Neutral Citation Number: [2024] EWCA Civ 1385

Case No: CA 2024 000685

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)
MASTER BRIGHTWELL
[2023] EWHC 2723 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 November 2024

Before:

LADY JUSTICE ASPLIN
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WILLIAM DAVIS

- -

Between:

THOMAS FLOHR	**Appellant**
- and -	
FRONTIERS CAPITAL I LIMITED PARTNERSHIP (Acting by Frontiers Capital General Partner Limited	**Respondent**

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- -

Jonathan Cohen KC, **Nicholas Goodfellow** and **Bláthnaid Breslin** (instructed by **Grosvenor Law Ltd**) for the **Appellant**
Sir Geoffrey Cox KC, **Ben Walker-Nolan** and **Simon Jelf** (instructed by **The Khan Partnership LLP**) for the **Respondent**

Hearing dates: 9 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This appeal raises two questions in relation to a pre-2009 limited partnership. The first is whether a general partner of a limited partnership, governed by the Limited Partnership Act 1907 (the "1907 Act"), may commence proceedings against a third party, on behalf of the partnership, in reliance upon section 38 Partnership Act 1890 ("PA 1890"), after the dissolution and apparent winding up of the partnership, where the cause of action arose before dissolution. The second and related question is if the general partner does have standing to bring such an action, whether it is "necessary" to do so.

2. These questions arise in the context of an appeal from the order of Master Brightwell, dated 6 November 2023. He dismissed the Appellant, Mr Flohr's, application for summary judgment and/or to strike out a claim by the Respondent, Frontiers Capital I Limited Partnership ("FCILP") against him in so far as it related to whether Frontiers Capital General Partner Limited ("FCGP") had authority to bring the claim on behalf of FCILP. Master Brightwell granted permission to appeal and transferred this appeal directly to the Court of Appeal pursuant to CPR 52.23.

Background

3. FCILP was a pre-2009 limited partnership registered in England and Wales. It was governed by a partnership agreement dated 15 May 2001, ("the 2001 Agreement") which amended an earlier agreement dated 3 April 2001. The 2001 Agreement was executed by FCILP's general partner, FCGP, by an initial limited partner and a carry partner. FCGP is a Guernsey company. FCILP ceased business on 5 April 2010, was dissolved and wound up and all limited partner capital contributions repaid.

4. On 4 February 2021, however, FCGP was restored to the Guernsey companies register. On 8 February 2021, Mr Horlick, who had been a director of FCGP from 6 December 2001 until 19 May 2009, was appointed as director and liquidator of FCGP and on 23 December 2021, it issued proceedings against Mr Flohr, allegedly in the capacity of agent for FCILP.

5. The claims against Mr Flohr are for alleged breach of contract and breach of fiduciary duty arising out of a Subscription and Shareholders' Agreement dated 27 March 2002, entered into between FCILP, Mr Flohr, and others (the "SSA"). The SSA concerned a joint venture business ultimately known as Comprendium (UK) Limited. Although the alleged breaches took place between 2002 to 2005, FCILP alleges that Mr Flohr deliberately concealed key elements of the claim such that it is not time-barred, by virtue of section 32 of the Limitation Act 1980. FCILP has also filed an application seeking permission to amend the Particulars of Claim, to introduce a claim in deceit.

6. Without filing a defence, Mr Flohr filed an application notice seeking orders striking out and/or granting summary judgment, on various grounds. By agreement, the authority argument – that FCILP has no standing to bring the claim because it has been dissolved and wound up pursuing such a claim is not "necessary" - was heard in advance of the remainder of the applications. The question before the Master was as follows: does the general partner of a limited partnership governed by the 1907 Act have standing after the dissolution and apparent winding up of the partnership to sue a third party in respect of a cause of action accruing before dissolution?

7. This appeal is concerned solely with the questions of whether FCGP has the requisite authority to bring the claim against Mr Flohr and, if it does, whether the requirements of section 38 PA 1890 are otherwise met. The remainder of Mr Flohr's application for summary judgment/to strike out the claim has been adjourned pending the outcome of this appeal

Relevant Legal framework and principles

8. Before turning to Master Brightwell's reasoning and the parties' submissions, it is helpful to have the relevant principles and legislative provisions in mind. Although we are concerned with a limited partnership governed by the 1907 Act, section 7 of that Act provides that the PA 1890 and the rules of equity and the common law applicable to partnerships apply to limited partnerships, except insofar as they are inconsistent with the express provisions of the 1907 Act.

9. A partnership is defined at section 1(1) of the PA 1890 as "the relation which subsists between persons carrying on business in common with a view of profit". Persons who have entered into partnership are called collectively a firm, whereas in Scotland, a firm has a legal personality which is distinct from the partners: sections 4(1) and (2) of the 1890 Act. The position in Scotland is not directly relevant here. I mention it only because a number of the authorities we referred to turn on Scottish law. In any event, and to be clear, a pre-2009 limited partnership which is subject to the 1907 Act is not a body corporate and does not have a separate legal identity from that of its partners.

10. Section 4(2) of the 1907 Act provides that a limited partnership "must consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm (including debts and obligations incurred in accordance with section 38 of the [Partnership Act] 1890), and one or more persons to be called limited partners…". As I have already mentioned, in this case, FCGP was the general partner and there were numerous limited partners over time.

11. Each limited partner is required to make a contribution of capital at the time of entering the partnership and is not liable for the debts or obligations of the firm (including debts or obligations incurred in accordance with section 38 PA 1890) beyond the amount so contributed: section 4(2A) 1907 Act. Section 4(3) of the 1907 Act provides that subject to sub-section (3A) (which is not relevant here) "a limited partner shall not during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and if he does so draw out or receive back any such part shall be liable for the debts and obligations of the firm (including debts and obligations incurred in accordance with section 38 of the Partnership Act 1890) up to the amount so drawn out or received back." Further, section 6(1) of the 1907 Act provides that a limited partner shall not take part in the management of the partnership business and, save in circumstances which do not apply here, shall not have power to bind the firm. If a limited partner does take part in the management of the partnership business, he becomes liable for all debts and obligations of the firm, including those incurred under section 38, while he does so, as if he were a general partner.

12. The general partner has power to bind the firm, as its agent: section 5 PA 1890. There is no dispute that that authority comes to an end on dissolution of the partnership. After dissolution, the position is governed by section 38 PA 1890 which is central to the argument on this appeal. It is said that it contains the power enabling FCGP to pursue this litigation on behalf of FCILP. Where relevant, it is in the following form:

> "After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution… but not otherwise."

It is common ground that section 38 applies to limited partnerships, subject to the terms of the 1907 Act. Section 6(3) of the 1907 Act provides that in the event of a dissolution of a limited partnership, save in circumstances which do not apply here, its affairs shall be wound up by the general partner, unless the court orders otherwise. There is no dispute that as a result of section 6(3), section 38 must be read as referring to the authority of the general partner after dissolution, rather than the authority of each partner.

13. It is also common ground that clause 13.5.3 of the 2001 Agreement was intended to reflect section 38 of the PA 1890. It provided as follows:

> "Upon termination or liquidation of the partnership…no further business shall be conducted except for such action as shall be necessary for the orderly winding up of the affairs of the partnership, the protection and realisation of the Partnership Assets and the distribution of the Partnership Assets amongst the Partners…."

14. Section 39 PA 1890 provides that on the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them, 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.

15. Section 43 PA 1890 provides that subject to any agreement the amount due from a surviving or continuing partner to an outgoing partner in respect of that partner's share is a debt. Although the interpretation of section 43 has given rise to difficulty, in *Duncan v the MFV Marigold* 2006 SLT 975 OH, Lord Reed, sitting in the Outer House, expressed the view at [52] (albeit obiter) that it applied to all dissolutions. Section 44 PA 1890 is concerned with settling accounts between partners after a dissolution of the partnership. It contains rules to be observed subject to any agreement which may have been reached.

The judgment below

16. With that framework in mind, I turn to Master Brightwell's decision. He held that FCGP has authority to bring the claim against Mr Flohr. He decided that the limited power contained in section 38 PA 1890 applied. At [64] of his judgment, he

explained that even though final accounts had been drawn and capital returned to the limited partners, a limited partnership is not fully wound up where a partnership asset, being a cause of action, which accrued before dissolution, and is not statute-barred, has not been pursued, realised or assigned. The affairs of the partnership had not been fully wound up even if the person carrying out the winding up believed mistakenly that it had been completed, all the partners believed that to be the case and the capital had been returned. He held that: ". . . in such circumstances those affairs will in fact have not been fully wound up and the ghost of the former firm will not have been finally laid to rest. There will remain a cause of action constituting an asset of the partnership, which has not been dealt with. . . ." He had also made clear at [53] that "any cause of action which is partnership property must either be pursued, or a decision made not to pursue it".

17. In addition, having considered *Queensland Southern Barramundi v Ough Properties Pty Ltd* [2000] 2 Qd 172, a decision of de Jersey CJ, sitting in the Supreme Court in Brisbane and *Belgravia Nominees Pty Ltd v Lowe Pty Ltd* [2015] WASCA 143, an authority from the Western Australia Court of Appeal, the Master concluded at [58] that the test for what is "necessary" for the purposes of section 38 PA 1890 is that which was adopted by Murphy JA in his obiter comments in the latter case. The Master stated that ". . . the test must be ascertainable, and I consider that the test of what is reasonably required in order to get in and wind up the affairs of the partnership is correct, it being "necessary" (as Murphy JA suggested) to wind up those affairs."

18. He made clear that he could see no justification for determining whether proceedings were "necessary" by reference to whether they were simple or speculative, the former allegedly being within the section 38 power and the latter outside it. He stated, also at [59], that if there is a partnership asset in the form of a claim with some merit, and the claim is capable of being realised, section 38 permits the claim to be brought but that: "[A]s Murphy JA acknowledged that does not mean that it will be necessary to commence proceedings in all circumstances. It would clearly not be so where the defendant is insolvent and there is no prospect of any recovery, or where the partner proposing to bring the claim has received advice that the claim is hopeless for some particular reason."

Grounds of appeal

19. In summary, the grounds of appeal are that the Master: (i) was wrong to conclude that litigation can be brought on behalf of a partnership after the return of partnership capital and the firm has been wound up because there is nothing left of FCILP and, in the circumstances, neither section 38 PA 1890 nor clause 13.5.3 of the 2001 Agreement confer such authority; and (ii) that he was wrong to decide that it was "necessary" to commence litigation within the meaning of section 38 PA 1890 and clause 13.5.3 of the 2001 Agreement.

Ground 1 – Authority after final accounts and return of capital

20. Mr Cohen KC, on behalf of Mr Flohr, submits that when a partnership is dissolved, the partnership relationship is brought to an end and the partners are under a duty to wind up the partnership as soon as possible: (*Duncan v the MFV Marigold* [2006] SLT 975 OH, at [41]; *Kingsley v Kingsley* [2020] 1 WLR 1909 (CA), at [62]).

21. He says that once winding up is complete and the partners have been repaid their capital (and any surplus), the partnership no longer exists and there is nothing left which could properly be referred to as the partnership. The relationship between the former partners has come to an end and there is nothing left on behalf of which the general partner can act. Once this has taken place, the limited authority conferred by section 38 PA 1890 is spent. He relied upon *Sew Hoy v Sew Hoy* [2001] NZLR 391 (NZ) in this regard.

22. In his written argument, Mr Cohen also relied upon dicta from the judgment of Lord Brodie in *Sheveleu v Brown* 2019 SC 149 at [35]. They are to the effect that dissolution brings an end to a partnership but that it continues only for certain purposes and has been "likened to the ghost of the former firm continuing to manifest its presence until it is finally laid to rest by the completion of the winding up and the payment of the surplus assets to the former partners". Section 38 is given as the example of circumstances in which the partnership will continue after dissolution.

23. Mr Cohen says that this approach is reflected in section 44 PA 1890 which is concerned with settling accounts between partners after a dissolution, points out that capital repayment requires settled accounts and submits that the accounts are settled because the winding up is complete. He also pointed to clause 13.5.4 of the 2001 Agreement which, where relevant, provides that:

> "Upon termination of the Partnership, the liquidating trustee or trustees may sell any or all of the Partnership Assets on the best terms available or may, at its or their discretion, distribute any or all of the Partnership Assets in specie….The liquidating trustee or trustees shall cause the Partnership to pay all debts, obligations and liabilities of the Partnership and all costs of liquidation and shall make adequate provision for any present or future contemplated obligations or contingencies in each case to the extent of the Partnership Assets. The remaining proceeds and assets (if any) shall be distributed amongst the Partners on the basis set out in clause 10."

In addition, he referred us to clause 10.1.1 of the 2001 Agreement which incorporates a distribution waterfall broadly in the same terms as section 44 PA 1890 ending in clause 10.1.1(d), as follows:

> "finally, at the end of the life of the Partnership, any balance remaining after the payments referred to above, in repayment of the Capital Contributions in accordance with clause 13.5."

24. In his oral submissions, Mr Cohen also took us to *Stewart v Stewart* (1835) 14 S 72, *Myers v Myers* (1889) 61 LT 757 and *Gopala Chetty v Vijayaraghavachariar* [1922] 1 AC 488 to which I shall refer in detail below. He says that the legislative policy is to ensure that winding up occurs without delay and that the Master's decision has the opposite effect and will create uncertainty. As he put it, the former partners would be shackled together indefinitely.

25. In his written argument, Mr Cohen also pointed out that although there are limited powers to restore a limited partnership in circumstances which do not apply here,

there is no general power to do so, unlike a company which can be restored to the register. He says that this is consistent with the fact that there can be no limited partners without a contribution of capital (section 4(2A) 1907 Act) and there can be no limited partnership without limited partners (section 4(2) 1907 Act). He submitted that if the position were otherwise, a firm could never finally be wound up and former partners would be placed in a constant state of uncertainty about whether there might be a further asset that a partner might seek to realise, having previously decided not to do so.

26. He also says that instead of conferring a limited authority to bind the firm for the purpose of winding up, the Master's analysis gives section 38 PA 1890 a wider effect. He says that it prolongs the life of the partnership for an indefinite period and gives the firm a continued existence on the basis that a partner might decide to take a further step to bring in an asset at any time. Mr Cohen says that that cannot be correct. Once brought to an end by winding up, the dissolution process is at an end and cannot be re-opened.

- *Discussion and conclusions*

27. As I have already mentioned, Mr Cohen took us to *Duncan v the MFV Marigold*, a decision of Lord Reed, sitting in the Outer House, in Scotland. Not surprisingly, therefore, the decision is one of Scots law which differs in a number of significant ways from English partnership law. The decision turned, nevertheless, upon the proper interpretation of provisions of the PA 1890 and Lord Reed considered the genesis of partnership law, in general. It is of considerable assistance in relation to the proper interpretation of section 38.

28. The executors of a deceased partner in a firm which operated a fishing boat brought an action against the surviving partners seeking a declarator that cessation accounts drawn up on the death of the deceased partner were true and accurate and that they were entitled to payment of the share standing to the credit of the deceased in his capital account with interest. That sum had not been paid to the executors and the surviving partners had continued to operate the fishing boat for a number of years before winding up the business. The assets were realised for much less than the amount which appeared in the cessation accounts.

29. It was held, amongst other things, that the cessation account prepared as at the date of dissolution was not the measure of the amount due to the estate of the deceased partner. The balance due had to be ascertained by winding up the affairs of the partnership, following the rules prescribed by section 44 PA 1890 and in the event that the pursuers did not accept the defenders' calculation, the appropriate remedy was an action for an account.

30. At [19], Lord Reed stated the uncontentious proposition (although it was in dispute in that case) that the dissolution of a partnership has the consequence (unless otherwise agreed) that its affairs must be wound up and the assets distributed in accordance with section 44 of the PA 1890. He added at [22] that the duty to wind up the affairs of the partnership is reflected in section 39 PA 1890 and that it can be carried out in two ways: by the partners pursuant to section 38; or by the court under section 39.

31. Lord Reed also set out the background to the PA 1890 and its application in Scotland. He explained at [26], that the draftsman took as his model the Indian Codes of Macaulay and Stephen which stated the central principles of the existing law in a series of general propositions. He described it, at [27], as a measure designed to codify the law (albeit partially), having pointed out at [26] that it does not purport to abrogate the case law but, on the contrary, provides that the rules of equity and common law continue in force except to the extent that they are inconsistent with the provisions of the PA 1890 (section 46).

32. He also made clear at [27] that as a measure designed to codify the law, PA 1890 has to be approached in the manner described by Lord Herschell in *Bank of England v Vagliano Brothers* [1891] AC 107 at 144-5 in the following terms:

> ". . . the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

Lord Herschell went on to make clear that he was: "far from asserting that recourse may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate."

33. Lord Reed considered section 38 PA 1890 and the effect of dissolution in some detail. At [30] he confirmed that following the *Vagliano* case, the starting point when considering section 38 was the language of the section itself. He stated that:

> "[30]. . .The section provides for the continuation, notwithstanding the dissolution of the partnership, of ''the authority of each partner to bind the firm, and the other rights and obligations of the partners''. The authority of each partner to bind the firm, prior to dissolution, is succinctly described in s 5 (the sidenote to which is ''Power of partner to bind the firm''): [his Lordship quoted its terms set out supra and continued:]
>
> [31] If the agency described in s 5 is not continued in force after dissolution by the reference in s 38 to ''the authority of each partner to bind the firm'' (on the view that the ''firm'', as defined by s 4 in relation to Scotland, ceases to exist on dissolution), it is in any event continued in force by the reference to ''the other rights and obligations of the partners''. The other rights and obligations which exist during the subsistence of a partnership are manifold. They include rights and obligations of partners in relation to third parties, such as the joint and several liability of individual partners for the debts and obligations of the firm, under s 9. They also include rights

> and obligations of partners as between one another, such as the obligation to render accounts, under s 28. In so far as the continuation of those rights and obligations may be necessary to wind up the affairs of the partnership, and to complete unfinished transactions, that continuation is effected by s 38. . ."

34. He explained, therefore, that in so far as the continuation of the rights and obligations of the partners may be necessary to wind up the affairs of the partnership, and to complete unfinished transactions, the continuation is effected by section 38. He pointed out at [31], that rights and obligations in relation to matters which are collateral to the winding up or the completion of unfinished transactions, such as the use of partnership assets to derive private profit or to continue the business of the partnership are dealt with by other provisions. He also concluded that the background to section 38, including the pre-existing law which it was intended to summarise was consistent with this approach to its interpretation: [32].

35. Lord Reed went on to explain that section 38 adopted general wording, resembling that of the corresponding provision (section 263) of the Indian Contract Act 1872 and added, also at [33] that: "As a result, s 38 might be interpreted (as it was by Lord Justice Clerk Scott Dickson in *Dickson v National Bank of Scotland* at 1916 SC, p 594: (1916) 1 SLT, p 308) as stating two alternative purposes for which a partner's rights and obligations would continue notwithstanding dissolution: first, "to wind up the affairs of the partnership", and secondly, "to complete transactions begun but unfinished at the time of the dissolution". He observed at [34] from the contemporaneous commentaries, that section 38 was understood, at the time, to reflect the existing law.

36. At [41], Lord Reed turned to the question of whether surviving partners are entitled under section 38 to carry on the partnership business. Having cited a number of authorities, he concluded at [43] that "[o]n any view, however, s 38 cannot warrant the continuation of the business for more than a temporary period" and that it is:

> ". . . necessary to examine the facts in order to determine whether a given transaction arose from the conduct of the business of the dissolved partnership by former partners for the purpose of winding up the affairs of the partnership and was "necessary" for that purpose, or whether it was attributable to some other relationship between the partners."

37. Although *Duncan v Marigold* is of great assistance in relation to the proper interpretation of section 38, it seems to me that it does not support Mr Cohen's proposition that a partnership ceases to exist altogether once the winding up has taken place. Although Lord Reed stated that in his view, section 38 could not warrant the continuation of the business for more than a temporary period, he did not come to any conclusion about the partnership having ceased to exist. In this regard, I note that in Scottish law the firm is a separate entity from the partners and that in *Duncan* it does not appear that the partnership was considered to have been wound up at all: [58].

38. Mr Cohen also took us to *Clark's "Treatise on the Law of Partnership and Joint-Stock Companies According to the Law of Scotland"* which was published in 1866.

For my part, I did not find it helpful. In any event, the proposition relied upon was that on dissolution every partner is entitled to insist that partnership property is realised and in the absence of agreement, it must be sold. Mr Cohen relied upon the further statement in Chapter III that a partner may insist upon this however long has elapsed since dissolution "provided the partnership affairs have not been wound up": *Stewart v Stewart* (1835) 14 S 72. That was another Scottish case in which the partnership had never been wound up. The report sheds no light on the court's reasoning. I do not consider that either the *Stewart* case or the *Treatise* carries the question before us any further forward.

39. Mr Cohen also took us to *Myers v Myers* which was heard in 1889, before the PA 1890 was enacted. In 1873, two brothers, who were tenants in common in equal shares of certain freehold and leasehold properties, entered into a partnership for a period of ten years, the properties and certain plant being made partnership assets. In 1877, the plant was sold and the proceeds divided but the properties, save for an office, were let to tenants and no new business was taken on. The business connected with the receipt of rents and payments relating to the properties was conducted from the office and a bank account was kept in the name of the partnership firm. In 1888, one of the partners died and the question was whether his share in the freehold property which had been referred to in the partnership articles, was realty or personalty.

40. Chitty J stated that the only question for him to decide was whether the partnership was still subsisting at the date of the death of the partner or whether it had previously been determined by mutual assent. He observed that originally the property had been owned by the partners as tenants in common in equal shares, the partnership had ceased to carry on business in 1875, contracts in hand had been completed by 1877 at the latest, and the plant was sold. Thereafter, the property was managed, rents received and books were kept. Chitty J did not consider that that was sufficient to constitute a partnership and was more consistent with the contention that what the former partners did was as owners managing their property in the ordinary way. Accordingly, he held that the property should be considered to be real estate.

41. Mr Cohen says that this case supports the proposition that on the cessation of the partnership, a winding up having taken place, the relationship has come to an end and outstanding assets are held by former partners as joint owners rather than being dealt with by resurrecting the partnership and re-opening the final accounts. He says that if this were not the case and one were able to realise those assets within the partnership, a partnership would go on forever.

42. For my part, I do not consider that the *Myers* case provides support for Mr Cohen's proposition. He himself accepted that the case turned on its own facts. It seems to me that it does and that it is significant that before the partnership was entered into in 1873, the partners had owned the property as tenants in common in equal shares. They agreed that it should become partnership property for the duration of the partnership. The partnership came to an end at the latest in 1877. Thereafter, as Chitty J put it, all the former partners did was to manage their jointly owned property as owners. The property had ceased to be partnership property and reverted to being jointly owned by them. It seems to me that that was the inevitable outcome on the facts. It does not support the proposition that after the completion of a winding up, partnership property is always owned by the former partners in equal shares as co-

owners and as a corollary, that the former partnership relationship is extinguished once and for all.

43. As I have already mentioned, Mr Cohen also placed reliance upon *Sew Hoy v Sew Hoy*, a case heard in the Court of Appeal in New Zealand. He says that it provides another illustration of the fact that once the winding up of a partnership is complete, the partnership is laid to rest and the limited authority conferred by section 38 is spent.

44. The facts were straightforward. In 1973, three brothers and their wives purchased land which they held together as partners. The land was compulsorily purchased under the Public Works Act 1928 and shortly thereafter, in 1977, one of the partners died, dissolving the partnership. Final compensation for the land was not paid until 1982. By then the Public Works Act 1981 had come into force. As a result, all the partners became entitled to the benefit of the statutory offer-back rights conferred by section 40 of the 1981 Act. The land was no longer required for any public work and therefore, in 1992, an offer-back was made, pursuant to section 40, to all the former partners, including the trustees of the estate of the deceased partner. The trustees were the only party to show interest in the offer before the deadline and negotiations ensued. The other partners began proceedings against the trustees alleging breach of fiduciary duty. They alleged that the fiduciary duties arose under section 41 Partnership Act 1908 in New Zealand (equivalent to section 38 PA 1890) or alternatively, they arose from the close family relationship and the co-ownership of land.

45. Blanchard J, with whom Keith J agreed, and McGrath J concurred, stated at [27] that the fee simple in the land had vested in the Crown on the compulsory purchase and that the Sew Hoys, therefore, retained no interest in the land. It was not until the 1981 Act commenced, three days before the final compensation payment was made, that the Sew Hoys could ever have had any expectation of being offered back the land if it was no longer required for any public work. Even when section 40 was enacted the Sew Hoys gained no more than an expectation or hope that at an indefinite future time, the conditions of the section might be satisfied: [28]. He concluded at [30] that all that existed when the final compensation payment was made in 1982, was an inchoate right. He held that was not a right of the kind contemplated in section 41: "[B]eing inchoate, it was unenforceable, and remained so until 1992."

46. He went on to explain at [32] that the evident purpose of section 41 is to enable the winding up of the dissolved partnership and that the rights and obligations of former partners continue "so far as may be necessary to wind up the affairs of the partnership" and "to complete transactions begun but unfinished". In this case, it was neither necessary nor possible in order to complete the winding up of the partnership to deal with the chance that there might be a future offer. Furthermore, it was accepted that if the offer was made and accepted it would give rise to an entirely new venture: [33]

47. McGrath J was in agreement but added some supplementary views on section 41. He observed at [62] that section 41 "makes no major intrusion on the general policy of the Act that a dissolved partnership's affairs should be promptly wound up and the partners discharged from their residual continuing authority and obligations". He added at [71]:

> "In the present case, once the final payment of compensation was made to the dissolved partnership and a final accounting followed, which took place in 1982, the winding up was complete. Neither partnership property nor anything which could properly be regarded as a partnership remained. Section 41 was spent and could not be the basis of continuing obligations. When the offer back was made in 1992 it was to the former partners as individuals. . . ."

48. I do not consider that this New Zealand authority supports Mr Cohen's contention. It was clear that the Court of Appeal in New Zealand did not consider the inchoate right to an offer-back at some indeterminate date in the future to be a partnership asset at all. It was in this context that they concluded the winding up had been completed and section 41, the equivalent of section 38, was spent.

49. Next, we were taken to a number of authorities which were not before the Master. The first was *Gopala Chetty v Vijayaraghavachariar.* It is a decision of the Privy Council on appeal from the High Court at Madras. It was concerned, therefore, with Indian law. Mr Cohen says, nevertheless, that it is directly relevant here and supports his proposition that once the winding up has been completed, it cannot be reopened and the powers under section 38 come to an end.

50. The very short headnote reads as follows: "If a partnership has been dissolved but no account has been taken the proper remedy of a partner in respect of an asset received by another partner is to have an account taken; if his right to sue for an account is barred by limitation, he cannot sue the partner who has received the asset for a share of it."

51. A partner having died, some two years later, his adopted son filed a suit against the former partners seeking a partnership account and payment to him of his adopted father's share. The judge held that the partnership had been dissolved in April 1910, before the death of the adopted father and that therefore, the suit was barred by art. 105 Schedule 1 of the Indian Limitation Act 1908 which provides that a suit for accounts and a share of the profits of a dissolved partnership must be brought within three years of the date of dissolution. The adopted son did not appeal but later the same year launched a second suit in which he claimed that certain sums had been received by the appellants from debtors of the old firm and claimed a quarter share in those sums. It was held that the adopted son was entitled to a quarter share of the sums and an account was ordered with a view to showing whether any sums were due by way of set off. The judge held that although a general partnership account was barred by the Indian Limitation Act 1908 and by the decision in the first suit, there was, nevertheless, a right in a partner to sue his other partners for his share of the assets of the partnership, for which the period of limitation would be six years and not three and therefore, that the second claim had been brought in time.

52. The judge came to this conclusion based upon certain authorities in the High Court of Madras, following earlier decisions in the High Court of Bombay. The appellants appealed to the High Court in its appellate jurisdiction. The appeal was dismissed on the basis that the judges were not prepared to go behind the three Madras decisions to the effect that a cause of action arises from the receipt after dissolution of partnership

assets by a former partner. The judges pointed out, however, that if that were not the case, it would be impossible to distinguish the case of *Knox v Gye* LR 5 HL 656.

53. The judgment of the Privy Council was delivered by Lord Phillimore. In the light of the conclusions below, he began by conducting a detailed analysis of *Knox v Gye*. Lord Phillimore explained at 493 - 494 that that was a case in which a general partnership account was sought and the parties were directed to confine themselves to arguments about limitation. The partnership between Gye and Thistlethwayte had commenced in 1853. Thistlethwayte had died in 1854, making Knox his executor. Knox contended that thereafter he and Gye had continued in partnership. In 1854, negotiations were commenced with a third party for use of a theatre and £5,000 was paid over. The third party did not carry out his share of the bargain and Gye sued him for the money and obtained judgment. The judgment was not satisfied and in 1862, Gye accepted £2,500 by way of compromise. In 1864, Knox claimed a general account from the date of the original advance of monies by Thistlethwayte, and for the winding up of the alleged partnership between Gye and Thistlethwayte, so that he might have his share of the money recovered from the third party or which ought to have been recovered from him and a share of the profits of the partnership.

54. At 493, Lord Phillimore explained that it was held that if the statute of limitation was applied, Knox's right to a general account accrued on the death of Thistlethwayte in December 1854 and that the action begun in 1864 was out of time, therefore. The receipt of monies from the third party more than six years after the partnership was dissolved did not take the case out of the operation of the statute. Lord Phillimore concluded, at 494, that as the suit was for a general account and not to recover Knox's share of the monies received from the third party, the decision "need not be taken for the purposes of the present judgment as laying down a final determination of the law . . ."

55. He went on to distil what he considered to be the rule of law in the following terms at 495:

> "If a partnership has been dissolved and the accounts have been wound up and each partner has paid what he has to contribute to the debts of the partnership and received his share of the profits, the mutual rights and obligations having been thus all discharged, and then it turns out afterwards that there was some item to the credit of the partnership which was either forgotten or treated as valueless by reason of the supposed insolvency of the debtor or for any other cause, which item afterwards becomes of value and falls in, it ought to be divided between the partners in proportion to their shares in the original partnership. There is no reason why one should have it more than the other."

He went on as follows:

> "The case will not often occur. If the debt is incurred to the firm and both the ex-partners are alive the debtor can only safely pay upon the receipt of both, for the agency of each for the other has ceased with the dissolution of the partnership, and

> both receiving and being in possession each can insist upon his proper share."

He concluded at 496:

> "At any rate in all cases where for any reason it did occur that after the dissolution and complete winding up of a partnership an asset which had not been taken into account fell in, it ought to be divided between the ex-partners or their representatives according to their shares in the former partnership.
>
> If on the other hand no accounts have been taken and there is no constat that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken; and if it is too late to have recourse to that remedy, they it is also too late to claim a share in an item as part of the partnership assets . . ."

56. It seems to me that *Chetty* is of less assistance than Mr Cohen suggests. It is primarily concerned with the Indian law of limitation and whether the remedy of a general account was still available as between the partners. It does not suggest that partners are not entitled to a partnership asset which "falls in" after the dissolution and/or winding up. On the contrary, it establishes that such an asset should be divided between them in accordance with their shares in the original partnership and if no accounts have been taken when the asset falls in, the proper remedy is to take an account, if it is not too late: per Lord Phillimore at 495 and 496. In my judgment, therefore, *Chetty* is contrary to Mr Cohen's submission that once a winding up has taken place the partnership is dead for all purposes and that any asset which was subsequently recovered would be divided between the former partners merely as joint owners, rather than in accordance with their partnership shares.

57. Lord Phillimore's reasoning is also premised on the basis that the partnership asset "falls in". He makes no mention of whether steps can be taken to recover such an asset, and if so, by whom and on whose behalf. Furthermore, and perhaps, not surprisingly given the Indian context, he makes no mention whatever of section 38 or its equivalent. He takes no account, therefore, of any continued agency as a result of section 38. His obiter comment about the cessation of agency at 495 should be read in this light.

58. All in all, therefore, I do not gain much assistance from *Chetty*. Unsurprisingly, it makes no mention of section 38 and accordingly, it neither establishes that section 38 ceases to operate or is spent once final accounts are rendered and capital is returned, nor is it authority for the proposition that once those things have occurred, the partnership is dead and moribund for all purposes.

59. The second authority which had not been before the Master was *Marshall v Bullock,* which is an unreported decision of the Court of Appeal of 27 March 1998. Mr Cohen described it as an application of *Chetty* in relation to partnership liabilities rather than assets. Although the partnership had been dissolved, it had not been wound up and there were no final accounts. Peter Gibson LJ described the question before the court in the following way: "A partnership between A and B is dissolved at a time when

there are partnership liabilities and there may have been partnership assets. Any such assets are taken by A who discharges the liabilities. More than six years after the dissolution, but within six years of the discharge of the liabilities, A brings proceedings to recover from B his share of the discharged liabilities. A has never accounted for any partnership assets which he took on dissolution, nor has any account been taken. An action for an account is out of time. Can A, relying on a right of contribution, nevertheless recover from B?"

60. Peter Gibson LJ with whom Pill and Ward LJJ agreed, stated that:

> "There can be no doubt but that in the ordinary way on the dissolution of a partnership an account would be taken of the partnership assets and liabilities. The entitlements and obligations of the partners would be computed having regard to such matters as any discharge by one partner of a partnership liability in respect of which the other partner would be obliged to make a contribution. A claim for the payment of a contribution is not inconsistent with an action for an account. It is only in unusual circumstances that the court would permit one partner to sue another in respect of a partnership transaction, or the discharge of a partnership liability, or the receipt by one partner of a partnership asset, otherwise than in an action for an account."

Having considered a number of authorities including *Chetty* and *Knox v Gye*, Peter Gibson LJ went on to state that he found it difficult to see, in principle, why there should be a difference in approach between the situation in which a partner or former partner is being sued in relation to a share in a partnership asset and where a partnership liability has been discharged by one partner who attempts to recover a sum from his fellow partner by way of contribution. He went on:

> "The authorities show that unless the case is an exceptional one the court will not allow one partner to seek to recover from another partner a sum which is referrable to a partnership asset save through an action for an account. So too, I would hold, generally a contribution in respect of the discharge of a partnership liability must be sought by an action for an account."

61. He went on to describe the "possible exceptions from the general principle", as follows:

> "One is where accounts have been finally settled. In such a case it will be known what the respective entitlements are as between the partners, and who is liable for what. In such a case, it would not be necessary to seek from the court an order for an account. The second possible exception is where an asset is unexpectedly recovered (or, by like reasoning, a liability to contribution unexpectedly arises) after a final settlement of accounts and the recovery of the asset (or the discharge of the liability) is made more than six years after the dissolution of the

> partnership (see Knox v Gye at page 678). It may be arguable that in such a case a separate action will lie. The third exception is where an account would serve no useful purpose. . . . An example of such a case was Brown v Rivlin. I that case, as I have indicated, the partners had agreed that there should be no such account taken."

Peter Gibson LJ went on to conclude that none of the exceptions applied. It was held that the action was for an account and it was too late for such a claim to be brought, six years after the dissolution of the partnership. He added that:

> "There are good policy reasons why this should be so. When a partnership comes to an end, there is an obligation on the partners to agree, or to have determined by the court, their respective liabilities and their respective entitlements. Once partners have dissolved the partnership, each should after six years be free of the risk of any claims being made by another partner.
>
> It would be unfortunate if the court were to encourage partners who have failed to obtain an account or who have allowed the time for an action for an account to be brought to expire, to rely years later on an individual item which would and should have featured in that account to make it the subject of a separate action for recovery. As I have already said, that is simply not fair, because, in ascertaining what is due from one partner to another, one has to look at both sides of the balance sheet, both sides of the account."

62. The approach in *Chetty* and *Marshall*, is reflected at paragraph 23-55 of the 21st edition of "*Lindley and Banks on Partnership*". It states as follows:

> "If, after the affairs of the partnership have been wound up and its accounts settled, an asset is received by one of the former partners which was not included in those accounts, time will only start to run as regards the other partners' entitlement in respect of that asset with effect from the date of its receipt: the fact that those other partners have lost their general right to an account will, in such circumstances, be irrelevant. *Per contra* if the dissolution accounts have not been settled and the right to a general account is time barred."

Reference is made in the footnotes to *Chetty* at 494 and onwards.

63. As Peter Gibson LJ explains in *Marshall* and as *Lindley and Banks* summarises at paragraph 23-55, where a partnership asset falls in or otherwise arises after the winding up the fact that the partners may have lost their right to seek a general account is irrelevant. Time starts to run in relation to their entitlement to the asset from the date of its receipt. As Peter Gibson LJ explains, in such a circumstance, an account is unnecessary because the position between the former partners has already

been established by the settled accounts which have been finalised. An action may lie to recover the asset.

64. I should mention that Sir Geoffrey Cox KC, on behalf of FCILP, suggested that if a further partnership asset comes to light, it is always possible to take a further account or to re-open an account already taken. That may be the case whilst a partnership is up and running. Otherwise, the principles to which I have referred apply.

65. In any event, it seems to me that *Chetty* and *Marshall* and the propositions for which they are authority, are of no assistance here. They are concerned with the availability of an account or a freestanding action between partners and the effect of the Limitation Act 1980 (or its Indian equivalent) upon the right to an account. They are not outward-facing in the sense that they do not address the question of whether a partnership asset can be recovered on behalf of the partnership after it would otherwise appear that the partnership has been wound up. They shed no light upon that issue nor upon whether, in those circumstances, the partnership is treated as at an end for all purposes. Nor do they shed light on whether the purported completion of the winding up means that section 38 is spent. They do not address the operation of section 38 at all. Accordingly, I do not find them of much assistance.

66. Lastly, in this regard, we were referred to *Dickson & Ors v National Bank of Scotland Ltd* 1917 SC 50, to which Lord Reed referred in *Duncan v Marigold*. This is a case in which section 38 PA 1890 was addressed. It concerned a sum of money embezzled by a former partner. The sum forming part of a trust estate had been deposited with the bank with a receipt which stated that it was repayable on the signature of the legal firm which was the agent of the trust. The firm was subsequently dissolved. Some years afterwards, the former partner endorsed the receipt with the firm name and embezzled the money.

67. It was held that the bank had been entitled to pay over the money. Uplifting the money was necessary either "to wind up the affairs of the partnership" or "to complete transactions begun but unfinished at the time of the dissolution" within the meaning of section 38 PA 1890. The Lord Chancellor held that the transaction was one which was begun but not finished and accordingly, any member of the firm which was dissolved in 1896, had, some eight years after the dissolution, power to append the signature for the purposes of "uplifting" the money. Section 38 applied. Lord Dunedin concurred and Lord Shaw of Dunfermline and Lord Parker of Waddington agreed.

68. Lord Shaw considered that the partner of a dissolved firm was entitled to continue the mandate resting on each partner to sign the firm's name in a matter relating to its affairs: p54. Lord Wrenbury added at p55 that: ". . . obligations and responsibilities arise in respect of the signature of the deposit-receipt that was in the hands of the firm, and the termination, the working out, of that obligation was the working out of an affair of the partnership—an affair of the partnership to be dealt with in the winding-up of the partnership affairs— and that the section of the Act of Parliament is exactly applicable to enable B, if he was, as he was, a member of the dissolved firm, to sign as he did in 1904."

69. It seems to me that this case is illustrative of the fact that section 38 operates to enable the affairs of the partnership to be wound up and to complete transactions which were

unfinished at the time of the dissolution even if a considerable time has elapsed since the dissolution took place. It goes no further. Although the Lord Chancellor made reference to the partnership having been "broken up", it is not clear whether final accounts had been settled after the dissolution.

70. Lastly, during the hearing some emphasis was placed upon section 43 PA 1890, although it did not feature in the skeleton arguments nor was it in our bundle of authorities. We asked counsel to produce short written submissions in relation to it which for my part, I did not find helpful.

71. As I have already mentioned, section 43 provides that subject to any agreement the amount due from a surviving or continuing partner to an outgoing partner in respect of that partner's share is a debt. Although Lord Reed expressed his view that it applied to all dissolutions, there is no definitive authority to this effect. We did not hear argument on that point. Suffice it to say that it is not necessary to come to a concluded view upon the proper construction and application of section 43 for the purposes of this appeal.

72. The fact that the amount due to an outgoing partner becomes a debt inter se does not take the matter further. Furthermore, it sheds no light on whether the partnership should be treated as dead for all purposes. As Lord Reed explained in *Duncan* at [51] the debt due under section 43 can be understood as being in an amount which is unascertained when the debt accrues but ascertainable through the procedure of winding up.

73. It seems to me, therefore, that the authorities to which we have been referred do not assist Mr Flohr. In effect, Mr Cohen submits that because there has been a return of capital, the partnership has come to an end. Such a submission assumes that winding up is always final, even if it is not complete. In my judgment, neither the authorities, nor sections 43 and 44 PA 1890, nor, for that matter, the terms of the 2001 Agreement, support the conclusion that where the accounts are settled and capital is returned, the partnership is "dead" for all purposes.

74. Neither do I consider that it is definitive that section 4(3) of the 1907 Act provides that a limited partner shall not receive back any part of his capital contribution "during the continuance of the partnership". In my judgment, the use of that phrase is insufficient basis for the conclusion that where a return of capital has taken place the partnership is dead and buried for all purposes. In fact, section 4(3) goes on to set out the consequences of a return of capital. The partner becomes liable for the debts and obligations of the firm "including debts and obligations incurred in accordance with section 38 . . ." Section 4(3) anticipates expressly that debts and obligations may arise under section 38, despite the return of capital.

75. It seems to me that Mr Cohen appears to be seeking to elide the position of a company with that of a partnership and to reason as if a partnership is a separate legal entity distinct from the partners, as it is in Scots law. It is not in dispute that the property of a company which has been wound up and struck off becomes bona vacantia. Nor is there any dispute that where a partnership is a separate legal entity, it ceases to exist on dissolution. In English law, however, the partnership is not a separate legal person and the relationship between the partners continues, for limited purposes, even though they have become ex-partners. The real question is whether section 38 PA 1890

applies. That can only be determined by interpreting section 38 as a whole and then applying it to the facts of this case.

76. Applying Lord Herschell's approach in *Bank of England v Vagliano Brothers*, it is necessary to start with the natural and ordinary meaning of the words used. The authority conferred is not limited to any particular time frame. It continues "notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership . . ." The question is whether the particular conduct or transaction is "necessary" in order to "wind up the affairs of the partnership". There is nothing in the pre-PA 1890 law to suggest that this interpretation is incorrect. It seems to me that if a partnership asset remains outstanding the winding up is incomplete. In such circumstances, the powers referred to in section 38 continue "so far as may be necessary to wind up the affairs of the partnership . . ." There is nothing contrived about such an interpretation.

77. As the Master put it, a cause of action against a third party which accrued to the partnership before dissolution, which is not pursued or realised or dealt with by assignment, and which does not become time barred, remains a partnership asset. Realising that asset is one of the affairs of the partnership. In such circumstances, the winding up is not complete even if the person carrying out the winding up mistakenly believes that it has been completed. Accordingly, section 38 continues to operate for the purposes of getting in the asset and completing the winding up. I do not consider that this gives section 38 a wider interpretation that it can properly bear.

78. Furthermore, such a construction accords with common sense. If it were otherwise, it would be possible for a disaffected partner to bring the authority conferred by section 38 to an end by driving the completion of final accounts forward despite the fact that a contract remained to be completed or to his knowledge a partnership asset remained outstanding.

Ground 2 - Is it "necessary" to commence litigation within the meaning of section 38 PA 1890 and clause 13.5.3 of the 2001 Agreement?

79. That brings me to Ground 2 of this appeal. The real question is whether the commencement of the litigation in this case, is "<u>necessary</u> to wind up the affairs of the partnership" (emphasis added). Mr Cohen pointed out, quite rightly, that section 38 PA 1890 does not entitle partners to engage in new bargains or contracts so as to bind a former partner and does not impose any additional duty: *Boghani v Nathoo* [2011] 2 All ER (Comm) 743 per Sir Andrew Morritt C at [27]. It confers a limited authority, in this case, on the general partner, to bind the firm as its agent only in so far as "may be necessary to wind up the affairs of the partnership . . .". Clause 13.5.3 of the 2001 Agreement reflects that provision.

80. Mr Cohen says that Master Brightwell was wrong to adopt Murphy JA's obiter dicta in *Belgravia Nominees Pty Ltd v Lowe Pty Ltd* [2015] WASCA 143 (at [65]), and to hold that "necessity" denotes what is "reasonably required" to wind up the partnership. He submits that in order to determine whether a claim is "necessary," the nature and circumstances of the claim must be considered; and that the claim is merely capable of being realised, is not sufficient. He says that a strict approach should be adopted. In this regard, he relies upon *Boghani*, at [31]-[35]; and *HLB Kidsons v Lloyds Underwriters & Ors* [2009] 1 All ER (Comm) 760).

81. Mr Cohen also drew our attention to the propositions which Murphy JA recorded as having been made by the respondents in the *Belgravia* case at [39(d) – (f)]. In summary, where relevant, they were that: although what is "necessary to wind up the affairs of the partnership" includes the recovery of the debts of the firm, "debts" for this purpose are confined to liquidated sums presently due in relation to which there is no genuine dispute; and the pursuit of other claims such as for unliquidated damages are not necessary because such claims may be sold. Mr Cohen submits that FCGPL's claim is "uncertain," "speculative," "difficult, costly and time consuming," with "a very considerable risk of failure" and accordingly, it is difficult to see how commencing such litigation could be "necessary," save in exceptional circumstances. Further, commencing new, complex, and wide-ranging litigation conflicts with the suggestion in the *Duncan* case that winding-up cannot continue for anything more than a temporary period.

82. He says that if the Master is correct, it would mean that a former general partner acting as agent could force other partners to litigate and potentially to incur considerable expenses and risk, even after the partnership has been wound up. In fact, he says that there are two alternatives. First, the former partners together can choose to litigate and if a partner or partners are unwilling to participate they will be joined as defendants to the action. Secondly, and alternatively, the cause of action can be assigned.

- *Discussion and conclusions*

83. *Boghani,* was a case in which a partnership at will had been dissolved. At the date of the dissolution, the assets of the firm included two very substantial uncompleted hotel developments. The agreements under which the developments were taking place both provided that the partnership could assign the benefits of the agreement and novate its obligations. The two partners disagreed about how the developments should be disposed of in the winding up of the partnership affairs. One contended that they should be completed and then sold on the open market following a six-month marketing campaign and the other that they should be sold following a three-month marketing campaign on terms which enabled both of the former partners to bid. Each sought an order giving effect to their suggestion. An issue arose about the proper construction of section 38. The defendant contended that the section obliged the firm to continue the developments unless and until the court in its discretion determined otherwise.

84. At [27] the Chancellor set out a number of propositions which in his view arise from section 38, as explained in the authorities. They are:

> ". . . (1) The obligations of partners to third parties continue notwithstanding the dissolution of the partnership. (2) In England, if not in Scotland, the satisfaction of those obligations by performance, release or novation or the payment of damages will not usually involve reliance on the terms of s. 38. (3) Section 38 does not entitle the surviving partners to engage in new bargains or contracts so as to bind a deceased or former partner. (4) Even in relation to transactions, not being new bargains or contracts, begun but unfinished at the time of dissolution s 38 applies only if and to the extent that the

> completion of such transaction is necessary to wind up the affairs of the partnership. (5) Section 38, if applicable, confers a power; it does not impose any additional duty. . ."

85. The Chancellor went on to consider whether it was necessary to complete the developments and concluded that to some extent, it depended upon what is meant by "necessary" and "complete" in the context of section 38. At [31] he stated that "[T]he necessity must arise from the need to wind up the affairs of the partnership." He concluded that performance of the contracts was not necessary in that sense because the benefit of them could be assigned and the obligations novated. The evidence was that there was a distinct possibility that suitable third parties would be interested in taking over the role of the partnership in relation to the two developments and the former partners themselves were both interested in doing so. It followed that it was "not necessary in order to wind up the affairs of the Firm that the dissolved Firm should complete these developments . . ": [33].

86. *HLB Kidsons (formerly Kidsons Impey) v Lloyd's Underwriters subscribing to Policy No 621/PKID00101& Ors* [2009] 1 All ER (Comm) 760 was a case in which it was held that section 38 was inapplicable. There had been a series of technical dissolutions arising not only from the merger of two accountancy firms, but also from the departure of partners from time to time. Judge Mackie QC held that section 38 was not intended to apply to partnerships that were in practice continuing without interruption other than changes of membership from time to time: [16] and [17]. Moreover, in any event, it had not been necessary to commence the claim in order to wind up the affairs of the claimant: [19]. Judge Mackie QC concluded that the claimants could proceed and join the retired partners as defendants pursuant to CPR 19.3.

87. It seems to me that as the Chancellor pointed out in *Boghani* the "necessity must arise from the need to wind up the affairs of the partnership." In my judgment, there can be little doubt that in general terms and subject to the further discussion below, it is necessary to bring in partnership assets in order to wind up the affairs of a partnership. As Lord Reed pointed out in the *Duncan* case, however, in order to determine what is necessary one must consider the facts with some care. What is "necessary" is, inevitably, fact-sensitive.

88. This leads me to the conclusion that the Master was right to follow Murphy JA's approach in the *Belgravia* case. What is necessary to complete the winding up is to be interpreted as what is "reasonably required" in the circumstances. There is nothing in the words used in section 38 to suggest that what is meant is that authority to bind the firm and the rights and obligations of the partners only continue to the extent which is "absolutely necessary" or "essential". The section is in general terms. Had the legislature intended to restrict the powers, rights and obligations continued by section 38 to situations in which they were absolutely or strictly necessary to wind up the affairs of the partnership and complete unfinished transactions, it would have used different language. Of course, in each case, a question arises as to whether, in the particular circumstances, what is done is necessary to wind up the affairs of the partnership, or is, in fact, collateral. It will depend on the facts of the case.

89. Although it is dangerous to hypothesise and each circumstance must be considered in context, it seems to me that it is very unlikely that it would be "necessary" in order to

wind up the affairs of a partnership to pursue a cause of action which has very little prospect of success, and/or where it is not cost-effective to do so. The question is what is necessary in the sense of reasonably required in the circumstances.

90. Furthermore, in my judgment, it does not follow from the *Boghani* case that it is never necessary to pursue a cause of action and that it should always be assigned. It, too, depends on the circumstances. There is no evidence before us, nor was there evidence before the Master about whether this cause of action could realistically be assigned.

91. Nor do I consider that either the *Kidsons* case or the *Belgravia* case is authority for the proposition that pursuing a cause of action is never "necessary for the winding up" because an action could be commenced by willing partners and the unwilling could be joined as defendants. In the *Kidsons* case, section 38 did not apply and Judge Mackie's conclusion in relation to whether it was necessary to commence the claim in that case was very short and was obiter. In the *Belgravia* case, it was held that section 49 Partnership Act 1895 (WA), the equivalent of section 38, was not the exclusive source of a partner's right to take legal proceedings in respect of partnership property after dissolution. The partners had joint rights and could commence proceedings joining other partners as parties, either as claimants, or if unwilling, as defendants. The Court of Appeal of Western Australia did not decide, however, that their equivalent of section 38 did not apply or was ousted. It merely concluded that the section was not the exclusive source of the partner's right to litigate.

92. If this proposition were correct, section 38 would never have any application where a partnership asset is in the form of a cause of action, even where there is a liquidated sum in relation to which there is no genuine dispute. That cannot be correct. Just because it is possible to constitute an action in such a way does not rule out section 38 out altogether.

93. Furthermore, in my judgment, it is not possible nor is it appropriate to draw a line between those actions which are considered to be sufficiently certain that they should fall within section 38 and those which allegedly are not, and accordingly, do not. That cannot be a proper way in which to interpret section 38. Once one accepts (as it seems from his reliance upon the points made by the respondents in the *Belgravia* case at [39(d) – (f)], that Mr Cohen does) that it is necessary to pursue a partnership asset in the form of a liquidated sum in relation to which there is no genuine dispute, it seems to me that, in principle, it is possible that it is "necessary" to pursue all causes of action which are partnership assets. There is no clear dividing line.

94. Of course, as the Master pointed out, the partners may have agreed not to pursue a particular cause of action for a variety of reasons, including the fact that it was merely speculative or would not have been cost-effective to pursue. The cause of action may also have become statute-barred and therefore, the partnership asset would no longer be capable of realisation. The decision whether to pursue the action is that of the partners and in the case of a limited partnership, the decision lies with the general partner. If they decide not to do so, the application of section 38 does not arise. Equally, if partners (or the general partner in a limited partnership) decide to pursue a cause of action which is a partnership asset, the third party defendant may challenge their authority to do so. However, if the partners/general partner considers it necessary for the winding up to pursue the cause of action, it seems to me that the court will approach the question of whether it is "necessary" with some

circumspection. There was no evidence on this appeal as to whether the claim against Mr Flohr is considered to be speculative or would not be cost-effective.

95. Lastly, I should add that I do not give any weight to Mr Cohen's argument that if the Master were right, partners would be shackled together forever and the partnership would never be laid to rest, contrary to the general policy of Partnership law that a winding up should be achieved as swiftly as possible. Although one can see that partnerships ought to be wound up and their affairs dealt with in an orderly manner as soon as possible, that does not affect the principle that the winding up must be complete. It cannot prevent section 38 from operating in circumstances such as these. Furthermore, the former partners remain former partners. Their relationship has come to an end but they are bound by the consequences of it having existed in the first place, at least to the extent that the PA 1890 and in this case, the 1907 Act provides. The position is not the same as if the partnership had been a company which was dissolved, or a partnership which is subject to Scots law which has a separate existence from the partners themselves. The rights and obligations of the partners continue for the purposes of the winding up until it is complete.

96. For all the reasons set out above, I would dismiss the appeal.

Elisabeth Laing LJ:

97. I agree.

William Davis LJ:

98. I also agree.