SUPREME COURT OF QUEENSLAND

CITATION:	*Rushton (Qld) P/L & Anor v Rushton (NSW) P/L & Anor* [2002] QCA 210
PARTIES:	**RUSHTON (QLD) PTY LTD** ACN 079 140 364 (first plaintiff) **AND** **SENMEAD PTY LTD** ACN 053 308 008 (second plaintiff/appellant) **v** **RUSTON (NSW) PTY LTD** ACN 079 164 202 (first defendant/first respondent) **AND** **RUSHTON (SA) PTY LTD** ACN 079 164 177 (second defendant/second respondent)
FILE NO/S:	Appeal No 8691 of 2001 DC No 5024 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2002
JUDGES:	McMurdo P, McPherson JA, Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDERS:	**Appeal allowed with costs. Judgment varied by omitting paragraphs 3, 4 and 5.**
CATCHWORDS:	PARTNERSHIP - DISSOLUTION AND WINDING UP - OTHER MATTERS - one partner buys interest of another – whether that is a "winding up" to which s 39 *Partnership Act (NSW)* applies PARTNERSHIP - PARTNERSHIP PROPERTY - IN GENERAL AND WHAT CONSTITUTES PARTNERSHIP PROPERTY - OTHER CASES - sale of partnership 'interests' - whether share is or includes net proceeds of share, liabilities having been accounted for *Partnership Act 1891* (QLD) s 41, s 42 *Partnership Act 1892* (NSW) s 38, s 39

Bakewell v Deputy Federal Commissioner of Taxation (1937) 58 CLR 743, applied
Federal Commissioner of Taxation v Everett (1980) 143 CLR 440, referred to
Hendry v Perpetual Executors & Trustees Association of Australia Ltd (1961) 106 CLR 256, applied
S J Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd [1989] 2 Qd R 87, referred to

COUNSEL: H Fraser QC, with L Bowden, for the appellant
R Perry, with G Beacham, for the respondents

SOLICITORS: Bennett & Philp for the appellant
Macrossans Lawyers for the respondents

[1] **McMURDO P:** I agree with the reasons of McPherson JA and with the orders proposed.

[2] **McPHERSON JA**: This is an appeal from a decision given in a long-running action in the District Court extending over a number of hearing days in December 2000 and May 2001. His Honour's decision determined a series of issues from which there has been no appeal. The only questions which have been brought to this Court concern his Honour's orders numbered 3, 4 and 5 requiring the second plaintiff to contribute one third of certain sums awarded against the defendants on their counterclaim, together with one third of the defendants' costs and the same proportion of the defendants' solicitor and client costs, both from 11 April 2001. Although the specific sum or sums awarded are not large, the solicitor and client costs alone are, no doubt because of the length of time occupied by the trial and the complexity of the issues involved, very large, being, so we are informed on appeal, of the order of some $420,000 before undergoing assessment. On that footing, no question arises about the amount in issue being within the appealable amount.

[3] The disputes arose out of the business or businesses of valuers conducted from Queensland by Mr Holzberger in partnership with the two plaintiffs Rushton (Qld) Pty Ltd and Senmead Pty Ltd (which are companies he controls) on one side of the record; and on the other, conducted from New South Wales by Mr Rogan in partnership with the two defendants Rushton (NSW) Pty Ltd and Rushton (SA) Pty Ltd, which are companies he controls. The simplicity of this account of the parties or their interests is, however, disrupted by the fact that Senmead Pty Ltd was also a member, in equal one third shares with the two defendants, of a partnership known as Rushton NSW Partnership, which was established under a partnership deed dated 29 August 1997 (ex 88), to which the second defendant Rushton (NSW) Pty Ltd was a party in the capacity of prospective agent and trustee for those partners (cl 12).

[4] Before 1 September 1997, Mr Holzberger and Mr Rogan through their companies carried on separate valuation businesses using the name Rushton under licence from Edward Rushton Pty Ltd, which was a company controlled by a Mr & Mrs Rushton. On that date, Mr Holzberger and the plaintiffs, and Mr Rogan and the defendants, together with a number of associated companies, entered into a contract described as the Rushton Group Equity Holders Agreement to acquire the shareholdings of Mr and Mrs Rushton in Edward Rushton Pty Ltd. Those

individuals and that company itself were never involved in any of the subject litigation and, from the time of execution of the Equity Agreement, it drops out of the narrative in the appeal.

[5] In addition to buying out Mr and Mrs Rushton, one of the purposes of the Equity Agreement was to co-ordinate the Holzberger and Rogan businesses in a national group using the name Rushton to provide valuation services throughout Australia and in Papua New Guinea. To administer the co-ordinated national service and to provide for its marketing, Rushton Group Marketing Pty Ltd was incorporated and also became a party to the Equity Agreement executed in 1997. Both sides participated in its control, and both were required to contribute funds in certain proportions to the administrative costs of conducting its operations. In addition, the Equity Agreement provided as part of the co-ordinated national service for requests received in one part of the country to be referred to the valuation business operating in that part of the country to which it related, with a commission of 10% of the fees received being payable by the referee to the referor. It was out of this arrangement or relationship, and disputes about it, that many of the claims in the proceedings arose.

[6] Not much of what has been said so far has any direct relevance to the issues for decision on this appeal except to provide the factual matrix against which the next step in relations between the parties took place. The attempt to co-ordinate the two businesses nationally proved less satisfactory than had been expected. Disagreements arose between Mr Holzberger and Mr Rogan or their companies, and it was decided to dismantle the national edifice created by the Equity Agreement and to disengage the two businesses which each of those individuals controlled. The obvious method of achieving this was for one side to buy the other out, and so separate the two enterprises. After lengthy negotiations, it was agreed, among other matters, that Mr Rogan and his companies should purchase the interest held by Mr Holzberger and his Queensland companies in what may be described as the New South Wales business; that is to say, for the interest held by the plaintiff Senmead Pty Ltd in the Rushton NSW Partnership to be bought out by the two defendants controlled by Mr Rogan in New South Wales. It was in order to carry out this intention that on 22 October 1999 a contract, described as the Sale of Business Interest Agreement ("the Sale Agreement") was executed by Mr Holzberger and the plaintiffs Rushton (Qld) Pty Ltd and Senmead as the Seller, and, on the other side, by Mr Rogan and Rushton (SA) Pty Ltd and Rushton (Vic) Pty Ltd as the Buyer.

[7] Clause 3.1 of the Sale Agreement provided that "the Seller must sell and the Buyer must buy the Interests for the Purchase Price …" specified in cl 4.1 as a total of $1,450,000, of which $50,000 was paid as a deposit, with the balance payable on completion. Clause 3.3 provided that the Seller must sell those Interests:

> "… together with all rights attached to them as at 30 June 1999 and all those rights which accrue between 30 June 1999 and Completion".

The word "Interests" was defined in cl 1.1 to mean:

> "all the right title and interest of the Sellers in the Shares and Partnerships which are particularised in Item 3 of Schedule 1."

Shares meant all shares held by the Seller in the companies described in that Item, which included Rushton (NSW) Pty Ltd and Rushton Group Pty Ltd; and Partnerships meant various partnerships including the Rushton NSW Partnership.

[8] As matters worked out, the date for completion was fixed at 6 December 1999. This was relevant for a number of purposes, but principally in relation to cl 4.2 by which the parties acknowledged that:

> "(a) the Purchase Price includes all amounts owed or owing by the Partnership and the Companies to the Sellers for the period up to 30 June 1999, and, subject to Completion, the Sellers have no further entitlement to any distribution, profits or loss claim or dividend of whatsoever kind from any of the Partnerships and Companies for the period ended 30 June 1999 or for the period up to and including Completion;
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> (b) the Purchase Price includes all debts owing for the period ending 30 June by the Partnerships and Companies to any member of the Sellers and the Sellers shall have no further claim in relation to these debts;
>
> (c) the Purchase Price includes all or any of the assets (including the goodwill of Rushton Group Partnership but expressly excluding any goodwill associated with the trading of the Business in Queensland and Papua New Guinea) of the Partnerships and Companies and is also in consideration of the transfer of the Business Name under clause 9; and
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> (d) prior to Completion all trading between the parties shall be performed in accordance with the Equity Holders Agreement."

[9] It is an axiom of partnership law that any change in the membership of a partnership occurring, whether by reason of the retirement, expulsion, death or otherwise of a partner, has the consequence of dissolving the partnership: *S J Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd* [1989] 2 Qd R 87, 90-91. After dissolution, the next step is to wind up the affairs of the partnership by realising the assets and paying the debts and liabilities of the firm before distributing the surplus, if any, among the partners according to their rights and interests. See *Partnership Act 1891* (Qld), s 42; *Partnership Act 1892* (NSW), s 39. Winding up in that way may be avoided if the parties agree on a sale to one or more of the remaining partners of the shares of the outgoing partner, or if there is a provision in the partnership agreement to that effect. This is sometimes described as a technical or notional dissolution, which is something of a misnomer because it is not the dissolution but, at most, the winding up that is notional. The partnership or firm itself is dissolved as soon as there is a change in membership, but the assets and, as between the partners, responsibility for the liabilities of the partnership are taken over by the remaining partners.

[10] This is what happened here. The interests or share of Senmead Pty Ltd in Rushton NSW Partnership were, under the Sale Agreement, purchased by the defendant members of that partnership Rushton (SA) Pty Ltd and Rushton (Vic) Pty Ltd. The effect of the Sale Agreement was, as I have said, to fix the date for completion of the contract at 6 December 1999. As between the parties to that

contract, however, it was acknowledged in cl 4.2(a) that the seller Senmead Pty Ltd should have no further entitlement in or to any of the Partnership or Companies, including the Rushton NSW Partnership "for the period ending June 1999 or for the period up to and including completion". Until quite recently the appellant plaintiffs Rushton (Qld) Pty Ltd and Senmead, who with Mr Holzberger are the Seller under the Sale Agreement, insisted that this meant that the date of dissolution of the Rushton NSW Partnership was 30 June 1999. However, on the hearing of the appeal, the appellants conceded that, as the defendants had been contending all along, the date of dissolution was 6 December 1999, when the contract was completed, so that there is now no longer any issue between the parties in relation to that question.

[11] At the trial, the defendants were successful in their submission that Senmead as Seller was, as the learned trial judge held, bound to contribute a one third share to the classes of liability specified in paras 3, 4 and 5 of the judgment. The basis of this liability was not articulated in the defendants' counterclaim as pleaded; but it seems to have rested principally on two propositions. One was the provision in cl 6 of the Rushton NSW Partnership Deed that, if the assets of the partnership were insufficient to meet its liabilities and expenses, they were to be paid by the partners in the proportions set out in the Equity Agreement of 1977; that is to say, as to one third each. The second proposition relied on to produce the result arrived at in those paragraphs in the judgment was founded on s 38 of the Partnership Act (NSW) (which is the same as s 41 of the Queensland Act) providing that, after dissolution of a partnership, the authority of each partner to bind the firm and the other rights and obligations of the partners continue notwithstanding the dissolution "so far as may be necessary to wind up the affairs of the partnership" and to complete transactions begun but unfinished at the time of dissolution. Authorities were cited to show that where, for example, a further partnership liability emerges after winding up has taken place, each of the partners is liable to contribute his proportionate share to the expense of discharging it. See *Uren v Nelson* 1910 TPD 562 and *Simon v Levin & Co* 1921 AD 49 (both of which are decisions from South Africa, where there is no statute or section comparable to s 38 of the *Partnership Act* (NSW)); and *BMF Trading v Abraxis Holdings Ltd* (2000) BCSC C99443, where there is some discussion of the analogue in British Columbia of s 38.

[12] None of these decisions is helpful in solving the problem that arises here. The operation of s 38 in continuing the authority and liabilities of partners after dissolution is predicated on its being necessary to wind up the affairs of the partnership. Winding up in that context plainly refers to a winding up of the affairs of the partnership in the sense described in s 39 of the *Partnership Act* (NSW) (s 42 of the Queensland Act). It is, in my opinion, a mistake to assume that what took place in this instance was a winding up in that sense; that is to say, by having the property realised and applied in payment of the debts and liabilities of the firm before distributing the surplus to the partners. Nothing like that happened here: indeed, the parties were at pains to avoid it, no doubt because it would have been destructive of the business goodwill for the assets to be realised and applied in payment of the debts, when the intention plainly enough was that the business should be continued in future subject only to the exclusion of Senmead Pty Ltd. The whole intention and effect of the Sale of Business Interest Agreement was, as its title implies, to sell and pay out the interest of Senmead Pty Ltd in the business of the Rushton NSW Partnership, and so enable that business to be carried on by the

Rogan associates without undergoing the disruption attendant on winding it up in the statutory sense of that expression.

[13] That being so, it becomes necessary to analyse more closely the effect of an agreement by continuing partners to buy the share of an outgoing partner in a solvent partnership. Such an agreement has, when carried out, the effect not only of dissolving the partnership but of terminating the outgoing partner's right to continue to share in the accruing profits of the business and to receive on winding up his due proportion of the surplus remaining after discharging the liabilities. See *Bakewell v Deputy Federal Commissioner of Taxation* (1937) 58 CLR 743, 770. In applying there what was said by Lord Blackburn in *Ewing v Ewing* (1882) 8 App Cas 822, 826, Dixon and Evatt JJ said that the right to share in the surplus "was converted into a right to receive the price"; and that the share in the partnership in which the outgoing (or, in that case, deceased) partner was beneficially interested "was transformed into a fund arising from its purchase."

[14] So here, the effect of Senmead's sale of its interest in Rushton NSW Partnership was to determine its share or beneficial interest in the partnership property, together with its associated right to share in any profits and surplus assets and to convert that share or interest into a right to receive the agreed price of $1,450,000. That, in practical terms, was the effect of the Sale Agreement, and in particular cl 4.2 of it, which was directed to emphasising, in various specific respects, that Senmead's partnership interests were converted into a single right to receive the total price, to the exclusion of any other right it had previously possessed as partner. The sub-clauses of cl 4.2 are, it is true, somewhat clumsily worded. Each of sub-cll (a), (b) and (c) opens with the words "the Purchase Price includes …", and then proceeds to designate items such as amounts owing by the Partnership to the Seller, debts owing for the period to 30 June by the Partnership to any member of the Seller, and all of the assets including goodwill of the Rushton Group Partnership. But although clumsily expressed, the meaning, I think, is clear enough. The total purchase price of $1,450,000 is to be understood to cover or to take account of all the matters specified. There are to be no more claims by the Seller for anything in addition, nor any demands for payments for or on account of any of the matters specified. The dismantling of the national edifice created by the Equity Agreement was to be complete on payment of the whole of that price.

[15] It was primarily because, as it turned out, the process of separation and payment for it was not as exhaustive as had been envisaged that the litigation ensued. Clause 4.2 failed to cater for some specific items or claims arising out of the joint trading that had taken place under the Equity Agreement of 1977. But when the terms of the Sale Agreement are looked at in the light of the judgment given in the proceedings and the upshot of the litigation as it turned out, it is evident that its broad intention and effect were as I have expressed it here to be. Then, at a late stage in the trial, the defendants were permitted to argue that in respect of sums awarded to the plaintiffs against the defendants, and in respect of the costs incurred by the defendants in the litigation, the plaintiff Senmead Pty Ltd as former partner in the Rushton NSW Partnership was liable to contribute its due proportion of one third to those liabilities, and to do so either by virtue of cl 6 of the Rushton NSW Partnership Deed or as a liability incurred pursuant to s 39 of the Act by the defendants in the winding up of that partnership.

[16] I have already stated my conclusion that what happened here was not a winding up to which s 39 of the Act applied. A further reason is that it is difficult to see that attempting to enforce the Sale Agreement can fairly be regarded as an incident of winding up the partnership or as a cost or expense of doing so. As regards s 6 of the Partnership Deed, its operation was brought to an end by the combined effect of the agreement for the sale of Senmead's share to the Rogan group and the dissolution of the Rushton NSW Partnership on 6 December 1999. Had the Sale Agreement been better drawn, it might have been expected to contain a provision by which the Buyer indemnified the Seller, or at any rate Senmead Pty Ltd, against all claims arising out of the previous trading of the parties or of the business carried on by the Rushton NSW Partnership. There is no such indemnity in the Sale Agreement. Having sold its share in that partnership to the Buyer, Senmead remained and remains liable to creditors of the partnership for debts incurred while it was a partner; but, as between itself and the other partners, any such liability has in justice become wholly theirs. It is impossible to accept that, having sold and relinquished its share or interest in the assets of a solvent partnership, it was the intention of the parties to the Sale Agreement that Senmead should nevertheless continue to retain a liability to contribute as partner to the debts of a business that had now in all respects become the property of the buyer.

[17] To arrive at such a conclusion runs counter to the legal conception and meaning which has been attributed to a share in a partnership, as it has been explained in the decided cases. Although having no title to specific property owned by the partnership, a partner has a beneficial interest in each and every asset of the partnership: *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440, 446. Because his share consists of a right to a proportion of the surplus after paying debts and liabilities of the partnership *(ibid),* it necessarily comprises, for the purpose of disposing of it, of a share in the net surplus of partnership assets over liabilities. In that respect it resembles the interest of a beneficiary in the assets of a trust: *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 587, which is to say, it is the interest in that net surplus on dissolution, whether present or prospective, and not the title to any particular partnership asset, that is capable of being disposed of by a partner. It is for that reason that a testamentary disposition of "my livestock" or "my real estate" can be interpreted as carrying to the legatee or heir the net proceeds of the testator's interest in the livestock or the real estate of a partnership of which he is a member. See *Hendry v Perpetual Executors & Trustees Association of Australia Ltd* (1961) 106 CLR 256; *Calcino v Fletcher* [1969] Qd R 8, 18-19. The chose in action disposed of when a share or interest in a partnership is transferred or assigned is one that assumes that the liabilities of the partnership have already, if notionally, been paid or at least provided for out of the available assets.

[18] It was in that sense that the "Interests" of Senmead Pty Ltd in the Rushton NSW Partnership were sold to Rogan and his companies in terms of the Sale Agreement executed in 1999. Being no more than the net proceeds of the sale of that share or interest, it necessarily follows that the liabilities of the partnership had already been brought into account in identifying the subject matter of the sale; as such, they were not something that still remained to be discharged or contributed to by the seller Senmead in return for the purchase price of $1,450,000. The parties are, of course, free to arrive at any price or terms they choose or are able to negotiate and agree upon. Ordinarily, however, the starting point for negotiations about the price is the most recent balance sheet of the partnership which, if it is competently prepared, ought to disclose the net worth of the partnership and so of

the partners' shares. On the hearing of the appeal we were informed that the partnership accounts in this case were in a state of some confusion; but that, of course, cannot detract from the fact that the "Interests" that were sold by Senmead were or included the net proceeds of its share after making allowance for any present or prospective partnership liabilities, like those that were made the subject of orders for contribution in paras 3, 4 and 5 of the judgment appealed from. In so far as they were properly regarded as partnership liabilities at all, they were already comprehended in identifying what was sold as the share or interest of Senmead in the Rushton NSW Partnership.

[19] It is necessary to mention only briefly a further point relied on by the respondent defendants on appeal. It was that the first defendant Rushton (NSW) Pty Ltd was not a party to the Sale Agreement. Despite that consideration, it is clear that that the defendants sought at trial to rely on the Sale Agreement, and that some of the orders it was successful in obtaining were founded directly on that Agreement or its terms. Precisely what significance, if any, the omission from the Sale Agreement of Rushton (NSW) Pty Ltd is said to have remains for me, at least, not altogether clear; but it is not something that assists the first defendant, and for the more general reasons I have given, it is in my view not relevant to the issues on this appeal.

[20] It follows from what I have said that the defendants were not entitled to orders for contribution by the plaintiff to the liabilities in question. The appeal should be allowed with costs and the judgment varied by omitting paragraphs 3, 4 and 5. There is no good reason for disturbing in any other respect the orders made by his Honour concerning the costs of the proceedings at first instance.

[21] **WILSON J**: I agree with the reasons of McPherson JA and with the orders he proposes.