Neutral Citation Number: [2021] EWHC 1863 (Ch)

Case No: BL-2018-001656

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 July 2021

Before:

Ian Karet (sitting as a Deputy High Court Judge)

- -

Between:

Peter John Tribe — **Claimant**

- and –

Elborne Mitchell LLP — **Defendant**

James Mather (instructed by CM Murray LLP) for the **Claimant**
George Bompas QC and Sarah Harman (instructed by Elborne Mitchell LLP) for the **Defendant**

Hearing dates: 18, 19 and 20 May 2021

- -

JUDGMENT

- -

Ian Karet:

Introduction

1. This is a claim brought by Mr Peter Tribe, a retired solicitor, against his former firm, Elborne Mitchell LLP (the "Firm"). Mr Tribe was a partner of the Firm and its predecessor for more than 25 years, but in his last few years at the Firm the relationship soured. The Firm had in those years made significant profits from contingent fee work, and Mr Tribe claims that he was not awarded a fair profit share in the last two years of his partnership.

2. The trial concerned the division of a proportion of the Firm's distributable profits for the financial years ending April 2015 ("2014/15") and April 2016 ("2015/16") under the terms of the Members' Agreement made on 1 September 2011 between Mr Tribe and the other four equity partners, Timothy Brentnall, Timothy Goodger, Rosalind Jones and Katharine Payne as amended in 2014 (the "Agreement"). In the relevant years Mr Brentnall was the Senior Partner.

3. Mr Tribe claims damages of £42,510 for 2014/15 and £93,941 for 2015/16 and declarations of his rights under the Agreement. There are other matters covered by the claim that have already been determined and some yet to be decided.

4. The relevant terms of the Agreement are as follows.

> "Distributable Profits" means such revenue or capital profits of the LLP as are shown in the Partners' Accounts and which are to be shared between the Partners in respect of any financial accounting period and which may be the same or more or less than the revenue or capital profits of the LLP as. set out in the Statutory Accounts and "Distributable Loss" shall be construed accordingly
> …
> "Equity Partners means [Mr Tribe and the four other partners above]
> …
> "Fixed Share Partners" means any members of the LLP appointed as Fixed Share Partners pursuant to Clause 6;
> …
> "Partners" means the Equity Partners
> …
> **6 FIXED SHARE PARTNERS**
> 6.1 The Partners may from time to time decide by special resolution in accordance with Clause 17.3 to appoint one or more persons to be members of the LLP as Fixed Share Partners.
> 6.2 Fixed Share Partners shall not become party to this Agreement and shall have no rights or obligations under it. The rights and obligations of each Fixed Share Partner as a member of the LLP shall be governed by the terms of the deed under which he shall be appointed to membership of the LLP as the same may be varied or supplemented from time to time in accordance with its terms.
>
> ….
> **12 LLP SHARES OF PROFIT**
> 12.1 Subject to Clause 12.2, for the financial accounting period ending 30 April 2012 and each financial accounting period thereafter the Distributable Profits of

the LLP shall be shared by each of the Partners in the proportions calculated according to the provisions of the Third Schedule (such proportions being referred to in this Agreement as the "LLP Shares").

12.2 the Fixed Share Partners shall have priority for the allocation of the Distributable Profits to the extent of their entitlement in each financial accounting period.

…

THE THIRD SCHEDULE referred to above (Clause 12)
Each Partner's LLP Share for each financial accounting period shall be calculated as follows:

1. Subject to there being sufficient Distributable Profit, every Partner shall receive a "fixed share" calculated as a fixed sum to be paid in priority to all other elements making up the LLP Shares, and to abate equally if there are not sufficient Distributable Profits to pay a full fixed share to every Partner. The fixed share for the financial accounting period from 1 May 2011 to 30 April 2012 shall be £75,000, and for subsequent periods it will be the same amount unless varied by special resolution in accordance with Clause 17.3.

2. From the balance if any of the profit there shall be appropriated a "discretionary fund", comprising up to a maximum of 40% of the whole Distributable Profit of the LLP (prior to the allocation of the fixed shares). The allocation of the discretionary fund:

a. may be made to one or more individual Partners or Practice Groups, and
b. is to be settled by Ordinary Resolution (if required) of the Partners – on recommendations to be brought forward by the Senior Partner - not later than 31 January following the end of each financial accounting period. If the allocation is not settled by 31 January in any year, any discretionary fund will be distributed according to lockstep points, as set out in Para. 3 in this Schedule;
c. the basis of the Senior Partner's recommendations are a matter to be determined at his discretion, but will have substantial regard for financial performance.

3. The remainder of the profit after the fixed element and any discretionary element shall be distributed according to lockstep points ("the lockstep element"), as follows:

a. Each Partner will receive such proportion of the lockstep element as his lockstep points bear to the cumulative total number of points of all the Partners, as determined below (such lockstep points are referred to herein as "points");
b. The Partners at 1 September 2011 will each be allocated 20 points and will each have fully paid up capital of £60,000;
c. A Partner's allocation of lockstep points will increase by 2 points at each 1 May, up to a maximum of 20 points PROVIDED THAT on an Ordinary Resolution of the Partners - on recommendations to be brought forward by the Senior Partner – not later than 31 January in any year, a Partner might (if he himself or she herself accepts the award) be allocated 1 additional point

for that year, i.e. a maximum increase of 3 in any year, or he or she might have his or her increase restricted to point or not receive any increase or exceptionally he or she might have his or her existing allocation reduced by 1 point.

5. The Third Schedule sets out the agreed method for the division of profits for each year. Each Equity Partner receives a fixed share (Paragraph 1). If there is a balance, then a "discretionary fund" is created comprising up to 40% of the whole Distributable Profit. That is then allocated by Ordinary Resolution (if required) "on recommendations to be brought forward by the Senior Partner" (Paragraph 2(a)). Those recommendations are "to be determined at his discretion but will have substantial regard for financial performance" (Paragraph 2(b)). The Partners then receive an equal share of anything that remains (Paragraph 3).

6. The Agreement thus provides for two determinations that are the centre of this dispute. Mr Tribe says that the both the Senior Partner's recommendation and the decision that follows from that (including an ordinary resolution if required) are exercises of a discretionary power which are constrained by the fetters discussed by the Supreme Court in *Braganza v BP Shipping Limited* [2015] UKSC 17. There is also a dispute as to the correct construction of the Agreement.

7. The trial was conducted remotely due to the Covid19 pandemic. Mr James Mather appeared for Mr Tribe and George Bompas QC and Sarah Harman for the Firm. There was some dispute as to the naming of others working at the Firm and the identity of the Firm's clients. In this judgment I describe them but do not need to identify them further.

8. Mr Tribe's Statement of Claim alleges that his partners acted in bad faith towards him. His Fourth Witness Statement goes further, making allegations against Mr Brentnall of "wholly improper and, on occasion, dishonest, conduct" and against Mr Brentnall, Ms Jones and Ms Payne of "greed, … cronyism and… dishonesty". Mr Tribe did not pursue these allegations at all at trial. Mr Mather's skeleton argument for the trial suggested only that Mr Tribe "did not need to go nearly so far as to establish any dishonesty". The allegations of dishonesty were not made out in any way.

9. There was evidence about the approach taken to distributions in years before those in dispute. It appears that in the predecessor firm both the form of partnership agreement and the process of dividing profits were similar to that under the Agreemennt. The Senior Partner had previously made a proposal to the partners for a division of profits based on a review of certain information. The partners debated that, sometimes in writing, and there was a partners' meeting at which a final division of the profits was agreed.

10. Each of the Partners gave evidence and was cross-examined in detail. Mr Goodger, Ms Payne and Ms Jones were careful and helpful witnesses. Mr Brentnall did not recall some matters about his approach to preparing his recommendations in the years 2014/15 and 2015/16, but he was in my view trying to be helpful.

11. Mr Tribe's recollection of the events in the years in question was rather different to that of the other witnesses. He said that he was still angry about the 2015/16 distribution.

12. The extensive contemporaneous documents - mostly emails, notes and financial information - have been very helpful in setting out the position, and I have drawn heavily from them.

The period leading up to the disputed years

13. In 2009 Mr D joined the predecessor firm as a Fixed Share Partner. He specialised in claimant professional negligence. This was carried out under conditional fee agreements ("CFA") backed by after the event insurance. Conditional fee work carries a risk for the legal adviser that in the event of losing s/he will not be entitled to some or all of their fees. The upside is that success may bring a success fee.

14. The partners of the predecessor firm had been dividing a discretionary fund for some years. In an email sent in November 2010, Mr Tribe described the process of dealing with the discretionary fund as follows:

> "[X] has referred, in his email, to "the principles applied in previous years" and it's fair to say that the principles, and objectives, which govern [Mr Brentnall's] task of assessing the appropriate distribution of funds have been long recognised and have been set out in very helpful form in the past….
>
> It would of course be wrong to assume that the basis of distribution applied in one year, will necessarily be the basis which will be applied in the following year. In fact that has never been the approach. There are certain understood general principles which provide the foundations of the assessment exercise, but the final structure always reflects the trials, vicissitudes, successes and general endeavours of the individual members of the partnership and which have characterised that previous year…"

15. He recognised that a partner who was leaving might receive a reduction in their share:

> "…once a partner has given notice of leaving the partnership, he or she does not receive, and has never received, a discretionary fund allocation based simply on the principles applying to him as a continuing partner."

16. In 2011 Mr D introduced a new bank client with a portfolio of cases. This required the firm to assign more lawyers to this work, which Mr D had originally carried out himself with an associate. Ms Jones and Mr Goodger took on some of the cases, as did a number of Fixed Share Partners.

17. Mr Tribe alleged that the Partners, aware of the risks and rewards for the Firm, reached an understanding or made an agreement that in considering the discretionary profits of the Firm the work was to be treated as a "full partnership venture" alongside or within the Agreement which would affect the split of profits. The Firm disagrees. There is no documentary support for Mr Tribe's contention and nothing to indicate that the Partners thought that they were approaching the CFA cases under any agreement other than the Agreement.

18. The years in dispute are the ones in which the CFA work generated significant profits. In the years before the profits were lower. Mr Brentnall had for some years made recommendations for distributions, circulating information on partners' time recording

and matter partner billings. Mr Brentnall appears to have stopped making recommendations after 2009/10 or 2010/11.

19. In the period ending April 2012 (the first financial period of the LLP) distributable profits were £542,4558. That was not much more than total of the Partners' fixed share entitlements. The profits were divided equally amongst them. Mr Tribe and Ms Payne had the highest matter partner billings. Mr Goodger and Ms Jones were working on CFA cases and had much lower billings. The Partners' shares thus represented very different multiples of their billings.

20. In the year ending April 2013 the Partners again had varied personal billings. The Distributable Profit was £993,231. Mr D, who had brought in the CFA work, billed around £1,185,000 and received £240,000. Mr Tribe had the highest billings of the Partners of just over £920,000. Mr Tribe took just under £180,000 in total, and the remaining Partners each took £110,000. The arrangement between the Partners appears to have been reached by a series of discussions between them in various pairs or groups and not on recommendations from Mr Brentnall.

21. In December 2014 Mr Tribe complained to Mr Brentnall about his failure to make proposals and said that the Partners needed to address this. In an email of 30 December 2014 to Mr Brentnall (copied to the other Partners) Mr Tribe explained that the Partners all understood how the Third Schedule to the Agreement worked:

> "Quite simply the senior partner is required to bring forward to the partnership his recommendations for allocation. In the event of any partners not agreeing those recommendations the allocation of the DF is decided upon by Ordinary Resolution of the partner. If the partners cannot by 31 January, settle the matter by OR vote then, but only then, the "default" position kicks in."

22. Mr Brentnall replied that it might be appropriate to consider a reduction of Mr Tribe's share for "various shortcomings", which was a shorthand reference to a number of bills Mr Tribe had yet to collect, adding "If you or anybody want to be put under the microscope I will apply my mind to it". Mr Tribe responded in early January 2015 suggesting that the allocation system was no longer fit for purpose. He acknowledged that the Partners had allowed the management of the arrangements to become sloppy, but he deprecated what he saw as a threat by Mr Brentnall.

23. After discussions by email, the Partners agreed to involve another person at the Firm in attempting to progress and collect certain of Mr Tribe's bills. Mr Brentnall apologised for having been "tetchy".

24. Mr Brentnall made his proposal for 2013/14 on 15 February 2015. He noted that the Senior Partner's role was only to make proposals and that while those should have regard to financial performance as a substantial factor, the Agreement was silent as to other matters that Partners should bear in mind should they vote on an Ordinary Resolution. There was no requirement on Partners to explain themselves. He also noted that at the time of making the Agreement the Partners had considered including and had rejected a clause making their relationship one of the utmost good faith. The relationship of partners in an LLP was thus more akin to shareholders than partners in an unincorporated firm.

25. He continued that his recommendations were intended to be persuasive, and he followed the approach he had taken in the past before the LLP bearing in mind the need to consider also the LLP and its unsecured creditors. He noted that the recommendations might be ignored, disagreed with in whole or in part and rejected or accepted. He noted that it was human nature for each partner to value their own contribution and that the market (for example those who approached the Firm to discuss merger) might not see things the same way as individuals. This should help prevent the majority from acting capriciously or unfairly against a partner.

26. Billings for the year were just over £7.4M, of which £5.9M came from CFA cases. The profit was £4,048,718 and the maximum discretionary fund was just under £1.62M. Mr Tribe's personal billings were the highest among the Partners - figures circulated show his as just under £747,000. Mr Brentnall noted that there had however been issues with Mr Tribe's bill collections. The billings from CFA cases were the result of intense work, including the exploration of interim funding. Mr Tribe and Mr Goodger had not been part of that, and Mr Goodger had tendered a weak performance on one case in particular leading to an unhappy client.

27. Mr Brentnall recommended dividing the fund in equal shares of just under £324,000 to all but Mr Goodger, who would receive £160,000. He proposed some small payments to others and dividing the remainder between Ms Jones, Ms Payne and himself such that they each receive just under £367,000. Mr Goodger would have been the lowest paid Partner, taking home in total more than £300,000.

28. The recommendations did not find favour with Mr Tribe or Mr Goodger. Each circulated a long and detailed written explanation of his disagreement. Mr Tribe's objections were longer than Mr Brentnall's recommendations. Mr Tribe objected in strong terms to the proposal and in particular to the suggestion that the CFA cases should be tied in particular to the Partners working on them. He also said that the majority could not in his view impose this division on the minority, and he would consider any partner supporting that approach liable for an actionable breach of the implied duty of good faith owed. He made no counterproposal but sought a "re-think".

29. Mr Goodger pointed out that figures could be approached in a number of ways and that this approach did not appear to be in line with any previous year. He thought that too much attention in the proposal had been devoted to time spent on management activities and he called for an election or re-election of a senior partner.

30. Mr Brentnall proposed resolutions to deal with that, and Mr Tribe suggested that in order that there should be choice of a senior partner he would propose Mr Goodger.

31. Further discussions of the proposal took place by email, some in strong terms. Mr Tribe suggested that the other three Partners increase Mr Goodger's allocation from their shares while preserving his. Mr Goodger took counsel's advice on Mr Brentnall's proposals which, he reported, found them wanting.

32. There was a partners' meeting in on 26 February 2015. Mr Tribe started the meeting as chair in view of the question over Mr Brentnall's status as senior partner. Mr Tribe proposed Mr Brentnall as senior partner and that proposal was carried. Mr Brentnall took the chair. A resolution to ratify Mr Brentnall's past acts as Senior Partner was passed, Messrs Tribe and Goodger voting against. Mr Goodger's allocation of the fund

was increased to £210,000 with a further smaller payment from the residue taking his overall remuneration to £383,710.

33. Mr Tribe's total share that year was £451,808, giving him around 60% of his personal billings.

34. I note from these events that each of Messrs Brentnall, Tribe and Goodger expressed themselves strongly and challenged each other's positions on the contents of Mr Brentnall's recommendations. Mr Tribe could make very strong statements but then compromise. While there was a strong debate over the contents of the proposal, no-one suggested that the approach Mr Brentnall had taken by making a proposal for discussion should have been any different.

35. Following the meeting, a number of issues continued to cause problems. There was a discussion about moving premises in which Ms Jones told Mr Tribe that he was free to leave the firm if he wanted. The other Partners continued to be concerned that Mr Tribe's billing and collection on matters was leaving the Firm exposed to significant liabilities for disbursements if clients did not pay.

36. During the year concerns about Mr Tribe's billings and collections continued in particular in relation to a dispute concerning a company owned by a wealthy Nigerian. The company was the Firm's client and it was not clear that the individual would cover the legal costs of the dispute.

37. On 23 October 2015 Mr Tribe emailed the other Partners to say that he had learned from a significant shipping client of his that they were changing their practice on awarding work. He had previously been able to secure a steady stream of off-panel shipping work, but the client had indicated that they would in future not be placing work off-panel so that opportunities like those arising in the past would no longer be available. While Mr Tribe had enough work for the present that would mean he would need to develop new sources of income. Mr Tribe gave notice of his intention to bring forward his retirement from the LLP from the financial year 2017/18 to 30 April 2016.

The 2014/15 recommendations and allocation

38. In early December 2015 Mr Brentnall emailed the Partners noting that they should address the discretionary fund for the previous year. On 22 December 2015 Mr Brentnall invited the Partners to obtain from the Firm's finance function whatever financial information about the previous year they wanted and to make suggestions to him about the distribution of the fund. On 23 December he copied around the LLP accounts for the year ending April 2015.

39. On 7 January 2016 certain financial information was circulated to the Partners. That showed that before the allocation of the distributable fund there was £1,281,422 for division between the Partners on the lockstep (that was in this case equally between them before a minor re-allocation based on one partner's external earnings). Mr Tribe's irreducible share was thus £258,827. Mr Tribe's billings were £452,749 out of a total of over £8.4M.

40. The CFA cases in that year had contributed by far the largest proportion of the Firm's billings.

41. Mr Brentnall circulated his proposal on 5 February 2015. He noted the "vigorous debate" that had taken place in 2013/14 which had been concluded with a compromise and his re-election as Senior Partner. He accepted that the Partners should approach any vote on the discretionary fund recognising that they owed each other a duty of good faith. Mr Tribe had encouraged him to recognise the "pain" of the years before the CFA cases had come good.

42. The distributable profit for the year was £5.57M and the discretionary fund was just under £2.23M. Mr Brentnall proposed dividing the fund into two. Half would be divided equally between the five Partners and half would be "in play" based on their performance.

43. Mr Brentnall said that he thought that Ms Jones was a "high scorer" and that he was too. Mr Goodger was a "solid scorer". Ms Jones had indicated that she did not want to be paid more out of the fund than Ms Payne or Mr Brentnall. He had been quite harsh on Mr Goodger in the previous year, but that in this year there had been no client issues or complaints. He had received a comment that Ms Payne's contribution to the CFA cases was harder to define, but he did not agree with that. The Firm had previously had a full-time non-fee-earning managing partner and more support staff who had been expensive, including two full time IT employees and two HR employees. Ms Payne had helped to streamline the Firm and that management function had a major interaction with the CFA work.

44. Mr Brentnall suggested that although Mr Tribe had not taken part in the CFA cases he should benefit as part of the half of the fund that would be shared equally. The bills that had caused concern in the previous year had been recovered in full, but it had exposed the Firm to credit risk. There was, however, a risk relating to a Nigerian client of some £250,000 and "a real sense of frustration" with that situation. There were also some shipping bills where the client was being slow to pay.

45. Mr Brentnall proposed dividing the second half of the fund as follows – 26.66% to each of Ms Payne, Ms Jones and himself, 15% to Mr Goodger and 5% to Mr Tribe. The overall split of the discretionary fund would thus be as follows: 12.5% to Mr Tribe, 17.5% to Mr Goodger and 23.33% to each of Ms Payne, Ms Jones and himself.

46. Mr Tribe responded immediately by email to say that the distribution would be controversial. On 8 February Mr Tribe responded to the proposal by email at length and in detail. He considered the difficulties the Partners had experienced with the 2013/14 distribution. He disagreed with Mr Brentnall's assessment of the contributions of the Partners working on the CFA cases. In particular he saw no connection between Ms Payne's management role and those cases. He said that Mr Brentnall had inflated the value of their non-financial contributions and to deflate the financial contributions of others. He reviewed the billings of the Partners other than the CFA cases; in that analysis he was the top biller. He took exception to the way Mr Brentnall had raised his billing performance which was not relevant to that year.

47. Mr Tribe said while the Partners knew that Mr Goodger had taken legal advice in respect of the 2013/14 distribution, he had done so as well, and he had re-activated those instructions. He concluded that Mr Brentnall's recommendations were wholly unacceptable and were not made in good faith. If they were put to a vote or passed then he would bring High Court proceedings against the Partners for breach of good faith

obligations. He put the Partners on notice that he would also seek damages against Mr Brentnall, Ms Payne and Ms Jones for breach of their good faith obligation for mismanaging the Firm, in particular in relation to its finances. He would write about that separately.

48. Mr Brentnall responded the same day noting that Mr Tribe was entitled to treat the recommendations “with the contempt you think they deserve”. All the Partners’ views could be fully aired at the meeting on 10 February. He thought it was “a little premature to be threatening to sue everyone” until Mr Tribe had heard their views.

49. On 9 February Mr Tribe responded that Mr Brentnall seemed not to have understood how angry he was. He doubted he would be prepared to sit and listen to that kind of “farce” as in the previous year. He suggested Mr Brentnall call the vote, after which they could put the matter in lawyers’ hands and “have this partnership sorted out once and for all”.

50. On 9 February Mr Tribe also requested financial information about payments to a former partner of the firm and the relationship with an insurer with whom there had been a dispute. These appear to be the matters which Mr Tribe had indicated in his 8 February email.

51. The Partners met on the morning of 10 February to discuss Mr Brentnall’s recommendations. Various percentage allocations were put forward. Mr Goodger argued for an increase in Mr Tribe’s share. Mr Tribe says that he took little part in the debate other than to reserve his rights to reopen the matter the following year. Following discussions, some in groups, a distribution of the fund was proposed as follows: Ms Jones and Mr Brentnall 21.5% each; Ms Payne 21%; Mr Goodger and Mr Tribe 18% each.

52. Mr Tribe says that the amounts at stake were not worth fighting over immediately and that the other Partners voted in the meeting to accept that, and that he abstained continuing to reserve his position.

53. The other Partners do not accept that Mr Tribe reserved his position. Mr Goodger says that he and Mr Tribe met together during a break in the discussion and Mr Tribe said that he was grateful for Mr Goodger’s efforts on his behalf and that he ultimately supported the compromise. Mr Goodger took notes at the meeting and recorded that each of the Partners agreed in turn to the final proposal. Ms Payne also took a note that recorded the agreement on the division as unanimous. Ms Jones understood that the split agreed on settled the dispute over the distribution. Mr Brentnall agrees the recollections of the others.

54. In giving his evidence Mr Tribe suggested that the other Partners’ notes of the meeting were not contemporaneous or complete. I reject that.

55. Mr Brentnall noted in evidence that this division of profits gave Mr Tribe a total share of around £652,000 for the year, which was substantially in excess of his personal billings. He noted that Mr Tribe’s evidence was that a partner might as a rule of thumb ordinarily receive around 30-35 % of personal billings for the year. By way of a comparison, the CFA business of the firm which had been initiated by Mr D and was

by then carried on by a number of lawyers made up about 85% of the total billings. Mr D's remuneration for the year was in the region of £1.76M.

56. In the afternoon of 10 February, following the meeting, Ms Jones circulated an email to the Partners proposing a resolution. It noted the meeting had considered Mr Brentnall's proposal, Mr Tribe's 8 February email and the following emails. It then recorded the value of the Discretionary Fund, the percentage entitlements of the Partners to that as set out above and the sums due to each Partner. Mr Tribe commented in reply on the need to extend time for the process. Mr Tribe did not take issue with the resolution as it described the allocation of the fund. A written resolution was prepared, and it was signed by all the Partners. Mr Tribe accepts that he signed the resolution but says that he expected the minutes of the meeting to record separately his reservation of his position. When they were prepared by the other Partners, they did not do that.

57. On 1 March 2016 there was an exchange of emails between Mr Brentnall and Mr Tribe about some possible new work. Mr Tribe raised his dissatisfaction with a number of matters and indicated he would not help other partners with the new work but would conclude and bill his remaining matters. He noted:

> "The [Discretionary Fund] distribution has been settled for this year by a compromise sufficient to stave off litigation, but not sufficient to restore any measure of integrity into the process. The whole business rankles deeply."

58. Mr Tribe continued to seek information about the matters he had raised on 9 February.

59. I find that Mr Tribe agreed the distribution of the fund as proposed at the meeting on 10 February and set out in the written resolution which he signed. That was a settlement of his dispute with his partners over the allocation of the Distributable Fund for the year 2014/15. He did not reserve his rights to re-open the issue or to bring litigation in respect of it.

60. In the following period there were a number of difficulties collecting money on Mr Tribe's matters. A shipping client sought a discount on old bills and the Nigerian corporate client looked unlikely to pay fees despite the Firm's relationship with its wealthy owner.

61. Mr Tribe retired from the Firm on 30 April 2016. There was no partner left to carry on the shipping practice that he had previously run.

The 2015/16 recommendations and allocation

62. On 6 January 2017 Mr Brentnall circulated his proposal for the allocation of the 2015/16 Discretionary Fund. His proposal started as follows:

> "It is with the usual trepidation that I now put forward this year's recommendations. In the last two years (for 2013/14 and 2014/15) my recommendations have not been adopted but have resulted in some frank and vigorous debate and different solutions have ultimately been found to those which I originally proposed. This is entirely in conformity with what the Members' Agreement envisages. Unlike in any of the years prior to 2013/14 when I don't believe we put any of my recommendations to a formal vote the last three years have been distinguished by a) larger than usual

profits available for distribution; and b) the overwhelming proportion of those profits deriving from cases not originated by any individual points partner. Thus there is room for more divergent views on attribution and credit. As I have said in the past I can give you my views and recommendations but they are not necessarily the only legitimate views. In the debates that ensued in the last two years valid points were made contrary to the views which I had expressed. And so, whilst for the sake of formality I incorporate into this note the notes that I prepared for 2013/14 and 2014/15 I do so simply because a) 2013/14 was the first year the discretionary fund came up for consideration under the [Agreement]; and b) because the current year is also an extension (although possibly less markedly so) of the unusual features that I have identified above. In this sense therefore this note is a continuation of the same thread."

63. The distributable profit for the year was about £2,134,693 and the Discretionary Fund was £840,552. Mr Brentnall included in his recommendations WIP figures as those were part of the audited profits for the year. There was also a significant release from reserves (around £567,000) including the settlement of the dispute with an insurer that had been mentioned before. Mr Brentnall claimed credit for the resolution of that issue. Mr D's share was likely to be around £675,000. He had again been the biggest biller.

64. Mr Brentnall made observations about the performances of each of the Partners.

65. He described Ms Jones, Ms Payne and himself as "top end", with Ms Payne and himself slightly ahead on the basis of origination of new work. Mr Tribe's billing was "as usual … reasonably solid" but with "considerable attritional costs" of problems with billing relating both the Nigerian matter and some complaints on shipping files which had arisen during the year. He noted that Mr Tribe had retired at the end of the year without leaving any seed capital or goodwill to rebuild the shipping practice. However, he was entitled to be treated fairly in respect of the distributable fund. Mr Goodger's billing performance was not as good as Mr Tribe's, but he deserved credit for a number of matters including his involvement in the settlement of the insurance claim. That had increased the fund by release of £567,824 from reserves.

66. Applying "broad principles" Mr Brentnall proposed £225,000 for himself and Ms Payne, £185,000 for Ms Jones, £115,000 for Mr Goodger and £70,000 for Mr Tribe.

67. Mr Tribe responded by email on 10 January. As in the previous year his comments were long and detailed. He took issue with Mr Brentnall's approach, finding fault with most of his analysis. He started by listing the billing figures for Mr Brentnall (£482,214), Ms Payne (£453,790) and himself (£436,487), and he objected to the different descriptions Mr Brentnall had given of their performances. He accused Mr Brentnall of trying to distort the figures with adjustments that were a continuation of the process he alleged Mr Brentnall had adopted over the past two years. He objected to the reference to work in progress and bad debts and write-offs. He alleged that Mr Brentnall had manipulated the reserve for the dispute with the insurer by taking a sum out in the previous year that was too large and exaggerated. He claimed that the Firm had in effect thrown away the shipping practice. He rejected the complaints about the shipping files as having been made opportunistically by a client's insurer. Such matters had not been taken into account before.

68. Mr Tribe said that he did not intend to attend the Partners' meeting to discuss the fund. His vote was against Mr Brentnall's proposal. He made a proposal that £200,000 each be given to him, Mr Brentnall and Ms Payne with £230,000 being divided between Mr Goodger and Ms Jones as the Partners saw fit.

69. The Partners met on 11 January 2017. They discussed Mr Brentnall's and Mr Tribe's proposals. Ms Jones and Ms Payne were critical of Mr Tribe's matter management and billing practices which they saw as creating undue risk for the Firm. The Partners rejected Mr Tribe's and adopted Mr Brentnall's.

70. The effect of the allocation was to give Mr Tribe profits of around £155,000, which was close to 35% of his billing for that year.

The Agreement – construction and implied terms

Construction

71. I approach the construction of the Agreement bearing in mind the Supreme Court decision in *Wood v Capita Insurance Services* [2017] UKSC 24, in particular at paragraphs 10-15, including the statement that where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense.

Implied terms

72. In *Mid Essex Hospital NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 Jackson LJ noted at paragraph 83 that in any contract under which one party is permitted to exercise a discretion making an assessment or choosing from a range of options, taking into account the interests of both parties, there is an implied term. The precise formulation of that term has been variously expressed. In essence, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult though not impossible to exclude.

73. In *Braganza* Baroness Hale said, at paragraph 18:

> "Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given."

74. The approach to be adopted is set out paragraphs 27-31, 52-53 and 102-103 of the decision. It has since been applied to confirm fetters on the exercise of discretionary

powers in commercial settings in *Watson v Watchfinder.co.uk Ltd* [2017] EWHC 1275 (Comm) and *Shurbanova v Forex Capital Markets Ltd* [2017] EWHC 2133 (QB).

75. *Re Charterhouse Capital Ltd* [2015] EWCA Civ 536 concerned a special resolution to amend the articles of association of a company. The Court of Appeal set out the following principles that apply in such a situation (at 90):

> "It is common ground that an alteration to a company's articles, even if passed by the requisite majority of shareholders, may be challenged as invalid in certain circumstances. We were taken to a number of cases which consider the conditions for an effective challenge. They included *Allen v Gold Reefs of West Africa Limited* [1900] Ch 656, *Sidebottom v Kershaw Leese and Co Ltd* [1920] 1 Ch 154, *Shuttleworth v Cox* [1927] 2 KB 9, *Peters' American Delicacy Co v Heath* (1939) 61 CLR 457, *Greenhalgh v Arderne Cinemas Ltd* [1952] Ch 286, *Citco Banking Corp NV v Pusser's Ltd* [2007] UKPC 13, and *Assenagon Asset Management SA v Irish Bank Resolution Corpn Ltd* [2012] EWHC 2090 (Ch), [2013] Bus LR 266:
>
> (1) The limitations on the exercise of the power to amend a company's articles arise because, as in the case of all powers, the manner of their exercise is constrained by the purpose of the power and because the framers of the power of a majority to bind a minority will not, in the absence of clear words, have intended the power to be completely without limitation. These principles may be characterised as principles of law and equity or as implied terms: *Allen* at 671; *Assenagon* at 278-280.
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> (2) A power to amend will be validly exercised if it is exercised in good faith in the interests of the company: *Sidebottom* at 163
>
> (3) It is for the shareholders, and not the court, to say whether an alteration of the articles is for the benefit of the company but it will not be for the benefit of the company if no reasonable person would consider it to be such: *Shuttleworth* at 18-19, 23-24, 26-27; *Peters' American Delicacy Co* at 488.
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> (4) The view of shareholders acting in good faith that a proposed alteration of the articles is for the benefit of the company, and which cannot be said to be a view which no reasonable person could hold, is not impugned by the fact that one or more of the shareholders was actually acting under some mistake of fact or lack of knowledge or understanding: *Peters' American Delicacy Co* at 491. In other words, the court will not investigate the quality of the subjective views of such shareholders.
>
> (5) The mere fact that the amendment adversely affects, and even if it is intended adversely to affect, one or more minority shareholders and benefit others does not, of itself, invalidate the amendment if the amendment is made in good faith in the interests of the company: *Sidebottom* at 161, 163-167, 170-173; *Shuttleworth*; *Citco* at 490, 493; *Peters' American Delicacy Co* at 480, 486.
>
> (6) A power to amend will also be validly exercised, even though the amendment is not for the benefit of the company because it relates to a matter in which the company as an entity has no interest but rather is only for the benefit of

shareholders as such or some of them, provided that the amendment does not amount to oppression of the minority or is otherwise unjust or is outside the scope of the power: *Peters' American Delicacy Co* at 481, 504, 513, 515; *Assenagon*.

(7) The burden is on the person impugning the validity of the amendment of the articles to satisfy the court that there are grounds for doing so: *Citco* at 491; *Peters' American Delicacy Co* at 482."

76. The parties were agreed that these principles applied in this case to decisions of the Firm as an LLP. They also agreed that in the context of an LLP a decision-making power must be exercised in good faith and in what a member considers to be the best interests of the LLP. Mr Mather labelled this a "subjective fetter" on the members' power.

77. In my view both types of fetter are relevant to both situations, although they are not as strict as Mr Mather contends.

78. The Senior Partner should exercise good faith in making the recommendations (as accepted by the parties) and should not take into account irrelevant matters or ignore relevant ones. The proposal should not be outside the range of reasonable proposals that might be made in the circumstances. The discretion here is broad. That is because this is a proposal to partners, rather than a decision that takes effect without more, and because it is about matters on which partners will likely have a range of views based on their perceptions of the matters addressed. Partners would be able to address what they saw as errors or omissions in the recommendations by raising them with the others.

79. Mr Mather pointed out that *Braganza* makes clear that the standard of decision making is fact-sensitive and not necessarily the same as that applied to a public body. He urged a "fairly rigorous" approach in this case because substantial sums were at stake; the conflicts of interest were "especially stark"; and professional pride was also at stake.

80. I do not accept this approach. It is inherent in the Partners' decision to adopt the arrangements in the Agreement that in any year some might be paid more than others. If they had not wanted that then they would have adopted a straight lockstep system which rewarded partners on a basis of the points they held and not based on any form of performance evaluation. A discretionary remuneration system is by its nature liable to raise issues between partners. In particular, the relative levels of reward may be taken as more significant than the overall profitability of the firm.

81. The decision of the Partners on the recommendations should meet the tests in *Re Charterhouse*. It should also not take into account irrelevant matters or ignore relevant ones. The decision should not be outside the range of reasonable decisions that might be made in the circumstances of allocating the discretionary fund.

The recommendations and allocation - discussion

82. Mr Mather argued that the Agreement provided for a process for allocating the fund that was rather different from the one that the Partners had in fact adopted. That was that on its true construction the Agreement required the Senior Partner to make a proposal that had an express rational basis, was made within his discretionary powers and was put to Partners for their approval or rejection. It was not open to the Partners

to agree an allocation that was not the same as his proposal. That, Mr Mather said, followed from the language in the Third Schedule that: "The allocation of the discretionary fund: …is to be settled by Ordinary Resolution (if required) of the Partners – on recommendations to be brought forward by the Senior Partner…" (added underlining).

83. Mr Mather argued that, as a potential beneficiary of the fund, the Senior Partner had a "profound" conflict of interest in relation to making recommendations. The Partners were similarly affected in exercising their votes. That was because this was a zero-sum game, in which any increase in one Partner's allocation must lead to a reduction in another's. This required a strict impartiality to be achieved by an expressly reasoned basis justifying the proposal in terms of the collective interest of the LLP.

84. If the recommendations were invalid, said Mr Mather, then no valid resolution could be passed based on them.

85. Mr Bompas said that this set the bar too high. In effect this meant the proposals had to be "defect-free" and if they were not, they became invalid; and without a valid proposal the Partners could not agree anything at all. The fiduciary duty that the Senior Partner was said to owe was not specified and applied not merely to the Partners but also those who might benefit from the Discretionary Fund. That included "Practice Groups" which was not, despite capitalisation, a defined term or one that had a fixed meaning in the Firm. This approach required the implication of a term into the Agreement that none of the Partners had recognised in all the time they used it.

86. In my view, the Agreement is not as rigid as Mr Mather suggests. Given their plain meaning, the words require the Senior Partner to make recommendations (which recommend a division but do not decide it) and the allocation then to be "settled", that is "agreed", based on those recommendations. The Agreement does not require that the Partners adopt the recommendations in their entirety or reject them and start afresh (or in default of fresh proposals default to a lockstep division of the fund).

87. If this provision were said to be capable of bearing both meanings, then I would reject Mr Mather's. That allows for no error in a proposal and would in practice require every Partner who wished to make their views known to tell the Senior Partner in advance of the recommendation being issued. It would in practice cut out the opportunity for any debate between the Partners based on their knowledge of the others' positions. It may be the case that partners in a firm of solicitors are not fully aware of the details of their colleagues' practices, and even where time is fully recorded that will not tell the whole story of a year's work. Each Partner would see the past year differently and would have something to offer by way of input into the discussion of the allocation. It is also possible that the Senior Partner might not be aware of a particular client or partnership issue. His lack of knowledge should not jeopardise the entire process.

88. Mr Mather's proposal would set up a system that might fail for the Senior Partner's failure to include a significant fact or matter. If the recommendations failed at some point then the process would have to start again. That process would be liable to go wrong. Applying *Wood v Capita,* the implications of Mr Mather's reading of the Agreement makes less commercial sense for the Partners and should not be adopted.

89. In my view the recommendations do not need to be perfect or to include all possible analyses. They need to be full enough to allow a debate between the Partners to take place. They can address matters other than financial performance, so long as "substantial" attention is paid to that. In this context "financial performance" is broader than just partner matter billings. That is, not least, because other matters, such as collections on bills, may affect how a firm performs financially. There are also questions of whether a firm is making efficient use of its resources and whether there are particular behaviours the partners wish to reward.

90. This is some distance from a case where one party to an agreement has a discretion to make a decision that without more takes effect on the other party. It is a discretion to make a proposal for debate amongst Partners. It is accordingly broad. It would be possible for the Senior Partner to fail to exercise the discretion properly, and if that happened it should in practice be picked up by the other Partners and lead either to a valid proposal or a distribution of the discretionary fund on the lockstep.

91. I note that this also is how the Partners (including Mr Tribe), all experienced lawyers, had assumed that was how the Agreement should operate in this regard.

92. I have addressed above the fetters on the Partners' discretion with respect to a resolution on distribution of the fund.

The 2014/15 process - discussion

93. I turn to the process in 2014/15. Mr Brentnall made recommendations that referred to financial information that had been circulated to the Partners in advance. He addressed the overall financial position of the Firm; referred to each partner's billings (which were set out elsewhere but to which he made reference); considered case management of the CFA cases in particular; and raised the question of debts. He also mentioned the spreading of profits over the years. The division proposed gave each Partner a share of the profits of the CFA work irrespective of their involvement in it and sought to differentiate between Partners based on his appreciation of how the Firm had performed in the year.

94. The proposal for the allocation of the fund was within the range of proposals that it was reasonable for the Senior Partner to make. It had "substantial regard" for "financial performance".

95. Mr Tribe's criticisms of the recommendations are not so significant as to show that they fall outside the discretion given to the Senior Partner under the Agreement.

96. In my view this was a valid exercise of Mr Brentnall's discretion.

97. All the Partners expected that the recommendations would be made on the basis that they would have a full opportunity to debate them, by written comment and in discussion. Mr Tribe commented in detail on the recommendations.

98. The Partners settled the allocation by agreement in a valid exercise of their powers. They did not adopt the Senior Partner's recommendations but compromised to a division that that was not very different (e.g. as they might have been, for example, had

a Partner been excluded altogether from the fund or a Practice Group been awarded a substantial share).

99. Mr Tribe agreed that proposal. As I have said, I do not accept his suggestion that he reserved his rights on the allocation. Mr Mather said that it was in any event irrelevant, because the flaws in the recommendation undermined the entire process.

100. Having found that the Senior Partner's recommendation was valid, I find that the Partner's resolution the distribution of the fund in that year was valid.

101. Mr Tribe's claim included an argument that there was also an agreement to share the profits of the CFA cases on a separate "full partnership" arrangement – this would have the effect that the lockstep provisions should apply to them. This was not pressed at trial. To the extent that it remains a live issue I find that there was no such agreement.

102. While this is not the basis for my decision, I note that in this year Mr Tribe received in total well over 35% of his matter partner billings.

The 2015/16 process – discussion

103. Mr Brentnall's recommendations for 2015/16 started by referring to financial information circulated to the Partners. He addressed the overall financial position of the Firm; referred to each partner's billings (which had been circulated); introduced the use of work in progress; addressed a release from reserves; considered case management; and raised the question of debts.

104. Mr Tribe's criticisms of these recommendations are not so significant as to show that they fall outside the range given to the Senior Partner under the Agreement.

105. In my view this was also a valid exercise of his discretion. The information which he provided addressed matters that it was reasonable to raise and did not exclude matters that should have been raised. There was substantial regard for financial performance.

106. As in preceding years, Mr Tribe had a different opinion, but ultimately that came down to his belief that he was entitled to a larger share than Mr Brentnall had recommended he be given. Mr Tribe had a different perception of the importance of his personal billings. This was a matter he had finessed in the previous year by encouraging the Partners to ignore the CFA cases – despite those being by far the largest source of income for the Firm. The Partners were entitled to consider those cases and also, as part of the process, their perceptions of Mr Tribe's overall performance as a partner.

107. The Partners' adoption of Mr Brentnall's proposal was in the circumstances also a valid exercise of their powers.

Conclusions

108. Mr Tribe's claim for damages and declarations fails. The Senior Partner's recommendations in the years 2014/15 and 2015/16 were reasonable exercises of his discretion to make recommendations to the Partners for distribution of the discretionary fund. The Partners' resolutions on the distributions in those years were reasonable.

109. I am grateful to counsel for their assistance and their detailed oral and written submissions.