



Constructive dismissal of partners and LLP members

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How does s.46(6)(b) EqA 2010 operate when case law provides that the doctrine of acceptance of a repudiatory breach of contract has no application to partnerships and LLPs?

Introduction

Partnerships are founded on a contract, oral or written. LLPs are usually founded on an agreement of the kind provided for in s.5 of the LLPA and in the absence of such an agreement, default rules, set out in reg 7 of the LLP Regulations, apply. Case law has established that because of the nature of partnership and LLP agreements, partners and LLP members cannot be constructively dismissed. This is because, it is said, that to allow this would have the effect of dissolving the partnership or bringing the LLP agreement to an end. However, s.46(6)(b) EqA 2010 suggests partners and LLP members can be constructively dismissed. This article suggests a way in which these two different positions can be reconciled.

Expulsion and the EqA 2010

EqA 2010 ss.44 and 45 prohibit discrimination and victimisation against partners and LLP members in various circumstances including by expelling the partner or LLP member or subjecting them to any other detriment. EqA 2010 s.46(6)(b) provides an extended definition of 'expelling' to include termination of the person's position (as a partner or LLP member); 'by an act of the person (including giving notice) in circumstances such that the person is entitled, because of the conduct of other partners or members, to terminate the position without notice'. This provision therefore appears to define expulsion to include the doctrine of acceptance by the innocent party of a repudiatory breach of contract (ie, akin to constructive dismissal).

Repudiatory breach and partners of firms

In *Hurst*, a solicitor partner claimed that he had accepted a repudiatory breach of a partnership agreement and was therefore discharged from continuing liabilities relating to the lease of a property, which he would have remained liable for

had there been a dissolution by agreement. His appeal to the House of Lords was confined to this continuing liability but, although not in issue, it was held, *obiter*, that a repudiatory breach was ineffective to dissolve the partnership.

The primary reason for this was that to find otherwise would sit uneasily with the s.35(d) of the 1890 Act, which gives the court a discretionary power to dissolve a partnership when a partner, other than the partner suing, 'wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him'. That is conduct, which is ordinarily a repudiatory breach of contract. Secondly, although the doctrine of repudiatory breach applies to multi-party contracts it can only operate bilaterally, ie, between the party in breach and the innocent party; it will not affect contractual relations between other partners who are not party to the dispute. There would therefore be a distinction between cases where the doctrine was effective to dissolve the partnership, ie two party partnerships or partnerships where there was one innocent partner and *all* other partners were in breach and other cases where there are different camps, with an innocent partner, some partners in breach and others who are not party to the dispute at all.

The effect of *Hurst* is that the partnership remains on foot unless dissolved by agreement or by the court and the innocent party remains a partner despite the purported acceptance of a repudiatory breach. *Hurst* was applied in *Mullins* where the question was directly in issue.

Repudiatory breach and LLP members

Hurst was applied to LLP members in *Flanagan*. There, the innocent LLP member sought to rely on the doctrine of

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acceptance of repudiatory breach to argue that the LLP agreement was terminated and he was subject to the default rules in reg 7 of the LLP Regulations, which were more advantageous to him. It was held that the doctrine did not apply to multi-party agreements made pursuant to s.5 of the LLP Act, essentially for the reasons set out in *Hurst* but with the additional point that it would lead to the incoherent position whereby some members would be subject to the default provisions of the LLP Regulations and others would be subject to the s.5 LLP agreement. The purported acceptance of the repudiatory breach was of no effect and the innocent party continued to be a member of the LLP and be subject to the terms of the LLP agreement.

Why does it matter?

Returning to s.46 EqA 2010; in many cases the inability to accept a repudiatory breach will not make any difference to the outcome. It is well established that the discriminatory conduct leading up to the point of resignation will have the effect that the resignation is caused by that conduct (see *Roberts* in the whistleblowing context). However, in the context of claims under the EqA 2010, two issues arise.

First, time limits. If the last discriminatory act is the resignation and it is in time, whereas prior acts are out of time, whether the claimant can accept a repudiatory breach may be critical in determining whether the tribunal has jurisdiction. By contrast, if there is a discriminatory expulsion, time will run from the date of the expulsion or, if there is an expulsion on notice from the end of the notice (see *McCull*). Secondly, causation of loss. If the innocent party is not permitted to resign forthwith, but is required to remain as a partner in the firm or LLP and work their (often very lengthy) notice they may be held either to have affirmed the contract (whether partnership agreement or LLP agreement) or broken the chain of causation.

There are also practical consequences. If a partner or LLP member is subjected to prolonged and sustained discrimination or harassment, can they really be held in the firm or LLP against their will and only be permitted to leave by breaching the notice provisions of the agreement or, by inducing an expulsion, by, for example, refusing to work, contrary to provisions requiring them to devote their time to the business?

Taplin

The issues above have not been considered at appellate level, however they were recently addressed in *Taplin*. In that case, the LLP member, who had resigned following acts of disability discrimination said to amount to a repudiatory breach of the LLP agreement, sought to rely on this as an expulsion. The tribunal held that the wording of s.46(6)(b) was similar to s.95(1)(c) of the ERA 1996. This provides for there to be a dismissal 'where the employee terminates the contract ... in circumstances in which he is *entitled* to terminate it without notice by reason of the employer's conduct'.

In *Western Excavating*, Lord Denning held that the word *entitled* in s.95(1)(c) referred to a legal right under contract law to terminate the agreement. The tribunal held that, following *Flanagan*, there was no such legal right under the LLP agreement. The effect was that s.46(6)(b) could not apply and therefore there was no expulsion by acceptance of repudiatory breach.

If the tribunal is right, then s.46(6)(b) is, as the tribunal observed, a 'dead letter', save possibly in cases of partnerships of two people or two member LLPs (although even this has been called in to question, see *Goldstein*).

Deemed expulsion?

The question is whether the approach in *Taplin* is correct. EqA 2010 s.46 was enacted after *Hurst* so it can be assumed that Parliament must have been aware of the position so far as the doctrine applying to partners of firms was concerned. It is unlikely, in our view, that Parliament would have intended that s.46(6)(b) should have no practical effect.

The partnership and LLP case law considered above has been concerned with acceptance of repudiatory breach entitling the innocent member to dissolve the partnership or to bring the LLP agreement to an end. However, s.46(6)(b) is not concerned with dissolution, it is concerned with expulsion. Expulsion is a well-recognised concept in partnership and LLP law. It is included in s.252 of the 1890 Act and referred to in reg 8 of the LLP Regulations and is usually the subject of detailed provisions in partnership and LLP agreements. When a partner or member is expelled, there is no dissolution or termination of the LLP agreement. What s.46(6)(b) arguably does, is to simply provide for *deemed* expulsion when the requirements of that subsection

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are satisfied, ie when the claimant is entitled, because of the conduct of other partners or members, to terminate their position without notice. It effectively inserts into the partnership or LLP agreement, by operation of statute, a provision which deems there to be an expulsion in those circumstances.

EqA 2010 s.46(6)(b) is not the only deemed expulsion provision; s.46(6)(c) provides for there to be an expulsion if the partner's position is terminated as result of dissolution. Termination on dissolution would not conventionally be regarded as an expulsion.

It also should be noted that s.46(6)(b) does not state (unlike s.95(1)(c) of the ERA 1996) that the innocent party is entitled to terminate the *contract* (ie partnership or LLP agreement) without notice, it refers to the innocent party being entitled to terminate their *position* without notice. A person subjected to sustained and prolonged discrimination is arguably entitled to say, in effect, 'I'm not putting up with this, I'm leaving'. It would of course, always be a question of fact whether the conduct was sufficiently egregious to entitle the innocent party to do so. If it was held that that it was, then they will be deemed to have been expelled. Notably the explanatory note to s.46 supports this with the example of a gay partner in a firm who, because of constant homophobic banter, feels compelled to leave his position as a partner. It states that the section will then apply in a 'similar way to how the employment tribunal would find for an employee who wins a claim for constructive dismissal'. The note does not suggest that the innocent party is reliant on his contractual rights or that it applies in the *same* way as in a constructive dismissal case.

Conclusion

If s.46(6) EqA 2010 is to be interpreted as a statutory device to deem certain factual scenarios as an expulsion, then the effect of s.46(6)(b) is simply to treat the wronged partner or member as expelled. It does not have the effect that there is a dissolution of the partnership or that the LLP agreement is brought to an end with all of the complications that would ensue. The partnership agreement or LLP agreement

will continue without the innocent member being party to it. They will have a right to be compensated for the losses resulting from their expulsion. This construction honours the intention of Parliament as it means that s.46(6)(b) has a purpose and is not a 'dead letter'.

Nevertheless, while the uncertainty outlined above persists, it would appear necessary to advise a partner or LLP member who is experiencing relevant discriminatory treatment and who wishes leave to:

- (i) give notice of termination in accordance with their partnership or LLP agreement; and
- (ii) make it clear they are accepting a repudiatory breach and consider themselves to have been constructively expelled and, but for the position in *Hurst/Flanagan*, they would have left immediately.

KEY:

EqA 2010	Equality Act 2000
LLPA	Limited Liability Partnerships Act 2000
LLP Regs	Limited Liability Partnerships Regulations 2001 (SI 2001/1090)
<i>Hurst</i>	<i>Hurst v Bryk</i> [2002] 1 AC 185 HL
1890 Act	Partnership Act 1890
<i>Mullins</i>	<i>Mullins v Loughton</i> [2003] Ch 250
<i>Flanagan</i>	<i>Flanagan v Liontrust Investment Partners LLP</i> [2015] Bus LR 1172
<i>Roberts</i>	<i>Roberts v Wilson Solicitors LLP</i> [2018] ICR 1092
<i>McCaull</i>	<i>British Gas Services Ltd v McCaull</i> [2001] IRLR 60
<i>Taplin</i>	<i>Taplin v Freeths LLP</i> ET case 2602284/2018
ERA 1996	Employment Rights Act 1996
<i>Western Excavating</i>	<i>Western Excavating (ECC) Ltd v Sharp</i> [1978] ICR 221
<i>Goldstein</i>	<i>Goldstein v Bishop</i> [2013] EWHC 881 (Ch)