Neutral Citation No: [2022] NICh 6 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **GIR11798** *ICOS No:* *Delivered:* **08/04/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

IVAN WILLIAM CHARLES McKEE

Plaintiff

and

ROBERT JOHN PENTLAND McKEE
(otherwise known as Robin McKee)

Defendant

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SIR PAUL GIRVAN

Introduction

[1] By Writ of Summons issued on 1 December 2016 the plaintiff claimed an order for the dissolution and winding up of a partnership made between the plaintiff and his father, the defendant, trading as R McKee & Sons. At the heart of his claim he seeks a declaration that the lands of the plaintiff and the defendant (which were admittedly used and farmed together by the plaintiff and the defendant from the commencement of an admitted partnership until its termination) constituted partnership assets. The lands were agricultural lands and used for the growing of potatoes, various types of vegetables and other crops. The lands are located in the North Down area renowned, in particular, for the growing of Comber potatoes.

[2] If the plaintiff is correct in this claim it would follow that in winding up the affairs of the partnership those lands would have to be sold and the moneys raised would have to be included in the partnership assets to be divided equally between the plaintiff and the defendant after discharge of partnership debts and liabilities and after finalisation of accounts of sums due by or to either or both partners. The plaintiff in his writ seeks in the alternative a declaration that the lands are held on a joint tenancy or tenancy in common and a declaration that the plaintiff has a beneficial half interest in the lands.

[3] In the proceedings the defendant denies the plaintiff's claim in respect of the lands. He disputes that the lands became or ever constituted partnership assets. It is the defendant's case that the lands remained in the individual registered ownership of the plaintiff and defendant. The defendant counterclaims against the plaintiff and he makes a substantial number of claims which, if established, would affect how the final account between the plaintiff and defendant should be drawn. These claims include, for example, the proposition that the plaintiff misappropriated cash and income of the partnership which he failed to properly declare and it is alleged that he took an unfair share of the farm machinery after the end of the partnership.

[4] In opening the case Mr Jonathan Dunlop, counsel for the plaintiff, concentrated on the issue of the lands. The outcome of the land issue will undoubtedly be the key issue in the finalisation of the partnership dissolution. The other issues raised in the counterclaim have not been finalised in terms of quantification or in relation to the identification of the triable issues to be determined by the court and of the nature of the accounts and enquiries to be determined by the Master. In the course of the trial in the light of submissions made by counsel it was decided pursuant to Order 33 rule 3 to proceed with the land issues and to leave other disputes for a later hearing.

[5] It was accepted by Mr Dunlop that as pleaded originally the Writ of Summons and Statement of Claim did not fully reflect the case being made by the plaintiff or the true issues which he was seeking to raise as spelt out in the written explanatory submissions which the plaintiff lodged in court before the commencement of the trial. Mr Dunlop reformulated and sought leave to amend the Statement of Claim. It was also apparent that the land referred to in paragraph B of the original Writ was not the totality of the land which the plaintiff claimed constituted partnership lands and the plaintiff also sought leave to amend the Writ accordingly. The applications to amend both the Writ and the Statement of Claim were granted.

Identification of the relevant lands

[6] At the time of commencement of the partnership the lands which were to constitute the areas to be farmed in partnership by the plaintiff and the defendant were contained in various registered Folios, some in the name of the defendant and some in the name of the plaintiff. Three different farm names applied to the lands (Ballyrickard Farm, Ballyhenry Farm and Mullans Farm.) The relevant Folios comprise DN44436 and DN43783 Co Down in the name of the plaintiff and Folios DN 19714, 1269, and 45206 in the name of the defendant and Folio DN137258 in the name of the defendant and his wife Margaret.

[7] Ivan McKee was born in 1971. He lived in his youth with his parents. The family farmland consisted of three different blocks of land at Ballyrickard, Grove Farm and Ballyhenry. His grandfather, and later his father, grew vegetables

including Comber potatoes and had a few beef cattle. A partnership was formed between the defendant, his brothers Mark and James, after the death of the grandfather. The plaintiff after studying at Greenmount joined the partnership at the age of 20. The partnership was known as RJM Farms and was established under a formal partnership agreement. The plaintiff in due course married and was given 3 Moat Road by his father after the death of his grandmother. He raised money and mortgaged to do it up and the house which is in folio 44436 Co Down was put into his wife's name.

[8] The running of RJM Farms partnership appears at times to have caused problems between the partners. The plaintiff alleges that he was bullied by his uncles and that on occasion he was assaulted. He also alleges that he never felt that he was well treated by his father who he claimed treated him more as a brother than a son. Ultimately, it was decided in the Autumn of 2007 to wind up that partnership and it was dissolved as from 31 March 2008.

[9] The land holdings used by the RJM partnership comprised various folios registered in the names of the defendant, the uncles and the plaintiff. It is accepted that these lands were never converted into partnership assets in that partnership. In the accounts of RJM Farms the lands appeared as tangible assets of the business but each partner's separate land holding was recognised in the capital accounts of the individual partners.

[10] Around the time of the decision to dissolve the RJM partnership the plaintiff and the defendant discussed the creation of a new business to be run by the plaintiff and his father separately from the uncles. According to the plaintiff, he and his father discussed a new partnership in the farmyard.

[11] The precise course of these conversations is of central importance because on the plaintiff's pleaded case it was as a result of those conversations that the plaintiff and the defendant reached an agreement to establish an equal partnership and to combine their respective individual land holdings so that they should become partnership assets. In view of the importance of establishing accurately the evidence given on that aspect of the matter I obtained a transcript of the evidence in chief of the plaintiff. So far as material, the evidence establishes:

(a) In reply to Mr Dunlop's question as to whether there were there any discussions between the plaintiff and his father about forming a new partnership the plaintiff's answer was "Yes, my father said, I said, I wanted out, I couldn't cope with it any longer and he said if you want to farm in your own right, I'll come with you and help you. … he said we can farm together, family (inaudible) into the job – family farms and family farms when you come up in it."

(b) Subsequently, the plaintiff said the defendant said "Come with me. We discussed it on numerous occasions in the yard. One time I actually said

"how is this going to work and he said well look we are going to (inaudible) we have land … we have machinery and we have assets, money as such, we can farm together and I'll give you a hand and direction."

(c) I asked the witness to explain what land he was referring to and his reply was "land that you know were into each other's names." To my question "Was that spelt out in those terms or was it a more general reference to there are lands?" his answer was "it was, it was lands that we had collectively together, we were putting together." It is to be noted that the plaintiff appeared to be putting his interpretation on what he thought his father was saying rather than giving precise evidence as to actual words used by his father.

(d) Similarly, the plaintiff in response to my question "What was the agreement or discussion or arrangement that you say you made with your father about how those lands, which were in separate names, were to be treated?" His reply was "They were all to be treated as one, we were farming them collectively as the partnership." I further asked, "Was it your understanding and was something said to lead you to believe that the title would be arranged in such a way that you would both own the lands?" The plaintiff's reply was that "It was to be arranged that we were both to have all the lands and were borrowing money collectively from the Northern Bank, the Danske Bank, and from all those lands and were all farmed as part of Robert McKee & Son". He later said "they – they were all – I assumed and was led to believe from my father that they are all assets of the partnership." Asked if he understood the legal niceties of partnership property he conceded that he may not have been up to full speed on that but he did partly. Asked by me as to what was his understanding his reply was "My understanding that everything that we had put together we would farm it together and we would borrow money together, it was all in a security on any loan we had."

(e) He said his father said a written partnership agreement was not necessary and that was conceded by the defendant.

[12] The partnership between the plaintiff and the defendant started to operate from 1 April 2008 and profits were shared equally. Accounts were prepared by the new accountant, John Neeson, who was engaged from 3 December 2007. He was also involved in relation to details of the intended split of the RJM Farms partnership. According to the evidence of Mr Neeson he met the plaintiff and the defendant to discuss the finalisation of the RJM Farms accounts to 31 March 2008 and to review the machinery and the initial lodgements which would comprise the said R McKee & Son opening accounts. Thereafter, there were annual reviews of the accounts. Mr Neeson, whose evidence I accept, said that when the first balance sheet of the partnership was constructed for the accounts for the year ended 31 March 2009 neither partner requested that the lands be included. Without any detailed discussion with the partners and without explaining the significance or potential consequences Mr Neeson took it upon himself to introduce into the accounts as

partnership assets the lands registered in the individual names of the plaintiff and the defendant (and land which was partly in the name of the defendant's wife). He did not follow the practice that had been followed in the accounts of RJM Farms of bringing together the partners' individual land holdings and recording them as tangible assets of the partnership but also recording the individuals' capital accounts and the value of their respective land holdings. The fact that in succeeding years the lands were consistently called partnership assets has undoubtedly reinforced in the plaintiff's mind a belief that the assets were partnership assets. It will be necessary to return to the question whether Mr Neeson's unilateral decision to so designate the lands requires the assets to be so treated as partnership assets.

[13] The partnership continued, apparently successfully, for a number of years. However, a serious breakdown of relationships between the plaintiff and the defendant occurred in the summer of 2015. It seems that there had been underlying tensions beginning to emerge between the plaintiff and the defendant who clearly nursed a sense of grievance about the nature of his relationship with his father and there were tensions between the defendant and the plaintiff's son, Jonathan. The plaintiff and his wife went on holiday to Australia and Jonathan, then aged 17, stayed at home on the farm to help with the farming. While the plaintiff and his wife were away relationships between the defendant and Jonathan deteriorated badly with the defendant allegedly becoming very unpleasant and abusive towards Jonathan. Another worker on the farm also alleged that grossly unpleasant remarks were made by the defendant. When the plaintiff returned from holiday, he found Jonathan distraught and many bitter words were spoken between the plaintiff and the defendant. The plaintiff demanded an apology for the defendant's behaviour. There is dispute as to whether or not such an apology was ever given. The plaintiff denies that he received one. Relationships had broken down irretrievably and the plaintiff decided to terminate the partnership. As the counterclaim makes clear there had been a developing series of grievances on the part of the defendant in relation to the plaintiff's conduct in connection with the partnership over recent years.

[14] Following the decision to dissolve the partnership it was agreed that lands would be sold to pay off the bank, which had security over lands registered in the names of the plaintiff and the defendant. Although one of the factors leading Mr Neeson to include the land as apparent tangible assets in the partnership accounts was to give "heft" to the accounts in the eyes of potential creditors such as the bank, the fact is that the bank had perfectly good security against the land individually owned by the partners according to the registered title. The defendant sold a portion of this land to raise £176,000 to help pay the bank debt and the plaintiff sold a portion of his lands realising £251,000 leaving a net balance of £67,880.02 still in the plaintiff's possession. Items of machinery were sold pursuant to the agreement although there is some dispute as to whether the plaintiff has received more than a fair share of the machinery.

[15] The defendant, in his evidence, denied ever using words that the lands would all be put together. As noted, the words "put together" appear to have been an

interpretation that at the time or later the plaintiff put on what his father had said. The defendant denies any discussion about land title or ownership. He denied any discussion about bringing the lands into the partnership. He said he did not have any discussion with the accountant suggesting or accepting that the lands should be treated as full partnership assets. He had no recollection of Mr Neeson saying anything about the inclusion of the lands as partnership assets or that they would make the accounts look more robust. He accepted that it appears that the plaintiff has got it into his head that the land was put into the partnership but the defendant said that was not what he intended and he did not believe or accept his land had ever become a partnership asset.

Relevant principles

[16] The onus of proof lies on the party asserting that property is a partnership asset. Whether or not an item is partnership property is a matter of agreement express or implied. The court may infer an implied agreement that property has been brought in or acquired as partnership property from surrounding circumstances. If there is no express agreement that a farm will become an asset of the partnership carrying on the farming business the English courts are reluctant to imply one for the business efficacy test. In *Ham v Bell* [2016] EWHC 1791 the court accepted that it was:

> "not necessary to imply that the farm on which crops grow or animals are grazed is an asset of the partnership. Such a partnership can work perfectly well on the basis of the land-owning partners making the land available to the partnership for the use of a partnership business so long as it continues and that could happen perfectly well without any change in the ownership of the farms."

In *Wilde v Wilde* [2018] EWHC 2197 the court accepted that this was a common arrangement in farming businesses. See also the Scottish case of *Jack v Jack* [2016] CSIH. In *Re Christie* [1917] 1 Irish Reports 17 O'Connor MR noted the overriding importance of the agreement of the parties when he observed that:

> "It does not follow from the carrying on of a business by two or more persons in partnership on certain premises that the premises become partnership property, they may or may not, according to the agreement of the partners."

[17] The treatment or non-treatment of property in the partnership accounts will be relevant in determining the question whether it is partnership property. The failure to produce partnership accounts with the property included therein does not inevitably result in the property not being held to be partnership assets (see *Re Ryan* [1868] 3 Irish Equity Reports 227. In *Hutchinson v Smyth* [1842] 5 Irish Equity 117 Brady CB said that:

> "If there had been a settlement of accounts containing an item in the first year of the partnership that would be a fair ground for saying that there was an agreement between the partners to that effect."

This must be read with what was said in *Joyce v Morrisey* [1998] TLR 707. In that case a variation of equality of profit sharing could not be achieved by sending partnership accounts to partners and assuming their silence constituted acceptance of the new term, particularly, when the partners might not be expected to understand the accounts without more explanation."

[18] In *Wilde v Wilde* [2018] EWHC 2197 Judge Eyre QC had to consider the effect on the inclusion of an asset in the accounts as a partnership asset. He said:

> "It was the claimant's case that the farm was included in the accounts and that this was because it was partnership property but he did not suggest that he relied on that. … The claimant's position was his belief that the farm was a partnership asset derived from what his father said rather than from perusal of and reliance on the terms of the accounts. … it would be appropriate to reopen the accounts and to proceed on a correct basis if, in the light of the evidence as a whole, I were to find that the inclusion of the farm in the partnership property in the accounts was an error."

The judge went on to conclude that the inclusion of the farm as an asset in the partnership accounts was not one taken on the basis of a discussion or agreement with the first defendant. He concluded on all the evidence that it was not open to him to infer an agreement or imply a term that the farm was brought into the partnership.

Conclusion

[19] The question is whether the plaintiff has satisfied the court on a balance of probabilities that it was agreed that the lands registered in the names of the plaintiff and the defendant (or the defendant and his wife in the case of the jointly owned folio) were to become partnership assets behind the paper registered title.

[20] Vagueness with which an agreement is expressed may negative any contractual intention. An agreement may satisfy the requirement of contractual intention yet be too vague to enforce. Vagueness or uncertainty may be a ground for concluding that the parties had never reached agreement at all or never reached agreement on a particular term. Where the words or language used by parties are or is not capable of any definite meaning and are or is so vague that further agreement is necessary then

no agreement has been concluded at least on the term in issue. As was stated in *Scammell* v *Ouston* [1941] 1 All ER: "The test of intention … is to be found in the words used. If these words, considered however broadly and technically, and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract…" (per Lord Wright at 25-26). Lord Clarke explained the relevant principles in RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG [2010] UKSC 14: "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations**….."** The question of contractual intention is, in the last resort, one of fact, and in doubtful cases its resolution depends, in particular, on the incidence of the burden of proof and on the objective test which generally determines the issue.

[21] On analysis the evidence fails to establish any clear consensus between the parties that the land would be brought into the partnership as partnership assets. The plaintiff's evidence as to the conversations which took place was vague and imprecise containing an attempted recollection of some words and a gloss put on them by the plaintiff as to what he thought the father was leading him to believe. The pleaded case was that the defendant said words *to the effect* that "we have lands and machinery and some money, let's put it all in together." Words "to the effect "represent a gloss put on what was actually said. In his evidence he said the defendant said that "we have land, we have machinery and we have assets, we can farm it together."

[22] It has not been shown that the word "put" was the word used by the defendant. Even if such word had been used it would have been by no means clear that that was a representation that the defendant wanted to make the land a partnership asset. Farming the land together is of course entirely consistent with the partners using their respective land holdings as lands on which to carry out their joint business and it does not lead to the inference of an agreement that they were to become a joint partnership asset. Even if the land were to be "put together" for the purpose of farming together that would remain consistent with the land to be farmed remaining in the separate ownership of the individuals.

[23] The history of land ownership in the RJM Farms partnership formed the backdrop to the emergence of the new partnership. It would have been unlikely that the defendant who had maintained separate ownership of his lands in the old partnership would have knowingly and deliberately have changed his approach when entering into the partnership with his son, particularly bearing in mind the fact that he had a much greater land holding as compared to his son. By the same

token care had been recently taken to put the whole of the Mullan's farm title into the sole name of the plaintiff.

[24] The plaintiff's strongest point relates to the treatment of the lands in the accounts as constituting evidence that it was agreed that the lands would be partnership assets. As in the case of *West v West* the plaintiff's case is not that the accounts themselves created a new separate agreement as to the terms of the partnership entered into. No such case was pleaded. The plaintiff focused his case on what he says he agreed with his father at the inception of the agreement to create the partnership. If the evidence does establish the creation of a partnership but it was not agreed that the lands were to come into the partnership as partnership assets then the accounts must have been in error if they purported to record such an agreement. In fact, I am entirely satisfied that the accounts were drawn in the way that they were by Mr Neeson without any discussion with the parties and without an explanation of what he was wanting to achieve in the accounts. A unilateral decision by an accountant to draw accounts in a particular way without explaining what the consequences might be could not create a consensus between the partners where none had previously existed (see for example *Joyce v Morrissey* cited above). In the RJM Partnership the lands had been shown as partnership assets which the plaintiff and defendant knew was not the case. They would have understood from the RJM accounts that they retained separate title to their individual folios (the accountant in that case recording different sums in the partners' capital accounts). The significance of the failure by Mr Neeson to record the land values in the new partnership's capital accounts would not have been a matter clear or obvious to either the plaintiff or the defendant both of whose understanding of the minutiae of partnership law and partnership accounting must inevitably have been limited. The accounting arrangements in this case do not lead to the conclusion that an agreement is to be inferred that the plaintiff and the defendant had decided to put the lands into the partnership contrary to what they had agreed at the outset, or not agreed as the case may be.

[25] Subsequent events confirm that there was a lack of understanding as to the significance of the accountant's treatment of the land in the accounts. The typed questions presented by the defendant and his wife at a meeting in October 2016 included the questions "if and when the land was put into the accounts" and "is the land part of the partnership?" Both questions indicate that the defendant was by no means clear as to the significance of the lands being recorded as partnership assets or when that had occurred. Mr Neeson's note of 20 October 2016 recorded a telephone conversation with the plaintiff who asserted that he had taken legal opinion and that the fact that the land was in the partnership accounts meant that the land had become owned equally. Although the plaintiff said that he had a poor line during the conversation, I am satisfied that Mr Neeson's recording of what was said is accurate. It is significant that the plaintiff did not assert that he and his father had agreed at the outset of the establishment of the partnership that the lands were to be brought into the partnership but sought to rely on the accounts.

[25] As a result I find that the lands in dispute had not become partnership assets. The rest of the proceedings remain to be determined or resolved. I shall hear counsel on the issue of costs, as to the future conduct of the rest of the proceedings and as to what directions require to be given to bring the proceedings to finality.