

# Ademption of Gifts of Partnership Shares; Executor Removal

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☞ Ademption; Administration of estates; Executors; Gifts; Interpretation; Partnerships; Removal; Wills

## Introduction

In *Lane v Lane*<sup>1</sup> the High Court ruled on whether a testamentary gift of a “share and interest” in a partnership adeemed on the basis that, at the time of death, the partnership had been dissolved but not yet wound up. The ruling appears to be the first consideration of such a question. The court also ruled on a claim for the removal of an executor.

The judgment of Jonathan Hilliard KC (sitting as a Deputy Judge of the High Court) contains illuminating observations on partners’ rights in a partnership, the court’s approach to the removal of personal representatives and the interaction between the interpretation of wills and the doctrine of ademption.

## Facts

The dispute concerned the estate of Monica Lane (deceased). She had three children: David, Susan and Peter. Peter predeceased her and left two children: Daniel and Georgia. Monica’s husband, Norman, also predeceased her.

During her life, Monica formed a trading partnership with Norman on the family farm in Lavenham, Suffolk. When Norman died, he passed his share and interest in the partnership to David through his will.

Monica and David started a new partnership. The partnership agreement provided that the partnership would dissolve on the permanent incapacity of a partner (among other things).<sup>2</sup>

By her last will Monica left David her “share and interest” in the partnership (hereafter the “Gift”), among other assets. She left other assets to Susan, Daniel and Georgia. She named David, Susan, Daniel and Georgia as beneficiaries of her residuary estate. She named David and Susan as executors.

David died after Monica. His wife, Karen, is the personal representative of his estate.

Monica’s estate was later valued at almost £2.5 million.

## Issues

Karen and Susan’s relationship broke down. Various disagreements arose. One of these involved the Gift. Susan contended that Monica became permanently incapacitated before her death, causing the dissolution of the partnership, in turn causing the Gift to adeem on Monica’s death.<sup>3</sup>

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<sup>1</sup> *Lane v Lane* [2024] EWHC 275 (Ch), 9 February 2024 (“*Lane*”). For the award of costs in the case, see *Lane v Lane* [2024] EWHC 752 (Ch).

<sup>2</sup> *Lane* [2024] EWHC 275 (Ch) at [3].

<sup>3</sup> *Lane* [2024] EWHC 275 (Ch) at [5].

Karen issued a Part 8 claim against Susan. Karen sought a declaration that the Gift had not adeemed (hereafter the “construction claim”), replacement of Susan as executor by an independent professional (hereafter the “removal claim”), and ancillary relief. Daniel and Georgia were joined but played no active part in the proceedings, other than to express support for Susan remaining in office.

The construction claim proceeded on the basis that Monica did become permanently incapacitated before her death, although Karen did not admit this. Karen’s primary argument was that, even if the partnership entered dissolution before Monica’s death, she still had a “share and interest” in it at the date of her death, so the Gift does not adeem.<sup>4</sup> Her fallback argument was that the partnership was replaced by a new partnership between Monica—acting through her LPA attorney Susan—and David, because Susan and David proceeded on the basis that the partnership was continuing.<sup>5</sup>

As to the removal claim, Karen argued (in summary) that Susan should be replaced because the relationship breakdown had impeded and would continue to impede the estate administration, because Susan was in a position of conflict by virtue of her and her branch’s interest in the estate and because Susan had delayed significantly in the administration.<sup>6</sup> Susan argued (in summary) that the administration was largely complete, a significant amount of this had been done by Susan’s solicitors who could be trusted to do so, any future disputes could be brought back to court if necessary and would need to be even with a new executor and the problems with the administration had been caused by Karen.<sup>7</sup>

The Part 8 claim proceeded to trial on the written evidence. The court was not asked to resolve any disputes of fact, except where the position was so clear cut that it could be determined without oral evidence.<sup>8</sup>

## Law

A specific gift fails for ademption if, at the date of the testator’s death, its subject matter has ceased to exist as part of the testator’s property, has fundamentally changed in nature or has been destroyed or converted into something else by the act of the testator or duly constituted authority.<sup>9</sup> It does not so fail if it has changed in name or form only but remains substantially the same thing.<sup>10</sup>

A share of a partner is a right to a proportion of what is left of the partnership assets after winding up.<sup>11</sup> The process of winding up is often referred to as “general dissolution”.<sup>12</sup> This is different to a dissolution where a new partnership arises and takes on the assets and liabilities of the new partnership without a break in the continuity of the business.<sup>13</sup> This often occurs where a partner leaves the partnership. This is commonly called a “technical” or “notional” dissolution, though it is not the dissolution but at most the winding-up which is notional.<sup>14</sup>

In previous cases, gifts of partnership shares have been held to adeem where, by the time of death, the testator had left the partnership and been paid out the value of their share.<sup>15</sup> But there appears, before *Lane*, to have been no case considering such a gift where, at the time of death, the partnership was dissolved but not yet wound up.

<sup>4</sup> *Lane* [2024] EWHC 275 (Ch) at [16].

<sup>5</sup> *Lane* [2024] EWHC 275 (Ch) at [17].

<sup>6</sup> *Lane* [2024] EWHC 275 (Ch) at [82].

<sup>7</sup> *Lane* [2024] EWHC 275 (Ch) at [83].

<sup>8</sup> *Lane* [2024] EWHC 275 (Ch) at [64].

<sup>9</sup> *Jenkins v Jones* (1866) 2 L.R. 2 Eq. 323; [1866] 4 WLUK 97; *Re Slater* [1907] 1 Ch. 665 (CA); [1907] 4 WLUK 23.

<sup>10</sup> *Re Slater* [1907] 1 Ch. 665 (CA) at 671–673.

<sup>11</sup> *Sandhu v Gill* [2005] EWCA Civ 1297; [2006] Ch. 456 at [19].

<sup>12</sup> *Rojoda Pty Ltd v Commissioner of State Revenue* [2018] WASCA 224; (2019) 368 A.L.R. 734 (“*Rojoda*”) at [101].

<sup>13</sup> *Rojoda* [2018] WASCA 224 at [102].

<sup>14</sup> *Rojoda* [2018] WASCA 224 at [102].

<sup>15</sup> E.g. *Ellis v Walker* 27 E.R. 210; (1756) Amb. 309.

The court has a statutory (and discretionary) power to appoint a person to act as personal representative in place of all or any existing personal representatives of the deceased.<sup>16</sup> The cases set out the criteria to which the court should have regard in exercising its discretion.<sup>17</sup> But the overriding consideration is whether the estate is being properly administered and the main guide is the welfare of the beneficiaries.<sup>18</sup>

## Judgment

Both the construction claim and the removal claim succeeded.

### *Construction claim*

The court considered it natural to describe a departing partner as having a “share and interest” in the partnership. Where one is focusing on a partner’s economic rights, the natural and ordinary meaning of a “share” in a partnership reflects or at least includes the partner’s entitlement to a proportion of the net proceeds of sale of the partnership assets after meeting all liabilities.<sup>19</sup> The natural and ordinary meaning of an “interest” in a partnership is a right to such a proportion.<sup>20</sup> These definitions focus their attention on what the partner receives at the end of the partnership.<sup>21</sup> Dissolution does not mark the extinction of a partnership.<sup>22</sup> It is the winding up process that produces the final cash sum to which a departing partner is entitled.<sup>23</sup> The share or interest does not disappear on dissolution but crystallises; dissolution marks the time from which it must be turned into a cash sum through the winding up process.<sup>24</sup>

The court rejected the submission that the Partnership Act 1890 s.43 converts a share in a partnership into a debt, so that no share or interest remains following the point of dissolution. A share or interest includes what a partner ultimately gets out of the winding-up process, and it would make little sense if the share or interest disappeared on dissolution.<sup>25</sup> The purpose of s.43 was to ensure that claims by a departing partner or their personal representatives were subject to the limitation period applicable to ordinary debts, and to make clear that the remaining partners were not trustees for the departing partner.<sup>26</sup> Section 43 does not reduce the rights of the departing partner to a debt, but merely states that the amount due in respect of their share shall be a debt, and a departing partner retains a bundle of rights.<sup>27</sup> Where all partners agree to bring the partnership to an end, all partners have rights under s.43, and the odd conclusion that none of the partners have any share or interest in the partnership cannot be avoided by contending that they have rights under s.38 to run the winding up; having conduct of the winding up is not decisive in whether someone has a share or interest.<sup>28</sup> Section 38 is an example of the partnership continuing post-dissolution in a particular respect.<sup>29</sup>

As to the construction of the Gift, the court considered it clear that Monica wished David to have the whole of the partnership, so the reference in the Gift to “share and interest” meant the rights to what will be received through winding up.<sup>30</sup> Monica still had the share and interest at the date of her death because

<sup>16</sup> Administration of Justice Act 1985 s.50, *Thomas & Agnes Carvell Foundation v Carvell* [2007] EWHC 1314 (Ch); [2008] Ch. 395 at [18].

<sup>17</sup> *Letterstedt v Broers* (1884) 9 App. Cas. 371; [1881–85] All E.R. Rep. 882, concerning removal of a trustee, said in *Thomas & Agnes Carvell* [2007] EWHC 1314 (Ch) at [44]–[47] to apply to applications under the Administration of Justice Act 1985 s.50.

<sup>18</sup> *Thomas & Agnes Carvell* [2007] EWHC 1314 (Ch) at [45].

<sup>19</sup> *Lane* [2024] EWHC 275 (Ch) at [25]–[27].

<sup>20</sup> *Lane* [2024] EWHC 275 (Ch) at [28].

<sup>21</sup> *Lane* [2024] EWHC 275 (Ch) at [32].

<sup>22</sup> *Lane* [2024] EWHC 275 (Ch) at [33].

<sup>23</sup> *Lane* [2024] EWHC 275 (Ch) at [34].

<sup>24</sup> *Lane* [2024] EWHC 275 (Ch) at [35]. The court (at [27] and [40]) derived assistance on this point from the judgment of Lord Reed in *Duncan v MFV Marigold PD 145* [2006] CSoH 128; 2006 S.L.T. 975.

<sup>25</sup> *Lane* [2024] EWHC 275 (Ch) at [39].

<sup>26</sup> *Lane* [2024] EWHC 275 (Ch) at [40].

<sup>27</sup> *Lane* [2024] EWHC 275 (Ch) at [41].

<sup>28</sup> *Lane* [2024] EWHC 275 (Ch) at [42].

<sup>29</sup> *Lane* [2024] EWHC 275 (Ch) at [43].

<sup>30</sup> *Lane* [2024] EWHC 275 (Ch) at [46]–[50].

there was no completed winding up.<sup>31</sup> This result also accorded with common sense and the way the phrase “share and interest” is commonly used in partnership law.<sup>32</sup>

In the premises, the court explained that the case was very far away from the classic case where a will refers to one asset, say a house, that is sold before death and thereby turned into another asset, namely cash.<sup>33</sup> Here, the share and interest in the partnership always, as the definitions set out above show, includes the right to receive the product of the winding up process.<sup>34</sup> As such, there was no ademption.

The court then distinguished *Re Beard*,<sup>35</sup> in which it was held that the gift in a partner’s will passing their share and interest in the partnership did not include the debt due to them at the date of death in the form of a balance on the partnership’s loan account. It did not follow from this that a debt owed under the Partnership Act 1890 s.43 did not pass as a share or interest in the partnership.<sup>36</sup> The reasoning in *Re Beard* was that the phrase “share and interest” did not refer to the debt due to the partner as an outsider to the partnership.<sup>37</sup>

Finally, the court rejected the argument that the provision in the partnership agreement for automatic dissolution on permanent incapacity (among other things) meant that the partnership would not survive for any long period of time but be dissolved so that its value could be distributed amongst the wider family. The partnership agreement said nothing about the distribution of the partnership’s value on dissolution, and the purpose of the Gift was that the whole of the partnership would pass to David on Monica’s death.<sup>38</sup>

### *Removal claim*

The court rejected the argument that Karen must show misconduct endangering the trust property. Even without misconduct, the breakdown in relationship between executor and beneficiary can be such that the due administration of the estate is unlikely to be achieved expeditiously.<sup>39</sup>

The court noted serious concerns about how the administration of the estate had proceeded to date: Susan should have sought court directions a long time ago on the ademption issue;<sup>40</sup> there was no response to Karen’s letter of claim or arguments in other correspondence concerning ademption;<sup>41</sup> Karen contended that no explanation had been provided about whether agricultural property relief and business property relief had been claimed, and the court received no evidence or explanation to contradict this;<sup>42</sup> the court received no up-to-date account of the estate and its assets from Susan;<sup>43</sup> there were a number of further potential disputes ahead;<sup>44</sup> and one reason for the delay in obtaining a grant was Susan’s concerns over the validity of Monica’s will, the basis of which was difficult to identify.<sup>45</sup>

The court also rejected the arguments that the issues with the estate administration could be dealt with by Susan’s solicitors, and that the court’s guidance would be needed whoever the executor was. Something needed to be done to ensure the proper conduct of the administration, and the court’s concerns taken cumulatively pointed towards replacing Susan.<sup>46</sup>

<sup>31</sup> Lane [2024] EWHC 275 (Ch) at [49].

<sup>32</sup> Lane [2024] EWHC 275 (Ch) at [54]–[55].

<sup>33</sup> Lane [2024] EWHC 275 (Ch) at [51].

<sup>34</sup> Lane [2024] EWHC 275 (Ch) at [51].

<sup>35</sup> *Re Beard* (1888) 57 L.J. Ch. 887.

<sup>36</sup> Lane [2024] EWHC 275 (Ch) at [53].

<sup>37</sup> Lane [2024] EWHC 275 (Ch) at [53].

<sup>38</sup> Lane [2024] EWHC 275 (Ch) at [56].

<sup>39</sup> Lane [2024] EWHC 275 (Ch) at [63].

<sup>40</sup> Lane [2024] EWHC 275 (Ch) at [86].

<sup>41</sup> Lane [2024] EWHC 275 (Ch) at [87].

<sup>42</sup> Lane [2024] EWHC 275 (Ch) at [88].

<sup>43</sup> Lane [2024] EWHC 275 (Ch) at [89].

<sup>44</sup> Lane [2024] EWHC 275 (Ch) at [90]–[91].

<sup>45</sup> Lane [2024] EWHC 275 (Ch) at [92].

<sup>46</sup> Lane [2024] EWHC 275 (Ch) at [94]–[95].

The court noted the lack of liquid assets in the estate but considered that the beneficiaries would be better served by an independent professional administrator. This was due to the concerns about the administration to date, the friction between Susan and Karen, the greater cost likely to be incurred if Susan remained in office, an independent professional being more likely than Susan to identify proposals that would be acceptable without the need for court involvement, and the fact that the estate was incurring the costs of Susan's solicitors in any event.<sup>47</sup>

The court declined to stand the issue of removal over to see whether the administration improved. Standing over was not guaranteed to resolve the problems, there was no obvious date to stand over to, it could lead to further legal costs in arguing over removal at that date, and it was neither party's primary position.<sup>48</sup>

## Comment

The court's conclusion on the construction claim was reached without difficulty but provides useful authority on the law. Indeed, it reflects the position taken in the practitioners' text, *Lindley & Banks on Partnership*,<sup>49</sup> but which did not hitherto have the benefit of supporting judicial authority.

At the core of the court's conclusion are the natural and ordinary meaning of the terms "share" and "interest" in the partnership context (derived from highly authoritative definitions), and the identity between the bundle of economic rights that a "*share and interest*" in a partnership represent before and after dissolution. The court's reasoning could apply in other cases where a testator, having gifted a share of a partnership, dies after dissolution but before the completion of winding up. The argument attempted by Susan could also, but for the judgment in *Lane*, have been attempted in many other cases where a partnership agreement has a clause relating to incapacity: it is of course common for a testator to lose mental capacity (even if it is in their final moments) before they die.

The court commented on how the doctrines of interpretation and ademption "fit together".<sup>50</sup> It observed that the court first interprets the gift to determine its subject matter, then asks whether the subject matter of the gift has ceased to exist as the testator's property or its nature has fundamentally changed.<sup>51</sup> This is methodologically informative. But it is probably unhelpful to interpret it as suggesting a two-stage analysis where the second stage is hermetically sealed. The court's conclusions about the testator's intentions can inform the application of the doctrine of ademption. The notional two stages could well be expressed as one: has the subject matter of the gift altered so as no longer to represent the gift that the testator intended? This is akin to other common questions of application of law to the facts, such as whether goods conform to a contractual description. The court in *Lane* was alive to this, observing that it saw no intention on Monica's part to distinguish between economic rights existing before and after dissolution.<sup>52</sup> Different testamentary wording and surrounding circumstances could of course lead to different results. The testator's intentions may assist in difficult cases where, unlike in *Lane*, the relevant difference (between the nature of the subject matter of the gift at the time of the will and at the time of death) is a matter of degree.

The court's conclusion on the construction claim meant that there was no need to consider Karen's fallback argument.<sup>53</sup> As explained earlier, this was an argument that, following Monica's incapacity, the partnership was replaced by a new partnership between Monica (whom Susan represented under a legal power of attorney) and David which did not dissolve before Monica's death.<sup>54</sup> In reality, the parties

<sup>47</sup> *Lane* [2024] EWHC 275 (Ch) at [101].

<sup>48</sup> *Lane* [2024] EWHC 275 (Ch) at [103].

<sup>49</sup> R. I'Anson Banks (ed.), *Lindley & Banks on Partnership*, 21st edn (London: Sweet & Maxwell, 2022), para.26–79.

<sup>50</sup> *Lane* [2024] EWHC 275 (Ch) at [21].

<sup>51</sup> *Lane* [2024] EWHC 275 (Ch) at [21].

<sup>52</sup> *Lane* [2024] EWHC 275 (Ch) at [50].

<sup>53</sup> *Lane* [2024] EWHC 275 (Ch) at [59].

<sup>54</sup> *Lane* [2024] EWHC 275 (Ch) at [17].

continued as if the existing partnership had not been dissolved. This argument could have given rise to useful judicial observations about whether partnership may be implied by conduct where a party is represented under a legal power of attorney. It was accepted by Susan at trial that this was a legal possibility, but she argued that it did not arise on the facts.

When discussing the law on removal applications, the court cited the authorities on the Administration of Justice Act 1985 s.50 but also highlighted the danger of the criteria enumerated in those authorities obscuring the simplicity of the legal test.<sup>55</sup> The simplicity is derived from the touchstone that is the beneficiaries' interests. The court reinforced the practice that questions of fact were not resolved on such applications.<sup>56</sup>

Removal applications are routinely heard by Masters and this was a rare case heard by a High Court Judge. In making these comments, the court referred—with implicit approval—to the 2020 Annual Lecture to the Association of Contentious Trust and Probate Specialists given by then Chief Master Marsh.<sup>57</sup> *Lane* appears to be the first judgment in which that excellent and informative lecture has been cited.

<sup>55</sup> *Lane* [2024] EWHC 275 (Ch) at [60]–[61].

<sup>56</sup> *Lane* [2024] EWHC 275 (Ch) at [7] and [64].

<sup>57</sup> *Lane* [2024] EWHC 275 (Ch) at [61].