IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2014-404-725
[2021] NZHC 1414

BETWEEN	THE ESTATE OF MICHAEL DAVID KIDD by its administrator BRYAN JOHN COOPER Plaintiff
AND	ALEXANDER PIETER VAN HEEREN Defendant

Hearing:	3-5, 8-12, 15-19, 22-26 and 29-31 March 2021
Appearances:	S J Mills QC, B O'Callahan, EJH Morrison and J Ding for the plaintiff M D O'Brien QC, S D Williams and JRS Lewis for the defendant R C Knight and L A Moyle for Ms van Heeren-Hermans
Judgment:	17 June 2021

INTERIM JUDGMENT OF JAGOSE J

This judgment was delivered by me on 17 June 2021 at 11.00am.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Counsel/Solicitors:
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Introduction

[1] This interim judgment takes the account between Michael Kidd and Alexander van Heeren on the ending of their partnership late last century. A further judgment will be necessary to bring that accounting up to date.

[2] At the time the men gave their evidence for trial, each was resident in South Africa. Mr Kidd died at Gauteng on 18 February 2021. I then expressed, and now repeat, this Court's condolences to his survivors.[1] The proceeding is continued in the name of his administrator, Bryan Cooper, resident in the United Kingdom.[2]

[3] Trial was set down for four weeks from 1 March 2021, extended — after a two-day delay to accommodate Auckland's renewed Alert Level 3 lockdown for COVID-19's management in the community — to the whole of the month. Given Mr Kidd's terminal illness, his evidence earlier was taken from South Africa by an audio-visual link in sittings over four nights in the first half of December 2020. Due COVID-19 travel restrictions, evidence of overseas witnesses (including Mr van Heeren) also was taken by audio-visual links in night sittings during trial. For the benefit of overseas parties, the audio aspect of the link was maintained for the

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1 *Kidd v van Heeren* HC Auckland CIV-2014-404-0725, 19 February 2021 (Minute of Jagose J) at [2].

2 Administration Act 1969, ss 24–25; and *Kidd v van Heeren* HC Auckland CIV-2014-404-0725, 25 February 2021 (Minute of Jagose J) at [10]. Mr Cooper personally has been involved in related proceedings: see, for example, *van Heeren v Cooper* [1991] 1 NZLR 731 (CA); *Cooper v van Heeren* HC Auckland CIV-2004-404-2545, 26 October 2005; and *Cooper v van Heeren* [2007] NZCA 207, [2017] 3 NZLR 783. But that is immaterial for the purpose of administration.

entirety of trial. I am grateful to the Registry and the parties for accommodating those arrangements as the best alternative to in-person attendance at trial in the circumstances, despite their significant additional burdens in time, timing and effort.

[4] My judgment partly is 'interim', because — as invited by the expert witness accountants — there remain issues for their calculation on the basis of my findings here. These are calculations relating to the partnership's cash balance on dissolution,[3] and interest accruing on other values from earlier dates.[4] The judgment was sought as interim by Mr Kidd's senior counsel, Stephen Mills QC, to enable Mr Kidd's perceived entitlement to election under s 79(2) of the Partnership Law Act 2019, although that may be affected by my finding as to the applicable law.

[5] My judgment also is interim because my findings have consequences for bringing the accounting up to date. Unless earlier agreed between the parties, further evidence will be necessary to make that assessment.

Summary background

[6] After meeting at their common South African employer, Mr Kidd and Mr van Heeren went into business on their own account from 1975.[5] Their business predominantly was in international steel trading, initially conducted through various entities in South Africa and Zimbabwe (and subsequently also New Zealand, and a majority-owned company in the United Kingdom), collecting and holding the bulk of trading surpluses in entities offshore from South Africa. The partnership business extended beyond international steel trading to investment of its profits.

[7] By 1981, Mr van Heeren had relocated to New Zealand. Mr Kidd remained domiciled in South Africa, although his work took him all over the world. In the later 1980s, he relocated to the United Kingdom. Without excluding the other's involvement in their respective areas, Mr Kidd was the steel trader, and Mr van Heeren the financial manager, in the partnership's business.

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3 See [130] below.
4 See [205] below.
5 The business initially was conducted also with Jack Ford-Massing, whose involvement ceased from early 1976.

[8] Although I discuss particular aspects of the financial structures later in this judgment, for introductory purposes, the partnership conducted its international steel trading business principally from Galaxy Export/Import Company Pty Ltd, trading as Tisco International SA ("Tisco"), in South Africa and Ferromar Pvt Ltd ("Ferromar") in Zimbabwe (formerly (Southern) Rhodesia). The business was conducted against a background of United Nations economic sanctions on trade with both countries.[6]

[9] Trading surpluses were retained offshore in Netherlands Antilles' Genan Trading Company NV ("Genan") and New Zealand's Prime International Limited ("Prime NZ"), which distributed funds to bank accounts and investments, including as held by other corporate entities primarily in New Zealand and the United Kingdom. Funds also were made available to the partners, who met periodically to review the partnership's and their own respective financial positions.

[10] Genan employed a local company, NV Fides, to act as its professional directors. In the context of UN sanctions, Genan also was used to distance the business from its South African or Rhodesian principals. So too was the United Kingdom's Prime International Limited ("Prime UK") (and Prime NZ, the distinction between which was blurred), and Jocrow (Steel) Limited ("Jocrow"). Similarly, Ferromar operated for the benefit of the United Kingdom company, Briar Trading Limited. But Briar's business was conducted on behalf of Genan and Prime NZ, Tisco maintaining ledgers for Briar "in account with" each Genan and Prime NZ, meaning Briar reported no profit.

[11] In very general terms, Tisco, as the operational entity, fell within Mr Kidd's primary supervision; Genan, as the investment vehicle, within Mr van Heeren's. Those roles were not exclusive: for example, in South African proceedings, Mr Kidd was found to be "an integral and essential part of the Prime NZ operations".[7] The joint business ceased in the early 1990s, after the men settled disposition of South African

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6 Concerning the question of Southern Rhodesia, SC Res 253 (1968) (terminated pursuant to SC Res 460 (1979)); concerning the question of South Africa, SC Res 421 (1977) (terminated pursuant to SC Res 919 (1994)).

7 *Kidd v van Heeren* South Gauteng High Court 27973/1998, 21 May 2013 [South African judgment] at [48], noted by Fogarty J as among "findings of fact which resolved issues": *Kidd v van Heeren* [2015] NZHC 517 [Interim payment order] at [58].

(and Hong Kong) entities to Mr Kidd in terms of 18 January 1991 sale and indemnity agreements.

[12] In 1996, Mr Kidd issued the present proceeding in this Court, claiming against Mr van Heeren specific performance and a variety of breaches of obligation. Mr van Heeren resisted the claim on grounds including the men's full and final settlement in terms of the indemnity agreement. As determination of disputes arising under that agreement was subject to South African courts' jurisdiction, the New Zealand proceeding was stayed, pending South African determination of the agreement's interpretation, operation, rectification or validity.[8]

[13] In 2013, finding the indemnity agreement to have been obtained by Mr van Heeren's misrepresentation,[9] Satchwell J in the Gauteng Division of the High Court of South Africa held the indemnity agreement to be "void and of no force and effect".[10] In coming to that conclusion, the Judge found the men were carrying out their business in partnership,[11] which partnership had acquired worldwide assets materially in excess of those disposed by the sale agreement:[12]

> [T]he partnership … , through Genan and Prime NZ as also Tisco and Jocrow and the other entities, made acquisitions throughout the world. These include but are not limited to Prime NZ, Huka [Lodge], Dolphin Island, Cromwell/Wellesley shares which ultimately became a substantial stash of monies, Optech, gold bars and bearer certificates, cash on hand in bank accounts. The full extent of the funds retained and the assets acquired is unknown to me.

[14] On return to this Court in 2014, Mr Kidd amended his claim to seek an account in winding up the partnership.[13] He pleaded Mr van Heeren had control of all the partnership's assets, save those transferred to or retained by Mr Kidd "on partial account".[14] In April 2015, Fogarty J directed such account be taken, holding the parties

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8 *Kidd v van Heeren* [1998] 1 NZLR 324 (HC) [Stay decision] at 34.
9 South African judgment, above n 7, at [170]–[171].
10 At [173].
11 At [126].
12 At [132].
13 The pleading for trial is Mr Kidd's second amended statement of claim dated 27 May 2014.
14 The transferred or retained assets are pleaded as the South African companies other than Ocean Steel; the Drury Hills house; Bramlin Ltd; the Jocrow (Steel) Ltd shareholding; and an asset of Prime International Ltd, being "the benefit of a purchase of steel from Tous Aciers Speciaux of France, known as the Siamasse shipment" (also as the "TAS shipment").

were bound by the South African findings of the men's partnership,[15] and its acquisition of specified and other worldwide assets,[16] as issues estoppel.[17] By 'issue estoppel' is meant, for reasons of public policy in "the twin objectives of finality and protection of litigants from repeated suits",[18] the South African findings are determinative in this jurisdiction. Fogarty J declared, by reason of the South African judgment:[19]

> … the defendant is issue estopped from denying the partnership and the accumulated worldwide assets of the partnership, as found by the Judge, particularly in [126] and [132] of her judgment.

The declaration was upheld on appeal,[20] from which further leave to appeal was refused.[21]

[15] This judgment now begins to take the account ordered by Fogarty J. However, before turning to it, the background includes also the Judge's April 2015 direction Mr van Heeren make an interim payment into Court of USD 25 million, for Mr Kidd's proposal for its investment and use.[22] After Mr van Heeren's extensive opposition to and delay in making the interim payment,[23] the Court of Appeal appointed receivers to Huka Lodge's owner, Worldwide Leisure Ltd ("WWL", as bare trustee for Mr van Heeren),[24] for the lodge's sale to realise funds to make the interim payment.[25] On such sale, payment was made on 4 February 2021, the excess in purchase price going to WWL. In the meantime, Mr Kidd had borrowed some USD 4.314 million from LCM Operations Pty Ltd ("LCM"), on terms said to entitle it to recover some USD 17.256 million in priority on any distribution from the interim payment, plus interest on the borrowing at the rate of 30 per cent per annum (compounding annually) from 14 May 2021.

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15 Interim payment order, above n 7, at [117], referring to South African judgment, above n 7, at [126].
16 At [117], referring to South African judgment, above n 7, at [132].
17 At [117].
18 *van Heeren v Kidd* [2016] NZCA 401, [2017] 3 NZLR 141 [Court of Appeal judgment] at [178].
19 Interim payment order, above n 7, at [171].
20 Court of Appeal judgment, above n 18, at [180]–[183].
21 *van Heeren v Kidd* [2016] NZSC 163.
22 Interim payment order, above n 7, at [172(f) and (g)].
23 *Kidd v van Heeren* [2019] NZCA 275, (2019) 24 PRNZ 596 at [2].
24 At [66].
25 At [79] and [84].

[16] Shortly before trial, both Mr Kidd and Mr van Heeren claimed their respective impecuniosity such the pending trial was put at risk. Mr Kidd proposed to be paid out the interim payment, to settle LCM's claim and to use the balance. I declined to permit such payment, on grounds of "the risks of non-recovery from LCM, and the proximity of trial and its prompt determination". Instead, with LCM's consent, I directed expert disbursements be made from the interim payment sum; with WWL's directors' consents, I earlier had directed identified litigation expenses be paid by WWL. After trial's conclusion, I declined Mr Kidd's renewed claim to be paid out the interim payment in advance of the commencement of interest's accrual, while directing residual litigation expenses or costs be paid by WWL (to a cap proposed by WWL's directors). Nothing in those orders affects any party's ultimate liability for litigation expenses in determination of costs in this proceeding.[26]

Evidence for the accounting

[17] Ultimately for the account, but also relied upon in various aspects of interceding litigation here and elsewhere, the parties instructed expert forensic accountants: Shane Browning for Mr Kidd, and Alan Greyling and John Hagen for Mr van Heeren (the "accountants"). Their evidence before me drew on the vast detail of their previous testimony in this proceeding, but also of Mr Browning in the South African proceeding and of Mr Greyling in proceedings between the parties in Liechtenstein (in which reliance also may have been made on Mr Browning's evidence).[27]

[18] For the account, I directed the expert witnesses convene and conference — under supervision of independent expert, Barry Jordan — to prepare a joint witness statement identifying the areas of their agreement and disagreement, including their

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[26] *Kidd v van Heeren* [2020] NZHC 3126; *Kidd v van Heeren* [2020] NZHC 3198; *Kidd v van Heeren* CIV-2014-404-0725, 12 February 2021 (Minute of Jagose J); Minute of 19 February, above n 1; Minute of 25 February, above n 2; *Kidd v van Heeren* CIV-2014-404-0725, 1 March 2021 (Minute of Jagose J); *Kidd v van Heeren* CIV-2014-404-0725, 19 March 2021 (Minute of Jagose J); *Kidd v van Heeren* CIV-2014-404-0725, 12 May 2021 (Minute of Jagose J); and *Kidd v van Heeren* CIV-2014-404-0725, 19 May 2021 (Minute of Jagose J). My May 2021 decisions were upheld by the Court of Appeal: *Kidd v van Heeren* [2021] NZCA 244 [Interim payment release decision].

[27] Mr Browning's witness statements for trial followed his ten affidavits filed in this proceeding; Mr Greyling's witness statements respectively followed his nine such affidavits. Both accountants' evidence developed as new information came to light, or different views were taken. For those reasons, together with their obligations to this Court as expert witnesses, I do not place any weight on their abandonment (or maintenance) of earlier positions they held.

reasons for the latter.[28] I am grateful for Mr Jordan's assistance, which was provided over six video conference sessions in January and February this year, and resulted in the 120-page joint experts' report dated 22 February 2021.[29]

[19] In very broad terms, the accountants agreed they were to identify and value the partnership's net assets at 18 January 1991 and add back the partners' drawings, for equal division between them, then to deduct the value of partnership assets held by each partner to arrive at a net amount due to one or other. The resulting statement calculated Mr Kidd's contended entitlements as at 18 January 1991, and their contended present value at 22 February 2021. Mr Browning calculated Mr Kidd was entitled to USD 22.768 million as at 18 January 1991, with a present value of USD 71.123 million; Mr Greyling and Mr Hagen comparably calculated Mr Kidd was entitled to USD 4.640 million as at 18 January 1991, with a present value of USD 10.418 million.

[20] The gap between the accountants partly is explicable by their (instructed) polar positions on the evidence available to them: Mr Browning assumes every asset directly or indirectly now or ever owned by Mr van Heeren is a partnership asset unless established to the contrary; Mr Greyling and Mr Hagen assume no asset is a partnership asset unless affirmatively established (including by law, through the assets and partnership issues estoppel).

[21] In addition to dispute as to identity of the offshore entities recipient of trading surplus,[30] there is dispute if the partnership assets included particular residential properties,[31] bank accounts,[32] or quantities of gold claimed personal to Mr van Heeren. The accountants' calculations also were complicated by the incomplete nature of the financial records available to them, which I address more fully at [70] below. Partly explained by the lapse of time since the partnership's commencement in 1975, and

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28 Mr Jordan also was appointed court expert, to answer any questions not agreed by the expert witnesses as may be put for his expert opinion: *Kidd v van Heeren* CIV-2014-404-0725, 4 December 2020 (Minute of Jagose J) at [1]–[2]. In the event, by reason of both the scope of expert witnesses' dispute and the close proximity of trial, no such questions were proposed for his answer.

29 Joint Experts' Report dated 22 February 2021.

30 See [69] below.

31 See n 117 below.

32 See n 118 below.

cessation of joint business in 1991, there is no complete or even comprehensive set of accounting or banking records for the partners, partnership, or entities. Instead, facts and inferences are sought to be drawn primarily from (incomplete sets of) periodic reporting sheets, listing that day's balances at various bank accounts held by Genan, Prime NZ, and Briar, often with explanatory annotation of particular contributions to those individual balances.

[22] The calculations were subject to the accountants' different instructions from the parties' respective counsel. Mr Browning calculated Mr Kidd's half-share entitlement to profits derived from the 18 January 1991 assets. Mr Greyling and Mr Hagen calculated Mr Kidd was entitled only to profits derived from his proportionate entitlement to the net balance of the 18 January 1991 assets. The difference is founded in the parties' distinct approaches to the account, as either of a debt in the value of Mr Kidd's share of the partnership's assets at 18 January 1991 (as Mr van Heeren contends), or of his on-going proprietary interest in those assets until the partnership's final accounting (as is Mr Kidd's contention).

[23] Mr Greyling and Mr Hagen also calculated Mr Kidd's alternative entitlement — based on their instructions the partnership's assets at 18 January 1991 exclude those transferred by Mr Kidd's contended February 1990 sale of his shares in Genan to Mr van Heeren — as USD 1.276 million at 18 January 1991, with a present value of USD 2.820 million. (Mr Kidd responds Mr van Heeren is estopped from denying the inefficacy of the Genan shares sale, which I address at [51] below).

[24] In those circumstances, I cannot (and do not) run each party's every contention to ground. As the accountants commend,[33] particularly given the incomplete financial record, a broad-brush approach often has been necessary to surmount the lack of definitive information.

Affirmative defences

[25] Mr van Heeren's amended defence for trial raises affirmative defences the proper law of the partnership was the law of South Africa; the partnership was

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[33] See [70]–[71] below.

dissolved pursuant to an oral dissolution agreement between the men in 1990/1991; and Mr Kidd has no proprietary claim to partnership assets retained by Mr van Heeren thereafter, but only a debt claim in a sum to be determined by the taking of the mutual account between the men as at 18 January 1991.[34]

[26] Mr Kidd applied to strike out the amended defence either in its entirety on the ground no preliminary issue remained to be tried; or of particular paragraphs predominantly on grounds those paragraphs' allegations either already had been determined in South Africa,[35] or as capable of there being determined now were abusive.[36] On similar grounds, Mr Kidd gave notice of admissibility disputes raised by Mr van Heeren's proposed evidence.[37] I had no opportunity before trial to address these issues and, particularly as my pre-trial determination of them contestably may have excluded evidence for the impending trial, I determined I would address those matters at trial.[38]

—preliminary issues

[27] Part 16 of the High Court Rules 2016 governs this Court's taking of an account. For present purposes, the following rules have materiality:

> **16.2 Orders for accounts and inquiries**
>
> The court may, on the application of any party, before, at, or after the trial of a proceeding, order an account or an inquiry, whether or not it has been claimed in that party's pleading.
>
> **16.3 Directions**
>
> (1) At the time of ordering an account or an inquiry, or at another time, the court may —
>
> (a) give directions or further directions about the account or inquiry:
>
> (b) order additional accounts or inquiries:

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34 The pleading is Mr van Heeren's second amended statement of defence dated 29 July 2020.

35 In reliance on the res judicata ("the matter has been decided") doctrine, and more particularly its emanation as issues estoppel: KR Handley *Spencer Bower and Handley: Res Judicata* (5th ed, LexisNexis, United Kingdom, 2019) at [1.01] and [1.05].

36 It is an abuse to raise in subsequent proceedings between the parties matters capable of being determined in prior proceedings between them: *Henderson v Henderson* (1843) 3 Hare 100 (Ch).

37 High Court Rules 2016, r 9.5(2) and (6).

38 Minute of 12 February 2021, above n 26, at [13]; and Minute of 1 March 2021, above n 26, at [5]. I also understood it was argued for Mr van Heeren Mr Kidd's 11 August 2020 application required leave, as coming after the 1 March 2021 trial date was allocated on 5 August 2020. But leave only is required after the close of pleadings date, which is the later of either trial allocation or 60 working days before trial: High Court Rules 2016, r 7.6(4A).

(c) direct that the relevant books of account are prima facie evidence of the truth of the matters contained in them.

(2) An order or direction under subclause (1) overrides rules 16.6 to 16.21.

16.4 Summary order for accounts

(1) If a party's pleading claims an account or makes a claim that involves taking an account, the court may, on application by that party at any stage of the proceeding, order —

(a) an account; and

(b) that any amount certified on the account as due to any party be paid to that party.

(2) The court must not make an order under subclause (1) —

(a) if there is some preliminary question to be determined; or

(b) against a defendant who has not filed a statement of defence or an appearance, until the time for filing a statement of defence has expired.

16.5 Mutual accounts

(1) The court may order that each party account to the other if it considers that each is accountable to the other because of —

(a) the relationship between the parties; or

(b) their course of dealing; or

(c) any other reason.

(2) At the time of making an order under subclause (1), or at any time afterwards, the court may direct —

(a) that the result of the account be certified as the net balance found to be due to 1 party; or

(b) that the certificate show the amounts found to be due to each party.

(3) An order under this rule overrides rules 16.6 to 16.21.

(Rule 16.5(3) overrides pt 16's subsequent mechanisms for taking an account.)

[28] Fogarty J's substantive 14 April 2015 orders were:[39]

(a) An account is to be taken between the plaintiff and the defendant to determine the amount due to the plaintiff arising out of the plaintiff's claim as a partner as against the defendant.

(b) That any amount certified by the High Court on the basis of that account be paid.

[29] Mr Kidd submits Fogarty J's 14 April 2015 judgment was made under r 16.4(1), inferring by reference to r 16.4(2)(a)'s prohibition no preliminary question

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39 Interim payment order, above n 7, at [172].

remained to be determined. He draws support for that from the Court of Appeal's subsequent rejection of Mr van Heeren's argument preliminary issues remained before an account, as Fogarty J had ordered be taken, could proceed. The contended preliminary issues then included "the proper law of the partnership, the terms of the partnership and the impact of the mutual accounting process".[40]

[30] In rejecting Mr van Heeren's argument, the Court of Appeal held "[t]he terms of this judgment are such that we see no basis for disturbing Fogarty J's orders."[41] Those terms were to endorse Fogarty J's finding of the assets and partnership issues estoppel arising from the South African judgment. Argument as to the proper law of the partnership then only had materiality if "appropriately levelled at the finding".[42] But the Court of Appeal did not expressly exclude preliminary issues from subsequent argument.

[31] Rule 16.4(2)'s prohibition is as to the making of a "summary order for accounts". Such summary order must not be made if there is some preliminary issue to be determined, or a timely defence or appearance has yet to be filed. At the time of Fogarty J's 14 April 2015 judgment, Mr van Heeren's defence broadly denied all allegations (save the existence of the pleaded entities), including that of the parties' partnership, which Mr van Heeren affirmatively pleaded fully and finally was settled by the January 1991 sale and indemnity agreements, and raised an affirmative defence of prospective time limitation but no other.[43]

[32] In context, however, by "preliminary issue", r 16.4(2)(a) refers to any issue with potential to undermine the summary order for accounts itself: that is to say, any issue affording a basis on which to resist the order, but not necessarily the accounts' content. Indeed, on other than an order for mutual accounts, the account's content — there being the accounting party's verified specification of receipts — expressly is open to dispute on grounds of omission or error (but otherwise is deemed correct).[44]

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40 Court of Appeal judgment, above n 18, at [180].
41 At [181].
42 At [182].
43 The pleading was Mr van Heeren's statement of defence dated 5 June 2014. The limitation defence was maintained in the amended defence for trial, but no argument was addressed to it. I therefore disregard it.
44 High Court Rules, rr 16.11–16.13.

[33] Rule 16.4 is not an alternative to r 16.5, for the taking of mutual accounts on grounds "each party … is accountable to the other" because of any of the specified reasons. Each rr 16.4 and 16.5 make separate provision for orders to be made under their respective "subclause (1)". Rule 16.5 contains no prohibition comparable to that in r 16.4(2). But that is because the Court's jurisdiction to order a mutual account is founded on its consideration the parties are accountable to each other. Such may well be ordered on a summary basis under r 16.4, as much as may an individual account under r 16.2.[45] An order under either rr 16.2 or 16.5 is not prohibited by reason of any preliminary issue remaining for determination. Rather, such preliminary issue would be determined in the course of the application's determination. Rule 16.4's disqualifying preliminary issues are as to summary entitlement to account, and not its content.

[34] Fogarty J's 14 April 2015 orders — made summarily, as the Judge stipulated[46] — plainly were grounded in the parties' undeniable partnership, and their necessary joint or separate receipt of partnership assets, and thus were for (staged, as Fogarty J ordered) mutual account. The Judge referred to Mr van Heeren as "the principal accounting party",[47] Mr Kidd only being relieved of further work "in the meantime",[48] for subsequent "completion of the account".[49] The Judge's order the account was "to determine the amount due to the plaintiff arising out of the plaintiff's claim as a partner as against the defendant" is explicable by his 'confidence' "the remedy of account will result in a substantial judgment in favour of Mr Kidd".[50] It was not to deny the taking of mutual account, even summarily. His confidence is made out by the expert witnesses' ultimate positions.

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45 McGechan's commentary proposes r 16.5 "does not confer any separate jurisdiction in itself", but rather the Court's account jurisdiction is under either rr 16.2 or 16.4: Robert Osborne (ed) *McGechan on Procedure* (online ed, Thomson Reuters) at [HR16.5.01]. In my view, the jurisdiction springs from either r 16.2 or 16.5, either of which may be exercised summarily under r 16.4. Notably, r 16.5(3) specifies the balance of pt 16 does not apply to mutual accounts. The jurisdiction to order mutual account under r 16.5 is distinct from that to order one party to account to another under r 16.2.

46 Interim payment order, above n 7, at [120].

47 At [172(c)].

48 At [172(e)].

49 At [172(h)].

50 At [172(a)] and [148].

[35] Whether Fogarty J's 14 April 2015 order for account was made under rr 16.4 and/or 16.5, Mr van Heeren is not prevented from raising issues going to the content of (but not to entitlement to) that account. The Judge allowed, for example, "maybe arguments endeavouring to displace the statutory presumption of equality of ownership, quantum and remedies to obtain payments";[51] "possibly a challenge to a 50/50 share",[52] by rebuttal of its presumption.[53] Such are not 'preliminary' to determination of entitlement to account, but 'preliminary' to determination of its content. Mr van Heeren's amended defence does not dispute Mr Kidd's entitlement to an accounting. I therefore decline to strike out the whole of Mr van Heeren's amended defence.

—proper law of the partnership

[36] Mr van Heeren's amended defence admits the parties' partnership and pleads "the proper law of the partnership was the law of South Africa". As said,[54] the pertinence of that contention is said to resound in: dissolution of the partnership on or about 18 January 1991 in accordance with the contended oral dissolution agreement; conversion of any proprietary interest Mr Kidd may have had in partnership assets at the date of dissolution to a debt claim as at that date; and "application of the South African law principle of in duplum", limiting any interest payable on the debt to an amount equivalent to its sum. Mr Mills argued the question of the proper law applying to the taking of the partnership account "is the subject of res judicata or issue estoppel or *Henderson v Henderson* abuse".[55]

[37] None of the prior judgments is explicit as to the proper law of the partnership. Smellie J's 1996 judgment notes the proper law of the partnership prospectively to be an issue.[56] The South African judgment was to determine "the meaning, scope and validity" of the indemnity agreement,[57] which was to be "determined according to South African law in the Republic of South Africa".[58] Satchwell J observed whether

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51 At [132].
52 At [148].
53 At [106].
54 See [25] above.
55 See nn 35 and 36 above.
56 Stay decision, above n 8, at 31.
57 South African judgment, above n 7, at [1].
58 At [3].

or not there was a partnership between the men "was not a highlight in the pleadings".[59] But her Honour concluded "[i]t is difficult to comprehend the joint enterprise … constituting anything other than a partnership", a view that was "fortified" by "the creation, movement and inter exchange of steel trading and funds". The consequential "acquisition of the worldwide assets … confirms the finding of a partnership".[60] Inferentially, the Judge applied South African law in so finding.

[38] In summarily ordering the taking of an account between the men, before Mr van Heeren pleaded the proper law of the partnership, Fogarty J applied New Zealand law. His Honour expressly relied on s 27 of the Partnership Act 1908, as to rules applying to the interests and duties of partners, to conclude Mr van Heeren bore the onus of rebutting the statutory presumption of equal sharing.[61] But that was in the context of Mr Kidd "seek[ing] to carry to New Zealand" the issues estoppel of the parties' partnership and its acquisition of worldwide assets established by the South African judgment.[62] Hence the Judge held "the disputes determined by the [South African judgment] should be final and conclusive in New Zealand": first, by reliance on the issues estoppel, to avoid the two courts "making contradictory findings"; and second, as res judicata, to protect Mr Kidd from "having to make the same case with the same voluminous evidence" in New Zealand.[63] As a matter of common law, the issues estoppel "resolv[ed] the dispute as to partnership, and to the accumulation of assets, which stood in the way of any duty to account."[64]

[39] Enforcement in New Zealand of a partnership duty to account knows no jurisdictional constraint. Rather, by resort to this Court's procedure for mutual account, it falls to me to determine the applicable law. In principle, matters of procedure are governed by the domestic law of the country to which the court in which the proceeding is taken belongs (the lex fori);[65] matters of substance, by the law to which

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59 At [119].
60 At [126].
61 Interim payment order, above n 7, at [105]–[106]. The 1908 Act now has been replaced by the Partnership Law Act 2019, a revision Act "not intended to change the effect of the law": s 4, referring to Legislation Act 2012, s 35.
62 At [104].
63 At [116].
64 At [132], citing [117] of the judgment.
65 Lord Collins (ed) *Dicey, Morris & Collins: The Conflict of Laws* (15th ed, Sweet & Maxwell, 2012) at [7R–001].

the court is directed by its choice of law rule (the lex causae).[66] Subject to partners' agreement for determination of disputes in and according to the law of any particular jurisdiction, it is open to this Court to order a partnership account in terms of the proper law of the partnership, wherever that may be. In summarily ordering such account, Fogarty J cannot be considered to have determined the proper law of the partnership, whether or not New Zealand.

[40] Certainly the Judge referred to New Zealand law in holding Mr van Heeren's duty to account was "a continuing obligation as a partner in a winding up of the partnership",[67] and in referring to the "presumption of 50/50 sharing",[68] at least if "statutory".[69] The Judge did not limit rebuttal of that presumption to "any agreement (express or implied) between the parties",[70] as otherwise inferentially may have rejected any alternative proper law (if imposing a different consideration). Rather the point is as taken by the Court of Appeal, that "[its] attention was also not drawn to any difference in partnership law applicable in the two jurisdictions of significance for present purposes",[71] even while it endorsed Fogarty J's finding "it is unlikely that Mr van Heeren will be able to displace the presumption that the partnership anticipated equal sharing in the profits".[72] That 'present purpose' was determination of the scope of the issues estoppel established by the South African judgment for taking of the partnership account in New Zealand. To the extent argument as to the proper law of the partnership had relevance to — was "more appropriately levelled at" — that determination,[73] the Court of Appeal saw "no basis for disturbing Fogarty J's orders".[74]

[41] Thus, subject to the issues estoppel and res judicata, Mr van Heeren is entitled to plead the proper law of the partnership to be South African law. I therefore also decline to strike out that pleading. Instead, to turn to it, the proper law of the partnership may depend if Mr Kidd's claim is to be characterised as contractual (as

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66 At [7–003].
67 Interim payment order, above n 7, at [147], referring at n 62 to s 41 of the Partnership Act 1908.
68 At [155].
69 At [161].
70 At [105], in referring to s 27(a) of the Partnership Act 1908.
71 Court of Appeal judgment, above n 18, at [172].
72 At [182].
73 At [182].
74 At [181].

debt, as Mr van Heeren asserts), or proprietary (as Fogarty J and the Court of Appeal considered).[75]

[42] On the former (contractual) foundation, the proper law is of the place with the "closest and most real connection" to the contract.[76] On the latter (proprietary) foundation, if a partner's interest in the partnership's assets is in its net surplus after realisation of the partnership's assets and payment of its debts and liabilities, the proper law is that of the firm's principal place of business.[77] Otherwise, if the partner's interest directly is in any or all of the firm's assets, the proper law is that of the asset's location.[78]

[43] Irrespective of the foundation for the accounting, as debt or net surplus, the proper law of the partnership here plainly is South African law. The parties were resident in South Africa; commenced their international steel trading partnership in South Africa; and operated it from South Africa (including the hub of its financial reporting). The partnership business' engine-room was in South Africa. The partnership's distribution of net surplus, including for investment, beyond that jurisdiction does not change its principal place of business as being in South Africa. Mr Kidd claims no personal interest in any partnership asset.

[44] Mr van Heeren called expert evidence on the South African law of partnership from Elizabeth Snyman-Van Deventer, a professor of mercantile law in the Faculty of Law at the University of the Free State in South Africa's Bloemfontein and an advocate of the High Court of South Africa. She is "responsible" for the most recent updates of "the standard works on the South African law of partnership … most often quoted by the South African courts", being "statement[s] of the law only and not a typical textbook or academic discussion or criticism of the law".[79]

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75 Interim payment order, above n 7, at [160]; and Court of Appeal judgment, above n 18, at [145]–[146].

76 *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [30]; rev'd on different grounds: [2017] NZSC 139, [2018] 1 NZLR 245), referring to *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 (HL) at 61–63.

77 Roderick I'Anson Banks *Lindley & Banks on Partnership* (20th ed, Sweet & Maxwell, London, 2017) at [36-55] and n 268, citing *Laidley v Lord Advocate* (1890) 15 App Cas 468 (HL); *Beaver v Master in Equity of Victoria* [1895] AC 251 (PC); and *Commissioner of Stamp Duties v Salting* [1907] AC 449 (PC).

78 At [36-55].

79 Brief of Evidence of Elizabeth Snyman-Van Deventer dated 2 February 2021 at [8].

[45] Ms Snyman-Van Deventer's written brief of evidence 'endeavoured':[80]

> … to give a comprehensive exposition of the South African law of partnership and, so far as might be relevant, my expert opinion on the application of that law to the particular facts of this case.
>
> I have been asked to address especially the following South African law issues: the essential elements of partnership; contributions; the ways a partnership may be dissolved; general consequences of dissolution; the action to enforce a dissolution agreement; and the remedies available for breach of the dissolution agreement.

She advised, in South African law, "a partnership is the carrying on of a business (to which each of the partners contributes) in common for the joint benefit of the parties with a view to making a profit",[81] the parties' legitimate or legal agreement for which conclusively is established if such is their intention.[82] Absence of any of such "*essentialia*" prevents finding of a partnership, or is determinative of its dissolution.[83]

[46] Mr Mills' careful cross-examination of Ms Snyman-Van Deventer also obtained the following summary points:

> Q. … The first [question] is that if a dissolution of a partnership is dependent on a condition, then the rights and duties of the partners remain unchanged until that conditions is fulfilled. Is that correct?
>
> A. Yes.
>
> Q. My second one was, if a partner wrongfully retains possession of partnership assets, following a dissolution, the partners continue to be treated as co-owners under South African law until the issues are finally resolved.
>
> A. Yes, co-owners, not partners, yes.
>
> Q. Next, there's an obligation of perfect fairness and good faith between the partners which remains until the final settlement of accounts. Is that correct?
>
> A. Yes, or final dissolution or termination, yes.
>
> …
>
> Q. … My next question for you is: am I right that if a partner continues trading with partnership assets that he has, or she, has unlawfully retained, then that

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80 At [3]–[4]. Because of its criticality in comprehending this judgment, I annex the text of Ms Snyman-Van Deventer's brief at Schedule 1, omitting her application of that law to this case.

81 At [23]–[24], citing *Joubert v Tarry and Co* 1915 TPD 277 at 280–281 and *Pezzutto v Dreyer* 1992 3 SA 379 (A) at 390B.

82 At [24]–[28].

83 At [29].

partner who has unlawfully retained must account for the profits to the other partner, the former partner?

A. Yes, if [un]lawfully retained, yes.

…

Q. My next — I've got two more for you, the next one is: if the contributions the respective partners have made are incapable of being separated out, then they'll be treated as having equal shares. Is that the South African position?

A. Yes.

Q. So even though you don't start from a presumption of 50/50, if you can't separate it out then you end up 50/50, do you?

A. Yes, we start with, hopefully there will be agreement between the partners in the way in which they will divide. If not, the basic rule will be, it will be in accordance with the contribution. If you cannot determine that, only then will we look at the equal share.

Q. Yes. And finally, and I think, I think this'll be the same as New Zealand law if I've got this correctly, there's no debtor-creditor relationship with partnerships until there's been a final settlement of the accounts, is that right?

A. I do not understand the question.

Q. Well, I thought that what you were telling the Court in your brief of evidence is that describing the relationship between, let's say, two partners after they've ended their partnership, it doesn't become as between them a debtor-creditor relationship until all of the final accounting has been done, and the Court has said A owes X amount to B, and it's only at that point that you have a debtor-creditor relationship. Is that right?

A. No sir, it can actually be earlier when you use either the [inaudible] to go to court to ask the Court for a division.

Q. But it's – we may be a little bit at cross purposes, it's only at the point where the Court has ordered the division that there is then a debtor-creditor relation to the partnership amounts.

A. It's not only the Court, it's also from the moment where the partners make an agreement, and for specific division, and they agreed to divide things in according to a specific, a specific, in a specific way.

Q. Yes okay, so it's the point at which by some means or other, by agreement or by the Court intervening and ordering it, that you have a determination as to who owes who what. Would that be right?

A. Yes.

I refer to Ms Snyman-Van Deventer's evidence in its relevant context of this judgment.

—partnership dissolution

[47] Fogarty J's 14 April 2015 judgment is open to being read as meaning the men's partnership subsisted until finally it was wound up by distribution of its net assets,[84] as previously I had done.[85] At New Zealand law, a partnership stands to be dissolved — whether expressly by notice, or impliedly from conduct — with the partners thereafter liable to each other for its winding up.[86] South African law does not appear to allow for unilateral dissolution, except to the extent such implies the partners' agreement to mutual end.[87] The materiality of dissolution is in commencement of the former partners' subsequent liability: under South African law, for each other's respective share of his preceding "undivided share in the [firm's] capital along with other partnership property".[88]

[48] Mr van Heeren claims Mr Kidd's February 1990 discussions with him — in which they agreed to divide the partnership's assets between them, any imbalance in value to be addressed by offsetting payment in a subsequent accounting — constituted agreement to dissolve the partnership. The division is said to have been accomplished by Mr Kidd's 21 February 1990 transfer of shares in Genan to Mr van Heeren, and Mr van Heeren's 18 January 1991 transfer of shares in the South African entities (and the Hong Kong Bramlin Ltd) to Mr Kidd, which by default left Mr van Heeren with the balance of the partnership assets (in which Mr Kidd had no legal, as distinct from beneficial, interest).

[49] The particular prize in that contention is exclusion of the value of those entities and their subsequent transactions from calculation for division.[89] In that respect, the assertion is similar to, if perhaps less ambitious in scale than, those Mr van Heeren previously essayed in attempted diminution of the partnership's assets. In relation to Genan, those staunchly were rebuffed by Fogarty J,[90] as inconsistent with

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84 Interim payment order, above n 7, at [123] and [160].

85 *Kidd v van Heeren* [2017] NZHC 3199 [Receivers decision] at [86].

86 See, for example, ss 66 and 76 of the Partnership Law Act 2019.

87 Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79, at [73] and [75]. See also [109]: "Neither can a partner appropriate the sole right to liquidate the partnership", citing *Kaplan v Turner* 1941 SWA 29.

88 At [85], citing Ben Beinart "Capital in Partnership" [1961] Acta Juridica 118 at 122.

89 The contended impact of Genan's exclusion already has been identified. See [23] above.

90 *Kidd v van Heeren* [2015] NZHC 2082 at [57]–[64]; and *Kidd v van Heeren (No 7)* [2015] NZHC 2475 at [20]–[24].

Satchwell J's findings (which included finding the Genan share sale "[had] not been proven")[91] — a rebuff upheld by the Court of Appeal.[92] Critically, Genan was the "conduit" by which the partnership's trading surpluses were transferred to its other entities and investments.[93]

[50] On its face, the Genan share sale agreement was for Mr van Heeren's payment to Mr Kidd of USD 3 million "in full and final payment for all [Mr Kidd's] shares in Genan". The agreement describes the men as "partners in the company of Genan Trading Company N.V.", and records, in consideration for Mr van Heeren's payment, "[a]ll the joint partnership assets and shares of Genan from the date of this Agreement shall be the sole property of [Mr van Heeren]". The ultimate position taken by Mr van Heeren calculates transfer of Genan's USD 6.727 million in cash reserves to him, for which Mr Kidd was paid USD 3 million for his share.

[51] There is room for some discomfort about Mr Kidd's assertion the Genan share sale agreement was a "fraud", obtained by misapplication of his signature provided on blank paper for administrative purposes. It convincingly is gainsaid by Gabrielle McLachlan, who witnessed both men's signatures, and by John Walker's unchallenged handwriting expert evidence as to application of Mr Kidd's signature directly to the documented agreement, and his opinion such application was by Mr Kidd. That was not in evidence before Satchwell J. But the efficacy of the Genan share sale agreement directly was in issue in South Africa — including on broader grounds,[94] and in which Mr van Heeren called and gave no evidence — where Satchwell J found "*current* worldwide partnership assets" obtained through Genan's conduit, after its purported sale to Mr van Heeren.[95]

[52] Whether unarguable as res judicata, a *Henderson v Henderson* abuse, or inconsistent with the issues estoppel, Mr van Heeren cannot now be heard to argue the Genan share sale agreement was effective to transfer partnership assets to him in 1990.

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91 South African judgment, above n 7, at [75] and [132].
92 Court of Appeal judgment, above n 18, at [164]–[165].
93 South African judgment, above n 7, at [51–[72]; Interim payment order, above n 7, at [94]; and Court of Appeal judgment, above n 18, at [164].
94 South African judgment, above n 7, at [76].
95 Interim payment order, above n 7, at [93]–[94] (emphasis added), referring to South African judgment, above n 7, at [132].

As previously I noted,[96] Fogarty J did not accept the submission: Satchwell J had found Genan to be a conduit for the partnership's acquisitions,[97] meaning that was "part of the issue estoppel".[98] The permissible "consequences" of the Genan share sale agreement for argument on the account do not extend to its effective transfer of partnership assets to Mr van Heeren.[99]

[53] The remaining evidence for Mr van Heeren's contended "oral dissolution agreement" is indeterminate. The Genan share sale agreement preceded Mr Kidd's exploration from September 1990 of the termination of his relationship with Mr van Heeren. I am not satisfied it was a building block for the partnership's agreed dissolution. 'Agreement' requires some degree of certainty. Despite Mr van Heeren's subsequent denial of any partnership, the men may have been working through issues necessary to give that certainty. But they were forever bedevilled by Mr van Heeren's perception of personal ownership of particular assets, inconsistently with what would become the assets issue estoppel.

[54] In addition to Genan itself, Mr van Heeren perceived he personally owned Fenton Ltd (which acquired Fiji's Yanuca (or Dolphin) Island in May 1986), an 80 per cent shareholding in Optech International Ltd, the proceeds of Cromwell Corporation Ltd and Wellesley Resource Ltd shares, and Worldwide Leisure Ltd (which acquired Huka Lodge in December 1984). As a very substantial portion of the partnership's assets, any 'agreement' to dissolve the partnership without reference to them was inchoate.

[55] I find no oral agreement of sufficient certainty between the men to constitute their express agreement to dissolve their partnership. Specifically, Mr Kidd's evidence in South Africa, and reiteration and acceptance under cross-examination before me, of the men's meeting in the Marriott Hotel in Amsterdam on 25 September 1990 — and, in particular, of his acceptance they agreed "Alex would assume ownership in the remainder of the partnership assets but would account to [him] for the balance of his

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96 Receivers decision, above n 85, at [25].
97 South African judgment, above n 7, at [132].
98 *Kidd v van Heeren (No 7)*, above n 90, at [23].
99 Interim payment order, above n 7, at [95].

half-share" — was so at odds as to what those partnership assets constituted as not to found the contended oral agreement.

[56] As a matter of pleading, it is claimed and admitted the partnership's business and investment activities ceased "on or about 18 January 1991". Mr Mills argued initially dissolution did not occur until the partnership was wound up, and subsequently no later than 1994 when Mr van Heeren first relied on the indemnity agreement as fully and finally settling the partners' claims against each other. But cessation of the partnership's business and investment activities is effective to dissolve the partnership according to South African law, as by the partners' agreement to be implied from the actual cessation of their joint business.[100]

[57] I sought the parties' submissions if unlawful purpose or conduct of the partnership business was effective to achieve its automatic dissolution at law from the earlier point in time of the unlawfulness. Ms Snyman-Van Deventer confirmed that was the position in South African law, as would a partnership's purpose or conduct contrary to public policy (albeit such was "a grey area" during South Africa's apartheid era). Both Mr Kidd and Mr van Heeren separately were explicit the partnership business at least had been conducted "illegally" from soon after its outset, in breach of both UN sanctions and South African foreign exchange and tax laws. At least from Mr Kidd, that evidence was express before Satchwell J,[101] who may be expected to have been alive to its consequences for her finding of the partnership. Obviously, the partnership's automatic dissolution at some earlier date would materially affect the issues estoppel: for example, the Judge found as late as 17 January 1991 Mr Kidd "remain[ed] a partner in a worldwide partnership".[102]

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100 Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79, at [73] and [77].

101 Mr Kidd's evidence there included:

> Galaxy/Tisco became a highly profitable international steel trading company breaking Rhodesian and South African trading sanctions by exporting the steel products of these countries worldwide.
>
> Galaxy/Tisco subsequently generated large sums of foreign currency in U.S. Dollars off shore of South Africa from such transactions in contravention of South African foreign exchange and tax laws and also U.N. sanctions.

102 South African judgment, above n 7, at [137].

[58] I am entitled (or even required) to explore the prospective illegality.[103] The Court of Appeal contemplated I "may consider it an abuse of process; a collateral attack on the liability judgment".[104] I do not. Counsel did not raise the issue; I did. The issues estoppel does not apply to me.[105] But the sanctions' contravention, at worst, only fell into South African public policy's grey area. There is no evidence of domestic South African law beyond that essayed by Ms Snyman-Van Deventer as to partnership law. While I must be astute the Court is not used effectively to endorse or enforce unlawful arrangements or those contrary to public policy,[106] I lack a foundation on which to conclude in South African law the partnership may earlier have dissolved by reason of any unlawfulness in its purpose or conduct. For the same reason, neither have I a sufficient basis on which to deny the parties their accounting on dissolution.

[59] I therefore conclude, in terms of South African law, the parties' agreement to dissolve their partnership arises by implication from the cessation of their partnership business and investment activities on or about 18 January 1991.

—nature of Mr Kidd's claim

[60] As said — on dissolution, under South African law — the former partners take their respective shares in the firm's formerly undivided capital and other property:[107]

> In the absence of a contrary agreement, a partner's capital is to be repaid to him or her upon dissolution of the firm: each partner receives what he or she has risked in the business should there be a surplus of assets.
>
> … Absent agreement on equal sharing, South African law is clear that on dissolution each partner is entitled to a share of the surplus according to the proportion of his contribution to the total pool of contributions. It is only when it is impossible to determine that one contributed more than the other that the partners will share equally or when there was an agreement to that effect.

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103 Banks, above n 77, at [8-70].

104 Interim payment release decision, above n 26, at [25].

105 *Thoday v Thoday* [1964] P 181 (CA) at 197 as cited in Handley, above n 35, at [1.13]; and *Thompson v Thompson* [1957] P 19 (CA) at 29 as cited in Handley, above n 35, at [15.06].

106 *Horsfall v Potter* [2017] NZSC 196, [2018] 1 NZLR 638 at [54], commenting on *Patel v Mirza* [2016] UKSC 42, [2017] AC 467. See also *Zheng v Deng* [2020] NZCA 614 at [42(c)].

107 Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79, at [85]–[87] (footnotes omitted).

[61] After dissolution, the former partners' relationship is that of co-owners of the partnership assets until they are realised and distributed for division between them:[108] "[t]he general rule is that partners are not considered as debtors and creditors *inter se* until there has been a final or prior binding settlement of accounts".[109] Such settlement is the co-owners' right:[110]

> … to have the partnership property applied in payment of the partnership debts, and to have the surplus assets, if any, applied in payment of what may be due to him after deducting what may be due by him to the firm.

[62] Hence, on this accounting, Mr Kidd's claim is made as co-owner with Mr van Heeren of the partnership assets. As co-owners, "their relationship is merely that of co-owners of joint property or of a joint estate".[111] In terms of the partnership assets, each is liable to account to the other for "that portion of the profits which is fairly attributable to the use of the capital contributed by [him]".[112] Until the assets are realised and distributed for division, their continued use of the assets is done "as trustees" for the co-owners, on which (absent alternative agreement, of which there is none here, either express or tacit) they remain liable to account to the other.[113] The sale agreement is to be construed in that context, rather than as received on partial account.

[63] Where contributions are difficult to evaluate or to put in monetary terms, Ms Snyman-Van Deventer responded to my query South African law "would go to the idea of equal shares". Although Mr van Heeren claims remuneration for his exclusive effort in profitably using the assets before and after dissolution,[114] the men's contributions to the partnership in general are indistinct as to the value to be attributed to each. Overall, I presume their partnership is of equal shares, Mr Kidd's generation of trading profits as significant a contribution as Mr van Heeren's investment of them.

[64] In terms of Mr van Heeren's affirmative defences, I therefore hold the proper law of the partnership to be the law of the Republic of South Africa, under which:

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108 At [94].
109 At [101].
110 At [103] (footnotes omitted).
111 At [94].
112 At [98].
113 At [71] and [98], citing *Monhaupt v Minister of Finance* 1918 NPD 47 at 52.
114 See [101] and [237] below.

(a) the partnership was dissolved by agreement implied from the parties' cessation of business and investment activities on or about 18 January 1991; and

(b) Mr Kidd's claim for an account of the partnership is as co-owner with Mr van Heeren of the partnership's net assets, either's dealings with which are as trustee for the other. It is not yet a debt claim.

[65] I now turn to the account itself.

The account at 18 January 1991

—introduction

[66] Mr Kidd and Mr van Heeren formally provided each other with their respective accounts of the partnership as at 18 January 1991, and then to the present day. Mr Kidd responded to Mr van Heeren's initial account with a more detailed breakdown of his partnership receipts and assets, which structure formed the basis for the accountants' joint report. As work essentially conducted by them, their explanation and development of the account is of greater utility.

[67] As outlined at [19] above, following their common starting point instructions the date of the partnership's dissolution is 18 January 1991, the accountants agreed:[115]

> … the appropriate methodology to determine entitlements as at 18 January 1991 is to first assess the value of net assets of the partnership at the date of dissolution; add back any drawings or distributions to the partners received during the term of the partnership; apportion the combined amount between the partners (in this case on a 50:50 basis …); to arrive at partners' entitlements.
>
> From this figure is deducted any amount the partners have already received to leave the balance either due to Mr Kidd from Mr van Heeren or vice versa.

[68] The accountants also agreed the partnership's international steel trading business and recipients of its surplus profits were as pleaded,[116] but extended

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115 Joint Experts' Report, above n 29, at [72]–[73].

116 In South Africa, Galaxy Export/Import Company Pty Ltd, trading as Tisco International SA, Edmonton Properties (Pty) Ltd (formerly Kiddeeren Properties (Pty) Ltd), Edmonton Steel (Pty) Ltd (formerly Steel Straighteners and Stockists (Pty) Ltd), Ocean Steel, Group Four Trading (Pty) Ltd, and TGM Metal (Pty) Ltd; in Zimbabwe (formerly Rhodesia), Ferromar Pvt Ltd; in the

distribution of trading surplus to or in Optech International Ltd and Worldwide Leisure Ltd in New Zealand, Fenton Ltd in the Isle of Man, and Bramlin Ltd in Hong Kong. They agreed the partnership's assets on dissolution also included cash on hand, some NZD 30 million cash derived from the sale of Wellesley Resource Ltd shares (earlier swapped from Cromwell Corporation Ltd shares), gold bars and accounts, and the TAS shipment. Their agreement in substantial part is derived from their acceptance of Mr Browning's 2011 South African analysis of the partnership's steel trading activities, cash profits generated from those activities, and their subsequent initial distribution.

[69] In dispute, on Mr van Heeren's instruction to Mr Greyling and Mr Hagen, is if trading surplus also may have been distributed to Prime Pacific NV and Forestry Corporation Chartering NZ NV in Belgium, Dunsel Investments Ltd and Dibeen Investments Ltd and the Rainbow Trust in Jersey, the Timbavati Foundation in Liechtenstein and Forbes SA in Luxembourg. Also in dispute is if particular properties,[117] bank accounts,[118] or quantities of gold claimed personal to Mr van Heeren are properly to be included as partnership assets. Mr Browning considers these distributions to have been made or with those consequences.

[70] The accountants' estimates of net asset positions are based on the information available to them; they warn assumptions were necessary to bridge considerable information gaps. Even allowing for the complexity of accounting for this international trading and investment partnership some thirty years after its dissolution, the warning is justified:[119]

> Many of the relevant transactions for this partnership occurred over 30 years ago, and for some entities, the underlying records for the transactions either no longer exist or they cannot be located. Key accounting staff of the partnership are now either deceased or have not been located. In addition, the entities within the partnership, and entities within the post 1991 van Heeren

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Netherlands Antilles, Genan Trading Company NV (whose wholly-owned subsidiary was Berrax NV); in the United Kingdom, Briar Trading Ltd and an 80% shareholding in Jocrow (Steel) Ltd; and in New Zealand, Prime International Ltd.

117 These are properties associated with Mr Kidd at Drury Hills in Auckland, and Foresters Lodge in the United Kingdom's Avon (owned by Bramlin Ltd); and with Mr van Heeren at Brasschaat in Belgium, at St Heliers in Auckland, and the Owner's Cottage neighbouring Taupo's Huka Lodge (the Lodge then being owned by Worldwide Leisure Ltd).

118 These are Algemene Bank Nederland ("ABN") bank accounts identified as "Crossing" in Amsterdam and "Ascot" in Zurich.

119 Joint Experts' Report, above n 29, at [66].

> family structures, were domiciled in multiple international jurisdictions, with different local disclosure and accounting regulations (not all of which met the IFRS equivalent requirements) resulting in differing levels of detail being recorded in the financial information that is available. In many cases the annual financial statements … of relevant entities were not all available for each financial year end, did not have the same financial year ends, were in different currencies and sometimes languages, were not subject to independent audit and inter entity transactions loan balances did not necessarily match due to these and other factors. There was another challenging aspect in that neither the partnership nor the defendant retained discrete separated accounting records of all transactions for each entity and there was comingling of funds across related party entities (both from 1976 to 1991 and later).

[71] The accountants noted in particular:[120]

> In many cases, in relation to the affairs of Genan, transaction records (cashbook and general ledgers) were not retained, or are not available to [us]. Genan for example was liquidated in August 1991 and its records were taken by the liquidators. The Genan and Amsterdam cash sheets, which are referred to by all [of us], are examples of records that were kept and have been disclosed. These records provide a useful snap-shot of some cash balances at a point in time. The Genan sheets, which regularly report on some of the bank accounts held by Genan from November 1986 to February 1991, show balances and have notes that explain movements in and out, currencies, interest rates, investment terms, and where funds are transferred to and from. … However the Amsterdam sheets that have been disclosed involve only a handful of dates in 1990 and January 1991, report on only a limited number of bank accounts each time and do not explain movements except on a limited number of occasions … .

[72] As an example, Mr Greyling sought to align the position recorded by the occasional Genan worksheets with a running balance contributed by entries in a handwritten cash book attributed to Genan. While the alignment holds within a few hundred thousand USD to August 1987, the divergence is of multiple million USD by February 1990 and remains so to the end of the analysed data in October 1990.

[73] Neither is there substantial pre-dissolution banking or tax records for either Mr Kidd or Mr van Heeren or the various entities under their respective or joint control. The passage of time now may explain some of their absence, although this claim commenced in 1996, some 20 years after the partnership's commencement and only five after its dissolution. At least since 1996 it may have been expected relevant records were identified and retained. Loss of Mr Kidd's personal records in a fire "just before the breakup of the partnership" — for which insurance proceeds were received

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120 At [67].

by the end of 1989, meaning the fire must have occurred earlier — does not explain the absence of his later records. Mr van Heeren said he and Mr Kidd "were running an international non-tax complian[t] sanction-evading operation, and all the trails were not kept for obvious reasons"; the course of disclosure and discovery perhaps was such as to dissuade further pursuit of his explanation. Nonetheless, derivation then of the parties' contended receipts from partnership entities' exceptionally incomplete financial records, for adding back as partnership assets in the method adopted by the accountants, is highly artificial.

[74] As can be seen from prior judgments in this proceeding,[121] disclosure and discovery has been vexed. That continued even into trial, when inadvertent non-disclosure by solicitors became apparent. Nonetheless, a substantial volume of records progressively has been recovered. Its magnitude may be inferred from Mr Kidd's trial bundle of over 14,700 documents, presented in electronic form comprising over 25 GB of data. Even if, by the documents' age, most are not more data-intensive native files, that bundle alone may exceed 500,000 printed pages.

[75] The documents' diverse and intermittent nature means they cannot be relied on to establish a comprehensive picture of the partnership's financial position. Particularly given their historical origin, and the complexities of the accounting, I do not draw any adverse inference from the absence of documentation alone. I pause to add I do not find either Mr Kidd's or Mr van Heeren's own evidence to provide a better source of information. Much of their evidence is to reconstruct (or to deny) a presentation of facts consistent with what contemporary documents then may have been available. Rather, the account must proceed on such assumptions as justifiably may be drawn from the contemporary documents now available.

[76] As previously indicated,[122] justification for such assumptions has given rise to most of the disagreements between the accountants. In particular, Mr Browning relies principally on the Genan and Amsterdam (Prime NZ and Briar) cash sheets to disclose the partnership's surplus cash. He concludes funds transferred from Genan's bank

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121 See, for example, Interim payment order, above n 7; *Kidd v van Heeren (No 8)* [2015] NZHC 3250; and *Kidd v van Heeren* [2019] NZHC 1761.

122 See [20] above.

accounts predominantly are — or more significantly, if not accounted for, are to be assumed — paid to Mr van Heeren's benefit. Thus he includes them in his calculation of the partnership's assets. Mr Greyling and Mr Hagen, on the other hand, are satisfied the quality of the partnership's bookkeeping was such as to assure them of their likely contemporary comprehensiveness. They resist any inference the records' present incompleteness establishes missing or unaccounted funds for such inclusion.

[77] Similarly, Mr Browning assumes particular of the partners' personal assets likely were funded from partnership funds, and therefore should be reclaimed as partnership assets for the purposes of valuation for division. Mr Greyling and Mr Hagen take the view, where evidence establishes an asset was personally held, it should be excluded from the partnership pool. Mr Browning also would reclaim any remuneration obtained by either partner as director of partnership entities, again for equal division between them. Mr Greyling and Mr Hagen say the remuneration was settled at the time of its payment as reflecting the respective partner's contribution, which need not to be revisited. But they allow interest received on shareholder loans should be equalised.

[78] The accountants also differ on the reliability of cash balances reported for January 1991. Consistently with their view the partnership maintained comprehensive bookkeeping, Mr Greyling and Mr Hagen generally adopt the records proximate to the partnership's dissolution. Mr Browning, however, reconstructed a cash position for the partnership to reconcile with known cash balances in January and November 1986. Extrapolating his cash analysis forward, he concluded the January 1991 cash sheets are unreliable as based on incomplete bank positions. He includes an interest component on his contended missing or unaccounted for funds, as consistent with the practice he perceives the partnership adopted of deploying funds on short-term money markets for returns exceeding interest-bearing deposit. Mr Greyling and Mr Hagen say that is to exacerbate the quantum of Mr Browning's error in assuming funds are unaccounted.

[79] While the accountants agree partnership entities' financial statements proximate to the date of dissolution are "an important and relevant reference point for

determining the value of any entity being examined",[123] Mr Browning treats their unallocated debts as ownership funding, meaning the entities' liability is their owners' asset. Similarly, for the period after dissolution, Mr Browning includes profits as funded by the partnership assets, but adds back some USD 16.9 million losses as unjustified deductions from the partnership assets. Mr Greyling and Mr Hagen take a net approach in both respects, while disputing Mr Browning's assumption all is to be attributed to Mr van Heeren.

[80] Mr Browning extends his analysis to some 20 further companies in which Mr van Heeren maintained a shareholding after dissolution, to add their assets to the partnership pool, as he does also for all Mr van Heeren's remuneration from any source and for his personal expenditure. Again, Mr Greyling and Mr Hagen say the other, now defunct, companies' net assets all have resolved to the entities under agreed scrutiny. They would allow Mr van Heeren additional remuneration to reflect his effort in managing the assets after the partnership's dissolution. They point out adding both remuneration and spending is to double count.

[81] Finally, while the accountants agreed the partnership's value should be attributed in equal shares to the partners at dissolution, Mr Greyling and Mr Hagen say Mr Kidd thereafter only is entitled to an account of profits attributable to his outstanding share after dissolution.

[82] I now turn to these issues in considering the detailed items of the account at 18 January 1991. I summarise their results at Schedule 2.

—1.01: Salaries – Tisco (directors' emoluments)

[83] Mr Browning derived from Tisco's audited accounts essentially equal salaries paid to each Mr Kidd and Mr van Heeren for the years from 1976 to 1989 inclusive.[124] He notes the accounts indicate no director salaries were paid in the 1978 and 1979 years, the 1987 allocation is "not available", and in 1990 and 1991 "the salary splits

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123 Joint Experts' Report, above n 29, at [103].

124 The exception is the 1985 payment of ZAR 37,308 to Mr van Heeren, but ZAR 37,300 to Mr Kidd. Without seeing the original documentation, that may just be a typographical or transcription error.

were uneven, although the differences were not significant", Mr van Heeren's 1991 salary being "reallocated to consultancy fees".

[84] Mr Browning initially calculated, over the duration of the partnership, Tisco director salaries of approximately ZAR 340,000 were paid to Mr Kidd, and ZAR 322,000 to Mr van Heeren. Adding Mr van Heeren's 1991 ZAR 227,000 consultancy fees brought his remuneration to ZAR 549,000, or to sum its annual conversion to USD, USD 335,717. Mr Browning commented:

> Mr Van Heeren received pension benefits via a scheme with Tisco which included other employees of the company and other S[outh]A[frican] companies. Not all the details are available concerning payments to this scheme on behalf of Mr Van Heeren and the wording used in the accounts for the above amounts refers to the remuneration as emoluments which is more [encompassing] than salary or directors fees and includes all remuneration of whatever type for each year.

He considered the amounts each man received by way of salaries and emoluments from Tisco, as recorded in its accounts, "should be uncontroversial", although he says so in connection with his attribution of those sums to the men as "drawings".

[85] However, Mr Greyling pointed out the 1991 ZAR 227,000 was not a sum paid to Mr van Heeren on account of his directorship, but in payment of consultancy fees (including travel expenses). Mr Browning considered that "an exceptional level of travel costs in one year", being over five times Mr van Heeren's average annual travel expenditure, but Mr Greyling observes the consultancy fee was approved by Tisco's auditor. Added back as a drawing was to deny Mr van Heeren's entitlement to the payment, disproportionately to increase the partnership value by that amount, and to reallocate the auditor-approved sum equally between the partners.

[86] Under cross-examination, Mr Greyling accepted Tisco's internal bookkeepers initially had recorded expenses incurred by Mr van Heeren against his loan account as "expenses for him", and the external auditor had reclassified them as consultancy fees. He rejected the proposition the reclassification was conservatively to avoid identifying unrecoverable sums as company assets. Rather "the reasonable inference" was the auditors considered the original classification of "legitimate business expenses" as shareholder loans to be in error. But Mr Hagen accepted under cross-examination "a normalisation approach [could be used] to get rid of extraordinary income or expense".

[87] In turn, Mr Browning accepted his treatment of Mr van Heeren's 1991 consultancy fee was as "an exceptional cost in that year", as "possibly" to avoid its capitalisation on the balance sheet unless it was recoverable, despite the auditors' treatment of it as an expense, and approved as such by Tisco's directors. He thought that "effectively … the same thing" as writing it off.

[88] Mr van Heeren's closing submission was "[t]he decision reached by the company, at the time, was that these were consultancy fees. Mr van Heeren should [not] be required to account for them." For Mr Kidd, Brent O'Callahan rationalised a debt write-off was not in prospect: "because it was not on the prior period balance sheet, a decision was taken to expense it directly". The directors' approval of that treatment could not be attributed to Mr Kidd or Mr van Heeren, meaning the sum is "an unequal amount received by Mr van Heeren and needs to be equalised".

[89] Such treatment — now, on this account thirty years later — of this particular accounting transaction can only be justified on one of two grounds. Either the transaction is an exception to the evidenced equalisation of all other Tisco's transactions with the two partners, or there is evidence the transaction was intended to benefit one at the other's expense. Neither is established here to a level warranting interference with the company's apparently orthodox accounting treatment of the transaction.

[90] Yet payments from Tisco clearly may be unequal, as illustrated by the ZAR 6,800 or 15 per cent disparity between the partners' 1990–1991 salaries. Contrary to Mr Browning's perspective, the disparity is significant, allowing an inference the business had some foundation to discriminate between the men. But there is no indication partial interests here were taken into consideration: the evidence only is of the auditor's handwritten notation on a workpaper adjusting journal entries in either man's favour.

		DR	CR
	…	…	…
26	Loan A/c — APJH Travel Reallocation private expenses	110,392.25	110,392.25
27	Loan A/c — MDK Travel Reallocation of private Travel	47,481.17	47,481.17
28	Loan A/c — MDK Consultancy fees — APJH Directors' expenses Reallocation of Expenses paid on behalf of the directors	101.46 42,852.44	42,953.90
29	Consultancy fees Loan A/c —APJH	226,742.52	226,742.52

The evidence does not expressly reallocate Mr van Heeren's 1991 salary as consultancy fees, as Mr Browning contends, although that may be established elsewhere in evidence not specifically drawn to my attention.

[91] The conclusion sought here by Mr Kidd goes far beyond any assumption justified by the incomplete nature of the financial records. It asks me essentially to accept Mr van Heeren's contended animus to Mr Kidd is self-evident on this transaction. I will not do so.

[92] The extensive back-and-forth between the accountants under this head is characteristic of their dealing with significant items on the account. I have included it here to illustrate their approach. But I summarise rather than substantially replicate it under subsequent heads.

—1.02: Salaries – other South African companies (directors' emoluments)

[93] For the period of the partnership from 1976 until 1991, Mr Browning identified salaries — paid by each Steel Straighteners and Stockists Pty Ltd and TGM Metals Pty Ltd, to the partners for their services as their directors between 1982 and 1987 — in the amount of USD 50,151, to be added back for equal division between the partners. Mr Greyling and Mr Hagen again oppose such treatment as at odds with the partnership's conduct of the business at the time the payments were made. Mr Browning responds the net effect is nil, because the payments were equal. If so, Mr Greyling would agree.

[94] Likely given that agreement, Mr Kidd's closing submissions assert item 1.02 is "[n]ot an issue", meaning USD 50,151 is to be added back into the partnership asset pool. I disagree. As with item 1.01, the evidence is not complete: item 1.01 had no evidence for 1987; item 1.02 only addresses the 1982–1987 years. Whatever happened in those unaccounted years is unknown. Tisco's 1990–1991 payments to the men illustrate equality is not a given. So too does Mr Browning's decision to cease allocations of salary to Mr van Heeren on his 1988 resignation as director.

[95] I apprehend from Mr Browning's reference to his allocations — and other notes to Mr Kidd's account, in which Mr Browning identifies the partner's respective shares by reference to the number of directors at the time (including a third and fourth director) — Mr Browning has derived the allocations to the partners from the companies' undifferentiated financial statement record of director salaries. But there is no evidence drawn to my attention any of those other South African company payments to directors in fact were made to either Mr Kidd or Mr van Heeren or equally between them. Critically, I have no evidence of either man's receipts from the partnership.

[96] I prefer not to deconstruct the formal regular conduct of the partnership businesses, in which the record of ordinary decisions rebuttably is presumed to be made in good faith in accordance with contemporary business considerations.[125] Although Mr O'Callahan argues (albeit in relation to item 1.03, to which I turn in due course) "[t]he partnership principle is that absent agreement, neither party is to be remunerated for their services to the partnership", his assumption there was no agreement conflicts directly with the presumption of regularity.

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125 For example, *Morris v Kanssen* [1946] AC 459 (HL) at 475; and *Tamaki v Māori Women's Welfare League Inc* HC Wellington CIV-2011-485-1319 at [72]. Similarly, the business records exception to the hearsay rule (Evidence Act 2006, s 19) is founded on the expectation "[b]usiness records as a class of documents are accepted as reliable": Evidence Bill (256-2) (select committee report) at 3. See also Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV19.01]; and Mathew Downs (ed) *Cross on Evidence* (online ed, Thomson Reuters) at [EVA19.1]. Further, see the Court of Appeal's remark "the [Evidence Act] presumes a basic level of reliability from the nature of the business records … The rationale is that if information supplied by someone having personal knowledge of the matter is recorded in order to comply with a duty or in the course of a business then the information is likely to be reliable": *Asgedom v R* [2016] NZCA 334 at [78].

[97] Thus the accountants' method of adding back the partners' receipts as partnership assets is unsound. I will not do so as a matter of course. The result is I disallow Mr Kidd's claims for an account under these two headings, 1.01 and 1.02.

—1.03: Salaries – WWL (directors' fees)

[98] Mr Kidd's claim here is for an account of directors' fees of NZD 30,000 paid by WWL to Mr van Heeren in each 1987, 1988, and 1989, their annual conversions summed to USD 54,069. WWL was, of course, Huka Lodge's owner; Huka Lodge was found by Satchwell J to be a partnership asset.[126] Her Honour recorded Mr Browning's evidence "there were '*more than adequate funds*' in Genan at the relevant times to pay for the acquisition of and renovations to Huka Lodge".[127] She went on to record Mr Kidd's evidence he inspected the property in July 1984 for the partnership's acquisition, and agreed to its acquisition, explaining the partnership's South African links meant the acquisition by WWL was presented "*as trustees*" for Mr van Heeren.[128] The Judge also recorded Mr Kidd's explanation of his lack of continuing involvement in Huka Lodge (and Dolphin Island, Wellesley and Optech):[129]

> The funds were our funds and [Mr van Heeren] was interested to use them and that is what I trusted him to do … My work was intensive. My trading work was intensive. I was flying all around the world. I was deeply involved in the steel trading side. It consumed an enormous amount of time. I did not have an affinity for flying … . Here was an investment Alex was handling it. I was very happy with that. I had no real reason to go back down there.

[99] Mr O'Callahan's comprehension of "[t]he partnership principle"[130] earlier mentioned is endorsed in South African law. Ms Snyman-Van Deventer explained:[131]

> Under ordinary circumstances, and in the absence of any express or implied agreement to that effect, a partner is not entitled to claim remuneration for services rendered by him to the partnership.
>
> Partners are not prevented from agreeing that one of them is to receive a salary in consideration of his taking a larger or more skilled share in the management

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126 South African judgment, above n 7, at [132].
127 At [56].
128 At [57]–[58].
129 At [116].
130 See [96] above.
131 Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79, at [57]–[59] (footnotes omitted).

> of the partnership affairs. In the absence of such an agreement, each partner is expected to perform all the duties contemplated by the contract without any fee or reward.
>
> If, however, a partner has performed special work beyond that performed by the others, and which was not contemplated as part of his duties under the contract, he will be entitled to claim remuneration for his services. Such remuneration must be paid to a partner after payment of partnership creditors, and before a division of the net profits.

[100] The partners' derivation of remuneration as directors in the various partnership companies at least implies their agreement such remuneration is available to them. As directors' fees, it also may be presumed (at least in relation to New Zealand companies) to reflect some contribution by the partners as directors justifying that remuneration as "fair to the company".[132] Prior to that statutory specification (as were the payments at issue), assuming express provision for directors' remuneration in the company's constitution,[133] courts were reluctant to second-guess such questions as they were commercial matters to be determined by those with relevant commercial expertise.[134]

[101] Particularly given Mr Kidd's acknowledgment he was not involved in the WWL's governance, and the evidence Mr van Heeren was, I again am not prepared to deconstruct the company's apparently regular affairs. I disallow this head of claim also. I similarly disallow Mr van Heeren's claim for compensation in relation to the pre-dissolution period. If WWL could and would have compensated him, it should have done so; it is not for me to revisit those commercial decisions.

—2.01: Dividends from Tisco from 1976 to 1991 inclusive

[102] Mr Kidd's account allocates USD 652,537 "dividends from Tisco" equally between the two men, to be added back to the partnership assets for equal division between them. If the actual payments were equal between the men, and there is no suggestion they were not, the accountants agree "the net effect on the account is nil".

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132 Companies Act 1993, s 161(1).

133 *Hutton v West Cork Railway Co* (1883) 23 Ch D 654 at 657. See also Companies Act 1955, s 190(1)(b), acknowledging a company may provide a director "with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company".

134 *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 (Ch) at 1041.

Thus Mr Kidd says this head is "[n]ot an issue", and Mr van Heeren says "the net effect is nil".

[103] Nonetheless, because the dividends' proposed inclusion in the pool of partnership assets involves a reconstruction of the factual reality of their distribution, I am not prepared to indulge the fiction. I disallow this head of the claim.

—3.01: Interest on shareholder loan balance with Tisco

[104] The accountants agree Mr Kidd's original claim for USD 88,109, to equalise interest paid on Tisco shareholders' loan advances between July 1989 and January 1991, is not justified. The disparity is explicable by Mr van Heeren's larger advance to Tisco. Mr Browning accepted under cross-examination its inclusion was "patently wrong".

[105] However, Mr van Heeren's account includes a debit from Mr Kidd and corresponding credit to Mr van Heeren of USD 338,112, noting "Van Heeren loan in Tisco appears to be written off and taken over by Kidd refer note 6.2 of 1990 AFS". The note identifies Tisco's unsecured long-term liability of ZAR 1,137,801, annotated "Shareholders capital accounts bearing no interest and with no fixed terms of repayment" for the 1990 financial year, with no corresponding entry in the preceding or subsequent year. Mr Browning points to his record of the ledger report behind that summary note, saying it "clearly shows that the amounts were paid back to the individual shareholders and partners". The issue was not more closely dealt with in evidence.

[106] Certainly Mr Browning's record shows 1989 advances of ZAR 695,394 from Mr van Heeren and ZAR 279,516 from Mr Kidd, which — together with accrued interest at 21 per cent per annum — amount to February 1990 shareholder capital accounts in the amounts of ZAR 809,689 for Mr van Heeren and ZAR 328,110 for Mr Kidd. But they appear completely to be repaid in January 1991 by transfer from Tisco's "Nedbank Current A/C". I do not know the foundation for Mr Greyling's contemplation of Mr van Heeren's loan as "written off and taken over by Mr Kidd".

[107] More significantly, from my perspective, I see no reason to go behind Tisco's business record, to construct an alternative reality. I make no allowance under this head of the claim.

—4.01: Drawings – funds received by van Heeren from Genan

[108] Mr van Heeren's initial account identified drawings paid to him by Genan (USD 116,170), and later Prime NZ (USD 1,401,325), to be taken into account as a deduction from his share of the total partnership assets. Mr Greyling subsequently was instructed Mr van Heeren personally owned significant physical gold or gold credits "which he sold to fund his living expenses in the early years in NZ". Mr Greyling understood the gold was in Genan's custody. He identified instructions from Mr van Heeren to Bert Sanders in Prime NZ's Amsterdam office to settle the drawing by gold sales. Genan's records of its gold holdings are consistent with those instructions. Accordingly, Mr Greyling considered there was no drawing to take into account.

[109] Mr Browning disputes classification of many of the entries as 'drawings'. Instead he considers some are funds used to purchase particular assets, notably in acquisition of the partners' New Zealand properties; he cannot identify material reimbursement. He also considers most entries attributed to Prime NZ are correctly to be attributed to Genan. In the result, he says USD 530,059 remains to be added back as drawings alone, and the balance to be addressed in dealing with the foundation assets. Under cross-examination, Mr Browning accepted the 'drawing' entries were detailed, consistent with correspondence Mr van Heeren "was covering the drawings with gold sales", and for his personal use. But without records of its sale and reimbursement to Prime NZ or Genan, Mr Browning took the view Mr van Heeren continued to own any gold he may have put in Genan's custody.

[110] Also under cross-examination, given the absence of independent source records of reimbursement being made, Mr Greyling preferred I decide if such reimbursement occurred:

> [Y]our Honour is going to have to draw an inference[. I]t makes no sense for Mr van Heeren to draw an amount out of Prime [NZ] or Genan or the partnership and then realise gold for the identical amount, [so as] landing up

> with two amounts in the bank account if he hasn't paid them over. I think that's just not a reasonable, but I take your point we have not seen the deposit into a partnership bank account. That is correct.

[111] So far as Mr van Heeren's personal gold is concerned, his evidence was — before his association with Mr Kidd — he had been well-remunerated for his then nine years' work in international commodity trading initially from Amsterdam and subsequently from Johannesburg. He said he had made good money and built up his own asset base through good investments. He noted gold was about USD 45 an ounce in 1971, but increased to USD 175 by 1975, and to USD 225 by 1979. In the 1970s, he traded in gold through ABN to accumulate a private account of "several million US dollars", initially held in the names of his father and a close family friend, and managed by the ABN bank officer, Han Heezius, and later with Mr Sanders (who was employed by a freight forwarding firm — Smuling and De Leeuw in Amsterdam, engaged to assist the partnership's steel trading and offshore banking arrangements — and subsequently came to operate some of the partnership's affairs directly).

[112] After Mr Kidd and Mr van Heeren established Genan in the Netherlands Antilles, the jurisdiction also offering Mr van Heeren tax advantages, he says he transferred his gold accounts to Genan (as he says he had agreed with Mr Kidd, "to house our personal offshore accounts and investments", which Mr Kidd disputes). Mr van Heeren's translation of the evidenced custody and management agreement — written in the Dutch language and countersigned at Willemstad in what was then the Netherlands Antilles' island territory of Curaçao on 19 September 1978 by a P A Groot for Genan — contends to have put 3,500 ounces of gold in Genan's care, for its sale and deposit of proceeds on his instruction, as recorded by Genan in its register. He says he added a further 2,000 ounces on 21 September 1978, and 5,500 ounces on 20 March 1979, similarly evidenced by Dutch language countersigned documents of those dates.

[113] Mr van Heeren explains he began to draw on those gold holdings on moving to New Zealand in 1981, as the New Zealand enterprise, Prime NZ, "was not generating sufficient profits to cover [his] personal expenses". His 9 August 1984 letter to New Zealand financial advisors, Arthur Young, observed:

> … as Prime International Ltd has not yet shown any profit, I therefore have not been able to draw any salary. I have been able to live in New Zealand by the realisation of certain capital assets. I am unfortunately forced to do this until such time as my enterprise here becomes self-supporting and enables me to draw a salary.
>
> Up until now, I have not filled in a personal tax return and I wonder if, taking the above circumstances into account, I am required to do this. If I am obliged to do so, please prepare the necessary return, and I will be happy to supply any further information you may seek. Perhaps you could advise me what are the rules and regulations governing this matter in New Zealand.

The evidenced copy of the letter is annotated in handwriting dated 10 August 1984 with Arthur Young's apparent advice "must return worldwide income in NZ[. I]f no income (selling of gold assets) no tax return". Mr van Heeren's 18 September 1984 memorandum to Mr Sanders, by then ensconced in Genan, refers to its board's (presumably, NV Fides's) approval to draw money from Genan for his personal use, for which he agreed Mr Sanders "could sell enough of [his] assets kept mainly in gold, to replenish any monies which [he] had borrowed from Genan". The memorandum asks Mr Sanders to reconcile his transfer of funds to New Zealand, and to report on gold sales to cover his borrowings. It apprehends such may need to be done "until such time as [he is] self-supporting and can begin drawing a salary".

[114] There are predominantly Dutch language advices to Mr van Heeren from Mr Sanders of various sales of gold from 21 January 1982 to 23 July 1985, and Genan's comparable internal record-keeping extending into 1989, more or less contemporaneously with credits from Genan to Mr van Heeren. Mr van Heeren additionally says he used his personal gold to acquire and renovate the St Heliers property, and to acquire two Mercedes-Benz cars (evidenced by his requests of Mr Sanders). He says he continued to draw on his personal gold holdings for living expenses, after relocating to Belgium in 1990. Mr Sanders affirmed Mr van Heeren's "substantial holdings of cash, shares and gold at ABN Bank", and he carried out Mr van Heeren's instructions for the gold's sale and payment of its proceeds. Other partnership employees were involved in providing and acting on the instructions.

[115] Mr Kidd's evidence is he was "staggered" by that explanation, which was "absolute news" to him. He did not know of Mr van Heeren's personal finances, or of Mr Sanders' role for Mr van Heeren personally. He had "never heard" of Mr van Heeren's personal gold holdings, only of some "90-odd kilos" the partnership

purchased. Mr Greyling's analysis, however, was the partnership lacked sufficient profit in its early years to have acquired the gold recorded as deposited with Genan or Mr van Heeren. Mr Kidd had no answer to that (although Mr Browning theorised in hindsight the partnership's average transactions then would have enabled a modest "float", enough to acquire the 11,000 ounces of gold), or to the proposition Genan permitted Mr van Heeren to draw money for his personal use and replenishment, other than positing "whether there are now in fact two Genans involved here and not one". But he acknowledged he had no capital to invest in the partnership at its outset, and Mr van Heeren funded both Mr Kidd's personal expenses as well as those of the fledgling business. Similarly, he accepted "the business in New Zealand really didn't make any money for several years".

[116] Plainly Mr van Heeren had some financial substance prior to entering into the partnership. There is no reason to doubt that included ABN gold accounts, custody of which he had transferred to Genan, or they were drawn on in amounts and at times referable both to Genan's payment of drawings to him and to the New Zealand business' lack of money. It is as clear the Genan sheets — although numbering over 200 from November 1986 to June 1991, nonetheless incomplete as a set, but some at least significantly coinciding in time with sales of Mr van Heeren's gold — record no reimbursement on his account at all. But I cannot disregard the contemporaneous evidence simply because there is no evidence of Mr van Heeren making any reimbursement to Genan. Either he reimbursed those drawings or duplicated them in his hands by drawing down on his own funds in Genan's custody in like amount. The latter is inexplicable on its face, and I am offered no context as may give it credibility.

[117] I therefore make no allowance under this head.

—4.05: Drawings – funds paid to Credit Suisse accounts

[118] The accountants agreed each Mr Kidd and Mr van Heeren were allocated a drawing of USD 500,000 into their respective Credit Suisse Luxembourg accounts. It will be taken into account.

—4.06: Drawings – net sales value of St Heliers property

[119] Gold held by Genan funded acquisition of the partners' Auckland properties: Mr Kidd's at Drury Hills and Mr van Heeren's in St Heliers. Mr Kidd says all their (possibly, non-South African) residential properties thus are partnership assets and seeks to recover USD 2,025,540 as net proceeds of the St Heliers property's 1989 sale.

[120] Mr Kidd's evidence in South Africa (adopted by him here) was he and his wife acquired the Drury Hills house in October 1981 for NZD 200,000. Because, in the event, Mr Kidd did not take up residence in New Zealand, the house was rented out with rental income held by the partnership's New Zealand solicitors, Bell Gully Buddle Weir of Auckland, and was sold in 1993 for NZD 345,000. He understood the van Heerens' St Heliers house was purchased by them toward the end of 1982 for NZD 800,000, and sold on Mr van Heeren's return to Europe in late 1989 for about NZD 3.5 million.

[121] Mr van Heeren is insistent his personal gold funded the acquisition and renovation of the St Heliers property. He says it never was intended the partners' personal family homes would be a partnership asset. He suggests — if his personal gold was used to fund the Drury Hills purchase, which he cannot recall — "this would have been treated as an advance to Mike, which we would have resolved in one of our regular 'squaring offs'".

[122] 'Squaring off' was Mr van Heeren's reference to regular meetings he had with Mr Kidd at various points around the globe to discuss Genan's accounts, roughly balancing drawings or distributions to each by "an equalising cash drawing". Taking that into account, the men would provide NV Fides with their resulting end-of-year figures, for confirmation by ABN, from which NV Fides would prepare Genan's draft annual financial statements for the men's approval as final. Mr Kidd does not dispute the meetings occurred, or such was their objective, except to say he lacked detailed financial information to substantiate the 'squaring off'.

[123] At least so far as Mr Kidd was concerned, he was paid a salary and otherwise called on Genan or Prime NZ to pay various of his personal expenses: for example, professional and school fees. He had not made any advances to Genan or Prime NZ.

So any payment of substance to him from Genan or Prime NZ would ultimately have to be balanced or 'squared off' with Mr van Heeren to restore the partnership's equilibrium. And because the payments came at least through Genan or Prime NZ, whether or not they were sourced in Mr van Heeren's own funds, restoration must have been accounted similarly. But none of that is to convert the partners' personal property into partnership property.

[124] The partners plainly had no regard for any risk incurred by the other in acquiring or renovating their residential properties. The most significant point is there was no suggestion Mr Kidd should (or did) account for proceeds from the Drury Hills property's rental or sale, notwithstanding substantial further funds also were obtained for Mr Kidd's residential United Kingdom property, Foresters Lodge in Bristol (as for Mr van Heeren at Brasschaat in Belgium, after sale of his St Heliers property), or for proceeds from the Bristol property's sale. Instead Genan's or Prime NZ's advances to or on behalf of either partner (such as for Foresters Lodge's and Brasschaat's renovations) were to be repaid by them, whether through the 'squaring off' process or otherwise.

[125] In South Africa, Mr Browning and Mr Kidd were cross-examined as to the prospect the New Zealand residences were purchased from steel trading profits. I do not accept that renders Mr van Heeren's assertion now the properties were acquired from his personal gold a *Henderson v Henderson*[135] abuse. The particular source of funds to acquire the residential properties was not capable of being determined between the parties in proceedings intended "to establish that the Sale Agreement dealt with only part of the assets that he and Mr van Heeren jointly owned".[136]

[126] The St Heliers property was not a partnership asset. The proceeds of its sale therefore are not to be regarded as a drawing. I make no allowance under this head of Mr Kidd's claim. However, I return to the residential properties topic at [149] below.

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135 *Henderson v Henderson*, above n 36.
136 Court of Appeal judgment, above n 18, at [122].

—5.01: Partnership assets – cash

[127] The accountants agree the partnership's cash assets should be included in its valuation at 18 January 1991.

[128] Mr Greyling refers to the actual cash balance positions recorded in the Genan and Amsterdam cash sheets at that date, to arrive at USD 10.213 million. Mr Browning is satisfied the Genan sheet can be verified from its predecessors, but says the Amsterdam sheet is not so verifiable and there are other partnership bank accounts not reported on by either sheet (or their predecessors). On his cash analysis — including by restoring funds paid to other entities and calculating interest to be earned — the sum is USD 25,306,256. Mr Grayling considers that an improbable sum, at nearly three times the totality of Mr Browning's calculation of steel trading profits over the entire course of the partnership. On the other hand, as improbable (but true) are some of the partnership's extraordinary returns from investments: for example, conversion of a 1984 NZD 3 million shareholding into a NZ 35 million return in 1987,[137] to say nothing of its subsequent reinvestments.

[129] The difference between the accountants arises from the weight to be given to the Genan and Amsterdam cash sheets. Accounting records were created by the partnership's offices in Amsterdam, Auckland, Bristol, and Johannesburg. Financial balances and flows of and between partnership entities appear closely to have been overseen by administrative staff in those offices (although there is a significant question if that oversight extended materially beyond recording the destination of returns from trading to track their progress in subsequent investments). The 'cash sheets' are a summary output from that oversight, reporting on cash balances held in identified bank accounts on the day in question. The cash sheets are not reporting on the individual transactions making up those balances. The issues are if the cash sheet balances nonetheless fail to include particular transactions, or if there are other accounts to be added.

[130] Mr Browning identified some 24 transactions he considers not to be included in the cash sheet balances, to arrive at his final cash balance. In closing submissions,

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137 See [132] below.

a number of these were said by Mr O'Callahan to be "no longer an issue" or taken up elsewhere in the account. I address below those I understand to require decision under this head. Otherwise I adopt the cash sheets' 18 January 1991 balances. I reserve leave if any aspect of the cash balance calculation requires further adjustment to address those removed from my present consideration by Mr O'Callahan.

… 5.1.1 and 5.1.5: DEM 6 million deposit with BNZ Singapore

[131] First is Mr Browning's proposed treatment of Worldwide Leisure's DEM 6 million facility with BNZ Singapore in August 1985: whether that was debt owing to Genan, or to Mr van Heeren. After extensive cross-examination, in which Mr Greyling maintained the source of the funding could not be ascertained, he promptly conceded a late-discovered BNZ statement dated 30 August 1985 established Genan as the source. I therefore allow Mr Kidd's claims at 5.1.1 and 5.1.5 (excluding interest, which I address at a global level at [205] below).

… 5.1.2 and 5.1.18: balance of Wellesley share sale proceeds

[132] Satchwell J held the partnership assets included "Cromwell/Wellesley shares which ultimately became a substantial stash of monies". Genan acquired some 1.553 million Cromwell Corporation Ltd shares for about NZD 3 million in early 1984. That holding was swapped for some 13.976 million Wellesley Resources Ltd shares in 1985 or 1986. The Wellesley shares were sold in early 1987 for in excess of NZD 35 million.

[133] The proximate Genan sheets identify specific sums attributable to the shares' sale proceeds of only some NZD 32 million.[138] At 5.1.2, Mr Browning claims USD 1,537,830 as the USD-denominated shortfall in proceeds from the sale of Wellesley shares.

[134] There is no dispute the available Genan sheets do not record the complete receipts. Mr Greyling says I can be confident, from the "meticulous" nature of the

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[138] The precise dates and figures vary between Mr Browning and Mr Greyling. Because Mr Browning's calculation for trial is derived "per Hagen", I rely on the dates and figures recorded in Mr Greyling's reply brief's annexure 15. It also records the 16,404 shares sale, thought unaccounted by Mr Browning, at NZD 9,763.26 on 3 February 1988.

available bookkeeping, the balance also would have been included on the appropriate sheet. He notes the cash sheets illustrate Genan's cash increasing from USD 3.945 million on 18 December 1986 (the date of the sheet prior to the first sale) to USD 24.323 million on 3 April 1987 (the day after the last sale), or roughly NZD 35 million.

[135] Mr Browning acknowledges the shares' sale proceeds "were placed in various currencies with various financial instructions". Only two of the proximate Genan sheets[139] are dated within a day or two after the shares' sales.[140] For example, the NZD 27.5 million sale on 18 March 1987 may be correlated with Genan's Bankers Trust NZD account balances of NZD 16.3 million on 19 March 1987 and NZD 30.4 million on 24 March 1987. The prior cash sheet, for 24 February 1987, shows a balance of NZD 2.7 million. Thus the lack of any substantial change in Genan's BNZ NZD account, even if initial recipient of the sale proceeds, is not a meaningful criticism.

[136] Given the absence of any comprehensive financial detail, the incomplete nature of the Genan sheets, and a coterminous increase in cash holdings approximating the shares' sale prices, no shortfall in proceeds from the Wellesley share sales is established.

… 5.1.6 and 5.1.22: funds held in Europe

[137] Item 5.1.6 claims USD 4.056 million in funds derived from steel trading held in Prime NZ's Amsterdam account with Bank Mees & Hope NV (plus USD 1.995 million interest under item 5.1.22). The account is not the subject of the Genan cash sheets.

[138] The account was recipient of surplus from Jocrow's sale of steel in the United Kingdom as agent for Tisco (trading as Northern Trust) or Prime NZ. Mr Browning reconstructed such sales as amounting to USD 9.131 million. Transfers from Bank Mees & Hope amounting to USD 5.075 million were identified in Genan

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139 Genan sheets dated 10 and 24 February 1987; 15, 19, 24 and 31 March 1987; and 3, 10, 14, and 24 April 1987.

140 Genan sheets dated 4, 18, and 19 February 1987; 18 March 1987; and 2 April 1987.

cash sheets for 22 April and 3 July 1987 and 5 December 1989, leaving USD 4.056 million "unaccounted".

[139] Belatedly, some 10 cash sheets relating to ABN Amsterdam bank accounts for Prime NZ and Briar between 7 March 1990 and 18 January 1991 were found and discovered. These are the 'Amsterdam cash sheets' to which I previously referred.[141] The last identifies Prime NZ's Amsterdam account as holding sums Mr Greyling calculated as amounting to USD 2.542 million (and Mr Browning calculated "and in London" as amounting to USD 3.154 million).

[140] The issue is if Mr Browning's reconstruction of inputs is more reliable than the last cash sheet record of retentions. The object is to calculate the partnership's cash assets at 18 January 1991. Mr Browning's reconstruction identifies profits as should have been remitted to the Amsterdam account over the period of its operation from 30 January 1987. The 18 January 1991 cash sheet establishes what remained in that account at that date. The disparity throws Mr Kidd's theory of the case into sharp relief.

[141] The Amsterdam cash sheets show a range of values, both diminishing and increasing over time from a starting point of USD 1.831 million on 7 March 1990, to a low of USD 1.338 million on 20 April 1990, and to the 18 January 1991 high. Three Genan sheets record sums received from the Amsterdam account. None is contemporaneous with any of the 10 Amsterdam cash sheets. The incomplete nature of the financial records means it entirely is possible additional sums similarly were received from, or payments otherwise made out of, the Amsterdam account.

[142] The account was monitored by Bert Sanders and reported by him to the partners and Tisco's bookkeeper, Gloria West. His evidence gave me no reason to think the account's 18 January 1991 balance may be irregular. For the purposes of determining the partnership's cash assets represented by the account at 18 January 1991, Mr Browning's reconstruction of expected credits to the account only provides a ceiling for that sum.

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141 See at [76] above and subsequently.

[143] Under this head, I would only allow the USD 3.154 million balance of Prime NZ's Amsterdam and London accounts recorded at 18 January 1991. But, effectively, the amount already is captured by the cash sheets at that date.[142]

… 5.1.13–5.1.15 and 5.1.36A–E: transfers

[144] Each of these line items 5.1.13–5.1.15 and 5.1.36A–E claim to recover cash transfers from partnership accounts to accounts seemingly associated with Mr van Heeren, plus interest. Absent any justification for their characterisation as drawings, the transfers should be retained within the partnership's assets. I allow them accordingly. I address interest at a global level at [205] below.

—5.02: Partnership assets – Sider liability

[145] It is agreed the partnership, through Prime NZ, was in dispute with the Algerian steel manufacturer, Enterprise Nationale de Siderugie ("Sider"), which ultimately was settled in November 2000 for USD 5.250 million. At the time of Genan's sale to Mr van Heeren, USD 5 million was transferred from Genan to a Prime NZ ANZ Bank account in Hong Kong.

[146] Mr van Heeren says, with that transfer, he accepted personal responsibility for resolution of the dispute. The proposition is, by removing USD 5 million from Genan to Prime NZ, the partners then would share Genan's USD 6 million balance between them on sale of Genan to Mr van Heeren.[143] The logic is Prime NZ then was Mr van Heeren's property.

[147] The logic runs headlong into the assets issue estoppel. Satchwell J held the partnership's acquisitions "include but are not limited to Prime NZ …".[144] Its assets, including the USD 5 million, are included in the partnership's assets. They stood to be drawn against to settle the partnership's liability to Sider, as occurred in November 2000. A net present value of money calculation requires to be conducted on both asset and liability: respectively, the retention and its ultimate disbursement.

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142 See [130] above.
143 See [50] above.
144 South African judgment, above n 7, at [132].

The retention's valuation is offset by comparable valuation of the liability. If anything, the five per cent larger liability should give rise to an ultimate deduction from the partnership's assets, but it is not pursued as such.

[148] No allowance is required under this head.

—5.03: Partnership assets – Brasschaat acquisition and renovations

[149] Brasschaat was the van Heerens' Belgian residence. There is no dispute it was acquired in March 1989 for BEF 30 million, from a transfer of BEF 40 million made from Genan to Mr van Heeren, the balance used to renovate the property. Beyond that, all is conjecture.

[150] The discovery includes a single-page document referring primarily to USD 2.603 million transfers made to Mr Kidd during the period 1988–1990. Three specific transactions in June 1990 are added to earlier subtotals to total USD 2.080 million annotated "HOUSE", and the USD 0.522 million balance almost equally between "MDK PERSONAL" and "PRIME". Below that appears "APvH – HOUSE USD 1,689,000" and "ANZ HONG KONG USD 2,000,000". Mr Browning concludes 'APvH – house' refers to "the total amount spent on the Brasschaat property", and values the property accordingly.

[151] For the reasons I explained at [124] above, I do not accept the partners' residential properties were partnership assets. The Brasschaat property's valuation is irrelevant. I do not know the context for the note about 'APvH – house'. As Mr van Heeren's senior counsel, Mark O'Brien QC, pointed out in closing, the note has even less context than a comparable annotation to a 24 August 1990 Genan sheet: "1. T/T to M D Kidd GBP – Hse & personal GBP 333,875", which numbered annotation refers back to an A[BN] Hong Kong DEM 3.456 million account balance, possibly indicating reason for its reduction. By reference to movements in that account corresponding to other identified payments to Mr Kidd, Mr Browning rejects the proposition. But the intermittent nature of the Genan sheets means they cannot be relied on to substantiate a cashflow analysis.

[152] Certainly it is clear very substantial sums were transferred from partnership accounts to the partners. Mr Kidd's assessed tax liability in the United Kingdom after only two years' residency at GBP 2 million (ultimately settled for GBP 0.666–0.668 million) illustrates the scale (although there is no evidence of Mr Kidd's actual dealings with Her Majesty's Revenue and Customs). From the four-and-a-half years of the Genan sheets alone (in the 15-year partnership), Mr O'Callahan calculates nearly USD 31 million were paid out, divided roughly 25/75 between Mr Kidd and Mr van Heeren respectively.

[153] If outstanding, they should be accounted as drawings. The question is if, as drawings, they already have been equalised between the partners. Although I accept Mr Kidd may not have had visibility of investment and expenditure directed by Mr van Heeren beyond Genan and Prime NZ, he clearly knew of the sums generated from the steel trading from his intimate involvement in it, of their initial distribution to and from Genan and Prime NZ accounts from Mr Sanders's reporting, and of Genan's annual financial statements prepared by NV Fides. That visibility included payments to each partner.

[154] It is implausible the partners could have expected each to draw down very substantial sums to support their personal finances without any requirement for periodic accounting between them. The evidence is such accounting occurred in Mr Kidd's and Mr van Heeren's occasional in-person meetings. In dispute is if the accounting was accurate. There simply is inadequate evidence now to be able to determine that. The partners' apparently deliberate secrecy and lack of external transparency has not helped. Conversion of the partners' personal acquisitions into partnership assets is not a permissible or principled response to that evidentiary shortfall.

[155] The partners' ease of individual access to the partnership's funds, and relative disinterest in each other's personal expenditures, is a pointer to their acceptance of the other's intended equalisation. The January 1991 sale agreement included transfer of the partnership's Hong Kong Bramlin Ltd (owning only Foresters Lodge, although Mr Kidd says the intention was all the partners' residential properties would be held by it for the partnership, while allowing that could not have been achieved for the

New Zealand properties "in the early days") to Mr Kidd. That transfer was done at Mr Kidd's insistence, seemingly without adjustment to the other terms of sale. Although the circumstances of the partners' separation — and, in particular, Satchwell J's avoidance of the indemnity agreement as essentially fraudulent[145] — make the whole of the transaction at least ambiguous, the Bramlin transfer also suggests the partners' residential accommodation was their own property, rather than among the partnership's assets. That in turn implies the partnership's expenditure on acquisition and renovation of the partners' residential properties had been equalised between the partners.

[156] I make no allowance for expenditure on the partners' residential properties.

—5.04: Partnership assets – Fenton Ltd

[157] Fenton Ltd, which owns Dolphin Island, undeniably is a partnership asset. The dispute is over its value at 1991: if that is better reflected by formal valuations in 1986 (USD 325,000) or 1995 (USD 674,900). Although Mr Greyling prefers the former as not including subsequent refurbishment, Fenton appears not to have incurred any expenditure on refurbishment before the latter. That is not to exclude the prospect that such expenditure may have occurred, sourced from other partnership entities, but the evidence goes no further. But there is no evidence the latter valuation takes any improvements into account.

[158] On that basis, while Solomonically unattractive, I take the rounded midpoint at USD 500,000 as Fenton's 1991 value.

—5.05: Partnership assets –WWL and Huka Lodge

[159] Also undeniably a partnership asset, the accountants differ on the 1991 value to be attributed to WWL's shares. Mr Browning says they were worth USD 6.726 million; Mr Greyling and Mr Hagen say they had a value of negative USD 2.101 million.

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[145] South African judgment, above n 7, at [152]–[173].

[160] All but one of WWL's 10,000 shares initially were held by Mr van Heeren. Mr Browning points to the late-1989 sale of nearly 25 per cent of WWL's 10,000 shares to Genan, and issue of some 2600 redeemable preference shares to Mr van Heeren, at NZD 900 per share. In May 1991, another 7,000 redeemable preference shares were issued to Mr van Heeren at NZD 1,000 per share. Despite the transactions' apparent purpose to extinguish WWL's debt to Genan, to avoid payment of non-resident withholding tax on the borrowing, Mr Browning is satisfied the underlying valuations are reliable, as advisedly and determinedly made on a commercially defensible basis.

[161] That is resisted by Mr Greyling and Mr Hagen, who say WWL's negative value (due liabilities exceeding assets, affirmed by adjusting WWL's August 1990 balance sheet to accommodate its January 1991 fixed assets valuation) at 1991 is illustrative of the long-term horizon of its luxury lodge business, whose accumulated losses from its commencement in 1985 (doubling from NZD 4.283 million in 1990 to a trough of NZD 8.700 million in 2012) were not erased until 2019. Nonetheless there are mutual 2017 valuations assessing WWL's then-current market value at NZD 32 million (or USD 22.627 million). But, after deducting NZD 21.294 million in additional 2012 share capital (and other assets) necessarily not contributed by the partnership, Mr Greyling and Mr Hagen calculate the 2017 partnership asset at NZD 15.560 million (USD 11.002 million). This, they say, illustrates the unreasonableness of Mr Browning's valuation, when including interest to May 2014 comes to USD 21.152 million. And the additional issued shares dilute the value of the partnership's 10,000 shares to NZD 17,300 (USD 12,200).

[162] There are criticisms available of either approach. I doubt Arthur Young's professional advice in 1989 as to considerations on increasing WWL's capital can be taken as implying an arm's-length transaction between a willing buyer and willing seller is required or established. Certainly Arthur Young identified "the value of WWL" would need to be determined to calculate the number of shares and their consideration, but noted a preference for "a premium per share and less share capital". Regulatory considerations for carrying losses constrained the availability of share capital. Their premia "may not be commercially acceptable depending on the value of WWL". And Arthur Young notes there was "[d]ifficulty getting valuation of WWL to

levels that allows 24.9% = $7.6 million = debt o/standing to Genan and BNZ". But the point was Genan needed to be "prepared to accept a share of capital gain in WWL and that they are prepared to wait", suggesting the valuation was more a matter of subjective faith than objective science. On the other hand, WWL has now sold, and at a price which may be seen to justify past faith in its future value. And that future value is not diluted across diverse shareholders; they all come back to Mr van Heeren. If Mr Browning's 2014 valuation is unreasonable, that may more be by its reliance on Judicature Act 1908 interest rates than says anything about the valuation's initial foundation.

[163] In the end, I see nothing irrational, unfair, or unjust about valuing WWL as between the partners by the method deployed during the term of the partnership to restructure the partnership asset's debt. Such valuation has the added benefit of consistency with actual steps taken in conduct of the partnership's business. I therefore do not engage with the expert valuer witnesses' retrospective valuations of Huka Lodge.[146]

[164] I account for the value of WWL's shares at 18 January 1991 as USD 6.726 million.

—5.06: Partnership assets – Optech

[165] Another subject of the asset issue estoppel, Optech International Ltd is a company acquired by Prime NZ for prospective use of its accumulated tax losses.

[166] Splitting the results of its 30 June 1990 and 30 June 1991 annual financial statements derives an 18 January 1991 deficit of NZD 3.345 million or USD 1.767 million, which Mr Greyling would adopt. Mr Browning, however, noted the deficit substantially was contributed by NZD 4.167 million in loans from Genan, thus reducing Genan's available cash. To count the loss again in Optech's hands is to double count. Excluding the loans means Optech had assets at 18 January 1991 in the

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[146] For Mr Kidd, Gary Michael Cheyne gave his expert opinion the property was valued "at 1 September 1991 at or about the sum of [NZD 8.250 million] plus GST (if any)", and differed for 18 January 1991; for Mr van Heeren, Stephen Luke Doyle gave his expert opinion the property's value then was "contained within the indicated value estimate range of [NZD 4.500 million and NZD 5.500 million] plus GST (if any)".

amount of NZD 0.833 million, or USD 0.489 million. Recognising at trial the loans double-counted an amount already allowed in Genan's cash position, Mr Browning revised Optech's 18 January 1991 position to NZD 0.086 million or USD 0.050 million.

[167] While valuation orthodoxy may require entity-by-entity assessment, as Mr Greyling and Mr Hagen say, the incompleteness of Genan's records means its loans to Optech are not taken up as its asset. In valuation of the partnership assets as a whole at 18 January 1991, it therefore makes sense to deduct the quantum of Genan's advances to Optech.

[168] I allow USD 0.050 million under this head.

—5.07: Partnership assets – Dunsel Investments

[169] The accountants agree USD 8.184 million of the Wellesley share sale proceeds were transferred to an ANZ Grindlays bank account, and then used to capitalise Dunsel Investments Ltd. Mr Greyling says that amount is a drawing by Mr van Heeren for which he should have to account. Mr Browning says he is instructed Dunsel itself is to be regarded as a partnership asset; in reliance on its 31 December 1990 annual financial statement, he derives its value as made up of shareholder equity in the amount of USD 7.659 million and a USD 1.090 million loan from Mr van Heeren. Having no evidence to the contrary, he assumes the latter was made from partnership cash (and reduces his calculation of that sum accordingly).

[170] The issues estoppel secures as a partnership asset the "substantial stash of monies" obtained from the Wellesley shares sale. Satchwell J found "[t]he absence of any mention or documentation or explanation as to what had become of the proceeds of the Wellesley Investment" was an instance of "bad faith" on Mr van Heeren's part,[147] ultimately to avoid Mr Kidd's claims to, among other things, "whatever other investments had been procured through the Wellesley funds".[148] Her Honour concluded Mr van Heeren's "behaviour over a period of years suggest that he had

147 South African judgment, above n 7, at [169].
148 At [165].

started treating Genan and Prime NZ profits for the benefit of himself alone and, in so doing, cheating Kidd".[149] Such are "findings fundamental to her decision";[150] "essential and fundamental steps that led to the conclusion that Mr van Heeren had misrepresented the effect of the Indemnity".[151] "Issue estoppel applies to prevent the defendant contradicting those findings in this Court".[152]

[171] In that context of "the groundwork of the decision itself",[153] "the legal foundation or justification for the conclusion reached in the judgment",[154] Dunsel's capitalisation cannot be characterised as Mr van Heeren's accountable drawing. It is instead, as Fogarty J predicted,[155] his 'profitable reinvestment over time' of partnership assets. The Judge held:[156]

> It is beyond argument that the assets of the partnership include the acquisitions and property described in [132] [of the South African judgment] and, inevitably, any subsequent acquisition of assets from those assets over the past nearly quarter of a century.

Those are the "accumulated worldwide assets" for which Mr van Heeren "is obliged to account" to Mr Kidd.[157] The Court of Appeal was clear the assets issue estoppel should not narrowly be construed.[158] Dunsel is the partnership asset. I do not know what to make of Mr van Heeren's contended loan, particularly given the larger sum used to capitalise Dunsel, and therefore disregard it.

[172] I therefore allow USD 7.659 million under this head.

—5.08: Partnership assets – Huka Trust

[173] The assets issue estoppel includes the October 1984 acquisition of Huka Lodge as a partnership asset from the Harland-Bakers. The Lodge was acquired on terms

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149 At [169].
150 Interim payment order, above n 7, at [99].
151 Court of Appeal judgment, above n 18, at [123].
152 Interim payment order, above n 7, at [117].
153 *Blair v Curran* (1939) 62 CLR 464 at 510, as cited in Court of Appeal judgment, above n 18, at [138].
154 Court of Appeal judgment, above n 18, at [139].
155 Interim payment order, above n 7, at [148]. See also *Kidd v van Heeren (No 7)*, above n 90, at [26].
156 At [160].
157 At [161] and [171]. See also *Kidd v van Heeren (No 7)*, above n 90, at [27]–[28].
158 Court of Appeal judgment, above n 18, at [148].

including the Harland-Bakers' warranty "to subrogate to the purchaser their rights (if any) in respect of any proposed sale of Huka Cottage" by its then-owners, the Grants. 'Huka Cottage' is the Owner's Cottage.

[174] In August 1988, the Owner's Cottage was acquired in Mr and Mrs van Heeren's names. Mr van Heeren explained he acquired it as a personal residence for his family. In 2002, the property was transferred to the Huka Trust, and then renovated and leased to WWL for use in the Huka Lodge business. I acknowledge both Mr van Heeren's certainty he "intended to acquire Huka Lodge in 1984 as a personal asset and … believed [he] had", and his acceptance of the courts' findings Huka Lodge was acquired as a partnership asset. However, a consequence of the latter is the partnership asset included benefit of the Harland-Bakers' warranty.

[175] Under South African law, partners have obligations between each other of "perfect fairness and good faith".[159] Whether or not the Harland-Bakers had any rights in respect of the Grants' sale of the Owner's Cottage, perfect fairness and good faith in the circumstances would have required Mr van Heeren to have informed the partnership of the opportunity to acquire the Owner's Cottage, at least by enforcement of the warranty (if possible). Without that advice, as a matter of perfect fairness and good faith, the assumption is Mr van Heeren acquired the Owner's Cottage for the partnership. The assumption is reinforced by Mr Greyling's acceptance under cross-examination "the new disclosure is showing … Genan's money has been used to purchase Huka Cottage". That is contrary to Mr Greyling's default expectation Mr van Heeren expended personal funds on his various acquisitions.

[176] Mr Browning proposes to value the Owner's Cottage at 18 January 1991 at its 1988 purchase price of NZD 0.425 million or USD 0.240 million. I am offered no alternative, and therefore allow accordingly.

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[159] Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79, at [75] and [78], citing *Sempff v Neubauer* 1903 TH 202 at 216.

—5.09, 5.10, and 5.12: Partnership assets – chartering companies

[177] Prime Pacific NV, Forbes SA and Forestry Corporation Chartering NZ NV appear to have been established on Mr van Heeren's instructions towards the end of the partnership. Mr O'Brien points out in closing "[i]t is illogical that the partners would be entering into new partnership ventures at that time". The issue is if the companies are to be considered partnership assets. Mr Browning assumes they were capitalised with partnership funds. Mr Greyling assumes they were not.

[178] Later in 1991, after the partnership's dissolution, Mr van Heeren explored arrangements with the Forestry Corporation of New Zealand Ltd and Forbes "to establish a joint venture for the purpose of chartering shipping for the transportation of the Corporation's timber products from New Zealand to overseas markets". That appeared to seek to capitalise on earlier chartering arrangements proposed between the Forestry Corporation and Forestry Corporation Chartering ("[trading as] Prime Pacific Chartering") in later 1990 and early 1991. The draft joint venture agreement also suggested Briar Trading, described as "an English company controlled by Van Heeren and his family interests", had arranged earlier shipping charters, retrospectively to be considered made under the joint venture.

[179] Under South African law, a former partner's improper appropriation of a partnership asset for use for that person's own benefit gives rise to that person's obligation to account for that use to their former partners.[160] Although Ms Snyman-Van Deventer is not explicit about the consequences of such unilateral use during partnership, it is improbable comparable accounting would not follow. Thus the 'logic' of late partnership entities' establishment is immaterial.

[180] The indications Mr van Heeren deployed Briar Trading, a partnership asset[161] in developing the Forestry Corporation business during the period of the partnership is a sufficient basis on which to conclude the entities' capitalisation also was with partnership funds. I allow Mr Kidd's claims for USD 0.305 million under these heads.

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160 At [89]–[90].
161 See [182] below.

—5.11: Partnership assets – Dibeen Investments

[181] The accountants agree the assets of Dibeen Investments Ltd, a Jersey company established in 1977 (whether or not by Mr van Heeren, who perceived he acquired a shelf company in 1989), are very substantially of partnership funds transferred from Genan on 18 January 1991 and accumulated interest. I allow USD 2.387 million accordingly.

—5.13: Partnership assets – Briar Trading Ltd

[182] There is no dispute Briar Trading is a partnership asset, operating "on account" for Genan and Prime NZ.[162] The issue is its value at 18 January 1991.

[183] Briar ceased steel trading in February 1989. At that time, Mr Sanders reported its bank account balance was USD 0.228 million, after a transfer to Genan of USD 0.400 million. Reclaiming that payment as untraced after transfer, plus interest, to 18 January 1991 brings Mr Browning to a claim of USD 0.877 million. Mr Greyling identifies the last of the Amsterdam cash sheets as recording a balance for Briar of USD 0.342 million, which he would apply instead.

[184] Given Mr van Heeren's deployment of Briar for his personal use later in the course of the partnership,[163] Mr Browning's valuation at the end of Briar's steel trading is the more material sum. The issue is if his reclamation of the Genan transfer is justified. The evidence is Briar's trading finances, as with all of those entities accounting for Tisco revenues, were under close overview by Tisco's bookkeeper, Gloria West. She reported monthly to Mr Kidd and Mr van Heeren. Briar's omission from her later reports suggests not only the Genan transfer legitimately was made and tracked, but the whole of Briar's balance was taken up elsewhere within the partnership.

[185] But, because Mr van Heeren also is required to account for his personal use of partnership assets,[164] I allow Mr Greyling's USD 0.342 million under this head.

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162 See [10] above.
163 See [178] above.
164 See [179] above.

—5.14: Partnership assets – gold bullion and accounts

[186] There is no dispute in late 1990 Mr Kidd uplifted all 30 kg of the partnership's gold bullion from ABN Singapore. At the time, Mr Kidd and Mr van Heeren were in correspondence about their respective entitlement to half Genan's gold investment, which comprised those 30 kg and an ABN account denominated in "XAU" (then understood to refer to a further 62 kg). At issue is if the latter is to be taken as records of actual holdings, or merely options (if to be presumed "out of the money", by their non-reporting in Genan annual financial statements). Mr Kidd's acknowledged self-help, seemingly not known to Mr van Heeren until April 1991, is to be taken into account.[165]

[187] The contemporary evidence perhaps is equivocal, although it is notable an XAU account appeared to provide "[collateral] … for certain facilities, i. e. £280,000 for Jocrow/VAT". I have no evidence from ABN as to the meaning to be given to its reported account balances, but Mr Greyling accepted under cross-examination it was "more reasonable" to assume the accounts only recorded holdings once any options were exercised and the transactions settled. Thus, at September 1990, the partnership assets included the ABN account denominated in gold in the amount of XAU 67,331 (or gold in grams; 67.331 kg) to the value of USD 0.823 million at 18 January 1991.

—5.15: Other gold

[188] As said at [116] above, I am satisfied Mr van Heeren had personal gold assets in Genan's custody. Their unaccounted balance is not for the partnership's credit.

—5.16: Prime NZ assets

[189] Prime NZ's annual financial statement at 30 June 1991 establishes its New Zealand operations as having an accumulated deficit of NZD 0.244 million. Its comparable 30 June 1990 deficit was NZD 0.213 million, suggesting a midpoint deficit of NZD 0.229 million at 18 January 1991. Mr Browning would add back the repayment to Genan of NZD 0.545 million in the 1991 financial year. (Also repaid was NZD 0.216 million to Optech).

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[165] See [199] below.

[190] Consistently with my approach to Prime NZ cash and Optech at [143] and [168] above, and the exercise of valuing the partnership asset as a whole, I account for Prime International at negative NZD 0.229 million, or USD 0.136 million.[166]

—5.17: Berrax NV

[191] Mr Browning also would add back the USD 1.472 million line item annotated "creditors" (as presumed related parties) in Berrax NV's annual financial statement at 31 December 1990, to uplift its USD 4,400 deficit. As with the preceding item, I allow the deficit only.

—6.01: TAS shipment

[192] The issue here is what value is to be attributed to steel rejected as substandard by Jocrow to Prime, 30 per cent of which subsequently was sold. There is a substantial backstory, including Mr Kidd indemnifying Prime for any claim in relation to the shipment from TAS,[167] as part of Jocrow's intended transfer to him, but the value now is all that I am asked to address.

[193] The shipment appears originally to have been invoiced at GBP 326,200. Other than sale of 545.230 tonnes of the original 1738.900 tonne shipment at GBP 80,600, less costs and four per cent commission amounting to GBP 37,000, there appear no records of the actual transactional circumstances. Mr Greyling extrapolates an average GBP 148 per tonne to the unsold balance; Mr Browning complains that does not take into account the costs of sale, and infers what was saleable had then been sold, leaving the balance unsellable.

[194] It equally is open to inference only so much of the shipment was sold as was sought to be acquired. Clearly there was some discount from the original price at GBP 187 per tonne, which may be thought to make up for the shipment's quality shortfall. I do not know if costs of sale are attributable to the quantity sold, or constitute

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166 Using the Reserve Bank of New Zealand's exchange rate: Reserve Bank of New Zealand "Exchange Rates and TWI – B1 Daily (1973-1998)" <www.rbnz.govt.nz>.

167 See n 14 above.

recovery of costs incurred on the original shipment. Something approaching 50 per cent costs of sale may be high, or not. I have nothing with which to compare it.

[195] To be pragmatic, I allow the value of the unsold balance of the shipment at the net sale price of GBP 80 per tonne, or GBP 95,500. Using a 1.936 exchange rate at 18 January 1991 gives USD 0.187 million.

—6.02: Tisco

[196] I adopt the accountants' agreement Tisco is to be valued at USD 1.140 million.

—7.01: Drawings to be added back

[197] As I have held,[168] the partners' receipt of salaries, dividends, and interest have been paid in the ordinary course of the partnership's business. They do not require to be added back for equalisation as drawings.

[198] As I also have held,[169] drawings for acquisition of and improvements to the partners' residential properties require to be added back for equalisation as drawings. But their proceeds on sale do not. Although Mr van Heeren contends to have used his personal gold for acquisition of the partners' New Zealand residential properties, he acknowledged Mr Kidd's advance was to be addressed through their 'squaring off' process. That effectively means he was to be repaid from partnership funds the same amount as he provided to Mr Kidd for acquisition of Drury Hills. Such would not constitute a drawing, but repayment of his funding Mr Kidd's New Zealand residence.

[199] I am unable to establish all funds advanced as drawings to each Mr Kidd and Mr van Heeren. In reliance on Mr Greyling's work, Mr Kidd accepted to have been paid drawings (including on acquisition and renovation of Foresters Lodge but not Drury Hills, the USD 3 million paid at the time of the Genan shares sale agreement, and in his recovery of the 30 kg of gold bullion valued at USD 0.370 million) amounting to USD 6.696 million. Mr van Heeren claims to have been paid drawings amounting USD 1.778 million.

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168 See [97], [103] and [107] above.
169 See [126] and [156] above.

[200] I infer from the absence of reference to equalisation in either the Genan share or January 1991 sale agreements the partners are to be taken to accept their drawings effectively were equal. The discrepancies are those USD 3 million and USD 0.370 million to Mr Kidd's account. Whatever "wash-up" may have been contemplated would turn on the partnership's asset valuation. The partners' equalised drawings then are USD 6.696 million on Mr Kidd's account and, by subtraction, USD 3.326 million on Mr van Heeren's, together USD 10.022 million.

[201] Thus, subject to adjustments for cash and interest, the partnership's value as a whole at 18 January 1991 is USD 50.895 million, for allocation in equal shares of USD 25.448 million to each Mr Kidd and Mr van Heeren.

—7.02: Retentions to be deducted

[202] From that sum is to be deducted the value of the partnership assets already transferred to Mr Kidd. In addition to his drawings (USD 6.696 million), such is comprised by the 18 January 1991 value of the entities transferred to or retained by Mr Kidd.[170] Mr Browning initially assessed these as comprising USD 0.570 million, being both Mr Kidd's own assessment of his share of the South African companies, and half their calculated value — thus, USD 1.140 million: essentially, the value attributed to Tisco.[171]

[203] Together, then, Mr Kidd already has USD 7.836 million of his 50 per cent share in the partnership's 18 January 1991 value. I would allow disbursement to him now on that account of USD 17.612 million from the USD 25 million interim payment, or such larger sum after adjustments for cash and interest.

—interest

[204] While I understand Mr Browning's rationale for applying short-term money market rates to various receipts,[172] it is too opportunistic to apply them now in

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170 At n 14 above.
171 See [196] above.
172 See [78] above.

compounding riskless hindsight, when the partnership investments indulged in a range of financial opportunities and thus risk.

[205] At least in New Zealand, the acceptable balance in the hands of an unpaid creditor is comprehended to be reflected by the retail 6-month term deposit rate published by the Reserve Bank of New Zealand.[173] Comparable rates in the jurisdictions in which the accounts (not the currencies) were held presumably similarly reflect a balancing of risk and reward. I will apply them instead, to bring non-cash values forward to 18 January 1991. If such interest rates are not agreed accordingly, I invite memoranda as to appropriate application.

The account at the date of final judgment

[206] I turn to address the position for final judgment. Trial's focus primarily was on valuation of the partnership's assets as at 18 December 1991. My findings in relation to those have consequences for the subsequent updating exercise.

[207] As I have outlined,[174] under South African law, pending partnership assets' realisation and distribution post-dissolution, the former partners remain co-owners of them, and their dealings with them are as trustee for the other. (Excluded from that pool are the entities transferred to Mr Kidd).[175] But Ms Snyman-Van Deventer is explicit the former partners have no property interest in those assets on the basis of their former partnership alone.[176]

[208] Ms Snyman-Van Deventer advises, under South African law, "on dissolution each partner is entitled to a share of the surplus according to the proportion of his contribution to the total pool of contributions".[177] (As I have held,[178] the partners' respective contributions are equal. No different proportion falls now to be applied by force of the assets' transfer to Mr Kidd). Thereafter:[179]

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173 Interest on Money Claims Act 2016, s 3(2)(c).
174 At [60]–[62] above.
175 Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79, at [72].
176 At [70].
177 At [87].
178 See [63] above.
179 Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79, at [89]–[90].

> If one of the former partners improperly appropriates a partnership asset and uses it for his own benefit, he will be obliged to account to his former partners for their interest and for their share of the profits of such use.
>
> Similarly, if on dissolution of a partnership the business is continued by one or more partners without realisation and distribution, they are liable to account to the outgoing partners for that portion of the profits which are fairly attributable to the use of the capital contributed by the latter.

Ms Snyman-Van Deventer explains that does not mean "there is an obligation to account merely because there is a retention of assets by one or more former partners after dissolution. It applies to wrongful retention only." She concludes by counterpointing assets' "wrongful retention"[180] with their distribution or retention by agreement.[181] But, absent realisation, someone must continue in possession.

[209] It is unclear to me what may render retention 'wrongful', if not by agreement. Presumably assets will 'wrongly' be retained if dealt with other than on trust for the co-owners. Any use other than on trust for the co-owners is unlawful: except on trust for the co-owners, the retaining party cannot conclude any transaction with the property or use it without the other party's consent.[182] But any independent transactions are for the retaining party's account alone.[183]

[210] I also am unclear if the availability under South African law of the actio pro socio or actio communi dividundo procedures (presumably as part of the lex fori) is founded on a post-dissolution right to respectively distribution or realisation and division of retained assets; and, if so, if that is to distinguish those rights from one to account on dissolution. Ms Snyman-Van Deventer explains, absent agreement, "the *actio pro socio* may in general be brought by a partner to have the partnership liquidated and wound up".[184]

—8.01: Value of Mr van Heeren's property and assets

[211] Because the partnership's remaining assets are in Mr van Heeren's possession, the accountants commence their present-day valuation by valuing the whole of

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180 See [46] above.
181 Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79, at [91].
182 At [94].
183 At [97].
184 At [108].

Mr van Heeren's property and assets, for various deductions to account effectively for those held in trust for Mr Kidd as co-owner. I foreshadowed such an approach may be necessary, given Mr van Heeren's failure to identify, as directed by Fogarty J, the partnership assets in his possession.[185]

[212] The accountants' assessment of Mr van Heeren's property assets differs only by about one per cent. Mr Browning calculates his property to be worth USD 44.382 million; Mr Greyling, USD 43.908 million. Despite their apparent closeness, Mr Browning's calculation is of real estate only; Mr Greyling's includes all assets. The USD 0.474 million difference between the accountants otherwise largely is contributed by Mr Greyling's "COVID-19" discounts to tourism assets, and dates of exchange rate calculations. I do not accept the evidence is sufficient to establish the former.

[213] I consider the accountants' approach at [231] below.

—9.01: Huka Trust

[214] Mr Greyling would deduct the value of Huka Trust at USD 1.959 million as Mr van Heeren's personal property. But I have found "Mr van Heeren acquired the Owner's Cottage for the partnership".[186] No deduction is allowed under this head.

—9.02: WWL preference shares

[215] Mr Greyling also would deduct USD 10.634 million to account for Mr van Heeren's contended redemption and conversion of personal preference shares in WWL to ordinary shares. My finding as to the source of those funds in Genan removes the foundation for the deduction.[187] It is not allowed.

—9.03: St Heliers property proceeds

[216] Although there is no direct evidence to support the proposition — from my findings of the parties' conduct of their partnership, and in particular their acquisition

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185 See the disclosure judgments cited at n 121 above.
186 See [175] above.
187 See [131] above.

of residential properties — I conclude also the USD 2 million proceeds from Mr van Heeren's St Heliers residential property's sale were retained in Genan, half going to acquire his subsequent residential property at Brasschaat in Belgium. Given my earlier findings,[188] I would allow deduction of the USD 1 million balance under this head.

—9.04: Brasschaat property proceeds

[217] For the same reason, I would allow deduction of the USD 3.554 million proceeds on sale of Mr van Heeren's residential property at Brasschaat in Belgium.

—10.01: Adjustment for Huka Trust related party loans

[218] The accountants agree related party loans within Huka Trust should be added back. Their reasons differ: Mr Browning says they are partnership assets; Mr Greyling, as a corollary of his exclusion of Huka Trust as Mr van Heeren's personal property. Given my finding as to the latter,[189] Mr Browning's analysis must be correct. The amount for inclusion is USD 1.456 million, which Mr Browning takes up in adjustments to the values of the related parties.

—10.02: "Unaccounted" cash

[219] Mr Browning identifies some USD 12.417 million in transactions conducted by Mr van Heeren in the period after 18 January 1991 to further reduce the USD 25.306 million cash Mr Browning contended then remained unaccounted to USD 3.623 million. My adoption of the cash sheets' 18 January 1991 balances, subject to such adjustments as I held established,[190] means there is no unaccounted balance. The additional transactions are taken up in Mr Browning's current valuations of the former partnership's assets.

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188 See [126] and [156] above.
189 See [175] above.
190 See [129] above.

—10.03: Adjusted value of 17 partnership entities

[220] Mr Browning proposes to increase the pool of partnership assets by some USD 31.704 million. In addition to gains in the assets' values perceived not to be reflected in their current balance sheets, Mr Browning seeks to add back essentially all expenditure and losses incurred since 18 January 1991 as unauthorised.

[221] Under South African law, as I have explained,[191] Mr van Heeren's dealings with the partnership assets after dissolution is as trustee for their co-owners, pending the assets' realisation and division. Those dealings no longer are constrained by partnership obligations. In particular, no agreement is required for any expenditure.[192] Questions of 'authorisation' are immaterial.

[222] The South African law consequences of that position in the present case is unclear. Ms Snyman-Van Deventer is clear no duty to account arises from retention alone, but only 'wrongful' retention.[193] Nonetheless, it may be surprising if a trustee of retained partnership assets had no duty to account to their co-owners. And it may be surprising if that co-ownership was in shares distinct from those at dissolution. But, perhaps because Ms Snyman-Van Deventer's analysis proceeds from instructions:[194]

> … Mr Kidd and Mr van Heeren reached an agreement to dissolve the partnership whereby the assets of the partnership would be distributed between them *in specie* with a final accounting and, if necessary, an equalising cash payment.

I do not know. While the co-owners have a continuing obligation of perfect fairness and good faith to each other, I also am unclear as to the South African law bounds of a trustee's permitted dealings with the assets. As previously indicated,[195] I do not know what in South African law may constitute 'wrongful' retention. After dissolution, but prior to distribution or realisation and division, someone must continue in possession of the former partnership's assets.

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191 See [60]–[62] above.
192 Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79, at [75] and [96].
193 At [91].
194 At [115(iii)].
195 See [209] above.

[223] Given that evidential non-specificity, I proceed on the basis, under South African law, a trustee unilaterally may deal with the former partnership's assets in the co-owners' joint interests. I therefore would disallow Mr Kidd's claims universally to add back losses and expenses. I apprehend, under South African law, it may only be those losses and expenses incurred in breach of either the co-owners' obligation, or the trustee's duty (if distinct from the obligation), as could be claimed for recovery. But that is not how the case was run, and none is argued so to be incurred.

[224] Similarly, I comprehend the trustee's post-dissolution introduction of funds without breach of duty is recoverable to the trustee,[196] meaning commingling of funds makes it appropriate to value each former partnership entity on a standalone basis. If not falling with any of Ms Snyman-Van Deventer's "exceptions", that would be consistent with the 'disconnection' of a former partner's post-dissolution transactions. But one of those exceptions nonetheless requires an account of profits "fairly attributable to the use of the capital contributed by [the outgoing partners]".[197]

[225] I cannot unpick Mr Browning's separate calculations for each of the seventeen partnership entities so as to achieve those comprehensions. If the parties remain unable to agree, it may be the experts (including Mr Jordan) should be reconvened to establish the correct calculation in accordance with this and any subsequent judgment.

—10.04: Adjusted value of 20 additional partnership entities

[226] Mr Browning also identifies some 20 additional partnership entities, in existence at dissolution but since liquidated,[198] for which USD 7.209 million in losses and expenses (as well as profits) similarly are sought to be added back into the partnership asset pool. For the reason I have explained,[199] without something more to qualify them for recovery, I would not allow post-dissolution losses and expenses.

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196 Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79, at [62] and [100].

197 At [98], citing *Monhaupt v Minister of Finance*, above n 113.

198 Stitchting Administratiekantoor African Retreats; Innax Group BV; Montreal, Maine & Atlantic Corporation; TIE Holding NV; Newconomy; European Hotel Management; Budex BV; Pall Mall Capital Ltd; Pedal Trading 147 (Pty) Ltd; Pedal Trading 134 (Pty Ltd); Carlyle Russia Ltd; Forbes SA; Nomad Freight (Pty) Ltd; Dibeen Investments Ltd; Gerda Foundation; STAK Arello Holdings; Arello Investments BV; MB Primoris Ltd; Mont Blanc Financial Services; and Forestry Corp Chartering New Zealand NV.

199 See [223] above.

[227] Mr Greyling suggests any liquidated entity's positive closing position likely was transferred into one of the extant partnership entities and taken into account there. Of particular focus is an adjusted USD 4.529 million net asset value from Dibeen Investments Ltd's final accounts at 31 December 2003. At that date, the final accounts recorded the company's net retained profit of USD 0.416 million. To that figure Mr Browning has added back: expenses of USD 0.086 million; loan repayment to Mr van Heeren of USD 2.349 million; profit distributions to Mr van Heeren of USD 0.321 million; and payment to Mr van Heeren by Dunsel for Dibeen's shares of USD 0.874 million, seemingly on grounds he was not certain any of those transactions occurred. Mr O'Callahan argued in closing there was "no evidence" Dibeen's assets "were contributed to the other entities".

[228] I allowed USD 2.387 million on account of Dibeen at 18 January 1991.[200] Mr Browning's notes to his analysis of Dibeen's final account identifies "[Dunsel's] minute authorising the purchase of the shares in Dibeen held by Mr and Mrs van Heeren for the amount of US$874,058", and records "Amount due to APVH per 1992 AFS[:] 2,348,552". Some evidence therefore underlies the final account in 2003. I understand Dunsel's accounts do not specifically identify the share purchase payment, and Mr van Heeren's private bank records are not available. Nonetheless, I am not prepared to assume, without more, apparently regular company records are false.[201]

[229] Regardless, I cannot unpick Mr Browning's separate calculations for each of these additional 20 partnership entities either. The same experts' conference referred to at [225] above may be required to resolve the position.

—10.05: Briar

[230] I allowed USD 0.342 million on account of Briar as at 18 January 1991. Mr Browning simply would carry that value forward as making up a portion of the value of Mr van Heeren's present-day property and assets. Mr Greyling says it is unreasonable to assume Briar is unchanged now, 30 years on.

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200 See [181] above.
201 See [96] above.

[231] This gives rise to an issue about Mr Browning's approach, which must be informed by principles of following or tracing for recovery.[202] Ms Snyman-Van Deventer advises:[203]

> [70] The South African law does not recognise the concepts of equitable tracing or the constructive trust. To claim a property interest (the division of a partnership asset) after dissolution a claimant must prove that his former partner wrongfully retained possession of a partnership asset or assets after the partnership was dissolved. In that case the law regards the former partners as co-owners of the wrongfully retained partnership asset/s. As a co-owner, the claimant partner could then institute the *actio communi dividundo* to claim a division of that asset/s.

But the alternative is lex fori procedures. In New Zealand, that includes an equitable remedy enabled by tracing (otherwise, "the nearest approach practicable to substantial justice").[204]

[232] To be clear:[205]

> There is no such thing as a stand-alone cause of action of tracing. What tracing can do for a company is to transform the unsecured breach of fiduciary duty claim into a proprietary interest in property by showing that company funds have, in breach of constructive trust, been put into a property which represents those funds in whole or in part, and from which they can be recovered. It is a process that can be used by a claimant to show what has happened to misappropriated property, and where it is now. It involves one form of property interest being properly regarded as substituted for another.

[233] The essential elements of tracing are (a) the claimant has an equitable interest in an identified asset, and (b) the traced property represents that original asset.[206] Critically, tracing will fail if the asset ceases independently to exist (or at all).[207] While there can be no doubt Mr Kidd has an equitable interest in the former partnership's assets, it is not enough simply to assert they continue to exist. And, even if they can

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202 *Halsbury's Laws of England* (5th ed, 2014, online ed) vol 47 Equitable Jurisdiction at [238].
203 Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79.
204 *Sinclair v Brougham* [1914] AC 398 (HL) at 424.
205 *The Fish Man Ltd (in liq) v Hadfield* [2017] NZCA 589, [2018] 2 NZLR 428 at [62] (footnotes omitted), citing *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) at 334 and *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102 at 127.
206 Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) at [35.1.6].
207 At [35.3.6(1)].

be shown to continue to exist within Mr van Heeren's assets, remedial issues may arise depending if his possession of them is as trustee, or otherwise as "wrongful".[208]

[234] Although Mr Kidd's is made as a "proprietary/tracing" claim, little submission was addressed to it. Because Mr Browning's approach is to assume, absent proof to the contrary, all Mr van Heeren's present property and assets derive from the partnership assets, the second essential element of tracing may not be met in principle. But that has not adequately been addressed at trial. It may require submissions after any further experts' conference.

—10.06: Gold account

[235] Similarly, Mr Browning would carry forward the 67.331 kg of gold to its present-day value of USD 4.193 million. My prior comments about tracing apply.

—10.07: Other gold

[236] Given my finding the unaccounted balance of Mr van Heeren's gold is not for the partnership account,[209] I disallow Mr Kidd's claim under this head.

—10.08–10.17: Mr van Heeren's personal expenditure and remuneration

[237] Mr Browning seeks to recover some USD 32.350 million under a variety of heads relating to Mr van Heeren's post-dissolution expenditure and remuneration. With the exception of the 10.15 claim — to recover profit from, and add back losses incurred on, the sale of residential properties acquired during the partnership, together amounting to USD 1.690 million — these claims may fail as inconsistent with the former partners' post-dissolution relationship only as co-owners of partnership assets, without property rights absent wrongful retention, and not as continuing partners. The 10.15 claim may face the same constraints as applied to the other residential properties.

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208 *Re Registered Securities Ltd* [1991] 1 NZLR 545 (CA); and *Fortex Group Ltd (in rec and liq) v MacIntosh* [1998] 3 NZLR 171 (CA).

209 See [188] above.

—11.01–11.02: Litigation expenses, payments to Ms van Heeren-Hermans

[238] Also sought to be added back is the total amount of Mr van Heeren's litigation expenses and matrimonial settlement payments. Again, these claims may fail as inconsistent with the former partners' post-dissolution relationship. In relation to this and the preceding heads of post-dissolution claim, further submissions may necessary to address the impact of the former partners' post-dissolution relationship under South African law.

—12.01–12.02: Adjustments

[239] The last issue is the proportionate split to be applied to the final account. Mr Browning would claim 50 per cent of the net traced assets for Mr Kidd; Mr Greyling would allow only that proportionate to Mr Kidd's share of the undistributed assets.

[240] Using my figures at [201] and [203] above, Mr Kidd already had USD 7.836 million of his USD 25.448 million share of the USD 50.895 million partnership asset value at 18 January 1991. That is to say, roughly, he already had 15 per cent, and was entitled to another 35 per cent, of the partnership asset pool at 18 January 1991. I understand Mr Greyling to propose, therefore, Mr Kidd only should be entitled to 35 per cent of the partnership asset pool at its current value.

[241] Mr Greyling's analysis appears to rely on Mr Kidd's interest being in a partially paid debt as at 18 January 1991. But Ms Snyman-Van Deventer is clear: no debt arises until the partnership assets are realised and distributed for division.[210] Mr Kidd's interest as co-owner of the undistributed assets remains in equal shares with Mr van Heeren, being "fairly attributable" to his equal contributions to the partnership.

Result

[242] I **order** disbursement to Mr Kidd in the amount of USD 17.612 million from the USD 25 million interim payment held by the Court, as an advance on a final accounting yet to be concluded.

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[210] Brief of Evidence of Elizabeth Snyman-Van Deventer, above n 79, at [94].

[243] I further invite Mr Kidd now to seek additional disbursement of up to the balance of the USD 25 million interim payment, by reference to the interest calculation I have specified at [205] above.

Next steps

[244] As I have outlined, outstanding issues include evidence of:

(a) adjustments for partnership cash and interest to 18 January 1991;[211] and

(b) recalculation of the 17 and 20 companies' present-day values.[212]

Submissions will be required to address the former partners' post dissolution relationship. Counsel also may wish to consider if further expert evidence is necessary on 'wrongful' retention under South African law.[213]

[245] I therefore **direct** counsel to confer on a proposed timetable to conclude the accounting in accordance with this judgment, for filing of (desirably, joint) memoranda by **Friday, 2 July 2021** (but any response or reply within five working days after service).

—Jagose J

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211 See [130] and [205] above.
212 See [225] and [229] above.
213 See [222]–[223] above.

Schedule 1: text of Ms Snyman-Van Deventer's brief (footnotes omitted)

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8. I am responsible for the 2021 update of Bamford *The Law of Partnership and Voluntary Association in South Africa* (hereafter *Bamford on Partnership*) and were also responsible with prof JJ Henning for two updates (1997 and 2015) of Volume 19 The Law of Partnership in the *Law of South Africa* (hereafter LAWSA Vol 19). *Bamford on Partnership* and LAWSA Vol 19 are the standard works on the South African law of partnership and are most often quoted by the South African courts. Both works are a statement of the law only and not a typical textbook or academic discussion or criticism of the law.

9. I have written 43 academic articles published in accredited journals. I am the author and co-author of 15 articles on the law of partnership.

[3] BRIEF HISTORIC BACKGROUND OF THE SOUTH AFRICAN LAW OF PARTNERSHIP

10. South Africa did not adopt either the Partnership Act 1890 or the Limited Partnership Act 1907 of the UK. The English law of partnership may serve as a guide, but it is not binding and recent decisions of the South African Supreme Court of Appeal do not contain any reference to the English law of partnership. There is no comprehensive partnership legislation in South Africa and the law of partnership consists of the South African common law mainly derived from the Roman-Dutch law (Voet, Grotius, Vinnius, Van Leeuwen, Huber etc) and especially the treatise on partnership of Pothier and also in the 1990s Felicius.

11. The importance of the Roman-Dutch law in particular, lies thus in the fact that Roman-Dutch law is deemed to be common law for those sections of South African law where there are no accepted legal principles. In the case of the law of partnership, the principles of Roman-Dutch law, among others eg. Pothier, serve as the primary authority, especially in pertaining to issues on which the Supreme Court of Appeal has not yet expressed itself.

12. The principles and application of these principles pertaining to the South African law of partnership are to be determined from the judgments of the South African courts including judgments from the courts of Rhodesia (now Zimbabwe) and South West Africa (now Namibia). Bamford on Partnership and LAWSA Vol 19 established the principles of the South African law of partnership based on these judgments and the common law authorities.

[4] GENERAL DEFINITION OF PARTNERSHIP

13. [Bamford] A partnership is a legal relationship arising from an agreement between two or more persons each to contribute to an enterprise with the object of making profits and to divide such profits.

14. A partnership can be formed orally or in writing, but it can also be formed tacitly through conduct.

[5] PROPER LAW OF THE CONTRACT

15. Matters of substance are regulated by the lex causae, ie the proper law of the partnership contract. In the present instance this is, in my opinion, the law of South Africa. I am instructed that there is no dispute that the partnership between Mr Kidd and Mr van Heeren was formed in South Africa at a time when both were domiciled in South Africa. I am further instructed that the partnership at this time was centered around steel trading conducted by or on behalf of Galaxy Export/Import Company (also known as Tisco), a South African company, and that this continued throughout. I am instructed, and I see from the judgment of Satchwell J, that later on there were other ventures in other jurisdictions, but there seems to be no suggestion they were anything other than parts of the one partnership. I observe also that at least some of the dissolution discussions and agreement occurred in South Africa.

16. Satchwell J applied the South African law of partnership to make the partnership finding at [126] of the judgment of the High Court of South Africa dated 20 May 2013.

17. The South African law of partnership must therefore regulate all aspects pertaining to the partnership formed in South Africa. Issues such as dissolution, the valuation of shares and the division of profits are substantive issues and in my opinion should therefore be determined with reference to the principles of South African law.

…

[5] ESSENTIALIA OF PARTNERSHIP TO DETERMINE IF A PARTNERSHIP EXISTS

20. I have been asked to address the *essentialia* of partnership to assist the Court in determining when the partnership between Kidd and Van Heeren terminated or was dissolved. I am instructed that the question of dissolution arises as a result of obiter statements by his Honour, Fogarty J, which assume that the partnership between Mr Kidd and Mr van Heeren still subsists to this day.

21. [Snyman and Henning] When determining the existence of partnership, it is necessary to establish whether the *essentialia* of a partnership are present.

22. [LAWSA] In South African law Pothier's description of the essentials of a partnership is generally relied upon. In *Joubert v Tarry and Co* these are stated as four essentials, namely:

i. every partner must contribute something to the partnership or bind himself to making a contribution, whether such contribution be money, labour or expertise;

ii. the business must be conducted to the joint benefit of all the parties;

iii. the objective of the partnership should be to accrue and distribute profit; and

iv. the agreement between the parties must be a legitimate or legal agreement.

23. This has been confirmed in the South African Supreme Court of Appeal in *Pezzutto v Dreyer*, namely:

> "(1) that each of the partners brings something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit. … In essence, therefore, a partnership is the carrying on of a business (to which each of the partners contributes) in common for the joint benefit of the parties with a view to making a profit".

24. It is therefore clear that it is necessary, inter alia, that there should be a contribution by every partner to the joint business with a view to the making and sharing of profits.

25. Apart from the essentialia, the intention of the parties is regularly referred to and it is stated that the intention of the parties shall be conclusive, even in the presence of all the essentials.

26. [Snyman and Henning] Where all four of these requirements are present and in the absence of evidence to the contrary that the agreement between the parties is not a partnership agreement, the courts must conclude that it is a partnership. The way in which the partnership agreement is established is not important, but what is of importance is the intention of the parties wishing to create the partnership.

27. [Snyman and Henning] The presence of all the essentials of the partnership serve as *prima facie* evidence that the intention exists to create a partnership. In such case the courts will rule that a partnership was established, unless such a conclusion is negated when in the light of other acceptable evidence to the contrary some other intention transpires from the agreement.

28. [Snyman and Henning] In determining the true intention of the parties, the entire agreement must be examined. The fact that profits are shared is a strong indication that a partnership exists, but it is not regarded as conclusive evidence. In order to determine the real intention of the parties, the court must take all the acceptable evidence into account. In every case the terms of the particular partnership agreement must be considered, as well as other circumstantial evidence such as the conduct of the parties, the circumstances in which the contract was concluded, the object of the transaction and the express intention or declaration of the parties.

29. As I will explain in more detail below, the absence of the *essentialia* can indicate the termination or dissolution of the partnership. As the intention of the parties shall be conclusive, even in the presence of all the essentials, an agreement between partners to dissolve the partnership results in the termination or dissolution of the partnership.

30. My conclusion, which I will also explain in more detail below, is that the agreement between Mr Kidd and Mr Van Heeren to end the partnership and their business together dissolved the partnership. The reason is twofold, namely their intention to dissolve the partnership and the absence of the essentialia after dissolution.

CONTRIBUTION BY PARTNERS

31. [Bamford] One of the duties of partners is that each partner must make a contribution to the partnership or undertake to make a contribution. This contribution may be capital or labour, knowledge, skill, experience or expertise.

32. In *Pezzutto v Dreyer* the court stressed that while "the contribution to be made by each partner need not be of the same character, quantity or value, each partner must contribute something 'appreciable', ie something of commercial value."

33. [Bamford] Where the partner contributes his knowledge, skill or labour, the value thereof forms part of the partnership estate, but the partner's co-partners have only a claimant's right to demand the delivery of the labour, knowledge or skills. The partner will be liable for damage suffered by the partnership should he not provide the knowledge and skills that he promised to contribute to the partnership.

34. [LAWSA] The partner is obliged to contribute that which he promised to the partnership.

35. [Bamford] If more than the use of goods is contributed, the fruits of the enterprise such as interest is also the property of the partnership.

36. [LAWSA] The contribution must be subjected to the risk of the business.

37. Therefore, a partner cannot claim to share in profit of a business where no contribution of the partner was subject to the risk of the partnership.

JOINT BUSINESS FOR MUTUAL BENEFIT

38. [LAWSA] This requirement entails two separate *essentialia*:

(i) Business to be carried on in common

39. The English Partnership Act of 1890 requires, for the establishment of a partnership, *inter alia*, the "carrying on [of] a business in common". Neither Pothier, nor other Roman-Dutch law authorities on partnership expressly mention this *essentiale*. Pothier merely states that there should be an "intérêt commun" (common interest). It has, however, been held that "'carrying on business in common' in the English definition and Pothier's requisite of 'gemeen belang' connote the same idea". That a partnership consists of the carrying on of a business, has been stated repeatedly.

40. A business is "anything which occupies the time and attention and labour of a man for the purpose of profit". For partnership purposes the business need not be of a continuous nature: a joint venture in a single transaction can constitute a valid partnership.

41. More than one business can be carried on by the same partnership and these businesses need not be of the same nature.

42. The business must be carried on in common. This means in the first place that a business arrangement by which each party can act independently of the others and in his sole interest cannot be a partnership. Thus, a partnership is not established where each party is free to deal with or to dispose of his total interest in the business when and how he desires.

43. In the second place, carrying on a business in common implies that each party should be engaged as a principal in the venture and not merely as an agent or employee of the others. This does not mean, however, that each party should have a share in the management of the partnership, for it is clear that a partnership can be formed on the basis that only one partner is clothed with management responsibilities.

44. In South African law a partnership is constituted by means of an agreement to carry on business. It is therefore not required that the partners actually commence with business before the partnership is established.

(ii) Joint benefit of all parties

45. This requirement implies, in the first place, that a partnership cannot be formed if each party is entitled to obtain an individual benefit from the business. Thus, for example, an investment in shares cannot be a partnership if the object is not to

make a profit jointly, but that each party, individually, should obtain half of the shares for his exclusive advantage.

46. The second implication of this requirement is that a partnership cannot exist where the benefit obtained is not a joint one but a benefit to one or some parties only. In practical terms it means that each partner is to share in the gains or profits. A partnership cannot therefore be established on the basis that one "partner" is to receive all the profits whilst the others have to bear all the loss. This does not mean that the respective shares have to be equal in value. A partner can be given a conditional share in the profits, for example, that he would be entitled to a share in the profits only after certain projections have been met.

47. From the fact that the benefit must be a joint benefit, it follows that a partnership cannot exist where the benefit obtained is to no party's advantage.

DIVISION AND SHARING OF PROFIT

48. [Bamford] The main objective of a partnership is in principle always profit making, whether commercial profit or any other form of proprietary benefit. If not, it is not a partnership.

49. [Bamford] The right to share in the profit of the partnership is an essential element of the partnership. The objective of the partnership is to make a profit for joint distribution. Each partner has the right to share in the profit and no partner may be excluded from sharing in the profits.

50. The term *societas leonine* has been used to regarding an agreement where one or some participants share the profits, while some does not share in any of the profits.

51. [LAWSA] Partners are free to determine the amount of each partner's share in the partnership agreement. As long as it is clear that each partner receives a share of the profits, it does not matter if the formula which is used for the determination of the respective shares is complex or unusual.

52. [Bamford] A partner may therefore be legally excluded from sharing in the net loss, but a partnership cannot be constituted in such a way that one partner takes all the profit and the other must bear all the losses.

53. [Bamford] If no contract exists that prescribes how the profits should be shared, the partners must share *pro rata* in the profit. The partners' share of the profit is therefore calculated according to the contributions each one made. There is no presumption of equal sharing.

54. From Bamford (directly quoted i-ix) the following can be summarised:

i. Each partner must allow his co-partner the latter's agreed share of the profits and must bear his own share of the losses.

ii. There is no presumption that, in the absence of agreement, partners have equal shares.

iii. The general rule is that division of the profits will be proportionate to the value of the contribution of each partner to the partnership.

iv. If the contributions are equal, or if they are incapable of evaluation,58 the partners will have equal shares.

v. Partners may agree on any proportions.

vi. A partner who has contributed more than his co-partner may be entitled to draw more of the profits.

vii. It may be agreed that the shares of profit and loss be left to the discretion of a third party, or even that they will be regulated from time to time by one of the partners; in the latter event, however, the partners are not bound by an apportionment which is inequitable.

viii. In the absence of contrary agreement: 'the basis adopted upon which to ascertain if there are profits should also be the basis when instead of a profit there is a loss resulting from the business'.

55. [LAWSA] Unless the partners have agreed otherwise, each partner is obliged to share in the net losses of the firm. In the absence of any contrary agreement in this respect, the general rule is that the net losses must be shared in the same proportion as the profits.

56. [LAWSA] Partners may refer the determination of their respective shares in the profits to a third party or even to a particular partner.

[6] COMPENSATION

57. [LAWSA] Under ordinary circumstances, and in the absence of any express or implied agreement to that effect, a partner is not entitled to claim remuneration for services rendered by him to the partnership.

58. [LAWSA] Partners are not prevented from agreeing that one of them is to receive a salary in consideration of his taking a larger or more skilled share in the management of the partnership affairs. In the absence of such an agreement, each partner is expected to perform all the duties contemplated by the contract without any fee or reward.

59. [LAWSA] If, however, a partner has performed special work beyond that performed by the others, and which was not contemplated as part of his duties under the contract, he will be entitled to claim remuneration for his services. Such remuneration must be paid to a partner after payment of partnership creditors, and before a division of the net profits.

60. [LAWSA] A partner is not entitled to any interest on his capital contributions to the partnership, unless payment of interest has been agreed upon. Where the partners have agreed on the payment of interest, the partners are not entitled to interest on such interest, unless there are special circumstances present, such as where the accrued interest is also left in the firm as capital.

61. [LAWSA] A partner is entitled to be refunded for expenses which he has incurred in connection with partnership affairs over and above his own share.

62. [LAWSA] A partner who pays a partnership creditor out of his own pocket, or who spends his own money on the maintenance of partnership property, is therefore entitled to a refund from the partnership.

63. [LAWSA] A partner is similarly entitled to be indemnified for losses which he personally sustained whilst carrying on the business of the partnership, provided that it can be said that the risk of such losses are directly and inseparably tied up with carrying on the partnership affairs. Interest on these items can also be claimed.

64. These principles imply that a partner who is alone responsible for the management of a partnership and the running of the business, has a right to compensation and for payment of costs and maintenance. In *Britannia Gold Mining Co v Yockmonitz* it was held that a partner does not breach his or her fiduciary duty towards the partnership by receiving an *honorarium* for special services from his or her co-partners.

[7] REMEDIES

65. I have been asked to explain the actions available to partners under South African law to assist the Court in determining the remedies available to partners in the absence of the concepts of equitable tracing or the constructive trust. These are the common law *actio pro socio* and the *actio communi dividundo*.

66. The common law *actio pro socio* has become part of the South Africa law of partnership as the action by which partners' mutual rights and duties can be enforced.

67. [LAWSA] Henning and Delport accurately propose that the current position in respect of the *actio pro socio* in South African law can be summarised as follows: First, the *actio pro socio* can be instituted by a partner against a fellow partner while the partnership still exists, specifically to demand the fulfilment of the partnership agreement, along with the fulfilment of personal responsibilities arising from the partnership agreement and the business. Secondly, it can be brought to demand the dissolution and liquidation of the partnership. Finally, the action can be instituted after the dissolution of the partnership to enforce the partners' rights and duties, or to claim a division of specific or all partnership assets.

68. [LAWSA] Apart from the *actio pro socio*, a partner can also employ the *actio communi dividundo* after termination of the partnership in order to have jointly owned partnership assets divided. This action can also be used to claim ancillary relief such as payment of expenses incurred in connection with the joint property.

69. [LAWSA] Where the partners cannot agree on the method of dividing a particular jointly owned partnership asset, or where a partner should retain possession of such an asset after dissolution, a partner can, as co-owner of the asset, institute the *actio communi dividundo* to claim a division of that asset.

70. The South African law does not recognise the concepts of equitable tracing or the constructive trust. To claim a property interest (the division of a partnership asset) after dissolution a claimant must prove that his former partner wrongfully retained possession of a partnership asset or assets after the partnership was dissolved. In that case the law regards the former partners as co-owners of the wrongfully retained partnership asset/s. As a co-owner, the claimant partner could then institute the *actio communi dividundo* to claim a division of that asset/s.

71. Where a former partner continues trading with wrongfully retained partnership assets, he must account for any profits made:

> '... if on the dissolution of a partnership the business is continued without any realization and distribution, by one or more of the partners, they do so as trustees for the others, and are liable to account to the outgoing partners for that portion of the profits which is fairly attributable to the use of the capital contributed by them.'

72. This would not apply where it is agreed that one partner, or several remaining partners, will keep the assets or specific assets or carry on the business. That is, the *actio communi dividundo* would not be available in respect of assets distributed to or retained by a former partner by agreement. Similarly, where a partnership asset is distributed to or retained by a former partner by agreement, the former co-partner has no right to any profits made post-dissolution.

[8] DISSOLUTION OF PARTNERSHIP

73. [LAWSA] Partnership as a contract can be dissolved by an agreement, express or implied, between all the partners to that effect.

74. There is no statutory formalities link to dissolution, but wide publicity should be given to the dissolution to ensure that third parties are informed that the partnership does not exist anymore. If not and partners give the impression that the partnership is still in existence, the partners may be liable though estoppel.

75. [LAWSA] Dissolution affects the relationship between the partners inter se and between the partners and third parties. The relationship inter se is not terminated, but alters dramatically. The relationship only ends with liquidation of the partnership estate and final settlement between the partners. Good faith still exists. However, the partnership agreement is terminated and mutual mandate is terminated.

76. [LAWSA] Liquidation is the realisation of assets, payment of creditors and distribution of assets. A liquidation need not, however, always be resorted to. Where, for example, partners agree that the dissolved partnership's assets and liabilities are to be taken over by a new firm, and an outgoing partner is to be paid a fixed sum representing his share in the firm, a formal or general liquidation of the partnership is not required.

77. [LAWSA] Where the partnership is dissolved by agreement, the consequences do not follow unless the dissolution was *bona fide*. Hence, notwithstanding publication of dissolution in the *Government Gazette*, the partners will continue to be *de facto* partners after the purported date of dissolution if there was no genuine dissolution of partnership on that date – for example if the partners in fact continued to carry on business in common.

78. [Bamford] It has been stated in regard to the duty of good faith:

> 'This obligation of perfect fairness and good faith is, moreover, not confined to persons who actually are partners. It extends . . . also to persons who have dissolved partnership but who have not yet completely wound up and settled the partnership affairs.'
>
> 'While partners are undoubtedly obliged to act in good faith in their dealings with one another, it is not a rule of our law that a partner who suspects another partner of misconduct is obliged, in effect, to apply the *audi alteram partem* rule before exercising a contractual right to dissolve the partnership…'.

79. [LAWSA] During the course of the winding-up of the affairs of the partnership a partner is still entitled to expect perfect fairness and good faith from his former partners.

80. [LAWSA] Unless otherwise provided in the dissolution agreement,88 no provision of the partnership agreement is binding after dissolution.

81. [LAWSA] If the dissolution is made dependent on a condition, the rights and duties of the partners remain unchanged until the condition is fulfilled.

82. [Bamford] Duties implied by law remain and a partner may exercise this right whatever his motive.

83. [LAWSA] Dissolution does not put an end to the debts of each of the former partners to the partnership or to those of the partnership to each of the former partners, or partnership.

84. As well: "The partnership (whether the old or the new one) was dissolved by the liquidation of one of the partners, namely HAS. A former partner has no proprietary claim in respect of the property of a dissolved partnership. The claim is at best for a proportionate share of the proceeds after liquidation of the partnership because, as Prof Beinart mentioned, common partnership property falls for division between the partners on dissolution, which, in the case of an indivisible object such as the Falcon, means that it has to be liquidated."

85. According to Beinart "partners have each an undivided share in the capital along with other partnership property, and on dissolution they will take their respective shares".

86. [LAWSA] In the absence of a contrary agreement, a partner's capital is to be repaid to him or her upon dissolution of the firm: each partner receives what he or she has risked in the business should there be a surplus of assets.

87. This indicates a significant difference between the South African law and the New Zealand law. Absent agreement on equal sharing, South African law is clear that on dissolution each partner is entitled to a share of the surplus according to the proportion of his contribution to the total pool of contributions. It is only when it is impossible to determine that one contributed more than the other that the partners will share equally or when there was an agreement to that effect. This is contrary to s 27(a) of the New Zealand Partnership Act 1908, which I am instructed sets out a presumption of equal sharing.

88. Under South African law, the partner must prove his entitlement to the equal share of assets.

89. [LAWSA] If one of the former partners improperly appropriates a partnership asset and uses it for his own benefit, he will be obliged to account to his former partners for their interest and for their share of the profits of such use.

90. [LAWSA] Similarly, if on dissolution of a partnership the business is continued by one or more partners without realisation and distribution, they are liable to account to the outgoing partners for that portion of the profits which are fairly attributable to the use of the capital contributed by the latter.

91. [LAWSA] This does not mean, however, that a partnership agreement is regarded as extending beyond the dissolution so as to include the period of such improper use. Nor does it mean there is an obligation to account merely because there is a retention of assets by one or more former partners after dissolution. It applies to wrongful retention only. If assets are distributed or retained by a former partner by agreement, the other former co-partner has no right to the assets or to any profits made post-dissolution.

92. [LAWSA] Former partners are also entitled to their share of the profits and their share of the losses arising from transactions which are a necessary result of transactions commenced or concluded prior to dissolution.

93. According to Felicius "profits gained from transactions newly started after the dissolution of a partnership need not be shared."

94. In *Maraisdrif (Edms) Bpk v Lee* the High Court of South Africa stated that the relationship between the partners as such is for all intents and purposes terminated on dissolution and that after dissolution their relationship is merely that of co-owners of joint property or of a joint estate. That applies only up until division of the partnership assets. The Court further stated that after dissolution, one partner cannot conclude any transaction on behalf of the other partner.

95. [Bamford] Rights vested in a partnership remain and may be divided among the former partners in accordance with their dissolution agreement, or may be sold by a liquidator:

> A partner or an ex-partner is not entitled to the use of the partnership property especially in the absence of the consent of the other partner or … the liquidator…"

96. [LAWSA] As far as the relationship between the partners is concerned, the primary consequence of dissolution of the partnership is that their implied authority (mutual mandate) is terminated. Consequently, subject to a number of exceptions, all new transactions entered into by a partner, which are unconnected with the liquidation or not necessarily consequential to transactions which occurred during the existence of the partnership, do not bind his former partners but are for his own account alone.

97. [Bamford] Dissolution normally ipso facto terminates the authority of a partner to bind the partnership and his co-partners, and all rights and duties acquired by him after dissolution are, even if contracted on behalf of the partnership, for his account alone.

98. [Bamford] To this, however, there are a number of exceptions, and one of these exceptions is: Where a partner [without agreement] continues trading with partnership assets, he must account for any profits made:

> '... if on the dissolution of a partnership the business is continued without any realization and distribution, by one or more of the partners, they do so as trustees for the others, and are liable to account to the outgoing partners for that portion of the profits which is fairly attributable to the use of the capital contributed by them.'

99. If however the assets have been distributed or retained on dissolution by agreement, then this will not apply. The former partnership assets will at that point cease to be partnership assets.

[LAWSA] Although the bonds of the partners' further association are dissolved, the relationship between the partners is finally terminated only when the liquidation of the firm is completed.

100.[LAWSA] Property contributed *quoad usum* can on dissolution of the partnership immediately be reclaimed in whole by the contributing partner. It is not subject to sale and division between the partners. Compensation for fair wear and tear cannot be claimed, but the contributing partner is entitled to the fruits and any appreciation in

value of such property. Property contributed *quoad dominium* falls for division between the partners on dissolution. It remains common property and each partner normally has the right to continue in joint possession for the purpose of liquidation.

101.[LAWSA] The general rule is that partners are not considered as debtors and creditors *inter se* until there has been a final or prior binding settlement of accounts and that a partner has no right of action against another partner for payment of any amount owed to him in connection with partnership affairs unless the firm's accounts are settled and a credit balance remains due to the partner.

102.[LAWSA] Hence, actual repayment of money taken by a partner from the partnership funds is necessary on dissolution of the partnership only when the partner's liability to the firm exceeds what is due out of the partnership fund to him, and then only to the extent of the excess.

103.[LAWSA] Upon dissolution of a partnership, each partner has a right against his co-partners to have the partnership property applied in payment of the partnership debts, and to have the surplus assets, if any, applied in payment of what may be due to him after deducting what may be due by him to the firm.

104.[LAWSA] This usually entails that the partnership must be liquidated, that is, a realisation of assets, payment of creditors and distribution of assets must take place. A liquidation need not, however, always be resorted to. Where, for example, partners agree that the dissolved partnership's assets and liabilities are to be taken over by a new firm, and an outgoing partner is to be paid a sum representing his share in the firm, a formal or general liquidation of the partnership is not required.

105.[LAWSA] Although dissolution by the withdrawal of a partner in theory requires a liquidation of the partnership, in practice the remaining partners more often than not take over the business of the partnership, and the assets, either in terms of an express partnership agreement or by an express or tacit dissolution agreement.

106.[LAWSA] It is only in the absence of such agreement that formal liquidation takes place.

107.[LAWSA] Where partners agree, either in the partnership agreement or at a later stage, on the manner in which the partnership is to be liquidated upon dissolution, any partner can, upon dissolution of the firm, employ the *actio pro socio* to claim specific performance of such an agreement.

108.[LAWSA] In the absence of an agreement to this effect, the *actio pro socio* may in general be brought by a partner to have the partnership liquidated and wound up.

109.[LAWSA] It is not, however, the function of the court to act as liquidator, and an action cannot be brought against a co-partner which will cast this duty upon the court. Neither can a partner appropriate the sole right to liquidate the partnership. As a general rule therefore, in the event of disputes arising between the partners concerning the liquidation, the proper procedure is to appoint a liquidator to realise the partnership assets for the purpose of liquidating the partnership debts and to distribute the balance of the assets or their proceeds amongst the partners. This procedure is nevertheless not mandatory in all cases.

110. [LAWSA] Thus, in appropriate cases a partner may, for purposes of liquidating the partnership, claim an account from his co-partner together with a rebate on it and payment of what is found to be due. A partner may also present an account

to his co-partners and claim from them what is allegedly due to him in terms of that account: if the correctness of the account is disputed, the court will settle the account, provided that the issues between the parties are restricted and properly defined.

111. [LAWSA] Furthermore, if, after a distribution of assets and payment of creditors, a partner retains possession of a particular partnership asset or assets which have not been included in the distribution, a partner may institute the actio pro socio to claim a distribution of these assets.

112. [LAWSA] Where the partners cannot agree on the method of dividing a particular jointly owned partnership asset, or where a partner should retain possession of such an asset after dissolution, a partner can, as co-owner of the asset, institute the *actio communi dividundo* to claim a division of that asset.

113. [Bamford] A court will in general not set aside a dissolution agreement if the effect is to revive the partnership:

> 'There may well be cases in which the cancellation of a dissolution agreement could have the effect of continuing an existing partnership, or even of reviving a former partnership. The examples that come to mind are those of a partnership in which the dissolution has not yet taken effect, or of a partnership in a particular asset or a particular source of income, or of a partnership reinstated as at the date of dissolution for the sole purpose of bringing all partnership assets properly and fairly to account in a revised dissolution. Here, on the plaintiff's allegations, the partnership ceased on 1 December 1972, and the undoing of the agreement of dissolution at this stage cannot create a general partnership during a period when none existed. The court cannot by a fiction deem the parties to have continued the partnership when, in fact, they did not do so. . . . [The argument that the plaintiffs are claiming nothing more than restitutio in integrum] might have had some validity if the plaintiffs' claim was that they be restored to the status quo ante as at 1 December 1972, so that a fair and proper dissolution as at that date could now be determined. However, the claim is not for that. . . . I have not been able to find . . . any statement of principle or any precedent for a proposition that the court is entitled, in according relief for a dissolution procured by misrepresentation, to resurrect a general partnership which was in fact dissolved and ended so as to impose on the parties the reciprocal rights and obligations of partnership for a period during which they were not in fact partners, and in respect of their business activities during that period transacted entirely outside the bounds of the former partnership.'

114. [LAWSA] If the dissolution of a partnership cannot be effected by agreement and it appears that the renunciation itself or certain aspects thereof will be contested by the other partners, the partner who made the renunciation should approach the court for an order to effect or confirm the dissolution. If, for example, the facts are not clear or there is a likelihood of such a conflict of evidence that it would be preferable to have oral evidence, procedure should be by way of action rather than notice of motion.

APPLICATION

…

[13] SETTLEMENT OF ACCOUNTS

119. [LAWSA] As a general rule partners are not, in so far as partnership transactions are concerned, considered as debtor and creditor inter se until the partnership is wound up or until there is a binding settlement of accounts.

120.[LAWSA] A partner therefore has, as a general rule, no right of action against a co-partner for payment of any amounts owed to him in connection with the partnership's affairs, unless the firm's accounts are settled and there remains a credit balance due to him.

128.[LAWSA] There are two main reasons behind this rule. In the first place, the extent of a partner's share in respect of any specific portion of the partnership assets can be determined only after a settlement of partnership accounts covering a specific time period. In the second place, it should be borne in mind that partners only share in the net profits and losses of the business and not in the gross returns or expenses of each individual transaction. Before the net profits or losses can be determined, a settlement of accounts is necessary.

129.[LAWSA] In certain instances a claim can be instituted by a partner against a co-partner without the necessity of having the partnership accounts settled.

130.[LAWSA] As the general rule requiring a settling of accounts is only applicable where a partner sues for the pro rata share owed to him in connection with the partnership affairs, an action can be maintained without a settlement of accounts where the claim is not one for a share owed, for example, where a partner claims that money be paid into the partnership account or that a co-partner transfer property to the partners in joint ownership.

131.[LAWSA] A claim can also be instituted without a settlement of accounts where the partners specifically agree that payment can be made to a partner regardless of the state of the partnership accounts.

132.[LAWSA] A settlement of accounts is naturally not required where the claim has nothing to do with the partnership affairs but concerns a private dispute between the partners.

133.[LAWSA] The rule that a settlement of accounts is generally required before a partner can sue his co-partner does not mean that there must be agreement as to the correctness of the accounts. In the absence of an express or tacit agreement as to its correctness, a dispute concerning the accounts can be brought to court by means of an action for an account and a debate.

134.[LAWSA] A partner may also by means of an ordinary actio pro socio proceed to claim what is owed to him upon his version of the accounts. If the defendant disputes the correctness of the plaintiff's version of the accounts, a defence can be raised in the pleadings in the usual manner. The court will then settle the dispute, provided that the dispute is of a limited or restricted nature. Where this is not the case, such as where the dispute concerns a wide variety of issues concerning the partnership business, the latter procedure cannot be followed, and the proper action would be for a debatement of the accounts.

135.[LAWSA] Disputes concerning the partnership accounts can also be settled by a third party such as a liquidator.

Schedule 2: partnership assets value at 18 January 1991

		USD million
1.01	Salaries – Tisco (directors' emoluments)	-
1.02	Salaries – other companies (directors' emoluments)	-
1.03	Salaries – WWL (directors' fees)	-
2.01	Dividends from Tisco from 1976 to 1991 inclusive	-
3.01	Interest on shareholder loan balance with Tisco	-
4.01	Drawings – funds received by van Heeren from Genan	-
4.05	Drawings – funds paid to Credit Suisse accounts	0.500
4.06	Drawings – net sales value of St Heliers property	-
5.01	Partnership assets – cash	10.213
5.1.1	—DEM 6 million deposit with BNZ Singapore	7.262
5.1.2	—balance of Wellesley share sale proceeds	-
5.1.6	—funds held in Europe	-
5.1.13–5.1.15	—transfers	2.679
5.02	Partnership assets – Sider liability	-
5.03	Partnership assets – Brasschaat acquisition and renovations	-
5.04	Partnership assets – Fenton Ltd	0.500
5.05	Partnership assets –WWL and Huka Lodge	6.726
5.06	Partnership assets – Optech	0.050
5.07	Partnership assets – Dunsel Investments	7.659
5.08	Partnership assets – Huka Trust	0.240
5.09–5.10, & 5.12	Partnership assets – chartering companies	0.305
5.11	Partnership assets – Dibeen Investments	2.387
5.13	Partnership assets – Briar Trading Ltd	0.342
5.14	Partnership assets – gold bullion and accounts	0.823
5.15	Other gold	-
5.16	Prime International assets	(0.136)
5.17	Berrax NV	(0.004)
6.01	TAS shipment	0.187
6.02	Tisco	1.140
7.01	Drawings added back	10.022
	Interest	[…]
TOTAL		**50.895**