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REF/2013/0823

PROPERTY CHAMBER LAND REGISTRATION
FIRST-TIER TRIBUNAL
LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) GRO KRISTINA BENNETT
(2) SIMONE DOMINIQUE BENNETT

APPLICANTS

and

WAYNE ANDREW BENNETT

RESPONDENT

Property Address: 122 Bridge Road Grays and 19 other properties

Title Number: EX335946 and 19 other titles

Before: Judge Owen Rhys

Sitting at: 10 Alfred Place, London WC1E7LR

On: 22nd and 23rd April and 8th May 2015

Applicant representation:	Mr Thorowgood of Counsel
Respondent representation:	Mr Clegg of Counsel instructed by Clyde & Co Solicitors

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D E C I S I O N

INTRODUCTION

1. On 30th April 2103 the Applicants applied to Land Registry, in Form RX1, to register a restriction in respect of Cobblers Mead Lake ("the Lake"), registered under Title number EX334205. The first Applicant is the step-mother of the Respondent. The second Applicant is his half-sister. The application was supported by a Statutory Declaration made by the first Applicant, in which she deposed that the Lake was purchased as an asset of a partnership in which all three parties to this reference had

an equal share. She stated that the Lake was registered in the sole name of the Respondent, was held on trust for the three partners in equal shares, and applied for a restriction on that basis. On 25th July 2013 the Applicants made a further application in Form RX1, in relation to 19 registered titles. The grounds for the restriction were the same as in relation to the Lake, although the nature of the trust was spelled out in more detail. Essentially, the allegation was the same, namely that the Applicants had an interest in the affected titles as partners in a property partnership. The Respondent was served with notice of the applications, and objected to both of them. The dispute could not be resolved by agreement, and accordingly on 30th September 2013 the Chief Land Registrar referred it to the Tribunal under section 73(7) of the Land Registration Act 2002 ("the 2002 Act"). For ease of reference, where it is appropriate I shall refer to the first-named Applicant as "Gro", to the second-named Applicant as "Dominique", and to the Respondent as Wayne. I mean no disrespect to the parties by referring to them in this way.

2. Statements of Case were served in the usual way. By paragraph 40 of his Statement of Case dated 27th January 2014, Wayne admitted that certain titles, listed at Annex 1 to the pleading ("the Annex 1 Properties"), were held by him on trust for himself and the Applicants in equal shares. However, this was not an admission that a partnership existed, merely that the Applicants had a beneficial interest in the properties. In relation to the other affected titles other than the Lake ("the Schedule 2 Properties") Wayne admitted (see paragraph 44) that these were held on trust for himself, a Mr Robert Stonebrook and Mr Ben Bennett ("Ben") in equal shares. Ben is the father of Dominique and Wayne and the husband of Gro (who is Dominique's mother). In relation to the Lake, he contended that although this had originally been acquired in the same three equal shares, in the events that had happened he had since become entitled to the entire legal and beneficial interest in the property. By a letter to this Tribunal dated 16th July 2014 Wayne's solicitor formally withdrew his objection to the Applicants' applications in relation to the Annex 1 Properties. In February 2015 Ben executed a Deed of Assignment in favour of the Applicants. By this document, he assigned to the Applicants his beneficial share in the Schedule 2 Properties and also in the Lake. Following on from that document, the Applicants' representative notified the Respondent, by email dated 10th February 2015, that "*As regards the Schedule 2 properties, whilst my clients do not accept what your client says about the*

basis and/or the proportions in which the properties are held, they also do not wish to continue to dispute the point with him. It follows that they must accept that their interest in the Schedule 2 properties is limited to a one third share. Can you please confirm that your client will now withdraw his objection to their application to register restrictions against these properties also?" My reading of this concession is that the Applicants no longer contend that the Schedule 2 properties are held in trust for them as partners, with a combined share of two-thirds, but are limited to the one-third share that Wayne agrees was originally acquired by Ben.

3. In the light of these developments, the issues between the parties have been narrowed considerably. The only real substantive factual issue relates to the Lake. The Applicants contend that this is held by Wayne on trust for themselves and him in their capacity as partners. He denies this, contending that it was originally purchased on trust for himself, Mr Stonebrook and Ben in equal shares, but subsequently Ben "*relinquished*" his beneficial interest, and he acquired Mr Stonebrook's interest, so that he is now the absolute beneficial owner. The primary issues in relation to the Lake are, it seems to me, as follows: (1) Did a partnership exist between the Applicants and the Respondent, in the terms alleged by the Applicants, prior to the purchase of the Lake? (2) If so, was the Lake acquired as a partnership asset and/or was its purchase funded with partnership monies? If the answer to both questions is affirmative, it follows that the Applicants are entitled to the restriction sought. That is not the end of the matter, however. First, there is an unresolved issue as regards the Schedule 2 Properties. On any footing, the Applicants are entitled to an interest in them, by reference to the Deed of Assignment executed by Ben in February 2015. It might be thought that their right to be protected by a restriction on the register was, therefore, not in doubt. However, the Respondent takes the point that the Applicants' RX1 application was made on 30th April 2013, alleging a partnership interest in the Lake, but they are now claiming a restriction based on their interests under the Deed of Assignment made in February 2015. Mr Clegg, Counsel for the Respondent, argues that they must make a new application based on the Deed of Assignment, and it would be improper to give effect to the original application. Secondly, there is a similar issue as regards the Lake. If the Applicants fail to establish a partnership interest in the Lake, they claim an interest based on the Deed of Assignment – in other words, they would claim as the assignees of Ben's admitted one-third share. In turn,

this requires them to defeat the Respondent's claim that Ben had "r*elinquished*" his interest prior to February 2015. Even if they succeed in establishing that Ben retained an interest at the date of the Deed of Assignment, the Respondent argues similarly that the Applicants are bound to make a new application for a restriction based on the Deed of Assignment. I shall consider these subsidiary issues once I have dealt with the primary factual issue as identified above.

THE APPLICANTS' CASE

4. The Applicants' case, in outline, is as follows. In the early 1980s Ben began to build up a property business, using profits that he had made from his haulage business. He began to purchase dilapidated properties and refurbished them for rental or sale. The legal title to these properties was vested in the names of third parties as nominees. Ben financed the deposit and arranged a mortgage in the name of the nominee. He serviced the mortgage debt, and the nominee made no financial contribution whatsoever. Ben managed the properties through the business entity known as "Callahans". The business developed, and Ben began to manage properties on behalf of third party landlords. In the "*early to mid 1990s Ben realised that he needed to take steps to ensure the financial security of his family….*" (see para. 11 of the Statement of Case). He decided that a suitable method of achieving this aim was to create a family partnership involving his wife and daughter (the Applicants) and his son (the Respondent). It was intended that the property portfolio would be held for the benefit of the family partnership, as would subsequent purchases and business opportunities.

5. In or around 1993 or 1994 Ben raised the subject with Wayne, at a meeting at the offices of Callahans. Ben suggested that the property business should be split four ways, with equal shares for all of the close family. Wayne would take over the day-to-day running of the property business. Wayne disagreed with this proposal. He asked for a half share of the business, and did not accept that the Applicants should have any share. "*By way of compromise*" Ben agreed that he would not participate in the partnership, but instead it would be divided equally between the Applicants and Wayne in equal shares. This would allow Wayne to have more of a share of the business, and Ben would indirectly benefit as the husband of Gro. Although Ben would not be a partner, *"he would continue to assist in the management and*

development of the business." (see para. 13). Although there was no formal partnership deed, Gro, Dominique and Wayne thereafter carried on the property business with a view to profit and a partnership was duly established within the meaning of section 1(1) of the Partnership Act 1890 ("the 1890 Act"). At paragraphs 16 to 31 of the Statement of Case, the Applicants plead a number of other facts and matters which, they contend, supports their case as to the existence of a partnership. These facts include the establishment of a partnership bank account in 2006 and the negotiation of a loan to the partnership at the same time.

6. With regard to the Lake, the Applicants' case is that this was purchased using monies belonging to the partnership – see paragraph 34 of Ben's first witness statement dated 12th September 2014, and paragraph 3 of the statement dated 17th March 2015. It is alleged that partnership monies were held in the client account of a firm of solicitors, Graham Harvey, and these monies were used to acquire the Lake. Mr Stonebrook (referred to above) was a conveyancer employed by this firm.

THE RESPONDENT'S CASE

7. There is a certain amount of common ground with Wayne as to the history of the parties' dealings, but also certain fundamental differences, which I shall have to resolve. Broadly speaking, Wayne does not disagree violently with the Applicants' account of the way in which the property portfolio was created and grown, primarily through the efforts of Ben and the scheme that he devised for maximising the benefit of mortgage interest tax relief. Where he begins to part company with the Applicant's account is in regard to the partnership that is alleged to have been formed in the early 1990s. He accepts that in 1993 or 1994 Ben raised with him the possibility of splitting the property business into four shares, with Dominique, Gro and Wayne having a one-quarter share each. He admits that he refused to accept the proposal, on the grounds that he had already assumed the day-to-day running of the property business and had contributed £38,000 of his own money as capital. He contended that Dominique (who was around 18 years of age at this time) had made no financial or other contribution to the business and did not see why she should have an equal share. He admits that, as a result of this discussion, it was agreed that the property assets would be divided equally between himself and the Applicants, with Ben himself taking no share. However, he denies that the arrangement can properly be described

as a "partnership". He also alleges that the arrangement with Ben included the beneficial ownership of certain properties of which Ben was the beneficial owner. He says (see para. 22 of his first witness statement) that Ben agreed to split the beneficial ownership of the portfolio properties into three equal shares. Ben, for his part, says that the arrangement made with Wayne did not include any transfer of the properties or a beneficial share in them – it related solely to the business of property management. This is what he said at para. 17 of his first witness statement: *"At this stage, I did not offer to transfer any particular properties to Wayne, Gro or Dominique as members in a family partnership. The properties continued to be held on trust for me until several years later, which I describe below. Further, I had my own properties which I did not intend to give to Wayne, Gro and Dominique."* He maintained this position robustly during his cross-examination.

8. With regard to the purchase of the Lake, Wayne denies that Gro and Dominique had any interest in it. He contends that it was purchased in the joint names of himself and Robert Stonebrook, on trust for themselves and for Ben in equal shares. He also contends that Ben subsequently "*relinquished"* his interest in the Lake in consideration of a sum of £60,000, released from a particular bank account to fund the purchase of a car for Gro. He states that he acquired Robert Stonebrook's share in the Lake in 2009. In his first witness statement, Wayne provided particulars of the funding for the Lake. He stated that "*The funds for the purchase of the Lake were raised partly by Rob mortgaging his property, 43 Lampits Lane, Corringham with Cheltenham & Gloucester and partly from the proceeds of sale from 20 Whitehall Lane, a property registered in my name but held on trust for myself, Rob and Ben in equal shares."* He corrected this evidence in a witness statement served shortly before the hearing. Relevant extracts from this witness statement are as follows: *"4. In around 2002/2003 Robert and I were active in pursuit of investment properties to add to the portfolio we were developing. In 2002/2003 we had purchased at least 4 properties. Further to this, I recall at around that time it was agreed that Robert would purchase Gro's share in 20 Whitehall Lane for £20,000…….. 5. …. I would like to apologise to the Tribunal that my initial description of the process should have been clearer. It was our intention that Cobbler's Mead was to be purchased from the sale of 20 Whitehall Lane and through the remortgage of Robert's home at 43 Lampits Lane. However, completion was delayed on 20 Whitehall Lane and thus it*

was suggested by Robert that as there was in excess of £75,000 sitting in the client account of Graham Harvey Solicitors in my name which had amassed from previous property transactions, this money could be used to complete the purchase on the understanding that the sums would be returned at a later date. In the end, this is how Cobbler's Mead was purchased. 6. The purchase price of Cobbler's Mead was £150,000. The funds from the client account made up £75,000 of this sum and Robert provided the remaining £75,000 through the remortgaging of his home at Lampits Lane. 7. As soon as 20 Whitehall Lane completed the money was returned to the client account at Graham Harvey solicitors."

THE APPLICANTS' CLAIM TO THE LAKE

9. The Applicants put their case with regard to the Lake entirely on the basis of a pre-existing partnership, alleging that partnership funds, derived from the Graham Harvey client account, were used to fund the purchase. They do not for example allege that the Lake is held on a resulting trust, based on Gro's individual share in the 20 Whitehall Lane property, a share which is admitted by Wayne. Mr Thorowgood, for the Applicants, was adamant that the partnership claim was central to the application for the restriction, subject to the default position arising from the Deed of Assignment. Their primary case is that of partnership. There may well be particular reasons why they wish to establish the existence of a partnership and, indeed, the Statement of Case makes various allegations which would not be out of place in a High Court partnership action. For the purposes of this reference, however, the primary issue that I must decide is whether Gro, Dominique and Wayne carried on a business together in partnership, as a result of the discussions and arrangements made between Ben and Wayne in the early to mid-1990s.

WHAT CONSTITUTES A PARTNERSHIP?

10. Before considering the evidence on this issue, I should briefly set out the legal test for the existence of a partnership. The starting point is the definition contained in section 1(1) of the Partnership Act 1890 ("the 1890 Act"): *"Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."* Section 2 of the 1890 Act provides certain rules for ascertaining the existence of a partnership. These include the following:

"(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is primâ facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business………"

11. No other cases have been cited to me in relation to these sections which are, it might be said, self-explanatory. I must therefore decide the point on the basis of these sections alone, untrammelled by authority.

THE WITNESSES

12. Evidence for the Applicants was given by Gro, Dominique, Ben and Susan McBride, the office manager of Callahans. Evidence for the Respondent was given by Wayne himself, Robert Stonebrook, Paul Baker and John Wheeler (one of the water bailiffs at the Lake).

THE APPLICANTS' EVIDENCE

13. It is clear on the evidence, and agreed by both sides, that a business known as "Callahans" has been carried on for many years. There is some disagreement as to the nature of the business, and when it came into being. The Applicants allege that it came into being in the early 1980s, as a vehicle for the management of the various properties comprised within Ben's portfolio. They allege that the business expanded as he began to manage properties on behalf of third parties. In his first witness statement, Ben said that there were in fact two entities called "Callahans". First, a limited company, purchased "off the shelf" in the early 1980s, used as a labour hire company (see para.10). Additionally, at para. 12 he says this: *"At other times I have used the trading name of Callahans as a sole trader. In particular I have used Callahans as my trading name for my property business, described above, but I have always acted as sole trader in relation to that business. That was until I passed on the business to the family partnership between Gro, Wayne and Dominique in equal shares."* Wayne, in his Statement of Case, pleads that he had been using the trading name "*Callahans*" since 1989. In his first witness statement he says that he opened a

bank account with Nat West Bank in 1999 in the name "*Wayne Bennett trading as Callahans*". He denies (see para. 8 of his Statement of Case) that Ben traded under the name Callahans, alleging that he traded though a company known as Babadale Ltd, and (according to his evidence) subsequently Alunray Developments Limited. It is his evidence that he was already running the Callahans business by the time of the discussion with Ben regarding the "family partnership" in the early to mid-1990s.

14. As far as the oral evidence is concerned, there is very little detail given by the Applicants as to their involvement in the Callahans business. Gro, at paragraph 14 of her witness statement says this: *"From that time onwards [around 1993], all the family dealt with each other and with the business generally on the basis that the business was owned jointly by me, Dominique and Wayne as partners. There was a profit share of one-third each…. Wayne and I worked together I the offices of the business for about fifteen years. We worked as part of a family partnership and worked together to make as profit for the business in order that we could each take a third share of the profits. I was a signee on the bank account for all that time until I became ill and left the office as I would have to have a substantial amount of time off and it was uncertain of I would return*." At paragraph 4 she also states that "*…for the past forty years I have assisted my husband Ben in the administration of his business which buys, develops and lets residential property and a small number of commercial properties. This business has operated from offices at 60 Orsett Road Grays Essex RM17 for the past fifteen years or so. All the property rentals and maintenance are administered from this office with assistance of employees."* She earlier explains that Ben had founded the business in 1974. In paragraph 13 she also refers to the fact that she had been made bankrupt in 1999. "*Although we had formed a partnership and I was taking money from the business (which I declared to the Official Receiver) I could not accept my share of any property equity in the business until my bankruptcy was discharged."* I note that very little documentation relating to the bankruptcy was disclosed. No statement of affairs was produced, and there are no records of any sums received by the Official Receiver or trustee from Gro.

15. Gro was cross-examined at length. She could recall Ben and Wayne having long discussions about the business. She thought they had agreed that she and Dominique should have a share in the "business". Initially she could not remember how much of

the rental income she was taking, or what proportion she was entitled to. Then she referred Mr Clegg to paragraph 12 of her witness statement, which mentions a one-third share. However, she could not remember how it was paid, since "*It was such a long time ago*". She did not believe that she had a legal interest in the properties in 1999. She said that she and Ben ran the business. The properties may have been in his name or both names or both names. There were a lot of different of bank accounts and companies through which the business was run. She could not recall which company owned which property. She accepted that Wayne had made a financial contribution to the business. She thought it was £22,000, as opposed to the £38,000 he had claimed. She was asked about the purchase of the Lake. She did not know how Robert Stonebrook had been involved, but felt the partnership had paid for the property and that she was entitled to a one-third share. She said that she was not involved in "*the details*"

16. Dominique's evidence was that she left England in around 1993 at the age of 18, did some travelling, worked as a ski instructor, and eventually moved to Amsterdam in around 1995, returning to the UK around 2005. She very fairly accepted that she had little involvement with the business, although from time to time she was asked to sign documents, and she was kept up to date by her father. She regularly visited her parents whilst living abroad. She frankly accepted that she knew very little about the purchase of the Lake, or Mr Stonebrook's involvement, or the funding arrangements.

17. A certain amount of documentary evidence was relied on by the Applicants. This includes an incomplete series of bank statements for the period 23rd March 1990 to 26th March 1992. The account-holder is "Callahan Limited". The Applicants also produce a series of pages from what appear to be an accountant's working papers headed "*Callahans Trial Balance*", relating to the year ended 31st May 2004 and 31st May 2005. These are not produced by any witness, such as the accountant himself, and carry no explanation. The Applicants rely on them because there are entries for Wayne and "*Gro/Dominique*" and a sum of money attributed to each. It is suggested that these represent drawings from the Callahans partnership. The Applicants have not produced any other documents that relate to Callahans. Nor have they produced any partnership accounts, or their own tax returns identifying any drawings or other payments derived from Callahans.

THE RESPONDENT'S EVIDENCE

18. Wayne's evidence, in essence, was that he rejected the idea of a partnership with Gro and Dominique and no such partnership ever came into being. Ben operated various parts of his business through different entitities, including limited companies. Callahans – the unincorporated business – managed the property portfolio/estate agency, and by the early 1990s Wayne had primary responsibility for this. As a result of the discussions between Ben and Wayne in the early 1990s, it was agreed that certain of Ben's properties would be held on trust for Gro, Dominique and Wayne in equal shares. Wayne would continue to manage the Callahans business, with input from Ben, but thenceforth the properties themselves would be held for the Applicants and Wayne beneficially. Wayne did continue to manage the business until around 2005, when he fell out with his father. He attributes his father's cooling towards him to the return of Dominique to the UK at around this time. There was also a dispute between them with regard to the ownership of the East Thurrock Football Club. At all events, he was excluded from the business from this time onwards, about which he clearly feels extremely bitter. However, he and his father continued to invest in property together after the exclusion from Callahans. Robert Stonebrook was also frequently involved as a joint investor. Wayne accepts – as he must, in view of the documents – that in 2006 he was held out to the Nat West Bank as a partner with the Applicants. He says however that this was not an accurate description of the relationship.

CONCLUSIONS ON THE PARTNERSHIP ISSUE

19. In the light of the oral and documentary evidence, my conclusions are as follows. The question is this: were Gro, Dominique and Wayne "*persons carrying on a business in common with a view of profit"*. In my judgment, they were not. First, there is no sufficient evidence that they ever carried on a business together. There is evidence that Ben set up a property business in the 1970s. He invested in property and built up a property portfolio. Gro assisted him in the administration of the business. The business was carried on both through the medium of limited companies and subsequently under the trading name of "Callahans". Wayne also assisted him, and in the early days was employed in a fairly menial capacity. At some point, probably in the late 1980s, Wayne assumed a much bigger role in the business. Clearly, there

were discussions between Ben and Wayne in the early 1990s with regard to the establishment of a formal business relationship between all four members of the family. I consider that these discussions related more to the ownership of Ben's various properties than to the property business itself, which had no assets, and whose activities mainly comprised the letting and managing of Ben's property portfolio. The value was in the property itself, not in the business that managed it. However, I do not accept that the parties contemplated a partnership as such. The reality appears to have been this: Ben and Wayne continued to run the business. Ben seems to have operated very much in the background, while Wayne was the public face of the business. The fact that the business bank account was, for many years, in the name of Wayne "*trading as Callahans*" reinforces this view. I accept that there was an informal understanding between Ben and Wayne that some of the properties in the portfolio would thenceforth be held for Gro, Wayne and Dominique in equal shares, but this is not the same as a partnership. Section 2(1) of the 1890 Act makes this absolutely clear. There is no evidence that Gro, Dominique and Wayne carried on any form of business together. Gro has always acted as Ben's assistant – this is her own evidence – and there was no change in her status as a result of the discussion between Ben and Wayne. Dominique took no active part in the business at any stage, until relatively recently at least, indeed she was absent abroad at the time of the alleged partnership agreement and for many years afterwards. The evidence that Gro and Dominique took money out of the business is unsupported by any documentation, other than the unexplained and unverified extracts from the accountant's working papers that postdate the alleged agreement in any event. Even if they did take money out of the business from time to time, from gross returns, that is insufficient in itself – see section 2(2) of the 1890 Act. Even if it had been possible to find that, in 2004 and 2005, Gro and Dominique had been taking a share in the profits of Callahans, this at best is only "*prima facie*" evidence of a partnership (see section 2(3) of the 1890 Act) and in my view is insufficient to establish a partnership in the light of the evidence overall.

20. I emphasise that the absence of any written partnership agreement or other equivalent document is not a critical element in my finding, although it does not assist the Applicants' case. However, it is abundantly clear that Ben has always been the prime mover in the property business. Legal ownership of the various properties comprised

within the portfolio was vested in a number of different nominees and trustees. Given the number of properties involved, there is a surprising lack of documentation relating to beneficial ownership. This appears to be a deliberate policy, since it allows Ben to create and deal with these interests (albeit without regard to the formal requirements of section 53 of the Law of Property Act 1925) according to his wishes and requirements from time to time. The absence of such documentation reinforces the general sense that the beneficial ownership of the various properties in the portfolio is deliberately shrouded in obscurity. Furthermore, it is quite apparent from the evidence of Gro and Dominique that they have very little knowledge of the dealings of the Callahans business. For example, Gro's answers with regard to her drawings from the business were vague in the extreme. Nor did she appear to have any knowledge of the involvement of Mr Stonebrook in the purchase of the Lake and indeed other properties jointly owned with Ben and Wayne. My conclusion as regards the partnership is based on an examination of all the evidence, including the actions of Ben and the parties in relation to the business of Callahans. I find that notwithstanding the discussions between Ben and Wayne in the early 1990s, in which the topic of partnership was raised, no partnership came into being as a matter of fact. In this particular respect, I prefer the evidence of Wayne to that of Ben, although there are other issues on which I have found the opposite. This reflects my sense that both of them have a tendency to tailor their evidence according to the position they wish to establish.

EVENTS POST-1993

21. The issue of partnership was again raised at a later date, in connection with the business loan to the "partnership" in 2006. In contrast with the position regarding the earlier discussions, the matter is well documented. The documents start with a letter dated 8th February 2006, from Nat West Bank ("the Bank"), recording certain discussions between Rob Rogers, the Senior Business Manager, and Wayne. Essentially, it was agreed that the Bank would make available a Flexible Business Loan in excess of £1m, to be secured by Wayne, Gro and Dominique on 9 identified properties. All these properties were registered in Wayne's name at that time, and are currently included within the Annex 1 Properties as referred to above. The letter is addressed to Wayne at *"the Bennett Partnership"*. Certain preconditions to the loan are set out in the letter. On of these relates only to "*Callahans Estate Agency £20K*

Overdraft requests" and reads as follows: "*1. Confirmation that the business remains a partnership (as per bank current account) with satisfactory clarification as to why 2005 trading figures produced on sole trader basis.*" On 23rd March 2006 a Flexible Business Loan Agreement was signed, between the Bank and Wayne, Gro and Dominique "*being the partners of Wayne Andrew Bennett, Dominique Simone Bennett, Gro Kristina Bennett",* defined as "*the Partnership*". The loan was preceded by a pro forma Business Financial Profile submitted and signed by Wayne, Gro and Dominique. This includes a section on "*Ownership Details*", which requests "*details for each person owning 20% or more of issued share capital".* In this section, Wayne is described as owning 34%, and the others 33% each. In the box marked "*Years in the partnership/company"* someone has placed the number "0". In the box marked "*Years in this type of business*" the number 20 appears next to Wayne's name, 30 next to Gro and 10 next to Dominique. There are various other documents generated by the Bank at this time, which I have also considered.

22. A new current account was opened by the Bank – 72080973 – in the name "*Bennett ptnrshp*" on or about 9th March 2006. The loan of £1,054,000 was credited to this account, and various transfers were made being repayments of the existing borrowings on various properties. As explained above, the original intention was for the nine specified properties to be transferred from Wayne to himself and Gro and Dominique and then charged to the Bank as security. In the event, this never happened. Wayne said that this was because Ben had been advised that the transfer would create an immediate Capital Gains Tax charge. Ben denied this. Eventually, Wayne simply took over the Flexible Business Loan, and the Loan Account (72081570) was closed in November 2006.

23. The loan arrangements made in 2006 may be significant in this sense. The Lake was purchased two years earlier, in 2004, and according to the Applicants with funds from the partnership which had come into existence many years earlier. If the documentation in 2006 shows that a partnership between the parties was already in existence, clearly that would strongly support the Applicants' case. Having considered the documentation, and the oral evidence received from the parties, I have however concluded that there was no pre-existing partnership in 2006. I consider it significant that the business accounts of Callahans were still being drawn up on the

basis that Wayne was a sole trader, as late as the 2005 year end, and the business bank account was also in his sole name. The answer given by the parties to the question "*Years in the partnership/company*" – namely "*0*" – is another indication that there had been no pre-existing partnership. I appreciate that it is not clear who actually wrote the figure "*0*" in the pro forma, but on the other hand this document was actually signed by Gro and Dominique. In this respect it is one of the very few documents relating to the partnership issue that can be tied to the parties. Whether or not a partnership came into existence in 2006 as a result of the arrangements made between the parties at that time is not an issue which I need to determine. If no partnership existed prior to the purchase of the Lake, the Applicants' claim to a beneficial interest on that basis must fail. I should perhaps add that I heard a considerable amount of evidence from Ben, Wayne and Robert Stonebrook as to the funding of the purchase. However, the source of the monies – other than the fact that it derived from the Callahans client account held with Graham Harvey Solicitors – is obscure. It is clear that Ben, Wayne and Robert Stonebrook entered into various property purchases, and no comprehensive attempt has been made to identify the source of funds in the client account, to demonstrate that Gro and Dominique had an interest in it. This leads on to a more general point. Wayne's accountant, Paul Baker, gave evidence, and was questioned closely about the schedule of properties (referred to in paragraph 25 below) and the settlement with HMRC. He said that he had a very considerable number of documents in his possession relating to the affairs of Callahans and of Wayne himself. Given that fact, it is very surprising that more documents relevant to the issues have not been disclosed.

THE ASSIGNMENT BY BEN

24. The Applicants also have a second string to their bow – namely, their rights as assignees of Ben's beneficial interest. Wayne accepts that Ben had a one-third interest at the time of purchase, but contends that this interest was "*relinquished*" in 2007 – see paragraph 88 of his first witness statement. His case is as follows: *"Around August/September 2007, Ben required funds in order to purchase a Mercedes for Gro. Accordingly, it was agreed that upon transfer of funds for the sum of £62,521, Ben would agree to relinquish his interest in the Lake. A copy of the bank statement showing the transfer to Daimler Chrysler is shown and exhibited hereto at page 1086 of "WAB1"."* Ben's evidence on this issue is to be found at paragraphs 5 to 16 of his

second witness statement. He accepts that funds within the bank account no. 72080973 – the Bennett Partnership current account – were used to pay for a car for Gro. A sum of £62,521.00 was paid by means of a CHAPS payment to Daimler Chrysler UK. He states that the source of the monies in the account was a personal loan of £366,000 made to Dominique on 7th September 2007, which he had negotiated with Nat West Bank for the development of certain land. He says that the partnership did not use the Partnership Account for its day to day activities. For many years it had used the account numbered 47898402 in Wayne's name. According to him, the loan monies were paid into the Partnership Account to distinguish it from partnership funds. The money has been used for a variety of purposes, but principally for the purchase of the ground of East Thurrock Football Club, an issue which has given rise to a further dispute with Wayne. At all events, in summary Ben says that Wayne had no interest in the monies in the Partnership Account, Ben did not need Wayne's permission to deal with it, and indeed Wayne was unaware of the use of the funds to purchase Gro's car until well after the event. In essence, he says that Wayne has fabricated the alleged agreement as to the relinquishment of Ben's share in the Lake.

25. Both Ben and Wayne were cross-examined in detail on their respective cases. A number of documents were put to the witnesses. One of these was a schedule [page 350 of the Bundle], drawn up by Mr Paul Baker, who is Wayne's accountant. It appears that in 2010 there had been an Inland Revenue investigation into the business activities of Ben and Wayne, and a substantial amount of tax was owed. Mr Baker was assisting Wayne and Ben to achieve some apportionment of the tax liability between themselves, and Robert Stonebrook. At some point on the process a document came into existence, being a schedule of the various properties owned within the Bennett family and the beneficial shares. Mr Baker was asked about this Schedule, and he thought it had originated in a meeting which he held with Dave Warren, the HMRC Inspector, but it was clear that the document had been seen by and discussed with both Ben and Wayne. Indeed, each of them relied on the document although neither was prepared to accept that it was entirely accurate. The significance of the document in relation to the Lake is that it showed it to be owned by Wayne and Ben in 2010, Wayne with a two-thirds share and Ben with one-third. Since Wayne had claimed that he had acquired Ben's share in 2007, necessarily this casts some doubt on his case. Other documents were produced from which it is

apparent that from the point of view of third parties, Ben was still viewed as the owner or one of the owners of the Lake.

26. Taking all the evidence in the round, I have concluded that Ben retained his one-third share in the Lake at the date of the Assignment in 2015, and that share has now passed to the Applicants. I reject Wayne's evidence as to the alleged agreement with Ben in 2007. By his own admission, Wayne had fallen out with Ben some years earlier and, in his view, had been unfairly excluded from the property business. The relationship was acrimonious to say the least. It is highly improbable, in my view, that Ben would have asked his consent for the use of any monies in the Partnership Account, monies which were derived from a loan to Dominique which Ben himself had negotiated without reference to Wayne. He did not need to involve Wayne in any way since there were other signatories of the account. Furthermore, it is quite apparent from the other evidence in this case, including evidence from Wayne himself, that Ben more or less did what he wished when it came to the various businesses that he was associated with. He was not prone to consulting or sharing decisions, and certainly not with Wayne at this stage. Taking the evidence altogether, including the relevant documents, I find that Ben did not "relinquish" his share in any way prior to the Deed of Assignment.

27. In any event, it is quite unclear as a matter of law how this "relinquishment" would work. A disposition of a subsisting equitable interest in land must comply with section 53(1)(c) of the Law of Property Act 1925. Therefore, it must be in writing signed by the disponor of his agent. Any contract to dispose of an interest in land must comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Manifestly, neither document exists. There is no indication in Wayne's Statement of Case, or indeed in Mr Clegg's Skeleton Argument, as to how this difficulty can be overcome. It is possible that some sort of estoppel might have come into play, and of course a constructive trust can come into existence despite the absence of a section 53 compliant document. It would be necessary for Wayne to plead, and prove, the existence of such an interest, which he has not done. In any event, for the reasons given, he has not been able to establish the primary facts on which he relies.

THE RELIEF CLAIMED BY THE APPLICANTS

28. The Applicants are entitled to a beneficial interest in the Schedule 2 Properties and in the Lake, by virtue of the Deed of Assignment, whereby they acquired Ben's share. There is no doubt that this entitles them to register a restriction to protect their interests. The regime under the 2002 Act relating to restrictions can be found at sections 40 to 47. The registrar has power to under section 42 to enter a restriction in three specified situations: (a) preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge; (b) securing that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached, or (c) protecting a right or claim in relation to a registered estate or charge. Interests under a trust fall within the second category, and there is no doubt that if an application were made now it would succeed – or, rather, any objection to it by Wayne would properly be regarded as groundless. However, it is argued by Wayne that the referred applications made by the Applicants to the Land Registry should be dismissed, since the Deed of Assignment postdates the applications. It would be wrong, Mr Clegg argues, to register restrictions on the basis of an interest which did not exist at the date of the applications.

29. Mr Thorowgood, on behalf of the Applicants, counters this argument in two ways. First, he argues that it would be consistent with the Tribunal's overriding objective to permit the Applicants to amend their original application, so as to raise the Deed of Assignment. He invites me to apply the test which exists under the Civil Procedure Rules, by analogy, and cited *Finlan and another v Eyton Morris Winfield* (a firm) and another [2007] 4 All ER 142 in support of the proposition that the court may permit an amendment even where the cause of action which arose after the date of issuing the proceedings. Secondly, he submitted that allowing the restriction to be entered as from the date of the original application does not offend the sanctity of the register, by altering priorities. This is because a restriction cannot alter priority – see sections 28, 30, 32 and 32 of the 2002 Act. In any event, a search of the day list reveals that the only pending applications or priority notices emanate from Wayne himself. There are no third party interests which might be affected by the restrictions.

30. It might be thought that there is a certain logical inconsistency in directing the Land Registry to give effect to applications made in 2013 on the basis of an instrument executed in 2015. On the other hand, it would plainly be undesirable to leave the restrictions in abeyance pending a new application, when the Applicants manifestly have an interest capable of protection. They could of course obtain an injunction or seek some other appropriate relief, to prevent any disposition pending registration of the restrictions, but that seems an unnecessarily expensive and uncertain course of action. I do not consider that the jurisdiction to amend a claim form under the CPR is analogous to the case of an application to the Land Registry – I do not think that this Tribunal has power to amend an RX1 form.

31. However, it seems to me that the answer is to be found in section 42 itself. Mr Clegg's argument is that I must not take into account events that occurred subsequent to 2013 when considering the application. I am bound to look at the position as it existed at the date of the 2013 applications. I shall assume that this argument is correct. The question then arises whether the registrar ought to have registered the restriction, or refused to do so on the grounds set out in Wayne's objection. In my judgment, the registrar had power to register the restrictions under section 42 (1)(c) – to protect the Applicants' claim to a beneficial interest. The registrar may protect by way of restriction a claim "*in relation to a registered estate or charge*". The Applicants' claim that they were beneficial owners of the Lake is such a claim. It was held in the *Republic of Croatia v Republic of Serbia* [2009] EWHC 1559 (Ch) that a person making such a claim has a "*sufficient interest*" under Rule 93 of the Land Registration Rules 2003 to apply to the registrar for a restriction. The registrar does not have to determine the validity of the claim – he merely has to be satisfied that the claim is arguable. Undoubtedly the Applicants' claim was arguable albeit that, having heard all the evidence, and on the balance of probabilities, I have rejected it. Accordingly, even if I am prevented from taking the Deed of Assignment into account, there are good grounds for directing the Land Registry to enter the restriction on the title. There could be no proper basis for cancelling such a restriction at the present time.

32. Alternatively, I have power under Rule 40 (3)(a) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to direct the Land Registry to make a

specified entry on the register of any title affected by my Order. It would be open to me to direct the registrar to cancel the application for a restriction based on the alleged partnership, but to enter a restriction to protect the admitted interests under the Deed of Assignment. However, this seems to be an undesirably circular method of achieving the same result.

33. I shall therefore direct the Chief Land Registrar to give effect to the Applicant's applications dated 3rd May and 28th July 2015 in the form of order attached.

COSTS

34. I did not hear full arguments on costs from the parties, given that there were a number of possible outcomes to this case. In the event, the result is as follows. Although I have rejected the Applicants' claim to an interest in the Lake based on the alleged partnership, I have nevertheless directed the Land Registry to give effect to the RX1 application dated 3rd May 2013. As regards the Schedule 2 Properties I have also directed the Land Registry to give effect to the RX1 dated 28th July 2013. However, the principal factual issue in the case – which took up most of the hearing – related to the partnership issue. The Applicants have failed to establish a partnership. In the circumstances, I am minded to order the Applicants to pay the Respondent's costs. However, I shall permit the parties to make representations on the costs issue. I direct that the Applicants should submit any written argument on costs no later than 10th July 2015, and the Respondent may reply no later than 17th July 2015. I shall then consider the matter further.

Dated this 1st day of July 2015

BY ORDER OF THE TRIBUNAL