Neutral Citation Number: [2024] EWCA Civ 888

Case No: CA-2023-001498

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**MRS JUSTICE MAY**
**[2023] EWHC 1743 (KB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2024

**Before:**

**LADY JUSTICE ELISABETH LAING**
**LORD JUSTICE BIRSS**
and
**LADY JUSTICE FALK**

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**Between:**

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| **ALEXANDER ISAAC HAMILTON** | **Claimant/ Respondent** |
| **- and –** | |
| **(1) MARK COLIN BARROW**<br>**(2) CLAIRE MICHELLE BARROW** | **First and Second Defendants/ Appellants** |
| **- and –** | |
| **(3) MARTIN WELSH** | **Third Defendant** |

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**Hugo Page KC and Madeline Dixon** (instructed by **Lupton Fawcett LLP**) for the **Appellants**
The **Respondent** appeared in person.

Hearing dates: 17 and 18 July 2024

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# Approved Judgment

This judgment was handed down remotely at 10.00am on 31 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lady Justice Falk:**

## Introduction

1. This is an appeal against an order of May J that the defendants in these proceedings are jointly and severally liable to pay the claimant £566,053.54 plus interest, reflecting a sum invested by the claimant in an arrangement called the "Currency Club". The claimant, Alexander Hamilton, successfully claimed at trial that the Currency Club was a partnership between the "Club Leaders", that all three defendants were partners in the partnership, and that on that basis the first two defendants, Mark and Claire Barrow (who are husband and wife), were liable for the fraudulent misrepresentations of the third, Martin Welsh. The essence of Mr Hamilton's case is that he was induced by Mr Welsh's deceit to invest in what he believes to have been a form of Ponzi scheme, and that he (along with others) lost money when the scheme collapsed.

2. All three defendants sought permission to appeal. Mr Welsh's application was refused, so he has played no part in this appeal. Mr and Mrs Barrow's application was allowed on four of the eight grounds for which permission was sought. Those four grounds relate to a) the existence of a partnership, and b) (if a partnership existed) whether Mrs Barrow was a member of it.

3. There were various additional applications before us. The only one to which I need to refer is an application by Mr Hamilton to adduce new evidence, which was largely opposed by Mr and Mrs Barrow. For reasons which will become apparent I do not need to deal with that application.

4. Hugo Page KC appeared for Mr and Mrs Barrow, leading Madeline Dixon. Mr Hamilton, who was previously a solicitor, appeared in person as he did below. While Mr Page made various criticisms of the way in which Mr Hamilton had handled the appeal process, which did include some lack of co-operation as well as a flurry of late paperwork, like the judge I was impressed by Mr Hamilton's grasp of the detail and also by his ability to present his arguments effectively.

## The evidence

5. A preliminary, but important, point is this. The judge was faced with a significant lack of direct documentary evidence about the nature of the arrangements between the individuals concerned. Not only were there no written terms between Club Leaders or between any of them and investors, but there was also a complete lack of accounting evidence in relation to investments amounting to many millions of dollars apparently made by a considerable number of individuals. The judge emphasised this difficulty at various points in her judgment and rightly observed that in those circumstances there was at least an evidential burden on the defendants to make good their account of what had taken place: see at [5], [79] (a "conspicuous lack of paperwork for a venture involving such large sums of money"), [112]-[113] and [130]. In the circumstances the judge was amply entitled to treat some of the defendants' assertions, for example about the separation of funds and commission arrangements, with a degree of scepticism.

## The factual background

6. The judge recorded Mr Barrow's evidence that he and Mrs Barrow had been introduced to a Mr Daniel Arkian while they were working in Malaysia in financial services, Mr and Mrs Barrow having moved there from Cyprus in 2012. This led to an investment by Mr Barrow of a relatively modest sum in unregulated foreign exchange trading which Mr Arkian said that he was conducting as "Arkian FX" through a (reputable) trading organisation called FxPro. Others based in Cyprus invested on Mr Barrow's recommendation, and what became known as the Currency Club grew fast.

7. The judge also recorded Mr Barrow's evidence that Mr Arkian had explained to him that he was "fiddling the system", using a contact at FxPro, in order to access a better trading platform. This involved funds moving from Arkian FX through two other parties. However, investors were not informed of this detail. Rather, they were given the clear impression that the funds would remain under the control of the Barrows at all times ([13]). Later in her judgment (at [67]-[69]) the judge rightly stressed the importance of being "entirely frank" with new members given the vulnerability of their investments, and (at [130]) referred to a "very real question mark" over whether there were ever any trades. She observed that the communications suggesting that Mr Barrow and Mr Welsh knew that Mr Arkian was "fiddling the system" at FxPro were "at least indicative of sharp practice".

8. Initially the Barrows used their personal bank account to collect funds from investors. From May 2013 the Standard Bank account of Mr Barrow's company, Blanmont Consulting International Ltd, was used. By late 2013 commission arrangements had been established under which 15% would be deducted from profitable trades, of which the Barrows received 9% and Mr Arkian 6%. Mr Barrow's evidence at trial was that by the time the scheme failed in 2017 he believed he had withdrawn $3-4m. He had invested $20,000 ([15]).

9. The Barrows started to pay commission to other people who introduced new investors, usually at a rate of 3%. One such introducer was Mr Welsh ([16]).

10. By September 2014 Standard Bank became sufficiently concerned to close the Blanmont Consulting account. John Bowles, a friend also working in financial services in Malaysia, offered the use of the account held by his company, IIMM Ltd, at Bank of China in Macau. Mr Bowles was at the time the sole director and shareholder of IIMM and remained at all times the sole signatory on the account. However, Mrs Barrow was appointed as a director of IIMM in January 2015 and later that year became a 50% shareholder ([17]).

11. From September 2014 all funds received for investment were routed through the IIMM account. The judge recorded Mr Barrow's evidence that because Mr Arkian was finding administration "difficult", a "netting off" system was operated under which funds required to pay investors who wished to make withdrawals, as well as commissions due on "winning trades", were taken from new sums coming in, with only the balance being sent on to Mr Arkian. I pause to note that this feature appears to me to be rather more consistent with what is commonly described as a Ponzi scheme than with conventional investment management arrangements.

12. The judge explained at [19] to [22] how the Currency Club was split into five "sections" during 2014-2015 (in fact, this seems to have been implemented during the first quarter of 2015, at least as far as Mr Welsh was concerned). The judge found that the Barrows continued to manage one group of investors while others were "loosely geographically organised" and managed by close associates. Mr Welsh managed the "Paphos" section. Other section leaders (that is, "Club Leaders") included Mr Bowles and Barrie Humphries, a brother-in-law of the Barrows.

13. The Barrows' case was that each section operated independently, with its own website, commission arrangements and account with Mr Arkian. However, all monies were routed through the IIMM account and it is common ground that the accounts with Mr Arkian were "sub-accounts" of Mr Barrow's own account (albeit that the documentary evidence of any such arrangement is limited). The Barrows also continued to collect commission as before on all profitable trades, although at one stage the manner in which this was done is said to have altered.

14. In an arguable understatement, the judge described the way in which investors' funds were treated as "cavalier, to say the least". She was shown no statements of account at all, nor details of the numbers of investors or how much they had invested. There were also some indications that additional sums were taken beyond the commissions due to Club Leaders: see at [21].

15. The judge then set out details of Mr Hamilton's own investment in the Paphos section of the Currency Club, which followed an introduction by a satellite dish engineer working at his house in Cyprus. The judge concluded at [32] that Mr Hamilton was not told that his funds might never be sent to Mr Arkian for investment, and that it was highly likely that all or most of what he invested went straight out to other investors or as commission. Instead, Mr Hamilton understood that trading was through an FxPro "PAMM" account over which Mr Welsh had sole control ([36]).

16. The rapid growth of the Currency Club and Mr Hamilton's attempt to invest a substantial sum caused some difficulties. On 11 April 2015 Mr and Mrs Barrow wrote to Mr Welsh, Mr Humphries and Mr Bowles informing them of a decision to cap new members' deposits to avoid jeopardising the banking arrangements. When Mr Welsh attempted to get around this for Mr Hamilton by having him send funds directly to Mr Arkian, Mr Barrow intervened to stop that: [48]-[50]. In the aftermath, Mr Hamilton was told more lies by Mr Welsh.

17. Mr Hamilton eventually invested a total of $US698,888 over an 18 month period. From January 2016 transfers were made to a different Bank of China account in Macau, in the name of Marela Ltd, also operated by Mr Bowles but to which Mr Welsh was given some access ([64]).

18. The rapid growth of the Currency Club meant that Mr Arkian was rarely called upon to make a payment. On the last occasion that he was, in October 2016, nothing was received ([18]). However, it seems that new investments may only have ceased from December 2016, and investors were only informed that funds were sent on to Mr Arkian, beyond the control of the Currency Club, in March 2017 ([65] and [66]). Mr Arkian vanished.

## The judge's conclusions

19. The judge concluded that there was a partnership between Mr Barrow and the other Club Leaders, and further that Mrs Barrow was a partner in the Currency Club partnership ([86] and [102]). Investors in the Currency Club were clients of the partnership rather than themselves being in partnership ([107]). Mr Welsh had misrepresented the nature of the account held with Mr Arkian to Mr Hamilton, including his lack of control of the funds and the netting off process, and Mr Hamilton had relied on the misrepresentation ([109],[110] and [115]). Further, Mr Welsh acted in the ordinary course of partnership business and bound Mr and Mrs Barrow ([122]). Mr Hamilton had also established the existence of one or more oral contracts with the partnership which had been breached ([126]-[128]), including a term that Mr Arkian would have access to the funds for trading purposes only. However, given the focus of the evidence and argument the judge declined to conclude that there was conspiracy to mislead ([131]).

## Mr and Mrs Barrow's case on appeal and relevant case law

20. Mr Page submitted that there was a short answer to the appeal, namely that each section of the Currency Club was a separate business. There was no profit sharing. The leader or leaders of each section had their own clients and managed their own section, each section had its own account with Mr Arkian and each section kept separate accounts. The fact that the Barrows received some commission in respect of investments in each section did not amount to profit sharing, and there was no further finding of profit sharing between Club Leaders. Instead, Club Leaders took commissions from investments made in their own section, and Mr Barrow gave evidence that they could fix their own commission rates.

21. Mr Page relied on statements in *Lindley & Banks on Partnership*, 21st ed. at 2-16 about the need for a single business carried on together, with acceptance of some level of mutual rights and obligations, and furthermore:

> "If, on a true analysis, each supposed partner is carrying on a separate business wholly independently of the other(s)… there can in law be no partnership between them."

22. One of the cases footnoted as being a recent example, and on which Mr Page relied, is *Arora v Moshiri* [2021] EWHC 2230 (Ch), a decision of Judge Jonathan Richards siting as a Deputy High Court judge. That case related to a profit-sharing agreement between the defendant estate agents and a couple (Mr and Mrs Arora) involved in property development. The judge found at [55] that, despite a closeness of relationship and a similarity of goals, they were carrying on separate businesses, namely property dealing in the case of Mr and Mrs Arora and estate agency and property management in the case of the defendants. Rather than a partnership, the couple had engaged the estate agent's services with a view to making profits of their own. The judge's conclusion was reinforced by some asymmetries of position, for example if properties were sold at a loss.

23. Mr Page also relied on three other propositions of law. First, what matters is the substance of the relationship and not the label: *Stekel v Ellice* [1931] 1 WLR 191, 199. The judge referred to this point at [78(1)] by reference to *Weiner v Harris* [1910] 1 KB

285, 290, saying that no conclusions could be drawn from titles and descriptions, which were "just one factor" to consider in all the circumstances.

24. Mr Page's second proposition was that, while profit sharing is not a prerequisite in every case, its absence is a strong indicator of the absence of a partnership. Mr Page relied on *M Young Legal Associates v Zahid* [2006] EWCA Civ 613, [2006] 1 WLR 2562 ("*Zahid*"). (It is worth noting here that s.2(3) of the Partnership Act 1890 provides that the receipt of a profit share is *prima facie* evidence of partnership, but does not itself make the recipient a partner.)

25. In *Zahid* there was no doubt that there was a single business. Rather, the question was whether the fifth defendant Mr Lees, a retired solicitor, was a partner of the fourth defendant, Mr Bashir. The existence of such a partnership was required in order for the firm to comply with the Solicitors' Practice Rules. Wilson LJ referred at [33] to the absence of a direct link between payments made to an individual and the level of profits as being "in most cases a strongly negative pointer towards the crucial conclusion as to whether the recipient is among those who are carrying on its business". However, whether a partnership existed had to be informed by reference to all the features of the agreement. Wilson LJ referred by way of example to whether there was provision for contribution to working capital and the existence of an express or implied agreement that acts of the putative partners would bind each other. Although Mr Lees did not contribute capital or share profits, the parties' intention to comply with the Solicitors' Practice Rules meant that they must have intended to enter into partnership, and the judge correctly inferred that they had succeeded ([37]). Hughes and Tuckey LJJ agreed. As Hughes LJ said at [40]-[41], "That the sharing of profits is a characteristic of partnership, as distinct from an essential ingredient of it, was and is uncontroversial". Rather, what is essential is the carrying on of business in common, such that each is agent for the other.

26. Mr Page submitted that, in contrast to *Zahid*, where there are a number of different businesses it is extremely difficult to see how a partnership could exist between those carrying them on in the absence of profit sharing.

27. Mr Page's third proposition relied on the Scottish case of *Worbey v Campbell* [2016] CSOH 148 at [28], in which Lord Tyre referred to the earlier case of *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 SLT 186. In the *Dollar Land* case Lord Coulsfield had referred at p.192 to the features of mutual agency, profit sharing, loss sharing, common capital and non-assignability (*delectus personae* – literally, choice of the person – in that case negated by an inability unreasonably to withhold consent to assignment). Lord Coulsfield then said at p.195:

> "… it is undoubtedly true that there is no one provision or feature which can be said to be absolutely necessary to the existence of a partnership, so that the absence of that feature inevitably negates the existence of a partnership or joint venture. Nevertheless it seems to me that … a sharing of profits and losses and mutual agency are typical of partnerships, and *delectus personae* may be said to be a further such feature. The absence of one or even more than one of these features might be reconcilable with the existence of a partnership. In the present case, however, it seems to me that none of them are present. That is a situation which I find irreconcilable with the existence of a partnership or joint venture."

28. Lord Coulsfield's decision in *Worbey v Campbell* was approved by the Inner House on appeal in that case ([2017] CSIH 49). However, Lord Glennie's reasoning on appeal was not the same as that of Lord Coulsfield. It can be summarised as follows. First, at [59] he stressed the need to carry on business "in common" as well as carrying on business with a view of profit, which he said was not a pure question of law and depended on an evaluation of all the facts. Secondly, in that case the parties had not actually reached the stage of a concluded contract. On the first point, Lord Glennie referred at [64] to *Lindley & Banks*, 19th ed. as authority for the need for a single business and for the parties to have "expressly or impliedly accepted some level of mutual rights and obligations as between themselves". (In this case Mr Page accepted that he had not taken a mutual agency point before the judge and would not pursue it before us.)

29. Lord Glennie also noted that *Lindley & Banks* refers to the decision of the Queensland Court of Appeal in *Whywait Pty Ltd v Davison* [1997] 1 Qd. R. 225. In that case the court referred at p.231 to partnership as involving a "relation of mutual confidence". I agree with Lord Glennie's comment that this reflects the fiduciary nature of the partnership relationship. I also agree with Lord Glennie's observation at [66] that the question whether a partnership exists is "pre-eminently one for the first instance judge hearing all the evidence and submissions pertaining to the business relationship between the parties".

## Approach to the appeal

30. Mr Hamilton rightly referred us to case law reiterating the approach of this court to appeals on questions of fact. Lewison LJ's summary in *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2] bears repeating:

> "The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> (i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> (ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

> (v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
> (vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

31. The appeal court's reluctance to interfere applies not only to findings of primary fact but to their evaluation and the inferences to be drawn from them: *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 at [114]. Absent an error of legal principle, this court will interfere with such findings only in limited circumstances: see for example *Walter Lilly & Co. Ltd v Clin*. [2021] EWCA Civ 136, [2021] 1 WLR 2753 at [85], where Carr LJ said:

> "In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:
> (i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support.
> (ii) Where the finding is infected by some identifiable error, such as a material error of law.
> (iii) Where the finding lies outside the bounds within which reasonable disagreement is possible."

## Discussion

32. Partnership is defined in s.1(1) of the Partnership Act 1890 as "the relation which subsists between persons carrying on a business in common with a view of profit". The judge observed at [78] that this involves an objective determination of law and fact. I would describe it as principally a question of the application of the statutory test in s.1(1) to the facts. It is an evaluative exercise, as Lord Glennie said in *Worbey v Campbell*. The principles discussed above at [30.] and [31.] apply.

33. In summary, Mr Page has not successfully identified any misdirection by the judge as to the legal principles to apply in determining either whether a partnership existed between the Club Leaders or whether Mrs Barrow was a member of it. On the contrary, the judge applied the correct principles. Further, she reached an evaluative conclusion that she was entitled to reach on the evidence. Indeed, based on the evidence we saw that was either shown to the judge at the trial or was included in the trial bundle (and was not therefore the subject of the new evidence application) I would have reached the same conclusion as the judge.

*The judge's analysis*

34. After referring at [77] to the test in s.1(1) of the 1890 Act, the judge went on to list a number of points to bear in mind, namely that labels are not determinative, that business must be carried on "in common" rather than as separate businesses, that profit sharing is not essential, that no formalities are required and that there is no checklist,

albeit that a degree of common interest is needed. All this is unexceptionable. At [79] she correctly noted that the absence of paperwork meant that whether a partnership existed or not had to be inferred from conduct. I would comment here that, in assessing that conduct, the judge was entitled to take account of all the evidence, rather than being limited to evidence of direct dealings between the putative partners as to the nature of their arrangements. This is particularly so given the evidential difficulties that she was faced with.

35. At [80]-[85] the judge considered and weighed up the various features relied on by the parties. She said this at [84]:

> "Mr Page may be correct that independent businesses can collaborate and share resources, but the Currency Club went well beyond that. It is not simply the case that the different sections shared banking facilities and followed self-imposed rules on the use of those facilities. The conduct of the Club Leaders was that of individuals who considered themselves to have mutual rights and obligations as to the running of their business. At least two Club Leaders met daily in meetings that were not open to regular investors and they were in near constant contact on email and messaging services about the running of the sections. Decisions were taken by majority vote, including on the texts of emails sent to members. Indeed, Mr Barrow's explanation for an inconsistency between a statement he made in an email to a member during the recovery process and his oral evidence was that the majority voting system could result in him making statements with which he disagreed. Mr Bowles took a higher rate of commission than that of other Club Leaders but this shows that Mr Barrow felt able to dictate terms on commission for other sections of the Club."

As already noted, the weight to be given to different aspects of the evidence is primarily a matter for the trial judge.

36. The judge also found that emails sent regarding the establishment of the Paphos section, providing reassurance to investors that their accounts would be managed "in the same manner as before", were revealing because they implied that the Barrows would continue to have influence. The judge was clearly entitled to conclude that the split was largely administrative and to reject the suggestion that Mr Welsh could have decided to dissolve the Paphos section unilaterally.

37. As to whether Mrs Barrow was a partner, the judge considered the evidence in some detail at [88]-[101]. I can see no error in her overall assessment. She was entitled to reject the Barrows' case that Mrs Barrow merely provided administrative support to her husband. For example, Mrs Barrow left her job in financial services compliance in 2014, whereupon her participation in the business increased. The initial marketing document for prospective investors was signed "Mark and Claire", as were a number of relevant emails. There was a frequent use of "we", clearly referring to the two of them, including on critical matters such as the decision to cap new members' deposits (an email which was also signed "Mark and Claire"). The description "co-founders" or similar was also used. Further, it was Mrs Barrow who had the obviously important role at IIMM Ltd. Although this had been represented as being "for tax reasons", no such reasons were identified and the judge was not impressed by Mr and Mrs Barrow's alternative explanations ([97], [98] and [101]).

38. Other investors gave evidence about Mrs Barrow's role at meetings and presentations. One of them, Paul Clayfield (who had not lost money), had been told by Mr Barrow that "Claire was his equal partner", with her doing the administration and Mr Barrow being client facing (judgment at [41]). Mr and Mrs Barrow even represented that Mrs Barrow held all the Currency Club money ([123(i)]). In one particularly revealing email, referred to by the judge at [92], Mr Barrow explained to a potential investor that:

> "We have a group of 7 people including us two that meet regularly to discuss key issues with the members['] interests at number one where they have always been.
> ...
> Mark and Claire" (Emphasis supplied.)

This speaks for itself.

*Mr and Mrs Barrow's arguments on appeal*

39. Turning to the points relied on by Mr Page, the judge was not wrong, and certainly not plainly wrong, to conclude on the facts that there was one business rather than separate businesses. This was not a case like *Arora v Moshiri* where individuals who were conducting separate kinds of business activity undertook some form of joint venture. All the Club Leaders were conducting exactly the same kind of business, and in reality were not doing so independently. Their dealings with each other went well beyond close collaboration in their mutual interests.

40. Notable features of those dealings included not only the frequency of meetings and correspondence, but the Club Leaders' relationship with Mr Arkian via Mr Barrow's account and the related "rules of engagement" (see [11.], [13.] and [16.] above), the use of the single IIMM account and the associated restrictions in the Club Leaders' mutual interest ([16.] above), near-identical marketing and other communications material, the roughly geographical split of investors, and the commission arrangements which gave at least Mr and Mrs Barrow a cut of each investment and possibly went beyond that to a further sharing of what was effectively a joint "pot" ([14.] above). In addition, the documentary evidence available to the judge included Club Leaders looking together at ways of putting the Currency Club on a different legal footing using some form of fund structure, discussion of a formalised arrangement to share running costs which it appears that Mr and Mrs Barrow may have previously borne from their share of the commissions, and discussion about other important matters such as rules for investor withdrawals. In reality, this was a joint enterprise in which the partners' success and failure was inextricably linked.

41. Further, there was documentary evidence that supported the judge's conclusion that the split into sections was largely administrative, rather than being intended to split up a business: the Currency Club was simply getting too large for Mr and Mrs Barrow to handle all the investors themselves. For example, an email from Mr Barrow in January 2015 explaining the proposed creation of the Paphos section referred to the need to make changes to "make the fund more manageable" and "reduce our workload", and explained that "Martin Welsh will be a direct client of Daniel Arkian whilst importantly remaining an integral part of the Currency Club" and that he "will be responsible for your administration or email queries, top ups or withdrawal requests". A further email dated 1 February 2015 to one investor also referred to the reason for the change as

being "to ease administration pressures on ourselves only and has no detrimental affect [sic] whatsoever". An email sent on 23 March 2015 to another investor which indicated that "Mark and Claire" would have "no responsibility going forward" obviously caused some concern, because it was followed up by another "Mark and Claire" email the next day explaining that the change was intended to "take some of the workload from us" and that "your account will still be traded under the same umbrella with Daniel, there will be no change to the strategy…".

42. Terminology is not determinative but it is also not irrelevant. While we were shown some references to the sections being described as separate clubs, the overall impression conveyed was of a single "Currency Club" with sections or divisions, that is, a single business.

43. Profit sharing is not an essential pre-requisite of partnership. The critical question here is whether a business was carried on "in common". On the facts of this case, particular stress might legitimately be placed on the nature of the relationship between the putative partners as involving mutual confidence (as noted by Lord Glennie in *Worbey v Campbell* by reference to *Whywait v Davison*). Apart from the meetings and discussions, the participants obviously had to trust each other in their joint reliance on the banking arrangements, and there was an acceptance of mutual obligations at least as regards that critical aspect and in relation to the interactions with Mr Arkian, with whom direct dealings outside the shared banking arrangements were not permitted. In those circumstances it is also inconceivable that a Club Leader would be able to hand over his role to a third party without the others' agreement. To use the Scottish law terminology, there was *delectus personae*.

44. These points are not overridden by arguments about separate accounts for different sections or separate websites, or by an argument that Club Leaders had flexibility about commission rates for introducers. The judge was certainly entitled to view none of those points as sufficiently fundamental to demonstrate a separation of businesses. The lack of accounting evidence emphasised by the judge (see [5.] above) amply justified her caution in assessing arguments about separate accounts. Further, the suggestion that Club Leaders alone had access to the accounts of their own sections is negated by the documentary evidence that made it clear that Mr Barrow had access to full information via an administrator. Mrs Barrow and Mr Bowles (as a minimum) must also have had similar access. The point about commission rates simply illustrates that some flexibility was allowed to individual partners, which is a common feature of partnership. Similarly, the argument that Club Leaders did not interfere with the relationship other Club Leaders had with their clients does not assist Mr and Mrs Barrow. Again, that is typical partnership behaviour.

## Conclusion

45. In conclusion, I would dismiss the appeal.

## Lord Justice Birss:

46. I agree.

## Lady Justice Elisabeth Laing:

47. I also agree.