetheless a good indicator that he did not believe that the property was held as property of any partnership. Indeed, in an email dated 22 September 2013, and in more detail in her oral evidence, the defendant seemed to advance a different version of events, which is that the claimant had offered to sell her an interest in the initial practice property, but she had not been able to take him up on his offer because she did not have sufficient capital to pay for it. If that was indeed what happened then that amounts to nothing more than an offer which was not accepted and which has no legal relevance.

(3) Thirdly, it is common ground that the effect of the partnership deed and the way in which the partnership accounts were subsequently prepared was to reflect the fact that the practice property was owned by the claimant alone. Although in cross-examination the defendant sought to suggest that she had in some way reserved her right to claim an existing interest in the practice property, what is striking is that this was never asserted by her at the time or subsequently until these proceedings arose. If the defendant had genuinely believed from 2002/03 onwards that the practice property was either partnership property or 50% owned by her then, in circumstances where she knew full well that its value had been significantly increased due to the extensions and improvements undertaken on it, she would not simply have abandoned this right in 2013 without a struggle. I am satisfied that what really happened in 2013 was that the defendant was happy to settle for an equal interest in the partnership going forwards because she knew that she did not have an equal or indeed any interest before that, either in the practice as a business or in the practice property as a business asset.

93. Finally, I accept the claimant's case that on its true construction the partnership deed operates as a compromise of any right the claimant might have had to claim that she had an equity interest in the practice or in the practice property. I reach this conclusion by reference to the terms of the partnership deed read in the context of the relevant factual matrix, as known to and communicated between the parties, which can be stated as follows.

94. On 1 January 2011 the claimant retired from the practice on the basis that he intended to, and did, return to practice the following day. It appears that by doing so he was entitled to draw his pension from that time whilst continuing to practise. It appears that this was permitted so long as over the period of his retirement another registered GP with a contract with the PCT was available to take

over his patients. It appears that it would suffice for the other GP to be a salaried partner so long as the GP was a partner and not a mere employee.

95. On 15 July 2013 the defendant wrote to the defendant stating that they needed finally to sign a partnership agreement. Although she attempted to disguise this in the letter it is clear that she was seeking to use, as a lever to force him into agreeing to do so, an assertion that because she was only a salaried partner as at 1 January 2011 either his retirement from or his return to practice was invalidated, with potentially serious consequences for him either way. She said that she had begun the process of obtaining third party assistance to draw up a suitable agreement.

96. On 22 July 2013 the claimant responded, contesting her assertion, and asserting that she was a fixed share partner rather than a salaried partner. Whilst these exchanges are a good example of how both the claimant and the defendant were willing to make assertions in correspondence which are clearly contrary to their positions and their evidence in this case, what is more relevant for present purposes is that he said that he had been willing for two years to meet to agree the terms of a new partnership agreement.

97. There then followed a number of exchanges. In an email written by the defendant to the claimant on 22 September 2013 she contended that she had been an equity partner in the practice since 2003 and had a share in the building. With assistance from two mediators from the Bolton PCT they were able to reach agreement and to agree to draw up and enter into a written partnership agreement. This process was completed and, the partnership deed entered into, on 28 November 2013.

98. So far as relevant, the evidence is that the partnership deed was produced by the parties through amalgamating a number of GP partnership deeds which they had obtained from various sources. They did not involve lawyers. As always in these cases that is a decision which may have seemed sensible at the time but has now led to legal costs far in excess of those saved at the time.

99. In those circumstances it is not surprising that the sole recital to the partnership deed makes no reference to the background, simply stating as follows:
"In consideration of the mutual trust and confidence of the parties to this deed they the said partners MUTUALLY COVENANT AND AGREE to become partners ("the Partners") in the practice of general medical practitioners providing general medical and other services … on the following terms."

100. Coupled with this recital is paragraph 2.1, which states that "the date of commencement of the Partnership shall be 01/04/2011" and paragraphs 3.1 and 7.3 which provide that the parties should share equally in the partnership capital and the partnership profits and losses.

101. As regards partnership capital and property, the only provision was clause 3.3, which states simply that: "the Partnership capital shall consist of any assets as may be acquired by the Partnership". It does not identify any existing assets which are already part of any pre-existing partnership or are otherwise to be treated as being partnership assets as from 1 April 2011 or otherwise comprising partnership assets. As regards the practice property, paragraph 2.3 states simply that the partnership "shall be conducted at the present time" from such property. There was a definition of partnership expenses which made no mention of any expenses relating to the practice property. There was also a definition of partnership receipts which included at paragraph 6.3.4 "the Notional Rent reimbursed by NHS England", but continued "In return the Partnership will pay this amount to the landlord". This provision, which refers to the fact that NHS England would pay a GP practice an amount equal to the rent which the practice would have paid for the right to use the practice property if it had been

owned by an unconnected party rather than by one or more of the partners, ties in with the final clause, which is headed "Landlord/Tenancy Agreement" and which states: "A landlord/tenancy agreement is to be drawn up separately to this agreement".

102. It can be seen from the above that there was no express recital or operative provision in the partnership deed to the effect either that there was no relationship of partnership in equal shares prior to 1 April 2011 or that the practice property was not partnership property.

103. Nonetheless in my judgment - and even leaving aside the factual matrix - on a true construction of the partnership deed, both as to what it did say and as to what it did not say, it is clearly the case in my judgment that the practice property was not to be treated as a partnership asset and would remain in the ownership of the landlord who would let it out to the partnership under the terms of a separate lease.

104. Although not quite so clearly expressed, on the same basis I am satisfied that on a true construction the parties are to be taken as agreeing that: (a) there was no pre-existing relationship of equity partnership pre-dating 1 April 2011; and (b) the practice property was to be treated as a pre-existing partnership asset forming part of the existing capital of the partnership. In my judgment conclusion (a) follows from the deliberate decision to choose 1 April 2011 as the retrospective commencement date and the absence of any provision to reflect or address any consequences of there having been any previous equity partnership at will. In my judgment conclusion (b) follows from the decision to refer only to future assets as forming part of the partnership capital and the decision to refer to and make specific provision for the practice property in a number of separate clauses without there being any provision to reflect or address any consequences of that having previously treated as partnership property.

105. Once I have regard to the factual matrix it becomes clear beyond any doubt in my judgment that the provisions of the partnership deed, again both as to what was expressly included and what was not stated, reflected a clear decision to compromise the existing dispute as to whether there had been a pre-existing equity partnership at will and, if so, over what period and on what terms, by agreeing a retrospective start date of 1 April 2011, and furthermore to compromise the existing dispute as to whether the practice property or any part of it was either partnership property or the property of the defendant by providing that it was to be the property of the claimant alone as the sole legal owner of the practice property and as the future landlord under a formal lease agreement.

106. It follows that regardless of my decisions as to: (i) the absence of any equity partnership at will from 2002/03; and (ii) the practice property not forming either partnership property or property in which the defendant had an interest, I would have concluded that the defendant was not entitled to assert any such claims in any event on a proper construction of the partnership deed because she had released any claims to such effect by entering into the partnership deed.

107. Finally, it is material to have regard to the way in which the practice property was subsequently treated in the accounts. In accordance with the defendant's express confirmation in correspondence (see for example her email of 8 December 2013) the practice premises was treated as the claimant's property and the claimant received a regular payment of what was describe as a service charge for the partnership's use of the premises whilst the expenses relating thereto (save for tenant expenditure such as heating and lighting) were stripped out of the partnership expenses.

108. It follows in my judgment that the defendant has not made out any of her claims in these respects.

## Alleged diversion of partnership receipts: issues 11 to 12

109. The evidence of Mr Sheen was of very considerable assistance in resolving this matter so that by the end of the trial there was little difference between the parties and no doubt in my mind as to the correct disposal.

110. In summary, by May 2015 the parties were at loggerheads as to the control of the joint partnership Nat West bank account. The claimant, acting unilaterally, took steps to procure that all partnership income received from NHS England and other sources including Bolton CCG was paid directly into the original practice RBS bank account in his own name which he also used to discharge partnership expenses. By September 2015 matters had been resolved, at least temporarily, and the joint partnership bank account was reinstated.

111. However, since the claimant had continued to use the RBS account for his own non-practice related income and expenditure including, for example, income and expenses relating to his ownership of the practice property and other investment property, it was always necessary for the purposes of preparing the accounts for YE 31/3/16 for all transactions on the RBS account over the relevant period to be properly analysed and all proper partnership receipts to be accounted for as such and for only proper partnership expenditure to be taken into account.

112. Mr Sheen confirmed in his witness statement at [14] that when preparing the accounts for YE 31/3/16 he asked for and the claimant provided the bank statements for this account over what he believed was the full period during which the second account was operated. He said that this enabled him to account for all of the funds received and spent and they were included in the accounts accordingly. He said that the defendant had queried whether the accounts had included all of the income, that he clarified the position and that she did not question matters further.

113. In cross-examination of the claimant and of Mr Sheen they were shown an email dated 25 January 2017 from Mr Sheen to the claimant asking for further information necessary to finalise the accounts for YE 31/3/16, including a request for full bank statements in relation to the RBS bank account after 28 September 2015, together with the claimant's email in response to Mr Sheen, stating that there were no relevant partnership transactions from that date.

114. However, Mr Harding was able to identify from the bank statements disclosed that there were in fact a number of payments from NHS England and Bolton CCG paid into the RBS account through until January 2016. It appears that circa £187,000 may have been paid in after 28 September 2015 which has not been accounted for.

115. The claimant did not appear to me to know very much about this. It appears from his email that he had left it to his son to deal with this. I do not consider that this was a deliberate attempt by the claimant to conceal receipts from the defendant or from Mr Sheen, as opposed to oversight. It appears likely that these were continuing payments outside of the usual monthly payments received by the practice which were missed either because the request to reinstate payments to the partnership account had not been sent or had been sent late or had not been actioned or actioned late. Mr Sheen said that he had taken the email in reply at face value, especially because he understood that the partnership bank account had been used after September 2015 and had been able to reconcile the usual monthly payment statements with the payments going into the partnership account after September 2015. However, he of course accepted that having now seen this information he would need to check back to see to what extent any of this income had not been accounted for.

116. I am satisfied however that there is no reason to think that Mr Sheen allowed expenses which were not genuine partnership expenses to be included in the partnership bank accounts. That is particularly so when there is no suggestion that any such expenses post-dating 28 September 2015 were even considered by him.

117. It follows, I am satisfied, that the only action required on the taking of the account is for Mr Sheen to correct the accounts for the YE 31/3/16 by adding in these additional receipts. In closing submissions Mr Mahmood suggested that such a claim was barred by clause 9.3 of the partnership deed, which provided that the annual accounts, where signed by both parties, should be conclusive save where a manifest error was discovered within 12 months. However, there is no evidence that the relevant accounts were ever signed off by the defendant either at all or less than 12 months ago, so that I do not accept that this defence has been made out.

**Alleged unauthorised expenses: issue 13**

118. In paragraph 10 of and the Annex to her schedule of matters to be taken into account the defendant identified a number of transactions which she said had not been agreed by her and included payments of the claimant's personal tax bills. These were matters raised by Mr Sheen in his email of 24 January 2017. However, in her witness statement she confirmed at paragraph 79 that, having now seen the claimant's contemporaneous email in reply, this issue had now been "clarified". It is clear from the evidence that Mr Sheen was satisfied with the answers provided and that this had enabled him to produce accounts for the year in question which the defendant has not disputed since. In opening submissions Mr Harding confirmed that the only issue raised related to a payment of £5,130 to the locum GP Dr Anicatt which was subject to dispute and which is dealt with below by reference to paragraph 12.

119. More generally, it should be noted that the defendant has never queried or challenged the accounts as prepared by Mr Sheen. For example, on 15 March 2016, in response to a letter from the claimant's then solicitors to her then solicitors suggesting that Mr Sheen produce revised accounts, she wrote to Mr Sheen stating in terms that she had agreed the accounts already prepared before they were submitted, that she had no issue with them and that did not authorise any revisions to be made to them.

120. In paragraph 11 of the schedule the defendant raised an argument that the claimant in breach of duty had caused loss to the partnership by a failure to make payment to suppliers, leading to litigation and unnecessary costs. This allegation related to the company Peninsula which the defendant had instructed to act on behalf of the partnership, in circumstances where it appears that the claimant had misunderstood the purpose of the instructions. In the end the allegation falls away because it was demonstrated that regardless of anything else the partnership had suffered no loss since Peninsula had agreed to accept payment of less than the amount of the original claim.

121. Finally, in paragraph 12 of her schedule, the claimant complained that the claimant had wrongfully authorised or permitted expenditure above the £1,000 limit permitted by the partnership deed without her consent. She complained of:

(a) The employment of Dr Anupama from 2013 without her consent and the increases in her salary, also without her consent, at a cost of between £3,000 to £6,000 pcm from November 2013 to April 2017.

(b) The payment of a salary to the defendant's wife when she did not work for the partnership and the payment of family expenses including car payments and mortgage payments on his own personally owned apartments.

(c) The payment to Dr Anicatt referred to above notwithstanding that it was not expressly referred to in paragraph 12.

122. Paragraph 17.2.8 of the partnership deed prohibited either partner from incurring any expenditure on behalf of the partnership exceeding £1,000 without the prior consent of the other partner.

123. Two preliminary points arise as to the construction and effect of this provision.

124. The first is that the defendant's case appears to be that any breach of this clause ought to lead to the expenditure being entirely disallowed as partnership expenditure. However, as Mr Mahmood rightly submitted in my view, that is misconceived. If the expenditure was in fact proper partnership expenditure, then it ought to be treated as such even if there was no proper consent. It is only if the expenditure was not proper partnership expenditure or could or should have been avoided or reduced that it should be disallowed in whole or in part as appropriate.

125. That is particularly relevant to the first allegation. As the claimant said, and as I accept, Dr Anupama was employed as a salaried GP to provide sessions for which the practice received payment from the PCT. I am satisfied that the defendant's objection was to the employment of Dr Anupama herself rather than to the employment of any salaried GP to provide these sessions. In cross-examination she accepted, rather grudgingly, that whilst she had not approved Dr Anupama's employment once she was there she might as well work and she assigned work to her. I accept the claimant's evidence, which is not the subject of any substantial challenge based upon any cogent objective evidence, that Dr Anupama received payment at the standard rate from time to time for her sessions. It follows the partnership would have incurred the same expenditure even had a different salaried GP been appointed and, therefore, that this complaint does not lead anywhere in financial terms and must fail. Insofar as in contemporaneous correspondence the defendant made various complaints about her lack of timekeeping and the like there is no pleaded or evidential basis for undertaking some retrospective assessment of the value of Dr Anupama's work as compared to some notional comparator.

126. The same conclusion follows in my judgment as regards Dr Anicatt. In cross-examination the defendant accepted that she had no objection to using her as a locum when required. Although she suggested that there were some occasions when it was not necessary to use her, and complained that she was used against her objections when Dr Anupama went on maternity leave even though she appeared to accept that cover was needed, there is no pleaded or evidential basis for undertaking some retrospective assessment of when she was reasonably needed and when she was not. It appears that the defendant's real objection to Dr Anicatt was that she took the claimant's side in the partnership dispute but that is obviously not a proper basis for holding the claimant liable for payments properly made to her for locum work undertaken by her.

127. The second is that although, as already stated, the partnership deed provided that the date of commencement of the partnership should be 1 April 2011, it did not provide, whether expressly or in my view impliedly, that the express obligation in paragraph 12.2.8 was to be treated as having retrospective effect. In the absence of some recital or incontrovertible evidence falling within the relevant factual matrix to the effect that the parties had agreed that they had always intended to conduct themselves in accordance with the terms of the partnership deed, it cannot sensibly be said that it could have been intended that any of the provisions in paragraph 12 should operate retrospectively.

128. It follows in my judgment that the defendant cannot complain about the fact that prior to 28 November 2013 the claimant did not seek or obtain her prior consent, either to the employment of Dr

Anupama (which, based on the evidence of her resignation email dated 23 March 2017, was entered into in October 2013 before the partnership deed was entered into), or to the employment of his wife or to the payment of family or personal expenditure.

129. Moreover, I accept Mr Mahmood's submission that it is not open to the defendant to expand this limited case into a more general complaint that the claimant's wife did not perform any services for the partnership which would have justified the remuneration paid to her over some or all of the period of such payments. That would involve a factual investigation which would extend beyond the pleaded case, where even though it is said that the claimant's wife "did not work within the partnership": (a) that is in the context of the overarching complaint of expenditure above £1,000 without the defendant's prior consent, not as a separate and freestanding allegation of breach of partner's duty; (b) there is no pleaded or particularised case to the effect that any employment relationship was, or should be treated as, some form of sham. In cross-examination the claimant agreed that his wife had been employed by the practice to undertake part time administrative and secretarial work from 2000 to 2009 whereas subsequently she had only been employed by him as opposed to the practice. In the absence of a pleaded case or contemporaneous evidence to the contrary I accept this evidence. As Mr Mahmood submitted in closing, even if I was wrong as to the non-retrospective effect of the partnership deed back to 1 April 2011 on any view it could not operate back beyond that date. It follows that this claim must fail.

130. As regards the complaints made about the payment of family expenses or car expenses or personal investment property related expenses, in the absence of any suggestion or evidence to the effect that Mr Sheen wrongly included these expenses as partnership expenses in the accounts produced for the years in question these complaints must fail.