**ORD 13/0018**

**IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN**
**CIVIL DIVISION**
**ORDINARY PROCEDURE**

**BETWEEN:**

MICHAEL ALLEN WHITE — Claimant

and

DAMIAN BRUNT FOZARD — First Defendant

CHANNEL ONE LIMITED — Second Defendant

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**Judgment of His Honour Deemster Caine**
**delivered on 5 May 2020**

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## INTRODUCTION

1. This case involves the partnership created in late August 2005 between the following three men: the Claimant, the First Defendant and Mr David Whitten (who is not a party to these proceedings) ("the Partners" and "the Partnership"). The creation of the Partnership is discussed in more detail at paragraphs 20 to 22 below. At the hearing of this Claim the Claimant represented himself and the First Defendant was represented by Mr William Buck.

2. For most of its existence the business of the Partnership ("the Partnership Business") has been conducted, in whole or in part, through the Second Defendant, a company incorporated in the Isle of Man (which is represented by Mr Robert Long). The First Defendant claims to be the sole legal and beneficial owner of the Second Defendant, and all of the 300 issued shares in the Second Defendant are registered in his name. The relationship between the Partnership and the Second Defendant lies at the heart of this case.

3. For reasons that will become apparent in the course of this judgment, it is necessary to consider in some detail the Claimant's case as pleaded in his Claim Form. Accordingly, references in this judgment to Paragraphs will be references to the corresponding paragraphs in the Particulars of Claim annexed to the Claimant's Claim Form (which was prepared by the Claimant's former counsel).

## The relief sought at Paragraph 67

4. The Claimant seeks the following relief, at Paragraph 67:

> "*67. (1) a declaration that the Claimant is entitled to a 1/3 share of "the Second Defendant's profits" (as defined at paragraphs 39-40)* [of the Particulars of Claim]*;*
>
> *(2) an order that the First and Second Defendants do make, within 28 days, full disclosure of all accounting information relevant to the*

*Second Defendant and to C1LLC and to Core Avionics, LLC and to Channel One Holdings, LLC (and to any other related company unknown to the Claimant), from 2005 to the present date, such as would enable quantification of the above 1/3 share;*

*(3) a consequential order that the First and/or Second Defendant do pay to the Claimant a sum which the Court considers equal to the Claimant's 1/3 share in the Second Defendant's profits (as defined at paragraphs 39-40* [of the Particulars of Claim], *such sum also to be quantified by reference to full accounting disclosure, pursuant to (2), above (whether by way of damages for breach of contract and/or conspiracy and/or breach of trust and/or restitution for unjust enrichment, or upon such other basis as the Court thinks fit);*

*(4) such other relief as the Court thinks just; and*

*(5) costs."*

**Definition of "the Second Defendant's profits" at Paragraphs 39 - 40**

5. It will be noted that the declaration sought by the Claimant is that he *"is entitled to a 1/3 share of "the Second Defendant's profits" (as defined at paragraphs 39-40, above)"*. In this regard Paragraphs 39-40 plead as follows:

"*39. The Claimant avers that the First Defendant has sought, for personal financial benefit, to renege upon the three founding parties' agreement to share all profits jointly and equally, and thereby to deprive Mr Whitten and the Claimant of their respective 1/3 shares of the company's (and subsequently, the related group's) apparently substantial profits - to which profits, the Claimant avers, Mr Whitten and the Claimant each remain entitled today ("the Second Defendant's profits").*

*40. By way of elaboration on the "the Second Defendant's profits", the Claimant avers, in particular, that his 1/3 beneficial profit share of such covers net profits (i.e. net of independently confirmed costs) arising from: -*

*(1) any contract (including multiple-year contract) entered into between the Second Defendant and any third party; and*

*(2) any contract (including multiple-year contract) entered into between the Second Defendant and/or any related group company (including but not necessarily limited to Channel One International, LLC and/or or Core Avionics & Industrial, LLC and/or Channel One Holdings, LLC) (see paragraphs 54, 60 and 61, below), on the one hand, and any third party, on the other."*

**The Claimant's grounds for relief at Paragraph 66**

6. The grounds upon which the Claimant relies in seeking the relief set out at Paragraph 67 are set out at paragraph 66 ("the Grounds for Relief"), under the heading "*GROUNDS FOR RELIEF*", as follows:

"*66. The Claimant repeats the factual background above, and avers that:*

*(1) an agreement existed between "the three founding parties" (as defined at paragraph 2 (above), such agreement being both written (as evidenced by the e-mails referenced at paragraphs 7 and 13 above), and by the parties' further conduct (as referenced at paragraphs 2-13, and paragraphs 2-26, above), such agreement being to share "the Second Defendant's profits" (as defined at paragraphs 39-40, above), jointly and equally (meaning, in the Claimant's case, that he would be entitled to a 1/3 share thereof;*

*(2) the First Defendant has breached the above agreement, by denying the Claimant's entitlement to his 1/3 share; by failing to provide the Claimant with full disclosure of all relevant accounting information, such as will enable the Claimant to quantify the precise sum properly payable to the Claimant; and failing to pay such share to the Claimant;*

*(3) further or alternatively, the Second Defendant has known of the above contract and has interfered with its performance (whether by inducement, procurement or otherwise) such as to show that it has intended to cause a breach of the above contract, or to prevent its performance by the First Defendant, to the detriment of the Claimant;*

*(4) further or alternatively, the First and Second Defendant's wrongfully, and with intent to injure the Claimant and/or cause loss to the Claimant by unlawful means, have conspired and combined together to defraud the Claimant of his entitlement to his 1/3 beneficial share of the Second Defendant's profits (as defined at paragraphs 39-40 above), and to conceal such fraud and the proceeds thereof from the Claimant;*

*(5) the Claimant has suffered loss and damage as a result of each of the above (which loss and damage is likely to be substantial – and, for allocation purposes only, in excess of £300,000 – as indicated by the indicative accounting information referenced at paragraph 16-22, above);*

*(6) alternatively, the First and/or Second Defendant holds, as constructive trustee for the Claimant, the Claimant's beneficial 1/3 share of the Second Defendant's profits (as defined at paragraphs 39-40 above), and is liable to account to the Claimant for such;*

*(7) the First Defendant has acted in breach of such trust by denying the Claimant his beneficial entitlement to such share, (a) by failing to pay such shares to the Claimant; and (b) by failing to provide the Claimant with full disclosure of all relevant accounting information, as above;*

*(8) the Claimant has suffered loss and damage as a result thereof (which is likely to be substantial: see (5), above);*

*(9) alternatively, the First and/or Second Defendant has been unjustly enriched at the expense of the Claimant, to the extent of the Claimant's 1/3 share of the Second Defendant's profits (as defined at paragraphs 39-40 above), which share is held by the First and/or*

*Second Defendant, but which share properly belongs to the Claimant; and*

*(10) the Claimant has suffered loss and damage as a result thereof (which is likely to be substantial: see (5) above).*"

**Claim for Damages**

7. The claim for damages contained at Paragraph 67(3) is sought by way of a "consequential order" that the First and/or Second Defendant shall pay to the Claimant a sum "equal to the Claimant's 1/3 share in the Second Defendant's profits", with such sum to be paid; "whether by way of damages for breach of contract and/or conspiracy and/or breach of trust and/or restitution for unjust enrichment, or upon such other basis as the Court thinks fit". This claim for damages is therefore dependent upon the Claimant first succeeding in his claim for a declaration that he is entitled to a 1/3 share of "the Second Defendant's profits".

**Basis of the Claimant's Claim**

8. The basis of the Claimant's claim to be entitled to a 1/3 share of the Second Defendant's profits is contained in Paragraph 9, which pleads as follows:

*"9. The Claimant avers that, from inception, each of the three founding parties owned – and beneficially still owns today – 1/3 of the above business (such business now being formally constituted as Channel One Limited, but also, more recently, having expanded into an international group, including affiliated companies too….. (the Claimant's share being defined in more detail at paragraphs 39-40, below)".*

9. In Paragraph 9, "Channel One Limited" is the Second Defendant, "the three founding parties" are the three Partners (as discussed in more detail at paragraphs 20 to 22 below) and "the above business" is the Partnership Business referred to at Paragraph 2 (which is set out at paragraph 20 below and discussed in more detail at paragraphs 27 to 29 below). However, the manner in which the Partnership Business became "formally constituted as" the Second Defendant is not pleaded with any particularity.

10. There is a similar lack of particularity in this regard in Paragraph 66(1) which pleads, in essence, that "an agreement existed between "the three founding partners" (as defined in paragraph 2 above) …. such agreement being to share "the Second Defendant's profits" ….. jointly and equally ……". Since it is accepted by the Claimant that the agreement defined in Paragraph 2 is the agreement made on or around 25 August 2005 to create the Partnership (see paragraphs 21 and 33 below) there is a lack of particularity in Paragraph 66(1) as to how the agreement to create the Partnership became an agreement to share the profits of the Second Defendant (which was not incorporated until 7 October 2005).

11. I do not consider that it is sufficient simply to plead that the Partnership Business became "formally constituted as" the Second Defendant. The transfer of a partnership's business to a limited company does not automatically mean that the profits of the company concerned will subsequently be shared amongst the partners, particularly if the partnership continues to exist, for the reasons discussed in more detail below.

**Difficulties caused by the lack of particularity in the pleadings**

12. As a result of the lack of particularity in the Claimant's pleadings it is necessary to consider carefully the possible ways in which the Partnership Business became "formally constituted as" the Second Defendant, and the consequent results. This is particularly so since the damages claimed in the "consequential order" sought at Paragraph 67(3) can only flow from the Claimant's claimed entitlement to a 1/3 share of the Second Defendant's profits.

13. Since those damages are sought on grounds that include breach of contract and/or conspiracy to defraud and/or breach of trust and/or unjust enrichment on the part of the First and/or Second Defendants in failing to provide the Claimant with a 1/3 share of the Second Defendant's profits, it is important to understand the Claimant's case as to how he came to be entitled to such a share, and as to how the First and/or Second Defendants defrauded him of that share. It is therefore a matter of concern that the Claimant's case in this regard is not pleaded with any particularity, especially since serious allegations of misconduct are made against the two Defendants as the basis of the claim for damages. Both Defendants make vigorous complaints about the inadequacy of the Claimant's pleadings, which I consider to be justified. In the case of *Three Rivers District Council v Governor and Company of the Bank of England (No. 3)* [2001] UKHL 16 Lord Hope observed (at paragraph 51) that:

*"The more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation."*

14. I note that in his pleadings the Claimant admits that he has never been a registered shareholder of the Second Defendant, but does not seek a declaration that the First Defendant holds 1/3 of the issued shares in the Second Defendant upon trust for him. Rather, in his Grounds for Relief the Claimant pleads, at Paragraph 66(6), that "the First and/or Second Defendants holds, as constructive trustee for the Claimant, the Claimant's beneficial 1/3 share of the Second Defendant's profits." In this regard it is important to bear in mind that the Claimant does not plead that he is entitled to a 1/3 share of the Second Defendant's profits on the ground that he is the legal and/or beneficial owner of 1/3 of the issued shares in the Second Defendant.

15. Confusingly, however, there are averments and pleadings at Paragraphs 12 and 15, under the heading "Intended ownership of the Company – position at the outset", in which the Claimant puts forward a case that he has some form of ownership of 1/3 of the shares in the Second Defendant, as follows:

    (i) (Paragraph 12) " *….. the three founding parties made clear, in early dealings with each other, that Mr Whitten and the Claimant were de facto considered by the First and/or Second Defendant as "shareholders" and "directors" of the Second Defendant, even though not registered formally as such; and that beneficial ownership of the Second Defendant was intended, from the outset, to be joint and equal, as between the three founding parties."*

    (ii) (Paragraph 15) *"As the Second Defendant was incorporated on 7 October 2005, and as the Claimant avers that he remains a 1/3 owner of the Second Defendant, the Claimant avers that any attempt to quantify the net profit share of each of the founding parties – upon a buy-out, by the First*

*Defendant, of the Claimant's share and/or of Mr Whitten's share, as has been proposed – requires reference to all relevant accounting records relating to the period from October 2005 to date."*

16. In his witness statement dated 17 November 2016, and in oral submissions to the court, the Claimant relied upon a partially completed but unsigned stock transfer form in the name of the Second Defendant ("the Stock Transfer Form") as evidence that he holds a beneficial interest in 1/3 of the issued shares in the Second Defendant, notwithstanding that beneficial ownership of shares in the Second Defendant is not a Ground for Relief upon which he relies in Paragraph 66.

17. However, the pleadings and submissions in Paragraphs 12 and 15 are inconsistent with Paragraph 10, in which the Claimant pleads that:

> "*10. The Claimant avers that the First Defendant holds: (1) 1/3 of the equity in the business for himself; and (2) the other 2/3 only as nominee for Mr Whitten and the Claimant beneficially (Mr Whitten and the Claimant holding 1/3 of the equity each).*"

I consider that "the business" referred to in Paragraph 10 must be the Partnership Business defined in Paragraph 2. If the Claimant had intended to plead, instead, that the First Defendant holds 2/3 of the issued shares in the Second Defendant as nominee for the Claimant and Mr Whitten, then he could easily have done so.

18. It is not clear to me as to why, in the light of the matters pleaded in Paragraphs 12 and 15 and in his reliance on the Stock Transfer Form, the Claimant has not made a claim for a declaration that 1/3 of the issued shares in the Second Defendant are held upon constructive trust for him. Nevertheless, even though the Claimant does not rely upon any legal and/or beneficial ownership of shares in the Second Defendant as one of his Grounds for Relief, when I came to reach my decision in this matter I considered whether the matters referred to at paragraphs 15 and 16 above could support the Claimant in his claim for a declaration that he is entitled to a 1/3 share of the Second Defendant's profits; (see paragraphs 83 to 89 below).

## Summary of my Judgment

19. In the light of the matters that I have discussed above, I had serious concerns as to whether, as a matter of law, the Claimant could ever have an entitlement to a 1/3 share of the Second Defendant's profits on the basis of his pleaded case. Accordingly, in reaching my decision I dealt with this issue first, since I needed to be satisfied that the Claimant could have such an entitlement before I went on to determine whether, on the evidence before me, he is entitled to the relief claimed at Paragraph 67. Having considered this issue in detail I have concluded that, as a matter of law, the Claimant cannot have an entitlement to a 1/3 share of the Second Defendant's profits on the basis of his pleaded case, for the reasons set out in detail below, and that his claim must therefore be dismissed.

## BACKGROUND

## The Partnership

20. At Paragraph 2 the Claimant pleads that:

"*… in late 2005, three associates launched a specialised new electronic components distribution business, mainly to customers in the avionics and medical industries; and that the three associates ("the three founding parties") were the Claimant; David Whitten …..; and the First Defendant."*

21. The defined term "the three founding parties" in Paragraph 2 lacks precision and contains considerable ambiguity. However, at an earlier hearing in this matter, in relation to the Claimant's unsuccessful application for a separate trial on liability, the Claimant accepted, through his (then) counsel, Mr Steven Coren, that a partnership had been created between "the three founding parties", as is recorded in my judgment in this matter dated 14 December 2017, and also in my judgment dated 13 August 2019. The First Defendant had already admitted in his Defence dated 27 January 2014 that he, the Claimant and Mr Whitten had created the Partnership "*in or about August 2005*". Mr Whitten retired from the Partnership on 1 December 2011, as detailed at paragraph 23 (below).

22. I consider that the Claimant was correct to accept that a partnership was created between the Claimant, the First Defendant and Mr Whitten (although no written partnership agreement exists), not least because Section 4 of the Partnership Act 1909 ("the 1909 Act") defines a partnership as "the relationship which subsists between persons carrying on a business in common with a view to profit".

23. Mr Whitten retired from the Partnership pursuant to a "Deed of Termination of Partnership" dated 1 December 2011 ("the 2011 Deed"), which was executed by the First Defendant and Mr Whitten (although not by the Claimant). Mr Whitten was called by the Claimant to give evidence on his behalf at the hearing of this matter, and produced in evidence the 2011 Deed. In it the First Defendant and Mr Whitten are together defined as "*the Parties*", and the 2011 Deed notes that; *"In August 2005 the Parties and Michael White formed a partnership (the Partnership) in order, inter alia, to sell end-of-life ATI graphic products;"* and that; ….. "*the Parties wish to determine the Partnership to the extent that it subsists between themselves on and in accordance with the terms set out in this Deed*". At clause 4 of the 2011 Deed the Parties agreed that "*the Partnership shall, with effect from the date of this Deed, be dissolved as between the Parties and shall terminate and cease …*". Under its terms Mr Whitten was to receive the sum $1,220,094.40 from "the *assets of the Partnership*" payable over the following five years.

24. Subsequently, the 2011 Deed was replaced by a new agreement between Mr Whitten and the First Defendant dated 1 August 2014 ("the 2014 Agreement"), pursuant to which the First Defendant agreed to make one final accelerated payment to Mr Whitten in the sum of $200,000 in full and final settlement of all matters between them, including as to the Partnership. The 2014 Agreement stated that the sum of $823,350.38 had been paid to Mr Whitten prior to the execution of the 2011 Deed and that following the 2011 Deed, but prior to the 2014 Agreement, payments totalling $814,911.84 had been made to Mr Whitten.

25. At clause 3 of the 2014 Agreement the First Defendant and Mr Whitten agreed and acknowledged that Mr Whitten had transferred "his one third interest in the Partnership, including its assets, any rights or powers in respect of the Partnership and any entitlement to monies as a result of the activities of the Partnership" to the First Defendant.

26. It is right to note, although irrelevant to my determination of this case, that there is some dispute between the Claimant, the First Defendant and Mr Whitten as to

the circumstances in which Mr Whitten left the Partnership. However, it was not argued by any of the parties to this Claim, or by Mr Whitten, that Mr Whitten is still a partner in the Partnership.

**The nature and scope of the Partnership Business**

27. Paragraph 3 pleads that:

*"the nature of the business opportunity was to provide manufacturers with bulk purchasing and long-term storage solutions for electronic components (typically, but not exclusively, manufactured by a company known as AMD), which had reached the end of their life-cycle, or which had become obsolete."*

28. The First Defendant agrees that this was the nature of the Partnership Business and, at paragraph 3(b) of his Defence, pleads that:

"*The business of the Partnership consisted of two principal areas. Firstly, there was the sale and immediate distribution of graphics chips to clients ("the Distribution Business"). Secondly, from March 2007 until November 2007, there was the sale and supply of graphic cards to clients pursuant to long term contracts, the duration of such contracts being over several years ("the Long-Term Contracts"). The Long-Term Contracts were to provide clients with guaranteed access to a supply of graphics cards, to a specific specification, over a long period of time, such chips having been stored in optimum conditions, thereby providing them with certainty of supply in circumstances in which the manufacturers of such graphic cards ceased production."*

29. Further, sub-paragraphs 6(a) and (b) of the Defence of the First Defendant plead that:

*"a. As detailed in paragraph 3 above, the Partnership commenced in August 2005. At that time, the Claimant and Mr David Whitten were employed in the graphics card industry. They were at this point in time predominately interested in arranging the sale and supply of bulk quantities of graphics cards to commercial users, in circumstances in which those users were unable to acquire cards directly from the manufacturers. In effect, the Claimant and Mr David Whitten were seeking to act as brokers, a business identified as the Distribution Business in paragraph 3(b) above.*

*b. It was not until March 2007 that the Partnership engaged in the provision of long-term contracts for the supply of graphics cards to users, being the Long-Term Contracts as identified in paragraph 3(b) above. Such Long-Term Contracts were a type of contractual arrangement devised by the First Defendant, the purpose being to guarantee to end users that they had access over a significant number of years to a secure source of graphics cards which had been stored in optimum conditions for their commercial needs and regardless of whether such cards had ceased to be manufactured and/or otherwise had become obsolete and/or unavailable in the marketplace. Prior to March 2007 the Partnership did not provide Long Term Contracts to any clients."*

**Roles of the partners**

30. Paragraphs 4 and 5 set out what are described as the "Founding parties' respective roles" (in other words, the roles of the Partners), as follows:

*"4. The Claimant avers that he has over 20 years' experience in the electronic sales and consulting industry; that he believed that he could use his existing industry contacts to develop new business; and that Mr Whitten is similarly experienced within such industry.*

*5. ….. the Claimant avers that, from inception of the business, in approximately September 2005, up to the present, the First Defendant has acted as the business' operations manager and/or chief executive officer. The Claimant further avers that, from inception until approximately late 2007, key strategic business decisions were taken by the three founding parties jointly."*

31. The First Defendant admits this summary of the roles of the Partners, and at Paragraph 8(e) of his Defence pleads that; "…. *neither the Claimant, the First Defendant nor Mr David Whitten had any formal titles in respect of the Partnership. Rather, as a matter of practice, both the Claimant and Mr David Whitten were involved in the generation of sales leads and the identification of potential marketing opportunities. By comparison, the First Defendant was responsible for all of the financial affairs of the Partnership, its logistics, administration, contract negotiations and contract implementation."*

**Equal Partnership**

32. At Paragraph 7 the Claimant pleads that; "…. *from inception, the three founding parties agreed a joint and equal 3-way split of equity in the new business".* At paragraph 3(c) of his Defence the First Defendant admits that; "….. *in respect of the Partnership, it was agreed that the profits, after all expenses and costs, relating to the aforesaid Distribution Business and Long-Term Contracts would be split equally between the three partners."*

**Initial Partnership Contracts**

33. The first two contracts in relation to the Partnership Business ("the Partnership Contracts") were implemented by the First Defendant personally, using the business name "*Channel One Distribution"* which he had registered for this purpose. The first Partnership Contract, introduced by the Claimant, was with a company called High End Graphics Inc ("HEG"), pursuant to which the Partnership provided graphic boards to HEG. The contract was completed on 25 August 2005. The First Defendant gave evidence that he personally provided the financing for the HEG contract, and had told the Claimant that; "*I would do the deal using my personal trading name, but on the basis that the contract was property of the three of us. By this I meant that whilst I was the contracting party, I was doing so for the benefit of all three of us. The Claimant was happy about this arrangement."*

34. The second Partnership Contract, which was also introduced by the Claimant, was with a company called Stratus Technologies Inc ("Stratus"), pursuant to which the Partnership provided Stratus with graphic microprocessors manufactured by ATI. As with the HEG contract, the First Defendant personally provided the financing for the Stratus contract, and arranged all the logistics using the trading name "Channel One Distribution". The First Defendant stated in evidence that the Stratus contract was also the property of the Partnership.

**The Second Defendant**

35. The Second Defendant was incorporated in the Isle of Man on the 7 October 2005. The Second Defendant has 300 issued shares, all of which are held by the First Defendant. The Claimant admits that neither he nor Mr Whitten have ever been directors or shareholders of the Second Defendant. In his evidence the First Defendant stated that he incorporated the Second Defendant to assist him in fulfilling his obligations as the business operations manager of the Partnership, but that he has always been the sole legal and beneficial owner of all of the issued shares in the Second Defendant. The First Defendant also stated that none of the Partners ever had any intention that the Claimant or Mr Whitten would become shareholders of the Second Defendant or have any beneficial interest in it, or that the Second Defendant would become Partnership property. In this regard the First and Second Defendants rely upon the English case of *Barber and Others v Rasco International Limited* [2012] EWHC 269 QB ("*Rasco*"), which confirms that a partnership can enter into a contract with a third party through a limited company which is not of itself partnership property, although the contract will be partnership property. In *Rasco* one of the three partners used Rasco International Limited (all of the shares in which he personally owned) to enter into contracts with BP on behalf of the partnership. It was accepted by all of the partners, and by the court, that Rasco International Limited had never become partnership property, although the contracts with BP that it entered into on behalf of the partnership were partnership property.

36. The principle that a contract entered into by a partner on behalf of a partnership can become a partnership asset had been confirmed by the decision of the Court of Appeal in *Don King Productions Inc v Warren (No. 1)* [2000] Ch 291 ("*Don King*"), in which the Court considered whether an inalienable asset acquired by an individual partner in his own name during the subsistence of the partnership can still be an asset of the partnership. Morritt LJ stated (at paragraph 25) that:

"*… partnership property within section 20 of the Partnership Act 1890 includes that to which a partner is entitled and which all the partners expressly or by implication agree should, as between themselves, be treated as partnership property. It is immaterial, as between the partners, whether it can be assigned by the partner in whose name it stands to the partners jointly.*"

(I pause to note that section 20 of the Partnership Act 1890 of England and Wales is in the same terms as section 22 of the 1909 Act)

Morritt LJ continued (at paragraph 45) by stating that:

"*In summary, I agree with the judge that: (a) each partner holds the entire benefit of a management or promotion agreement entered into by him with a European registered boxer at any time between 16 September 1994 and the dissolution of the partnership and which is still in operation at the time of such dissolution on trust for the partnership; (b) the benefit to which the partnership is so entitled does not terminate on or by reason of such dissolution but continues until such time as the agreement expires or is properly disposed of in the winding-up of the affairs of the partnership; and (c) … the entire benefit of all management and promotion agreements concluded by a partner after the date of the dissolution but before the conclusion of the winding-up of the partnerships' affairs with the boxer with whom such partner has such an agreement at the date of the dissolution is also held on trust for the partnership*".

37. The *Don King* case is usefully summarised in "Lindley and Banks on Partnership" (19th Edition; 2010) ("Lindley & Banks") (at paragraph 10-54), as follows:

> "*There is no reason in principle why the benefit of an unassignable contract held by one or more of the partners should not become a partnership asset, as was clearly established in Don King Productions Inc v Warren. It follows that, where the partnership business involves the exploitation of such contracts, it should be made clear whether or not they are to form part of the partnership assets and how they are to be treated on the retirement, etc. of a partner or in the event of a general dissolution. The same treatment should be applied to any renewals of such contracts whilst the partnership exists and during the period of any winding-up*".

38. It can be seen, therefore that the Partnership Contracts entered into by the Second Defendant on behalf of the Partnership are Partnership property, since all of the Partners agree that they should be treated as Partnership property. It would be possible, in principle, for the Second Defendant itself to be treated as Partnership property (even though all of its shares are owned by the First Defendant) if all of the Partners agreed that it should be so treated. In such circumstances the First Defendant would hold all of the shares in the Second Defendant on trust for the Partnership as a whole (although not on trust for each of the Partners). However, the First Defendant emphatically does not agree that the shares that he holds in the Second Defendant should be treated as Partnership property.

39. Unfortunately, whilst the ownership of the Second Defendant is an important matter for consideration in this case, the Claimant's position is unclear from his pleadings (see, for example, the inconsistencies between Paragraph 10 and Paragraphs 12 and 15, discussed above). Further uncertainty arises out of the inconsistencies between (i) the Claimant's evidence concerning the incorporation of the Second Defendant, and (ii) his pleaded case. In this regard:

    39.1 in his witness statement dated 17 November 2016 the Clamant states that:

> "*In early 2005, David Whitten and I determined that we had a potentially lucrative opportunity to add value to the above industry, and to serve the existing ATI customer base … We discussed, throughout the year, how we might incorporate a stand-alone company to support such added value propositions...*"

> "*In approximately August/September 2005, David Whitten and I agreed to canvass our professional contacts worldwide, in an effort to identify an individual who might best fit the profile of a candidate matching the criteria required to manage our business ambitions. We interviewed a few key colleagues, and I determined that the First Defendant, Damian Fozard, would prove the most advantageous to us … we approached Mr Fozard to discuss the parameters for joining our team as an acting executive to run the day-to-day operations of the new company … Mr Fozard would be responsible for incorporating our company, and for the administration and fulfilment of customer orders*".

> *"Negotiations began on how the new company would be formed; on the precise role which Mr Fozard would perform; and on terms. We initially offered Mr Fozard an executive position with the company, in charge of*

*managing the day-to-day logistics of the newly planned company. Mr Whitten and I would entirely own the newly formed company*".

39.2 however, the Claimant's evidence in this regard is inconsistent with the contents of Paragraph 8 of his Claim Form (which was issued on 13 May 2013), in which he pleads that:

"*The Claimant avers that, at an early stage, the First Defendant persuaded Mr Whitten and the Claimant that an Isle of Man company should be incorporated to operate the new business; and that on 7 October 2005 Channel One Distribution Limited (Company No. 114518C) was incorporated in the Isle of Man; and that on 19 June 2006 Channel One Distribution Limited changed its name to Channel One Limited.*"

(It will be borne in mind that the first two Partnership Contracts were executed before the Second Defendant was incorporated: see paragraphs 33 and 34 above).

**The Long Term Contracts**

40. The First Defendant states in his Defence and in evidence that the Long-Term Contracts (as defined at paragraph 3(b) of his Defence, set out at paragraph 28, above) require the Partnership to store graphic processing units in carefully regulated conditions (particularly in relation to temperature and humidity) at considerable ongoing expense to the Partnership. The First Defendant admits in his Defence that the Long-Term Contracts are Partnership property. Accordingly, the profits from the Long-Term Contracts will, to some extent, form part of the ultimate residue of the Partnership to be distributed equally between the Claimant and the First Defendant as the remaining Partners, pursuant to Section 46(b)(4) of the 1909 Act, once the Long-Term Contracts have been concluded, and the Partnership has been wound up. The issue of the distribution of the ultimate residue of the Partnership upon its dissolution is discussed in more detail at paragraphs 71 to 74, below.

41. In this regard counsel for the First Defendant informed the court at the start of the hearing on 27 January 2020 (after pleadings had been closed and witness statements had been filed) that the final Long-Term Contract has now been concluded. Counsel submitted that following finalisation of the Partnership accounts the Partnership will be wound up, and the ultimate residue (sometimes referred to as the surplus assets) of the Partnership will be distributed equally between the remaining Partners. I note that the Claimant has not sought an order for the dissolution of the Partnership by the court, pursuant to Section 37 of the 1909 Act.

**The breakdown in the relationship between the Partners**

42. The Claimant pleads that the relationship between the Partners has broken down, and that he has not had any, or any significant, input into the running of the Second Defendant since November 2007, which is admitted by the First Defendant.

43. It is the case of the First Defendant that the Partnership was dissolved in November 2007, and that all that remains to be done is the winding-up of the Partnership Business at the conclusion of the Long-Term Contracts. In support of this submission the First Defendant relies upon the commentary upon the meaning

of dissolution in relation to a partnership in *Lindley & Banks* (at paragraph 24-01) in which it is stated that:

"*What is meant by the "dissolution" of the partnership is often misunderstood, not only because that word is used in two distinct senses but also because it has a very different meaning when applied to a company or limited liability partnership. In the case of a partnership it invariably refers to the moment of time when the ongoing nature of the Partnership relation terminates, even though the Partners may continue to be associated together in a new partnership or merely for the purposes of winding-up the firm's affairs. Indeed, the outward appearance of a partnership immediately prior to and immediately following a dissolution will frequently be unchanged.*".

44. The Claimant's case, however, is that the Partnership still exists, but that the Partnership Business has been "formally constituted as" the Second Defendant, (see paragraph 8, above).

**Contracts entered into by the Second Defendant after November 2007**

45. The First Defendant's case is that he is the sole legal and beneficial owner of the Second Defendant, which is still an operating business, but that its business no longer relates to the Partnership Business. As a result, says the First Defendant, none of the contracts entered into by the Second Defendant after November 2007 were entered into on behalf of the Partnership in relation to Partnership Business and they are not, therefore, Partnership property. The First Defendant asserts that, accordingly, the profits accruing to such contracts belong to the Second Defendant, and not to the Partnership, since they do not arise from Partnership property or the Partnership Business.

46. The Claimant, however, does not appear to accept that the First Defendant is the sole legal and beneficial owner of the Second Defendant, although his pleadings as to ownership are inconsistent (see paragraphs 15 and 16 above) and has not sought a declaration that the First Defendant holds 1/3 of its shares upon trust for him.

47. Accordingly, it is necessary to consider by whom, and in what capacity, the Partnership Business is held. I will return to this point later when dealing with the Partnership property.

**The relationship between the Second Defendant and the Partnership Business**

48. The stance of the First Defendant in this regard is as set out above. To recap, in very broad terms, the First Defendant states that: (a) he incorporated the Second Defendant to assist him in fulfilling his Partnership obligations; (b) he has always been the sole legal and beneficial owner of the issued shares in the Second Defendant, which is not Partnership property, although the Partnership Contracts relating to the Partnership Business which were entered into on behalf of the Partnership by the Second Defendant are Partnership property; (c) the Long-Term Contracts were all entered into before November 2007, and remain Partnership property; (d) the Second Defendant has not entered into any Partnership Contracts since November 2007; (e) any contracts that were entered into by the Second Defendant after November 2007 did not relate to the Partnership Business, were not entered into on behalf of the Partnership, and are not, therefore, Partnership property.

49. The stance of the Claimant with regard to the relationship between the Second Defendant and the Partnership Business is less clear, and relies upon his pleading in Paragraph 9 that the Partnership Business was "formally constituted as" the Second Defendant. It is therefore necessary to try to establish, if possible, what is meant by the Claimant's pleading that the Partnership Business became "formally constituted as" the Second Defendant.

50. In this regard, I consider that when pleading that the Partnership Business became "*formally constituted as*" the Second Defendant the Claimant cannot mean that the Partnership Business was transferred in its entirety to the Second Defendant in return for a pro rata allocation of its shares (legally and/or beneficially) to each of the Partners, since it is the Claimant's case that the Partnership is still in existence. For the reasons set out in detail at paragraphs 55 to 65 below, I consider that a partnership cannot normally continue to exist if its business has been transferred to a limited company in return for the allocation of its shares to the former partners.

51. In addition, the Claimant has not sought a declaration that the First Defendant holds 100 of the 300 issued shares in the Second Defendant upon trust for him, as might have been expected if it is the Claimant's case that the Partnership Business was transferred to the Second Defendant in return for a pro-rata allocation of its shares (legally and/or beneficially) to each of the Partners. Further, the 2011 Deed, which sets out the terms of Mr Whitten's retirement from the Partnership on 1 December 2011, makes no suggestion that the shares in the Second Defendant were allocated to the Partners, or that the First Defendant holds such shares on any type of trust for Mr Whitten and/or the Claimant. Rather, it acknowledges that the Second Defendant is "*owned solely and exclusively*" by the First Defendant.

52. It appears to me, therefore, that by pleading that the Partnership Business became "*formally constituted as"* the Second Defendant, it must be the Claimant's case (which is strongly contested by the First Defendant) that the Partnership Business was transferred from the Partnership to the Second Defendant to own and operate on behalf of the Partners and that by the agreement of all the Partners the Second Defendant itself became Partnership property. I consider that I am supported in my view that this is the Claimant's case by Paragraph 13, in which the Claimant avers that; "….. *from inception, the three founding parties in effect treated the new company as a corporate vehicle to operate the previously unincorporated business owned by the three parties jointly and equally."* In this regard, in *Chahal v Mahal and Another* [2005] EWCA Civ 898 ("*Chahal*"), Neuberger LJ noted (at paragraph 46 of his judgment) that:

> *"…. it is quite common for a partneship to own shares in a company in connection with the partnership's business…."*

*Lindley & Banks* commented upon the judgment in *Chahal* (at paragraph 2-04) as follows:

> *"It now seems clear that the sale of the entire partnership business to a company owned by the firm will not per se prevent the partnership continuing to exist, particularly if the partnership business can be regarded as extending to the business carried on through the medium of the company or other special circumstances exist."*

53. The only other way in which the Partnership Business could have become formally constituted as the Second Defendant is that put forward by the First Defendant, which is that the Second Defendant became solely responsible for entering into and implementing Partnership Contracts, but that whilst such Partnership Contracts are Partnership property, the Second Defendant remains wholly owned by the First Defendant and is not Partnership Property, as to which see *Rasco*, discussed at paragraph 35, above.

54. Accordingly, it is necessary to consider the law upon the transfer of a partnership's business to a limited company.

**Transfer of a partnership business to a limited company**

55. This issue was considered in detail in the judgment of the Court of Appeal in *Chahal*, from which considerable guidance can be obtained.

56. In *Chahal* three partners acquired and ran a caravan site and its associated business. However, in 1982 the partnership business was transferred to a limited company, which allocated shares in the company to two of the partners. Thereafter the business was run in the name of the company, and in 2001 the business and land were sold. The claimant (Mr Chahal, who was the partner who did not receive any shares) asserted that he was entitled to a significant share of the proceeds from the sale on the basis that he was still a partner in the enterprise. The defendants (who were the remaining two partners) denied that the claimant was entitled to a significant share of the sale proceeds. The claimant therefore sought a declaration that there was still a partnership between the three parties, an order for the dissolution of the partnership, and consequential accounts and enquiries. The judge at first instance held that the partnership had been dissolved and its business terminated by the sale of the company in 2001. The defendants appealed, contending that the partnership had terminated when the ownership and possession of the business had been transferred to the company, in 1982. However, their appeal was dismissed by the Court of Appeal, which held that:

    (i) where a business was carried on by two or more people in partnership, and the assets and operation of the business were then transferred in their entirety to a limited company in which shares were issued to the partners, the natural conclusion, both as a matter of commercial common sense and as a matter of law, was that the partnership had been dissolved, since it was to be inferred from the parties' conduct in transferring all the assets and operations of the partnership to a company that they had agreed that the partnership would come to an end by mutual agreement and that their relationship would change from that of partners in the partnership to that of shareholders in the company;

    (ii) however, on the evidence before the Court, the assumption that the transfer of the land and business out of the partnership and into the company had put an end to the partnership was rebutted, and it followed that the partnership continued until it was dissolved by the sale of the company in 2001, notwithstanding that all the assets and operation of the partnership business were transferred to the company in 1982.

57. It will be immediately noted, of course, that in *Chahal* the claimant sought a declaration that there was still a partnership between the three parties concerned, whereas in the present claim it is the Claimant's case that the Partnership still

exists, meaning that it cannot be inferred by the court, or anyone else, that the Partners had agreed that the Partnership would come to an end by mutual agreement, and that their relationship would change from that of Partners to that of shareholders in the Second Defendant.

58. In his judgment in *Chahal*, Neuberger LJ stated (at paragraphs 17 and 18) that:

> "*17. Where a business is carried on by two or more people in partnership, and the assets and operation of the business are then transferred in their entirety to a limited company, in which shares are issued to the partners (and particularly where each partner's allocation of shares is proportionate to his interest in the partnership), it appears to me that the natural conclusion, both as a matter of commercial common sense and as a matter of law, will normally be that the partnership had been dissolved.*
>
> *18. So far as commercial common sense is concerned, in such a case there would seem to be no purpose on the partnership continuing. There would simply be nothing, whether in conceptual or practical terms, to which any partnership relationship could relate, other than for the purpose of winding-up. The business and the assets, previously treated as operated and owned by the partnership would have become vested in the company, and the shares of the company would be beneficially owned by the respective shareholders, the former partners. In the absence of further facts to support such a proposition, it would be surprising if the shares, having apparently all been allocated to the partners beneficially to reflect their respective interests in the partnership, were to be treated as being partnership property.*"

59. At paragraph 37 of his judgment Neuberger LJ stated that:

> *37. … It appears to me that, in the normal case of transfer, the reason, or at least an important reason, why the partnership relationship ceases when the shares are issued to the individual former partners, is because the ownership of the shares by the individual (former) partners beneficially is inconsistent with the ownership of the shares being subject to the partnership relationship.*"

60. At paragraph 39 of his judgment Neuberger LJ commented that:

> "*39. In this connection, I consider that it is important to remember that one is here concerned as to whether it is right to infer an agreement between all the partners that a partnership would be wound-up as a result of actions or discussions. In my view, where, as here, one of the partners has not been involved in the relevant actions at all, and has only been peripherally involved in those discussions, it must at least be more difficult to spell out an agreement between all the partners, including him, that the partnership is to be dissolved."*

61. At paragraph 47 of his judgment Neuberger LJ stated that:

> "*47. For these reasons, I am of the view that the judge was right to conclude that, on the rather unusual facts of this case, the transfer to HPL of the business, previously owned and run by the partnership, and of the land, being the asset of the partnership, did not operate to dissolve the partnership. Just as in National Westminster Bank Plc v Jones [2001] 1*

*BCLC 98, where the facts were also quite unusual, albeit very different from the present case, there are reasons for concluding that the complete transfer of the business and all its assets from the partnership to a company did not carry with it the inference of an agreement that the partnership should be dissolved.*"

62. In the present case, of course, there is no question of this court inferring that the transfer of the Partnership Business to the Second Defendant (if that is what happened) carried with it the inference of an agreement between the Partners that the Partnership should be dissolved, since it is the Claimant's case that the Partnership still exists.

63. *Chahal* makes it clear, therefore, that in the present case the Claimant's pleadings cannot be construed as meaning that the Partnership Business was transferred to the Second Defendant in return for the allocation of its shares, legally or beneficially, to the individual Partners, since it is the Claimant's case that the Partnership still exists, as is demonstrated by:

63.1 Paragraph 9 (set out at paragraph 8 above), in which the Claimant pleads, amongst other things, that "*from inception, each of the three founding parties owned – and still owns today – 1/3 of the above business (such business now being formally constituted as Channel One Limited)*";

63.2 the evidence of Mr Whitten, and the contents of the 2011 Deed and the 2014 Agreement which he adduced in evidence (see paragraphs 23 to 25) above;

63.3 the Claimant's submissions in his skeleton argument, in which he stated that:

"*It is ridiculous of Mr Fozard to plead (see paragraph 3(d) of his Defence) that, "the partnership was dissolved in November 2007", in circumstances which – as late as November 2010 – Mr Fozard was unsuccessfully seeking that Mr Whitten and I sign a document agreeing that the partnership, "shall, with affect from the date of this Deed, be dissolved …"";*

63.4 the fact that the Claimant has not sought a declaration that the First Defendant holds 100 of the issued shares in the Second Defendant upon trust for him, or an order rectifying the register of members of the Second Defendant to show the Claimant as the holder of 100 shares in the Second Defendant, as would be expected if his case is that Partnership Business had been transferred to the Second Defendant in return for a pro-rata allocation of its shares to the Partners.

64. In the light of the judgment of the Court of Appeal in *Chahal*, I find that the Claimant cannot have any form of beneficial ownership of any of the issued shares in the Second Defendant, since it is his case that the Partnership has not been dissolved, in which case 100 shares in the Second Defendant cannot have been legally or beneficially allocated to him in return for his share of the Partnership Business.

65. In these circumstances I consider that since the Claimant's case is that the Partnership has not been dissolved, but that nevertheless the Partnership Business has been "formally constituted as" the Second Defendant, the Claimant must be taken as either; (i) treating the Second Defendant as Partnership property; or (ii)

accepting that the Second Defendant manages the Partnership Business, in whole or in part, whilst being wholly owned by the First Defendant.

66. It is therefore necessary for me to consider whether the Claimant is entitled to "a 1/3 share of the Second Defendant's profits" on the basis that either; (i) the Second Defendant itself is Partnership property (which is denied by the First Defendant); or (ii) that because the Partnership Business is managed by the Second Defendant the Claimant is entitled to a 1/3 share of the Second Defendant's profits. In order to do so it is necessary to consider the law on partnership property.

**The Law on Partnership Property**

67. Partnership property is defined at Section 22(1) of the 1909 Act as:

> "*All property and rights and interest in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm or for the purposes and in the course of the partnership business are called in this Act 'partnership property', and must be held and applied by the partners exclusively for the purpose of the partnership and in accordance with the partnership agreement.*"

68. Section 23 of the 1909 Act states that:

> *"Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm."*

(It is unclear from the evidence before me whether the Partnership paid for the Second Defendant to be incorporated (and I make no finding of fact in this regard) but nothing turns upon this, because if the Partnership did so pay, with the result that the Second Defendant became Partnership property, that is one of the two alternative possibilities for me to consider, as identified in paragraph 66 above).

69. *Lindley & Banks*, at paragraph 18-02, states that:

> *"Lord Lindley defined Partnership property in this way:*
>
> *"The expressions Partnership property, partnership, stock, partnership assets, joint stock and joint estate, are used indiscriminately to denote everything which the firm, or in other words all the partners comprising it, can be considered to be entitled as such. The qualification as such is important; for persons may be entitled jointly or in common to property, and the same persons may be partners, and yet that property may not be Partnership property; e.g. if several persons are partners in trade, and land is devised or a legacy is bequeathed to them jointly or in common, it will not necessarily become Partnership property and form part of the common stock in which they are interested as partners."*

70. I consider that, at paragraph 65 above, I have identified the only two ways in which the Partnership Business could have been "formally constituted as" the Second Defendant on the basis of the Claimant's pleadings. The second basis (that the Partnership Contracts are Partnership property) is not controversial. The first basis (that the Second Defendant has become Partnership property) is strongly contested. However, before I endeavour to determine whether the Second Defendant has become Partnership property I shall consider whether, in the event

that it has, the Claimant could be entitled to a 1/3 share of the Second Defendant's profits, in any event. To determine this issue it is necessary to consider the law upon a partners "share" of partnership property.

**The "share" of a partner in partnership property**

71. In *Popet v Shonchhatra* [1977] 1 WLR 1367 (at 1372) ("*Popet*") in the Court of Appeal, Nourse LJ stated that:

> "*Although it is both customary and convenient to speak to a partner's "share" of the partnership assets, that is not a truly accurate description of his interest in them, at all events so long as the partnership is a going concern. While each partner has a proprietary interest in each and every asset, he has no entitlement to any specific asset and, in consequence, no right, without the consent of the other partners or partner, to require the whole or even a share of any particular asset to be vested in him. On dissolution the position is in substance not much different, the partnership property falling to be applied subject to ss 40 to 43 (if and so far as applicable), in accordance with ss 39 and 44 of the 1890 Act. As part of that process, each partner in a solvent partnership is presumptively entitled to payment of what is due from the firm to him in respect of capital before division of the ultimate residue in the shares in which profits are divisible; see section 44(b) 3 and 4. It is only at that stage that a partner can accurately be said to be entitled to a share of anything, which in the absence of agreement to the contrary, will be a share of cash.*"

Although *Popet* was not followed in the subsequent Court of Appeal case of *Sandhu v Gill* [2005] EWCA Civ 1297 ("*Sandhu* "), Neuberger LJ (at paragraph 18 of his judgment) described the passage from the judgment of Nourse LJ in *Popet*, set out above, as "uncontroversial". In the present case I consider that, on the Claimant's case at least, the Partnership is "a going concern", since the Long-Term Contracts are still running, with attendant ongoing costs to the Partnership.

72. At paragraph 18 of his judgment in *Sandhu* Neuberger LJ considered the meaning of the words "his share of the partnership assets" in section 42(1) of the Partnership Act 1890 (which is in the same terms as section 44(1) of the 1909 Act). At paragraphs 19 to 51 of his judgment Neuberger LJ set out what he described as "the arguments for the Appellant's case" in this regard, which he subsequently considered in detail at paragraphs 52 to 62 before stating (at paragraph 63) that; "*I have come to the conclusion that the Appellant's case, as advanced by Mr Blackett-Ord, on this issue, is correct*". I consider that considerable guidance can be obtained from "the arguments for the Appellant's case" set out and accepted by Neuberger LJ in his judgment, which include the following points which are of particular relevance to the instant case:

    72.1 (at paragraph 19 of the judgment) "*In the [18th Edition] of Lindley and Banks on Partnership, the topic of "partnership shares" is dealt with in Ch 19. Lord Lindley's "classic definition" is quoted in paragraph 19-05. He said that "the share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities have been paid and discharged". In the following paragraph, the editors effectively endorse this definition, albeit stating that, "it would be more accurate to speak of a partner's entitlement to a proportion of the net proceeds of sale of the assets".*

(It should be noted that since the judgment of the Court of Appeal in *Sandhu* the 19th Edition of *"Lindley and Banks on Partnership"* has been published, but that there have been no material changes to the contents of the paragraphs in the 18th Edition cited in the judgment of Neuberger LJ).

72.2 (at paragraph 20) "*As to the position while the partnership is continuing, "Lindley and Banks" suggests (para 19-09) that, "in the absence of any agreement to the contrary, the share of a partner will represent (and should always be stated in terms of) his proportionate share in the net proceeds of sale of the partnership assets, after all the firm's debts and liabilities have been paid or provided for. The editors go on to suggest that this is supported "in substance" by the approach of the Court of Appeal in the passage I have quoted from Popet's case.*"

72.3 (at paragraph 21) "*In para 19-10 the editors turn to the position on the general dissolution and "submit" that "each partner's share will have the same proprietary characteristic as it had prior to the dissolution". They immediately go on to state that "in terms of value, the share must still be expressed as a net entitlement since, in the absence of some specific agreement between the partners, it cannot be properly viewed in any other light". That is also stated to be supported by the passage I have quoted from Popet's case".*

72.4 (at paragraph 22) "*One can find support for this conclusion in at least some of the authorities referred to in the footnotes to the passages that I have cited in "Lindley and Banks". Thus, in Re Ritson, Ritson v Ritson [1899] 1 Ch 128, Chitty LJ said (at 131) of a deceased partner that his "interest in the joint assets [of the partnership] was only his share of the surplus after payment of the joint debts", echoing a similar observation of Lindley MR himself (at 130-131). In Rodriguez v Speyer Bros [1919] AC 59 at 68, Lord Finlay LC said this:*

*"When a debt due to the firm is got in no partner has any definite share or interest in that debt; his right is merely to have the money so received applied, together with the other assets, in discharging the liabilities of the firm, and to receive his share of any surplus there may be when the liquidation has been completed.*"

72.5 (at paragraph 23) "*The concept of an interest in such a "surplus" is also to be found in a judgment of Buckley J, in Burdett-Coutts v IRC [1960] 3 All ER 153 at 159, where he said this, when he observed that the analysis of Romer J in Manley v Sartori [1927] 1 Ch 157:*

*"…… is authority for the view that, when a dissolved partnership is to be, or is in the course of being, wound-up, each partner or his estate retains an interest in every single asset of the former partnership which remains unrealised or unappropriated, and that interest is proportionate to a share in the totality of the surplus assets of the partnership.""*

72.6 (at paragraph 24) "*So far, I have referred to authorities after the 1890 Act, but it is worth observing that it seems to have been the same before that Act came into force. Thus, in Ashworth v Munn [1880] 15 ChD 363, James LJ said this (at 369-370):*

*"[The partners] interest is exactly in proportion to what the ultimate amount coming due to them upon the final taking and adjustment of the accounts may be … the share of each of the other partners no doubt is not a share in any specific asset or any specific part of the assets real or personal, but a share of what will ultimately come to him when the accounts are ascertained, and when the partners are to contribute have contributed, and when the assets are got in, the debts paid and the amounts realised".*

72.7 (at paragraph 25) "*Although this observation was, as mentioned, made before the 1890 Act came into force, it should be noted that, as stated in "Lindley and Banks" (para 1-06), the 1890 Act "introduced no great change in the law".*

73. I note that it is also stated in paragraph 19-08 in the 19th Edition of "*Lindley & Banks*" (which is in almost identical terms to paragraph 19.09 in the 18th Edition) that:

"*Nevertheless, it is submitted that, irrespective of the terms of the agreement, each partner's share will display two characteristics which may be regarded as constants. First, each partner's beneficial interest, expressed in terms of its realisability, is in the nature of a future interest taking effect in possession on (and not before) the determination of the partnership, whether brought about by his departure or by a general dissolution. This limitation on his entitlement may be explained by reference to the fact that, as long as the partnership continues, each partner is entitled to require the partnership assets to be applied for partnership purposes and no partner is entitled to use or enjoy his share of those assets to the exclusion of his co-partners. Secondly, when the partnership is determined and the partner's beneficial interest in the partnership assets notionally falls into possession, it will take affect subject to the right of the other partners to have those assets applied towards payment of the firm's debts and liabilities and any surplus divided between the partners in the manner prescribed by the Partnership Act 1890. This will normally entail a sale of such property.*"

74. Accordingly, it can be seen that a partner does not have a separate interest in any of the partnership property prior to the winding-up of the partnership. In the instant case, therefore, in can also be seen that the Claimant does not have any entitlement to either 1/3 of the issued shares in the Second Defendant (and therefore to 1/3 of its profits) if the Second Defendant is Partnership property, or to 1/3 of the Second's Defendant's profits arising out of the Partnership Contracts executed and implemented by the Second Defendant on behalf of the Partnership (if the Second Defendant is wholly owned by the First Defendant), since the Partnership Contracts are Partnership property. The Claimant's entitlement to Partnership assets is as set out in the judgment of Nourse LJ at page 1372 of his judgment in *Popet* (see paragraph 71, above).

75. In these circumstances there is no need for me to determine whether the Second Defendant is Partnership property in order to determine whether, as a matter of law, I can grant a declaration that the Claimant is entitled to a 1/3 share of the Second Defendant's profits.

**Determination as to whether, as a matter of law, the Claimant can be entitled to the declarations sought in Paragraph 67(1)**

76. If the Second Defendant is Partnership property, the Claimant can have no separate interest in it, either legally or beneficially, and it follows that he can have no separate interest in its profits which would entitle him to a 1/3 share of those profits.

77. Alternatively, if the Second Defendant is wholly owned by the First Defendant, but the Partnership Contracts that it entered into on behalf of the Partnership are Partnership property (as are any profits arising from those Contracts) the Claimant cannot have any separate interest in those Partnership Contracts which would enable him to a 1/3 share of the profits arising from them.

78. Instead, upon the winding-up of the Partnership, which I am informed is likely to take place later this year, the Claimant will be entitled to a 1/3 share of the ultimate residue of the Partnership assets, which is likely to be a share of its net cash after all the Partnership's debts and liabilities have been paid or provided for, pursuant to sections 41 and 46 of the 1909 Act. It will be noted that "ultimate residue" is the term used in section 46(b)(4) of the 1909 Act in relation to the distribution of assets after the dissolution of a Partnership, and is also the term used by Nourse LJ in his judgment in *Popet*, (set out at paragraph 71 above).

79. I consider that I am supported in my conclusion that, as a matter of law, the Claimant cannot have any entitlement to a 1/3 share of the Second Defendant's profits by the judgment of Millet LJ in *Hurst v Bryk* [2002] 1AC 185 (at 194) who stated, in relation to a partnership, that:

*"Neither during the continuation of the relationship nor after its determination has any partner any cause of action at law to recover monies due to him from his fellow partners. The amount owing to a partner by his fellow partners is recoverable only by the taking of an account in equity after the partnership has been dissolved; see Richardson v Bank of England [1893] 4 My & Cr 165; Green v Hertzog [1954] 1 WLR 1309."*

80. *Hurst v Bryk* (above) was followed by the Court of Appeal in *Cowan v Wakeling* [2008] EWCA Civ 229, although it should also be noted that both decisions have been the subject of some criticism in *Lindley & Bank*s. Nevertheless, at paragraph 19.08 *Lindley & Banks* states that –

"*Thus, in the absence of any agreement to the contrary, the share of a partner will represent (and should always be stated in terms of) his proportionate share in the net proceeds of sale of the partnership assets, after all the firm's debts and liabilities have been paid or provided for. The foregoing analysis appears to have been accepted by the Privy Council in Hadlee v Commissioner of Inland Revenue [1993] A.C. 524 (at 532g), and, in substance, by the Court of Appeal in Popet (above) at page 1372C-E.*"

(Paragraph 1372C-E in *Popet* is set out at paragraph 71 above).

81. To conclude, therefore, I find, as a matter of law, that the Claimant is not entitled to a 1/3 share of "the Second Defendant's profits" as defined at Paragraphs 39-40 of his Claim Form, and it follows that his claim for a declaration that he is so entitled, at Paragraph 67(1), must be dismissed.

82. For the avoidance of doubt, I should make it clear that I do not make any determinations or findings of fact (because it is unnecessary for me to do so) as to the matters and assets that will need to be taken into account when the

Partnership is eventually wound-up, or as to whether the Partnership is still a going concern (on the Claimant's case) or was dissolved in 2007 with its winding-up to be undertaken at the conclusion of the Long-Term Contracts (on the Defendant's case). I consider that it would be inappropriate for me to pre-judge any issues that may arise in this regard. They will be a matter for the two remaining Partners, and in his closing submissions counsel for the First Defendant accepted, quite properly, that the Claimant can challenge the final Partnership accounts produced by the First Defendant in his capacity as the business operations manager for the Partnership. In this regard I note from paragraph 20-006 in *Snell's Equity* (33rd Edition) that; "*Accounting for the assets and liabilities of a partnership upon dissolution is notoriously difficult*."

**A shareholder's entitlement to a share of a company's profits**

83. As stated at paragraph 18 above, in case I am wrong in my determination that the Claimant has no beneficial interest in the Second Defendant (and none is claimed as a Ground for Relief by the Claimant at Paragraphs 66 and 67) I have considered whether, as a matter of law, the Claimant could have an entitlement to a 1/3 share of the Second Defendant's profits if he does have a beneficial interest in 100 of its 300 issued shares, or indeed if he were to be the sole legal and beneficial owner of 100 of its shares.

84. Having done so, however, I still consider that, as a matter of law, the Claimant could not be entitled to a 1/3 share of the Second Defendant's profits, for the following reasons:

84.1 a shareholder in a Manx company is not entitled, as of right, to a share of its profits for a particular period which is proportionate to his shareholding in that company. Rather, he is entitled to receive a dividend declared by an ordinary meeting of its shareholders, which must not exceed the amount recommended by its directors;

84.2 *Halsbury's Laws* (5th Edition – 2016) ("Halsbury's") notes (at paragraph 1582) that:

"*The general rights of shareholders with reference to dividends, and the manner in which they are to be declared and paid, are usually stated in the Company's Articles of Association.*"

84.3 the articles of associations of the Second Defendant ("the Articles") are in terms which are similar, although not identical, to the standard Table A articles contained in the Companies Memorandum and Articles of Association Regulations 1988;

84.4 Article 104 states that, "*The company in General Meeting may declare dividends, but no dividends shall exceed the amount recommended by the Directors*";

84.5 Article 105 states that; "*The Directors may from time to time pay to the members such interim dividends as appear to the Directors to be justified by the profits of the company*". It can be seen, therefore, that the directors of the Second Defendant have a discretion in this regard, and that the shareholders do not have an entitlement, as of right, to such an interim dividend payable out of the Second Defendant's profits;

84.6 further, Article 108 states that; "*The Directors may, before recommending any dividend, set aside out of the profits of the Company such sums as they think proper as a reserve or reserves which shall, at the discretion of the Directors, be applicable for meeting contingencies or for equalising dividends, or for any other purpose to which the profits of the Company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the Company or be invested in such investments (other than shares of the Company) as the Directors may from time to time think fit.*" In this regard, as Halsbury's states at paragraph 1586, the discretion of directors to set aside a sum out of profits as a reserve cannot be questioned on the ground that it reduces the amount available for a dividend; see *Burland v Earle* [1902] AC 83, PC, in which the Privy Council held that there is no principle which compels a company, whilst a going concern, to divide the whole of its profits among its shareholders;

84.7 accordingly, it is clear that even if the Claimant is the beneficial owner of 100 shares in the Second Defendant, held upon trust for him by the First Defendant, he still cannot be entitled to 1/3 of the Second Defendant's profits, since the First Defendant has no entitlement to the whole of the Second Defendant's profits for any particular period. As a result, the Claimant cannot have a beneficial entitlement to 1/3 of the profits either, whether payable pursuant to the consequential order sought in Paragraph 67(3), or otherwise;

84.8 with regard to the Claimant's claim, at Paragraph 66(6), that the Second Defendant holds as constructive trustee for the Claimant, 1/3 of the Second Defendant's profits, I note that Paragraph 1589 in Halsbury's makes it clear that; "*Only those members who are on the register when a dividend is declared are entitled to participate in it*". In this regard Halsbury's cites *Godfrey Phillips Limited v Investment Trust Corp. Limited* [1953] 1 All ER 7, in which it was held that a dividend can only be paid to those persons who are registered as the holders of shares at the time of the declaration of the dividend;

84.9 the Claimant admits that he has never been on the register of members of the Second Defendant, from which it follows that the Claimant has never been entitled to a share of a dividend declared in relation to the Second Defendant, let alone a "*1/3 share of its profits*". In relation to the Second Defendant, therefore, I do not consider that it could hold a 1/3 share of its profits on trust for the Claimant, in any event.

**The Stock Transfer Form**

85. For the sake of completeness, I will also deal with the Stock Transfer Form relied upon by the Claimant in his submissions to the court.

86. In this regard the Claimant produced in support of his claim to have beneficial ownership of 100 shares in the Second Defendant the unsigned and undated Stock Transfer Form, which bore the company seal of the Second Defendant. The Stock Transfer Form, which has been partially completed by hand, refers to 100 of the issued shares in the Second Defendant, and shows the First Defendant as the transferor of the shares and the Claimant as the transferee. It has not been signed by the First Defendant as transferor. In his evidence the Claimant stated that he received the Stock Transfer Form on or about 23 April 2007. In

submissions made in support of his earlier unsuccessful application to amend his Claim Form the Claimant submitted, in reliance upon the Stock Transfer Form (as noted at paragraph 25 of my judgment dated 13 August 2019) that the First Defendant holds 2/3 of the shares in the Second Defendant in "*nominee trust*" for the Claimant and Mr Whitten, and that accordingly he is either the beneficial owner of 1/3 of the issued shares in the Second Defendant or, "*if Mr Whitten is legally no longer a shareholder*", half of the issued shares.

87. However, as submitted by Mr Long, counsel for the Second Defendant, the Stock Transfer Form has not been signed by the First Defendant as transferor of the shares, or by any directors or the secretary of the Second Defendant with the result that the company seal has not been validly affixed to it. In this regard Article 102 of the Second Defendant states that:

"*If the Company does adopt a Common Seal, the Seal shall be used only with the authority of the Directors and every instrument to which the Seal shall be affixed shall be signed in the presence of any two Directors, or of a Director and of the Secretary, or such other persons as the Directors may appoint for the purpose; and the Directors and the Secretary and other persons aforesaid shall sign every instrument to which the Seal of the Company is so affixed in their presence.*"

88. As a result the Stock Transfer Form is of no effect. In addition, as pointed out by Mr Long, the Second Defendant has no record that it has ever received a request to register any of its shares in the names of either the Claimant or Mr Whitten, whether in reliance on the Stock Transfer Form or otherwise. It is also relevant that the Claimant has not made any application to amend the register of members of the Second Defendant, pursuant to the provisions of section 101 of the Companies Act 1931, under which the court may order rectification of the register of members of a company.

89. In any event, however, even if the Stock Transfer Form did amount to conclusive evidence that the Claimant is the beneficial owner (or even the legal owner) of 100 shares in the Second Defendant, he would still not be entitled to a 1/3 share of its profits, for the reasons set out at paragraph 84 above.

**The claims for disclosure of accounting information and damages**

90. Since I have determined, as a matter of law, that the Claimant is not entitled to "*a 1/3 share of the Second Defendant's profits*", and that his claim for a declaration that he is so entitled must be dismissed, it follows that the Claimant is not entitled to:

(i) the disclosure of the accounting information sought in Paragraph 67(2). In this regard I bear in mind that the Claimant has not sought an account between the Partners, whether under sections 30 or 31 of the 1909 Act or otherwise, but instead has sought accounting information "*such as would enable quantification of the above 1/3 share*" of the Second Defendant's profits, which is entirely different to an application for a partnership account. Since I have found that the Claimant is not entitled to 1/3 of the Second Defendant's profits, it follows that he is not entitled to the accounting information as sought. I also bear in mind the judgment of Millet LJ in *Hurst v Bryk*, referred to at paragraph 79 above;

(ii) *"the consequential order"* for damages sought in Paragraph 67(3), in relation to which I would repeat the comments that I made in paragraph 7, above.

**The First Defendant's Counterclaim**

91. By way of Counterclaim dated 27 January 2014 the First Defendant seeks (i) repayment by the Claimant of the sum of $500,000 loaned by the First Defendant to the Claimant on 12 September 2007, and (ii) interest on the said loan on the basis of one of the two following alternatives:

91.1 at the rate of 8% per annum, calculated and compounded monthly, from 12 September 2007 until 31 December 2013, and continuing until the date of judgment or sooner payment. I assume that the date of 31 December 2013 is relied upon by the First Defendant because his Defence and Counterclaim were filed on the 27 January 2014;

91.2 interest pursuant to section 41 of the High Court Act 1991 at the rate of 4% per annum upon the said sum from 13 September 2007 until the date of judgment.

92. In his Defence to Counterclaim dated 11 February 2014 the Claimant admits that the sum of $500,000 is repayable by him, but pleads that it is repayable to the Second Defendant, and not to the First Defendant, and that he is entitled to off-set such sum from the amounts claimed by him in his Claim Form. (I will refer to the said $500,000 loan to the Claimant by either the First or Second Defendant as "the Loan").

93. In his Defence to Counterclaim the Claimant also relies upon the contents of Paragraphs 28 to 32 of the Particulars of Claim annexed to his Claim Form, in which he avers that the Second Defendant advanced to him the sum of $1million to facilitate the purchase of the property in Chicago in which the Claimant resides. With regard to the advancement of the said $1million, the Claimant pleads that:

"*(1) Of the $1million some $500,000 represented a net profit distribution of the Second Defendant, to which the Claimant was entitled;*

*(2) The remaining $500,000 was a loan from the Second Defendant to the Claimant;*

*(3) The term of the $500,000 loan was 1 year*"

94. Leaving aside the question of who provided the Loan, the issue of the term of the Loan is also contentious. As noted above, the Claimant avers that the term was 1 year, whereas in his witness statement dated 17 November 2016 the First Defendant states that the Loan was to be repaid almost immediately, and produces in evidence an email dated 12 September 2007 from the Claimant to the First Defendant in which the Claimant states that; *"Also, I have confirmed I can secure a home equity loan on the property almost immediately after closing. The painful bit is that the interest rate …… will cost me 1.5% closing points and 10.95% interest."* The First Defendant stated in evidence at the hearing that he had understood that the Claimant would repay the Loan from the monies raised by the home equity loan.

95. In his oral evidence at the hearing of this matter the Claimant confirmed that he had obtained a mortgage over the property in Chicago, but that he had not used the money so raised to repay the Loan. He also stated, initially, that the whole of the sum of $1,000,000 had been advanced to him on 12 September 2007 to enable him to purchase the property in Chicago, "…… *to build out the Partnership into real estate",* and to *"….. broaden our horizons to different areas"*, and that in this regard it was thought that the Claimant might, *"…. rent it out, rehab it and sell it in the future"*. Subsequently, however, the Claimant stated, in response to questions from Mr Buck, that *"I now see it as a distribution of $500,000 with $500,000 to be paid back."*

96. I note that the oral evidence initially given by the Claimant at the hearing is inconsistent with the content of Paragraph 30 of his Claim Form, which states that:

"*The Claimant avers that he has consistently accepted that the $500,000 is repayable by him (with interest) at a rate to be agreed*."

**By whom was the Loan to the Claimant made?**

97. In his witness statement dated 17 November 2016 the First Defendant provides considerable background detail about the making of the Loan to the Claimant on the 12 September 2007. In this regard the First Defendant states that:

(At paragraph 137)

"*The Claimant was buying a new home for himself in Chicago … The $100,000 paid to him at the very end of July 2007 was for the deposit on the new property … As to the balance of $900,000, the Claimant told me he was going to use a further US$400,000 from the Partnership and a bank mortgage of US$500,000 in order to complete in early September. I was therefore arranging to make sure that there was US$400,000 available for him as he required.*"

(At paragraph 140)

"*On the weekend over the 8 and 9 September 2007 Mr Whitten rang me several times. He told me that the Claimant was fraught and stressed as he needed money in order to complete on the new home. I kept on explaining that monies were very tight and that whilst we might have done lots of MSP* ["Managed Supply Programmes"] *contracts, it did not mean that large sums of money would be available to distribute. He was seeking to reassure me that the Claimant had a banking mortgage lined up and that there was only a requirement for a very short term bridging loan to help the Claimant out. Eventually, whilst I said that I didn't believe that the partnership could afford it, I said that I might be able to help by providing a personal loan to the Claimant, but on the basis that the money was to be returned to me within a few days*".

(At paragraph 147)

"*The actual $500,000 that I agreed to loan to the Claimant, came out of the bank account of the Second Defendant. This money, together with the other $400,000 provided, was treated by the Second Defendant as a director's loan to me personally. It was transferred on 12 September 2007. The money was transferred from the Second Defendant to my personal bank account. It was then*

*transferred from my new bank account over to the account nominated by the Claimant."*

(At paragraph 149)

"*It was my intention, as it had always been, that my drawings of $500,000 were to remain within the business so as to provide cash to fund the MSPs until we were able to obtain financing. I was therefore depending upon the Claimant honouring his promise that he would return my $500,000 almost immediately. I knew that without this money, the Second Defendant and its business would be placed into real peril.*"

(At paragraph 150)

"*In the event the Claimant broke the terms for which I personally lent him the $500,000. It was never repaid and to the date of this witness statement it remains outstanding."*

(At paragraph 154)

"*I now consider that the Claimant's behaviour was even more reprehensible because I have discovered that the Claimant actually mortgaged his new Chicago home in order to acquire $417,000 from the Washington Mutual Bank. Despite having secured this mortgage, the Claimant failed to repay any part of the loan back to me."*

(At paragraph 153)

*"The direct consequence of the Claimant's behaviour was that on 1 November 2007 I had to provide personal security equivalent to the equity balance on my family home in the Isle of Man to the value of $400,000. This security was provided to Barclays Bank PLC in order to support an overdraft, even though that overdraft was in the name of the Second Defendant. I was therefore placing the home of my family at risk, specifically to cover the shortfall in funds available to me caused by the Claimant breaking his promise to repay the $500,000 to me."*

(At paragraph 155)

*"I needed to borrow money from Barclays Bank PLC in order to purchase sufficient stock to fulfil the commitments acquired by the partnership in respect of both existing MSB contracts and distribution deals. For the avoidance of any doubt, these monies were not being used to fund any new deals that I was involved with since we agreed to wind-up the partnership's affairs. I was therefore placing my own personal finances at risk for the benefit of the Claimant and Mr Whitten, in circumstances in which they were exposed to absolutely no risk at all. Had I not done this, then the partnership would not have been able to honour its obligations pursuant, specifically, to the MSBs."*

98. It is right to note that the First Defendant has not provided copies of any bank statements or transfer documents detailing the transfer of the Loan to the Claimant. I note, also, that the Claimant has not provided copies of any bank statements or transfer documents showing that he received the Loan from the Second Defendant.

99. However, Mr Long, counsel for the Second Defendant, pointed out in his submissions that there is no record of the Second Defendant resolving to make any loan to the Claimant.

100. I consider that I must also take into account paragraphs 5 and 6 of the second witness statement of the First Defendant, dated 17 November 2016, made on behalf of the Second Defendant and filed in his capacity as a director of the Second Defendant. Paragraphs 5 and 6 read as follows:

> *"5. ….. I note that the Claimant does not deny that he benefitted from a loan in the sum of $500,000 in September 2007, and that this must be repaid with interest, but disputes as to who provided the loan. I believe that I provided this to the Claimant personally, whereas the Claimant has asserted that it was provided by the Second Defendant. Whilst this is disputed, if the court does determine that the loan was provided by the Second Defendant, I request, on behalf of the Second Defendant, that judgment be entered in favour of the Second Defendant against the Claimant in the sum of $500,000 plus such interest as the court shall think reasonable. In respect of the amount of such interest, the Second Defendant adopts the position I have set out at the end of my substantive witness statement.*
>
> *6. In respect of this request for judgment, the Second Defendant relies upon the express undertaking provided by the Claimant's advocate, Mr Steven Coren, in his email timed at 14:19 on 19 May 2016 to the Second Defendant's advocate, Mr Rob Long. A copy of this email is annexed hereto as "Exhibit A". For the avoidance of doubt, the Second Defendant has placed reliance upon this undertaking, in that it has not sought to formally amend its statement of case to provide for this alternative outcome at trial."*

101. Exhibit A consists of an email dated 19 May 2016 sent by Mr Steven Coren the (then) advocate for the Claimant to Mr Long, advocate for the Second Defendant. The relevant part of the email reads as follows:

> *"If after final determination of ORD 13/0018 on the merits, it is found by the court that the $500,000 is repayable to your client, our client unconditionally and irrevocably consents and undertakes to agree to an order being made that such sum be discharged to your client without the need for the instigation of further proceedings."*

102. However, I do not consider that I can grant the judgment in favour of the Second Defendant requested in paragraph 5 of the First Defendant's second witness statement, not least because no claim has been made against the Claimant by the Second Defendant for repayment of the Loan. Further, it is not clear to me how the Second Defendant could make such a claim, given that:

(i) one of its directors (the First Defendant) has filed a witness statement on its behalf, in which it is disputed that the Second Defendant made the Loan; and

(ii) the Second Defendant admits that it has no record of resolving to make the Loan to the Claimant.

103. There is no doubt that the Loan was made to the Claimant, and is repayable by him, with interest at a rate to be determined. With regard to the identity of the lender, I carefully observed each witness at the hearing, and in respect of the internal consistency of their evidence I find that the First Defendant's evidence was more credible than that of the Claimant's, which was inconsistent in relation to the Loan (as discussed at paragraphs 95 and 96 above). When added to the contradictions in the Claimant's evidence in relation to the ownership of the Second Defendant and its incorporation (discussed at paragraphs 15 and 38 respectively, above) I consider that the lack of consistency in the Claimant's evidence in certain areas means that I am unable to accept at face value the Claimant's evidence in relation to the Loan. I therefore find that the Loan was made by the First Defendant, and direct that the Claimant shall repay the said sum of $500,000 to the First Defendant.

**Interest on the Loan**

104. With regard to interest, I note that there was no agreement, either oral or written, as to the applicable rate. I also note that the First Defendant was forced to provide personal security to secure the Second Defendant's overdraft with Barclays Bank PLC as a result of the Claimant's failure to repay the Loan.

105. I assume, therefore, that any interest on the overdraft has been paid by the Second Defendant, and no evidence has been placed before me as to whether the First Defendant is liable to the Second Defendant for interest in respect of the director's loan to him. Irrespective of these issues, however, the First Defendant has been out of the money that he lent to the Claimant for over 12 years, and it is accepted by the Claimant that interest is due on the Loan. At paragraph 7 of his Defence to Counterclaim the Claimant pleads that the applicable rate of interest is "*either (a) 4% p.a. pursuant to section 41 of the High Court Act 1991, from 13 September 2007 (or from such other date as the Court thinks fit) to the date of judgment or sooner payment, or (b) such contractual interest as the Court considers reasonable*". I consider option (a) to be the most appropriate in the circumstances of this case.

106. Accordingly, pursuant to my powers under section 41 of the High Court Act 1991, I order that simple interest at 4% per annum for the period from 13 September 2007 to the date of this judgment shall also be paid by the Claimant to the First Defendant, in addition to the sum of $500,000 awarded to the First Defendant in respect of his Counterclaim.

**Judgments**

107. Accordingly, for all of the reasons set out above –

(i) the Claimant's claim is dismissed in its entirety;

(ii) the Counterclaim of the First Defendant is granted, and the Claimant shall pay to the First Defendant the sum of $500,000 together with simple interest at 4% per annum for the period from 13 September 2007 to the date of this judgment.

**Subsequent Applications**

108. The parties should make any consequential applications arising out of this judgment within 14 days. Each party shall have 14 days thereafter within which

to respond to any application that is adverse to it. I shall then deal with such applications administratively, without the need for a hearing.

109. In view of the current Covid-19 crisis, any application by a party for an extension of time within which to make such consequential applications, or any response therefore, will also be dealt with administratively, and the grounds relied upon in support of any such application for an extension of time should be filed with the application.

**POST SCRIPT**

110. After this judgment had been provided to the parties in draft for the correction of any minor errors, the Claimant responded by sending two emails to the Court Registry on 1 May 2020 ("the Claimant's Emails"). The first of the Claimant's Emails stated that the Loan "*had always factually been against the partnership firm Channel One",* and referred me to one of the "Defendant's disclosure documents" ("the Disclosure Documents") in support of that statement. "Channel One" is the Second Defendant.

111. The second of the Claimant's Emails stated that the Disclosure Document had been *"read "out loud" in Court by Mr Fozard in cross-examination testimony"*. Mr Fozard is the First Defendant.

112. I have determined that the First Defendant made the Loan to the Claimant, for the reasons set out at paragraphs 97 to 103 above, on the basis of all the evidence before me, and not just on the evidence specifically referred to in my judgment. The evidence before me included the documents put to the First Defendant by the Claimant in cross-examination, and the First Defendant's responses in relation to those documents. Accordingly, I do not consider that anything in the Claimant's Emails causes me to reconsider my judgment in relation to the Loan.

**Seth Caine**

**5 May 2020**