OUTER HOUSE, COURT OF SESSION

[2020] CSOH 49

CA109/17

OPINION OF LORD CLARK

In the cause

IAN GRAHAM RENNIE

Pursuer

against

MARK DOUGLAS St CLAIR RENNIE

First defender

Pursuer: McColl QC; Addleshaw Goddard
Defender: Turner; Ennova Law

26 May 2020

Introduction

[1] This action arises from a dispute amongst members of a family farming partnership ("the partnership"). The pursuer seeks reduction of a notice expelling him from the partnership and also seeks interdict to prevent it being held out or represented that he has been expelled. The first defender, who is the pursuer's son, contends that the notice of expulsion is valid and resists the application for interdict. The case called for a proof before answer.

Background

[2] In addition to the first defender, the summons was served on four other defenders. The second defender, D V Rennie & Co, is the partnership. The principal document setting forth the terms of the partnership agreement is a Minute of Agreement dated 15 August 1994. The pursuer has been a partner in the partnership for many years. His son, the first defender, was appointed as a partner in early 2013. The third defender (the pursuer's sister) and the fourth defender (the pursuer's brother) are also partners in the partnership. The other partner is a discretionary trust ("the trust") which was set up by the pursuer's parents. The fifth defender was formerly married to the pursuer. She is not a partner in the partnership. However, the pursuer and the first, third, fourth and fifth defenders are trustees of the trust. The only defender who lodged defences and entered appearance to defend the case was the first defender. For convenience, when referring to the others, I will continue to use the designations of them in the summons.

[3] From about 2016, the personal and business relationship between the pursuer and the first defender deteriorated. This deterioration was caused, at least in part, by a dispute over the pursuer's entitlement to receive certain net rental income generated by rental properties at the farm. In due course, the pursuer indicated that he wished to withdraw a significant part of his capital from the partnership. The first defender resisted the removal of these funds from the partnership's bank account, partly on the basis that the amount of capital held on behalf of the pursuer was not known, as the partners had not reached agreement on the annual accounts. On about 19 October 2017, the pursuer transferred £273,000 from the partnership's bank account to a bank account held in his own interests. Following upon the pursuer's withdrawal of this money, the first defender (acting in the name of the partnership) commenced legal proceedings in the Commercial Court against the

pursuer. Those proceedings sought, *inter alia*, repayment of the monies drawn by the pursuer from the partnership's account and various ancillary interdicts. By interlocutor dated 25 October 2017, the pursuer was interdicted *ad interim* from drawing certain monies from certain bank accounts. Thereafter, by interlocutor dated 31 October 2017, the pursuer was ordained to repay the sum of £273,000 to the partnership under and in terms of section 47(2) of the Court of Session Act 1988. That action was sisted after the present action was raised.

[4] By email on 26 October 2017, the first defender proposed to all partners and trustees that a meeting of the trust and partnership should take place on 3 November 2017. While the first defender did not state so expressly at the time, the purpose of this proposed meeting was, *inter alia*, to discuss the potential expulsion of the pursuer as a partner. The pursuer was unable to attend a meeting on that date, but indicated that he would be able to attend a meeting on 30 October 2017 or in the weeks following 3 November 2017. The first defender decided that he did not wish to wait and told the third and fourth defender of the proposed expulsion and asked them, on 28 October 2017, to vote by way of e-mail. By email, they each voted in favour of the expulsion of the pursuer. On about 30 October 2017, the notice of expulsion was sent to the pursuer, executed by the first defender.

[5] The notice of expulsion dated 30 October 2017 was sent without any formal meeting of the partners to discuss the proposed expulsion having taken place. The decision to expel the pursuer was, as noted, taken by the first, third and fourth defenders. No formal vote of the partners in the partnership was held. The pursuer was not requested to make representations to the other partners about the issue of his expulsion. However, shortly prior to his expulsion the pursuer had sent certain emails making comments about the reasons for his withdrawal of the funds from the partnership's account. The trustees of the

trust were not, in their capacity as trustees, informed of the proposed expulsion or given an opportunity to vote as trustees (and hence as decision-makers for the trust) on the proposed expulsion of the pursuer as a partner. The pursuer was not informed of any proposal that he was to be expelled or that a vote was to take place on his potential expulsion. He was not given an opportunity to vote on his proposed expulsion. The third and fourth defenders based their decisions to vote to expel the pursuer on information provided to them by the first defender.

[6] The notice of expulsion stated:

> "Dear Sir
>
> D V Rennie & Co
>
> I confirm that, having considered the matter, the partners of D V Rennie & Co have decided to expel you in terms of clause 11 of the Minute of Agreement of the Partners dated 15 August 1994.
>
> The reason for your expulsion is your removing £273,000 from the main partnership bank account, contrary to the provisions of the aforementioned Minute of Agreement (including but not limited to clause 10(a) and 11(f)).
>
> On behalf of the remaining Partners of DV Rennie & Co, I hereby give you notice that you are expelled from the Partnership. Your expulsion will be effective from the date that you receive this notice.
>
> Yours faithfully
>
> [signed by the first defender]
>
> For and on behalf of DV Rennie & Co"

The key terms of the partnership agreement

[7] For present purposes, the key clauses in the Minute of Agreement are as follows:

> Clause 9:
>
> "Where any decision is required to be taken or any act authorised by or in relation to the partnership such decision shall be taken or such act shall be authorised, in default

of unanimous agreement of the partners, by a simple majority votes [*sic*] of the partners. In the event of equality of votes Ian Rennie shall have a casting vote."

Clause 10:

"No partner shall, without the express consent of the other partners, do any of the following acts:

(a) draw, accept or endorse any bill of exchange or promissory note, or contract any debt, on account of the partnership, or in any manner pledge its credit or employ its funds, except in the normal course of its business;

…"

Clause 11:

"If any partner shall

(a) become apparently insolvent or enter into any composition or arrangement for the benefit of his creditors generally,

(b) do any act prohibited by Clause 10 hereof,

(c) grossly neglect the business of the partnership,

(d) act any [*sic*] such a way as to bring his name or the reputation of the partnership into disrepute,

(e) commit any act of serious professional misconduct, or

(f) act in any respect contrary to the provisions of this Contract or to good faith between partners

then, in any of these events, the other partners may expel the partner concerned with effect from such date as shall be specified in written notice given by or on behalf of such other partners to the partner concerned who shall be deemed to have ceased to be a partner on such date."

The parties' averments

[8] The pursuer's averments included that the purported notice of expulsion of 30 October 2017 was invalid and of no effect. It proceeded upon an erroneous factual basis that the pursuer drew monies from the partnership's bank account to which he was not

entitled. In fact, having given prior notice of his intention to draw his capital from the firm (in accordance with the long established practice and an agreement as to the entitlement of partners in the second defender to do so), the pursuer was entitled to draw £273,000 of his capital. The purported notice was procedurally defective, for the following reasons:

> "Prior to it being executed by the first defender, no meeting of the partners of the second defender had taken place to consider the potential expulsion of the pursuer. No decision to expel the pursuer as a partner had been taken by the partners of the second defender (or, for the avoidance of doubt, all of the partners other than the pursuer himself). No meeting had been convened of the partners (or the partners under exception of the pursuer) for the purpose of considering and voting upon his proposed expulsion. No opportunity had been afforded to the pursuer to make any representations to the other partners as to any proposed expulsion. In these circumstances, the purported notice of expulsion has been issued by the first defender without the first defender having any power or entitlement to do so and without having met the requirements of clause 11 of the Minute of Agreement."

For these reasons, the pursuer sought reduction of the notice of expulsion and also sought interdict against the first defender and the partnership from representing or holding out that the pursuer has been expelled as a partner.

[9] In answer, the first defender averred:

> "The pursuer was in breach of clause 10(a) of the 1994 Partnership Agreement. The remaining partners were entitled to expel the pursuer in terms of clauses 11(b) and/or 11(f) therefor. On 22 October 2017, the first defender wrote to the pursuer and requested that the pursuer provide an explanation for his withdrawal of funds. On 23 October, the pursuer responded asking 'Why do you want to withhold my money?' On 27 October, he suggested that the withdrawal should be treated as a loan. No request was made or consent given to a loan to the pursuer. Despite being afforded an opportunity, no explanation justifying the withdrawal was proffered. The 1994 Partnership Agreement does not provide for decisions to be taken exclusively at meetings. The partnership agreement does not require an opportunity for representations. In email exchanges among them, the first defender, the third defender and the fourth defender indicated their votes to expel the pursuer. Their agreement was sufficient to authorise the first defender to issue a letter of expulsion dated 30 October 2017 to the pursuer on behalf of the other partners of the second defender. The pursuer was fully aware that the factual basis of his expulsion was the unauthorised withdrawal of funds. Clause 19 of the 1994 Partnership Agreement provides for any dispute as to the pursuer's expulsion to be referred to arbitration. The pursuer has not availed himself of this provision. The first defender is content for any dispute as to the grounds of expulsion to be determined by the Court."

The issue

[10] At the proof, the question of whether or not the pursuer was entitled to withdraw monies from the firm's account was not taken up. Accordingly, the issue for determination is whether the purported notice of expulsion was invalid and falls to be reduced.

Evidence

[11] I have already summarised the background and so I restrict the following discussion of the evidence only to additional salient matters. The pursuer gave evidence. Much of his testimony, including his witness statement and supplementary witness statement, concerned the history and background, and the circumstances surrounding his withdrawal of the funds from the partnership's bank account. He had fallen out with his brother (the third defender) many years ago. Decisions about the partnership's affairs were sometimes made by email, including voting on matters. The issue of whether he could withdraw funds from his capital account had been discussed by email, including an email from the first defender asking the pursuer to explain why he had "drained" £273,000 from the partnership's bank account. By email dated 26 October 2017, the first defender had proposed a "trust and partnership meeting" on 3 November 2017. The pursuer had replied to say that he could not attend a meeting on that date. The pursuer expected that there would be a meeting, but none took place and the notice of expulsion was issued. No other witnesses were led for the pursuer.

[12] The first defender gave evidence. He accepted that he had completely fallen out with the pursuer. He denied that this was prompted by the pursuer giving significant assets to his own daughter, the first defender's sister. Much of his evidence also covered the

history and the circumstances which gave rise to the dispute about the pursuer's ability to withdraw funds from the partnership's bank account. He denied that what was driving the current dispute was that he had stopped the pursuer receiving his agreed rental monies from properties of the partnership and was now also seeking to stop him drawing his capital from the business. In response to it being put that he did not speak to the pursuer before expelling him, the first defender explained that he had emailed the pursuer to ask why he had taken the money, looking for an expression of remorse and reasons, but nothing had come forward. When the first defender tried to organise a meeting for 3 November 2017, the pursuer said he couldn't make it. The pursuer did not offer any explanation as to why he couldn't attend and did not give any other dates, apart from the following Monday, which didn't suit the first defender because he could not get the trust's lawyer to attend on that day. The proposed meeting was to give the chance to the pursuer to explain his actions, to the partners and the trustees, as the partners would be making a decision about expulsion.

[13] The first defender said in his witness statement that he sent an email to the third and fourth defenders on 28 October 2017 proposing that the pursuer should be expelled. The first defender had made his decision to expel the pursuer on that day. His oral evidence included that, on reflection, he may have contacted the third and fourth defenders by phone rather than email. He accepted that there was nothing sent from anyone acting as a trustee saying that they agreed to the expulsion of his father from the partnership. He also accepted that the pursuer had wanted a meeting. The first defender did not wish to wait to have a meeting. At one point, he said it remained his evidence that he had sent an email. He did not know why this email had not been produced. He was not aware of his solicitors having asked for a copy of the email. He did not know whether he had a copy. He was not in the habit of deleting emails. He denied that this email contained significant material that was

deeply damaging to his position and that was why it had not been produced. He could not remember what the email said. He could also not remember the content of conversations he had with the third and fourth defender around this time. He had provided the wording contained in their emailed responses. He was receiving legal advice at the time. He had told his aunt and uncle (the third and fourth defenders) what to write, should they wish to expel the pursuer. The first defender told them of the decision he had made and what they had to state if they decided to do the same thing. They made their own decisions. He accepted that two of the trustees, the pursuer and the fifth defender, were not contacted.

[14] In re-examination, he said that the partners had made the decision to expel. When he wrote the letter of expulsion his understanding was that the decision could be taken by a majority vote. The third and fourth defenders were their own people and made their own decisions. He did not tell them what to decide. The email proposing the meeting on 3 November 2017 was sent to all partners and trustees. The email from the pursuer on 27 October 2017 was also addressed to all partners and trustees. It remained the first defender's position that he sent an email to the partners on 28 October. He had expelled his father because he couldn't see how they could go on. His father had crossed the line and it was the taking of the money that caused the expulsion. There was no motivation to hang on to his father's capital account. After expulsion, the monies in that account would be paid to his father as stated in the partnership agreement. He could not "100% say" that it was true that he had sent an email on 28 October to the third and fourth defender. His memory was that his uncle got back to him by email on the same day and his aunt the day after.

[15] The next witness was the fourth defender, Michael Rennie. In response to the question of whether anyone had sought to influence him in the decision to expel the pursuer, his recollection was very vague. He said that obviously the first defender, his

nephew, had asked him if he thought it was a good idea and he thought it was. He had been told by the first defender that the pursuer had emptied the partnership's bank account. That was a pretty good reason to say one didn't want to work with him. The fourth defender had acted on that information. He had no recollection of whether the information had been provided to him by email or by phone. He did not attend a meeting about the expulsion. That matter was dealt with by email and it needed to be dealt with relatively quickly. He was given the choice of what decision to make, with suggested wording if he was in favour of expulsion, but no suggested wording for a decision not to expel. In his email to the first defender on 28 October 2017, he used the wording suggested to him by the first defender: "I confirm that I would like to proceed with expelling Ian Rennie from the DV Rennie Partnership".

[16] Fiona Rennie, the third defender, then gave evidence. The reason she had sent her email to the first defender, her nephew, expressing that she was in favour of expulsion was because the pursuer had taken money from the partnership. She took her own decision on the matter. No-one influenced her. She recalled that she used to work with someone whose banks "closed on him" and she thought the same could happen here to the partnership. The first defender had told her that the pursuer had withdrawn most of the money from the partnership's bank account. She did not know precisely when this had been said by him to her. She thought the first defender indicated that he didn't see an alternative to expulsion. It was correct that the pursuer was not given the chance to make representations to her about the possibility of being expelled. She had no recollection of the first defender at any stage giving her advice about what should happen. It was her decision and it was not based solely on information given by the first defender, but also on events from her previous employment. While in her witness statement she said that the first defender sent her an

email, prior to her expressing her positon on the expulsion, she could not now say that this was correct. In her email of 29 October 2017 she had used the same form of words as the fourth defender, these having been suggested by the first defender.

[17] The next witness was Stewart Allister, a chartered accountant who acted on behalf of the partnership. His evidence largely concerned the accounting and financial history and background, including previous withdrawals from the partnership's bank account and disputes which had caused recent annual accounts not to be finalised. Monies had been withdrawn in mid-October 2017 by the pursuer. The witness could not say whether he had previously seen the letter giving notice of expulsion. He had no input into any discussion about expulsion, apart from what would happen if the money was not put back in.

[18] The final witness was Robbie Dalgleish, also a chartered accountant and from the same firm as the previous witness. Mr Dalgleish had previously acted on behalf of the partnership. He had stepped back after his relationship with the pursuer had deteriorated. He gave limited evidence about certain financial matters but not about the expulsion issue.

Submissions

Submissions for the pursuer

Relevant legal principles

[19] Where a partnership deed permits decisions to be taken by a majority of partners, this did not mean that a bare majority of individuals who happen to be partners could impose decisions on the other partners without giving them a prior opportunity to discuss and vote upon the issue: *Miller, Partnership* (2nd ed.), p185. Where a partnership deed makes provision for the expulsion of a partner, the grounds on which expulsion may be justified and the procedural requirements for the exercise of the power set out in the

partnership deed will be strictly construed (*Miller*, p187). It is invalid to expel a partner for an ulterior, private motive. An expulsion on that basis, even if it bears to meet the provisions of the partnership deed, should be reduced (*Miller*, p506). Where the partners (or some sub-set of them) are the body determining whether or not to expel, a failure to give the person under threat of expulsion intimation of the grounds upon which expulsion is sought and an opportunity to make representations will render the purported expulsion invalid (*Miller*, p509). This is an application of the rules of natural justice (*Barrs* v *British Wool Marketing Board* 1957 SC 72; *Inland Revenue* v *Barrs* 1961 SC (HL) 22; *Stair Memorial Encyclopaedia* (Reissue), *Partnership*, [28]). Applying these principles, the actions of the first defender (together with the third and fourth defenders) did not comply with the expulsion provisions of the partnership agreement. *Fairman* v *Scully and ors* 1997 GWD 29-1942 was entirely consistent with the pursuer's position. *Green* v *Howell* (1910) 1 Ch 495 had not been followed in Scotland at any point, but that decision did not in any event absolve those seeking to expel from giving notice and fair opportunity of a hearing in every case. In assessing the matters in the present case, those who made the decision to expel had been acting in a quasi-judicial capacity.

The terms of the partnership agreement

[20] Clause 11 fell to be construed strictly. As such, it plainly required all of the other partners in the partnership to vote in favour of an expulsion under clause 11. This did not happen. If an alternative approach to expulsion had been the intention, the agreement could have said expressly that it could be done by a majority vote among the other partners. It was also important to note the nature of this partnership. As a family farming partnership, it could be anticipated at the time when it was written that all of the partners would be family members, and the trust. In that context, it was even more understandable why one

would need unanimity before someone was expelled. The procedure for expulsion of a partner is set down by clause 11, not by Clause 9. But even if clause 9 was in play, the procedure adopted by the first defender did not comply with it. There was no vote taken of the partners. There was no opportunity for either the trust or the pursuer to vote on the proposed expulsion. They were not even told that such a vote was taking place. The pursuer was not provided with an opportunity to make his representations in relation to the proposed expulsion before any such vote. Only if there is default in achieving unanimity can one turn to consider a majority vote.

The involvement of the trust

[21] The trustees of the trust did not express any view as to the proposed expulsion and, as noted, were not even given notice of the proposed vote on expulsion. The fact that some people who happened to be trustees voted on it in a different capacity was neither here nor there. There was nothing before the court as to how the trust comes to a decision. In the normal course of events, a body of trustees is to be given an opportunity to discuss and determine what approach is to be taken.

Natural justice

[22] There was nothing in the point made by counsel for the first defender about a lack of fair notice in relation to submissions on this matter. The rules of natural justice assist the court in a proper construction of the partnership provisions and that was the basis upon which the points were taken. The factual averments gave absolutely clear notice of the acts and omissions relied upon. Given that the partners would be acting in a quasi -judicial capacity in determining whether or not to expel the pursuer, it was necessary for this determination to take place in accordance with the rules of natural justice. This required the pursuer both to be made aware that there was a vote to be held on his potential expulsion, to

be provided with an explanation of the grounds upon which his expulsion was sought, and to be given an opportunity to present his position as to his potential expulsion and the grounds on which it was sought. When a person is given the opportunity to explain his position, that may persuade some others to adopt a different approach. Fairness was also part of the requirement to act in the utmost good faith.

[23] Further, no properly independent vote had been cast in relation to the issue of expulsion of the pursuer by either the third or fourth defender. They had simply acted in accordance with the wishes of the first defender and on the basis of the facts presented to them by him, rather than on the full factual picture. In such circumstances, there had been no proper determination of the proposed expulsion. The purported vote had not taken place on a fair and proper basis. Other partners being provided with wording and asked to send it back was not a true choice. In terms of clause 11, a decision was taken on material with a sanction being imposed. There was an assessment and determination of the civil rights of the pursuer. The consequences of expulsion would include ceasing to have any entitlement to partnership income and having the monies in the capital account paid back over 96 months. The decision was a quasi-judicial act.

Inferences to be drawn

[24] The first defender had taken active steps to conceal the true reasons behind the purported expulsion of the pursuer and the manner in which it was carried out, in particular, by failing to produce the e-mail of 28 October 2017. The third and fourth defenders were guided in their decision to expel the pursuer by the first defender. The manner in which the evidence of the first defender was given was evasive and incomplete as to the critical events at about the time of the purported expulsion. The court should properly regard the absence of the full email evidence as being indicative of there being (a)

an ulterior motive for the purported expulsion which was not being disclosed, and (b) a significant level of control being exercised by the first defender over the votes of the third and fourth defenders. The first defender had not provided the court with a full or frank picture of the grounds upon which he sought to indicate to the third and fourth defenders that the expulsion should take place. In these circumstances, it was appropriate for the court to reach the view that the expulsion of the pursuer had taken place for reasons collateral to those stated in the notice of expulsion. These included the general falling out between the pursuer and the first defender and the ongoing dispute in relation to rental income. The court should conclude that the email of 28 October 2017 was likely to contain collateral reasons for the expulsion and could demonstrate that the position that the third and fourth defenders reached was not on an impartial basis. If no independent assessment was made by the third and fourth defenders, that too would invalidate the proposed expulsion. That had occurred. On the evidence, they had been provided with the wording for expulsion that they both sent back, which was not indicative of them applying their own minds to this situation on an independent basis. They were not given the full picture about the circumstances underlying the withdrawal of the monies.

[25] Prior to the first defender becoming a partner, the partnership had agreed that the pursuer would receive the net income generated by cottages on the farm as part of his pension. The first defender had stopped the pursuer from receiving these monies. He had no proper basis for doing so. He had no intention to reinstate payment of these monies. The first defender's desire to expel the pursuer as a partner in the partnership was driven, at least to a material extent, by the fact that his relationship with his father had collapsed as a result of the rental dispute. The inference that this was the case fell strongly to be drawn from the failure on the part of the first defender to produce the full correspondence passing

between himself and his aunt and uncle in relation to the proposed expulsion. The decision to expel had, in fact, been taken by the first defender and accepted by the third and fourth defenders before the purported votes on the proposed expulsion were cast by the third and fourth defenders. The withdrawal by the pursuer of monies from the partnership account was driven by frustration on his part that he was not being permitted by the first defender to draw his monies from the partnership and that his access to the rental monies had been stopped. These factors were not drawn to the attention of the third and fourth defenders (or otherwise considered by them) as part of the process leading to them casting their purported votes to expel the pursuer as a partner.

Submissions for the first defender

Relevant legal principles

[26] It was accepted that the terms of the partnership agreement dealing with expulsion fall to be strictly construed (*Miller, Partnership* (2nd ed. p187). Subject to the fair notice point made below, it was accepted that where partners are a body determining whether or not to expel a partner, a failure to (i) give the person under threat of expulsion intimation of the grounds; and (ii) an opportunity to make representations, is a breach of natural justice. However, the converse was also true: where the partners are not a body determining whether or not to expel but merely instigating a process which might result in a determination by a further adjudicator (such as an arbitrator), these rules of natural justice do not apply (*Green* v *Howell* [1910] 1 Ch. 495). The passage in the *Stair Memorial Encyclopaedia* upon which the pursuer relied was based upon *Fairman v Scully* but in that case the court actually made no determination as to the application of the rules of natural justice, the defender having conceded their application. In any event, the agreement in that case made clear that a quasi-judicial function was to be exercised. Moreover, there was no

provision for a further adjudication of any dispute. The current editor of *Lindley & Banks on Partnership*, (20th ed., at para 10-145) did not consider it appropriate to import the principle *audi alteram partem* into expulsion provisions. In *Green* v *Howell* the partner who served the notice was in no sense acting in quasi-judicial capacity. Rather, he was simply asserting something; a breach of the partnership contract.

The terms of the partnership agreement

[27] The pursuer's actions portrayed a total disregard of his duties to the partnership, including to act in good faith. A majority of the partners reached a decision that they wished to expel the pursuer. They were entitled to reach that decision. The pursuer was entitled to challenge the substance of the decision at arbitration (although the first defender was content for that issue to be litigated). Absent a substantive defect, the partners (acting by their majority in terms of clause 9) were entitled to expel the pursuer. It was open to the partners to communicate their decision in relation to the expulsion in writing. Properly construed, the partnership agreement in its terms did not provide for a mandatory right to be heard before any decision is taken. The right to resolution of any decision lay in the arbitration provisions of clause 19. In email exchanges amongst them, the first defender, the third defender and the fourth defender indicated their votes to expel the pursuer. That sufficed to authorise the first defender to issue the notice of expulsion. The pursuer was fully aware that the factual basis of his expulsion was the unauthorised instruction of the withdrawal of funds. The fact this was a family partnership made no difference; fall-outs occur in a family business context. It was readily apparent why a majority-vote provision would be a sensible thing to put into the partnership agreement. The partners were entitled to reach a decision to expel the pursuer in terms of clause 11(b) in respect of the breach of clause 10(a)) and 11(f)) of the agreement.

The involvement of the trust

[28] The trust is governed by a majority of the trustees. A majority of the people who were trustees had indicated their intention to expel the pursuer from the partnership. The emails from the third and fourth defender did not express in what capacity they were voting and it could reasonably be inferred that they voted in all capacities they held. The trust being entitled to act by its majority, the trust had in fact been consulted regarding the pursuer's expulsion, even if it had not taken steps to reach its own decision. In any event, standing the earlier majority votes of the partners having been cast, a further determination on the part of the trust was superfluous and unnecessary.

Natural justice

[29] The pursuer's substantive plea was directed to invalidity, pled as caused by procedural defects in terms of the contractual requirements. At no time had the question of natural justice been raised. Senior counsel for the pursuer described it as a legal issue, but in that case one would have expected to see it in a plea-in-law. There was a joint statement of issues, which made no reference to natural justice. It was accepted that the factual basis for the natural justice argument was averred by the pursuer. However, the pursuer had failed to plead a case addressed specifically to the application of the rules of natural justice or the absence of consideration of any minority view of the partners. While these matters could be addressed by counsel for the first defender, they ought not to be considered in the absence of fair notice. The pursuer's case also fell to be considered on its weaker alternative. The pursuer having founded on an alternative of no meeting having been held, any submission in regard to the pursuer not having been an opportunity to vote was irrelevant. In any event, the pursuer's case based upon natural justice failed. The other partners did not

perform a quasi-judicial function. Arbitration provided the mechanism whereby any quasi-judicial determination would take place.

[30] Absent the application of the rules of natural justice, there was no requirement for a meeting or any right for the pursuer to make representations. In any event, all of the relevant correspondence had been copied between the first defender, the pursuer and the third and fourth defenders. They were all aware of the full factual background. The pursuer was offered the opportunity to explain what he did and why he did it. He gave responses by email. The fact that the first defender did not seek that the case be taken to arbitration was irrelevant. The judicial function was therefore for the court. There was a clear distinction between making a decision and acting in a quasi-judicial capacity. The decision could be quasi-judicial if there was no reference in the partnership agreement to arbitration.

Inferences to be drawn

[31] The third and fourth defender each gave clear evidence that their decisions to expel the pursuer were as a result of him having emptied the partnership's bank account. The third defender indicated in particular her concern arising from personal knowledge of a bank foreclosing upon an acquaintance in similar circumstances. Whilst the first defender referred to an email of 28 October 2017 in his statement, his evidence should be taken as being that he mis-spoke on that point. It was to be noted that no attempt was made by the pursuer to recover this email at any stage. The evidence of the third and fourth defenders was that they had acted independently. No basis existed for the inferences sought to be drawn. The first defender put a proposal to the third and fourth defender. It was not disputed that he may have given them a form of words in the event that they reached a

decision to expel the pursuer. The fourth defender said in evidence that in the event that they were not voting for expulsion they simply wouldn't rely on the wording given.

[32] It was accepted that it is invalid to expel a partner for an ulterior motive (*Miller* p 506). However, such motive must be demonstrable. It was not sufficient for a party to infer such a motive from the existence of an alternative potential motivation. The existence of an alternative motive, without proof that this was the true motive behind any expulsion, could not reasonably restrain a partner from exercising a right to expel where a proper motive existed. An expulsion will not be struck down merely because it happened to fit in with the continuing partners wish to be rid of the expelled partner (*Lindley & Banks on Partnership*, (20th ed., at 10-141). The grounds of expulsion were clearly understood from the notice of expulsion to relate to the pursuer's actions in withdrawing funds. In any event, there was no provision requiring reasons for expulsion to be provided (*Green* v *Howell*, at 510). There was no proper basis to infer that the first, third or fourth defenders had other motivations. The suggestion put in cross-examination that the first defender was motivated by a desire to retain the pursuer's capital was flatly denied by the first defender. In fact, the partnership agreement provides for repayment of his capital upon expulsion, thereby triggering repayment. No witness presented any evidence of any motivation to remove the pursuer from the partnership for any reason other than his detrimental actions in leaving the partnership without funds. The first defender in seeking the views of the third and fourth defenders necessarily required to communicate with them. The fact of that communication could not have itself found an allegation of an ulterior motive, not least in the face of a blatant and readily apparent justification of expulsion.

[33] In relation to the conclusion for interdict, there was no basis presented for a reasonable apprehension that there has been any holding out or representation to third

parties. There was nothing before the court to suggest any reasonable apprehension that in the event the expulsion notice is struck down the first defender would do anything other than comply with that. There was no basis for a permanent interdict.

Decision and reasons

Relevant legal principles

[34] The two cases cited by senior counsel for the pursuer (*Barrs* v *British Wool Marketing Board*; *Inland Revenue* v *Barrs*) demonstrate the principles of fairness and the rules of natural justice but do not deal expressly with expulsion from a partnership. The textbooks referred to by the parties, *Miller, The Law of Partnership in Scotland* (2nd ed, at 508-511) and *Lindley and Banks on Partnership* (20th ed, 10-140-10-144) provide a helpful and detailed examination of the principles and the authorities. The passage referred to in the *Stair Memorial Encyclopaedia* relies largely upon *Fairman* v *Scully*, which I discuss below. Unfortunately, as these works demonstrate, when the case law is analysed the application of the rules of natural justice in the context of expulsion of a partner is unclear.

[35] In *Blisset* v *Daniel* (1853) 10 Hare 493 the rules of natural justice were held to apply to the expulsion of a partner. The same view was reached in *Barnes* v *Youngs* [1898] 1 Ch 414, where Romer J made the following observations (at 418):

> "And undoubtedly, to my mind, it is essential that partners exercising a power of this kind should before they do so, and peremptorily exclude a co-partner and advertise that co-partner's exclusion, give him an opportunity of knowing before they serve the notice what the cause of complaint is, so that at any rate he may have an opportunity of explaining and, if possible, satisfying them that no good cause of complaint exists. I think partners are not entitled to spring a notice of dissolution on their co-partner without the slightest preliminary warning being given to him, and without calling his attention in the slightest degree to any alleged cause of complaint, and without giving him the slightest opportunity of meeting the case which is alleged against him. Now, that is what the defendants did in this case."

[36] But there is also authority to the contrary. *Green* v *Howell* is commonly viewed as a leading decision on this issue. At first instance, Neville J accepted that the rules of natural justice can apply to expulsion from a partnership but concluded that they did not apply in the case before him. He appeared to found strongly on the presence of the arbitration clause in the partnership agreement, stating (at 500):

> "I have been referred to *Blisset* v *Daniel* and many other cases, in which it has been held, and the principle has been laid down in the widest possible terms over and over again, that where a question of this kind—a question of expulsion—has to be determined either by the other party or by members of a committee, or by a majority of the partners, or by any other domestic tribunal constituted by agreement between the parties, that discretion cannot be exercised unless and until the accused party has had the opportunity of laying his case before the tribunal which has to judge him and giving them the opportunity of coming to a just conclusion. I think that principle is clear beyond the possibility of dispute, founded in natural justice, and established, I was going to say by innumerable, but certainly by numerous decisions. But it does not appear to me that those authorities have any bearing upon the case before me. Here it is not for either party to decide whether he is entitled to expel his partner from the partnership or not. He is only given the power to put certain proceedings into train whereby it shall ultimately be decided by the proper tribunal."

Neville J then declined to follow what had been said by Romer J in *Barnes* v *Youngs*, even though the facts were similar. In the Court of Appeal, Cozens Hardy MR agreed with Neville J and said (at 504) that the person who gave the notice was "so to speak, the moving party, the litigating party, the person who was starting proceedings which would ultimately lead to a proper adjudication on the rights of the parties". Buckley LJ said (at 510) that the plaintiff had merely asserted that there was a breach of duty by the other partner. It was for the arbitrator, and if not then the court, to try that matter and make the judicial determination. He added (at 512) that the plaintiff had taken "a certain step which set in motion a certain course of procedure upon which the defendant had every opportunity of asserting that the plaintiff was wrong". Both judges rejected the views expressed in *Barnes* v *Youngs.* Cozens Hardy MR also said that *Blisset* v *Daniel* was entirely distinguishable on the

ground indicated by Sir George Jessel in *Russell* v *Russell*. The relevant passage in *Russell* where *Blisset* v *Daniel* was distinguished appears to be this (at 479-480):

> "There the Vice-Chancellor was of opinion that even in that limited case, where it was only *inter se* as regards the partners themselves, yet, if the reason, as far as the other partners were concerned, was misconduct, they ought to give the partner sought to be expelled an opportunity of explaining his alleged misconduct. How that case applies to the case of a single partner I do not well understand. In the case of several partners it may well be that it is a thing to be considered, but if it is a single partner it is plain that neither *Blisset v Daniel* nor *Wood v. Woad* has any application, because the moment you give the power to a single partner in terms which shew that he is to be sole judge for himself, not to acquire a benefit, but to dissolve the partnership, then he may exercise that discretion capriciously, and there is no obligation upon him to act as a tribunal, or to state the grounds on which he decides for himself."

However, that emphasis on the distinction between several partners deciding on expulsion and a single partner doing so, leaves open the question of why the Court of Appeal in *Green v Howell* rejected the position taken in *Barnes* v *Youngs* where the notice of expulsion was on behalf of more than one of the partners. The partnership agreement in *Barnes* v *Youngs* also contained an arbitration clause similar to that in *Green* v *Howell* which conceivably could have been a factor behind the reasoning of the appeal court judges in rejecting the position in *Barnes* v *Youngs*, although that is not stated by either of them. But importantly each of the appeal court judges in *Green* v *Howell* who explained their views also made reference to the fact that if the issue was not taken to arbitration, the court would determine the question of whether expulsion was justified. So, the presence of the clause allowing the issue to be determined by arbitration, despite repeated reference to it in the judgments at first instance an on appeal, appears actually to be of no real consequence.

[37] Thus, the key differences in the facts in the leading cases include that some involve simply two partners, one seeking to expel the other, and contain comments which might conceivably be taken to differentiate those circumstances from cases involving more than

two partners (*Russell* v *Russell*; *Blisset* v *Daniel*). Arguably, where there are only two partners, expulsion by notice from one partner can take place without the other being heard (*Russell* v *Russell*) because it is akin to dissolution, which may be done arbitrarily. Cases such as *Green* v *Howell* could be viewed as really involving dissolution rather than expulsion, although there is of course a degree of overlap between these concepts. On that analysis, if one could distinguish the two-partner dissolution cases, the approach in *Barnes* v *Youngs* to expulsion may be argued to be correct. Further, there may be circumstances in which exclusive personal advantage is being sought by those seeking to expel, rather than them acting in good faith and in the interests of the partnership (*Blisset* v *Daniel*) and that can invalidate the expulsion. Also, the court hearing the matter may have determined (after trial) that the expulsion was plainly justified, for example because of a flagrant breach of duty by the partner, and in that context comes to deal with what might then be regarded as the minor issue of whether he had the right to be heard before he could be expelled (*Green* v *Howell; Peyton* v *Mindham* [1972] 1 WLR 8).

[38] Ultimately, however, these factors do not suffice to allow *Green v Howell* to be distinguished in the present case. The main distinction drawn in that case is between circumstances in which those in favour of expulsion simply assert that misconduct warranting expulsion has occurred and, on the other hand, where they have to determine (or judge) whether or not they are entitled to expel (as occurred in *Wood* v *Woad* (1874) LR 9 Exch 190). This approach focuses the issue of whether or not the decision to expel is a quasi-judicial act. In most cases, that will be determined by the language in the relevant provision. For example, in *Wood* v *Woad* (which involved a decision by a committee of a mutual insurance society to expel a member), the ground was

> "that if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member."

The word "deem" was referred in *Russell* v *Russell* as having different meanings, including to adjudge or decide. *Green* v *Howell* effectively states that if no purported adjudication or determination requires to be made and what is said to justify the expulsion can be viewed as an assertion, then the rules of natural justice do not apply. This understanding of the decision fits with what Neuberger J (as he then was) said in *Mullins* v *Laughton and Others* [2003] Ch. 250, [2003] 2 WLR 1006 (at [95]): "… at least in general, a partner need not be given an opportunity to explain his conduct or to argue his corner before he is expelled: see *Green* v *Howell* [1910] 1 Ch 495". It may therefore be correct (as it was put in *Russell* v *Russell* at 478) that the *audi alteram partem* principle, as a rule of natural justice, applies when the other partners are "invested with authority to adjudicate upon matters having civil consequences for individuals"

[39] Looking at more recent developments, in *Eaton* v *Caulfield* [2013] EWHC 173 (Ch), Proudman J found (at [52]) that an expulsion was unjustified when "there was no prior notice or opportunity to make representations before an unbiased tribunal". However, that issue arose in the context of an unfair prejudice claim involving a limited liability partnership. Moreover, *Green* v *Howell* was not cited to the court. The issue is also discussed briefly in the Joint Consultation Paper on Partnership Law, issued by the Law Commission (Consultation Paper No 159) and the Scottish Law Commission (Discussion Paper No 111) on 31 July 2000. It notes (at para 13.6, footnote 7) under reference to *Barnes* v *Youngs*, *Green* v *Howell* and *Kerr* v *Morris* [1987] Ch 90 at 111, that there is doubt in English law whether, beyond the duty to exercise the power in good faith, the rules of natural justice apply to expulsion clauses in partnership agreements. It then states that "In Scotland the

rules of natural justice apply to the exercise of a contractual power of expulsion in a partnership or any other voluntary association", referring to *Fairman* v *Scully* and added that "Lord Hamilton, though not required to reach a decision on the matter, agreed with the concession of the parties that the rules of natural justice applied". However, in *Fairman* v *Scully* Lord Hamilton did not reach any view as to whether the submission on behalf of the pursuer in that case that the rules of natural justice applied, based on most of the English cases cited above, should be sustained. Rather, quite understandably, he expressly stated that in light of the concession made on behalf of the defender, there was no need to examine the principles which determine when those rules do or do not apply. *Fairman* v *Scully* may in any event be viewed as falling within the category of adjudicating and determining the entitlement to expel. The relevant clause in the partnership agreement in that case referred to any partner "considered" to have been guilty of professional misconduct or "considered" to have brought himself or the business into disrepute.

[40] Accordingly, leaving aside the various nuances about expulsion and dissolution, and whether different principles apply where there are more than two partners involved, the distinction drawn is between, on the one hand, provisions in the partnership agreement which do not result in those who expel exercising a quasi-judicial function and, on the other hand, provisions which do involve that function. *Green* v *Howell* can be taken as meaning that if the provision allows expulsion as a result of a breach of duty or a breach of the agreement, and the notice of expulsion making that assertion is challenged, the matter falls to be determined by the court or an arbitrator. If the provision is that the other partners have to decide whether they are entitled to exercise the power to expel, and hence to determine the rights of the partner who is proposed to be expelled, that is a quasi-judicial function.

Application of the principles

[41] On behalf of the pursuer, it was submitted that the exercise carried out by those who decided to expel him was a plain exercise of a quasi-judicial function, as there was an assessment of whether there had been a breach (including of clause 11(f) which concerns acting in good faith). The other partners also required, it was argued, to determine what sanction would be appropriate and whether expulsion would be appropriate. However, it could be said that there is no material difference between the factual circumstances and the provisions in the agreement relating to the grounds of expulsion in the present case and those in *Green v Howell*. In that case, the plaintiff had been told in the notice of expulsion that he had breached some or all of seven clauses in the agreement, had committed a flagrant breach of his duties as a partner and had acted contrary to good faith. One of the key issues for me, therefore, is whether I should properly regard *Green v Howell* as persuasive authority for the proposition that in circumstances such as the present case the rules of natural justice do not apply.

[42] In my opinion, it is clear from the terms of clause 11 that a condition for expulsion must be met: "… in any of these events, the other partners may expel the partner concerned". Thus, one of the listed events must be determined to have happened. That was a matter for consideration and decision. Similarly, "may expel" indicates that it is an exercise of discretion. Unlike the position in *Green* v *Scully* these were matters which "the other partners" required to reach conclusions upon. Clause 9 reinforces the point that this is a decision: it permits a vote by a majority *inter alia* "where any decision requires to be taken" and indeed the first defender relies upon that in respect of the decision to expel. I therefore conclude that the provisions of the partnership agreement did confer a quasi-judicial role on the other partners when considering and deciding upon whether to expel. While actions of

parties after their contract has been entered into are irrelevant to the construction of the provisions, the notice of expulsion demonstrates what was done. It states: "having considered the matter, the partners of D V Rennie & Co have decided to expel you". It also makes reference to the reason being that the pursuer had acted contrary to the provisions in the partnership agreement "including but not limited to clause 10(a) and 11(f)". Such a decision is expressly stated to have involved consideration of the matter, which must include the facts and the terms of these provisions. There was therefore a determination of the entitlement to expel. It could be suggested that the facts in *Green* v *Howell* are consistent with the plaintiff there having considered and decided on whether he was entitled to expel (or in fact dissolve); he plainly reached a view that, in light of what had occurred and the terms of the partnership agreement, he was entitled to expel. Whether that case properly involved a mere assertion is therefore perhaps open to argument.

Interpretation of the partnership agreement

[43] Clause 11 has to be read in the context of the whole of the agreement, including clause 9 which, as noted earlier, contains the important expression "in default of unanimity". It is only in those circumstances that a majority vote can suffice. Historically, that expression has been used in a number of situations. Its meaning is clear: in order to identify whether or not there is a default of unanimous agreement, there must be steps taken to ascertain from all partners what their position is on the matter to be decided upon. These steps will allow determination of whether or not there is unanimity. Plainly, in at least the vast majority of situations, if not all, the person whose expulsion is being considered will not agree to or vote in favour of his own expulsion, so that unanimity will not be possible. However, that does not avoid the need to identify that person's position. Nor does it allow those in favour of expulsion to ignore another partner (in this case, the trust) and deny it of

notice or the right to vote. Clause 9 also refers to "votes" which again indicates obtaining the views of each partner. Bearing in mind that the provision for expulsion is to be given a strict construction, the reference to "the other partners" must mean that all of the other partners (including the trust) have been consulted, and hence given notice of the proposed expulsion. I do not accept the pursuer's position that in this regard clause 11 effectively supersedes clause 9 and requires all of the other partners to vote in favour of expulsion; rather, it interacts with clause 9 and so allows a majority decision, as long as proper notice is given to all partners.

[44] Accordingly, it is clear from these provisions that all partners (including the trust and the pursuer) required to be advised of the proposal for expulsion. That did not happen. In addition, as a matter of construction there is a need to decide upon the breaches, and for that purpose all of the other partners need to know the basis for the allegations of breach including the particular provisions alleged to be breached. Communication of that information was not established in evidence. The procedure for expulsion was therefore not complied with. On the submission for the first defender based on the weaker alternative rule, I do not regard that as well founded. Properly understood, the pursuer did not make alternative and inconsistent averments on the procedural irregularities, but averred that several had occurred.

The involvement of the trust

[45] For the reasons I have given, clause 9 of the partnership agreement required that the trust should have been contacted, and the trustees should then (according to whatever procedures are required by the constitution of the trust) have reached their view on the position of the trust on the matter of expulsion. That is so even where, as here, it is likely that the majority of the trustees would vote in the same way as they did in the decision to

expel. Trustees have a duty to act in the interests of the trust, to be reflected in their votes on the position of the trust.

Natural justice

[46] On the first defender's contentions regarding a lack of fair notice about the natural justice issue, there is some force in the point that it ought to have been the subject of a plea-in-law. However, its relevance is, as was submitted for the pursuer, linked to the construction and application of the terms of the partnership agreement. Moreover, the factual basis for the issue was the subject of clear averment on behalf of the pursuer. Perhaps more importantly, counsel for the first defender, to his credit, did not suggest that he had been taken by surprise by the submissions on this issue, to the extent of being prejudiced or unable to respond; on the contrary, he responded in full and clear terms, including under reference to the authorities. I therefore reject the first defender's position that this issue should not be considered.

[47] For the reasons I have given, having regard to the proper interpretation of the terms of the partnership agreement, a quasi-judicial function was exercised and so the rules of natural justice applied. These included the need to give the pursuer fair notice of the grounds for his proposed expulsion and the right to be heard prior to any decision being made. It is true that the pursuer did not ultimately insist upon his position that the factual basis for his expulsion was not established. However, the right to be heard has as its purpose that it may result in a different decision being taken. The pursuer did send emails which set out his position on the withdrawal of funds, but this is not the same as being able to state his position on whether or not specific clauses had been breached or expulsion should follow. No fair notice of the proposed expulsion was given. The rules of natural justice were therefore breached.

Inferences to be drawn

[48] The first defender made express reference in his witness statement to having sent an email on 28 October 2017 to the third and fourth defenders. This was echoed by the fourth defender, in her witness statement. Where any other specific email is identified in the witness statements, the number of that document in the joint bundle of productions is given. That is not done for the email of 28 October 2017, which was not in fact produced. The first defender's position on it was equivocal. He appeared to accept that it existed but also expressed doubt on that point. It is of concern that the matter of whether this email exists was not checked by or on behalf of the first defender prior to him giving evidence, and it may well be correct that if such an email does exist it contains information which the first defender does not wish to disclose. However, inferences can only go so far and it would be speculation for me to conclude, for example, that the email must have indicated that the first defender cajoled or pressurised the third and fourth defenders into doing what he wanted. Their evidence did not support that position. I am also unable to infer that this email would have disclosed an ulterior motive, or that there is any other ground for concluding that there was such a motive. The existence of other tensions or disputes between the parties is of no moment if the grounds for expulsion existed. The fact that the third and fourth defenders followed the wording put forward by the first defender is of no real significance, given that I accept their evidence that they made their own decisions. What I am able to infer from their evidence, and that of the first defender, is that he did not give notice of the specific matters upon which they were to decide. For that reason also, having regard to the meaning of the terms of the partnership agreement and the implicit requirement for such information to be given, the procedure which gave rise to the notice of expulsion does not comply with the terms of the agreement.

[49] In relation to the conclusion for interdict, it proceeds on the footing that there is a reasonable apprehension that the first defender may represent that the pursuer has been expelled, even if the court decides to reduce the notice of expulsion. The basis for that position was not established. I therefore do not grant the conclusion for interdict.

Disposal

[50] For the reasons given, the procedure adopted in relation to expulsion of the pursuer did not comply with the terms of the partnership agreement or with the rules of natural justice. Accordingly, I shall repel the first defender's pleas-in-law, sustain the first plea-in-law for the pursuer and grant decree of reduction of the notice of expulsion, reserving in the meantime all questions of expenses.