Dr. Samrath Singh Cheema v Dr. Stephen Jones, Dr. Reshma Rasheed, Dr. Mita Roy, Dr. Meenakshi Rawal

Case No: A2/2017/1442

Court of Appeal (Civil Division)

2 November 2017

[2017] EWCA Civ 1706

2017 WL 04967447

Before : Lord Justice Longmore Lord Justice Newey and Lady Justice Asplin

Date: 02/11/2017

On Appeal from the High Court of Justice Queen's Bench Division Commercial Court

David Pittaway QC

HQ16X03267>

Hearing date: 25th October 2017

Representation

Daniel Tatton-Brown QC (instructed by Hill Dickinson LLP) for the Appellant.
Steven Woolf (instructed by Taylor Wood Solicitors) for the Respondents.

Judgment Approved

Lady Justice Asplin:

1 This is an appeal against the order of David Pittaway QC, sitting as a Deputy High Court Judge dated 19th May 2017. The learned Judge granted declarations that: a partnership at will between the Appellant, Dr Samrath Cheema, Dr Stephen Jones, Dr Reshma Rasheed, Dr Mita Roy and Dr Meenakshi Rawal was entered into as from 1 July 2016 (the "New Partnership") and had superseded the partnership between Dr Cheema and Dr Jones which was the subject of an agreement dated 8 April 2016, (respectively referred to as the "Old Partnership" and the "April Agreement"); and that the New Partnership was dissolved by the service of a notice on 14 October 2016 (the "Notice"). He also dismissed Dr Cheema's claim against Dr Jones in which Dr Cheema had claimed interim and final injunctive relief to restrain Dr Jones from breaching the April Agreement and/or the Partnership Act 1890 and ordered that the affairs of the New Partnership be wound up and that all necessary accounts and enquiries be taken and made.

2 Permission to appeal was granted by Lewison LJ on 20 June 2017 in relation to a single ground, namely whether the Judge was wrong to conclude that the New Partnership was a partnership at will rather than finding that the new partners (Drs Rasheed, Roy and Rawal) had acceded to the partnership on the existing terms and conditions of the April Agreement which was for joint lives and required unanimity of decision making or alternatively, that he was wrong to conclude that none of the prospective new partners had been provided with a copy of the April Agreement and accordingly, should have found that at least those who were aware of the April Agreement were bound by its terms.

3 By their Respondents' Notice, the Respondents ask the court to uphold the Deputy Judge's decision on the same grounds and on an additional ground that, if the learned Judge was wrong to conclude that the New Partnership was a partnership at will which was dissolved by the Notice, he ought to have exercised his discretion under section 35(f) Partnership Act 1890 and dissolved the New Partnership in any event. Accordingly, even if the Judge was wrong about the partnership at will, the outcome of the proceedings would have been the same because the New Partnership would have been dissolved. This court is asked to exercise that discretion.

Factual background

4 In early 2016, Dr Jones invited Dr Cheema to become a partner in the medical practice run from two surgeries in East Tilbury and Corringham, Essex. He accepted the invitation and signed the April Agreement. Shortly afterwards Dr Jones discussed with Dr Cheema the prospect of enlarging the partnership and taking on more patients. Before the end of April 2016, Dr Jones had canvassed the names of Dr Rasheed, Dr Roy and Dr Rawal. On 21 April 2016, a formal meeting about the proposed expansion took place attended by all of the doctors with the exception of Dr Rawal. At or about that stage, Dr Cheema asked Dr Jones to ensure that any new agreement contained provisions for a probationary period for the three new doctors.

5 On 22 April 2016, Mrs Halcox, the Practice Manager, emailed Dr Roy making a formal partnership offer. Further, at or around that time, Dr Jones instructed Blake Morgan to prepare a new draft partnership agreement and Mrs Halcox was in correspondence with the practice accountants over the structure of the new partners' drawings. The practice minutes of 27 May 2016 recorded that the new partnership would commence on 1 July 2016. Dr Rasheed, Dr Roy and Dr Rawal started work with effect from 1 July 2016 and attended weekly practice meetings with Dr Jones and Dr Cheema. However, the discussions on the terms of the partnership were successively deferred throughout July and early August 2016.

6 The dispute between Dr Jones and Dr Cheema appears to have come to a head because of a discussion he (Dr Cheema) had with Dr Rasheed after a meeting on 9 August 2016, in which Dr Rasheed says that Dr Cheema suggested that Dr Jones should retire. On 12 August 2016, Dr Jones telephoned Dr Cheema mid-morning at the practice, whilst he was seeing a patient and berated him in unflattering terms. After the telephone call Dr Cheema suffered an anxiety attack and went home. He remained off work but was fit to return to work on 22 August 2016.

7 On 17 August 2016 Ms Halcox instructed Blake Morgan not to carry out any further work on the new draft partnership agreement. When Dr Cheema attempted to return to work on 22 August 2016, he found that no clinics had been scheduled for him, on the instructions of Dr Jones. The following day he attended a meeting with Dr Jones and Dr Rasheed at which they questioned his fitness to practise, and queried the medical certificate that he had produced. Dr Cheema returned to work on 2 September 2016 and once again was prevented from seeing patients and refused access to the computerized medical records.

8 Dr Cheema issued proceedings against Dr Jones on 20 September 2016 claiming a mandatory injunction to enable him to return to practice. He relied upon the April Agreement. He maintained that no new partnership agreement with Dr Rasheed, Dr Roy and Dr Rawal had been concluded and that they were not partners. Whipple J granted an interim injunction following a contested hearing on 29 September 2016. The terms were that Dr Jones was restrained from preventing Dr Cheema from practising as a general practitioner at the practice, or from acting in any way that prevented him from exercising his rights under the April Agreement.

9 On 29th September 2016, the Respondent's solicitors, Taylor Wood, wrote to Dr Cheema's solicitors, Hill Dickinson LLP, inviting Dr Cheema to agree to an immediate dissolution of the partnership pursuant to clause 17.6.7 of the April Agreement but Dr Cheema did not agree. However, thereafter, Taylor Wood served the Notice purportedly dissolving the partnership at will with immediate effect, which they asserted had been formed between all five doctors on 1 July 2016.

10 In his defence, Dr Jones alleged that the Old Partnership, pursuant to the April Agreement, had been dissolved on 1 July 2016 and that the New Partnership, being a partnership at will, had come into being to which all five doctors were parties. It was further asserted in a Part 20 claim brought by Drs Jones, Rasheed, Roy and Rawal that the partnership at will had been dissolved by service of the Notice. Thereafter, the applications before the court on 30 December 2016 were dealt with by way of undertakings as to the running of the practice until the determination of the substantive issues of the status of the parties at an expedited trial.

The Judge's decision

11 The Judge considered there was clear evidence that as from 1 July 2016 the doctors acted as and treated each other as partners, and intended to create a contractual relationship between themselves. At [37] he held that on 1 July 2016, the five doctors entered into an oral partnership agreement with the future intention of entering into a written partnership agreement and went on to conclude at [39]:

> "In the absence of a written partnership agreement, I consider that the five doctors became partners at will, which in my view, superseded the agreement entered into by Dr Jones and Dr Cheema on 8th April 2016. I accept Mr Woolf's submission that there cannot have been two partnerships running in tandem to provide medical services under the GMS contact. It follows that I do not accept Mr Tatton-Brown's submission that Dr Rasheed, Dr Roy and Dr Rawal joined Dr Jones and Dr Cheema as partners under the agreement they had entered into on 8th April 2016, or, indeed, that there was some form of collateral agreement, falling short of the existence of a partnership that came into being on 1st July 2016, pending a formal partnership agreement. In my view, it does not conform to the reality of the situation that arose when Dr Rasheed, Dr Roy and Dr Rawal joined the practice on 1st July 2016. Although they were provided with a draft agreement, they were not provided with a copy of the agreement between Dr Jones and Dr Cheema and nor did they consider themselves bound by it."

12 He found that the Notice was capable of, and did dissolve the New Partnership (which was a partnership at will) between the five doctors. Thus, the Judge held at [40] that Dr Cheema's application for a permanent injunction failed and the Part 20 proceedings succeeded. Further, the Judge noted at [41] that had it been necessary to decide whether it was just and equitable to dissolve the partnership under s35(f) of the Partnership Act 1890 , he would have done so. He stated:

> " … I cannot see that it is practical for these five doctors to continue working together in circumstances where their mutual relationship of trust and confidence has broken down. Dr Cheema's desire to continue in practice with the other doctors on a long-term basis is, in my view, unrealistic and not in the interests of any of the doctors, or indeed, the staff or patients. I have heard evidence that the operation of the practice has been at an effective standstill over the past few months. Notwithstanding Dr Cheema's meetings with Dr Jones and Dr Roy, the oral evidence from Dr Jones, Dr Rasheed, Dr Roy and Dr Rawal is clear that they do not wish to do so."

13 The Judge had already noted at [14] that Dr Jones, Dr Rasheed, Dr Roy and Dr Rawal had all given oral evidence in which they maintained that there had been a breakdown of trust and confidence between themselves and Dr Cheema "brought about by Dr Cheema bringing these proceedings and by maintaining that Dr Rasheed, Dr Roy and Dr Rawal [are] not partners in the Rigg Milner Medical Centre." Further, at [20] the Judge noted that the management of the practice had been at "an effective standstill" since Whipple J's order and that notwithstanding Dr Cheema's positive outlook as to the future, the relationship between him and the other doctors had "broken down irretrievably." He added that having heard the oral evidence from Dr Jones, Dr Rasheed, Dr Roy and Dr Rawal he was satisfied that "none of them wish to continue working with Dr Cheema in the Rigg Milner Medical Centre, at least not in the foreseeable future and probably again at all."

The Parties' Submissions in outline

(i) Terms of the New Partnership

14 Mr Tatton-Brown QC on behalf of Dr Cheema contends that the Judge's conclusion that the New Partnership was a partnership at will is wrong in law. He criticises what he says are the Judge's

conclusions at [39] of the Judgment that "in the absence of a written partnership agreement", the five doctors became partners at will and that "it follows" that they did not become partners under the April Agreement. He submits that in the absence of evidence that Drs Cheema and Jones agreed to dissolve the Old Partnership, the New Partnership between the five medical practitioners was on the terms of the April Agreement. He prayed in aid a minute of a partnership meeting between Drs Jones and Cheema on 13 May 2016. Under the heading, "Further discussion as to solicitor's questions for partnership agreement", it was noted:

- Agreeable official start date to become partners is 1st July
- Probationary period of 6 months to be put in agreement
- Voting to remain the same being unanimous.

Although the Judge recorded that he suspected that the probationary period point dropped away, Mr Tatton-Brown says that the agreement that voting should remain unanimous is wholly inconsistent with a partnership at will and it is not possible to imply an agreement that Dr Cheema would abandon his rights under the April Agreement (which included a provision as to unanimity). He submits that in the absence of new terms having been agreed the new partners joined on the existing terms and, if that were not the case, the existing partners would be deemed to have given up their rights inter se.

15 Further, Mr Tatton-Brown submits that the acceding partners knew that the existing partnership between Dr Jones and Dr Cheema was governed by the April Agreement and that none of them sought to challenge those terms or communicated any disagreement with them. It is accepted in this regard, that the Judge's finding that none of the prospective partners had been provided with a copy of the April Agreement was not completely accurate. In fact, Drs Roy and Rasheed were sent copies by way of an attachment to an email of 10 May 2016. The evidence was, however, that only Dr Roy accepted that she had read it. In this regard, Mr Tatton-Brown also sought to rely upon a draft of the proposed new partnership agreement which was circulated to all the doctors including Dr Rawal on 1 July 2016. He says that it appeared in the form of a tracked change version of the April Agreement. In support of the proposition that Dr Rawal was aware of the April Agreement, he also placed some reliance on the fact that she had signed an application for admission to the national Medical Performers List on 12 May 2016 which included a declaration that "a partnership agreement has been/is being prepared …"

16 Thus, it is said that the Old Partnership which was subject to the April Agreement was not dissolved and the only way in which the three new partners could join the practice as partners as the Judge found they did, was by way of novation or implied variation of the terms of the April Agreement. In this regard, Mr Tatton-Brown relies upon obiter dicta from *Austen v Boys (1857) 24 Beav 598* per Sir John Romilly MR as follows:

> "There is no doubt, that if two partners take in a third partner, without specifying the terms on which he becomes such partner, he has the same rights and is subject to the same liabilities as the two original partners; the terms and conditions of the partnership which bind them bind him, unless a new contract be made between them. And so also, if the conditions of his becoming partner are partially set forth, then to the extent that they are not specified and involved by necessary inference therein, he will be bound by the terms of the partnership contract affecting the two original partners with whom he associates himself."

The issue in that case was whether the plaintiff was entitled to be paid a share of the goodwill of the business on his retirement from the solicitors' partnership. The Master of the Rolls noted the unusual circumstances because two partners had contracted for value with a stranger (a partner who was retiring) to admit a specified third person (the retiring partner's grandson) to the business at any time. It was held that any subsequent stipulations between the continuing partners could not bind the incoming grandson unless he consented to them and that he could not have consented if he did not know of their existence: see [607].

17 Mr Woolf on behalf of Drs Jones, Roy, Rasheed and Rawal, submits that the Judge made no error of law and that the Old Partnership was dissolved by the formation of the New Partnership and that the New Partnership was dissolved by the Notice. In the alternative, he says if the New Partnership is governed by the April Agreement, it should be dissolved under s35(f) Partnership Act 1890 .

18 Mr Woolf submitted that the Judge's conclusion that the Old Partnership was terminated no later than 1 July 2016 and was supported by overwhelming evidence and the only reasonable inference that could be drawn from the doctors' conduct and dealings was that they had agreed to dissolve the Old Partnership or at the very least, evidenced a clear intention of their joint desire not to be bound by it. In particular, he drew attention to the fact that there was no discussion recorded in the minutes of partnership meetings to the effect that if a new agreement were not concluded the parties would fall back on the April Agreement. On the contrary, all of the recorded discussions look forward to a new agreement which Blake Morgan had been instructed to draft. Furthermore, the minutes of the practice meeting on 13 May 2016 attended by Dr Jones and Dr Cheema record that they both agreed on the terms to be included in the new proposed partnership agreement rather than looking back to the April Agreement and the draft of the proposed new agreement was the subject of negotiations at the weekly practice meetings on 12, 19 and 26 July and 8 August 2016. Mr Woolf says therefore, that one could only find that the New Partnership was governed by the April Agreement if the minutes were wrong.

19 In support of the Judge's conclusion at [39] that there cannot have been two partnerships running in tandem, that the New Partnership superseded the Old Partnership and that not all of the new partners knew of the terms of the April Agreement and therefore could not have been bound by it, Mr Woolf referred to " *Partnership Law* " by *Blackett-Ord & Haren* 5th edition at 7.24 which is as follows:

> "If a person joins in carrying on the business of the firm he is likely to become a partner, as discussed in Chapter 2. If an incoming partner is aware of the existence of the old agreement and does not raise any objection to its terms, he will be bound by it by novation or by implied agreement. Similarly, if he succeeds to another's partnership share, he will be bound by variations which have already been agreed.
>
> But if he is unaware of the old agreement or indicates (for instance by negotiating for new terms) that he does not consider himself bound by it, then he is not bound, and his arrival creates a new partnership between all the partners which supersedes that of the old agreement. It will be a partnership at will unless all partners implicitly accept some new specific duration for it."

Mr Woolf says that all of the partners were negotiating for new terms and that it was clear therefore, that the new partners did not consider themselves bound by the April Agreement. He submits that the passage at paragraph 16.1 of *Blackett-Ord & Haren* upon which Mr Tatton-Brown relied in his written submissions, to the effect that the circumstances in which a partnership is dissolved does not include the arrival or departure of a partner is not relevant in the circumstances. He also relied upon *Lindley & Banks on Partnership* 19th Edition at 9.13 and 9.14 which appear under the heading "Change in partners". They are as follows:

> "9.13 Where a new partner is admitted to a fixed term partnership, as a matter of law that partnership will determine and a new partnership will be created between the enlarged number of partners. However, whether that new partnership is at will depends on the terms of the original agreement, i.e. whether it contemplates the admission of additional partners, and, more importantly, whether the new partner has expressly or impliedly agreed to be bound either by that or some other agreement. Although it was held in *Cummings v Stockdale* that this proposition is not correct and that in all cases, a person who has been validly admitted as a partner must, absent a clear agreement to abandon the existing partnership terms, have been admitted on those terms, it is submitted that this decision cannot be correct, as it is

based on the fundamental misconception that the enlarged partnership is the same firm and that a new partner can *only* be admitted on those terms.

9.14 In a leading case in this area, *Firth v. Amslake* , two doctors had, prior to 1958, carried on practice in partnership under the terms of a deed which provided for the partnership to continue during their joint lives. In 1958, they agreed in principle with a third doctor that all three would enter into partnership and share profits and losses equally. From May 1959, the three doctors practised together and a draft deed was drawn up but, in the event, never signed because one of the doctors objected to certain of its provisions. In October 1959, the two original partners wrote to the third partner saying that, since agreement could not be reached, the partnership ought to be dissolved as from November 30, 1959. Plowman J held that, when the third doctor joined the firm in May 1959, the new partnership thereby created, which had superseded the old partnership, was a partnership at will, since no agreement had been reached as to its duration. As a result, that partnership could be (and in fact had been) validly determined by notice.

Firth v. Amslake is, accordingly, a very clear example of a case where the existing agreement had been abandoned. In the vast majority of cases the existing partners' intentions will be a matter of inference from the agreement and from their conduct, but instances in which the requirements of the agreement have been wholly ignored with little or no thought as to the implication are by no means unusual. In those circumstances, the outcome is by no means as predictable as the decision in *Cummings v. Stockdale* appeared to suggest."

Mr Woolf says that *Firth v Amslake (1965) 108 SJ 198* , which is reported in no more depth than what is also set out in *Lindley & Banks on Partnership* , is on all fours with the situation in this case.

20 Furthermore, Mr Woolf points out that whilst there is evidence that Dr Roy and Dr Rasheed were aware of the draft of the April Agreement, neither saw a signed copy and there is no evidence of Dr Rawal even being aware of it. He also says that the content of the application for admission to the Medical Performers List relied upon by Mr Tatton-Brown is ambiguous. Further, there is clear and unequivocal evidence contained in the witness statements of Dr Rasheed and Dr Roy that they did not wish to be bound by the April Agreement, and in any event the parties were negotiating new terms.

(ii) Section 35(f) Partnership Act 1890

21 Mr Tatton-Brown submits that if he is correct and the New Partnership is governed by the April Agreement, it would not be just and equitable to dissolve it pursuant to section 35(f) Partnership Act 1890 because the April Agreement itself contains detailed provisions governing the relationship of the parties including the ability to retire, to expel a partner and to mediate in relation to disputes. He also points to *In re Yenidje Tobacco Company Ltd [1916] 2 Ch 426* which was concerned with whether it was just and equitable to wind up a company. However, at [430] Lord Cozens-Hardy MR considered the position if there had been a partnership and concluded:

"It is not necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it."

Mr Tatton-Brown says that in this case, Drs Jones, Rawal, Rasheed and Roy are seeking to rely upon their wrongful behaviour which has caused a lack of trust and confidence on their part and that they should not be allowed to do so. He also pointed out that the doctors had continued to operate the surgeries but accepted that there was no evidence of the position since the trial in May 2017.

22 Mr Woolf on the other hand referred to passages from the transcript of the trial at which the Judge had asked questions of Dr Cheema who had explained that although he had a good relationship with the staff, the doctors or it seems, at least some of them, are not speaking to each other. He also relied upon the Judge's findings that the relationship between the doctors had broken down. He also submits that by the time the Notice had been served, it was Dr Cheema who had caused the relationship to rupture by alleging that the three new partners were not partners at all. Therefore, Mr Woolf submits that it cannot be said that they are relying on their own wrongdoing in order to seek relief under section 35(f) 1890 Act.

Conclusion:

23 In my judgment, the Judge's conclusion reveals no error of law. First, it seems to me that on the basis that all of the discussions from April 2016 onwards were focussed on a new partnership agreement to be entered into between all five doctors and that there is no reference to the April Agreement as a fall-back position, it is quite proper to infer that Dr Jones and Dr Cheema intended to abandon the April Agreement and to enter into a new contractual relationship as from 1 July 2016 which would supersede the Old Partnership. The fact that a new agreement was never signed does not undermine that inference.

24 I come to this conclusion despite the reference in the practice minutes of 13 May 2016 to the agreed intention of Drs Jones and Cheema that the new agreement would include a provision requiring a probationary period and would be subject to unanimity of decision making. The Judge found the former point fell away and there is no appeal against his finding, nor could there be. As to the latter, it seems to me that it is an insufficient ground upon which to base the conclusion that the April Agreement had not been abandoned. All of the evidence is that Drs Jones and Cheema, as well as the proposed new partners, were looking forward to a new agreement the terms of which were under negotiation. The extract from the 13 May minute itself is consistent with that. It does not record that the April Agreement would continue to subsist or that unless the points which were noted appeared in the final version of the new agreement, the April Agreement would not be superseded. The bullet points were concerned with questions which had been raised by the solicitors in relation to the drafting of the new partnership agreement. The fact that the new agreement may have been intended to contain a provision as to unanimity but was never signed is an insufficient basis upon which to conclude that the April Agreement was intended to subsist.

25 It seems to me that such a conclusion is consistent with the extracts from *Lindley & Banks on Partnership* at 9.13 and 9.14, *Blackett-Ord & Haren* in the second paragraph at 7.24 and with the decision in *Firth v Amslake* . In my judgment, the dicta from *Austen v Boys* were focussed on a different situation. The Master of the Rolls in that case was concerned with the admission of a new partner on existing terms, in the absence of the intention of all of the parties, both the existing and proposed new partners, to enter into a new agreement.

26 Secondly, there is no evidence that the new partners intended to be bound by the April Agreement or that all of them had even had sight of it. It seems to me that on that basis, Mr Tatton-Brown's submission that none of them challenged those terms and therefore, should be taken to have acceded to the Old Partnership founders. As I have already mentioned, all the focus was upon the negotiation of a new partnership agreement and there is evidence that all of the incoming partners did not intend to be bound by the April Agreement. None of them received a signed copy of it. It is also accepted that Dr Rawal did not see the April Agreement in any form at all and Dr Rasheed said that she had not read it. In such circumstances, they cannot be taken impliedly to have agreed to be bound by its terms.

27 It seems to me that Mr Tatton-Brown's reliance upon a draft of the new agreement having been circulated in the form of tracked changes to the April Agreement takes the matter no further forward. The draft which was received was by its very nature a draft of the proposed new agreement. It happened to be modelled upon the April Agreement but included changes to it. Having received it in

that context and form, it seems to me that it is impossible to argue that the proposed new partners were aware of it, did not challenge its provisions and should be taken to be bound by them. Further, in my judgment, the application for admission to the Medical Performers List signed by Dr Rawal was ambiguous and takes the matter no further. It could not form the basis for the conclusion that Dr Rawal was aware of the terms of the April Agreement and made no challenge to them. Although the circumstances were very different in *Austen v Boys* , the incoming partner in that case was not bound by terms of which he was unaware. It seems to me that if Mr Tatton-Brown were correct that that would be the effect here, at least in the case of Drs Rawal and Rasheed.

28 As I consider that the Judge was right and that his decision reveals no error of law, it follows that the partnership at will which took effect on 1 July 2016 between the five doctors was validly brought to an end by the service of the Notice. In the circumstances, therefore, it is not necessary to consider whether this court would have exercised the discretion under section 35(f) Partnership Act 1890 to wind up the partnership on the basis that it would just and equitable to do so.

29 In all the circumstances, therefore, I would dismiss the appeal.

Lord Justice Newey:

30 I agree.

Lord Justice Longmore:

31 I agree.