IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Case No: PHW-SC-2019-000409

NCN: [2022] EWHC 2092 (QB)

Room E307
Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 25th January 2022

Before:
MASTER DAGNALL

B E T W E E N:

CLAIRE LOUISE SANDBROOK
(IN HER CAPACITY AS HIGH COURT ENFORCEMENT OFFICER)

- v -

MARCUS HERRING (1)
CHRISTOPHER MARK HERRING (2)

MR C ROYLE appeared on behalf of the Applicant
MR N BURROUGHS appeared on behalf of the First Respondent
NO APPEARANCE by or on behalf of the Second Respondent

APPROVED JUDGMENT

MASTER DAGNALL:

1. This is my judgment regarding an application made by application notice dated 24 February 2021 regarding a writ of control sealed on 5 February 2020, which I will call the "the writ", which was directed towards the applicant, Claire Louise Sandbrook, High Court Enforcement Officer. The writ relates to an enforcement of a judgment debt owed by the judgment debtor, Marcus Hugh Herring, who I will call "Marcus", who appears before me by Mr Burroughs of counsel, the judgment being of the Senior Courts Cost Office, the amount then outstanding being £169,470, and the judgment creditor, who did not appear before me and who takes a neutral stance to this application, although he has provided a material consent, is Christopher Mark Herring, whom I will call "Christopher", although it appears that he is often known as Mark. The application was made by the High Court enforcement officer to whom the writ is directed, Ms Sandbrook, who appears by Mr Royle of counsel.
2. The application notice seeks for the Court to make a summary assessment of the fees and costs which the High Court enforcement officer asserts should be paid from the proceeds of the assets of which control was taken, the application being said to be brought under Civil Procedure Rule 84.16.
3. However, at the hearing it was clear that the real disputes between the parties were as to two sets of matters; first whether as to, notwithstanding the second matter outcome, certain costs and fees should be awarded to the High Court enforcement officer at all, at least in principle, and assuming that the relevant seizure and sale of the relevant goods was lawful; but secondly as to whether control had been lawfully taken of certain assets and as to whether those assets were subsequently lawfully sold; it being asserted by Marcus that such was not lawful and that this would mean various potential consequences including: firstly, that related costs and fees would not be capable of being taken from the proceeds; secondly, possibly that the remaining costs and fees should not be awarded at all so they should not be taken from other property; thirdly, that there be some remedy for unlawful seizure and sale including damages and compensation of various forms. The High Court enforcement officer disputes those allegations of unlawfulness generally but also says that there is no material application from Marcus and so that I should not deal with the point or at least its consequences.
4. The context of the judgment debt and the various disputes is as follows: Christopher, who I think is Marcus' father, and Marcus are or were in a farming partnership and under the provisions of a partnership deed dated 5 February 2009. I note that clause 2.2 of the deed provides that the partnership subsists until it is wound up by the provisions of the Partnership Act 1890 or of the agreement. The partnership operates or operated from leased premises, which are called "the premises", at Walk House Farm, Winterton near Scunthorpe, Lincolnshire DN15 9RE, at which premises there were stored goods and machinery where it appears, although I am making no determination as to this, that some of those goods and machinery were owned by Marcus in his own right and some were property of the partnership.
5. In any event disputes seemed to have occurred between Christopher and Marcus which resulted in the dissolution of the partnership, which, and which seems to me to be common ground – I am making no final determination – has not yet been completed and which resulted in an arbitration between Christopher and Marcus which eventually led to the judgment from the Senior Courts Costs Office in favour of Christopher. Although Marcus discharged some of the relevant judgment, £169,470 remained outstanding. The result was that Christopher then obtained a writ of control from the High Court, Queen's Bench

Division on 5 February 2020. That writ is in usual form and provides that it is addressed to Claire Louise Sandbrook as being an enforcement officer and specifies:

> "You are now commanded to seize an execution of goods, chattels, and other property of the claimant Marcus Hugh Herring authorised by law and raise therefrom the sums detailed in the schedule together with fees and charges to which you are entitled and immediately after execution to pay the defendant Christopher Mark Herring the said sums and interest".

6. In February or early March 2020 the High Court enforcement officer instructed an enforcement agent to attend at the premises and seize the goods thereat, and which goods are said at least arguably belonged in some cases to Marcus alone and to other cases to the partnership. The enforcement agent, then acting in conjunction with the High Court enforcement officer, secured the relevant goods and machinery and sought to have them marketed and sold by public auction. At this point the Covid-19 pandemic supervened in its full force and with the consequent statutory governmental regulations and guidance imposing various lockdowns and restrictions. As a result their sale process became complex and took longer than otherwise might have done so. Ms Sandbrook instructed the enforcement agent to instruct auctioneers Messrs Masons to conduct the relevant auction. This auction was ultimately carried out online and with the result that Masons eventually purportedly paid over a sum slightly in excess of £444,000, and which went to the enforcement officer.
7. In August 2020 Ms Sandbrook remitted various sums to Christopher's solicitors to discharge the judgment debt and then distributed a remaining balance, being after deduction or reservation of asserted sums due to the High Court enforcement officer, between Christopher and Marcus.
8. On 10 November 2020 Ms Sandbrook produced an account of what she says are the proceeds from the sales of the grain and machinery and what deductions have taken place including with regards to Ms Sandbrook's fees and charges, those being deductions which were applied to what is said to be Marcus' share of the proceeds of the grain and machinery and leading to a gross balance from which the judgment debt was then deducted and the net balance was then paid over to Marcus. That account and a spreadsheet provided to me detail various disbursements including certain disbursements which are said to be either generally properly charged or alternatively justified by a term in the regulations to which I will come as being exceptional disbursements.
9. The schedule includes not only fees and charges generally of the High Court enforcement officer, including scale proportion charges on the basis provided by the relevant regulations, but also the costs of certain advice provided by the auctioneers Messrs Masons and by lawyers instructed by the enforcement officer, Belton Law, and also costs for security services which were obtained from a third-party contractor securing the premises and the goods and the machinery pending the sale of the stored assets. Marcus challenges the ability of the High Court enforcement officer to be paid these particular charges as well as charging the ability of the High Court enforcement officer to raise any fees and charges generally. It seems to me to be common ground, although for the purposes of this judgment it only seems to be necessary for it to be arguable, that a substantial element of the grain and machinery was or at least arguably was the property of the partnership albeit in dissolution.
10. The applicant High Court enforcement officer's primary case is effectively as follows: the writ gives the High Court enforcement officer authority and indeed imposes a duty by way of command upon them to take control of and raise money from the assets which were seized. The relevant procedure is governed by section 62 of the Tribunals, Courts and

Enforcement Act 2007, which I will call "the 2007 Act", and in consequence of that section by schedule 12 of that Act. Schedule 12 of that Act provides for procedures and other matters with regards to taking control of goods. Paragraph one contains certain definitions including that a power to use the relevant procedure has caused an enforcement power and defining debtor and creditor. Paragraph two of Schedule 12 defines enforcement agent as a relevant authorised person and provides that only the enforcement agent can take control of the goods to sell them under the enforcement power.

11. Mr Royle submits, it seems to be likely to me correctly, that the enforcement agent is not the High Court enforcement officer who is, at least potentially, a separate person. Paragraph three effectively provides the enforcement officer can be authorised by a person on whom an enforcement power is confirmed to act under that power, and that is exactly Mr Royle says has occurred here; Ms Sandbrook as the person who is authorised under the writ has instructed an enforcement agent, Mr Christopher Lucas Jones in this particular instance. Paragraph 2(4) provides that, in relation to goods being taken control of by an enforcement agent, then references in the schedule are to that enforcement agent.
12. Paragraph three of the schedule contains further definitions and that includes the definition of controlled goods being goods of which control is taken; and of a co-owner as being somebody who, other than the debtor, has an interest in the relevant goods but only if the enforcement agent knows that person has such an interest or would know if they had made reasonable enquiries. The Court for these purposes at least includes the High Court; and exempt goods are defined as goods that regulations exempt by description or circumstances. Paragraph 3(2)(a) provides that references to goods of the debtor or another person are references to goods in which the debtor or that person has an interest.
13. Under paragraph 4(1) it is provided that for the purposes of any enforcement power the property and all goods of the debtor except for goods that are exempt goods for the purposes of this schedule or "are protected under any other enactment" would become bound by control being taken of them; and the goods of the debtor, as I have already said, include any goods in which the debtor simply has an interest. I bear in mind paragraphs 13 to 27 of the schedule give the enforcement agent various powers to take and hold the relevant goods; that is to say to make them controlled.
14. Paragraph 37 provides that an enforcement agent must sell or dispose of controlled goods for the best price that could be reasonably obtained.
15. Paragraph 40 provides that prior to the sale an enforcement agent must give notice of effect of the sale to any co-owner, the co-owner of course being defined as somebody who the enforcement agent knows has an interest in the goods or would know if they had taken reasonable enquiries.
16. Paragraph 41 provides that the sale must be by public auction, as has occurred here.
17. Paragraph 50 provides for the proceeds of the sale are to be used to pay the amount outstanding in relation to the judgment debt but, under (6), that if there is a co-owner then the co-owner must first be paid their share. That actually causes certain difficulties in relation to a partnership context, as I will mention in due course; however, Ms Sandbrook submits that this is exactly what has properly occurred in this case.
18. Paragraph 60 deals with a situation of a third party who makes a claim to the goods of which control has been taken and says that they belong to them and not at all to the debtor.
19. Paragraph 62 provides that regulations may make provision for the recovery by any person from the debtor of amounts in relation to the costs of enforcement-related services in anything done under or in connection with an enforcement power.
20. Paragraph 63 provides that liability of an enforcement agent or a related party, which for these purposes will include the High Court enforcement officer, to a lawful claimant for the

sale of controlled goods is excluded except in two cases. Those cases are specified at (2) as, first, being at the time of the sale the enforcement agent had notice that the goods were not the debtor's or not the debtor's alone. Subparagraph 3 deals with the second exception of where a lawful claimant had made an application to the Court claiming an interest in the goods, that not being the case here because such an application would have had to have been made before the sale. Subparagraph 4 defines the lawful claimant in relation to goods as being a person who has an interest in them; although there are certain exceptions that do not apply here. Mr Royle draws my attention to that paragraph as being a distinct limitation on liability, being liability as far as the enforcement agent or related party high enforcement officer is concerned.

21. Paragraph 64 provides that any liability of an enforcement agent or related party to a lawful claimant for paying over proceeds is excluded except in two cases, those two cases being effectively the same as those to which I referred in paragraph 63.

22. Paragraph 65 provides that the previous paragraphs do not affect the liability of anyone other than the enforcement agent or a related party and do not protect the judgment creditor. Subparagraph 3 provides that the enforcement agent or related party has notice of something if they would have found it out if they had made reasonable enquiries of related parties other than the creditor or the enforcement agent (and although I do not finally decide that in any way, it seems to me, that that potentially applies to making inquiries of the High Court enforcement officer).

23. Paragraph 66 provides at (1) it applies where an enforcement agent (a) breaches a provision of the schedule or (b) acts under an enforcement power under a writ or other matter "that is defective" (2) it provides that the breach or defect does not make the enforcement agent or the person they are acting for a trespasser but (3) it provides that a debtor can bring proceedings under the paragraph, (4) it provides that this is subject to rules of court as to where the proceedings may be brought, being the High Court or the County Court. In (5) it provides that in the proceedings the Court may (a) order their goods to be returned to the debtor – I know that is not a practical possibility here because the goods have been sold – or (b) order the enforcement officer, agent, or a related party to pay damages in respect of loss suffered by the debtor as a result of the breach or of anything done under the defective instrument. Here (6) defines the related party as being the person on whom the enforcement power is conferred and that is certainly the High Court enforcement officer (and maybe the creditor). (7) provides that (5) is without prejudice to any other powers of the court and (8) provides that (5)(b), that is the damages provision, does not apply when the enforcement agent acted in the reasonable belief (a) that he was not breaching a provision of the schedule or (b), as the case may be, that the instrument was not defective.

24. The question as to whether or not a particular event is a breach of the provision of the schedule or relates to a defective writ gives rise to a number of possible construction questions of Paragraph 66 including as to what amounts to a reasonable belief in the circumstances, and as to whether reasonable belief only extends to matters of fact or also extends to matters of law, and also as to whether it is simply a matter for the enforcement agent's reasonable belief even if the creditor or person on whom the enforcement power is conferred might be in a different position. It does not seem to me that it is appropriate for me to be deciding such questions in this judgment for the same reasons as why, as I am going to explain, I am not going to decide particular other matters. I also bear in mind that paragraph 68 provides that it is an offence for any person to intentionally instruct someone lawfully acting as an enforcement agent.

25. The fees and charges which are described by Regulation 62 for the purposes of Regulation 58 are provided for in the Taking Control of Goods (Fees) Regulations 2014/1.

In their Regulation 2, the schedule 12 definitions are important. In Regulation 3 it is provided that these regulations apply where the schedule 12 procedure is used. Paragraph 4 deals with the recovery by the enforcement agent, effectively, the enforcement agent/High Court enforcement officer's own fees; and that paragraph, schedule, and subsequent paragraphs deal with the fact that certain fees are recoverable at certain stages of the process.

26. Regulation 9(1) provides that the enforcement agent may recover disbursements related to the sale of goods from the debtor in accordance with that Regulation and Regulations 10 and 11. Regulation 9(2) provides where the sale is held on premises provided by the auctioneer conducting the sale, the enforcement agent may recover from the debtor (a) a sum in respect of the auctioneer's commission not exceeding 15% of the sum realised by the same of the goods; (b) the auctioneer's out-of-pocket expenses; and (c) reasonable disbursements incurred in respect of advertising the sale. 9(3) provides where the sale is held on other premises the enforcement agent can recover those sums except the sum referred to in (2)(a) may not exceed 7.5% of the sum realised. 9(4) provides for other types of auction including by way of an internet auction site and, although the goods were the subject matter of an online auction, no one has sought to rely on it before me.

27. Regulation 10 is entitled, "exceptional disbursements". Regulation 10(1) provides that the Court may make an order for the enforcement agent to be able to recover exceptional disbursements as long as the enforcement agent has the consent of the creditor, that is to say Christopher (and I have been provided with written copies of such consent in relation to the matters before me). Regulation 10(2), though, provides that the Court may not make such an order:

> "Unless satisfied that disbursements to which it relates are necessary for effective enforcement of the sum to be recovered having regard to all the circumstances including (a) the amount of that sum and (b) the nature and value of the goods which have been taken into control or which sought to take into control".

Regulation 11 refers to a situation where more than one enforcement power is effectively being exercised. Regulation 15 provides that, upon application, in accordance with the rules of the Court by the enforcement agent, the creditor, the debtor, or a co-owner of goods, any dispute about the amount of the proceeds payable to the co-owner under paragraph 56(a) of schedule 12 is to be determined by the Court. Regulation 16 provides that, upon application in accordance with the rules of Court, any dispute regarding the amount recoverable under these regulations is to be determined by the Court.

28. That takes me to the relevant Civil Procedure Rules regarding such an application and which are contained in part 84 where 84.3 provides that the rules set out where and how applications referred to in the part must be made, and schedule 2 provides that they should be made in accordance with the CPR Part 23 procedure. Rule 84 part 13 provides that the rule applies when the debtor wishes to bring proceedings under paragraph 66 of schedule 12 for breach of a provision of schedule 12 or for enforcement action taken over a defective instrument, and that the debtor may bring such proceedings by way of an application which must be accompanied by certain evidence. This effectively reflects the provisions of paragraph 66 of schedule 12, and effectively provides that if Marcus wishes to bring proceedings under paragraph 66 then he should be issuing a Part 23 application.

29. CPR 84.14 provides for the situation where an enforcement agent is making an application for exceptional disbursements under Regulation 10 of the fees regulations. That provides at

subparagraph 2 that the application must be made accompanied by a certain evidence including the creditor's consent and evidence as to the relevant disbursements, and that they satisfy the provisions of Regulation 10(2); it seems to me that that is what the applicant has sought to do in this case.

30. CPR 84.16 provides in (1) that it applies where there is a dispute about the amount of fees or disbursements other than exceptional disbursements recovered under the fees regulation and a party wishes the Court to assess those particular amounts. It provides that an application may be made and must be accompanied with evidence of the amount in dispute.

31. Thus it seems to me that where an application is being made with regards to exceptional disbursements it is made under CPR 84.14. If there is an application with regards to any other dispute about fees or disbursements then it is made under 84.16 but if there is an application which is being made effectively for damages or another remedy under paragraph 66 for schedule 12 it is then made by the debtor under CPR84.13. The High Court enforcement officer in this case says there is a dispute with regards to certain disbursements which is a dispute which the application before me properly puts before the High Court.

32. I bear in mind that what the application notice actually asks is for a directions order to make an application for summary assessment of the fees by a High Court Master under CPR 84.16. That application notice in its terms seems to me to be itself somewhat defective insofar as part of the application is an application for various items to be ordered to be recoverable as exceptional items within Regulation 10, which brings into play a different rule, CPR 84.14, under which that application should be made.

33. I also note that Mr Royle made some complaint to the effect that Marcus is effectively seeking to dispute all the fees and charges which have been raised and that Marcus has not made his own application in that regard. I note that CPR 84.16 states that an application under it is appropriate in any circumstance where there is a dispute about fees and charges. However, it seems to me that there also is in fact a dispute which I will come to as to what actually is the amount of proceeds which were being realised by the sale and which at first sight does not seem to be apposite for the strict wording of CPR 84.16 which is concerned with fees and charges, not proceeds.

34. However, I do not feel that any of this really particularly matters in terms with dealing with this case in accordance with the overriding objective. Firstly, the High Court enforcement officer is always able as an officer under the writ to be able to apply to the Court for directions. Secondly, as far as exceptional disbursements are concerned, the High Court enforcement officer has complied with the substance of CPR 84.14 by producing the relevant evidential material relied on and it seems to me that any failures which have occurred are only technical and do not prejudice Marcus.

35. However, this is subject to the fact that Marcus wishes to say that, first, enforcement against partnership property is either not within the power conferred by the writ at all or, alternatively, is not a justified use of the writ for various reasons including the provisions of paragraph 4.1 of schedule 12. Secondly, and as an alternative, he wishes to say that the writ is defective insofar as it failed to exclude partnership property.

36. I think Mr Royle for Ms Sandbrook's case is to say that any claims based on that should be brought by application under CPR 84.13 by Marcus invoking paragraph 66 of schedule 12. Marcus responds by saying that that is wrong and such claims as he wishes to bring can be brought by separate proceedings but, in any event, he is only seeking to challenge the fees and charges at that point and should be able to wait until later to bring a more full challenge. Following on from that, Marcus submits that since the fees and charges are the subject matter of a CPR 84.16 application as well as a CPR84.14 application under the application notice, he can raise these matters, in effect, by way of defence and response to the

application.

37. Mr Royle for Ms Sandbrook would submit that this is abusive, or at least not a way the Court should deal with that as all matters ought to be determined at once; but he also submits (i) as a preliminary point that, in any event, Marcus' case should fail for various reasons to which I will come, but if that is wrong then (ii) matters ought to proceed in a more sophisticated manner including with the involvement of the enforcement agent Mr Lucas Jones, who is potentially an interested and perhaps an essential party.

38. As far as all that is concerned, I need to, in order to consider it, turn to what is the issue with regards to partnership property. This is an issue of a somewhat unusual but important technical nature which is made somewhat curious by the fact that the other partner in this case, Christopher, is actually the judgment creditor.

39. Section 23 of the Partnership Act:

> "Procedure against partnership property for a partner's separate judgment debt.
> (1)A writ of execution shall not issue against any partnership property except on a judgment against the firm.
> (2)The High Court, or a judge thereof, . . . F1 [F2or the county court in England and Wales or a county court in Northern Ireland,] may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.
> (3)The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same".

I bear in mind particularly at this point that section 23(1) in prohibiting the issue of the writ of execution against partnership property is doing so by use of a simple bald and unequivocal statement (with, of course, the exception of a judgment against the firm but which is of course not this situation). Section 23(2), of course, provides for an alternative method of enforcement in relation to, as opposed to against, partnership property where it is sought to enforce a debt of the individual partner alone; namely the procedure set out there for the making of a charging order and then potential methods of enforcement of the charging order such as by way of sale or the appointment of a receiver.

40. Mr Burroughs for Marcus submits that with regards those goods and machinery which were partnership property (and where it seems to me it is common ground that I should proceed on subject to one point to which I will come, that there were certain goods and machinery which fell within that category, though I have no evidence as to what extent such is said to be the case), firstly, that the writ did not extend to them at all. Secondly, if the writ did extend to them then the section 12 procedure could not lawfully be operated in relation to those goods or machinery or, thirdly, if it could be so lawfully operated, the writ was defective. Mr Burroughs submits that these are each and all reasons as to why I should not

permit the officer, the enforcement officer and the enforcement agent to have their fees and charges either generally or specifically in relation to that property, whatever it was, whether under Regulation 9, Regulation 10, or indeed under the other regulations within the fees regulations with regards to the staged proportionate charges.

41. Mr Burroughs also submits that Marcus has been caused various losses as a result of what has happened, including his being deprived of the relevant goods and their being sold on what can and would have been seen by the purchasers to be a forced sale basis and thus at a discount to ordinary market value.

42. Mr Royle submits that that was wrong. It may be that he is submitting that section 23 of the Partnership Act 1890 has been impliedly overruled or at least mutated by the 2007 Act. However, in any event, he submits that section 23 of the Partnership Act 1890 does not apply to this particular writ and/or does not apply in these particular circumstances; and he also submits that the High Court enforcement officer was acting under a writ, being a direction of command of the Court and that that attracts immunity so that the officer and the agent are as a result immune both under the general common-law and under the Regulations. He accepts that there is a possible exception to immunity in relation to any ability of Marcus to invoke paragraph 66 schedule 12, but submits that (i) defences would exist even if that paragraph is applicable but, in any event, (ii) Marcus has not even chosen as yet to bring any such application under paragraph 66. Mr Royle also submits that the schedule makes certain clear distinctions between Ms Sandbrook as the enforcement offer and Mr Lucas Jones as the enforcement agent and with the result that I should not deal with Marcus' contention, at least without there being any joint or other involvement of the enforcement agent.

43. Mr Royle therefore submits that what I should do is to fully, at least on the basis of determining individual issues, decide the matters which are actually the subject matter of the application notice which is before me, and thereforedetermine amounts of fees and costs under Regulation 9 and whether or not there are certain matters which should be allowed as exceptional disbursements under Regulation 10.

44. I have been provided with a bundle which contains within it what seems to me is all the evidential material which is required in order to determine whether Marcus' points regarding the application of section 23 of the Partnership Act, what is allowable under Regulation 9 and Regulation 10 and also, since these are not apart from the section 23 point in dispute as long as it is clear what the total proceeds are to which I will come in due course, what are the recoverable proportionate fees under the fees regulations.

45. It seems to me that with regards to the question as to whether or not section 23 is in point with regards to this particular writ is a pure matter of law, and that I have the relevant material to be able to determine that. It seems to me also that it might be technically possible to determine pure questions of law with regards to whether or not the writ actually extended in law to property which was partnership property, and also as to whether or not for the purposes of paragraph 66 of schedule 12 the enforcement agent had breached the provision of the schedule or had acted under an enforcement power under a writ that was defective.

46. However, in any event, I do not have material to go further with that as, firstly, I do not know as to what is the split either in terms of actual assets or their values between whatever was Marcus' own property and whatever was partnership property. I also do not have the material, if paragraph 66 is relevant, to determine various issues arising under it such as to reasonable belief of the enforcement agent. I also have no material or indeed even contentions as to what are or might be the losses that Marcus says they have suffered. I also bear in mind that the High Court enforcement officer, let alone the enforcement agent, is not

really in any position to defend any claim Marcus may seek to bring because they simply do not know what that claim is. All of that seems to me raises a considerable procedural question as to what I should actually determine in this hearing and in this judgment.

47. I also bear in mind Mr Royle's contention that Marcus should advance and indeed already should have advanced Marcus' whole case, and that it is Marcus who is at fault if matters cannot be determined now. Marcus responds that Marcus is simply seeking to resist an application which has been brought by the High Court enforcement officer and would ask rhetorically as to why Marcus should be forced into having to advance a full case at an early point in time when Marcus would wish to be able to give full and proper consideration to what should be advanced and where, at first sight, there is no particular limitation period in play.

48. I have of course to apply the overriding objective of CPR 1.1 which I read fully into this judgment to what I should do.

"1.1
(1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
(b) saving expense;
(c) dealing with the case in ways which are proportionate –
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders."

I also bear in mind that CPR Part 3 gives very wide management powers to the Court, including in CPR 3.1(1)(ii), various extensive powers to adjourn hearings to decide particular issues or particular points in time, and indeed to take any other step and make any other order for the purpose of managing the case and furthering the overriding objective.

49. I also bear in mind firstly that the correct procedural approach here is a complex one, as, first, there are overlapping claims and asserted rights of Marcus arising from the section 23 point, some of which, if schedule 12 is not in play, may arise under and be at common law generally and others, if schedule 12 is in play, potentially under paragraph 66; secondly, that it seems to me that it is not appropriate for me particularly to blame Marcus as to the fact that all matters are not before the Court at this particular hearing, bearing in mind that before the application and indeed at its first hearing, he was a litigant in person and where only limited matters were being raised against him; but, thirdly, that there is a general principle and policy of the courts, and which indeed is recognised in cases with regards to abuse of process such as *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313, that it is desirable, and for some cases essential, that a person should advance their full case at one particular time rather than merely seeking to put forward a limited defence at one point on the basis that they will counter-attack later. As that case recognises, it is contrary to the general policy of the law in principle for such to occur because there are strong public and

private interests in terms of there being an end to litigation and for matters all to be dealt with or at least raised at the same time so that resources can be used efficiently, waste can be avoided, and a matter can be properly case-managed and dealt with on a holistic basis. On the other hand, I also bear in mind that that is only a general rule of policy and as to whether or not proceeding down a multiple route is an abuse, that is a multi-factorial exercise and, as explained in such cases as *Johnson v Gore Wood & Co* [2000] UKHL 65, it may well be appropriate to proceed in a two-stage basis.

50. I have considered the parties' various submissions and borne in mind the overriding objective, and it seems to me that I have to balance (i) the desirability of resolving certain issues where if that can be done then it is desirable to do so, so that everybody knows where they are, and (ii) the risk of deciding issues where by so deciding them they have unintended consequences. I bear in mind that in relation to certain of the issues I have either all the relevant evidence before me or they are matters of pure law. I also bear in mind that I should see this in the context of seeking to achieve orderly case management and to resolve disputes at proportionate cost, but I also bear in mind that the entirety of this matter could never have been resolved fully at this hearing anyway, even if Marcus had in some way or another sought to advance his full case because that would have raised all sorts of factual matters with regards to what was or was not partnership property and as to financial consequences which the Court simply could not have resolved in a hearing of this nature.

51. Having borne in mind all those particular matters, it seems to me that (i) I should deal with questions as to whether or not section 23 is actually in point in this case and as to whether or not it actually potentially gives one or more rights to Marcus, but without actually deciding which, if any, of those rights apply, (ii) I should decide to the extent which I can as to whether, absent the section 23 point, what would be the fees, charges, and disbursements to which the High Court enforcement officer and enforcement agent would be entitled, and also the limited question which has been raised as to what are actually the proceeds of the auction after deduction of relevant charges. However, apart from deciding those particular questions, it seems to me, and I will refer to further reasons in due course, that it is not appropriate for me, seeking to achieve the overriding objective, to go any further. It seems to me that that actually accords both with Mr Burroughs' main position and Mr Royle's fall-back position.

52. To do this I deal first with section 23 itself. Mr Royle submits that it does not apply at all. Firstly, Mr Royle submits that, possibly, section 23 is simply inconsistent with the 2007 Act, although it seems to me that the 2007 Act and section 23 need to be read somewhat together. Mr Royle did not press that point and it does not seem to me that it would be correct in any event. For one statute to impliedly repeal another is something which is possible as a matter of construction but effectively requires a very clear interpretation from the words and underlying policy for the Court to consider that that has occurred; and it seems to me that section 23 of the 1890 Act and the 2007 Act are not inconsistent with each other. They can perfectly well operate in tandem with each other in one of a number of ways to which I will come in due course in this judgment; and it does not seem to me that there is any inconsistency as such between them. The 2007 Act simply provides for a procedure which exists in the certain circumstances, that is where a power is being conferred by amongst other things by a court writ of control, and section 23 simply provides that a writ of execution shall not issue in certain circumstances. That may have further consequences and difficulties to which I will come but it does not seem to me that there is any inconsistency between an Act containing a prohibition on the issue of a certain type of writ in certain circumstances and another Act which provides that a certain type of writ

exists and confers a particular type of power to issue it. That power to issue and the exercise of relevant writ will be subject to the provisions of the first Act, but there is no necessary inconsistency. However, other matters are of more difficulty.

53. Mr Royle makes numerous submissions which it seems to me effectively for these purposes divide into four but which overlap. Firstly, he submits that section 23 does not matter because, although it may prohibit the issue of a writ, a writ has been issued in these particular circumstances. Secondly, he submits that this writ does not fall within section 23 in any event, firstly because section 23 does not apply to a writ in general terms, applying generally to the goods of the judgment debtor, but only to a writ which is directed towards a specific property. Thirdly, he submits that section 23 does not matter because the partnership has been dissolved and/or as a result of that or otherwise there is no relevant partnership property for section 23 to bite on in these circumstances; and, fourthly, he submits that the writ is both an authorisation and a command directed to the High Court enforcement officer and by extension to the enforcement agent, and that they are simply entitled to treat it as being a valid writ and therefore not in any way invalidated by section 23. Fifthly, he submits that this is all irrelevant to what is the application before me from the High Court enforcement officer. It seems to me for reasons which I have already given that, although Mr Royle may well be right to say that Marcus should be raising some other application or claim of his own by a particular originating process, in part for reasons which I have already given but to which I will revert, that the fact that Marcus intends to make such an application is potentially relevant to the application before me and needs to be borne in mind by the Court.

54. Various of these submissions overlap and therefore what I will do now is go through the material which has been advanced of support of them by both sides. Mr Royle submits that section 23 is a prohibition on the issue of a writ and he submits to me that, once the writ has been issued, then, as far as his clients are concerned, the writ just simply stands and indeed they are bound to comply with it.

55. In this regard Mr Royle has taken me to the decision in the *R (on the application of Majera (formerly SM (Rwanda)) (AP) v Secretary of State for the Home Department* [2021] UKSC 46. I read paragraphs 44 to 56 of that judgment into this judgment:

"44.It is a well established principle of our constitutional law that a court order must be obeyed unless and until it has been set aside or varied by the court (or, conceivably, overruled by legislation). The principle was authoritatively stated in *Chuck v Cremer* (1846) 1 Coop temp Cott 338; 47 ER 884, in terms which have been repeated time and again in later authorities. The case was one where the plaintiff's solicitor obtained an attachment against the defendant in default of a pleaded defence, disregarding a court order extending the period for filing the defence, which he considered to be a nullity. The order in question had been intended to give effect to an agreement between the parties, but had mistakenly allowed the defendant longer to file a defence than had been agreed. The Lord Chancellor, Lord Cottenham, set aside the attachment, and stated at pp 342-343:

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it … It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed."

45.Three important points can be taken from this passage. First, there is a legal duty to obey a court order which has not been set aside: "it must not be disobeyed". As the mandatory

language makes clear, this is a rule of law, not merely a matter of good practice. Secondly, the rationale of according such authority to court orders, as explained in the second and third sentences, is what would now be described as the rule of law. As was said in *R (Evans) v Attorney General (Campaign for Freedom of Information intervening)* [2015] UKSC 21; [2015] AC 1787, para 52, "subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive". This principle was described (ibid) as "fundamental to the rule of law". Thirdly, as the Lord Chancellor made clear in *Chuck v Cremer* , the rule applies to orders which are "null", as well as to orders which are merely irregular. Notwithstanding the paradox involved in this use of language, a court order which is "null" must be obeyed unless and until it is set aside.

46.This rule was applied by the Court of Appeal in *Hadkinson v Hadkinson* [1952] P 285. In a well-known passage, Romer LJ stated at p 288:

"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

Romer LJ then cited Lord Cottenham's dictum in *Chuck v Cremer* . That passage in the judgment of Romer LJ was approved by the Privy Council in *Isaacs v Robertson* [1985] AC 97, 101-102, which in turn was cited with approval by the House of Lords in *M v Home Office* [1994] 1 AC 377, 423, and by the Privy Council in *Mossell (Jamaica) Ltd (t/a Digicel) v Office of Utilities Regulations* , para 43.

47.This rule was not engaged in the case of *Boddington* (nor, for that matter, in *Hoffmann-La Roche*), since that case was not concerned with a court order. That was one of the grounds on which the Divisional Court correctly distinguished *Boddington* in *Director of Public Prosecutions v T* [2006] EWHC 728 (Admin); [2007] 1 WLR 209, where the defendant was charged with breaching an anti-social behaviour order which was alleged to be invalid. Richards LJ cited *Boddington* and observed, at para 27:

"Very different considerations apply in the present context. First, the normal rule in relation to an order of the court is that it must be treated as valid and be obeyed unless and until it is set aside. Even if the order should not have been made in the first place, a person may be liable for any breach of it committed before it is set aside."

The same distinction was also drawn by the Privy Council in *Mossell (Jamaica) Ltd (t/a Digicel) v Office of Utilities Regulations* , para 43:

"The Board would reject entirely [the appellant's] submission that the principle established in *Boddington* is relevant only in the context of criminal prosecutions and not, as here, Ministerial Directions. The Board would reject too the suggested analogy between Ministerial Directions and the orders of superior courts which, it is well established (see for example, *Isaacs v Robertson* [1985] AC 97) must always be obeyed, whatever their defects, until set aside."

48.As Richards LJ pointed out in *Director of Public Prosecutions v T* at paras 30-31, although Romer LJ referred in *Hadkinson v Hadkinson* to "a court of competent jurisdiction" (para 46 above), and although that case, like *Isaacs v Robertson* and *M v Home Office* , was concerned with a court of unlimited jurisdiction, the rule has also been applied to courts of limited jurisdiction: see, for example, *Johnson v Walton* [1990] 1 FLR 350 and *In re B (Court's Jurisdiction)* [2004] EWCA Civ 681; [2004] 2 FLR 741.

49.That is consistent with the rationale of the rule. As explained in para 45 above, it is based

on the importance of the authority of court orders to the maintenance of the rule of law: a consideration which applies to orders made by courts of limited jurisdiction as well as to those made by courts possessing unlimited jurisdiction. In the present case, the First-tier Tribunal was in any event a court of competent jurisdiction: it possessed jurisdiction under paragraph 22 of Schedule 2 to the 1971 Act to hear and determine applications for bail.

50.It is relevant to note some other recent examples of the application of this approach, in contexts more closely analogous to that of the present case. First, the case of *R v Central London County Court, Ex p London* [1999] QB 1260 concerned the compulsory detention of a patient in hospital under mental health legislation. The application for his admission by the hospital managers was made by the local social services authority, which had been authorised to make the application by orders made by the county court. The patient subsequently applied for judicial review to quash the court orders and the compulsory admission based upon them. The Court of Appeal concluded that the orders were valid, but went on to consider what the position would be if the county court had no jurisdiction to make them. Stuart-Smith LJ, with whom Robert Walker and Henry LJJ agreed, cited *Hadkinson v Hadkinson* , *Isaacs v Robertson* , *Boddington* and *Percy v Hall* , and concluded at para 36 that even if the county court had no jurisdiction to make the orders in question, the decision of the hospital managers to admit the applicant was valid. As he explained at para 30, if the orders were made by the county court without jurisdiction, then the applicant was entitled to have them quashed, but he was not entitled to a declaration that the decision to admit him was unlawful: that decision could only be quashed if it was ultra vires the hospital managers at the time when it was made, and it was not.

51.Another recent example, which also illustrates the point that the rule set out in *Chuck v Cremer* is not confined to orders made by courts possessing unlimited jurisdiction, is the decision of the Court of Appeal (Simon Brown, Mummery and Dyson LJJ) in *R (H) v Ashworth Special Hospital Authority* [2002] EWCA Civ 923; [2003] 1 WLR 127. The case arose out of the decision of a hospital authority to re-detain a patient after a mental health tribunal had ordered his discharge from detention. The hospital authority then applied for judicial review of the tribunal's order, on the ground that it was unreasonable and unsupported by adequate reasons, and the patient applied for judicial review of the authority's decision, on the basis that it was incompatible with the tribunal's order. Both applications succeeded: the tribunal's order was held to be unlawful and was quashed, but the authority was also held to have acted unlawfully in making a decision which was inconsistent with the tribunal's order at a time when that order had not been set aside. The mental health tribunal was, of course, a body exercising a limited jurisdiction.

52.Dyson LJ based his reasoning upon article 5(4) of the European Convention on Human Rights, but it was entirely consistent with the common law. He stated at para 56:

"In the absence of material circumstances of which the tribunal is not aware when it orders discharge, in my judgment it is not open to the professionals, at any rate until and unless the tribunal's decision has been quashed by a court, to resection a patient. … To countenance such a course as lawful would be to permit the professionals and their legal advisers to determine whether a decision by a court to discharge a detained person should have effect."

Simon Brown LJ based his reasoning on the rule of law, stating at para 102:

"… the tribunal's view must prevail; the authority cannot simply overrule the discharge order. Court orders must be respected - the rule of law is the imperative here."

The authority's decision was therefore unlawful, notwithstanding the Court of Appeal's conclusion that the tribunal's order was also unlawful and had rightly been quashed by the court below.

53.Reference might also be made to the judgment of the Court of Appeal in *R (Lunn) v*

Governor of Moorland Prison [2006] EWCA Civ 700; [2006] 1 WLR 2870, which concerned an error in a warrant of imprisonment. Moore-Bick LJ, giving the judgment of the court, stated at para 22:

"It is an important principle of the administration of justice that an order of a court of competent jurisdiction made in the exercise of that jurisdiction, as it was in this case, is valid and binding until it is varied or set aside, either on appeal or in the proper exercise of the court's own jurisdiction. (It is unnecessary in this case to consider the position in relation to an order which is unlawful on its face or which is made in excess of jurisdiction, though, as appears from the authorities, an order which is valid on its face is binding even if it was made in excess of jurisdiction and is therefore liable to be set aside.) It is necessary that that should be the case, both in order to preserve the authority of the courts and thereby the orderly administration of justice and to ensure that those who have to take action on the basis of the court's orders may be confident that they can lawfully do so."

The sentence in parentheses is supported by a line of authority going back to the 17th century concerned with the execution of warrants issued in excess of jurisdiction, summarised by Lord Alverstone CJ in *Demer v Cook* (1903) 88 LT 629, 631.

54.Another recent example is the case of *Rochdale Metropolitan Borough Council v KW (No 2)* [2015] EWCA Civ 1054; [2016] 1 WLR 198, where a judge of the Family Division took the view that a decision of the Court of Appeal was ultra vires. Lord Dyson MR, giving the judgment of the Court of Appeal, stated at para 22:

"An order of any court is binding until it is set aside or varied. This is consistent with principles of finality and certainty which are necessary for the administration of justice: *R (Lunn) v Governor of Moorland Prison* [2006] 1 WLR 2870, para 22; *Serious Organised Crime Agency v O'Docherty* [2013] CP Rep 35, para 69. Such an order would still be binding even if there were doubt as to the court's jurisdiction to make the order: *M v Home Office* [1994] 1 AC 377, 423; *Isaacs v Robertson* [1985] AC 97, 101-103."

55.A further example is the decision of the Court of Appeal in *R v Kirby (John Martin)* [2019] EWCA Crim 321; [2019] 4 WLR 131, which concerned convictions for the breach of a non-molestation order that was subsequently set aside because of a procedural irregularity. The convictions were upheld. Singh LJ, giving the judgment of the court, based the decision on "a long-standing principle of our law that there is an obligation to obey an apparently valid order of a court unless and until that order is set aside. This is a crucial feature of a civilized society which has respect for the rule of law" (para 13). In that regard, Singh LJ cited *Chuck v Cremer* , *Hadkinson v Hadkinson* , *Isaacs v Robertson* and *M v Home Office* , among other authorities, and followed *Director of Public Prosecutions v T* in distinguishing the case of *Boddington* .

56.In the light of this consistent body of authority stretching back to 1846, it is apparent that the alleged invalidity of the order made by the First-tier Tribunal had no bearing on the challenge to the decision of the Secretary of State. Even assuming that the order was invalid, the Secretary of State was nevertheless obliged to comply with it, unless and until it was varied or set aside. The allegation that the order was invalid was not, therefore, a relevant defence to the application for judicial review of the Secretary of State's decision. As there was no other basis on which the Court of Appeal reversed the Upper Tribunal, and the Secretary of State does not ask the court to dismiss the appeal on other grounds, it follows that the appeal should be allowed."

56. Mr Royle and I extract from those paragraphs the following general propositions. Firstly, that a court order is valid until it is set aside or varied. Secondly, in principle, although subject to the provisions of any statute, that applies even if the court order has been made without jurisdiction. Thirdly, subject to the second point that has the consequence that a

person, here the High Court enforcement officer and the enforcement agent, is bound to comply with the court order unless and until it is set aside or varied.

57. Mr Royle in support of various of his arguments has said that it is clear that the partnership is in dissolution, which I think is common ground and in any event I regard as being arguable (it is a separate point that the other partner is the judgment creditor and of course has consented to everything which has occurred). Mr Royle next points out, as I have already read, that the writ is directed generally to the good, chattels, and other property of Marcus and not to any specific goods or assets. Mr Royle submits that section 23 was a prohibition simply on the issue of a writ against partnership property and therefore should be read as only being applicable through a writ which was directed towards specific partnership property and not a writ which is in general in nature. He further has referred me in the context of to what writs section 23 applies when it refers to a writ of execution to excerpts from *Mather on Sheriff Law* (1894) where various particular writs are identified in the book as existing at the time of the Partnership Act in 1890 including such writs as a writ of extent or a writ of delivery which writs were said to relate to particular specified property only.

58. He has also referred me to section 32 of the Partnership Act:

> "Dissolution by expiration or notice.
> Subject to any agreement between the partners, a partnership is dissolved—
> (a)If entered into for a fixed term, by the expiration of that term:
> (b)If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:
> (c)If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership. In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice",

which refers to the ability of partners to dissolve a partnership by various means including by service of a notice, and where, unless otherwise agreed, section 32 provides the dissolution that occurs as at the date of the notice. He has also taken me to various passages and sections within *Lindley & Banks on Partnership* in its 20th Edition, including elements of chapter 19 which relates to partnership shares.

59. Section 1 of chapter 19 deals with the nature of a partnership share and I read paragraph 19-01 to 19-08 into this judgment.

> " Although it is convenient to refer to a partner's interest in the firm as his "share," that expression is notoriously difficult to define, not least because its meaning differs according to the context in which it is used. In common parlance, a share is usually seen merely in terms of an interest in the profits of a business and of a capital or "equity" stake therein; indeed, this may well be the partners' own perception. However, in legal terms, such an approach is too simplistic, since the constituent elements which go to make up a share are not only infinitely variable but subject to potential alteration during the continuance of the partnership and thereafter. Thus, whilst the "share" of an outgoing partner may quite properly be viewed solely in financial terms, reference to the "share" of a *continuing* partner must include the totality of the rights which he enjoys under the partnership agreement and under the general law. It follows that no single meaningful definition is possible and, if the expression is used without regard to the context, confusion and potential disputes

are inevitable. It was for this reason that the Court of Appeal in *Ham v Ham* emphasised that the meaning to be ascribed to the expression "share" in a partnership agreement will ultimately be a matter of construction rather than "the application of a well defined term".

Proprietary nature of a share

It has already been seen that partnership is a relationship which results from a contract, although the House of Lords has been at pains to point out that the relationship involves far more than a simple contract. Although generalisation is dangerous in this (as in any other) area, it might be said that one particular feature which distinguishes a partnership from an ordinary contract is that, in addition to creating contractual rights and obligations between the partners, it will usually (but by no means necessarily) confer on each partner certain proprietary rights in respect of the partnership assets. As Arden LJ put it in *Revenue & Customs Commissioners v Anson*:

"A partner in an English partnership has an equitable interest in the partnership assets and thus will be able to show that he had a proprietary interest to the extent of his profit and share in the partnership."

Certainly, it is difficult to imagine a partnership which involves no proprietary rights whatsoever, even though the only partnership property may be of an intangible nature, e.g. goodwill, or of negligible value.

The internal and external perspectives

When analysing the proprietary nature of a partnership share, it is necessary to distinguish between the internal and external perspectives, since they are very different. The distinction was clearly drawn by Lord Justice Hoffmann in *I.R.C. v Gray* in these terms:

"As between themselves, partners are not entitled individually to exercise proprietary rights over any of the partnership assets. This is because they have subjected their proprietary interests to the terms of the partnership deed which provides that the assets shall be employed in the partnership business, and on dissolution realised for the purposes of paying debts and distributing any surplus. As regards the outside world, however, the partnership deed is irrelevant. The partners are collectively entitled to each and every asset of the partnership, in which each of them therefore has an undivided share."

This chapter is concerned principally with the *internal* perspective. However, the external perspective *may* still be of relevance in certain circumstances, e.g. when determining the manner in which a partnership share should be transferred and, perhaps, where a firm holds shares in a company subject to a right of pre-emption, if one partner were to assign his partnership share.

Essential nature of a partner's proprietary interest

It is clear that, in the absence of some other agreement (express or implied), all the members of an ordinary partnership have identical and equal interests in its assets16 and that no partner is entitled, without the concurrence of all his co-partners, to insist that a particular asset (or an interest therein) is vested in him, either during the continuance of the partnership or following its dissolution. Although these propositions are simply stated, an analysis of the precise legal and beneficial nature of a partner's interest in the firm's assets raises a number of difficult issues.

The classic definition

Lord Lindley observed:

"What is meant by the *share* of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities have

been paid and discharged. This it is, and this only, which on the death of a partner passes to his representatives, or to a legatee of his share; which under the old law was considered as *bona notabilia*; which on his bankruptcy passes to his trustee …".
Although it would be more accurate to speak of a partner's entitlement to a proportion of the *net proceeds of sale* of the assets, the correctness of the statement of principle embodied in the above passage cannot seriously be questioned, reflecting as it does the proper application of sections 39 and 44 of the Partnership Act 1890. This approach underlay the decision in *Commissioners of State Taxation v Cyril Henschke Pty Ltd* and was clearly endorsed by Norris J in *Bieber v Teathers Ltd*.
Accordingly, a partner's entitlement will reflect not only his capital and current account balances and the size of his capital profit (or asset surplus) share, but also any amounts which he may owe to the firm, e.g. in respect of overdrawings. It is submitted that any attempt to demonstrate that a particular element of a partner's share, e.g. his entitlement to capital, has an existence independent of the remainder must, in the absence of an express agreement, fail. Thus, in *Green v Moran*, an outgoing partner's action to recover a fixed sum representing his perceived value of his share on retirement without taking an account was dismissed, inter alia on the basis that he had sought to "cherry pick" certain assets and ignored the firm's liabilities. Moreover, to speak of a share in financial terms *otherwise* than by reference to a partner's net entitlement (whether calculated in the above way or in some other manner prescribed by the partnership agreement) is both misleading and legally incorrect. It was this principle that led to the Tribunal construing an agreement purporting to specify a corporate partner's increased share in the partnership assets as merely declaring its increased share in capital profits. The position may, of course, be otherwise where a specific agreement is reached, e.g. for repayment of a retiring partner's capital balance.
Nevertheless, it is considered that Lord Lindley's definition is, as such, incomplete and that a full understanding of the nature of a share (viewed solely in terms of the financial and proprietary entitlement which it confers upon its owner) is only possible if that entitlement is analysed at three stages in the life of a firm, namely: (1) whilst the partnership is continuing; (2) on a general dissolution and (3) on the death, retirement or expulsion of a partner.

The nature of a share—an analysis

(1) Continuing partnership

Whilst the partnership continues, each partner interested in the capital and assets of the firm will unquestionably be entitled to a beneficial interest in respect of those assets and *may* also hold the legal title thereto, either alone or in conjunction with one or more of the other partners. If the legal title is vested in *all* the partners, it might be described as an incident of each partner's share, even if not part of the share itself; if, on the other hand, title is vested in only some of the partners, they will hold the relevant assets as trustees for the firm and the title therefore cannot properly be regarded even as an incident of their shares.
So far as concerns each partner's *beneficial* interest in the partnership assets, its precise nature will to an extent depend on the contents of the agreement, which may, for example, direct that, as between the partners, no account is to be taken of goodwill, thus in one sense purportedly negating their interests therein, or declare that an outgoing partner is only to be entitled to the return of his capital. Nevertheless, it is submitted that, irrespective of the terms of the agreement, each partner's

share will display two characteristics which may be regarded as constants. First, each partner's beneficial interest, expressed in terms of its realisability, is in the nature of a *future* interest taking effect in possession on (and not before) the determination of the partnership, whether brought about by his departure or by a general dissolution. This limitation on his entitlement may be explained by reference to the fact that, as long as the partnership continues, each partner is entitled to require the partnership assets to be applied for partnership purposes and no partner is entitled to use or enjoy his share of those assets to the exclusion of his co-partners. Secondly, when the partnership is determined and the partner's beneficial interest in the partnership assets notionally falls into possession, it will take effect subject to the right of the other partners to have those assets applied towards payment of the firm's debts and liabilities and any surplus divided between the partners in the manner prescribed by the Partnership Act 1890. This will normally entail a sale of such property. Thus, in the absence of any agreement to the contrary, the share of a partner will represent (and should always be stated in terms of) his proportionate share in the net proceeds of sale of the partnership assets, after all the firm's debts and liabilities have been paid or provided for.
The foregoing analysis appears to have been accepted by the Privy Council in *Hadlee v Commissioner of Inland Revenue* and, in substance, by the Court of Appeal in *Popat v Shonchhatra*."

60. Mr Royle, however, took me particularly to paragraph 19-09 which I read now into this judgment:
"*(2) General dissolution*
In the event of a general dissolution, each partner will again be entitled to insist on the partnership assets being applied towards payment of the firm's debts and liabilities and a division of any surplus proceeds. Until such time as those assets are either sold or divided *in specie*, it is submitted that each partner's share will have the same proprietary character as it had prior to the dissolution. Nevertheless, in terms of value, the share must still be expressed as a net entitlement since, in the absence of some specific agreement between the partners, it cannot properly be viewed in any other light. This analysis was, in effect, confirmed by the Court of Appeal in *Popat v Shonchhatra*. The fact that a partner's share may have been ascribed a certain value as at the date of dissolution, e.g. in a dissolution account, is neither here nor there, since it does not represent his ultimate entitlement."
and which he says shows effectively once a dissolution has occurred within the meaning of section 32 is support for his contention but the law as to partnership property should cease to apply.

61. In further support of that, he has drawn my attention to paragraphs 19-25—19-27 of *Lindley* (dealing with section 39 of the Partnership Act 1890) which I also read into this judgment:
"Lord Lindley was at pains to point out that, irrespective of the title which it may be given, the foregoing right normally has little practical application prior to the dis-solution of a partnership, when its affairs fall to be wound up or the share of a partner ascertained. This is now expressly recognised by section 39 of the Partnership Act 1890, which provides as follows:
"**39.** On the dissolution of partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as

partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the court to wind up the business and affairs of the firm."

It is submitted that the above section does no more than give statutory recognition to the partner's lien on dissolution and does not purport to exclude its operation at other times. Thus, the possibility of its enforcement could conceivably arise during the continuance of the partnership, e.g. if a partner in whom is vested the legal title to a partnership asset were to dispose of it to a third party who had notice of its status. In such a case, the existence of the lien could well be material in the event of the third party's insolvency.

Property subject to the lien

Whilst the partnership continues, the lien attaches to *every* item of partnership property, including stock in trade. Of the latter, Lord Lindley pointed out that the lien "is not …lost by the substitution of new stock in trade for old", thus recognising that, to this extent at least, the lien has a "floating" character, i.e. it attaches to the stock for the time being. This aspect of the lien will be considered in greater detail hereafter.

The corollary of the foregoing is, naturally, that the lien does not attach to anything other than partnership property. Thus, if there is in truth no such property because the partnership is confined to the profits produced by property belonging to one or more of the partners, there will be nothing to which the lien can attach.

Position on dissolution

On a dissolution, the lien will only be exercisable in respect of the partnership property at that time and will not extend to assets acquired subsequently, unless they can properly be said to be partnership assets. It follows that, if surviving or continuing partners carry on the business and, in the course of so doing, acquire property, it will prima facie be free of the lien. Lord Lindley observed that "in this respect the lien in question differs from the lien of a mortgagee on a varying stock in trade assigned to him as a security for his loan." Subject to the foregoing, on the death or insolvency of a partner, his lien continues in favour of his personal representatives or trustee, and does not terminate until his share has either been ascertained and paid by the other partners or, seemingly, extinguished by efluxion of time under the Limitation Act 1980."

and where I note that section 39 of the Partnership Act deals with the partners' rights as to what happens on a dissolution albeit that can be subject to the wording of an individual partnership deed. Mr Royle in particular refers me to the second sentence in paragraph 19-27, providing if the partnership business is to be carried on post-dissolution then that can result in property which is free from section 39, "and therefore which we say should not be treated as partnership property for the purposes of section 23".

62. Mr Burroughs disputes those interpretations of the Partnership Act and partnership law. He submits that this is a continuing dissolution where the property remains partnership property. He says section 23 provides for a general prohibition on execution against such property here, and he submits that, for various reasons, section 23 therefore bars what has actually happened here. In general he submits, firstly, that the writ itself is invalid as contravening section 23, and secondly, or alternatively, it simply does not extend to

partnership property and does not refer any power with regards to it, and, thirdly, that schedule 4 does not permit the writ to be used against partnership property, and, fourthly, whether or not he is right about all that, that either the schedule has not been complied with or the writ is defective so that paragraph 66 of schedule 12 applies.

63. Both sides sought to refer me to relevant case law and authorities regarding the interaction between enforcement and partnership property. Mr Royle has referred me to *Mather* at page 79 and where I read the full paragraphs on that page into this judgment. Those paragraphs, it seems to me, make clear that *Mather* is saying that the 1890 Act had changed the method of enforcement against partnership property and it seems to me treats the prohibition in section 23 as applying generally to methods of execution; however, it is not particularly concerned with the precise points which Mr Royle seeks to advance. I was also taken by them to section 3-07 of *Lindley*

"Also central to an understanding of the law of partnership is the dual capacity in which a partner acts, i.e. both as a principal and an agent. Lord Lindley explained:
"As a principal [a member of an ordinary partnership] is bound by what he does himself and by what his co-partners do on behalf of the firm, provided they keep within the limits of their authority; as an agent, he binds them by what he does for the firm, provided he keeps within the limits of his authority."
Thus, where a partner receives money belonging to the firm, he will do so both as principal (i.e. for himself) and as agent for his co-partners; in those circumstances, he cannot be treated as having received the money in a fiduciary capacity.
However, as Lord Lindley took care to point out, it is wrong to regard a partner as a mere surety for the firm's debts: as a principal, he is personally liable to meet those debts, whether or not they could be met out of the partnership assets."

together with footnote 29:
"29. Until the law was altered by the Partnership Act 1890 s.23, the property of the firm was, of course, liable to be seized for the private debts of any of the partners composing it."

64. *Lindley* there, as in other footnotes, simply seems to treat section 23 as being in its own terms a change from the previous law. *Lindley* does, however, deal with section 23 in somewhat more detail in chapter 19, section 4; however, although *Lindley* there draws attention to the facts that as far as the enforcement method provided for in section 23(2) of the Partnership Act is concerned, that the Civil Procedure Rules in CPR Part 73.22 and paragraph 6 of the Practice Direction to CPR 73 provide for a relevant rules mechanism/ Otherwise, *Lindley* is simply silent on the sort of questions being raised by Mr Royle as to whether section 23 prohibits the issue of general writs and as to the consequences of a writ being issued contrary to the provisions of section 23.

65. The only authority which appears to exist in this area and to which both parties have drawn my attention is that of *Peake v Carter* [1916] 1 KB 652. The situation there was that the judgment creditor, Carter, had a judgment debt against the judgment debtor, Bellamy, and the judgment creditor had obtained a writ of execution which at first sight appears to have been in general terms against the goods of Bellamy, and the sheriff had seized those goods. Mr Peake, the claimant, had claimed that certain of the goods which had been seized belonged to him, Mr Peake, and had brought a claim against the sheriff accordingly. What was held at first instance, and from which finding the Court of Appeal did not depart, was that the relevant goods had actually belonged to a partnership between Bellamy and Peake. It seems from the report that what had happened at first instance was that Mr Carter had relied on a principle which is said to have been extracted from a previous case, *Flude v*

Goldberg [1916] 1 KB 662, that where someone chose to challenge an execution alleging that the goods belonged to them alone, it was not then open to them to succeed on the basis of the goods belonging to a partnership between them and someone else; they were simply left with their primary case and if that primary case failed on the basis not that the goods belonged to the judgment debtor but on the basis that they were co-owned, then Rowlatt J (at first instance) appears to have held that *Flude v Goldberg* meant that the claimant simply lost. That was a conclusion which the Court of Appeal reversed and which was the matter before them. However in considering the case, the Court of Appeal considered the matter generally. Swinfen Eady LJ opened his judgment by stating that the relevant goods were the joint property of Bellamy and Peake and then stated as follows:

" Upon this state of facts Peake has established that the goods are his as against the execution creditor - that is to say, that he has such an interest in the goods that they cannot be taken in execution by the sheriff. By s. 23, sub-s. 1, of the Partnership Act, 1890, it is provided that a writ of execution shall not issue against partnership property, except on a judgment against the firm. Under sub-s. 2 any judgment creditor of a partner may obtain a charging order on that partner's interest in the partnership property. Previous to this enactment the sheriff under a judgment against a partner could seize and sell the interest of the partner in a partnership. Such a seizure was not adverse to the other partners; the sheriff only purported to deal with the share and interest of the partner who was the execution debtor, and it was for this reason that it was held that interpleader proceedings do not lie where the debtor's partner gives notice to the sheriff that the goods are partnership property, and alleges that the debtor has no beneficial interest in them, being indebted to the firm beyond the amount of his share in the effects. The sheriff's duty was to sell the share, though he might not have been able to ascertain the amount of actual interest: *Holmes v. Mentze*. (1) If the execution creditor disputed that any particular chattels were in fact partnership property and alleged that they were the sole property of the execution debtor, the ordinary interpleader issue would be directed to try this question: *Holmes v. Mentze* (2); *Dibb v. Brooke & Sons*. (3)

Under the present law, seeing that the sheriff is no longer entitled to seize in execution the share of a partner in a partnership, if on such a seizure a claim is made that the property is partnership property and this is not disputed, an order should be made at chambers for the sheriff to withdraw. If the execution creditor disputes the partnership with regard to particular chattels and claims that they are the sole property of the execution debtor, the other partner may maintain the claim of the partnership to the chattels upon an interpleader issue, and such a dispute will be the proper subject of an interpleader. If on the other hand the other partner maintains that certain chattels are his own property and do not belong to the partnership, this question does not properly fall to be determined on a sheriff's interpleader, as in neither case would the sheriff be right in seizing them under a judgment against the debtor partner. The dispute should be decided by an inquiry directed under s. 23, sub-s. 2, of the Partnership Act, 1890, to ascertain the particulars of the partnership assets and of the debtor's share and interest therein."

66. There, it seems to me that what Swinfen Eady LJ is doing is referring to the change from the previous law to section 23 and appears at first sight to say that if the sheriff under such a writ seized partnership property then the sheriff would not be right to do so and, "is no longer entitled to seize". Swinfen Eady LJ then went on to deal with the *Flude v Goldberg* point and said:

"The practice in interpleader is well settled, and I have dwelt upon it because the judge, in deciding against the claimant in the present case, thought himself bound to do so, owing to the decision in *Flude, Ld. v. Goldberg*. (3) This view was erroneous. That decision of the

Court of Appeal proceeded upon the facts of that particular case, and does not disturb the general rule that a claimant, having claimed under a title which he failed to prove, is not thereby precluded from relying on the title found. In *Flude, Ld. v. Goldberg* (1) the claimant had filed particulars of his claim under the County Court Order XXVII., r. 5, by which a claimant is required to lodge particulars of the ground of his claim. He stated that "the grounds of my claim are that the said goods and chattels were purchased by me out of my own proper moneys, or upon my own proper credit, from the following firms," whose names he proceeded to state. The partnership was strenuously denied by Isaacs, the claimant, both in his affidavit and in his evidence at the trial, while it was the execution creditor who insisted on the partnership, and that the goods were partnership goods and not that the goods were the sole property of Goldberg. This was the dispute between the parties. No application was made to amend the particulars, and the case proceeded at the trial on the claim as thus appearing on the record. It was under these circumstances that the Court of Appeal decided that the county court judge was right, having regard to the facts of the case, the course of the trial before him, and the conduct of the claimant, in keeping him to the record as it stood and as if limited by his particulars, and in holding that he had failed in his claim. Isaacs persisting in his claim to be sole owner of the goods, the question was left by the judge to the jury, "Were the goods in question the goods of Maurice Isaacs alone?" and the jury answered "No." This answer disposed of the claim. There was no application for leave to amend, and no application to the judge to put the question to the jury whether the goods in question were the goods of the claimant as against the execution creditor. The case must be regarded as having turned on the particular facts. Another instance of a claimant having been held bound by the particulars of his claim is *Hockey v. Evans*. (2)

In the present case the claimant, although alleging that the goods seized are his absolute property, has exhibited a copy of the agreement of July 18, 1914, to which I have before referred, showing the purchase by himself and Bellamy jointly. It may be that in substance all the beneficial interest in the chattels belonged to him, as he found all the money to buy them, and they are said not to be worth or to have realized the amount of his lien. But technically the goods belong to the adventurers jointly.

In my opinion the learned judge was wrong in deciding that he was bound by the case of *Flude, Ld. v. Goldberg* (1) to hold that there was no case for the defendant to answer. The claimant has proved a prima facie case that the sheriff was wrong in making the seizure. The judgment must be set aside and a new trial had. Any costs paid to be repaid. The appellant to have the costs of this appeal. The costs of the former trial and of the new trial to abide the event."

67. It seems to me that what Swinfen Eady LJ is doing there is simply deciding that it is perfectly proper to bring alternative cases to challenge a seizure by the sheriff being either that the goods did not belong to the judgment debtor or, alternatively, that the goods were partnership property.

68. The other judgment was delivered by Pickford LJ who said in his judgment:

"The issue came on for trial before Rowlatt J., and at the end of the plaintiff's case counsel for the defendant, the execution creditor, submitted that there was no case because the plaintiff had in hisaffidavit claimed the goods as his absolute property and when that case failed in proof could not set up a claim as partner. In support of this contention he relied on the cage of *Flude, Ld. v. Goldberg*. (1) Rowlatt J. held that he was bound by that case to uphold the defendant's contention and gave judgment accordingly. The learned judge had not the advantage of a full report of the case; if he had had, I think he would not have felt himself bound by it. It turned entirely upon the peculiar circumstances of that particular case. Something turned upon the nature of the proceedings in the county court and the

County Court Rules, but the main ground of the decision was that the conduct of the claimant in that case had been such that he ought not to be allowed to set up a case other than that on which he made his claim in the first instance. This is apparent from the remarks of Bankes L.J. in a note of the judgment supplied to us by the reporter. The learned Lord Justice said "It is just one of those cases where a claimant ought to be bound by his particulars," and it is clear that he was speaking with reference to the special facts of the case. The case did not decide that in all cases the claimant must prove the exact interest which he has alleged in his claim. The affidavit is not a pleading, and the issue is not whether the claimant has proved that all he there swore is correct; it is whether the goods are his property as against the execution creditor, and to succeed in that issue it is sufficient for him to prove such an interest as will make it wrongful as against him that the goods should be seized to satisfy the debt due from the execution debtor. An interest as partner is in my opinion such an interest. Since the Partnership Act, 1890, partnership property cannot be seized to satisfy the debt of one partner; all that can be done is to make an order charging the partner's interest in the partnership property with payment of the amount of the judgment debt, and the share can only be ascertained after satisfying all the partnership liens and other claims.

The claimant must state proper materials to enable the judgment creditor to form a correct judgment of the nature of the claim: see per Maule J. in *Webster v. Delafield* (2); Halsbury's Laws of England, vol. 17, p. 597, s. 1190; but it is nowhere decided that if heakes an incorrect statement or draws a wrong inference from those facts his claim must be dismissed. The decision of the Divisional Court in *Flude, Ld. v. Goldberg* (1) established the contrary, and was only reversed on the special circumstances of the case. There may be cases in which the claimant may be prohibited from making any alteration in his claim because it is unjust to the execution creditor by reason of his being misled as for other reasons, as in *Flude, Ld. v. Goldberg* (2); see also *Hockey v. Evans*. (3)

But in this case nothing of the kind exists. All the facts upon which the claimant relies are set out in the affidavit and exhibits, and all that can be said is that the claimant has stated a wrong conclusion from the facts, i.e., that the goods were his absolute property, and that he incorrectly stated that Bellamy had assisted him in the negotiations instead of stating that he was his partner. If the execution creditor had been willing to admit the partnership, some question as to costs might have arisen; but he is not so willing, he wishes to contest the fact of the partnership and to attempt to prove that the goods were the absolute property of Bellamy."

69. It seems to me Pickford LJ is saying in passing, "Partnership property cannot be seized to satisfy the debt of one partner" and that the judgment creditor is simply limited to the recourse which is set out in section 23(2). Pickford LJ went on to say:

"A further point was taken before us, i.e., that interpleader proceedings cannot be taken and an issue cannot be granted where the claim is in respect of a partnership. This is stated to be the case in some text-books, and the authority upon which it is so stated is *Holmes v. Mentze* (4), more fully reported in 4 Ad. & E. 127. This case does not support the proposition. According to the procedure then in force a rule was obtained calling on the claimant and the execution creditor to state their claims. The claimant alleged a partnership; the execution creditor did nothing and did not contest it. The Court discharged the rule on the ground that there was no adverse claim, but on the case coming before it again on another point Patteson J. said that if on the first occasion the partnership had been contested the case would have been within the Interpleader Act and the rule would have been granted. It is therefore no authority that even at that date a claim of partnershipcould not have been

the subject of interpleader proceedings. But at that time there was power to seize goods for one partner's debt, and the result of proving a partnership was not that the sheriff was obliged to withdraw, but that he could only sell the partner's interest and not the absolute property in the goods. Since the Partnership Act, 1890, the partnership goods cannot be seized for a partner's debt, and therefore to prove an interest as partner is to prove that the seizure was wrongful as against the claimant, and the sheriff must withdraw. A proper way of deciding whether the claim to such an interest is well founded is in my opinion by interpleader proceedings, and I can see no reason in principle or authority why such proceedings do not apply to such a claim."

70. I note in particular what Pickford LJ says in the penultimate sentence being, "Since the Partnership Act 1890 the partnership goods cannot be seized for a partner's debt and therefore to prove an interest as partner is to prove that the seizure is wrongful as against the claimant and the sheriff must withdraw".

71. Mr Royle submits with regards to *Peake*, firstly, that it is not a decision about whether section 23 applies to a general writ, then a fieri facias, now a writ of control. He submits secondly that that point simply was not argued and indeed, as far as dealing with section 23 is concerned, anything said in *Peake* is simply obiter because, as Mr Royle submits, what was being argued and decided in *Peake* was the *Flude v Goldberg* question as to whether somebody who advanced a case that the goods belonged to them alone was barred from succeeding if the Court decided that the goods were actually joint-owned partnership property rather than simply owned by that claimant. Mr Royle submits that it would be highly inconvenient if section 23 applied to a general writ, and cause great difficulties as far as the officer and agent were concerned as to determining what was and was not partnership property.

72. Mr Royle further relies on schedule 12 to submit that, firstly, in this case the officer and agent have acted properly and are therefore entitled to at least some fees and charges. Secondly, that schedule 12 provides for its own procedures and remedies and rights and defences if something has gone wrong. These are in paragraph 66 which deals with where a provision in the schedule had not been complied with or the writ was defective but also in paragraph 60 dealing with the situation where somebody else claims the relevant assets. He submits that this is all distinctly important in this context because if Parliament in schedule 12 has provided particular sets of defences with regards to High Court enforcement officers, who are, after all, acting under court writs, then it is important that those rights and defences should be given full effect. Mr Royle also submits that Marcus' case fails to distinguish between the enforcement officer and the enforcement agent in connection with his submissions that the various defences and other matters contained in schedule 12 are of very substantial importance. He further submits that it should not be possible for Marcus simply to outflank these provisions by relying on section 23 of the 1890 Act and saying schedule 12 does not apply. Mr Royle has also drawn my attention to the judgment from *Hamilton v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 2647 (QB):

> "64. Apparently accepting the point that once the court has determined the applicant's claim, the prohibition on sale in paragraph 60 ceases, Mr Royle nevertheless submits that, where there is an actual or potential appeal against the court's determination, an enforcement agent would be 'highly unwise to sell the goods in control'. It was, Mr Royle says, precisely for that reason that the second respondent made the application of 4 December 2020, in that there was a suggestion that Jacqueline Hamilton owned the vessel; and

> Mr Hamilton had embarked upon various applications, including for permission to appeal against the decisions of Master Cook. An enforcement agent would be likely to lose his protection under paragraphs 63 and 64 of Schedule 12, were he or she to sell in such circumstances.
>
> 65. I have to say that I do not accept that last concern. Paragraphs 63 and 64 of Schedule 12 confine an enforcement agent's liability to two situations. The first is where the enforcement agent 'had notice that the goods were not the debtor's, or not his alone'. The mere suggestion that Jacqueline Hamilton might own the goods does not come close to constituting such notice. The second situation is where before sale the 'lawful claimant had made an application to the court claiming an interest in the goods'. That, too, is not relevant. Mr Newett's application had been unsuccessful. Even if the position on appeal turned out to be otherwise, I do not consider that that would give rise to liability on the part of the enforcement agent".

Mr Royle says that that emphasises the importance of those particular defences.

73. Mr Burroughs, apart from submitting generally that I should only be concerned at this point with regards to Marcus' possible asserted defences to fees and charges rather than with regard to Marcus' other complaints to which he says that those paragraphs are more directed towards, submits that this is, in any event, a very different situation from *Hamilton* where in this case Mr Burroughs asserts that Marcus had raised section 23 and the property being partnership property at a very early stage.

74. I have born in mind all of the parties' submissions which were made orally at the hearing on 26 October and skeleton arguments submitted for that hearing but also in various post-hearing submissions, some of which were post-hearing submissions were delivered in response to various queries from myself. It seems to me, for reasons to which I have referred in part already but which I will deal with further in due course, that I should not deal with all these various points which have been raised by the parties but only in relation to what I would categorise as being potential knock-out points advanced by Mr Royle against Marcus, where it does seem to me that it is desirable that I should deal with the Mr Royle's main submission that section 23 for one reason or another is simply not in point at all.

75. I start off my analysis by considering what actually is a partner's interest in partnership property and as to how that is affected by a partnership being in dissolution. First, in my judgment, in general partnership property is held in law by whoever is the relevant legal owner in the sense of the property or the land or otherwise being in their name. That person or persons might be one or both the partners. However, in equity it is not strictly right to say either that they own it fully or, more importantly, that they own it in particular (undivided) shares. The position is that it is, as is set out in the excerpts which I have read from *Lindley* chapter 19, effectively held on trust for the purposes of the partnership and primarily to pay the partnership debts but otherwise as the partners may decide. That is not the same as its being held in (undivided) shares. The partners merely have rights for the property to be applied in accordance with the purposes of the partnership.

76. Once the partnership is in dissolution it is held on trust in accordance with section 39 being to pay the partnership debts and then after satisfaction of the partnership debts to satisfy the partner's various financial rights which will include the return of capital, the payment of current accounts, the payment of certain interest, and then, and only then, to be divided

between the partners in accordance with their various shares. However, the situation is again not one simply of undivided shares as in a situation where property is simply held by a legal owner or owners for beneficiaries as tenants in common. What the right actually is, is a right to have each and all the partnership property applied for those particular purposes so it cannot be said that one partner owns a particular percentage or other share of a specific item of partnership property. There is, however, as recorded in *Lindley* at 19-27, which I earlier read into this judgment, a particular exception in the special circumstance of a dissolution, and that is a situation where surviving or continuing partners have carried on a partnership in business.

77. However, it seems to me that both in the paragraph in *Lindley* and section 39 and generally that that statement has to be read carefully. It all depends on the facts and including two particular matters: firstly, the type of dissolution. Some types of dissolution are general; others actually are more in the nature of a retirement where someone has ceased to be a partner and it is those who remain who are the continuing partners, and the person who has ceased has effectively their share converted into financial entitlement. The situation before me, however, is, or at least is arguably, a general dissolution.

78. Secondly, it depends factually as to what has happened and the basis on which the after-required asset has been generated. There are two main possible situations, one being where the dissolution is simply continuing and has not come to an end and the partnership is simply trading in dissolution either actively or simply by not doing anything but simply holding on to the various assets from the past. In those circumstances the trading and the assets remain part of the dissolution and therefore seem to me to quite clearly remain as partnership property. There is a difference if what has been decided is that the partnership dissolution has actually fully taken place and has been concluded, and the partners nonetheless in some way or other continue the trade which previously existed. It is possible that that situation exists, for example, where all the partnership debts have been paid and the partners have agreed in some way or other to proceed on a consensual basis. However, again, that does not seem to me to be in this case and, even if it was, it would require evidence.

79. It seems to me that this is more the usual situation that there is a continuing dissolution, and so that assets which may well always have been assets of the partnership remain within it, remain partnership property; and insofar as the partnership has been continuing to trade in dissolution, then the assets which are the result of that trade or have been generated by it are also partnership property; and, that position thus continues, absent of other sufficient, specific agreement, until the final winding-up, and which it is common ground has not yet occurred in this particular case.

80. It may be that the position with regards to partnership shares was different before 1890; that is implicit within the citations from *Mather*, *Lindley*, and *Peake v Carter* although only to a limited degree. It may be that before 1890 the position was more that, in relation to partnership property, the person with legal title owned it but the others had rights to it, which rights might have been more of the nature of conventional undivided shares in trust law; and where, as with other trust assets, the legal owner could be compelled to use those trust assets for partnership purposes including for the payment of partnership debts but otherwise those undivided shares of each partner in the ordinary conventional trust form would exist within it, rather than the partners merely having rights to have the property applied in accordance with the terms of the partnership without having individual shares subsisting in the individual specific items of partnership property. However, whether or not that was the case, the law post-1890 is, in my judgment, as to how I have just set out and that is consistent with *Mather*, *Peake v Carter*, and *Lindley*.

81. Also importantly it seems to me that all of those authorities make clear that the enforcement procedure where there was partnership property in relation to debts of an individual partner changed in 1890. Before 1890 it was possible to enforce against partnership property by a writ which was directed to the goods of that particular partner, but the way in which that was done was simply by enforcement against that partner's share in the goods. It is unclear to me as to how exactly that mechanism of enforcing against the partner's share took place, although it would seem that something would be sold and, according to Swinfen Eady LJ in *Peake*, what happened was not in any way adverse to the other partners. It is unclear to me as to whether or not the sheriff could actually seize the property itself but it does seem that in some way or other the sheriff could sell the judgment debtor's partner's share; however, it does not seem to me the precise mechanism involved matters because I am concerned with a post-1890 situation.

82. It is clearly held in *Peake v Carter* that there was a change in 1890, and it is further held in *Peake v Carter* that the effect of section 23 is in some way or another, at least under the then enforcement law, that, in principle, the sheriff cannot seize or get involved with regards to what is partnership property, and what the judgment creditor has to do is to go down the route of obtaining a charging order and then consequential sale or receiver or perhaps other consequential remedy. It seems to me that that provision was introduced by the statute possibly as part of a reflection of a change in the nature of a partnership share; but that it does not matter whether or not that is the underlying justification because section 23(1) is just simply clear in its terms when it says that a writ will not issue against partnership property. It seems to me that *Peake v Carter* simply affirms that, although subject to other points to which I will come.

83. As far as Mr Royle's raising of the question as to whether section 23 has any application in the circumstances of a dissolution, it seems to me that it does; the relevant property remains or indeed can become partnership property notwithstanding the dissolution. I do note that that is actually what the deed says; but it seems to me that that would be the case even if the deed was silent on the subject. However, I am also in the position that I cannot say what is and is not partnership property; it seems to me that that question is and has to be all for another day.

84. The next point of Mr Royle's which I will deal with is his submission that section 23 does not apply unless the writ is directed to specific property and not generally against the goods of the debtor. In the circumstances which I have referred to earlier in this judgment I do not agree with that submission for the following reasons. Firstly, section 23 refers to a "Writ of execution" and not just any specific type of writ such as a writ of delivery or a writ of extent. It is true that CPR 83.1(2)(l) defines writ of execution on an inclusory wide basis but specifically excluding writs of control; however, it seems to me that that is simply a definition which exists for a statutory purpose of CPR Part 83 and does not affect the construction of section 23 of the 1890 Act. I simply see the words "writ of execution" on a first reading as being general.

85. Secondly, it seems to me that the policy of section 23 is to recognise in some way or other the special nature of a partnership share and the special status of partnership assets and to provide a special procedure accordingly. That is exactly what section 23 does; and it seems to me that that policy would be undermined if in some way or another section 23 could be evaded simply by obtaining a general writ of control, and I note that that would have enabled an evasion before the 2007 Act by a creditor simply obtaining a general writ of fieri facias, as indeed was the position back in 1890.

86. Thirdly, it seems to me that the actual outcome in *Peake* on the facts are simply contrary to Mr Royle's submission. There is no suggestion in *Peake* that the writ there was simply

limited to particular property; it seems to have been general in its terms. Fourthly, and linked to that, it seems to me that the reasoning in *Peake* is simply inconsistent with Mr Royle's submission. It is correct that the point was not argued, but it seems to me that if the Court of Appeal in any way viewed the concept of "writ of execution" as being limited to specific writs then they would have remarked upon that.

87. I have considered this in the manner required by the modern law of interpretation being a holistic, intuitive approach of considering together all the possible constructions in the light of the words used and the underlying purpose, and asking myself which is the best interpretation. It seems to me that, looking at it in that manner, the words are simply clear. Further the underlying purpose also supports the words "writ of execution" as applying to any writ seeking to execute against property, and that applies precisely to a writ of control. I therefore reject Mr Royle's submission. As I said previously, I also reject the submission that he made, albeit only to a limited extent that section 23 was in some way or other inconsistent with the 2007 Act and schedule 12. As far as I can see, section 23 simply provides that the relevant writ should not issue in its particular circumstances.

88. I deal next with Mr Royle's points that this should not matter, in the circumstances of this case, to the High Court enforcement officer and the enforcement agent because they simply are faced with a writ which contains a command to them, and that they, as stated in the *R (on the application of Majera (formerly SM (Rwanda)) (AP) v Secretary of State for the Home Department* decision, should be able to, and indeed are actually bound to, treat the writ as being proper and valid unless and until it is set aside or varied. It seems to me that *Majera* and this principle are not an answer to Marcus' case. However, it seems to me that I should only decide that and not go any further into deciding particularly why *Majera* is not such an answer. It seems to me that if I was actually to reach a decision that it was for a particular reason, then that would potentially give rise to various consequences, both substantive and procedural, and where it does not seem to me to be appropriate in the light of the overriding objective to reach such a decision at this hearing. However, it does seem to me that I can decide that *Majera* is simply not an answer because, in my judgment, at least one and quite possibly more than one of the following matters apply.

89. Firstly, *Majera* itself makes clear that it is possible for a court order to be effectively overruled by legislation; a modern consideration of this would be in relation to the law of torture, where there is a general principle of human rights law that torture is simply impermissible and where at first sight, although I am not deciding this, it would therefore seem difficult to see that a court order could be regarded as authorising torture. That is a very different situation from this one but it does seem to me that there is at least potential for a court order to be invalid or at least not to confer any authority where it is actually contrary to the express words of an express statute. That appears to have been the Court of Appeal's view in *Peake* where they held that, because of section 23, the sheriff was not entitled to seize the relevant goods and was bound to withdraw; and with there being no indication in *Peake* that it was necessary to set aside the writ first.

90. As I said, I am not deciding that this is necessarily the correct analysis here. It seems to me that there is a strong argument following *Peake* that the Court should just simply proceed on the basis that the High Court enforcement officer and enforcement agent should also have proceeded on the basis that the writ simply does not justify the seizure of partnership property, and that is not withstanding that it is a High Court writ.

91. However, even if that is wrong, the question would then arise as to whether or not this writ actually extends to partnership property. As Mr Royle points out, it is not a writ which is specific in terms of being directed towards specific property; it is simply generally directed to take the goods, chattels, and other property of the claimant, and I ask myself that as to

whether, as a matter of interpretation, that extends to partnership property which in one sense is the property of the claimant; it may be in their name or it may be in joint names.

92. On the other hand, the wording, it seems to me, is perfectly susceptible to an interpretation of applying to the sole property of the claimant or possibly co-owned property but which co-owned property is not partnership property. There is a general maxim of interpretation that in construing a document, and in particular a legal document, whether court order or statutory regulation or otherwise, that the document will only seek to achieve or authorise that which it is legitimate to achieve or authorise, and section 23(1) in my judgment makes clear that it is illegitimate to authorise execution against partnership property. It seems to me that that perfectly affords an answer to the *Majera* point even if the court order is to be regarded as being valid and effective absent being set aside or varied.

93. Thirdly, even if those points are wrong, paragraph 4 of schedule 12 only entitles the enforcement agent to use the schedule 12 procedure in relation to goods which are not goods which "are protected under any other enactment". At first sight it seems to me that section 23 does exactly that; it provides that a writ of execution is not to be issued against partnership property and it seems to me that that affords such a protection. Again, though, I am not reaching a final conclusion about this; it simply seems to me that in one way or another for the preceding reasons, this reason, and other reasons which I will come on to, section 23 is in point.

94. Even if I was wrong in my preceding analysis, it seems to me that on that assumption one or other element of paragraph 66(1) would apply. Paragraph 66(1)(a) is where there has been a breach of a provision of the schedule. If the paragraph 4 point is applicable, that these goods are protected by section 23, then a question would arise as to whether that means that if they are seized there is simply a trespass to goods or whether the schedule is in point but paragraph 4 has been breached. That, it seems to me, is a question which I should not be deciding at this point because it has complex ramifications, needs full argument, and the parties may well, in the light of whatever are the factual contentions and claims eventually being advanced by Marcus, wish to tailor their arguments accordingly.

95. However, if there is not a breach of a provision of the schedule and the writ is nonetheless valid, and the writ's construction is such that it does extend to partnership property or at least the assets which have been seized notwithstanding that partnership property i.e. that all my previous considerations were incorrect;, then it seems to me that in those circumstances paragraph 66(1)(b) would apply. Paragraph 66(1)(b) applies to an enforcement power under a writ that is defective. I end up asking myself what can be meant by "defective" in relation to a writ since, in principle, a writ is simply what it is and it either is a writ, in which case, under *Majera*, if that is applicable, it is valid, or it is not, in which case it is not a writ at all. So I have to ask myself as to what can be meant by a statutory provision operating where a "writ is defective". Whatever is the ambit of those particular words, it seems to me that if it is a valid writ (not having been set aside), but is a writ which has been issued contrary to an express provision of act of Parliament in the form of section 23, then it must come within the meaning of being defective.

96. For all those reasons, one way or another, it seems to me that section 23 is in point here and applies to this particular writ, and that the *Majera* general argument (i.e. the officer and the enforcement agent had been acting under a sealed writ which has not been set aside or varied) is not an answer.

97. However, the difficulty which I have is that I come to that conclusion only one way or another (i.e. that the conclusion is inevitable whatever route is taken to reach it) but it does not seem to me that I should decide which is the correct way or ways. Firstly, because those different routes may well have different consequences in terms of Marcus' various possible

claims. Secondly, with regards to the different routes, I am not sure that all the arguments have been deployed or all the ramifications considered as to what would happen if one route or another was correct. Thirdly, although I consider that, as a result, a substantial question exists as to what, if any, fees can be recovered, the answer to that question will depend very much on what is the correct route. Likewise various other matters will arise dependent upon whatever is the correct route, and, for example, the existence of reasonable beliefs may be relevant in relation to some routes but not others. Fourthly, that for me to effectively postpone that aspect it is more likely to be prejudicial to Marcus than to the applicant, and it seems to me that Marcus should be first deploying his full case before others so that others can assess the various ramifications and what they wish to argue rather than something simply being decided in somewhat of a vacuum It seems to me those others may be prejudiced if I decide which is the correct route(s) now because they might be able to say in the future, "Well, if we had known, Marcus, that you were going to end up bringing such-and-such a claim we would have argued as to whatever is the correct route(s) differently". It seems to me that, applying the overall objective, all I need to do is to determine at this point that section 23 is in point and applicable to this particular writ and *Majera* is not just simply a knock-out answer, and to leave the question of precisely why and which is the applicable route(s) for a further stage.

98. In conjunction with that is Mr Royle's point that Marcus, if he is going to bring a claim, should be using the paragraph 66 of schedule 12 procedure. I am not entirely sure that is right because it may depend on which procedure Marcus can best use; some of the procedures might actually seem to require a claim form; others such of the paragraph 66 procedure may only require an application notice. However, it does seem to me that it is undesirable to raise a situation where it would effectively determine that one procedure rather than another is the appropriate one, leading to the possibility of an interim appeal with regards to what I have decided, which would produce undesirable uncertainty with regard to the future progress of this claim. It seems to me much the best to do is, rather than coming to any concluded view as to what is the correct legal analysis, to decide only that: (i) section 23 is in point (ii) Mr Royle's knockout arguments do not succeed to achieve a knockout at this particular point and (iii) to direct instead that Marcus should actually bring his relevant claims within a particular period in time, which will result in some global statement of case being advanced, and (iv) that the matter can then be properly case-managed from that point and including with whoever are the respondents to those claims, be it the enforcement officer, the enforcement agent and/or, I suppose, possibly Christopher, with those persons all in a position where they can have considered what defences they wish to advance and what arguments they wish to advance, and the Court can case-manage matters on an holistic basis. That therefore is generally what I am going to do with regards to section 23.

99. I come on to what I can also deal with in terms of the issues which are subject to the section 23 point; and where Marcus may be seeking to say that section 23 invalidates the rights of the applicant to charge entirely but which arguments are for another day. It seems to me that I can deal with the four specific items which are in dispute, assuming (which I have not yet decided) that the officer and the enforcement agent are entitled to charge.

100. The first item which is in dispute is being framed in two particular ways, although it seems to me that the point is the same in both. It is a combination as to what was actually generated by the auction and remitted by the auctioneers, and the question of the auctioneer's buyer's premium. What the auctioneers have provided at page 65 of the bundle before me is a general statement of account, where, as far as income is concerned, there are various columns including amount, VAT, and paid. As far as income is

concerned, there are two items; auction sale and buyer's premium, the auction sale item being stated to be as "amount and paid" £458,970 with a VAT of £76,495; the buyer's premium being stated both as "amount and paid" to be £29,833.42 and the VAT being £4,972.36. There are a number of items of expenditure described as misc. expenses where in each line there is given as "amount" what appears to be a net of VAT figure, then there is a VAT figure, and then as "paid" there is a gross figure of the two amounts being added together; thus for buyer's premium the amount is stated to be £24,060.88 which, together with VAT of £4,972.18, adds up to the total of £29,833.06. Mr Burroughs points out that this seems inconsistent insofar as under the income column is concerned, VAT is identified but "amount and paid" are the same figure whereas, under expenditure, VAT is identified but "amount" and "paid" are different figures, and he submits that something has gone wrong here and that the buyer's premium is not justified.

101. It seems to me that the auctioneer's statement is intensely confusing but is readily explicable especially when document number 67 in the bundle is considered, which identifies the buyer's premium as being 6.5% of the gross sale proceeds of £382,475. What this indicates, and the mathematics, it seems to me, is correct, is that the 6.5% was applied to a gross sale proceeds net of Value-Added Tax figure of £382,475 figure and a gross sale proceeds gross of Value-Added Tax £458,970.00 figure. The buyer's premium was calculated with regards to that, giving a net of VAT figure of £24,860.88 (6.5% of £382,475) and VAT £4,972.18 (being 20% of £24,860.88 or 6.5% of (£458,970-£382,475) – the calculation is effectively the same and with the same outcome).

102. It is somewhat unhelpful that in the summary account the amount figure was stated as being the gross of VAT figure rather than the net of VAT figure. However, since the buyer's premium appears in both the income section and in the expenditure section, it seems to me that it is simply equalised out, and that is the explanation for what has happened in the summary section. The summary section goes on to add the gross auction sale proceeds and gross buyer's premium together as providing total income and then deducts the various expenditures but the expenditures are deducted not with regard to their net of VAT figures but with regards to their gross of VAT figures to produce a residual amount of £443,785.12 paid to client. Although VAT then needs to be accounted for, presumably on the basis of calculating the difference between VAT received as part of the income less VAT paid out as part of the expenditures, and accounted for to HMRC, that is a matter just simply of internal accounting. Effectively; the £443,785.12 was an-inclusive-of-VAT figure and thus would give rise to a net of VAT figure from it. However, it seems to me that no difficulty exists as a result of that.

103. Mr Burroughs, however, has raised some query as to whether or not this is a legitimate way of proceeding with regards to auctioneer's commission under Regulation 9 of the Fees Regulations. That, as I have already stated, provides the enforcement agent may recover from the debtor a sum in respect of auctioneer's commission not exceeding 15% of the sum realised by the sale of goods, although because of what has happened that may have been under Regulation 9(3) limited to 7.5%, albeit I do not have to determine that because it does not matter on the facts of this case. It seems to me that what has happened is justified.

104. It is unclear to me as to whether what was actually required of a bidder at the auction was a bid of a particular price on the basis that, if that bid won the auction, then the bidder would pay that and would pay an additional buyer's premium, or whether the auction was calculated on the basis that the bidder would bid a particular amount, the bidder would only pay that amount, and the auctioneer would deduct from that amount the buyer's premium. It seems to me likely that it was the former case since the latter case would be more accurately described as a seller's premium.

105. However, I do not think that it matters. What is permitted by Regulation 9(2)(a) is for there to be an auctioneer's commission which must not exceed a particular percentage of proceeds. Even if the more likely analysis of what happened is correct and so that the bidder was paying one amount together with a buyer's premium, it seems to me that that still represents auctioneer's commission for the purposes of Regulation 9(2)(a). The reality is that the bidder was making a bid which was a bid to pay a global total sum whether that bid was for a total figure (including a buyer's premium) or for a net figure which would give rise to an additional obligation to pay a buyer's premium. It is the bid and the sale of the goods which has generated the buyer's liability(ies) whether that was one or two payments, the total is the same. It is not a situation that the buyer was simply paying a bid amount and with the obligation to pay a buyer's premium is wholly separate. Rather it is simply a matter of mechanics; the buyer is, by making a bid and winning the auction, placing themselves under a liability(ies) and the satisfaction of that liability(ies) is the simply a matter of the process of that particular auction sale but includes the auctioneer's commission; so that, whatever has happened in theory, the buyer's premium is properly treated as auctioneer's commission because it is the price charged by the auctioneer to be paid by the prior and has been calculated by reference to the net sale proceeds. All I have do, in accordance with the Regulation, is to ask whether the buyer's premium was less than 15% or, possibly, if it was less than 7.5%. Technically, as a mathematical calculation, it seems to me that the correct calculation is not 6.5% of the bid, but 6.5% of the overall amount which would be in fact 6.1% of the total, but it does not matter because, in any event, 6.5% is less than both 7.5% and 15%. Therefore it seems to me that, in principle, subject to the section 23 point, that is a legitimate recoverable disbursement.

106. The next matter are these: in two amounts, one being £7,000 and one £764, in relation to what Ms Sandbrook has described in paragraph 10 of her witness statement in support of the application as being significant advice and assistance from the auctioneers which she says it was necessary to take in connection with the auction sale, as: the impact of the Covid pandemic caused the first auction sale to be cancelled; and it was necessary to take into account how the auction sale could be concluded in compliance with the Covid regulations; and she says that that was advice from an auctioneer as to what type of auction would be determined upon and how it should best be conducted.

107. Ms Sandbrook originally sought for this to be recoverable under Regulation 10 as being an expenditure necessary for effective enforcement. Mr Royle in his submission rather disclaimed that and said that it came within Regulation 9, in particular Regulation 9(2)(c) as reasonable disbursements incurred in respect of advertising the sale. It seems to me that it is correct that it does not come within Regulation 10 where the cost is for advice from the auctioneers themselves as to how the auction should best be set up and conducted. It does not seem to me that that comes within Regulation 10 for two reasons. Firstly, it does not seem to be necessary for effective enforcement; it was always perfectly possible to sell online notwithstanding the pandemic, and in any event it is a matter which is much more related to sale rather than enforcement itself. Second, it seems to me that it is effectively part of the fees of the auctioneer; and the fees of the auctioneer are being dealt with by Regulation 9, not Regulation 10. All this is is advice from the auctioneer which is of the nature that auctioneers have always provided as part of their role in selling the relevant goods (and where their services are remunerated by way of their auctioneer's commission), albeit in this particular case what happened was conditioned by the fact of the Covid-19 pandemic and regulations.

108. It seems to me that, as far as auctioneers' fees and expenses are concerned, they are dealt with by Regulation 9 and, even if the matter could otherwise be said to come within

Regulation 10, it seems to me that that is not permissible; these regulations are clearly structured so that auctioneers' fees, whether fees or expenses or disbursements, are dealt with by Regulation 9, and that particular fees for the advice about how the auction should be conducted itself are simply ordinary auctioneer matters which would ordinarily be dealt with as being part of the justification for the auctioneer being able to levy their commission in the first place.

109. I also do not see these as being auctioneers' out-of-pocket expenses within Regulation 9(b). I also, notwithstanding Mr Royle's contentions, do not see them as being reasonable disbursements incurred in respect of advertising a sale. It seems to me that that provision is directed towards actually incurring a disbursement on advertising, for example with an advertiser or alternatively by setting up a mechanism to advertise. It does not seem to me that that provision can be applied to taking advice from the auctioneer about how best to time and conduct the auction or even as to how best to advertise it. Those matters, it seems to me, are just simply within the ordinary matters which are dealt with by the auctioneer and falling within the auctioneer's commission. They are not matters where a charge can be described as a separate disbursement even if, of which I am not satisfied anyway, it could be said to be in respect of advertising a sale. As far as auctioneer's commission generally is concerned, it has been dealt with by the buyer's premium. It seems to me that this simply does not come within Regulation 9(c), and I shall determine accordingly.

110. The next matter is security which was provided to the premises by means of the officer/agent instructing separate security contractors, and their advice as to this was obtained, and where security costs were occurred in the sum of £7,820 together with some limited advice costs. Ms Sandbrook deals with this in paragraph 11 of her witness statement the contents of which I accept. I note that the assets were of high value and that these were assets which are of a nature as to be prone to risk of theft, and particularly so in conjunction with their location at a farm where an enforcement process was taking place, which therefore may have created certain vulnerabilities. I also note that, as Ms Sandbrook deposes, and which evidence it seems to me I should simply accept, in fact, the envisaged risk proved to be something of a reality, in that people did attempt to access the premises and take away, in effect steal, the relevant goods.

111. Mr Burroughs responds that Marcus had himself offered to provide security at his own expense and submits that the officer and agent should have accepted that, and that the incurring of this expense simply was not necessary. As far as those submissions are concerned, firstly, it does not seem to me that that is really evidenced from any material in the bundle; but, secondly, even if it was, it does not seem to me that it is remotely satisfactory for an officer/agent to be put in a position of having to accept that the judgment debtor should provide relevant security, and all the more so where the judgment debtor is actually evincing some considerable opposition to not only the judgment creditor but also the officer and agent. It seems to me that the officer/agent to leave matters up to the judgment debtor would, in principle, be obviously incurring a set of risks, on the basis that they could not rely on the judgment debtor, which they should not have to undergo at all. The enforcement is taking place precisely because the judgment debtor has not complied with their obligations to pay the judgment debt, and at first sight the judgment debtor is to be seen for these purposes as being simply unreliable.

112. I then have to ask myself, as to whether or not Regulation 10.3 is satisfied i.e. whether I am satisfied that the disbursements were necessary for effective enforcement of the sum to be recovered, particularly bearing in mind the amount of the sum, which was large, and the nature and value of the goods which I have already dealt with. In all those circumstances, for the reasons which I have given, it does seem to me that it was necessary for effective

enforcement, and I therefore will determine that, subject to the section 23 points, these were exceptional disbursements.

113. The next matter is a question of advice from the solicitor which the officer and agent took in relation to correspondence which was being had with Mr Marcus Herring with regards to his various disputes, including with regards to section 23 and the property being partnership property. I cannot see that this expenditure was "necessary for effective enforcement". I am not at all convinced that it even concerned the process of enforcement in itself. As far as I can see, enforcement can perfectly well take place effectively without it but, in any event, it does not seem to me to be directed towards enabling enforcement to be effective, and it is more directed towards the questions to whether or not it was appropriate to seek to enforce at all. I do not see it as coming within Regulation 10(2) at all.

114. A minor point was raised with regards to various mileage which Masons had charged and their precise rates. As far as I can see, Masons raised the various charges. At first sight they appear to be auctioneer's out-of-pocket expenses under Regulation 9(2)(b), and it seems to me that, subject to the section 23 points, that I can determine that those are, in principle, recoverable.

115. I did on occasion mention previously that this was somewhat of an unusual situation in relation to section 23 of partnership property in the light of the fact that the judgment creditor is themselves the other partner. I am not sure if that takes matters any further but it is a further reason as to why I regard it as being inappropriate to go any further on section 23 other than determining that it is, in principle, in point for the reasons which I have given.

116. I have also borne in my own mind the fact that, as far as the division of the proceeds are concerned, in terms of them being divided 50/50 after deduction of the asserted fees and charges and the judgment debt between Marcus and Christopher, that is not necessarily what the Partnership Act provides under section 39 because it all depends on the final partnership account; however, no one has taken any point about that before me and therefore I say absolutely nothing further about it.

117. It seems to me, therefore, that I have decided that, subject to section 23 and its consequences, I have determined what I think were the various disputes with regards to Regulations 9 and 10 and the amount of the proceeds. As far as section 23 is concerned, it seems to me that what should be done now is that Marcus should have a particular period of time in which to advance his case by a relevant originating process as to what he says are the consequences of the breach or contravention of section 23. What that process is, whether it is claim form or application notice or both, is not something that I am minded to determine, at least at this point; it is for Marcus to decide what case he is going to advance and how he is going to advance it. He should have a particular period of time in which to do that, which will also include his setting out what he says is his challenge to the various fees and charges, either all together or, alternatively, in relation to some apportionment of the partnership property and non-partnership property, and obviously that course will also require him to identify as to what he says was partnership property and what he accepts was not. I would envisage that the best way to deal with it is, as long as there is the correct originating process, is that: there should then be some global statement of case, in order to avoid a multiplicity of documents; whoever he is bringing the case against should have a period of time in which to produce some global defence; and matters should then come back, in effect, for a further case management hearing, and which might even be a costs case management hearing. At the moment it seems to me to be difficult to direct anything more than that, although in fact it might be less, but I will hear submissions from counsel.

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End of Judgment

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