



## Commercial

# Business Law Briefing

July 2015

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# Business Governance and Business Reward

### Flanagan v Liontrust Investment Partners LLP

[2015] EWHC 2171 (Ch)

Multi-party LLP Agreements are not subject to the doctrine of repudiatory breach

LLPs  
Excluded members  
Claims to capital and profit share

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Mr. Flanagan, a fund manager, petitioned for unfair prejudice in relation to the affairs of Liontrust Investment Partners LLP of which he was, and claimed still to be, a member even though his membership had purportedly been terminated by the LLP by notices of compulsory retirement served on him.

By the LLP Agreement, he and other individual members contributed £5,000 each whilst the corporate member Liontrust Investment Services Limited (LIS) contributed £5m. The profits for each financial year were allocated between the individual members in accordance with "side letters" between them and the LLP which they had signed upon joining and their allocations comprised a fixed amount and a variable amount, corresponding (in broad terms) to the basic salary and performance-related bonus to which they would have been entitled under a contract of employment. Any remaining profits, including all capital profits, were allocated to LIS. No individual member was entitled to any remuneration for acting in the business or management of the LLP. The obligations and duties of individual members included obligations to work full time for the business, not to engage in any other business, and to act at all times in the utmost good faith in all matters relating to the LLP and the business.

LIS closed the Fund managed by Mr. Flanagan. The LLP served a compulsory retirement notice on Mr. Flanagan. It placed him on garden leave pending the expiry of the notice period.

Mr. Flanagan claimed that the notice was invalid. Mr. Flanagan argued that the conduct of the LLP and LIS amounted to a repudiatory breach of the LLP Agreement which he had accepted, thereby bringing about the termination of the LLP Agreement with immediate effect and its replacement, as regards his relationship with the LLP, by the default provisions set out in Regulation 7 of the the LLP Regulations 2001. On that footing, it was argued that Mr Flanagan would be entitled to an equal share of the capital and profits of the LLP pursuant to Regulation 7(1), which on the basis that there were still 15 members of the LLP would entitle him to a one-fifteenth share; he would have the right to take part in the management of the LLP under Regulation 7(3), and to attend and take part in Management Committee meetings; and he would be protected by Regulation 8 from expulsion by a majority of the members.

Mr. Flanagan's contentions, if right, would have had the result that although his contribution to the capital of the LLP was only £5,000, he would be entitled to an equity share worth several million pounds.

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### **Flanagan v Liontrust Investment Partners LLP** *continued*

Henderson J. found that the retirement notice served on Mr. Flanagan was ineffective and a nullity and had not been cured by later notices. Mr. Flanagan's exclusion from active participation in the business of the LLP amounted to a breach by the LLP of the LLP Agreement, which was repudiatory in effect.

The critical question was whether the common law doctrine of repudiatory breach was excluded in the case of LLP Agreements as it is in relation to traditional partnership agreements following Mullins v Laughton.

Henderson J. held that it was excluded in the case of multi-party LLP Agreements. Otherwise, the effect would be to bring about the co-existence of two different contractual regimes governing the same LLP – the default rules applicable to the member who was the victim of the breach and the provisions of the LLP Agreement as regards the other members. This was likely to lead to results that were legally incoherent and could only be resolved by further agreement between all the members.

It was, he found, implicit in the statutory regime for the internal governance of LLPs that, in relation to any particular matter, an LLP and all of its members for the time being must be subject to the same set of rules, whether those rules are contained in an exhaustive section 5 agreement, or (in the absence of any section 5 agreement) in the default rules alone, or in a combination of a section 5 agreement and the default rules. There was no place for operation of the doctrine of repudiation in relation to section 5 agreements, save perhaps where the LLP has only two members.

Another way of expressing the same principle was to say that, once a section 5 agreement had been made, it would continue to bind the LLP and the members until either it was terminated by common agreement, or was varied in accordance with a procedure to which all the relevant parties had previously subscribed.

The judge was fortified in this conclusion by the consideration that it would be offensive to common sense, and contrary to the reasonable commercial expectations of the parties, if the effect of the doctrine were to permit Mr Flanagan to share in the profits of the LLP on a basis of notional equality with the other members, when the LLP Agreement itself gave him only a fixed allocation of income profits and no entitlement to any capital profits, all of which were allocated to LIS.

The appropriate remedy for a member in Mr Flanagan's position was a declaration as to his continuing membership of the LLP and a right to damages, if he could establish that he had suffered any loss as a result of his exclusion.

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# Business Protection

### James Petter v (1) EMC Europe Limited (2) EMC Corp

[2015] EWCA Civ 828

Share Scheme Agreements

Mandatory jurisdiction under Recast Brussels Regulation

Anti-suit injunction (ASI)

The English court granted an ASI to restrain proceedings in Massachusetts in order to uphold the scheme in the Recast Brussels Regulation protecting employees from being sued other than in their domicile. It did so even though the parties had made a contractual choice of Massachusetts law and forum in their Stock Plan agreement.

EMC Corporation ("EMC") based in Massachusetts provides data storage hardware and services. Mr. Petter was employed by its English subsidiary, EMC Europe, in a senior role. In that role, he was party to a share distribution scheme known as a "Stock Plan", under which awards of common stock of EMC were made available as part of his total remuneration on a deferred basis. The Stock Plan contained an express choice of Massachusetts law and an exclusive submission to the jurisdiction of the Massachusetts courts.

Mr. Petter left EMC Europe and took up employment with a local subsidiary of a competitor American company. EMC started proceedings against Mr. Petter in Massachusetts seeking declarations that it was entitled under the terms of the Stock Plan and related agreements to rescind the most recent awards of stock to him. Mr. Petter responded by starting proceedings against EMC and EMC Europe in the High Court seeking declarations that the restrictive covenants in his contract of employment were unenforceable as being an unreasonable restraint of trade, that the provisions of the Stock Plan under which EMC purported to rescind awards of stock were unenforceable and that he had not acted in breach of his contract of employment. He also sought an interim injunction prohibiting EMC from pursuing the proceedings against him in Massachusetts. EMC challenged the jurisdiction of the English court on the grounds that the Stock Plan contained a contractual choice of Massachusetts forum.

Cooke J. below (i) upheld the English court's jurisdiction against EMC on the basis that the Stock Plan was part of the contract of employment and the provisions of s.5 of the recast Brussels Regulation 1215/2012 in matters relating to *individual contracts of employment* applied to the dispute and overrode the jurisdiction agreement in the Stock Plan, following *Samengo-Turner* but (ii) declined to grant an anti-suit injunction (ASI) to restrain EMC from pursuing its proceedings in Massachusetts as a matter of discretion for reasons of comity and because the Massachusetts proceedings were not vexatious or oppressive by reason of them being in the forum of contractual choice.

The CA, allowing Mr. Petter's appeal against the refusal of the ASI and dismissing EMC's appeal on jurisdiction, held that the case was indistinguishable from *Samengo-Turner* and the result ought to be the same.

The effect of the Regulation was that the English court was bound to disregard the Massachusetts exclusive jurisdiction clause and to assume jurisdiction. The principle emerging from *Samengo-Turner* was that, in such a case, an anti-suit injunction should ordinarily be granted to restrain proceedings outside the Member States in order to protect the employee's rights.

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# Business Regulation

### Transparency of Beneficial Ownership of Companies

### Register of People with Significant Control

### Small Business Enterprise and Employment Act 2015

### Small Business Enterprise and Employment Act 2015 makes changes to Companies Act 2006

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On 26 May 2015, the first commencement regulations for the Small Business Enterprise and Employment Act (SBEEA) 2015 were made.

They brought into force, for the purposes of enabling the exercise of power to make secondary legislation, s. 81 SBEEA and Schedule 3, which amend the Companies Act 2006 to require companies to keep a register of people who have significant control.

Schedule 3 inserts a new Part 21A CA 2006 *Information about people with significant control*.

New s.790M CA 2006 sets out the duty on companies to keep a register of persons who have significant control.

The definition of significant control is set out in a new Schedule 1A CA 2006.

By Schedule 1A, an individual ("X") is a person with "significant control" over the company ("Y") if at least one of the following 5 conditions are met by him.

1. **Ownership of shares:** X holds, directly or indirectly, more than 25% of the shares in company Y.
2. **Ownership of voting rights:** X holds, directly or indirectly, more than 25% of the voting rights in company Y.
3. **Ownership of right to appoint or remove directors:** X holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of company Y.
4. **Significant influence or control:** X has the right to exercise, or actually exercises, significant influence or control over company Y.
5. **Trusts, partnerships etc:** the trustees of a trust or the members of a firm that, under the law by which it is governed, is not a legal person meet any of the other specified conditions (in their capacity as such) in relation to company Y, or would do so if they were individuals, and X has the right to exercise, or actually exercises, significant influence or control over the activities of that trust or firm.