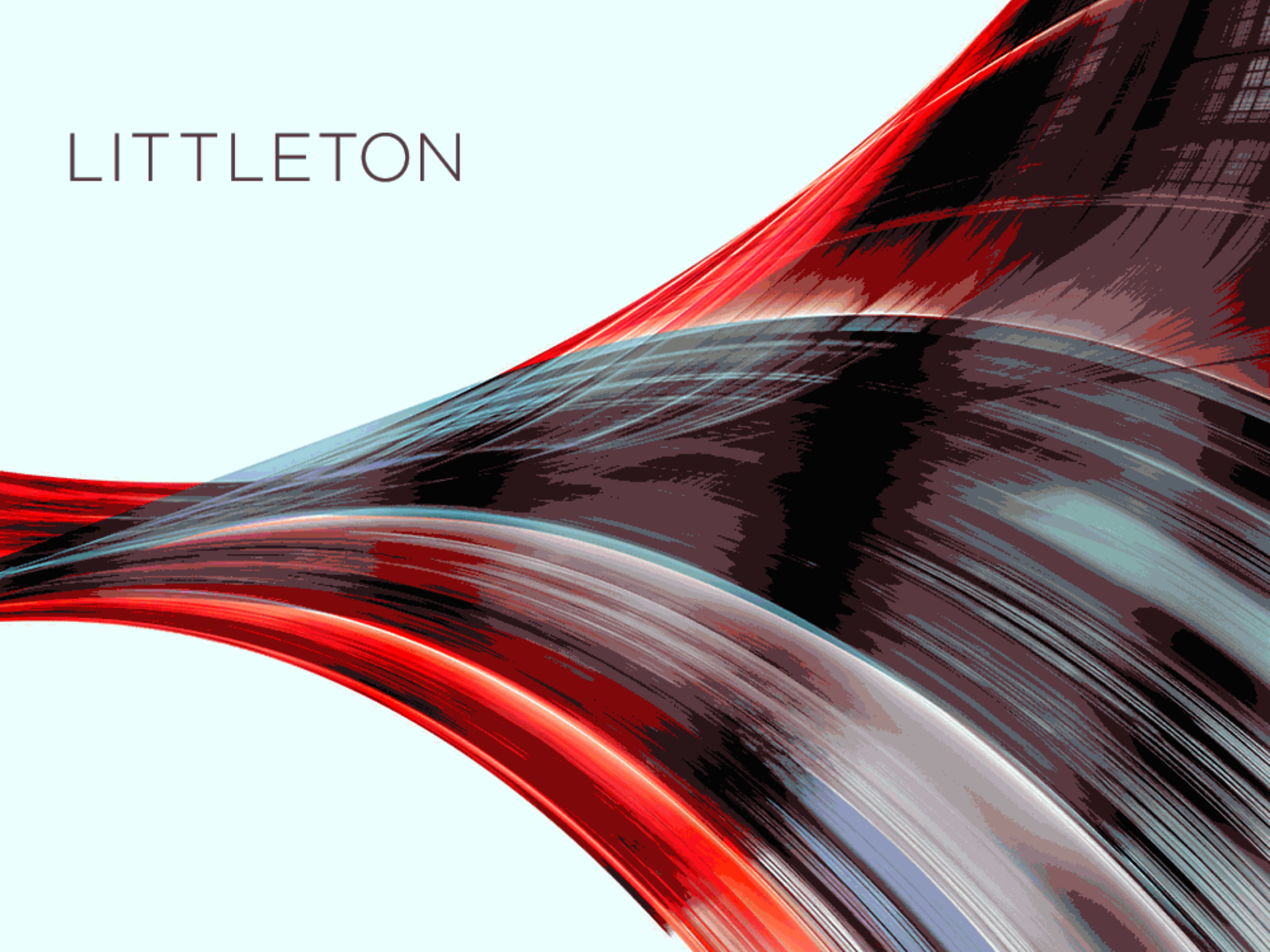


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# Expulsions and Forced Retirements in Partnerships and LLPs

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## Introduction

- Context of COVID, lockdown and the furlough scheme.
- Financial pressures on partnerships and LLPs.
- Administrations?
- Change in attitudes to partner removal and exit disputes.
- ‘Me too’; misconduct expulsions.

# Topics

- This webinar will cover:
  - Decision making and exercise of powers;
  - Express/implied terms and ‘reasonable expectations’;
  - Discrimination: law and tactics;
  - Whistleblowing;
  - Procedure.

# Overview

- 1890 Act Partnership. History?
- The LLP. Contract but no repudiation (*Flanagan v Liontrust Investment Partners LLP* [2016] 1 BCLC 177)
- LLP Act 2000. Section 5(1). Rights and duties are governed by the members agreement. Primacy of contract may override fairness, see e.g. *Joseph v Deloitte NSE LLP* (listed for hearing in the C of A in November)
- Absent agreement, the member can give reasonable notice to cease membership (Section 4(3)), but
- “No majority of the members can expel any member unless a power to do so has been conferred by express agreement between the members” (LLP Regs 2001, Reg 8).



# Types of Powers

- General discretionary decision making
- Fault based expulsion. Splits into -
  - (a) Threshold test expulsion, e.g. “serious breach”
  - (b) Opinion, e.g. “if in the opinion of the management committee you are in breach of...”
- No fault compulsory retirement

# General Discretionary Decision Making

- The traditional fetter – reasonableness (or non-capriciousness)
- The Braganza duty. Applies where the decision maker is given the right to form an opinion or exercise a discretion.
  - (a) Take into account relevant considerations.
  - (b) Leave out of account irrelevant considerations.
  - (c) Reach a decision which is objectively reasonable.

# Good Faith - 1890 Act Partnerships

- The special situation of partnership. Good faith?
  - (a) May be express. Sometimes is. Sometimes is not. Sometimes one way. If not -
  - (b) 1890 Act Partnerships. Fiduciary relationship between the partners. Good faith probably applies to all decision making, e.g. dissolution, see L&B at 16-02:

*Moreover, whilst the point is not entirely free from doubt, the current editor takes the view that a partner must display good faith when he seeks to dissolve the firm by notice, whether pursuant to an express power in the agreement or the provisions of the Partnership Act 1890.*
  - (c) certainly applies to any power of expulsion, which is expropriatory (see *Blisset v Daniel* (1853) 10 Hare 493.
  - (d) What is good-faith? Not the same as trust and confidence. Requires the intentionally improper exercise of a power with a corrupt type motive, e.g. dishonesty or self-interest



## Good Faith - LLPs

- Is there any such duty, if not expressed?
- Members do not owe a duty of good faith (or other fiduciary obligations) to each other – see *F&C Alternative Investments Holdings Ltd v Barthelemy* [2012] Ch. 613.
- However, a member does owe that duty to the LLP because every member is an agent of the LLP, see section 6(1) of the LLPA, though note that this may not arise where the member is not acting as agent, *Barthelemy* at 219.
- The LLP may owe the duty to a member in limited circumstances, i.e. expulsion (to which we will turn in a moment)

# Fault Based Expulsion

- Need to satisfy the threshold test – yes. Depending upon construction, may be objective (he/she did it) or subjective (I genuinely believe that he/she did it). It has always been thought that such powers in an 1890 Act context must be “strictly construed”. Query whether the same point applies to LLP powers.
- Good faith – yes.
- Braganza – yes. Does not matter if the threshold test is objective. Matters very much where opinion forming is the basis of expulsion.

# No Fault Compulsory Retirement

- *Braganza* – This QC’s view, no role to play. No opinion to be formed. It may be a discretion, but it is one that does not require a factual determination of any kind. Nor is it a direction which is to be exercised “reasonably”, which qualification applies to discretionary benefits and the like.
- Good faith. Yes (W&M at 17.28). Are we sure?
- *TAQA Bratani Ltd v Rockrose* [2020] EWHC 58 (Comm). Commercial case but concerned with “relational” contracts, where good faith may be implied. HHJ Pelling QC at 56:

*56. It is unnecessary for me to attempt to define further what constitutes a "relational" contract. I am content to treat the JOAs as being at least arguably such contracts. However, that does not lead to the conclusion that it is necessary to imply a good faith obligation into the exercise of the power on which the claimants rely. That is so because: (a) on its true construction that power is an absolute and unqualified power for the reasons explained earlier; in consequence; (b) it is impermissible to imply a term that qualifies what the parties have agreed between them; and (c) it follows that the parties have legislated in the sense referred to by Leggatt J and it is not necessary, indeed it would be wrong, to imply such a term to qualify the power on which the claimants rely because it is not necessary in order to make the contract the parties have chosen work as it is to be presumed they intended it to work, or, to the extent there is any difference, to give effect to their presumed common intention.*

# A possible interplay

- The trend – LLP doesn't fancy their chances of getting over the "fault" threshold. It switches to a no-fault termination power. It is using no-fault termination to avoid the need to go through the hoops. Can it?
- Irish High Court – *Grenet v Electronic Arts Ireland Limited* [2018] IEHC 786, per Mr Justice O'Connor at 13:  
*"This Court is impressed by the cogent concentration by counsel...to the effect that....[it] did leave open for an employee to challenge a no fault termination which is dressed up to avoid unlawful conduct such as a breach of contract or a breach of a constitutional right to vindicate one's good name. The " see-through clothes " argument persuades this Court, particularly having regard to the deliberate decision to gloss over the serious impact on the plaintiff's reputation, that there is a strong case in this regard. In other words, the state of the evidence at the moment is that the so-called no-fault termination is, on the balance of probabilities, a cynical contrivance."*

# Procedural Fairness and Misconduct Cases

- An implied right?
- *The role (if any) of procedural justice in the exercise of a power to expel (or compulsorily retire) a member is not wholly clear (W&M at 19.13).*
- This QC's view. Probably. If *Braganza* moves private decision making towards public law decision making, it would be very odd if natural justice did not apply. Natural justice requires at least the right to respond. This QC now sees major professional services firms giving the same procedural rights as would apply to employees (and endorses that approach).

# Consequences

- Divergence of view as between 1890 Act partnerships and LLPs
- 1890 Act – a defective notice “*will be ineffective for all purposes and the recipient partner will remain a partner of the firm*” (L&B 10-148). Probably correct on the basis of *Blisset* and by analogy with decisions taken which conflict with the constitution of a company.
- LLP – *Ilott v Williams* [2012] Lexis Cit 80. Bad faith exercise of expulsion power IS effective, leaving a claim in damages. L&B at 10-148 suggests wrong, W&M does not deal with it, this QC thinks correct.
- Damages. Capped at notice period or at large? Only really dealt with in an 1890 Act case, *Mullins v Laughton* [2002] EWHC 2761\_and even then, more concerned with BCCI type damages.



## Discrimination: overview

- This talk will cover both law and tactics.
- Equality Act framework clear:
  - Protected Characteristics (ss. 4-12);
- Key prohibitions well-known: Direct discrimination s. 13; discrimination arising from disability s. 15, gender reassignment discrimination s. 16, pregnancy and maternity discrimination ss. 17-18.
- Key issue of s.19 indirect discrimination.

## Discrimination: law (1)

- Sections 44-46 Equality Act 2010:
  - A Firm/LLP must not discriminate against B:
    - ‘as to the terms on which B is a partner/member’;
    - ‘by expelling’ B;
    - ‘by subjecting B to any other detriment’.
  - Extended definition of expulsion: s. 46 (6);
  - Harassment and victimisation: s. 45/6 (3)-(6).

## Indirect discrimination

- ‘A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s’.
- It is for A to show that the PCP is ‘a proportionate means of achieving a legitimate aim’.

## Indirect discrimination (2)

- *Essop v Home Office and Naeem v Secretary of State for Justice* [2017] IRLR 558, SC.
- ‘*Indirect discrimination... aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification.*’

## Indirect discrimination (3)

- S. 23: 'Comparison by reference to circumstances'.
- S. 23 (1): 'On a comparison of cases for the purposes of [s. 19] there must be no material difference between the circumstances relating to each case'.
- Identity of appropriate comparator group: *Ministry of Defence v De Bique* [2010] IRLR 471. Note *Magoulas v Queen Mary University of London* UKEAT/0244/15/RN.

## Discrimination: particular issues

- What type of discrimination is being argued?
- Financial targets cf. discriminatory application.
- ‘Dead men’s shoes’ and the justification arguments accepted in *Seldon v Clarkson Wright and Jakes* [2012] IRLR 590 NB in respect of a retirement age.
- Statistics and disparate impact: *Seymour-Smith* in the ECJ [1999] IRLR 253 and HL [2000] IRLR 263
- Process arguments: law cf. tactics.



# Discrimination: tactical considerations

Acting for the individual:

- When to present the arguments?
- Who to present the arguments to?
- Challenges to which decisions by which decision-makers?
- Engaging with the process: a right to step out?  
*Wilson Solicitors v Roberts* [2018] EWCA Civ 52

# Discrimination: tactical considerations

Acting for the individual (2):

- The path ahead:
  - Identifying statistics, comparators, information.
  - How high to put the case?
  - A new role.

## **Discrimination: tactical considerations**

Acting for the firm/LLP:

- How solid is the justification?
- How much has been documented?
- Identifying and considering potentially comparable cases.
- The 'rogue email' phenomenon.
- DSARs.

# **Discrimination: tactical considerations**

Acting for the firm/LLP:

- Defending proceedings.
- Explaining collective nature of decisions.

## Whistleblowing: law (1)

- Whistleblowing protection extends to ‘workers’ – s. 230(3) ERA 1996
- *Clyde & Co LLP and another v Bates van Winkelhof* [2014] UKSC 32 – equity partner in a law firm who was an LLP member was a worker pursuant to s. 230(3)(b)
  - “*she could not market her services as a solicitor to anyone other than the LLP and was an integral part of their business. They were in no sense her client or customer*”
- NB passing reference was made to traditional partnerships in Lady Hale’s judgment

## Whistleblowing: law (2)

When is a disclosure protected?

- C needs to identify a disclosure of information that, in their reasonable belief, tended to show that a matter listed in s. 43B(1)(a) – (f) ERA 1996 has occurred, was occurring, or was likely to occur
- NB list includes ‘breach of any legal obligation’
- Legislation amended to require a reasonable belief that the disclosure is in the public interest - s.43B(1) ERA 1996
- No definition or guidance on ‘public interest’



## Whistleblowing: law (3)

- How has the ‘public interest’ requirement been applied?
  - *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed* [2018] ICR 731, CA – 4 factors
  - *Underwood v Wincanton plc* EAT 0163/15 – terms of employment
  - *Morgan v Royal Mencap Society* [2016] IRLR 428, EAT – health and safety related complaint
  - *Al Qasimi v Robinson* EAT 0283/17 – tax and NI
  - *Parsons v Airplus International Ltd* UKEAT/0111/17 – wholly self-interested

## Whistleblowing: law (4)

- ERA provides protection to the worker from unlawful detriments
- Detriments relied on in *Bates Van Winkelhof* included suspending her, making allegations of misconduct against her and ultimately expelling her from the LLP

## Whistleblowing: litigation practicalities

Practical difficulties inherent in pursuing high value whistleblowing claims in the ET -

- Short time limit – perhaps extended by EC
- Difficulty in securing hearings in respect of preliminary issues i.e. whether the public interest test is likely to be met
- Delays in listing hearings
- Low chance of recovering costs in ET proceedings
- Open hearings and publicity

# Practical considerations: concurrent proceedings

1. An arbitration clause will not catch a discrimination claim if C wishes to litigate in ET: [2011] EWHC 668 (QB).
2. Stay jurisdiction in ET (**GFI Holdings Ltd v Camm** UKEAT/0321/08) –statements of case.
3. Significant backlog in ET.



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