**THE EASTERN CARIBBEAN SUPREME COURT**
**SAINT VINCENT AND THE GRENADINES**
**IN THE HIGH COURT OF JUSTICE**

**SVGHCV2008/0093**

**BETWEEN:**

**SYLVIA SUTHERLAND** **CLAIMANT**

**AND**

**PANNELL KERR FORSTER** **FIRST DEFENDANT**

**FLOYD PATTERSON** **SECOND DEFENDANT**

**Appearances:**

Mr. Emery Robertson Snr and Ms Samantha Robertson for the Claimant
Mr. Grahame Bollers and Mr. Sten Sargeant for the Second Defendant
No appearance made for or on behalf of the First Defendant at any stage of the proceedings

---

2018: 9 October
10 October

2019: 14 February
17 October

---

**JUDGMENT**

**Byer, J.:**

[1] This case has been one of the matters in this jurisdiction which has suffered the fate of many others, the passage of time. This suit is some 11 years old and as a result, one would have thought that the vim and vigour that would have accompanied the early filings would have dissipated and perhaps dimmed the antagonism that must flow from the breakdown of a professional relationship in a small island state like St. Vincent and the Grenadines. Rather it seemed to this court that the longer that time passed the more rancor that accumulated. That being said, this was a matter that

took an inordinate amount of time to get to trial and then it took another six months after trial before this court was graced with the submissions of counsel for both the claimant and the second defendant. However, even though this court facilitated numerous extensions of time for the production of the submissions to ensure that the parties were able to adequately represent their client's position and the evidence that was copious and over considerable periods, it was still of some consternation to this court that the final date of 30 August 2019, which was the date given at the close of the court term for the filing of closing submissions, was still not met by the Claimant in this matter. In fact, the claimant purported to file submissions on 2 September 2019 without making a further application for an extension of time or for the same to be deemed properly filed.

[2] Therefore this judgment is determined on the following documents that this court considers are properly before the court: 1.the submissions of the Second defendant filed on 30 August 2018. However additionally I have also taken note of and considered the following which were not properly filed before the court, the skeleton arguments of the claimant filed on 8 October 2018[1], the Second defendant's skeleton submissions filed on 5 October 2018[2] and the closing submissions of the claimant filed on 2 September 2019[3].

**Background**

[3] The claimant and the Second defendant are accountants by profession. In or around December 1998 or January 1999, the Second defendant approached the claimant with a proposal to merge her accounting practice which she carried on under the name "Pannell Kerr Forster" with the Second defendant's practice which at the time was still being carried on under the name "PricewaterhouseCoopers" but which entity in itself had taken a decision to exit the Vincentian market.

[4] The claimant and Second defendant agreed to merge their practices and it was agreed that they would operate under the name "Pannell Kerr Forster" which was a name used under license from PKF International upon payment of the requisite licence fee. There was no written partnership agreement and the claimant alleges that the partnership was an equal one while the Second defendant alleges that it was agreed that the interest in the First defendant would be determined on the basis of the tangible assets or net assets that each party brought and maintained in the combined practice and it was never agreed that it would be equal. He contends that he owned a 2/3 share of the practice and the claimant a 1/3 share.

[1] Due the 17/9/18 by pre trial review order made on the 25/4/18
[2] Also due on the 17/9/18
[3] Due on the 30/8/19

[5] The Second defendant further alleges that the claimant's initial capital contribution in the First defendant was $216,950.00 while his initial capital contribution was $700,000.00 and a current account balance of $16,821.00.

[6] He also alleges that it was agreed that he would receive a notional monthly salary of $13,000.00 and the claimant would receive $8,000.00.

[7] The parties agree that the merger took effect on 1 July 1999 and operated out of premises situate at Arnos Vale. The merged partnership did not last very long and the parties' dispute the date on which the partnership ended. The claimant alleges that the partnership ended when she retired from the firm on 31 March 2002. The Second defendant alleges that the partnership ended on 31 December 2001, and that the claimant remained at the firm until 31 April 2002 to wind up outstanding jobs and to collect outstanding balances at a monthly salary of $10,000.00 in lieu of any entitlement to the partnership profits or share for that period.

[8] It was not disputed by the parties that on 1 January 2002, Arrion Barnwell and Ronald Lewis were admitted as partners of the firm.

[9] By letter dated 10 June 2002, the Second defendant wrote to the claimant informing her that her 33.3% interest in the firm was valued at $303,000.00 and that the balance due to her after deducting the balance due on her current account was $108,214.63.

[10] The claimant responded by letter dated 22 July 2002, and commented that she had not received a copy of the final accounts for 2001. She also stated that she had told the Second defendant that "they were adjustments to be made to the 1999 and 2000 accounts which would result in a more equitable distribution for her on the dissolution of the same".

[11] The parties were unable to agree a sum to which the claimant was entitled and she instituted these proceedings in 2008.

[12] In furtherance of the claim as filed, the claimant on 6 June 2008 applied to the court for *inter alia* an order that the First and Second defendants do account for monies due and owing to the her in respect of the years 1999-2002.

[13] By a consent order dated 8 January 2010 it was ordered by consent that Mr. Henry Joseph, Chartered Accountant of Grenada and Dr. Grenville Phillips of Barbados be appointed to prepare the accounts for the period 1 July 1999 to 31 March 2002. The experts duly completed their report and it was submitted to the court on 4 June 2010. Among their recommendations was that as a compromise sum, that the claimant should be paid the sum of $348,951.36.

[14] As a result of these facts the claimant filed a claim in 2008 claiming the following:

i. An account for the period 1 July 1999 – 31 March 2002.
ii. An Order directing the taking of an account for the said period referred to in paragraph (i) above.
iii. Such further orders or directions as the Court seems just pursuant to any order for the taking of an account and that pursuant to such an order that any amount found due and owing to the claimant be paid by a specified date.
iv. A declaration that the claimant is entitled to an equal share in the partnership known as Parnell Kerr Forster from 1 July 1999 to 31 March 2002.
v. An Order that the property situate at Arnos Vale from which the partnership presently conducts it's business is the property of Joziena Inc.
vi. A declaration that Joziena Inc is owned by the claimant and the defendant Floyd Patterson in equal shares and that the said shares in the company Joziena Inc be allotted in the said proportions.
vii. A declaration that Ross Holdings Limited and the Second defendant holds the said property on trust for Joziena Inc.
viii. An order directing that Ross Holdings Limited and the defendant do transfer to Joziena Inc the said property.
ix. Interest on the said accounts.
x. An Order for Costs.

[15] From the trial of the matter it became clear to this court that the issues that could be distilled from the prayers and the evidence elicited on the trial dates were as follows:

1. What was the agreement for profit sharing between the parties, and is the claimant estopped from denying the 2/3-1/3 profit sharing ratio?
2. When was the partnership determined?
3. Whether the concept of goodwill had to be considered on the termination of the partnership?
4. Whether the claimant has a beneficial interest in the Arnos Vale Property, the subject matter of Deed Number 3447 of 1998?

[16] However before this court delves into the issues that surround this particular case at bar, it would in this court's mind be useful to establish the parameters within which this matter is to be determined and in particular the legislative framework within this jurisdiction.

[17] Within St. Vincent and the Grenadines, the law of partnership is governed by the Partnership Act CAP 155 of the Revised Laws (the PA) which is in large measure almost a carbon copy of the Partnership Act of 1890 in the United Kingdom (the 1890 Act).

[18] The definition of partnership under the PA is as set out at Section 3 (1) and states that a "partnership is the relation which subsists between persons carrying on a business in common with a view to profit".

[19] Having said so, there is no doubt in this court's mind that the claimant and the Second defendant did in fact operate a partnership despite the surprising lack of a written agreement between them evidencing this fact.

[20] Therefore, this court finds that the manner in which they conducted themselves and the way in which their relationship came to an end was circumscribed by the PA and the common law rules related thereto[4].

[21] That being said, the issues that arise on this claim must be determined and considered in light of those rules and what has been referred to as the black letter law.

**Issue #1: What was the agreement for profit sharing between the parties and is the claimant estopped from denying the 2/3-1/3 profit sharing ratio?**

**The Claimant's Submission**

[22] As identified earlier, the submissions of the claimant are indeed not properly before this court due to the failure of the claimant to make the necessary application to have them deemed properly filed. Once again, it appears to this court that the orders of this court have been considered a suggestion to counsel as opposed to a directive to be complied with by the parties.

[23] Be that as it may, for the sake of completeness the court considered the submissions made by counsel for the claimant on this issue.

[24] The claimant's simple position is that there having been no partnership agreement, the law must operate and by Section 26 of the PA it clearly states that the partners are entitled to share equally in the capital and profits of the business[5].

[4] Section 47 of the PA:

***"47. Saving for rules of Equity and Common Law***

*The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act."*

[25] Thus the claimant submitted that in order to displace this presumption it had to be done expressly and with the consent of all the partners. Counsel for the claimant submitted that because there may have been an inequality in the initial capital contributions and perhaps even in the drawings taken by each partner over time, did not mean that without some express indication or consent by all the partners that the presumption of equality had been displaced[6]. This having not been done, meant in the claimant's submissions that the parties on the dissolution of the partnership in the case at bar was to be distributed on a 50/50 (equal) basis for both profit and loss.

**The Second Defendant's Submission**

[26] The submission of the Second defendant as expected maintains that the distribution of the profits and loss of the partnership were on a 1/3-2/3 basis (being 2/3 to the Second defendant and 1/3 to the claimant).

[27] The Second defendant based this submission on a number of matters, including the respective skill, experience and client base that each party brought to the partnership. Additionally they sought

---

[5]Section 26 of the PA:

***"26. Rules as to interests and duties of partners subjects to special agreement***

*The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the parties, by the following rules-*

- *(a) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm;*
- *(b) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him-*
  - *(i) In the ordinary and proper conduct of the business of the firm, or*
  - *(ii) In or about anything necessarily done for the preservation of the business or property of the firm;*
- *(c) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of six percent per annum from the date of the payment or advance;*
- *(d) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him;*
- *(e) Every partner may take part in the management of the partnership business;*
- *(f) No partner shall be entitled to remuneration for acting in the partnership business;*
- *(g) No person may be introduced as a partner without the consent of all existing partners;*
- *(h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners;*
- *(i) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them."*

[6] Page 7 of the submissions of the claimant filed 2/9/19

to rely on the manner in which the parties dealt with the termination and the acceptance[7] of the claimant throughout all the negotiations at the termination of the partnership and finally the accounts of the partnership itself which were never queried by the claimant save and except with respect to suggested adjustments for sums owed as opposed to making any challenge to the actual percentage division.

[28] Taking all these matters in the round, it was the submission of the Second defendant that with the Second defendant being the stronger partner, having brought more to the partnership and the partnership accounts revealing that the parties had accepted sums that would represent a 2/3-1/3 split, meant that the claimant was estopped from denying the same and that the court was entitled to find that the claimant was not entitled to a fifty percent share of the partnership as claimed.

**Court's Considerations and Analysis**

[29] This issue in this court's mind is the pith and substance of the entire claim before this court. It is from this belief on the part of the claimant that the entirety of this claim stems.

[30] Thus it is incumbent upon this court to undertake an in depth analysis of the evidence that was led on this point and the law that relates to the division of partnerships.

[31] In this regard, this court had the helpful assistance of the court appointed expert Dr. Grenville Phillips. It may be useful at this point to recap the circumstances that led to the appointment of Dr. Phillips of Barbados and Mr. Henry Joseph of Grenada who prepared and presented a joint expert report to this court.

[32] By application filed in this court by the claimant on 6 May 2008, the claimant sought the appointment of an expert to prepare an account for monies owed to her on the dissolution of the partnership. At the time of the application the claimant had suggested Arrion Barnwell however the court on the consensual position of *both* parties, appointed the experts Mr. Joseph and Dr. Phillips.

[33] Subsequent to the publication of the said report the claimant raised issues which amounted to a disagreement with the findings of her own expert and attempted to have yet another one appointed, with the intention it appeared, to have yet another expert weigh in on the matter and render a finding. In an apparent recognition that this was highly irregular, the application was refused by the court who heard the matter and the matter proceeded to trial with Dr. Phillips giving evidence of the joint findings of himself and Mr. Joseph.

[7] By way of correspondence between the parties from June 2002 to June 2008 -paragraph 40 of the submissions of the second defendant

[34] Despite the extensive cross examination of Dr. Phillips this court is satisfied that the evidence based on the findings of the expert remained intact and on a balance of probabilities this court accepts that the experts fully and competently understood their mandate[8] which guided the entire process.

[35] This being said, in looking at this issue it was clear from the onset that the Second defendant's position always was that there was never an intention for there to have been a 50/50 split of the losses and profits of the partnership.

[36] Under the PA, it is clear that where there is no agreement either express or implied, the interests of a partnership are to hold as equal as between the parties, in the capital and the profit as well as the losses sustained by the firm[9].

[37] In this case at bar it was agreed by both parties that this partnership was created orally between the parties and as such it must be for this court to determine whether there was in fact an agreement that was different in terms of inequality of sharing or whether the provisions of the PA must be adopted in this regard.

[38] First and foremost as this court heard the evidence being elicited from the only two witnesses, the claimant and the defendant this court was struck by the disparity in the manner and preciseness of the evidence as between the claimant and the Second defendant.

[39] This court saw the claimant as she gave her evidence and the answers that she gave to the questions asked of her by counsel and could not help but be struck by the imprecision, lack of clarity and even apparent lack of forthrightness with which the claimant gave her evidence. On this issue, in particular, this court found it particularly difficult to accept on a balance of probabilities the version of events on which the claimant sought to rely to establish the equality of sharing as between these two partners. Without any real or substantial evidence to the contrary, save and except her saying so, the claimant asked this court to accept that the parties had agreed to a 50/50 split which in this court's mind could be summed up in her statement during cross examination as to why she had not raised certain issues upon the dissolution of the partnership and her response was that she had used "loose language" on her part. It is this loose language which in this court's mind translated to loose arrangements, that I find pervaded the claimant's case and in particular this issue.

[40] In direct contradistinction, we then had the evidence of the Second defendant and the findings of the court appointed experts.

---

[8] This was clear from the succinct and clear summary of the issues that were governing the report at page 3/21 of the report filed in this court.

[9] Section 26 PA (See Foot Note 5)

[41] The Second defendant maintained, throughout his rigorous cross examination, there had never been an agreement to split the relative profits or losses as between the parties in any other manner than two thirds to him and one third to the claimant. In the cross examination of the Second defendant, he conveyed the circumstances in which he and the claimant had entertained the discussion as to the manner in which the partnership would be run. The Second defendant told the court that it was clear that any division would have been based on the sums brought into the partnership, the claimant's being $600,000.00 and his being $1.2M equating to a one third share to the claimant and a two thirds share to him[10].

[42] It is this version that this court accepts on a balance of probabilities when this court also takes into consideration the largely uncontroverted evidence of Dr. Phillips.

[43] Dr. Phillips made it clear that upon an examination of the accounts of the partnership, that "throughout the period of the partnership one third of the profits were credited to the current account of Ms. Sutherland and two thirds to the account of Mr. Patterson"[11]. In fact, he said that in looking at the entire accounting period for the partnership, that "we saw no evidence …to suggest that there was any disagreement of that…[12].

[44] I therefore find on a balance of probabilities that this partnership did not operate on a fifty/fifty split of losses and profits and I am fortified in this view when one considers the following.

[45] Firstly, when one considers the relative experience and monetary contribution that was brought to this partnership by the claimant and the second defendant, even though it is accepted that if one or more partners makes a greater contribution than the others that the presumption of equality is not by necessity displaced[13], this court accepts that this Second defendant in light of all that he admittedly brought to the partnership would never have agreed to a fifty/fifty division. It is clear in this court's mind, that the Second defendant was very clear as to his contribution and his expertise. He was the one, who having exited the partnership with PwC, (PricewaterhouseCoopers) who was leaving the market in St. Vincent and the Grenadines negotiated his term of exit, which did not include the new partnership buying any share of that practice as this court accepts that it was the Second defendant alone who entered into the agreement with his former partners. It was therefore clear in this court's mind, that even if this court were to accept that the unequal contributions in and of itself may not have been sufficient to buttress the displacement of the presumption in favour of

[10] Page 33 and 34 of the transcript of the proceedings for 14 February 2019 ( provided to the court by external stenographical services)
[11] Transcript for the 10/10/18 page 65 lines 2-5
[12] Transcript for the 10/10/18 page 65 lines 19-20
[13] Lindley and Banks on Partnership(20th Ed) at paragraph 19-18; **Joyce v Morrisey** [1999]E.M.L.R 233 at 243 per Waller J

equality, this court accepts that the Second defendant would never have negotiated a compromise position in which he would have accepted the same share as the claimant.

[46] Secondly, it was also clear in this court's mind that the claimant, between 2002 (the claimant's date of termination of the partnership) to 2008 when the claim was filed had never made claim for a fifty/fifty claim of the partnership.

[47] In the words of the claimant, she had a particularly hard time getting the Second defendant to sit down with her to discuss the termination of the partnership and by June 2002 had resorted to writing to him with her claims. So thus in July 2002 in response to the correspondence of the Second defendant setting out the manner in which the partnership was to assessed and final payments made, the claimant wrote to the Second defendant talking of adjustments to be made to the accounts[14], and by letter dated the same day, the property at Arnos Vale[15].

[48] The claimant wrote the Second defendant again in February 2003 seeking a meeting and asked for information regarding the general ledger for 2001, the fixed assets schedule and the breakdown of an account in the name of Jozeina[16]. It would be noted that this letter was after correspondence had been sent by the Second defendant sending the financial statements, with the balance sheet and net fee income for 2001[17]. Again, what was startling was that the claimant did not raise with the Second defendant any indication that she had a difficulty with the purported division as suggested by the Second defendant or did she make a claim that she was entitled to an equal share of the partnership proceeds.

[49] Thus this court notes that it is not until 2007, matters still not having been resolved as between the parties, the claimant again writes to the Second defendant and raises the issue of the property at Arnos Vale[18] and sets out the calculations that are due to her on her withdrawal from the firm[19] and for the first time, some 5 years after the admitted dissolution of the partnership, claims that she is entitled to a 50% interest in the partnership to the sum of $834,069.73. In this court's mind therefore if the claimant had always maintained a position of equality with the Second defendant for the purposes of distribution, this court is satisfied that she would have raised it at some point during the five year period when the parties had failed to settle the outstanding issues. The court therefore does not accept the explanation of the claimant that these were matters she "intended" to raise with the Second defendant when they actually met[20].

---

[14] Letter dated 22/7/02 Trial Bundle #3 page 7
[15] Letter dated 22/7/02 Trial Bundle #3 page 8
[16] Letter of 17/2/03 in Trial Bundle #3 page 12
[17] Letter dated the 31/7/02 in Trial Bundle #3 page 10
[18] Letter dated 29/11/07 Trial Bundle #3 page 13
[19] Letter dated 11/12/07 Trial Bundle #1 page 24 – 25
[20] Transcript of 7/11/18 Page 157 Lines 12-14; Page 170 lines 12-13

[50] Thirdly that the actual accounts of the partnership, which reflected monies actually made and received by the parties clearly demonstrated that from the inception of the partnership the claimant accepted, withdrew and utilized a one third distribution as against the Second defendant's two third payment.

[51] When this court considered that even the notional payments made to the respective parties of $13,000.00 to the Second defendant and $8,500.00 to the claimant, a sum which this court accepts she accepted for many years without demur, which clearly reflected an unequal share, it was a high hurdle that the claimant had to cross to convince this court that in spite of this evidence, the intention was equality.

[52] In fact when this court heard the evidence elicited from the claimant on cross examination when the accounts were shown to her that evidenced the payment to her of $8,500.00 a month she had this to say that: 1) she asked their financial manager to send $8,000.00 to her account and that she additionally (apparently undetected and reflected nowhere in the bookkeeping records of the partnership) drew monies to pay her bills and income tax which amounted in reality to $13,000.00 a month identical to the Second defendant and 2) that when she joined the pension scheme being offered she only capped her salary at $8,500.00 for the purposes of that scheme that it was the Second defendant who assigned her that amount in the accounts without her consent[21].

[53] It again struck this court that the claimant whose case it was, upon whom the burden of proof lay, once again made allegations that she could not substantiate. All this court had were the accounts that showed that the claimant got a notional salary of $8,000.00, credited to her account every month. Her claim was that she in fact received sums in excess of this was not borne out on the evidence that she presented to the court. The claimant did not produce any documents to show deposits to her bank accounts or any records to show what drawings she alleges she took over the period of the partnership. In other words, no proof. I therefore accept that the evidence before me shows that the participation of the claimant and the Second defendant was unequal at the beginning and continued for the period of the partnership. In the case of **Stewart v Forbes**[22] the court in the 19th century found that "*the presumption of an equal partnership will be rebutted if the entries in the books and accounts of the partnership instead of absolute silence as to the shares of the partners have described the shares in which the partners were entitled in the business as materially differing in amount and value. Entries in the books of a partnership are as conclusive of the rights of the partners as if they had been prescribed in a regular contract."* Indeed, the Lord Chancellor of the court found that "an *equal partnership implies not only an equal participation de facto in profits and loss but a right in each partner to claim and* ***insist*** *on such participation".*

[21] Transcript of the 7/11/18 Page 201 Line 21-22
[22] 41 E.R 1215

[54] In the case at bar this court is therefore unable to accept that the claimant received and accepted any sum greater than the sum of $8,500.00 which was close to or equated to the sums paid to the Second defendant during the currency of the partnership. This court also accepts that at no point during the partnership or its immediate aftermath did the claimant insist upon an equality of sharing nor did she provide any proof to that effect which supported the allegation of equality.

[55] In light of all of the foregoing I therefore refuse the declaration sought that the claimant is entitled to an equal share in the partnership known as Parnell Kerr Forster.

**Issue #2: When was the partnership determined?**

[56] Although this court recognizes that this particular issue did not strictly form part of the claim as pleaded by the claimant, it was clear from the prayers that the claimant has pleaded and claimed that the partnership lasted for the period July 1999 to March 2002.

[57] The Second defendant's position is that at the close of 2001, the parties agreed that the claimant would be a salaried partner with no entitlement to the profits of 2002 and that the partnership with her had come to an end with the acceptance of the two new partners who joined the firm as of 1 January 2002.

[58] Therefore this court is of the view that this must be determined by this court and I will deal with it now.

**The Claimant's Submissions**

[59] The claimant's submissions generally unhelpful, were silent on this issue as to the date of dissolution having taken as a given that the claimant having worked in the partnership until March 2002 meant *ipso facto* that the partnership existed until that date and that what happened in December 2001 was a technical dissolution[23].

**The Second Defendant's Submissions**

[60] The Second defendant's submissions on this point are very short. The Second defendant submitted that the fact that there was no written agreement for the terms of the partnership including its dissolution meant that the claimant retiring from the same and having given notice of

[23] There were no submissions on the issue but the claimant maintained in cross examination that she was a partner until 31 March 2002, Transcript of 7/11/18 page 277 Lines 6-14; 23-24

such retirement at the age of 53, amounted to the dissolution of what could be considered a partnership at will. The Second defendant placed reliance on Section 28 (1) of the PA and Section 34 (c) to substantiate this point[24].

[61] Additionally the Second defendant also submitted that the fact that there were new partners taken on by the partnership in January 2002 signaled the dissolution of the old partnership and would have amounted to the technical dissolution to which the claimant referred. The final submission by the Second defendant was also that the claimant becoming a salaried partner for "ease of accounting" in the mind of the Second defendant also amounted to acceptance of the end of the partnership by the claimant between herself and the Second defendant and the fact that she never claimed profits for the period in 2002 indicated clearly that even the claimant accepted that the partnership had ended in December 2001.

## The Court's Considerations and Analysis

[62] The nub of this issue goes to the period in which the claimant is entitled to claim and by necessity impacts the sums that she claims to be entitled.

[63] It is clear to this court that both parties accept that this partnership between the claimant and the Second defendant had no fixed term for termination or even for its existence for that matter.

[64] Indeed the claimant has accepted that at the commencement of the partnership (set at July 1999 to which both parties agree) she had made the indication that she had no intention of being with the partnership past a five period[25]. However even though she does not say when she notified the Second defendant that she wanted to retire early, she does state that she gave that indication[26].

[65] It is in fact the Second defendant in his evidence (which was not disputed by the claimant) that gave the date of the notice as the first half of 2001. He went on to say that this meant that the claimant was to leave on her 50th birthday as opposed to her 53rd as initially indicated to him[27]. However this court notes that in 1999 the claimant would have already been 51 and this court

---

[24] Section 28(1)

***" Retirement from Partnership at Will:***

*(1) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention to do so to all the other partners."*

*Section 34(c)*

***"Dissolution by Expiration Or Notice:***

*(c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership."*

[25] Witness Statement of the claimant filed 14/2/13 paragraph 29

[26] Witness Statement of the claimant filed 14/2/13 paragraph 26

[27] 2nd Witness Statement of the Second defendant filed 17/9/18 paragraph 21

accepts that this must have been a misstatement on the part of the Second defendant as to the age /time period although I do accept that the claimant withdrew from the practice earlier than her original five year period.

[66] The question must therefore arise as to what was the actual nature of the partnership.

[67] According to the editor of the text Stair Memorial Encyclopedia[28] the PA makes it clear as to what may be considered a partnership at will. In the 1890 Act, Section 26 (1) provides that "where no fixed term has been agreed upon for the duration of the partnership any partner may determine the partnership on giving notice of his intention to do so to all the other partners". Our Section 28 (1) is in the exact same terms and is captioned "Retirement from a partnership at will".

[68] I therefore accept that the partnership between the claimant and the Second defendant falls within the parameters of a partnership at will[29].

[69] That being said, we must then go on to examine the nub of this issue, when did the partnership come to an end. By Section 32 of the 1890 Act and Section 34 of our PA, it is clear, that a partnership is dissolved by notice. By Section 34 (c) of that PA, it clearly states that a partnership is dissolved "if entered for an undefined time by any partner giving notice to the other or others of his intention to dissolve the partnership". The learned editor of Stair Memorial has gone onto consider the effective date of such notice and stated that if the time of the subsistence of the partnership is undefined, that the use of Section 32 of the 1890 Act (Section 34 of the PA) provides that a notice of dissolution takes effect on the date mentioned in the notice or if there is no date specified, it takes effect on the date of communication of the notice[30].

[70] In the case at bar, we do not have the date as to when the termination was effected as there was no notice for this court to peruse nor is this court aware as to the precise date that it was received. Therefore, this court is unable to rely on the fact of the purported notice to determine the date of the termination.

[71] Therefore we must turn to the other circumstances that presented itself at that time to determine the effective date of dissolution of the partnership.

[72] In addition to the notice having been given by the claimant, in January 2002, the firm Pannell Kerr Forster took on two new partners in the persons of Arrion Barnwell and Ronald Lewis. The

[28] Re issue 2 Partnership paragraph 40
[29] **Maillie v Swanney** [2000] SLT 464
[30] Op Cit paragraph 40

provision of the PA makes it clear that any such addition would have to have been done with the consent of the claimant[31].

[73] In fact the claimant in her evidence admitted that there had been two new partners[32], and that by 31 December 2001 there was a technical dissolution of the partnership[33].

[74] The evidence of the Second defendant on this point in fact supports the claimant's evidence in this regard when he stated during his cross examination that the claimant retired as an equity partner in December 2001[34]. The contention of the Second defendant which has been strenuously opposed to by the claimant however, is that upon this retirement, the claimant became an employee of the firm as her only role and function at that stage was to "clear up housekeeping and collection of receivables and assignments she had in progress"[35].

[75] There is however consensus between the parties (in spite of the pleaded case of the claimant) that the claimant then became a salaried partner who was not to participate in the profits of the partnership. In the extensive cross examination, the claimant in answer to counsel Mr. Bollers stated categorically, when asked if she was a non equity partner at that time said "…I accepted a salary rather than a share of the profits"[36] and the Second defendant who also stated "she was not an equity partner she was not to participate in profits but paid a salary like an employee"[37].

[76] On this evidence, this court accepts on a balance of probabilities, that in December 2001 that the claimant had in fact exited the partnership and had become a salaried partner who was not entitled to participate in the profits past 2001 and had "divested [herself] of every interest.." in the firm[38].

[77] However even if I accept that the mere changing of partners or the replacement of the claimant by new partners in and of itself would not have sufficed to signal the dissolution of the partnership as between the claimant and the Second defendant, the additional fact that saw her becoming a salaried employee in this court's mind crystallizes the contention that the partnership came to an end in December 2001.

[78] In coming to this position I rely on the learning in the case of **HLB Kidsons v Lloyd's underwriters and others**[39] and the dicta of Mackie J in which he also examined the provisions of

---

[31] ***Section 26 (g):***
***"26. Rules as to interests and duties of partners subjects to special agreement***
*(g) No person may be introduced as a partner without the consent of all existing partners"*
[32] Transcript 7/11/18 page 276 Lines 20-23
[33] Transcript 7/11/18 page 277 lines 1-6
[34] Transcript 14/2/19 (prepared for this court by an outside stenographical service) Page 52 Lines 15-16
[35] Transcript of 14/2/15 (prepared for this court by an outside stenographical service) page 52 Lines 17-24
[36] Transcript 7/11/18 Page 278 Lines 7-8
[37] Transcript 14/2/19 (prepared for the court by an outside stenographical service) page 53 Lines 2-4
[38] **Easdown v Cobb** [1940] 1AL L ER 49 at 51 per Lord Atkin

Sections 26 and 32-38 of the 1890 Act which are our Sections 28 and 34-40 of the PA. His Lordship recognized that there was a difference between the regime for the retirement of a partner (as happened in this case at bar) as opposed to the dissolution of a partnership provided for by Sections 34 et seq. It is the technical dissolution that is created by the retirement of a partner where the firm continues with changed personnel[40] and it was a technical dissolution that occurred as the firm Parnell Kerr Forster continued. Therefore whether or not this court could have made a determination as to the effective date of the notice of retirement on the part of the claimant, this court is satisfied on the claimant's own evidence that she had left the firm and that she made no claim to its assets past 31 December 2001. That, in this court's mind must be the effective date for the end of entitlement. The claimant would therefore not be entitled to seek any accounting from the Second defendant for the period January to March 2002, termination of the partnership having occurred on 31 December 2001.

**Issue #3: Whether the concept of good will needed to be taken into account upon the claimant exiting the partnership.**

[79] This issue occupied a large measure of the claimant's submissions in this matter and in this court's mind sought to impugn the findings of the expert in this regard.

**The Claimant's Submissions**

[80] In relation to this issue the claimant submitted that the parties having agreed on a method to value the business on the exit of the claimant, agreed on the valuation of good will. They therefore relied on the law that relates to the manner in which goodwill is taken into consideration in a partnership[41] and the manner in which the valuation is undertaken[42].

**The Second Defendant's Submissions**

[81] The Second defendant in his submissions relied on the findings of the experts in this regard.

[82] The experts having found that any reliance on the use of goodwill in a partnership of this nature was ill conceived as there was no continuation of the partnership in which the claimant's reputation or name would have been retained for the partnership to capitalize on any of her personal benefits.

---

[39] [2009] 1 ALL ER (Comm) 760
[40] Op Cit Paragraph 16
[41] The Encyclopedia of Forms and Precedents Vol 30(1) paragraphs 158, 159 and 160
[42] Op Cit paragraph 242

[83] The Second defendant submitted that the experts found that since the partnership was continuing under the name of the international business name of Pannell Kerr Forster there was no good will of the claimant that passed and that it was an error on the part of the claimant and the Second defendant when they sought to interpose this basis into the valuation of the partnership.

**Court's Considerations and Analysis**

[84] Before this court considers this issue as raised, I wish to make a comment as to the manner in which this claimant has prepared and argued its case in the submissions before this court and in particular on this issue.

[85] Indeed it is of course useful to the court to have the information and law that relates to a particular issue that is before the court for determination but it is of limited use to the court to have simply a restatement of the law from the authorities relied on without any further analysis or attempt to relate them to the issue that is being addressed. In this instance despite the claimants setting out the authorities upon which she sought to rely, there was no attempt made to relay them to the factual matrix and to assist the court as to the position being taken by the claimant particularly in circumstances where the claimant was seeking to impugn the opinion of the joint experts of whose appointment she participated.

[86] Be that as it may, it is clear to this court that it is generally accepted that goodwill is usually considered to be part and parcel of the "intangible property"[43] of partnerships. It can be considered in the valuation of the partnership on the exit of a partner or dissolution of a partnership. However, what is clear to this court is that this does not form part of every such valuation.

[87] It has been recognized, that this issue of whether there is or is not goodwill in a partnership which can in fact be valued, must amount to a pure question of fact[44]. That is, whether from the circumstances there can be gleaned that there is "…*an advantage-every positive advantage …as contrasted with the negative advantage of the late partner not carrying on the business himself - that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the late firm or with any other matter carrying with it the benefit of the business*"[45]. As the Master of the Rolls Romily stated in the case of **Wedderburn v Wedderburn (No.4)**[46] goodwill is that "*species of connection in trade which induces customers to deal with a particular firm".*

[43] Op cit. paragraph 158.
[44] **Attorney General v Bodden and Anr**[1912] 1 K.B. 539 at 559
[45] Wood VC in **Churton v Douglas** Joh 174 188
[46] [1856] 22 Beav.84 at 104

[88] In the case at bar, the question must be asked, was the claimant so connected to this firm, part and parcel of it, so connected to the trade, that it was her that induced persons to come to the firm Pannell Kerr Forster and that upon her leaving, she had that personal connection to sell?

[89] On the balance of probabilities and on the evidence that was led before this court, in this court's mind the answer to that question must be no.

[90] When one considers the evidence in this court's mind the claimant could not and did not prove that with her leaving, she was leaving her reputation, her name, her clients or her "connection" to warrant a valuation of any goodwill in her favour.

[91] On the cross examination of the expert Dr. Phillips he had this to say, *"There is nothing to pass. The only thing that you can allege that you were passing was… good will…. They (sic) could have been good will in an accounting partnership had for example this partnership been carried on under the name Sutherland and Patterson had they built up a substantial dominant position in the accounting field ... They were practicing under the name of PKF, under the good will really and truly attached to the brand. PKF was not owned by Patterson or Sutherland, it was a practice under license of the international firm Parnell Kerr Forster, none of them could have sold that name. Secondly, there was no element of super profits derived in this partnership and thirdly the exiting partner will do all that she was entitled to and lastly if you at talking about good will, there will generally be a restraint of trade, you cannot sell me your good will and then go next door and compete with me. None of those elements were present to constitute even consideration My Lady, of the notion of good will. That is why we said it was irrelevant."*[47]

[92] The basis of the claimant's contention however on the claim of goodwill was simply that she and the Second defendant had an agreement as to how her interest would be valued and the "specific way in which [her] goodwill...value…"[48] would be considered.

[93] However, in this court's mind this failed to take into account not only the expert's view of the valuation of goodwill but by the claimant's own admission that not only was the firm carrying on business in the name of Pannell Kerr Forster under licence from the international operator but that additionally she had by 2002, lost two large clients being the National Insurance Scheme and the St. Vincent and the Grenadines Port Authority[49] and had in fact admitted that all the income attributed to loss in the firm at the end of 2001 were clients that were part of her portfolio at one point.[50]

[47] Transcript for the 7/11/18 page 78 at lines 16 – page 79 line 14
[48] Transcript of 7/11/18 Page 149 Lines 3- 4
[49] Transcript of 7/11/18 Page 180 Lines 21-24
[50] Transcript 7/11/18 Page 185 Line 20 to page 186 Line 12

[94] I therefore do not find that in any accounting exercise that had to be undertaken by the experts in coming to the monies due to the claimant that a valuation of goodwill had to be undertaken. There was nothing in this court's mind that established any such connection with the firm by the claimant that made this at all relevant.

**Issue #4: Is the Arnos Vale property partnership property?**

[95] In this court's mind of all the issues that were presented on this case, this one proved the most troubling in that the entirety of this claim by the claimant surrounded ownership of the parcel of land upon which the partnership operated, which is in fact owned by an entity that was neither a party to the proceedings or in reality an existing company.

**The Claimant's Submissions**

[96] The claimant's claim is that the property at Arnos Vale was to be purchased in the name of a company Joziena Inc. This company which was to own the property was a company incorporated by the claimant and the Second defendant who were to own the company equally and thereby the property that was to be acquired through it.

[97] The claimant appears to rely on the learning with regard to what constitutes a constructive trust and relies on those principles to submit, that this court must look to the common intention of the parties. The submission of the claimant therefore is that when one examines the intention it was therefore clear that the claimant and the Second defendant were to own the same in joint shares. The Second defendant in this regard, the claimant submitted, must therefore hold the property subject to a trust in her favour.

**The Second Defendant's Submissions**

[98] The Second defendant submitted that the claimant's claim although seemingly couched in the terms of asking this court to find that the Arnos Vale property is partnership property although that is not the specific claim, the same could not be so considered in that it failed to meet the prerequisites to be considered partnership property under Sections 22 and 23 of the PA.

[99] Additionally they submitted that this property was bought solely by the financial resources of the Second defendant, he was the only party to negotiate the mortgage based on his credit history, that the claimant knew very little of any details of the purchase which was evident by her failure to make a realistic offer to purchase "her share" in the same and finally even though Joziena Inc had

been incorporated it had never been capitalized or shares issued as its purpose was for the avoidance of the payment of transfer tax at the time and the same was never undertaken.

[100] Finally, the Second defendant submitted that there was no evidence to establish a trust in favour of the claimant as there was no evidence of a common intention and the claimant had made no direct or indirect contribution to the acquisition of the same.

**Court's Analysis and Considerations**

[101] The nub of this issue is whether or not the Arnos Vale property from which the firm operated can or cannot be considered partnership property to which the claimant would be entitled to a share.

[102] Sections 22 and 23 of the PA set out what property can be considered partnership property. Section 22 in its entirety states as follows:
*"(1) 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 purposes of the partnership and in accordance with the partnership agreement:*

*Provided that the legal estate of interest in any land which belongs to the partnership shall devolve according to the nature and tenure thereof and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.*

*(2) Where the co-owners of an estate or interest in any land, not being itself partnership property, are partners as to profits made by the use of that land, and purchase other land out of the profits to be used in like manner, the land so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land first mentioned at the date of the purchase."*

Section 23 states:
***"23. Property bought with Partnership Money***
*Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm."*

[103] From all the evidence, this court finds that Section 23 does not apply. It was agreed to by the claimant herself in evidence that the partnership did not purchase the property, but it was financed by a loan negotiated by the Second defendant[51].

[51] Transcript 7/11/18 Page 238 Lines 18-23

[104] So the real questions must be, was this property 1) brought into the partnership stock or 2) acquired by purchase or otherwise on account of the firm or for the" purposes and in the course" of partnership business?

[105] In order to determine this, it is essential for this court to consider the evidence that is given by both parties as to this acquisition.

[106] The claimant's evidence in a nutshell is that in preparation for the coming into existence of the partnership, the parties agreed to form a company which would acquire the property required to house the firm and that company would in turn rent to the firm. The shares in this company would be allocated on a fifty/fifty basis as between the partners. The claimant stated that she offered to pay her share of the ten percent deposit that would be needed ordinarily to secure the building that she says the Second defendant found[52] but that this contribution was refused as the Second defendant intimated that he would get one hundred percent financing from his bank. This the Second defendant did and the partnership moved into the premises in September 1999.

[107] The evidence of the Second defendant is that during the merger negotiations between himself and the claimant, he had discovered a property at Arnos Vale. Having conferred with his bankers who were prepared to give him one hundred percent financing for the same, he made an offer to the property owners who accepted the same on the basis that they would receive the entire amount offered and that the stamp duty would have to be paid separately as opposed to being deducted from the purchase price. The Second defendant claims that the claimant never made an offer to make a payment towards the deposit as one was never paid and that the claimant made no contribution in any event to the acquisition of the property. The Second defendant says he also never made any offer to give the claimant a share in the proposed holding company which was primarily established with a view to taking advantage of the law that allowed for the avoidance of stamp duty which he would have had to pay in full. The Second defendant however admits that he did discuss with the claimant a pay out of fifty percent of the equity that would have accumulated to the holding company upon her retirement but not that she would get any ownership of the company itself. He said this was done with a view to give the claimant a similar payout that would have operated in the scheme of the PwC partnerships[53]. The property was ultimately obtained by way of loan through his family's holding company Ross Holdings which owned the family home and a property of the Second defendant at New Montrose.

[52] Witness Statement of the claimant filed 14/2/13 at paragraph 14
[53] Witness Statement of the Second defendant filed 17/9/18 paragraphs 41- 49

[108] On the balance of probabilities this court therefore accepts the following with regard to the acquisition of this property:

a. The property was identified by the Second defendant as suitable to house the work of the partnership.
b. That the partnership was never to own the said property but that the partnership would rent it.
c. That the acquisition was undertaken by the Second defendant's ability to obtain one hundred percent financing from his bankers using the property of Ross Holdings.
d. The claimant made no direct contribution to the acquisition of the property.
e. That the proposed holding company never acquired the property in its name and the same remains in the name of the vendor, the Gabriel family.

[109] Thus having so found what is the extent, if any, of the claimant's interest to this property. This court accepts on the claimant's own evidence[54] that she showed very little interest in the acquisition of the property. However, does that mean that this property was not acquired on account of the firm, or the purpose of the firm in the course of the partnership?[55]

[110] This court accepts that the Arnos Vale property was acquired with the intention to house the business of the partnership. I further accept that in this happening, the claimant however was not involved in the purchase, negotiations or financial arrangements of the property[56].

[111] However more important than how the acquisition was achieved is the question, what was the intention of the partners. Indeed "…*where property became involved in partnership dealings it must be regarded as partnership property…it … [is] immaterial how it may have been acquired …if in fact it was substantially involved in the business."*[57]

[112] In this court's mind in spite of that case having been decided before the advent of the 1890 Act, that it is still good law when one considers the wording of the PA at Section 22 which speaks of property being acquired on account of the partnership.

[113] In the case at bar, the Second defendant has never denied that the Arnos Vale property was used by the partnership. In fact in his amended defence the rubric that deals with his pleadings of the Arnos Vale property states "*The commercial property used by the partnership*[58]…" and then goes on to plead that *"…he did not want the property which housed the accounting partnership to be owned by the partners. His position was and still is that the property will be owned by the Firm that all the partners would have an equity in it. …the objective of this method of purchase is that the*

[54] Transcript 7/11/18 page 250 Lines 8-15 and page 252 Lines 10-24
[55] Section 22 of PA
[56] Transcript of 14/2/19 obtained from external stenographic services page 120 17-25; Transcript 14/2/19 obtained from external stenographic services page 129 lines 21 -25 and page 130 lines 1-7
[57] **Waterer v Waterer** [1873] LR 15 Eq 402
[58] Amended defence filed 30/3/11

*partners were to be free to use the property as collateral if necessary to develop their accounting business without having to seek the permission of individual partners-owners"*[59]*.*

[114] What therefore happened however is that the Second defendant utilized his resources to obtain the loan that was then paid by the partnership. In this court's mind the logical conclusion is therefore that if this money was not paid for rent it would have been money to which the partners would have been entitled to distribute between themselves in the respective shares as found by this court.

[115] In this court's mind the simplistic interpretation considered by the Second defendant in his submissions that the presumption of the common intention trust does not apply in commercial or non domestic transactions but rather the presumption of the resulting trust but only if there has been a direct contribution by the particular party, does not do justice to the jurisprudence in this regard.

[116] The case of **Mars v Collie**[60] upon which the Second defendant seeks to rely for this proposition, in this court's mind, makes no such proposition of the law. Rather, what the Board in that case having considered the cases that had been decided on a finding of either a constructive trust or a resulting trust and the nature of those relationships in which either presumption was found to obtain found that it cannot be simply that one presumption triumphs over another depending on the nature of the relationship. The Board clearly stated that in fact "…*in this as in many areas of law, context counts for if not everything, a lot. Context here is set by the parties' common intention or lack of it*."

[117] In the case at bar, I too find that context is everything. I accept that the intention was that this property was to be for the sole purpose of the firm, for the use of the partnership and that in that regard it must be considered partnership property to which the claimant has a claim.

[118] The Second defendant has consistently stated that in fact his intention was that when the claimant retired (although he saw that as being at 65) he would have given her fifty percent of the equity that would have been acquired by then in the holding company that was the vehicle originally slated to hold the same.

[119] This company, Joziena Inc never became capitalized never owned the property and in fact much to the surprise of this court the property is still vested in the vendor. This court also does not accept that the offer of the Second defendant was in fact meant to give the claimant any right to a fifty percent ownership of what is now a nonexistent company or a fifty percent share in the property. Partnership monies were used to pay the mortgage and together with the acceptance of the Second defendant's agreement I accept that the claimant is entitled to a share in the equity that had accrued to the date of the termination of the partnership that is as of 31 December 2001. That

[59] Amended defence filed 30/3/11 paragraph 8
[60] [2018] UKPC 17

share is to be in keeping however with the share to which the claimant is entitled in all partnership assets and as such she will be entitled to a one third share of the equity that had accrued as of that date. As such that sum is to be ascertained from the financial institution from which the Second defendant had obtained the mortgage loan and the sum is to be paid to the claimant.

**Reliefs Sought**

[120] By the claim form and statement of claim filed in this matter this claimant sought nine heads of relief which appear at paragraph 15.

*Account to be taken for period 1July 1999 to 31 March 2002*
*An order directing the taking of an account for the above mentioned period*
*Such further orders or directions pursuant to the order being made for the account to be taken and that any sum found owing to the claimant be paid by a specified date*

[121] In this court's mind these prayers are all related to the challenge raised by the claimant to the report prepared and presented to this court by the experts, one of whom was appointed by the claimant herself.

[122] In this court's mind for this challenge to have been adequately pursued the court would have had to have been presented with evidence that showed that either there was incompetence on the part of the experts, bias or a general inability to grasp the task that had been given to them upon their appointment.

[123] On the extensive cross examination of the expert who gave evidence on behalf of both experts, Dr. Phillips, this court was satisfied that the findings of the experts remained unshakeable and that all the concerns of the claimant as to the difficulty with the accounts produced were addressed and in most cases agreed to by the experts.

[124] This court is therefore slow to grasp the reasoning behind the prayer for an account to be taken for the period of the partnership which this court in any event has found ran from 1 July 1999 to 31 December 2001.

[125] In order for this court to have granted any such account exercise, this court would have had to have been satisfied on the balance of probabilities from the evidence led that either no accounts existed for that period as found or that the accounts that did exist were either so problematic or had so many issues with regard to their veracity that this court was required to send them back to be re done.

[126] In this court's opinion neither of those situations existed regarding the existing accounts. Indeed, this court accepts the opinion of the experts that the books and the accounts of the partnership were adequately maintained[61].

[127] Indeed the claimant herself nowhere in her pleadings made any allegation of fraud on the part of the Second defendant on the accounts but simply said that she was not consulted on them. However, this court is unable to accept this proposition when the claimant was clearly able to raise several points of concern on these very accounts which were considered by the experts and to a large extent resolved in her favour.

[128] I therefore find that the claimant being bound by the report of the experts is not entitled to have a fresh account prepared for the period of the partnership. The claimant has not satisfied this court on a balance of probabilities that the methodology or the accounting principles upon which the accounts were based or the rectifications made to those accounts in favour of the claimant were fundamentally flawed and I therefore dismiss the prayers related to the obtaining of a fresh account being taken for the period 1999-2001 and all the relief sought consequent upon this prayer are also denied.

*Declaration that the claimant is entitled to an equal share in the partnership of Pannell Kerr Forster from 1 July 1999 to 31 March 2002.*

[129] In looking at the relief as sought under this prayer, this court accepts that the entitlement of the claimant must be looked at in terms of specific items of consideration.

[130] In the submissions of the Second defendant, the Second defendant itemized these considerations for an outgoing partner as follows:

*"The learned authors Lindsey & Banks at para 10-180 sets out how precisely how an outgoing partner's share is assessed:*

> *"There are numerous bases on which the financial entitlement of an outgoing partner can be quantified, but that entitlement will normally be made up the following components:*
> *(a) His profit share up to the date he cease to be a partner, adjusted by reference to his drawings;*
> *(b) The balance on his capital accounts;*
> *(c) The balance on his current account;*
> *(d) His entitlement in respect of surplus assets;*
> *(e) Any tax provision held in his name; and*
> *(f) His share of unused or excess reserves."*

[6161] Page 4 of 21 of Experts report filed 4/6/10 TB # 2 page 99 -122

*Subject to any adjustments in respect of sums due from the outgoing partner to the firm, e.g. in respect of overdrawings, there will usually be little question of his entitlement to components (a) to (c) and (e). Component (f) is unlikely to be problematic if the partners have address the issue of ownership of reserves as and when they were made. It follows that the real question will generally centre on component (d).*

[131] Indeed this court accepts that the nub of the assessment for the claimant is her entitlement upon her exit from the partnership and the methodology for calculating such entitlement.

[132] In this regard this court has already determined that the claimant is not entitled to any compensation for the sale of what she considered her "goodwill". This court has found that this consideration just does not have any relevance to the claim at hand.

[133] With regard to the monies earned during the duration of the partnership, it was clear from the report of the experts that for each financial year of the accounting records, excluding 2000, the year for which no query was raised by the claimant, that the experts made fundamental adjustments to the income attributable to each partner. In 1999, provision was made to adjust the opening capital accounts of both parties. Both the claimant and the Second defendant had their respective contributions adjusted. In 2000 there was no adjustment made to the accounts as the experts found that the adjustment sought by the claimant was unsubstantiated and the amount available for profit distribution remained at $352,028.00. In 2001, the issue arose as to the over compensation for work in progress that had not been realized during 2001. The experts again considered that there had not been this overcompensation but approved the addition of one historical account of the claimant to the profits for division between the parties in 2001 from $398,855.59 to $542,777.59.

[134] This court is satisfied and as such found that the claimant was in fact not entitled to a one half share of the partnership which must not only be the sums due for profit payment but also any sums that were earned after the claimant had left the partnership, if those sums that were due to the claimant's capital that remained within the partnership and were used by the Second defendant and the new partners to earn more profit[62].

[135] I however do not accept that in the case at bar there was any capital of the claimant that remained at the disposal of the partnership which rightfully belonged to the claimant when the court has seen the evidence of the transference of $207,269.84 to the claimant's current account which was then withdrawn by the claimant at the end of her tenure.

[62] **Manley v Sartori** [1927] 1 Ch 157

[136] This court therefore declares that the claimant is entitled to a one third share of the partnership of Pannell Kerr Forster and that her entitlement after the payment of the $207,269.84 the balance due was $88,915.57 as found by the mathematical calculations of the experts[63].

[137] These same experts have also found that there was an overpayment to the claimant on drawings made during the year of 2000 and 2001 in the sum of $9,600.00 but this court accepts that the Second defendant has not prayed for a return of those drawings and that although the same was not taken into account in the balance due to the claimant, this court is only prepared to acknowledge that this may have in fact occurred.

[138] The declaration is therefore denied and instead it is declared that the claimant has a one third interest in the partnership Pannell Kerr Forster.

*An order that the property situate at Arnos Vale from which the partnership conducts its business is the property of Jozeina Inc.*
*A declaration that Jozeina Inc is owned by the claimant and the defendant Floyd Patterson in equal shares and that the said shares in the company Jozeina Inc be allotted in the said proportions*
*A declaration that Ross Holdings Limited and the Second defendant hold the said property on trust for Jozeina Inc.*
*An order directing that Ross Holdings Limited and the defendant do transfer to Jozeina Inc the said property.*

[139] It was indeed startling to this court that the claimant included these prayers against and in favour of parties who were not before the court.

[140] Not one of the prayers sought in the above referenced paragraphs in this court's mind can be properly considered or ordered even if she had produced the required evidence to support the same, which in this court's mind she did not.

[141] However I accept the submission of the Second defendant that the court has a duty to seek and definitively resolve all issues as between the parties[64]. In this regard the claimant has raised the

[63] Experts Report filed 4/6/10 page 17 of 23:
***"Capital/Current Accounts Reconciliation Showing the Net Entitlement of Ms Sutherland on Dissolution of the Patterson/Sutherland Partnership***

| | |
|---|---|
| ***Adjusted capital Account Balance per Appendix C*** | ***$148,690.00*** |
| ***Add balance of Net profits due per Appendix B*** | ***160,495.41*** |
| | ***$309,185.41*** |
| ***Less amount transferred from capital to Current Account*** | ***$207,269.84*** |
| | ***$101,915.57*** |
| ***Less invoiced amount collected from client by Ms Sutherland*** | ***13,000.00*** |
| ***NET BALANCE DUE to MS SUTHERLAND*** | ***$88,915.57*** |

issue of the nature of her entitlement to the Arnos Vale property. This court accepts that indeed there was no specific pleading or prayer for the same. This court accepts that the pleadings of the claimant made clear that this was a consideration to be taken into account in the determination of the claimant's interest in the said property[65].

[142] I also wish to quickly add here that this case was also an example of the claimant's claim form and the prayers contained therein being different from the prayers contained in her statement of claim. This discrepancy has made it difficult for the court to assess which matters were proceeding to trial and what this court had to determine. However, I have based these final considerations on the claim form as filed and acknowledge the slight differences in the prayers that are contained in the attached statement of claim.

[143] Thus it was in that regard I considered earlier in this judgment the nature of the Arnos Vale property to the partnership. This court is not in a position to issue any directives to nonexistent parties to convey the said property or interest therein but as I had determined earlier, that the property can be considered partnership property and in that vein I make the order that the claimant is to be paid her one third share of the equity that would have existed in the property at the termination of the partnership, namely 31 December 2001.

[144] In arriving at the equity for the purposes of the payment to the claimant, this court does not accept that there was in fact saving of $38,000.00 on stamp duty as alleged by the Second defendant which should inure to him.

[145] When this court looks at how that savings was to come about, by the use of the company Jozeina Inc. this court also accepts that the same was never in fact utilized and this court sees no evidence before it upon which any such finding can in fact be made.

[146] I therefore find that this is not to be taken into consideration for the purposes of the calculation.

[147] The final point this court wishes to address is the contention that the claimant has been over paid pursuant to several orders of the court in excess of $350,000.00.

---

[64] Section 20 Eastern Caribbean Supreme Court Act CAP 24

[65] Paragraphs 10 – 17 of the Statement Of Claim and the prayers in the Statement Of Claim at #3, 4 and 5 filed on 28/3/08

**The Overpayment to the Claimant**

[148] It was with some interest to this court that the submissions of the Second defendant in support of their case included a submission that this court should make a finding that if there were any sums over paid to the claimant that it should then make an order for the restitution of such sums.

[149] While I accept that indeed this court is empowered to deal with all matters that arise on a claim, as indicated above relying on the provisions of Section 20 of the Eastern Supreme Court Act[66] (Section 20) I must accept the learning of our very own Court of Appeal who in the case of **Marie Makhoul v Cicely Foster and Louis Lockhart**[67] restated the court's approach of a litigant's failure to plead an aspect of their case[68]. The Learned Chief Justice referred to the case of **Eastern Caribbean Flour Mills Limited v Ormiston Ken Boyea**[69] and the decision of Barrow JA, as he then was, that "the pleadings should make clear the general nature of the case…to let the other side know the case that it has to meet and therefore to prevent surprise at trial, the pleading must contain the particulars necessary to serve that purpose".

[150] In the **Marie Makhoul** case the respondent attempted to make a claim in the submissions following trial that was not raised in the pleadings. Counsel for the respondent in an attempt to rely on the provisions of Section 20 the Learned Chief Justice made it clear that these provisions could not assist counsel in that regard "…as it does not entitle one to grant a remedy that was not claimed".

[151] This court finds itself constrained likewise.

[152] The submission raised by counsel in closing address was that this court was positioned to grant restitution to the Second defendant of the overpayment to the claimant. It goes without saying that this was not pleaded nor was it foreshadowed in pleading but raised in the supplemental witness statement of the Second defendant for the first time in 2018, some seven years after the pleadings had effectively been closed.

[153] It was also raised in cross examination of the claimant who gave a response to questions regarding the nature of the payment to her of the sum of $348,000.00 being an offered settlement figure. In her cross examination in an attempt to convince the court that she did not understand that that was indeed the nature of the payment, but rather that this was a portion that the Second defendant accepted as being offered to her, she applied to the court and received the said payment.

[66] Op Cit
[67] ANUHCVAP2009/0014
[68] Op Cit paragraph 39 per Pereira CJ
[69] SVGHCVAP2006/0012

[154] In response to whether she would repay the same if it was found that it was in fact an overpayment to her of any entitlement under the termination of the partnership, she said that she would not hesitate to refund the same[70].

[155] Indeed this court does find that there has been overpayment to the claimant of sums that may be due to the claimant, however there being no pleading by the Second defendant for unjust enrichment and restitution on that basis, which must be pleaded[71] this court is not in a position to order restitution as urged by the Second defendant.

[156] What I am however prepared to do is make a declaration that there has been overpayment by the Second defendant to the claimant in relation to her partnership entitlements and by so doing the Second defendant is at liberty to take all requisite action if he so wishes to have the same repaid.

## Costs

[157] By order of this court on 1 June 2018, upon the application of the Second defendant to have the claim valued, this court valued the claim at $1,014,183.00.

[158] Under the provisions of Part 65.5 CPR 2000 costs on this value would have been prescribed costs pursuant to Appendix B.

[159] In considering this matter in its totality, this court considered the provisions of Part 64.6 (5) and 64.6 (6) and has considered the manner in which the claimant pursued this litigation and in particular the over payment to the claimant which this court accepts was in fact made in pursuit of a settlement as between the parties[72]. It was therefore in this court's mind not in the claimant's interest to continue to pursue the litigation. However, I am also of the opinion that the claimant has not been entirely unsuccessful and although I find that the defendant is entitled to their costs I would not award them one hundred percent of the same[73] and award eighty percent of the said sum due to them under the prescribed costs regime.

---

[70] Transcript 7/11/19 page 211 line 1 to 215 Line 4

[71] Halsbury Laws of England Vol 88 (2019) Para 401

[72] Contained in letter of the 10/6/02 from the Second defendant to the claimant plus the sums found owing to the claimant by the Expert Report filed 4/6/10 at page 22/23

[73] **Rochamel Construction Limited v National Insurance Corporation** Civil Appeal No 10/2003 at paragraph 8, 10 per Byron JA

**The order of the court is therefore as follows:**

1. The order for the taking of an account for the period of the partnership and all the consequent orders that would have flowed therefrom is denied.

2. The declaration that the claimant is entitled to an equal share of the partnership known as Pannell Kerr Forster is denied and this court declares that the claimant is entitled to a one third share of the partnership Pannell Kerr Forster.

3. The order for a finding that the property at Arnos Vale is the property of Jozeina Inc. is denied.

4. The declaration that Jozeina Inc. is owned by the claimant and the Second defendant in equal shares and that the shares of Jozeina Inc. be allotted in the said proportions is denied.

5. A declaration that Ross Holdings Limited and the Second defendant hold the property on trust for Jozeina Inc. is denied.

6. An order directing Ross Holdings Limited and the Second defendant to transfer to Jozeina Inc. the said property is denied.

7. This court however declares that the property at Arnos Vale is partnership property and the claimant is to be paid her equity in the same in the manner as set out in paragraph 119 hereof.

8. Costs to the Second defendant at 80% of the sum due on the prescribed costs regime based on the value of the claim as ascribed by way of order of this court pursuant to Part 65.5 and 64.6 (5) and (6).

**Nicola Byer**
**HIGH COURT JUDGE**

By the Court

Registrar