**Neutral Citation No.: Master 62**

| **Ref:** | **2000/2348** |
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*Judgment: approved by the Court for handing down*
*(subject to editorial corrections)*

| **Handed down:** | **18 November 2008** |
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2000/2348

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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BETWEEN:

MARY BRIGID FOSTER (PERSONAL REPRESENTATIVE OF JOHN FOSTER DECEASED)

Plaintiff;

and

JAMES McCORRY

Defendant.

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**MASTER ELLISON**

1. This is a report consequent on the Order of The Honourable Mr Justice Hart made on 9 October 2006 in a partnership suit commenced by a writ issued on 26 January 2000. That Order directed that the premises 531 Falls Road Belfast (in this report referred to as "the property") be sold, that a firm of solicitors to be agreed between the parties was to have carriage of the sale, that the matter be remitted to the Master for accounts and inquiries and that the question of costs be reserved for judgment. On 23 April 2007 I made an Order directing that the following accounts and inquiries be taken and made:-

1. an account of the credits, property and effects belonging to the former partnership ("the partnership") between John Foster deceased ("the deceased") and the defendant at 25 August 1994 the date of commencement thereof;
2. an account of all partnership dealings and transactions between the deceased and the defendant from 25 August 1994 until 6 November 1996 ("the dissolution date");
3. an account of the credits, property and effects belonging to the partnership at the dissolution date;
4. an account of the partnership debts and liabilities at the dissolution date;
5. an inquiry what has become of the partnership property and whether any, and if so what, parts thereof remain;
6. an inquiry whether any and which partnership debts or liabilities have been paid or satisfied and by whom and out of what fund.

2. My Order went on to direct that the defendant file and serve his account and his affidavit evidence verifying that account and in the inquiries, and to afford the plaintiff the opportunity to file and serve a notice of objection or surcharge pursuant to Order 43 rule 5 of the Rules of the Supreme Court (NI) 1980 together with her affidavit evidence.

3. The plaintiff is the widow and personal representative of the deceased who died on 5 July 1999. The defendant and the deceased had entered into a written partnership agreement dated 25 August 1994. The agreement included the following provisions:-

(a) that the business would be that of "purchase management and letting of offices and premises for an unlimited duration …";

(b) the name of the partnership was to be "531";

(c) the business of the partnership was to be carried on at 531 Falls Road, Belfast which at the time of the agreement were agreed for sale to the defendant. Once purchased, the premises would be the property of the partnership notwithstanding that the "title was to be registered in the sole name of James McCorry" and each partner would have a half share in the property;

(d) the profits and losses of the partnership would belong to and be borne by the partners in equal shares.

4. By far the main partnership asset was at all times the leasehold estate in 531 Falls Road (for a term of 9,000 years from 1 November 1955 subject to the yearly rent of £20) which was vested in the defendant by a rectifying assignment dated 30 August 1994 and made by the previous owner of the leasehold estate, Extern Organisation Limited.

5. The deceased was adjudicated bankrupt on 6 November 1996 whereupon the partnership terminated after a lifespan of just over two years. (The plaintiff subsequently acquired the interest of the deceased's trustee in bankruptcy in the property.) Most of the issues in these accounts and inquiries revolve around the fact that the defendant continued to occupy and manage the property after dissolution of the partnership and is claiming reimbursement of expenses and remuneration against the capital profits of the partnership when the property, which has been on

the market for sale for some considerable time, is eventually sold. At the date of hearing, 20 February 2008, the property was being marketed by the Hopkins Partnership at "offers over £400,000" and prominence is given in the sales leaflet to its potential as a "redevelopment opportunity (subject to statutory approval)". The leaflet describes the property as located on a "generous site extending to c 215 square metres on the corner of Glen Crescent and Falls Road; suitable for residential or commercial redevelopment subject to statutory approval". The leaflet also clarifies that at present the property comprises a two storey detached building with offices/sales space on the ground floor and storage accommodation above.

6. As in essence the partnership period was comparatively very short and no significant amount of income was received prior to dissolution, I shall focus first on the somewhat more complex post-dissolution period. Since February 2002 the property has been occupied on a parol monthly tenancy by a company called Sanco Technologies Limited at a rent of £400 monthly. There were other tenancies in favour of the Victims and Survivors Trust from January 1999 until September 1999 at a rent of £380 monthly, in favour of Andersonstown Music School from mid 1998 until August 2000 at £30 weekly, and in favour of two companies owned and operated by the defendant in respect of which no rent was actually charged. The existence of the two companies, namely Systemex Limited and Megabytes Limited (otherwise referred to as "Megabytes Cyber-Café Limited"), was only made known to the plaintiff by way of discovery on the eve of the hearing of these proceedings on 20 February 2008. Although it had been anticipated that Systemex Limited would be

a paying tenant, the company appears to have been in occupation from October 1996 or earlier to at least May 2001 without paying any rent. Megabytes Limited operated and was in occupation of the property from July 1997 at the earliest until 27 July 2004. Most of the utility, maintenance etc invoices or delivery documents upon which the defendant relies to vouch his expenditure are addressed not to him personally but to Systemex Limited, or Megabytes Limited or both. Despite the lengthy periods of occupation of the property by these companies the defendant has provided no account whatsoever of the income or profits of either company and has neither charged nor factored into his calculations any rent in respect of their occupation.

7. The amounts the defendant accepts that he received by way of rent down to the date of hearing on 20 February 2008 are as follows:-

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| Victims and Survivors Trust | £ 3,420.00 |
| Andersonstown Music School | £ 3,360.00 |
| Sanco Technologies Limited | £28,800.00 |
| Total | £35,580.00 |

8. The current tenant is in occupation of the ground floor only and pays a rent of £400 per month. Systemex however was in occupation of both floors and (as I understand the defendant's evidence) Megabytes operated mainly from the first floor. If therefore a notional rent of say £600 monthly were to be deemed to have been received from Systemex and £300 monthly from Megabytes then, taking for the purpose a period of (say) 4.5 years for the tenancy of Systemex and a period of 7 years for the tenancy of Megabytes, the additional rental income would amount to

£57,600, making a total of £93,180 in respect of the post-dissolution rental income down to hearing.

9. The paucity of information supplied by the defendant to his solicitors and accountants in respect of the tenancies (and generally) is revealed on reading a letter dated 9 July 2007 from the defendant's accountants in these proceedings, Cunningham & McParland. The only income of which particulars were given in their letter was the rent of £400 per month from Sanco Technologies from February 2002 until June 2007, totalling £25,600. Although the letter mentions that income was also believed to have been received from the Victims and Survivors Trust, the accountants report simply that "no figure is available". They also said that they were unable to "verify or distinguish partnership property income" from an enclosed summary of bank lodgements.

10. For my own part I am satisfied that the appropriate figure to be taken for the purposes of rental income actually received or which should be deemed to have been received down to hearing on the 20 February 2008 is £93,180.

11. The defendant claims a figure of £107,260 for expenditure post-dissolution until 9 July 2007, the date of the letter from Cunningham and McParland. However, the majority of that amount is comprised of sums claimed in respect of management, supervision, labour time and transport, totalling £82,574. In respect of those items Cunningham & McParland say that those expenditure or remuneration figures are "based on your own estimates and cannot be agreed to supporting documentation". Moreover, the highest element by far is management and supervision at £76,200. This simply is not vouched and even if the time and charges were of themselves not

unreasonable in quantum (given that for much of the time post-dissolution the defendant's own companies were operating out of the property) it would be impossible to differentiate between time spent by the defendant supervising and managing the property as a component of the former partnership business and time spent by the defendant engaged in the activities of Systemex Limited and Megabytes Limited.

12. The defendant's claim for expenditure and remuneration, and these accounts and inquiries generally, must be considered in the context of a number of legal principles, including the existence of a fiduciary duty owed by the defendant to the plaintiff and the obligation to keep proper books or records.

13. Fiduciary duties which partners owe one another do not cease on the death of a partner, but continue in favour of the personal representatives of the deceased until the affairs of the firm are wound up or the deceased partner's share has been purchased by the surviving partner: Meagher v Meagher [1961] IR 96 and the Irish Supreme Court case of Williams v Harris [1980] ILRM 237 at 241 where Kenny J noted:-

> "The relationship between partners and between personal representatives of a deceased partner was a fiduciary one so that those partners who continued the business were, in the absence of an agreement to the contrary, liable to account for the profits which they earned with the share of the retiring or deceased partner".

14. A partnership account will normally be taken from the date of commencement of the partnership or the date of the last settled account, if there is

one. In the present case there is no settled account, or indeed anything approaching an account as normally understood in a legal or commercial context.

15. The burden of proof relating to the defendant's claims is discussed under the heading "Outlays and Improvements" at paragraph 18–39 of Lindley & Banks on Partnership (18th edition 2002) as follows.

> "Difficult questions may arise where there is an outlay of partnership money on an asset belonging to one of the partners or, conversely, an outlay of a partner's own money on an asset belonging to the firm. In either case, it must be determined whether such an outlay will confer any rights in respect of the asset benefited. Of the possibility that it might give rise to a charge over the asset, Lord Lindley observed:-
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> > 'The agreement of the partners, if it can be ascertained, determines the rights in such cases. But where, as often happens, it is extremely difficult, if not impossible, to ascertain what was agreed, the only guide is that afforded by the burden of proof. It is for those claiming an allowance in respect of the outlay to establish their claim. On the other hand, an intention to make a present of the permanent improvement is not to be presumed.'"
>
> (Emphasis added.)

14. The principles underlying remuneration for services are discussed in Lindley & Banks at paragraph 25–31 as follows:-

> "Prior to the Partnership Act 1890, Lord Lindley pointed out that –
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> > '… in taking an account of subsequent profits, the partner by whose exertions they have been made is usually allowed compensation for his trouble, unless he is, in the proper sense of the word, a trustee,

> guilty of a breach of trust, when no such compensation is allowed'.
>
> Such an allowance is still afforded where an order is made under section 42".

In the present case therefore, should the defendant discharge the burden of proof, the capital profits arising by reason of the increase in the value of the property would (on his case) be subject to payment of an appropriate amount in his favour for expenditure and remuneration.

17. However rental income must also be taken into account, and paragraph 22–12 of Lindley & Banks reads as follows in respect of a situation where books are not kept or have been destroyed:-

> "If no books of account whatsoever are kept, or if such books as are kept are unintelligible or are destroyed or otherwise wrongfully withheld, on an account being directed by the court all necessary presumptions will be made against those partners responsible for the non-production of proper accounts. However, where all the partners are in pari delicto, this rule cannot be applied."
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> (Emphasis added.)

18. In the present case no reliance has been made by the defendant on books of account and the results of interlocutory applications for specific discovery and interrogatories have been somewhat patchy - as perhaps epitomised by discovery of documents relating to the two companies Systemex Limited and Megabytes Limited only being made on the eve of hearing of the accounts and inquiries.

19. To a certain extent the passage of time since dissolution may explain failure to produce adequate documentation, but there is a fiduciary duty and in the present case a duty in terms under the partnership agreement itself for the surviving partner

to account fully for the use of the partnership assets after dissolution. While the plaintiff may not have issued these proceedings until the year 2000 the defendant would have been under a continuing liability to account to her for her share of any profits and generally, and manifestly failed to do so.

20. I now revert to the defendant's claim for post-dissolution expenditure and remuneration. Given the legal principles I have mentioned, it may come as no surprise that I prefer the order of magnitude indicated during oral testimony at hearing by the plaintiff's accountancy witness who estimated that a more appropriate basis of charging for management and supervision and labour (ie time and "out-of-pocket" expenses generally) in the particular circumstances would be £100.00 per month. Taking that figure from the dissolution date of 6 November 1996 down to June 2007 a total for management, supervision and labour time down to that date would be £12,800 (ie, 128 months at £100.00 monthly), and the figure down to hearing would be £13,500. It is of course impossible retrospectively in the absence of any or adequate vouching documentation to be confident that this accurately reflects time spent by the defendant in relevant and appropriate management and supervision having regard to the relevant terms of the letting agreements, none of which were reduced to writing. However, on the material before me I am satisfied that it is a more satisfactory approximation than the figures of £76,200 and £3,000 (totalling £79,400 for management, supervision and labour down to June 2007) mentioned by Cunningham & McParland.

21. The defendant's claim for post-dissolution expenditure also includes the following:-

Insurance
Rates
Fire Protection
Electricity
Banking costs
Transport costs
Miscellaneous
Materials
Cash materials

I have considered carefully the evidence including that of Mr Sean McParland, the defendant's accountancy witness, and the book of discoverable documents. Many of the invoices are addressed to one or other or both of the defendant's two companies. I am satisfied that accounts were prepared for these companies, albeit the responsible accountant Mr McParland cannot recall whether either company broke even or made a modest profit or a modest loss. As the accounts were not produced it falls to me to presume (in line with the legal principles I have mentioned) that all of the above expenses were included in the accounts of (a) one or both of the companies Systemex Limited and Megabytes Limited and (b) those of the current tenant (so far as applicable). Accordingly the defendant cannot successfully claim reimbursement of those expenses in these proceedings.

22. Section 42(1) of the Partnership Act 1890 reads as follows:-

> "42 – (1) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per

> cent per annum on the amount of his share of the partnership assets".

23. The plaintiff has not exercised her option to claim statutory interest, meaning that she is entitled to claim such amount of the profits post-dissolution which have been attributable to the defendant's use of the plaintiff's share in the partnership property. On my analysis the defendant could be said to have generated significant net profits since dissolution, the total rental (including rent deemed to have been received rather than actually received) being a figure (£93,180 down to hearing on 20 February 2008) greatly in excess of the appropriate total for the defendant's expenditure since dissolution of the partnership (the latter being £13,500 down to hearing). Accordingly, as the post-dissolution rental profits are more than enough to absorb the revised amount for expenditure (including the additional, pre-dissolution, expenditure to which I will shortly turn), the defendant's claim to a refund for expenditure and remuneration out of the proceeds of sale of the partnership property must be declined.

24. The defendant is also claiming £40,338.00 for expenditure and remuneration in respect of the pre-dissolution partnership period between 25 August 1994 and 6 November 1996. Applying a like fining down exercise to the figures for management, supervision and labour over the period, the amount would be £2,600 (ie 26 months at £100 per month). However this would have been a period when the defendant would have been significantly more active in terms of labour, management and supervision and I prefer, for the pre-dissolution period only, a figure of £400 a month for management, supervision and labour making a total of £10,400 allowed under those headings (in lieu of £16,200 claimed for management

and supervision and £7,200 for labour this totalling £23,400). I am reducing the figures drastically, because they appear to be mere estimates, being conspicuously vulnerable to reduction as in the words of Cunningham & McParland they are "not agreed to supporting receipts". Moreover, it would be difficult in the extreme to differentiate between time spent on management and supervision and time spent on labour. As before, the court's task is invidious in endeavouring to come to an appropriate figure, perhaps the more so as I am satisfied that the defendant would have been the partner predominantly, or perhaps exclusively, involved in supervising and organising the work and, as a plasterer by trade, directly involved in a significant amount of the labour. However, my view is that the proper value of the defendant's claim for reimbursement of expenditure and remuneration for work carried out before the dissolution of the partnership would be reflected by a figure of £25,000 – arrived at by abating the figures for management and supervision and labour to £10,400 (as already indicated) and rounding down the resultant overall balance in a robust manner from £27,338 to £25,000 (which "rounding down" exercise would address inter alia the facts that "subcontractor costs" of £3,160 were not vouched by receipt and Systemex Limited was operational in the month preceding dissolution and its accounts may have "absorbed" part of the defendant's expenditure pre-dissolution).

25. The defendant gave evidence that, once the initial capital contributions of £8,500 by the deceased and £10,000 by the defendant had been used up in expenditure during the period of the partnership, the defendant and his wife had to borrow monies necessary for further works amounting to £10,000 from a building

society. The plaintiff's case is that any such loan related to the £10,000 capital initially introduced by the defendant and not to additional monies, and accordingly he should not be credited with an additional contribution of £10,000.

26. Among the discovered documents are a letter dated 1 August 1996 from the defendant to the building society specifying the works for which the advance is required and a valuation report stating inter alia the purpose of the additional loan and it appears clear from both of those documents that the relevant work was to be carried out to the defendant's home and not to commercial premises such as the property at 531 Falls Road. Accordingly the defendant's claim that such a loan was for the purpose of additional works to the property is untenable.

27. The defendant also gave evidence of a guarantee he entered into in an attempt to promote a business which he hoped would acquire the property. His evidence is that he mortgaged the property by deposit of the title deeds with a bank to secure the guarantee and that it was a reasonable thing for him to have done in the circumstances, given that the principal debtor was a prospective purchaser for the property. There is however no evidence that the defendant sought or obtained the consent or acquiescence of the plaintiff to any mortgage by way of guarantee. The defendant did not give affidavit evidence of this matter either in the body of his affidavit or the exhibited letter of 9 July 2007 from Cunningham & McParland. His oral evidence failed to put the matter much further and it is hard, frankly, to see how it is reasonable for an intending vendor to become guarantor for the liabilities of a prospective purchaser and to secure that guarantee against the property without the consent of the plaintiff as a beneficial co-owner. Accordingly, such liability (if any)

as is secured against the property in respect of the guarantee should be borne out of the defendant's share alone.

28. The individual accounts and inquiries may be addressed as follows:

1. *An account of the credits, property and effects belonging to the former partnership at 25 August 1994 the date of commencement thereof.*

   (a) The partnership property at 531 Falls Road, Belfast which was in course of acquisition at the date of commencement at a price of £15,000 (according to the deed of assignment) or £20,000 (according to other evidence) and which was vested in the defendant by a rectifying assignment dated 30 August 1994 of the leasehold estate created by a lease dated 24 February 1956 for a term of 9,000 years from 1 November 1955 subject to the yearly ground rent of £20.

   (b) £8,500 lodged by the deceased and £10,000 lodged by the defendant into a joint current account in their names.

   (c) Other incidental properties and effects, the value of which is unknown.

2. *An account of all partnership dealings and transactions between the deceased and the plaintiff from 25 August 1994 until 6 November 1996 (the dissolution date).*

   Particulars of partnership dealings or transactions between the deceased and the plaintiff during this period cannot be ascertained or estimated. It appears however that the defendant's company Systemex Limited was operating at the partnership premises for at least a month prior to dissolution of the partnership.

3. *An account of the credits, property and effects belonging to the partnership at the dissolution date.*

(a) The partnership property at 531 Falls Road, Belfast. Although the value of this property would have been enhanced significantly during the period of the partnership by works carried out prior to dissolution, there is no evidence to indicate what the value of the property at dissolution was and given the other conclusions in this report it will not be necessary for the court to estimate a value as at that date.

(b) Incidental properties and effects of which there are no available particulars and in respect of which it is unnecessary for the court to attribute a value.

4. *An account of the partnership liabilities at the dissolution date.*

(a) For reasons stated earlier in this report the £10,000 loan obtained by the defendant and his wife appears to relate to their home and not to the property.

(b) The defendant is entitled to claim as a liability of the partnership £25,000 for pre-dissolution expenditure and remuneration but this liability should be set off against post-dissolution rental income.

5. *An inquiry what has become of the partnership property and whether any, and if so, what parts thereof remain.*

As at the date of hearing the property 531 Falls Road was on the market for sale at an asking price of £400,000. The property was at the time of hearing in the occupation of tenants Sanco Technologies Limited and had been previously in the occupation of other tenants including two companies owned and operated by the defendant,

namely Systemex Limited and Megabytes Limited. I am satisfied that an appropriate figure for the rent which was paid in respect of the property or which ought had to have been paid and received since dissolution is £93,180 down to the date of hearing, 20 February 2008, and the value of the defendant's claim for (post-dissolution) reimbursement and remuneration should be £13,500 (as at hearing) which of course should be set off against the rental income, as should the sum of £25,000 for the defendant's like claim for the pre-dissolution period. It is impossible and unnecessary to attribute any value in these proceedings to incidental property and effects.

6. *An inquiry whether any and which partnership debts or liabilities have been paid or satisfied and by whom and out of what fund.*

As indicated under 5 the defendant's claims for expenditure and remuneration must be regarded as absorbed by post-dissolution rental income. If the property remains subject to a mortgage to a third party to secure a guarantee liability undertaken by the defendant alone without the consent of the plaintiff then it appears to me that on division of the proceeds of the partnership property an appropriate adjustment should be made as between the plaintiff and the defendant to ensure that the amount (if any) required to redeem the mortgage is borne out of the defendant's share alone. (This is without prejudice to the rights of the mortgagee, as it is not a party to these proceedings.) No other material partnership liabilities have been identified.

29. I reserve the issue of costs to the judge having conduct of the action and will make an Order referring briefly to this report and directing that the proceedings be restored to the list of The Honourable Mr Justice Hart for further consideration.