

## Terminating Partnerships by ‘Accepted Repudiation’: the Differing UK and Australian Approaches

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### Abstract

*As a general rule, if one party commits a repudiatory breach, the other party can then terminate the contract.*

*Therefore, if one partner commits a repudiatory breach of the partnership agreement, it might be expected that the partnership could be terminated — under general law principles.*

*That, however, is not necessarily what happens — and the approaches of the UK and the Australian courts differ considerably.*

*The UK courts have generally followed Lord Millett’s approach in *Hurst v Bryk* [2002] 1 AC 185 — holding that the doctrine of accepted repudiation cannot apply to partnerships.*

*Although his reasoning on that point was clearly obiter, the remainder of the court did not disagree with it and it was subsequently adopted in both *Mullins v Laughton* [2003] Ch 250 and *Golstein v Bishop* [2014] Ch 455.*

*In Australia, the courts have taken the opposite view, holding that partnerships can be dissolved by repudiatory breach — though none of the cases to date have been finally decided on that basis.*

*In *Johnson v Snaddon* [1999] VSC 243 Coldrey J accepted the possibility, but then held that, on the facts, there had been no repudiation.*

*In *Ryder v Frohlich* [2004] NSWCA 472 McColl JA (with whom the other members of the court agreed) found that, while there had been a repudiation, there had also been an abandonment — and that was enough to terminate the agreement. The same applied in *Walker v Melham* [2007] NSWSC 264.*

*Subsequent decisions (*Fazio v Fazio* [2012] WASCA 72, *Bonzaliev v Cullu* [2013] NSWSC 1576, *Letizia Building Co Pty Ltd v Redglow Asset Pty Ltd* [2013] WASC 171 and *Lien v Clontarf Residential Pty Ltd* [2019] 1 Qd R 107) have used similarly equivocal reasoning — though all seem to have preferred McColl JA’s approach to that of Lord Millett.*

*This paper considers the differences between the two approaches and asks the question: in the end result, does it really matter?*

### Introduction

#### The Doctrine of Accepted Repudiation

##### What is It?

If one party repudiates a contract the other may accept the repudiation and immediately bring the contract to an end. As the High Court of Australia put it in *Shevill v Builders Licensing Board*, the innocent party ‘is entitled to accept the repudiation, thereby discharging himself from further performance, and may sue for damages’.<sup>1</sup>

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<sup>1</sup> (1982) 149 CLR 620 at 625-26.

Discharge occurs at the point at which the acceptance of the other party's repudiation occurs and the consequences are as Dixon J described them in *McDonald v Dennys Lascelles Ltd*:

... the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, *but rights are not divested or discharged which have already been unconditionally acquired*. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected<sup>2</sup> (emphasis added).

### Justifying the Doctrine

The doctrine of repudiatory breach is largely an exercise in pragmatism. It allows parties to bring an end to contracts that will clearly not be performed, and to seek immediate relief, without having to wait for an actual breach. As Lord Keith of Kinkel put it in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*:

The doctrine of repudiatory breach is largely founded on considerations of convenience and the opportunities which it affords for mitigating loss, as observed by Lord Cockburn in *Frost v Knight* [(1872) LR 7 Exch 111 at 114]. It enables one party to a contract, when faced with a clear indication by the other that he does not intend to perform his obligations under it when the time for performance arrives, to treat the contract, if he so chooses, as there and then at an end and to claim damages as for actual breach.<sup>3</sup>

### The Principles Underlying the Doctrine

The principles underlying the doctrine were summarised by Finn J in *GEC Marconi Systems Pty Ltd v BHP Technology Pty Ltd*,<sup>4</sup> saying:

- (i) A party will have repudiated a contract if, by words or conduct, it evinces an intention no longer to be bound by it or if that party shows it intends to fulfil the contract only in a manner substantially inconsistent with its obligations and not in any other way: *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 625-626; *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623.
- (ii) The party's conduct is to be judged objectively by reference to the effect it would be reasonably calculated to have upon a reasonable person: *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* at 658; *Satellite Estate Pty Ltd v Jaquet* (1968) 71 SR (NSW) 126 at 150.<sup>5</sup>
- (iii) A party that acts on a genuine but erroneous view of its obligations under the contract will not for that reason alone have repudiated it. That party may still be willing to perform the contract according to its tenor; to recognise its heresy; or to accept an authoritative exposition of the contract: *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 431-432; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1

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<sup>2</sup> (1933) 48 CLR at 476-77. Lord Millett noted in *Hurst v Bryk* [2002] 1 AC 185 at 193 that 'This passage has been expressly approved by your Lordships' House' (citing *Johnson v Agnew* [1980] AC 367 at 396, per Lord Wilberforce, and *Colonial Bank v European Grain and Shipping Ltd* [1989] AC 1056 at 1098-99).

<sup>3</sup> [1980] 1 All ER 571 at 588. See also *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR at 476-77.

<sup>4</sup> (2003) 128 FCR 1 at [889]-[891].

<sup>5</sup> Whether a party's conduct meets that requirement is determined by examining 'the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way': *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571 at 586 per Lord Keith of Kinkel citing *Freeth v Burr* (1874) LR 9 CP 208 at 213, *Johnstone v Milling* (1886) LR 16 QBD 460 at 474, *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 438-39 and *James Shaffer Ltd v Findlay Durham & Brodie*[1953] 1 WLR 106 at 116.

WLR 277.<sup>6</sup> But persistence in an untenable construction will ordinarily be regarded as repudiatory: *Summers v Commonwealth* (1918) 25 CLR 144 at 152; and see Chitty on Contracts, vol 1, para 25-018.

As the references that Finn J cited in support of those propositions demonstrate, the same underlying principles also apply in the courts of England and Wales.

Other (or allied) principles that the courts have applied include:

- a. repudiation 'is a serious matter and is not to be lightly found or inferred';<sup>7</sup>
- b. in considering whether a contract has, in fact, been repudiated, all the circumstances of the case must be considered to determine whether the conduct alleged to be repudiatory 'amounts to a renunciation, to an absolute refusal to perform the contract';<sup>8</sup>
- c. 'in general, an unwarranted termination of a contract in consequence of a purported acceptance of what is wrongly claimed to be repudiation will be regarded as repudiation by the person giving the notice of termination [though that may] not necessarily ... be so in all cases and in all circumstances'.<sup>9</sup> Therefore, as Neuberger noted in *Mullins v Laughton*, it may be that 'an innocent party who purports to accept a repudiatory breach would often not be certain as to whether or not the partnership had been brought to an end until the court decides on the issue of whether the breach was in fact repudiatory'.<sup>10</sup>

Therefore, the essence of the applicable principles is that whether one person's conduct amounts to a repudiation which can be 'accepted' by the other to terminate the contract depends, to a very large extent, on a consideration of the entirety of what was said and done and the context in which that occurred, with the overriding consideration that repudiation is not to be 'lightly found or inferred'.

### **Restrictions on its General Application**

There are at least two restrictions on the accepted repudiation doctrine. First, a party cannot terminate a contract for the other's repudiation unless he or she was ready, willing and able to perform at the point of acceptance,<sup>11</sup> or has had performance waived (though, as Mason CJ put it in *Foran v Wright* '[i]n the case of an anticipatory renunciation accepted by the plaintiff, the requirement of readiness and willingness extends only up to the time of acceptance because then the earlier repudiation results in an early termination of the contract'<sup>12</sup>).

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<sup>6</sup> See also *Ross T Smyth & Co Ltd v TD Bailey Son & Co* (1940) 3 All ER 60 at 72. If that occurs the 'innocent' party should try to show the 'repudiating' party that he or she is mistaken before relying on the conduct as a repudiation of the contract: *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699 at 734.

<sup>7</sup> *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 629 per Wilson J and at 633 per Ashley JA (citing *Ross T Smyth & Co Ltd v TD Bailey Son & Co* (1940) 3 All ER 60 at 71). See also *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571 at 576 per Lord Wilberforce and at 583 per Lord Russell of Killowen and *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 32 per Mason J.

<sup>8</sup> *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 439. See also *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 633 per Ashley JA.

<sup>9</sup> *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 at 453.

<sup>10</sup> *Mullins v Laughton* [2003] Ch 250 at [92].

<sup>11</sup> *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* (2006) 236 ALR 115 at [64] per Kiefel J, citing *Hensley v Reschke* (1914) 18 CLR 452 at 131 and *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 253 (which, in turn, cited *Jones v Barkley* (1781) 2 Doug 684; 9 ER 434, *Ripley v M'Clure* (1849) 4 Ex 345; 154 ER 1245; *Cort v Ambergate & c Railway Co* (1851) 17 QB 127; 117 ER 1229 and *Byrne v Van Tienhoven* (1880) 5 CPD 344). See also *Foran v Wright* (1989) 168 CLR 385 at 408-09 per Mason CJ. Being ready and willing to perform also imports an ability to perform: *De Medina v Norman* (1842) 9 M&W 820 at 827, 152 ER 347 at 350 and *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 253.

<sup>12</sup> (1989) 168 CLR 385 at 408 per Mason CJ.

Secondly, if a party does elect to terminate, that election must be by clear and unequivocal words or conduct that evinces that election. That is because, as Asquith LJ put it in *Howard v Pickford Tool Co Ltd*, ‘an unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind’.<sup>13</sup> Therefore, as his Lordship went on to note, ‘a declaration that the defendants had repudiated their contract with the plaintiff would be entirely valueless to the plaintiff if it ... was not accepted’.<sup>14</sup>

To be effective the acceptance must also be communicated, or otherwise made plain to the repudiating party, through either words or conduct, so that that party becomes aware that, because of their wrongful action, the innocent party is treating the contract as at an end.<sup>15</sup> No specific form of communication is required but the innocent party must make it unequivocally clear that he or she is treating the contract as at an end.<sup>16</sup>

Conduct evidencing an election to accept a repudiation and terminate the contract could include making alternative contractual arrangements with another party (as was the case in *Holland v Wiltshire*<sup>17</sup>) though, in appropriate cases, it could even be simple inaction — as was the case in *Vitol SA v Norelf Ltd*<sup>18</sup> where the plaintiff’s failure to perform its part of the contract (by not trying to deliver the cargo to the defendant following the defendant’s repudiation) was held to be a clear and unequivocal election to treat the contract as at an end.

### **Application of the Doctrine to Partnerships**

Because partnerships involve a contractual relationship between the parties, it might be thought that if a partner commits a serious breach of the partnership agreement (that is, either a fundamental breach or a breach of one of its express or implied conditions) or if they otherwise renounce their obligations under the contract, and if the other partner/s accept that repudiation, the partnership would automatically terminate under general law principles. Unfortunately, there is considerable doubt about whether the general law contractual doctrine of ‘accepted repudiation’ applies to partnerships, at least as a means of automatic dissolution.

### **The Decision in *Hurst v Bryk***

The matter was discussed in some detail by Lord Millett in *Hurst v Bryk*,<sup>19</sup> even though that question was not, in fact, relevant to his decision in that case – for two reasons.

First, both the court of first instance and the Court of Appeal had proceeded on the basis that an accepted repudiation could automatically terminate a partnership<sup>20</sup> and, as his Lordship acknowledged, because the accuracy of that assumption had not been raised on appeal, it was not something that the House of Lords had to consider.<sup>21</sup>

Secondly, (and in any case) the plaintiff’s action was based on a misconception of the basis on which partners are liable for the debts and other obligations of their firm.

Hurst had argued that his exit from the (already doomed) partnership was the result of him accepting what he argued was the repudiation by all of his fellow partners of their partnership agreement — a

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<sup>13</sup> [1951] 1 KB 417 at 421 (cited with approval by Stevenson J in *Network Ten Pty Ltd v Seven Network (Operations) Ltd* [2014] NSWSC 692 at [137]).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Heymans v Darwins Ltd* [1942] AC 356 at 361 per Viscount Simon LC; *Ryder v Frohlich* [2004] NSWCA 472 at [117]-[119]; *State of New South Wales v Shaw* (2015) 97 NSWLR 169 at [186].

<sup>16</sup> *Lakshmijit v Sherani* [1974] AC 605 at 616; *Ryder v Frohlich* [2004] NSWCA 472 at [117]-[118]; *State of New South Wales v Shaw* (2015) 97 NSWLR 169 at [186].

<sup>17</sup> (1954) 90 CLR 409.

<sup>18</sup> [1996] AC 800.

<sup>19</sup> [2002] 1 AC 185 at 193–95.

<sup>20</sup> *Hurst v Bryk* [1999] Ch 1 at 9.

<sup>21</sup> [2002] 1 AC 185 at 196.

repudiation effected by them entering into an agreement (the 'dissolution agreement' which he had refused to sign) to bring about an earlier dissolution than that to which they had already agreed (ie bringing it forward from 31 May 1991 to 31 October 1990 because they all agreed that it was not practically possible to continue with their partnership until the later date).

This, Hurst said, meant that 'as between himself and his fellow partners, he [was] discharged from all further performance of those obligations which he undertook by becoming a partner, and these include[d] the obligation to contribute to the firm's losses'<sup>22</sup> — an obligation which, clearly, would have attached to him if the partnership had been dissolved in any of the ways provided for in the *Partnership Act 1890* (UK).<sup>23</sup>

However, as Lord Millett pointed out, Hurst's argument fundamentally misconstrued the legal position.<sup>24</sup> Even if Hurst's acceptance of his fellow partners' 'repudiatory breach' had brought the partnership agreement to an end that merely excused *both parties* from further performance of its terms; it did not affect the firm's creditors. Under the terms of the *Partnership Act*, they could 'still recover judgment against the firm and execute against any of the partners separately'.<sup>25</sup> In the absence of an indemnity from his fellow partners, Hurst could not avoid his liability for the firm's debts.

What his acceptance of the 'repudiation' might have done was to entitle Hurst to damages for breach of contract — but they could not 'be measured by the contribution he must make to the accrued and continuing liabilities of the firm pending the completion of the winding up. [That] liability to contribute ... had accrued before any breach of the partnership agreement occurred and has in no sense been caused by his partners' breach of contract'.<sup>26</sup>

In other words, because the liabilities that Hurst sought to avoid were incurred (or assumed) by the firm while he was still a partner, he was liable for them<sup>27</sup> and that liability, both before and after dissolution, had to be taken into account when determining his share of the firm's profits and losses under s 44 — an outcome not affected by the termination of the partnership, whether for accepted repudiation or otherwise.

For both reasons, while Lord Millett opined at some length on whether the doctrine could apply to contracts of partnership, he did not base his decision on any concluded view of the matter, noting instead: 'In these circumstances I am content to proceed on the basis of the same assumption [as the courts below] while reserving for future consideration the question whether it is correct.'<sup>28</sup>

Against that background though, his Lordship's view, with which none of the remainder of the court disagreed, was that 'accepted repudiation' does not terminate the *partnership relationship*, though it does terminate the *partnership contract* (although Lord Nicholls of Birkenhead expressly stated, in relation to the question of the applicability of the doctrine of accepted repudiation to partnerships, that 'I, too, prefer to keep open for another occasion the question whether a partnership can be

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<sup>22</sup> Ibid at 198.

<sup>23</sup> While dissolution by agreement is not specifically provided for under the *Partnership Act* it is, as Lord Millett noted at 195, 'catered for by section 19 [the 'variation' power] taken in conjunction with section 32(a) [dissolution of a fixed term partnership by expiration of the fixed term]'. In *Chahal v Mahal* [2005] 2 BCLC 655 at [21] Neuberger J also noted that 'it may be that determination by agreement is actually covered by the opening words of s 32, rather than by the more indirect way identified by Lord Millett'.

<sup>24</sup> [2002] 1 AC 185 at 198-99.

<sup>25</sup> Ibid at 198.

<sup>26</sup> Ibid at 199.

<sup>27</sup> *Partnership Act 1890* (UK) s 9.

<sup>28</sup> [2002] 1 AC 185 at 196.

automatically dissolved by an innocent partner or partners treating the other partner's or partners' breach as repudiatory'<sup>29</sup>).

Lord Millett explained his reasoning saying:

Repudiation as a ground of dissolution first saw the light of day in *Hitchman v Crouch Butler Savage Associates* (1982) 80 LS Gaz 550, where Harman J treated as axiomatic the proposition that the doctrine of repudiatory breach applies to partnership agreements as it applies to other contracts. The question, however, is not whether the doctrine applies to the *contract* of partnership, but whether it operates to bring about the automatic dissolution of the partnership *relationship*.<sup>30</sup>

That reasoning was based on the fact that a partnership is more than a mere contract. As his Lordship noted, 'it is more than a simple contract; ... it is a continuing personal as well as commercial relationship'<sup>31</sup> — and it is heavily governed by both the express provisions of the Partnership Acts and equitable principles. As a result '[d]isputes between partners and the dissolution and winding up of partnerships ... have always fallen within the jurisdiction of the Court of Chancery'.<sup>32</sup> Therefore, he argued:

By entering into the relationship of partnership, the parties submit themselves to the jurisdiction of the court of equity and the general principles developed by that court in the exercise of its equitable jurisdiction in respect of partnerships.<sup>33</sup>

That being the case, he saw three reasons why the doctrine of accepted repudiation could not apply to partnerships.

First, the Partnership Acts expressly state the circumstances in which a partnership is (or can be) dissolved (those set out in ss 32-35 of the *Partnership Act 1890* (UK)), and there is nothing in that Act that refers either directly or indirectly to acceptance of repudiatory breach of contract being one of those grounds.

Secondly, if the courts were to accept that acceptance of repudiatory breach was an additional ground for automatic dissolution, it would be difficult to see how it might apply in practice where there were more than two partners and one of them, who was not guilty of repudiatory breach, refused to accept the repudiation. In such cases it could be argued that the partnership between the partner who repudiated and those who accepted that repudiation would thereby automatically come to an end, but that the partnership between that partner and those who refused to accept it would remain on foot. The consequence would be that an application to the court for dissolution would still be needed to bring that partnership to an end (presumably on the 'wilful or persistent breach' ground, because

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<sup>29</sup> [2002] 1 AC 185 at 189.

<sup>30</sup> *Ibid* at 195.

<sup>31</sup> *Ibid* at 194.

<sup>32</sup> *Ibid*

<sup>33</sup> *Ibid* at 196. This passage was cited by Southin JA in *Brew v Rozano Holdings Ltd* 2006 BCCA 346 at [22] to support her view (at [23]) 'that Lord Millett is essentially right for this reason: Partners owe each other a duty which is, in my opinion, is not created by s 22(1), but was also a principle of good faith'. (Section 22(1) of the *Partnership Act 1996* (BC), which has no equivalent in the *Partnership Act 1890* (UK), imposes a statutory duty on partners to 'act with the utmost fairness and good faith towards the other members of the firm in the business of the firm'). Her Honour did not entirely support Lord Millett's views, instead adopting a middle course which would seem to allow partnerships to be terminated by accepted repudiation, subject to the qualification that, in accepting the repudiatory conduct the innocent party must have acted in 'utmost good faith' (see [24]-[26]). (What her Honour actually said (at [3]) was that the doctrine would apply 'if at all, only in limited circumstances' — without explaining what those circumstances might be. However, she clearly failed to find any that would justify the purported termination that had taken place in that case — though she also found, at [27], that: 'If there ever were a case for a dissolution under the just and equitable provision, this was it. The partnership was not going to work'). See also *Greg Dowling Architects Inc v J Raymond Griffin Architect Inc* 2012 BCCA 366 at [31]-[36] and *Ning v Li* 2017 BCCA 156 at [11].

any such breach would clearly be repudiatory). As his Lordship then noted '[t]his would lead to a very odd distinction between those (few) cases where dissolution was automatic and those cases where it was not'.<sup>34</sup>

The third, and in Lord Millett's view the strongest argument against admitting accepted repudiation as a further ground for automatic dissolution, was that 'it would circumvent the discretionary power of the court under [the wilful or persistent breach provision in s 35(d)]'. Noting that, 'even where the plaintiff establishes conduct ... which comes within [that section], the court is *not bound to order a dissolution*' (emphasis added), he went on to say that:

... there is much to be said for the view that [by entering into a partnership] they [the partners] thereby renounce their right by unilateral action to bring about the automatic dissolution of *their relationship* by acceptance of a repudiatory breach of the partnership contract, and instead submit the question to the discretion of the court (emphasis added).<sup>35</sup>

Those comments were, however, clearly obiter and, as Lord Millett expressly left the point undecided, it was left to subsequent courts to decide whether or not they should apply his Lordship's reasoning.

### **UK Decisions after *Hurst v Bryk***

Nearly all UK decisions after *Hurst v Bryk* approved Lord Millett's views<sup>36</sup> — though, tellingly, none of them relied on the suggested principle as the legal basis for their decisions.

The first was *Mullins v Laughton*,<sup>37</sup> where, 'on the basis of the written material, and the brief oral argument on the topic'<sup>38</sup> Neuberger J held that the partnership there in question could not be automatically dissolved by the claimant simply accepting the defendants' repudiatory breach — although, perhaps in deference to the obiter nature of Lord Millett's views and the existence of contrary views in other decisions,<sup>39</sup> he did not base his decision on accepted repudiation not being available as a way of dissolving a partnership. Instead, he noted that:

... on the issue of repudiation, I conclude, as a matter of law, that BKR could not have been dissolved by an accepted repudiation, *but, if that is wrong*, the conduct of [the defendants] was such that there would have been a repudiatory breach, which has been accepted by Mr Mullins, and which would therefore have led to dissolution of the partnership. Effectively, by their words and their

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* See also Southin JA in *Brew v Rozano Holdings Ltd* 2006 BCCA 346 at [22]. Lord Millett followed this passage with the words, 'For a similar principle in a different contractual context, see *Johnson v Agnew* [1980] AC 367, 399, per Lord Wilberforce'. With respect this is a difficult analogy to accept. That case involved a matter in which an order for specific performance of a contract had been made and, when it was not complied with, the vendors sold the properties (for a lesser price) and sued for damages. Lord Wilberforce's comment that '[o]nce the matter has been placed in the hands of a court of equity, or one exercising equity jurisdiction, the subsequent control of the matter will be exercised according to equitable principles' was made in that context, not in the context of a situation where the parties had not submitted a dispute to the jurisdiction of a court of equity but were simply in a relationship which involved, inter alia, equitable obligations.

<sup>36</sup> The one notable exception was the decision in *Lie v Mohile* [2015] EWHC 200 (Ch) where Justice Birss, relying on the Court of Appeal decision in *Hurst v Bryk* and not citing the House of Lords decision at all, seemed to proceed on the basis that acceptance of repudiatory breach could bring partnerships to an end: see at [21]. The judgment also rather inexplicably references *Golstein v Bishop* at [32] without noting Briggs LJ's acceptance of Lord Millett's views.

<sup>37</sup> [2003] Ch 250.

<sup>38</sup> *Ibid* at [93].

<sup>39</sup> See, especially, *Hitchman v Crouch Butler Savage Associates* (1982) 80 LS Gaz 550 per Harman J (referred to by Lord Millett in *Hurst v Bryk*) and, to a lesser extent, *Fullwell v Bragg* (1983) 127 SJ 171 per Nourse J (appeal allowed on other grounds).

conduct, the defendants were evincing a clear intention not to be bound by the partnership agreement, at least as far as Mr Mullins was concerned' (emphasis added).<sup>40</sup>

His Honour then went on to note that, in any case, the defendants' conduct towards Mullins was such that it was appropriate to dissolve the partnership on each the statutory grounds on which Mullins had relied<sup>41</sup> (after he refused to resign, they purported to treat him as if he were no longer a partner without following the expulsion process required by their partnership agreement). However, having decided to dissolve the partnership, either because of accepted repudiation or on s 35 grounds, he then chose not to order a winding up because, in all the circumstances, he did not think 'that it would be right to wind up the partnership'.<sup>42</sup> Instead he concluded that a *Syers v Syers* order,<sup>43</sup> requiring the other partners to buy Mullins out, would be preferable, so long as that did not produce a worse result for Hurst than a formal winding up.<sup>44</sup>

In the end result, therefore, Neuberger J, while clearly approving what he saw to be the thrust of Lord Millett's 'characteristically thorough and careful analysis'<sup>45</sup> of the question did not base his decision on his acceptance of those views.

A similar approach was adopted in *Golstein v Bishop*<sup>46</sup> where, after saying that 'this appeal is not about deciding ... whether repudiation has any place in the context of dissolution of partnerships ... [nor] ... whether there is any exception to Lord Millett's analysis, in the case of a two partner firm, where some but by no means all his objections to the recognition of dissolution by accepted repudiation fall away',<sup>47</sup> Briggs LJ (with whom Sullivan and Maurice Kay LJ agreed) then went on to note '[m]y own view that Lord Millett, Neuberger J and the [trial] judge were all correct'.<sup>48</sup> (Consistent with the views expressed in *Hurst v Bryk* and *Mullins v Laughton*, the trial judge in *Golstein v Bishop* had held that partnerships could not be terminated by acceptance of repudiatory breach<sup>49</sup>). His Lordship's view was however substantially qualified by his acknowledgement that his own view 'adds nothing of substance, since the point was not subjected to any adversarial argument in this court'.<sup>50</sup>

His comments on the correctness of Lord Millett's views must also be seen in the light of the fact that he finally disposed of the matter before him by finding that the partnership in question, which the trial judge had held had come to an end by mutual agreement (so termination by accepted repudiation was not really in issue), could equally have been terminated on the 'wilful or persistent breach' ground — because of the defendant's wrongful behaviour.

Therefore, once again, although the decision does, on its surface, confer strong support for the view that accepted repudiation is not a basis on which partnerships can be terminated, it is not binding authority for the proposition, particularly, as was also the case with both *Hurst v Bryk* and *Mullins v Laughton*, the proposition was not subject to any substantive 'adversarial argument'.

There have only been two other UK decisions in which Lord Millett's views on the question of accepted repudiation in the context of partnerships have been cited and neither have advanced the question to any appreciable extent.

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<sup>40</sup> *Mullins v Laughton* [2003] Ch 250 at [103].

<sup>41</sup> *Partnership Act 1980* (UK) ss 35(d) (wilful or persistent breach rendering it 'not reasonably practicable' to carry on the business of the partnership) and 35(f) (the 'just and equitable' ground). See at [104]-[106].

<sup>42</sup> [2003] Ch 250 at [107].

<sup>43</sup> *Syers v Syers* (1876) 1 App Cas 174.

<sup>44</sup> [2003] Ch 250 at [107].

<sup>45</sup> *Ibid* at [93].

<sup>46</sup> [2014] Ch 455.

<sup>47</sup> *ibid* at [9].

<sup>48</sup> *Ibid* at [10].

<sup>49</sup> [2014] Ch 131 at [117]-[118].

<sup>50</sup> [2014] Ch 455 at [10].



In the first, *Khurll v Poulter*, Mr D Young QC sitting as a Deputy Judge in the Chancery Division found that the partnership there in question had not been repudiated and, while noting that Lord Millett's speech 'has since been adopted by Neuberger J in *Mullins v Laughton* ... where it was held that as a matter of law, a partnership could not be dissolved by an accepted repudiation' he went on to note that '[i]n the light of the above findings it is not necessary for me to decide this important question'.<sup>51</sup>

In the second, *Barber v Rasco International Ltd*<sup>52</sup> Judge Anthony Thornton QC sitting as a Judge of the Queens Bench Division, after referring to Lord Millett's judgment, noted:

It follows that the authority of the Court of Appeal's decision in *Hurst* that a partnership agreement can be repudiated by a partner and that that repudiation can be accepted by another partner with the effect that the partnership is dissolved has been severely dented, if not removed, by the decision and reasoning in the same case. This was the view of Neuberger J in *Mullins v Laughton and others* where he concluded:

*"93. While the point is plainly difficult, I have reached the conclusion that, on the basis of the written material and the brief oral argument on the topic, Lord Millett's provisional view should prevail."*

I am clear that I should follow and apply the views of Lord Millet and Neuberger J and should conclude that in this three-partner partnership, there is no scope for the partnership to be dissolved by the acceptance by Mr Rassouli of the repudiatory conduct of Mr Barber and Mr Jangra *even if such conduct had occurred* (emphasis added).<sup>53</sup>

However, in the end result his acceptance of those views was not relevant to his Honour's ultimate decision. Instead, he found that the partnership had not been dissolved on any of the pleaded grounds because, as a partnership for both a single venture and a fixed term, it was not terminable by notice, the partnership agreement did not contain an express or implied power to terminate, there was no evidence that an agreement to terminate could be inferred and, in the case of any accepted repudiation, 'it was not terminated by it having been repudiated *and there was no evidence that any repudiation had been accepted*' (emphasis added).<sup>54</sup>

Therefore, Lord Millett's views on the question were, once again, not relevant to the ultimate decision. Consequently, the case, while supporting those views, is, again, not authority for their general adoption.

*Flanagan v Liontrust Investment Partners LLP* also contains one further very brief reference to Lord Millett having 'provisionally decided that the doctrine ... could not apply to partnership agreements'<sup>55</sup> but, given that the entity in question there was an LLP, that reference was, again, not relevant to the ultimate decision that 'the doctrine is implicitly excluded in relation to multi-party section 5 agreements' applicable to LLPs.<sup>56</sup>

### **The Australian Decisions**

In Australia, the courts have taken the opposing view and have held that partnerships can be automatically dissolved by acceptance of repudiatory breach. Citing as his authority the Court of Appeal's decision in *Hurst v Bryk* (the correctness of which Lord Millett subsequently questioned on appeal), Coldrey J noted in *Johnson v Snaddon* that '[i]t cannot be doubted that, as with any contract, a partnership agreement may be breached, and such breach may involve repudiation'.<sup>57</sup> However, in

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<sup>51</sup> [2003] All ER (D) 117 at [22].

<sup>52</sup> [2012] EWHC 269 (QB).

<sup>53</sup> *Ibid* at [60].

<sup>54</sup> *Ibid* at [139].

<sup>55</sup> [2015] EWHC 2171 (Ch) at [242].

<sup>56</sup> *Ibid* at [243].

<sup>57</sup> [1999] VSC 243 at [100].

the particular circumstances of that case, he then went on to find that there had not been a repudiation of the partnership agreement, so the matter clearly did not receive his full consideration.

On both grounds, therefore, the decision cannot be regarded as strong authority for the proposition that partnerships can be automatically dissolved on acceptance of a repudiatory breach — especially as his decision preceded Lord Millett’s comments by some nine months.

In 2004, the question came before the New South Wales Court of Appeal in *Ryder v Frohlich*<sup>58</sup> in which it was alleged that, by leaving his firm to accept paid employment elsewhere, the appellant had committed a repudiatory breach of the partnership agreement, which had then been accepted by the respondent agreeing to the departure — thereby automatically terminating the partnership. After discussing both *Hurst v Bryk* and *Mullins v Laughton* (and in a decision with which the remainder of the court agreed), McColl JA took the view that, in the circumstances of that case, Ryder’s departure was a repudiation, Frohlich had accepted it and that that had been enough to terminate the partnership.<sup>59</sup>

On the specific question of the correctness (or otherwise) of Lord Millett’s views, her Honour noted that neither party had drawn the court’s attention to *Hurst v Bryk* and that (emphasis added):

As will be apparent, I have concluded that the primary judge’s decision can be sustained both on the basis that Mr Frohlich elected to accept Mr Ryder’s repudiatory conduct as well as on the basis that the partnership had been determined by abandonment, *so it is not necessary to explore this fascinating point further*. It might be noted, however, that a conclusion that ordinary principles of contract law applied to partnership, notwithstanding the provisions of the *Partnership Act 1892* (NSW), might be thought to be appropriate “in the light of the essential elements of the bargain, the modern money economy and the modern development of contract law”: *Progressive Mailing House Pty Limited v Tabali Pty Limited*, above, at 29 per Mason J (as he then was).<sup>60</sup>

In his concurring judgment, Ipp JA was similarly equivocal, finding that:

whatever technical labels one may choose — acceptance of repudiation, abandonment, agreement by conduct, unilateral act, or some other doctrine — common sense rebels against the notion that the appellants can now be permitted to assert that the partnership was not terminated.<sup>61</sup>

As a result, this decision, like that in *Johnson v Snaddon*, cannot be regarded as strong authority for the proposition it advanced — a conclusion supported by White J’s subsequent decision in *Walker v Melham*.<sup>62</sup>

In that case, one partner in a ski-lodge partnership told the other that he was no longer prepared to work in the business and, thereafter, he took no further part in it. Although that clearly constituted a repudiation of that partner’s obligations under the partnership agreement, White J expressly chose not to decide the question of dissolution on that basis, preferring instead to hold that Walker had abandoned the partnership and had, thereby, dissolved it. As His Honour said:

The proper characterisation of these events is that Mr Walker abandoned the basis on which the parties had agreed that the partnership would be conducted, and thereby abandoned the partnership. ... he did abandon the relations to which the parties had agreed ...

I do not decide this issue on the ground that Mr Walker repudiated the contract of partnership and that his repudiation was accepted. ... I do not need to go into that question. Nor do I go into the debate as to whether acceptance of the repudiation of a partnership contract will itself dissolve

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<sup>58</sup> [2004] NSWCA 472.

<sup>59</sup> *Ibid* at [121] and [124]-[126].

<sup>60</sup> *Ibid* at [133].

<sup>61</sup> *Ibid* at [12].

<sup>62</sup> [2007] NSWSC 264.

the partnership. That question was considered by McColl JA in *Ryder v Frohlich*. It is enough that the partnership was abandoned.<sup>63</sup>

Subsequent decisions have been similarly equivocal, though all seem to have preferred McColl JA's general approach to that of Lord Millett.

In *Bonzalie v Cullu*,<sup>64</sup> for example, Robb J, after noting that 'the parties appear to have approached the issue of termination as if it were brought about by repudiation and acceptance of repudiation, or by abandonment,'<sup>65</sup> then went on to say: '*If that were the correct approach*, the applicable legal principles would be as set out in the judgment of McColl JA in [*Ryder v Frohlich*]' (emphasis added).<sup>66</sup> He did not, however pursue that line further, finding instead that, as a partnership at will, the partnership could be terminated by notice and that that had occurred, because 'the conduct of the plaintiff ... constituted the clearest notice that the plaintiff did not wish the partnership to continue — indeed he would not physically permit it to continue'.<sup>67</sup>

In *Fazio v Fazio*,<sup>68</sup> although an allegation of termination by acceptance of repudiation was raised in the pleadings, the court found that it was not necessary to deal with it. Despite that, Murphy JA (with whom Pullin and Newnes JJA agreed) went on to say that *Ryder v Frohlich* had held that accepted repudiation could effect a dissolution (while also noting that '[t]here is dicta and authority to the contrary in England', citing *Hurst v Bryk* and *Mullins v Laughton*<sup>69</sup>) — but then indicated a clear preference for McColl JA's view, saying:

It seems to me with respect, that if, at law, the contract from which the relation 'springs' (see *Booth v Booth*) has been validly terminated at law (and assuming there is no equitable constraint on the innocent party exercising its legal right to terminate, eg, an equitable estoppel), it is difficult, at least prima facie to envisage that relationship subsisting'.<sup>70</sup>

However, he also specifically said, 'the point ... was not tested in the heat of debate at the hearing of this appeal, and it is not necessary to express a concluded view for the disposition of this case'.<sup>71</sup>

In *Letizia Building Co Pty Ltd v Redglow Asset Pty Ltd*,<sup>72</sup> while the court found that there had been a repudiation, it also found that there was a question about whether it had been accepted. Accordingly, especially as he had found in favour of the defendants on two other grounds, Beech J simply commented that, 'it is unnecessary to determine whether the agreement came to an end by acceptance on the part of the defendants of the plaintiff's repudiation'.<sup>73</sup>

In *Lien v Clontarf Residential Pty Ltd*,<sup>74</sup> a case involving a joint venture agreement rather than a partnership, Jackson J held that the breaches of an implied term that the parties would act in good faith towards each other in the performance of the contract and in the exercise of the powers thereunder were 'matters that destroy the mutual relationship of good faith that is the basis of a joint venture relationship that is either a partnership or as closely analogous to a partnership as in the

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<sup>63</sup> Ibid at [28]-[29].

<sup>64</sup> [2013] NSWSC 1576.

<sup>65</sup> Ibid at [72].

<sup>66</sup> Ibid.

<sup>67</sup> Ibid at [78]. That conduct included the plaintiff assaulting the defendant, preventing her entering the property to participate in the partnership's business and culminated in a solicitor's letter which purported to terminate the lease over the property (which was owned by the plaintiff) in which the business was carried on and threatened the defendant with a claim of trespass if she entered the property.

<sup>68</sup> [2012] WASCA 72.

<sup>69</sup> Ibid at [412].

<sup>70</sup> Ibid. See also at [76].

<sup>71</sup> Ibid.

<sup>72</sup> [2013] WASC 171.

<sup>73</sup> Ibid at [174].

<sup>74</sup> [2019] 1 Qd R 107.

present case'.<sup>75</sup> He therefore held that the contract had terminated as a result of acceptance of the defendant's repudiation.<sup>76</sup> In doing so, though, he again sidestepped the question of whether Lord Millett's views or those of McColl JA should be preferred (although, while acknowledging the former, seeming to prefer the latter), saying:

... in *Hurst v Bryk* Lord Millett queried whether a party to a partnership contract could terminate the contract for the other party's breach. It is unnecessary for me to consider the point in detail. Where, as here, the contract is, in commercial substance, between only two parties, some of the potential problems do not arise. But, in any event it is enough for present purposes that the Court of Appeal on New South Wales considered that the ordinary contractual principles of termination can apply in *Ryder v Frohlich*.

Therefore, even though none of the Australian courts needed to commit one way or another to whether partnerships could be brought to an end by accepted repudiation in order to reach their ultimate decisions, their clear consensus is that they can be.

### Common Features

Although the courts in the United Kingdom and Australia have taken different views about the extent to which Lord Millett's views should be accepted and applied, they share at least three common features.

- a. in every case in both jurisdictions the views expressed were made in the absence of any significant considered argument;
- b. in no case was determination of the question pivotal to the outcome of the case; and
- c. perhaps unsurprisingly given the first two common features, none engaged in any real critical analysis of Lord Millett's views.

In *Hurst v Bryk* itself, both the court at first instance and the Court of Appeal had accepted that the partnership there could be (and had been) brought to an end by Hurst accepting his partner's repudiatory breach, that finding was not challenged on appeal and, as Lord Millett himself acknowledged, 'In these circumstances I am content to proceed on the basis of the same assumption while reserving for future consideration the question whether it is correct'.<sup>77</sup>

Lord Nicholls of Birkenhead, the only other of their Lordships to express a personal view, also noted a preference 'to keep open for another occasion the question whether a partnership can be automatically dissolved by an innocent partner or partners treating the other partner's or partners' breach as repudiatory [because] [t]hat question does not call for decision in the present case'.<sup>78</sup>

In *Mullins v Laughton* Neuberger J, after acknowledging that 'the point is plainly difficult' reached the conclusion that Lord Millett's 'provisional view' should prevail simply 'on the basis of the written material and brief oral argument'<sup>79</sup> and then, in case he was wrong on the point, held that the defendants' conduct had been repudiatory and that Mullins had accepted that repudiation. He then, however, side-stepped the real issue and, after finding that dissolution was justified under both ss 35(d) and (f), ultimately decided not to wind the partnership up and made a *Syers v Syers* order instead.<sup>80</sup>

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<sup>75</sup> Ibid at [192].

<sup>76</sup> Ibid at [198]-[200].

<sup>77</sup> [2002] 1 AC 185 at 196.

<sup>78</sup> Ibid at 189.

<sup>79</sup> [2003] Ch 250 at [93].

<sup>80</sup> Ibid at [103] and [107].

On the particular facts of *Khurll v Poulter*, it was held that the contract had not been repudiated and, therefore, that 'it is not necessary for me to decide this important question'.<sup>81</sup>

In *Barber v Rasco International Ltd*,<sup>82</sup> while Lord Millett's views (as endorsed by Neuberger J) were clearly preferred, their adoption was expressly limited, in that case, to the three-partner partnership then before the court and, even then, with the further practical qualification that on the facts of the case:

... there is no scope for the partnership to be dissolved by the acceptance by Mr Rassouli of the repudiatory conduct of Mr Barber and Mr Jangra *even if such conduct had occurred*<sup>83</sup> (emphasis added)

The judgment in *Golstein v Bishop*<sup>84</sup> was similarly restricted in scope (if unequivocal in its support of Lord Millett's general principle<sup>85</sup> — despite the express acknowledgement in the court below that 'It is true that Lord Millett did not hear argument, and did not express a final view'<sup>86</sup>). However, Briggs LJ specifically prefixing the relevant parts of his judgment with the words, 'this appeal is not about deciding ... whether repudiation has any place in the context of dissolution of partnerships ... [nor] ... whether there is any exception to Lord Millett's analysis, in the case of a two partner firm, where some but by no means all his objections to the recognition of dissolution by accepted repudiation fall away'.<sup>87</sup>

That comment is probably unsurprising given that, as his Lordship acknowledged in the following paragraph, the trial judge had held 'that there cannot be automatic dissolution of any partnership by accepted repudiation *and Mr Golstein has not challenged [that] decision*' (emphasis added).<sup>88</sup> His Lordship's acceptance of Lord Millett's views was also significantly qualified by his acknowledgement that his own view of the question 'adds nothing of substance, since the point was not subjected to any adversarial argument in this court'.<sup>89</sup>

The Australian decisions were similarly constrained.

In *Ryder v Frohlich*, the case which laid down what came to be the accepted Australian position, McColl JA specifically noted that '[n]either of the parties drew the Court's attention to *Hurst v Bryk*'<sup>90</sup> before

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<sup>81</sup> [2003] All ER (D) 117 at [22].

<sup>82</sup> [2012] EWHC 269 (QB).

<sup>83</sup> *Ibid* at [60].

<sup>84</sup> [2014] Ch 455.

<sup>85</sup> *Ibid* at [10].

<sup>86</sup> [2014] Ch 131 at [120] — though his Honour did then go on to note that 'but this does not diminish the force of the points he made. I accept that there are points to be made on the other side: the point is plainly arguable and indeed difficult (as Neuberger J described it, at para 93). In particular I can see, as Lindley & Banks suggests, that Lord Millett's view can leave the innocent partner in a position of some difficulty pending an application to the court for dissolution. The force of this however is somewhat diminished by the considerations that (i) as Neuberger J said, at para 92, even if the doctrine applies, the parties may be left in uncertainty until the court has ruled on whether the conduct was in fact repudiatory; and (ii) I suspect it will often be the case (as happened in both this case and *Hurst v Bryk* [2002] 1 AC 185 itself) that in practice the parties will agree that the partnership is undoubtedly over even though there is a dispute over the legal mechanism by which it came to an end. In any event this does not detract from the central points made by Lord Millett that the discretionary power in the court to dissolve sits uneasily with a right for the innocent party to bring about an automatic dissolution out of court; and that the relationship of partnership subsists not just between the repudiating and accepting partners but between all the partners, and a legal mechanism is needed to bring about a dissolution as between all partners. In the circumstances I conclude that I should follow Neuberger J unless his decision can be distinguished.'

<sup>87</sup> [2014] Ch 455 at [9].

<sup>88</sup> *Ibid* at [10].

<sup>89</sup> *Ibid*.

<sup>90</sup> [2004] NSWCA 472 at [133] — a matter specifically referred to by His Honour in *Golstein v Bishop* at first

noting that she had concluded that the primary judge's decision could be sustained both on the basis of acceptance of repudiation and abandonment 'so it is not necessary to explore this fascinating point further'.<sup>91</sup> Ipp JA was similarly equivocal, having decided that the partnership had in fact been terminated, and held that it was largely immaterial whether it was because of 'acceptance of repudiation, abandonment, agreement by conduct, unilateral act, or some other doctrine'.<sup>92</sup>

In *Walker v Melham* White J expressly chose not to decide the case on the issue of accepted repudiation (despite there being a clear repudiation), finding instead that the partnership there, as with the partnership in *Ryder v Frohlich*, had been dissolved by abandonment.<sup>93</sup>

The decision in *Bonzaliev v Cullu*, while expressly preferring McColl's view, also side-stepped the underlying issue finding that, although the parties had approached the issue on the basis that the termination had been brought about by accepted repudiation, found that, as the partnership was a partnership at will, it had, in fact, been terminated by notice.<sup>94</sup>

*Fazio v Fazio* similarly refused to address the issue directly and, while expressing a preference for McColl JA's views, the court did so with the qualification that 'the point ... was not tested in the heat of debate at the hearing of this appeal, and it is not necessary to express a concluded view for the disposition of this case'.<sup>95</sup>

The point was also not tested in *Letizia Building Co Pty Ltd v Redglow Asset Pty Ltd*,<sup>96</sup> despite the court finding that there had been a repudiation. Instead it questioned whether it had been accepted and found for the defendants on two other grounds, commenting that as a result, 'it is unnecessary to determine whether the agreement came to an end by acceptance on the part of the defendants of the plaintiff's repudiation'.<sup>97</sup>

*Lien v Clontarf Residential Pty Ltd*,<sup>98</sup> also refused to engage in any discussion of the underlying question, and while preferring McColl's view, the court held that as the contract there was a two-party contract, any of the potential problems that Lord Millett had identified simply did not arise.<sup>99</sup>

The result is that while the Courts in England and Wales and the courts in Australia have both expressed a clear, if diametrically opposed, preference for whether Lord Millett's views should be accepted, either generally or with identified qualifications, neither have actually, finally and unequivocally settled the question.

If they are to do so a much more detailed analysis than has occurred to date is necessary and it will need to answer at least three specific questions:

- a. what exactly did Lord Millett mean when he said that partnerships could not be brought to an end by accepted repudiation;
- b. how valid were his reasons for adopting that view; and
- c. in the end result does it really matter?

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instance (at [116]). He then also went on to say about McColl's decision, 'His (sic) decision is therefore neither reached after adversarial argument, nor regarded by him (sic) as a definitive view', an interesting comment as he then also noted in relation to Lord Millett's views (at [120]) that: 'It is true that Lord Millett did not hear argument, and did not express a final view, but this does not diminish the force of the points he made'.

<sup>91</sup> Ibid.

<sup>92</sup> [2014] Ch 455 at [12].

<sup>93</sup> [2007] NSWSC 264 at [28]-[29].

<sup>94</sup> [2013] NSWSC 1576 at [78].

<sup>95</sup> Ibid.

<sup>96</sup> [2013] WASC 171.

<sup>97</sup> Ibid at [174].

<sup>98</sup> [2019] 1 Qd R 107.

<sup>99</sup> Ibid at [187].

## What Did Lord Millett Actually Mean?

A significant problem with Lord Millett's views is that they are capable of two possible interpretations.

The first can be taken from the passage where he says:

Repudiation as a ground of dissolution first saw the light of day in *Hitchman v Crouch Butler Savage Associates* (1982) 80 LS Gaz 550, where Harman J treated as axiomatic the proposition that the doctrine of repudiatory breach applies to partnership agreements as it applies to other contracts. The question, however, is not whether the doctrine applies to the *contract* of partnership, but whether it operates to bring about the automatic dissolution of the partnership *relationship*.<sup>100</sup>

This would seem to indicate that Lord Millett had no fundamental problem with the proposition that the doctrine can apply to terminate *the contract* of partnership; his problem was whether it could also apply to dissolve the underlying partnership *relationship* (though his subsequent comment that '[t]he admission of a new ground of dissolution which is not mentioned in the Act and which would not have been recognised by the Court of Chancery is far from axiomatic'<sup>101</sup> could call this interpretation into doubt).

The Law Commission clearly took the view that that was Lord Millett's intended meaning, saying in its 2000 Consultation Paper:

... in *Hurst v Bryk* in the House of Lords, Lord Millett has expressed the obiter view that an accepted repudiatory breach terminates the partnership contract, but that it does not bring about an automatic dissolution of the partnership.<sup>102</sup>

However, if Lord Millett's concern was not with whether the doctrine could apply to terminate the contract of partnership but only with whether it could dissolve the *relationship*, that, in itself, is problematic — and the necessarily underlying assumption, that there is a distinction between the contract under which the contract was formed (and, presumably, performed) and the partnership relationship that resulted from it, was expressly questioned in *Fazio v Fazio* where Murphy JA commented:

It seems to me with respect, that, if, at law, the contract from which the contract 'springs' ... has been validly terminated at law ... it is difficult, at least prima facie, to envisage that relation subsisting.<sup>103</sup>

It was also subject to comment by the Law Commission in its July 2000 Consultation Paper, albeit for slightly different reasons. The relevant passage reads:

We respectfully question Lord Millett's view. If it is correct, the termination of the contract will bring about a partnership at will which the accepting parties may then terminate immediately, rendering section 35(d) otiose. It seems strange that the accepting partners, having terminated the partnership agreement, should have to take any further step to terminate the partnership at will. In the circumstances of a repudiatory breach and an acceptance putting an end to the formal contract the conduct of the accepting partners is likely of itself to put an end to the partnership at will at the same time as it would commence under Lord Millett's analysis.<sup>104</sup>

Neuberger J dismissed those concerns in *Mullins v Laughton* saying:

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<sup>100</sup> [2002] 1 AC 185 at 195.

<sup>101</sup> Ibid.

<sup>102</sup> The Law Commission Consultation Paper No 159, The Scottish Law Commission Discussion Paper No 111 *Partnership Law A Joint Consultation Paper* 31 July 2000, para 6.28. The same view seems to be taken in *Lindley & Banks on Partnership* (20<sup>th</sup> ed 2017) Thomson Reuters Sweet and Maxwell London, at 24.06.

<sup>103</sup> [2012] WASCA 72 at [412].

<sup>104</sup> The Law Commission Consultation Paper No 159, The Scottish Law Commission Discussion Paper No 111 *Partnership Law A Joint Consultation Paper* 31 July 2000, para 6.29.

It seems to have been assumed that [Lord Millett] held that the partnership contract could be terminated by accepted repudiation, so that the un-terminable partnership would merely be ‘a partnership at will which the accepting parties may then terminate immediately’. I am not at all convinced that that is the consequence of Lord Millett’s analysis. Indeed, on the basis that a partnership could not be dissolved by an accepted repudiation, I think that this analysis is wrong.<sup>105</sup>

Instead, relying on an earlier passage in Lord Millett’s judgment (at 193 — see below), he said that ‘This indicates to me that [Lord Millett] was suggesting that accepted repudiation could not determine the contract (or the partnership) while the partnership was in existence’<sup>106</sup> — it could only do that in the period before the partnership actually commenced or in the period after it had come to an end but before it had been formally wound up. To that extent Neuberger J also seems to be accepting that the contract of partnership and the partnership relationship that results from it are two different things.

Leaving aside the very obvious question about whether a single contract can be terminable by accepted repudiation at particular point in its life but not at others, his views (in the context of those of Lord Millett to which he referred) and the fact that they did not really resolve the question was referred to, without comment either way, in the Law Commission’s subsequent Report. It merely noted that:

The decision of the House of Lords in *Hurst v Bryk* revealed a real uncertainty in the law as to whether the contractual rules on rescission by acceptance of a repudiatory breach of contract apply to dissolve a partnership. Lord Millett’s approach (that the contractual rules do not apply) has been followed by Neuberger J in *Mullins v Laughton*. (citations omitted)<sup>107</sup>

That Report did, however then go on to note that its suggested reform of partnership law:

... provides an opportunity to clarify the role of contractual doctrines in the dissolution of partnerships in order to remove the uncertainties which we have mentioned. We have concluded that the law can be simplified by defining in the draft Bill the grounds upon which a partnership may be brought to an end by the intervention of the court and by thus excluding the application of the doctrine of repudiatory breach in line with Lord Millett’s reasoning in *Hurst v Bryk*. We do this by providing in the draft Bill comprehensive lists of the events which break up a partnership and of the circumstances in which a person ceases to be a partner in a partnership.<sup>108</sup>

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<sup>105</sup> [2003] Ch 250 at [91].

<sup>106</sup> *Ibid.* His Honour cited as support for that view a passage in the 18<sup>th</sup> edition of *Lindley & Banks on Partnership* at para 24-06. In that para of the current edition Banks notes at n 34 that ‘Unknown to his Lordship, much of the reasoning set out in that paragraph of the Consultation Paper was derived from an earlier draft of this chapter, representing the current editor’s then preliminary view, whilst absorbing the full implications of Lord Millett’s speech. In the 20<sup>th</sup> edition (in the same footnote) Banks says: ‘Lord Millett should, however, not be taken to have suggested that a repudiation of the partnership contract whilst the partnership relationship exists would terminate the former and leave the latter in existence: were that to be the position, the partnership would, in any event, be transformed into a partnership at will and could be terminated at any time, without the need for any application under ... s 35. ... Needless to say, it would be a very exceptional case in which it could be argued that, notwithstanding a repudiatory breach, an express right to terminate the contract would have to be exercised’.

<sup>107</sup> The Law Commission and the Scottish Law Commission *Partnership Law*, Report on a Reference under s 3(1)(e) of the *Law Commissions Act 1965*. Cmnd 6015, 10 October 2003, at 8.83.

<sup>108</sup> *Ibid* at 8.84. Paragraph 137 of the Explanatory Notes accompanying the Draft Partnerships Bill that was included as Appendix A to that Report explained how the proposed cl 38, dealing with ‘Events which break up a partnership’, was intended to operate. Indicating the Law Commission’s continuing view that Lord Millett’s views had not then been accepted as decided legal principle, it read: ‘Under the existing law there has until recently been some doubt about the application of contractual doctrines such as repudiatory breach or frustration in such cases. The recent decision of the House of Lords in *Hurst v Bryk* [2002] 1 AC 185 has given guidance on this question. The approach of the draft Bill is consistent with the approach of Lord Millett in that



The Report's proposed reforms, at least in relation to general partnerships were, however, rejected by the UK government in 2006.<sup>109</sup>

The second possible interpretation of Lord Millett's views can be taken from the passage in his judgment that was relied upon by Neuberger J where he said:

The doctrine of accepted repudiation is of general application in the law of contract, and there is no reason why it should not apply to an agreement to enter into partnership or to the contractual obligations which the partners mutually undertake to observe after the partnership has come to an end. But I have considerable doubt that it can be employed to bring about the automatic dissolution of the partnership itself.<sup>110</sup>

This could be taken to mean that while the doctrine of accepted repudiation could apply to partnership contracts it could not do so while the partnership was actually on foot, when it would be 'within the jurisdiction of the Court of Chancery',<sup>111</sup> but only before it actually commenced operations or after it had terminated (but, presumably, before it was completely wound up).<sup>112</sup>

That is the view that Neuberger J took in *Mullins v Laughton* and, by extrapolation, the view that both the primary judge and Briggs LJ, in the Court of Appeal, took in *Golstein v Bishop* — though, as already indicated, in neither case was that finding necessary for the decisions ultimately reached in those cases.

There is, however, considerable merit in the Law Commission's reservations about this possible interpretation. Dissolution of a partnership and termination of the partnership contract are not necessarily the same thing.

Consequently, it may well be, as Lord Millett notes, that dissolution can only be effected in the manner set out in the *Partnership Act*, whether that be by court order under s 35, by the occurrence of one of the events provided for in ss 33 or 34, by expiration or notice under s 32, or otherwise by agreement between the partners.

On the other hand, early termination of a contract normally depends solely on whether one party has elected to terminate for the other's breach or repudiation. In the context of partnership contracts it is difficult to understand why an innocent partner should be deprived of his or her 'normal' contractual rights (unless they have been waived or varied under either the original partnership contract or some variation of it) to bring the contract to an end by acceptance of the other party's breach or repudiation (at least in two-party partnerships). That would allow the innocent party to ensure that, for example, no further liabilities were incurred by the partnership (or, at least, to ensure that he or she was not liable for them by being immediately able to give third parties dealing with the firm notice of termination under ss 36 and/or 37 of the *Partnership Act 1890* (UK)). In that way termination of the

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case as adapted for a law of partnerships with separate legal personality. Under the draft Bill, acceptance of a repudiatory breach of contract will not cause a partnership to break up (see clause 38)'.<sup>109</sup>

<sup>109</sup> Written Ministerial Statement, Ian McCartney, Hansard (HC), 20 July 2006, col 53WS. See also Ministry of Justice *Report on the Implementation of Law Commission proposals*, 22 January 2013 para 12.

<sup>110</sup> *Ibid* at 193. See also the discussion of this point by Neuberger J in *Mullins v Laughton* [2003] Ch 250 at [91].

<sup>111</sup> *Ibid* at 194.

<sup>112</sup> If this is what Lord Millett intended it would seem a little strange in that it is well-accepted that the partners' fiduciary relationship (and therefore the jurisdiction of the courts of equity) extend to transactions both before the partnership formally commences (see, for example, *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 12-13 per Mason, Brennan and Deane JJ, *Bell v Lever Bros Ltd* [1932] 1 AC 161 at 227 and *Conlon v Simms* [2008] 3 All ER 802 at [127]-[128]) and after it has been dissolved, at least until such time as its affairs have been completely wound up (see, for example, *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 All ER 1239 at 1249; [1974] 1 WLR 605 at 613 per Pennycuik V-C; *Chan v Zacharia* (1984) 154 CLR 178 at 205 per Deane J and *Metlej v Kavanagh* [1981] 2 NSWLR 339).

partnership contract (like retirement, or even expulsion) could be a legitimate precursor to a formal winding up or a buy-out (on a 'technical' dissolution, such as occurs on retirement).<sup>113</sup>

It is relevant to note that much the same concerns as were expressed by the Law Commission were also expressed by the editor of *Lindley & Banks on Partnership* 18<sup>th</sup> ed, 2002 at 24-09. In a passage cited by McColl JA in support of her view that accepted repudiation was a means by which partnerships could be brought to an end he said, 'Lord Millett perhaps failed to take into account ... the position in which the innocent partner is thereby placed'. He then went on, as Neuberger J subsequently put it in *Mullins v Laughton*:

'to explain that, if accepted repudiation could not dissolve the partnership, then an innocent party would be left in a state of uncertainty while he made an application to the court for dissolution pursuant to section 35 of the 1890 Act, during which period he would be left in an unfair state of uncertainty, and indeed would be unable to put an end to the partnership in the meantime.'<sup>114</sup>

While acknowledging that this was not a 'negligible point' Neuberger J rejected it on the grounds that 'it does not seem to me to be very forceful, and the present case provides a good example of why that is so',<sup>115</sup> saying:

Even if the doctrine of accepted repudiation applies to a partnership, an innocent party who purports to accept a repudiatory breach would often not be certain as to whether or not the partnership had been brought to an end until the court decides on the issue of whether the breach was in fact repudiatory, and, indeed, on any other issue such as waiver, which might prevent the innocent partner relying on the dissolution'.<sup>116</sup>

In the 20<sup>th</sup> edition of *Lindley & Banks on Partnership* that passage was referred to with the comment:

The current editor remains unconvinced. If one takes the classic scenario exemplified in *Mullins v Laughton* itself, ie where a partner's continuing membership of the firm is denied by the other partners and he is, as a result, excluded from further participation therein, on Lord Millett's and Neuberger J's approach, the partnership and the excluded partner's liability as a member thereof will necessarily continue until such time as an order has been made under s 35 of the 1890 Act. The court has no power to backdate the dissolution and the excluded partner will, if held liable to a third party, have to seek an indemnity from his co-partners, either on the basis of their unauthorised conduct or by way of damages. The efficacy of such a right of indemnity will necessarily be dependent on the financial status of the other partners (citations omitted).<sup>117</sup>

As is shown below, this difference between the two possible interpretations of Lord Millett's meaning has potentially significant ramifications for the extent to which the reasons he gave for reaching his ultimate conclusions can be supported.

### **How Valid are Lord Millett's Reasons?**

In addition to the problem of determining what exactly Lord Millett intended there are also questions about the extent to which the reasons he gave for reaching his conclusion are likely to be upheld if they are subjected to a more rigorous analysis than that to which they have been exposed to date. Possible issues with each of those reasons are outlined below.

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<sup>113</sup> See, for example JW Carter et al, *Contract Law in Australia* (5<sup>th</sup> ed) LexisNexis Butterworths, Sydney 2007 at [30-36].

<sup>114</sup> *Mullins v Laughton* [2003] Ch 250 at [92].

<sup>115</sup> *Ibid*

<sup>116</sup> *Ibid*.

<sup>117</sup> RI Banks, *Lindley & Banks on Partnership* (20<sup>th</sup> ed 2017) Thomson Reuters Sweet and Maxwell London, 24-09.

**a. Accepted repudiation is not expressly included in the Act as a ground on which partnerships can be dissolved.**

Rejecting accepted repudiation as a means of terminating partnerships because it is not expressly referred to in the Act seems to be based on the proposition that termination of the partnership contract and dissolution of the partnership are one and the same thing, either generally or at least while the partnership is actually on foot (assuming that Neuberger J's interpretation of that aspect of Lord Millett's judgment is accepted). However, before that proposition is accepted there are a number of issues of principle that should be considered.

The relationship between partners is affected by three factors: the terms of their partnership contract (both express and implied), the express provisions of the Partnership Act (which, in many cases, can be varied by the partners by including express terms to that effect in their contract) and the fiduciary relationship which exists between them (which can also be varied by the terms of their contract<sup>118</sup>). Each of those sets of rights arise (and exist) separately but the necessary conclusion is that, unless validly excluded, they will all co-exist. Further, the termination of one set of rights (and obligations) need not necessarily terminate the other rights (and obligations) at the same time — a proposition amply demonstrated by the fact that even after dissolution, the provisions of the *Partnership Act* continue to apply until winding-up is complete,<sup>119</sup> as do the fiduciary duties that the now former partners' owe one another.<sup>120</sup>

Consequently, the mere termination of a partnership contract will not necessarily terminate the partnership relationship — it will continue until winding up is complete.

That being the case there is considerable merit in the first of the two possible interpretations of Lord Millett's views — that while an accepted repudiation might bring about a termination of the partnership *contract* it is 'much more doubtful' that it also 'operates to bring about the automatic dissolution of the partnership *relationship*'.<sup>121</sup>

Peden and Carter approached the question with one simple thesis: 'The partnership legislation's concept of dissolution of a partnership is not the same as the contractual concept of discharge'.<sup>122</sup> This they said implied two things: first, that 'general principles of contract law may be used to determine whether a partner is entitled to terminate a partnership contract [and] second, discharge of a partnership contract for breach or repudiation may occur before its dissolution'.<sup>123</sup>

It is not certain that their second point is necessarily valid, because they used the term 'dissolution' both there and elsewhere in the paper to refer to the entire 'dissolution' process, up to and including finalisation of winding up. The wording of the Act, especially in ss 38 and 44, makes it clear that dissolution and winding up are not co-extensive; dissolution terminates the partnership relationship, winding-up, if it occurs, brings the firm's business to an end.<sup>124</sup>

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<sup>118</sup> See, for example, *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 97 per Mason J.

<sup>119</sup> See, for example, the opening words of s 38: 'After the 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' (emphasis added). See also ss 39 (rights as to the application of partnership property) and 44 (rules for distribution of assets on final settlement of accounts).

<sup>120</sup> *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 All ER 1239 at 1249; [1974] 1 WLR 605 at 613 per Pennycuik V-C; *Chan v Zacharia* (1984) 154 CLR 178 at 205 per Deane J; *Metlej v Kavanagh* [1981] 2 NSWLR 339.

<sup>121</sup> *Hurst v Bryk* [2002] 1 AC 185 at 195.

<sup>122</sup> Elisabeth Peden and John Carter, *The Bonds of Partnership* (2000) 16 Journal of Contract Law 275 at 277.

<sup>123</sup> *Ibid.*

<sup>124</sup> See, for example, *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at [12] where the distinction between 'general' dissolutions and 'technical or notional' dissolutions is discussed.

Their first point is however conceptually valid, albeit that it clashes with the second possible interpretation of Lord Millett's views (that apparently adopted by Neuberger J in *Mullins v Laughton*).

In particular, they take issue with Lord Millett's statement that 'the admission of a new ground of dissolution which [is not mentioned in the Act] and which would not have been recognised by the Court of Chancery is far from axiomatic'<sup>125</sup> — and they do so for two reasons.

First, they say that:

in principle, it is difficult to see why a partnership contract is not subject to the general principles which regulate the discharge of contracts. The general law of contract exists for the benefit of all contracting parties, and the presumption is that unless they have agreed to the contrary, principles regulating discharge apply.<sup>126</sup>

Secondly, in relation to Lord Millett's specific concern, they note that:

Given that the modern law of discharge did not develop until the second half of the twentieth century, it is hardly surprising that the Act does not speak in terms of discharge for repudiation.<sup>127</sup>

They also note that if Lord Millett's view is correct there are a number of other circumstances which, under the general law, would lead to a contract being discharged, but, under his approach, would not apply to partnership contracts. They cite, as one instance, situations where the partnership agreement 'states that a particular obligation is an essential term of the contract' and note that 'Under Lord Millett's approach, breach of that term does not entitle a partner to terminate the contract'.<sup>128</sup>

The same might be said if a condition subsequent provided for in the contract occurred. Under the general law the innocent party would then be immediately entitled to terminate the contract and resume the status quo ante.<sup>129</sup> If Lord Millett's approach is correct, partners could be denied that right because the occurrence of a condition subsequent is not expressly referred to as a ground for dissolution in the Act.<sup>130</sup> (It could, of course, be argued that, as an 'agreement', it might allow the partnership to be dissolved under s 32<sup>131</sup> — but that, in itself, could create issues with disposition of any third party contracts the firm entered into before the occurrence, and even with how the partnership property should be dealt with on dissolution).

A similar problem arises with whether the doctrine of frustration could apply to partnership contracts. Frustration is not expressly included in the Act as a ground on which partnerships might be dissolved and, if Lord Millett's approach was applied consistently, then, as the Law Commission put it in its 2003 Report, it would be 'uncertain whether the contractual doctrine of frustration applies so as to bring

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<sup>125</sup> Peden and Carter (n 122) at 279.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid. They also note that Lord Millett himself acknowledged that much of the modern law of discharge for breach or repudiation emerged after the enactment of the partnership legislation: see *Hurst v Bryk* at 193.

<sup>128</sup> Ibid at 281

<sup>129</sup> See, for example, *Head v Tattersall* (1871) LR 7 Exch 7 and *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418. The same issue would not arise on the failure of a condition precedent because, then, either the partnership itself or the obligation to perform would never have come into effect: *McCaul (Aust) Pty Ltd v Pitt Club Ltd* [1957] 59 SR (NSW) 122 and *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 543 per Gibbs CJ.

<sup>130</sup> It is unlikely that s 46 of the *Partnership Act 1890* (UK) (Saving for rules of equity and common law) would alter this position because its operation has been restrictively interpreted to mean that 'the rules of equity and common law so preserved are the rules of equity and common law relating to partnership, and to partnership only.' *Cameron v Murdoch* (1986) 63 ALR 575 at 586 (PC) per Lord Brandon of Oakbrook. Rules of general application seem to fall outside the section's ambit. It might however be argued that the partnership in such cases had terminated by agreement.

<sup>131</sup> Either by a combination of ss 19 and 32 (as suggested by Lord Millett — though not in the context of conditions subsequent) or, as Neuberger J suggested in *Chahal v Mahal* [2005] 2 BCLC 655 at [21], by simply applying the opening words of s 32.

about the dissolution of a partnership'.<sup>132</sup> Peden and Carter made the same point, although somewhat more forcefully, noting that 'the doctrine of frustration cannot be applied because, again, discharge occurs under the general law'.<sup>133</sup>

However, they then went on to suggest that the failure to include any express reference to potential occurrences, such as acceptance of repudiation and frustration, under which contracts could either be terminated at common law or terminate automatically, could be explained by the Act's historical context and the state of the law in 1890. They said:

One explanation for the absence of any reference to repudiation and frustration is, as we have indicated, the fact that these ideas only emerged a short time before the Act was drafted. Thus, repudiation was established as a distinct basis for discharge in 1872 [citing *Frost v Knight* (1872) LR 7 Exch 111] and it was in 1874 that commercial frustration first came to light [citing *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125]. Moreover, the rationale for both repudiation and frustration was, in 1890, an implied term of the contract [citing *Hockster v De la Tour* (1853) 2 E&B 678 at 689; 118 ER 922 at 926 per Lord Campbell and *Taylor v Caldwell* (1863) 3 B&S 826 at 833-34; 122 ER 309 at 312 respectively]. Pollock may well have taken the view that there was no need to state expressly what was implied in law.<sup>134</sup>

This 'implied term' explanation for the omission of any express provision for dissolution on such occurrences would, in the context of the state of the law at the time the Act was passed, seem entirely feasible. It would also allow the other possible options for terminating a partnership that Ipp JA identified in *Ryder v Frohlich*, 'abandonment,<sup>135</sup> agreement by conduct, unilateral act, or some other doctrine'<sup>136</sup> to be applied as means whereby partnerships could be dissolved — despite the absence of any express mention of them in the Act.

There is therefore much to be said for the view that Peden and Carter took, that, contrary to Lord Millett's views: 'The question ... is not whether the Act includes these principles but, instead, whether they are displaced by the Act'.<sup>137</sup> They concluded that they were not.

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<sup>132</sup> The Law Commission and the Scottish Law Commission *Partnership Law*, Report on a Reference under s 3(1)(e) of the *Law Commissions Act 1965*. Cmnd 6015, 10 October 2003) at 8.83. In the same Report the Law Commission recommended the exclusion of 'contractual doctrines such as acceptance of repudiatory breach of contract, frustration and rescission for fraud or misrepresentation' as grounds on which a partnership could 'break up'. See cl 38 of the Draft Bill and para 115 of the Explanatory notes, both in Appendix A to the Report. See also para 137 of those Explanatory notes

<sup>133</sup> Peden and Carter (n 122) at 281.

<sup>134</sup> *Ibid.*

<sup>135</sup> There is a clear relationship between repudiation and abandonment which Lord Wilberforce referred to in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571 at 574 saying: 'in considering whether there has been a repudiation by one party, it is necessary to look at his conduct as a whole. Does this indicate an intention to abandon and to refuse performance of the contract?' It follows that, in the normal course of events, abandonment of one's obligations under a contract can constitute repudiation which entitles the other party to bring the contract to an end. However, abandonment (or discharge by consent inferred from inactivity) is also a quite separate basis on which a contract can be terminated if the parties' conduct is such that neither can be taken to have intended that the contract would be further performed. Termination as a result of abrogation or abandonment, and termination as a result of acceptance of repudiatory breach, while related, are also not the same thing. As Murphy JA put it in *Fazio v Fazio* [2012] WASCA 72 at [412]: ... both involve the discharge of further performance of the contract, but in the latter case, the innocent party maintains the right to sue for (common law) damages for the breach. See also *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 914, 916-17, 920, 923 and 924-25.

<sup>136</sup> [2004] NSWCA 472 at [12].

<sup>137</sup> Peden and Carter (n 122) at 279.

- b. If accepted repudiation was accepted as an additional ground for automatic dissolution it would be difficult to see how it might apply in practice where there were more than two partners and one of them refused to accept the repudiatory breach — or if there are numerous partners who fall into two camps (so that an application to the court for dissolution would still be necessary either to terminate the partnership at all or to terminate the partnership as between parties in the same camps);**

Lord Millett himself accepted that, ‘the contractual doctrine applies to multilateral as well as two party contracts’ though he then went on to qualify that statement by saying:

... but it merely affects the mutual discharge of reciprocal obligations. It necessarily operates bilaterally as between each party in breach, and each party accepting the breach as repudiatory by discharging them from their reciprocal obligations. It is difficult to see how it can operate to discharge the parties in the same camp, whether guilty or innocent, from the obligations they owe each other. This can only be achieved by agreement.<sup>138</sup>

However, is that really a problem? Parties can purport to terminate any contract by accepting the other party’s repudiation — through if the other party then disputes the validity of the termination either may to apply to the court for a declaration either that it was valid or that it was not (Neuberger J’s point in *Mullins v Laughton*).

If it was valid, the inescapable result is that the contract came to an end at the point at which the repudiation was accepted and, as Dixon J said in *McDonald v Dennys Lascelles Ltd* (in the passage expressly referred to by Lord Millett), the effect is that the parties’ mutual obligations terminated at that point. In the case of partnerships that means that the partnership is dissolved and the winding-up process can then commence.

If it was invalid, then the contract will not have terminated and the partnership will not have been dissolved. Therefore, if the parties do wish to bring it to an end they would have to do so using one of the dissolution provisions in the Act.

However, that would not impose an undue burden. The court can use the same proceedings in which the validity of the accepted repudiation was challenged to dissolve the partnership anyway. That could be on any of the grounds specified in s 35, including s 35(d)’s wilful and persistent breach ground (which would almost certainly apply if the breach was repudiatory though not validly ‘accepted’) or, if the conduct was not repudiatory, under s 35(c) if it was sufficiently ‘calculated to prejudicially affect the carrying on of the business’, or under s 35(f) if it was otherwise ‘just and equitable that the partnership be dissolved’.<sup>139</sup>

If the partnership is one at will, which could therefore be terminated by notice, even that step would not be necessary. However, if notice was given and its validity was disputed, the court before which the matter was tried could still order dissolution and could even backdate it to the first point of notice. That could be the time of the purported acceptance of the repudiatory breach, which would normally be effective as notice that the innocent partner (or partners) no longer wanted to remain in partnership with the partner (or partners) in default.<sup>140</sup> Alternatively, it could be to the commencement of the action, because service of pleadings in which the existence of a partnership is denied is effective notice of an intention to dissolve and the partnership can then be dissolved from the date the proceedings were issued.<sup>141</sup>

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<sup>138</sup> [2002] 1 AC 185 at 195.

<sup>139</sup> This was in fact the specific outcome in *Brew v Rozano Holdings Ltd* 2006 BCCA 346.

<sup>140</sup> Notice need not be in any particular form though it should be clear and unambiguous: *Syers v Syers* (1876) 1 App Cas 174 at 183 per Lord Cairns.

<sup>141</sup> *Kirby v Carr* (1838) 3 Y & C Ex 184; *Unsworth v Jordan* [1896] WN (Pt 2) 5; *Yard v Yardoo Pty Ltd* [2007] VSCA 35 at [104]; *Reynolds v Medway* [2013] NSWSC 206 at [40].

There is in fact much to be said for the Law Commission's view that, subject to certain qualifications,<sup>142</sup> the effect of an accepted repudiation would be to bring the contract of partnership to an end, with the result that:

The termination of the contract will bring about a partnership at will which the accepting parties may then terminate immediately, rendering section 35(d) otiose.<sup>143</sup>

As the Consultation Paper then went on:

It seems strange that the accepting partners, having terminated the partnership agreement, should have to take any further step to terminate the partnership at will. In the circumstances of a repudiatory breach and an acceptance putting an end to the formal contract the conduct of the accepting partners is likely of itself to put an end to the partnership at will at the same time as it would commence under Lord Millett's analysis.

If that analysis is correct that 'further step' would not be required – whether the partnership was originally a partnership at will or a fixed term partnership which was terminated and converted to a partnership at will by the innocent partner's acceptance of the defaulting partner's repudiatory breach. In either case all that would be required to terminate the partnership and, therefore, to initiate the winding up process, would be 'notice' under s 32(c), which, as already noted, could be found in the act of accepting the repudiatory conduct.

Neuberger J rejected the Law Commission's analysis 'on the basis that a partnership could not be dissolved by an accepted repudiation'. With respect, that seems to put the cart before the horse. Lord Millett argued that accepted repudiation could not be a means of terminating a partnership *because* that would create undue post-termination problems. The Law Commission's Consultation paper argues that Lord Millett's conclusion was wrong *because* there is an alternative analysis. To reject that alternative analysis because it is inconsistent with or does not produce the desired conclusion involves what appears to be severely flawed logic.

The Law Commission's analysis of this aspect of Lord Millett's objection is particularly apposite in cases involving two-party partnerships where, as Briggs LJ noted in *Golstein v Bishop*,<sup>144</sup> 'some but by no means all [of Lord Millett's] objections to the recognition of dissolution by accepted repudiation fall away'.<sup>145</sup>

However, it is also equally arguable in multi-partner partnerships. Lord Millett postulates that an application to the court under s 35(d) would be needed:

where there are more than two partners and there is at least one partner who is innocent of any wrongdoing and who does not accept the repudiation. It would also arguably be needed even in a case like the present where there are numerous partners who fall into only two camps, those who are alleged to have committed a repudiatory breach and those who claim to have accepted it.<sup>146</sup>

However, he then goes on to acknowledge that:

the contractual doctrine applies to multiparty as well as two party contracts, but ... it necessarily operates bilaterally as between each party in breach and each party accepting the breach [and] it is difficult to see how this can operate to discharge the parties in the same camp.<sup>147</sup>

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<sup>142</sup> As the Consultation Paper noted at 6.28, 'clauses like arbitration clauses may survive'.

<sup>143</sup> *Ibid.*

<sup>144</sup> [2014] Ch 455.

<sup>145</sup> See also *Lien v Clontarf Residential Pty Ltd* [2019] 1 Qd R 107 where it was held that, as the contract there was a two-party contract, the potential problems that Lord Millett had identified simply did not arise.

<sup>146</sup> [2002] 1 AC 195.

<sup>147</sup> *Ibid.*

With respect, this misstates what would be the legal effect if even one partner accepted a repudiatory breach by another. If, as Lord Millett suggests, that action would discharge those parties from their reciprocal obligations (as it should), it has another effect which is not present in multilateral contracts generally (where, as Lord Millett also suggests, the contract between the other parties could remain on foot unless there was an agreement to the contrary<sup>148</sup>). This is because, as his Lordship also noted earlier in his judgment ‘while partnership is a consensual arrangement based on agreement, it is more than a simple contract ... it is a continuing personal as well as commercial relationship’.<sup>149</sup>

Because of this unique aspect of partnerships it has always been recognised that *any change* in the composition of a partnership automatically dissolves that partnership *in its entirety*.<sup>150</sup> The remaining partners may agree to continue with the firm’s business without the outgoing partner (after having reached agreement to buy out his or her interest so a formal winding up is not necessary) but, if they do, they do so as members of a new and separately constituted partnership.<sup>151</sup>

Therefore, if, as Lord Millett suggests, the acceptance by even one partner of a repudiatory breach by any other partner ‘would discharge those parties from their reciprocal obligations’ it would not only terminate the contract (and dissolve the partnership) between them, it would, because of the resulting change, also dissolve the partnership as a whole. It would then be up to the (now) former partners, collectively, to decide whether they wished to continue the business with a new partnership — whether it consisted of the partners in the old firm less the partner guilty of repudiatory breach, less the partner who brought the old firm to an end by accepting that repudiatory breach or in some other combination.

Disputes as to individual entitlements could, of course, be dealt with in the winding-up process, whether formal or through a buy-out, and it could even be governed under one of the Law Commission’s Consultation Papers ‘qualifications’, with any provisions included in the original partnership agreement for how a buy-out on dissolution should be conducted surviving the dissolution.<sup>152</sup> Alternatively, as in *Sobell v Boston* [1975] 2 All ER 282, the question might be settled pursuant to some quite separate agreement reached after dissolution became a real possibility. If the parties could not reach agreement they would also still have recourse to the courts, either for appointment of a receiver, or receiver and manager or, in appropriate cases, to apply for a *Syer v Syers* order after dissolution (as was the outcome in *Mullins v Laughton*).

Therefore, as Peden and Carter suggest, it is possible that ‘the proper perspective on discharge is that it is analogous to retirement’.<sup>153</sup> That is, it ends the contract, it ends the partnership between the repudiating and the accepting parties and, because of the ‘special’ nature of partnerships, it also ends the partnership as a whole.

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<sup>148</sup> *Ibid* at 195-96. See also *Petrocapital Resources plc v Morrison & Foerster (UK) LLP* [2013] EWHC 2682 (Ch) at [166].

<sup>149</sup> *Ibid* at 194.

<sup>150</sup> *Rushton (Qld) Pty Ltd v Rushton (NSW) Pty Ltd* [2003] 1 Qd R 320 at 323 per McPherson JA.

<sup>151</sup> *Hadlee v Commissioner of Inland Revenue* [1989] NZLR 447 at 455; *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* (2010) 242 CLR 508 at [11]; *Income Tax Commissioners (City of London) v Gibbs* [1942] AC 402, particularly at 414 per Viscount Simon LC; at 429, 430 per Lord Wright; at 432 per Lord Porter; *Brace v Calder* [1895] 2 QB 253 at 258 per Lord Esher MR; at 261 per Lopes LJ; at 263 per Rigby LJ.

<sup>152</sup> See, for example, *Biliora Pty Ltd v Leisure Investments Pty Ltd* (2001) 11 NTLR 148.

<sup>153</sup> *Ibid* at 281. There are two obvious problems with this argument. First, s 26 only provides for retirement from partnerships at will, which can be brought to an end by notice anyway — so an application under s 35 is not necessary). Secondly, an outgoing partner’s liability to third parties differs depending on whether he or she has ‘retired’ or the partnership has been otherwise dissolved. If the latter he or she remains liable until the third party has either actual notice or, in the case of those who had not dealt with the firm before dissolution, until the dissolution has been advertised under s 36(2). With retirement the retiring partner is simply not liable for partnership debts contracted after retirement, at least as regards those who did not know that he or she had been a partner: see s 36(3).



Lord Millett's comment to the effect that acceptance of repudiatory breach as an additional ground for automatic dissolution where there were more than two partners 'would lead to a very odd distinction between those (few) cases where dissolution was automatic and those cases where it was not'<sup>154</sup> is not a real issue. As a result, his concerns about the possible effect of accepted repudiation on the residual relationships within the original firm are effectively baseless.

**c. It would circumvent the discretionary power of the court to order dissolution under the wilful or persistent breach provision in s 35(d).**

Lord Millett suggested that this was the 'strongest argument against admitting repudiatory breach as a further ground for the automatic dissolution of a partnership'.<sup>155</sup>

In contrast, Peden and Carter argue that nothing in s 35:

'exclude[s] the right of a partner to elect to terminate the contract which underlies the partnership for the other partners' repudiation. It would indeed be *quite shocking* for a partner to be bound by his or her fiduciary obligations to persons in whom he or she had ceased to have trust and confidence ... with no more than a right to contribution from them of their share of any loss which the partnership suffers in the meantime'.<sup>156</sup>

Their contrary view is that 'the proper perspective on discharge is that it is analogous to retirement'<sup>157</sup> — it ends the contract and, at least as regards the partner who exercises the right (by accepting the other's repudiation), it ends the partnership. It does not however end the underlying relationship which will continue until the firm is wound up (or that partner's interest is bought out).

It also does not automatically terminate that partner's liability to third parties with whom the firm has dealt. That will only occur when they have been notified of the change under ss 36 and 37. If necessary, and to put the matter beyond doubt, that partner could also apply for a formal order for dissolution under s 35 — thereby addressing Neuberger's concerns that:

Even if the doctrine of accepted repudiation applies to a partnership, an innocent partner, who purports to accept a repudiatory breach, would often not be certain as to whether or not the partnership has been brought to an end, until the court decides on the issue of whether the breach was in fact repudiatory, and, indeed, on any other issue, such as waiver, which might prevent the innocent partner relying on dissolution.<sup>158</sup>

As Peden and Carter then went on to say:

There is in this respect nothing unique about partnerships. Termination of any contract merely has the effect of discharging the parties from their respective performance obligations. Further consequences, such as recovery of restitution, or a contractual debt or damages, necessarily depend on court order giving effect to rights which existed at the time of termination.<sup>159</sup>

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<sup>154</sup> *Hurst v Bryk* [2002] 1 AC 185 at 196.

<sup>155</sup> *Ibid.*

<sup>156</sup> Peden and Carter (n 122) at 280-81

<sup>157</sup> *Ibid* at 281. See also Lawrence Jacobson *Separate ways* (2011) 155 SJ (39) pp 14–15. The issue with Jacobsen's view, that the innocent party's acceptance of a repudiation could take effect as a notice determining the partnership under ss 26 and 32(c), is that the notice provision there only applies to partnerships at will. Therefore, the suggestion in para 6.29 of the Law Commission's Consultation Paper that the outcome of Lord Millett's view of accepted repudiation would be that 'the termination of the contract will bring about a partnership at will' would mean that that step would be needed even if it and the notice were then regarded as contemporaneous events.

<sup>158</sup> [2003] Ch 250 at [92].

<sup>159</sup> Peden and Carter (n 122) at 282-83.

There is also the practical consideration that, even if the court does have a discretion not to order dissolution under s 35, that discretion has historically been used sparingly.<sup>160</sup> Even where it has been used it has mainly been to refuse dissolution when the application was because of allegations that a partner was of permanently unsound mind or permanently incapable of performing his or her part of the partnership contract, or because the business could only be carried on at a loss.<sup>161</sup>

In each of those cases the discretion is justified (and has been used) because the insanity or the incapacity might not be 'permanent',<sup>162</sup> or might not be such as to render the affected partner completely incapable of performing his or her part of the partnership contract,<sup>163</sup> or because the inability to generate profit might only be the result of something of an extraordinary or temporary nature.<sup>164</sup>

Where dissolution is sought for behaviour that would constitute repudiation at common law it will generally be sought, as Lord Millett indicated, under s 35(d), for wilful or persistent breach (though, if there was any doubt about whether the conduct was sufficiently wilful or persistent to justify an order under s 35(d), it could also be sought under s 35(c) for prejudicial conduct, or under s 35(f) because it is just and equitable to order dissolution<sup>165</sup>).

It is less likely that the discretion to refuse dissolution would be exercised in such cases because it will also almost invariably have resulted in it no longer being 'reasonably practicable for the other partner or partners to carry on the business in partnership with [the offending partner]'.<sup>166</sup> Even in *Mullins v Laughton*, where Neuberger J specifically referred to the discretion, he did not exercise it. Instead, he determined that the partnership should be dissolved, either because of the accepted repudiation or under each of ss 35(d) and 35(f), but then, having determined that it would not 'be right to wind up the partnership,' he elected to make a *Syers v Syers* order instead, requiring the defendants to buy the claimant out.<sup>167</sup>

Consequently, the importance of the discretion, at least in respect of ss 35(c), (d) and (f), seems to be to allow the court to bring the partnership to an end in some other way — not to refuse to dissolve it at all. Where the discretion does have a place is, as Neuberger J said, 'if another course would achieve a more just result'.<sup>168</sup> That might occur where, as the latest edition of *Lindley & Banks on Partnership* puts it, 'there is some other remedy open to the partner(s) seeking a dissolution'.<sup>169</sup> Those remedies might include expulsion of the partner in default if the agreement contains an appropriate power to expel, or retirement of the partner(s) seeking dissolution if that is an option that they could elect without suffering adverse financial consequences (which could occur if their entitlements on winding-up exceeded their entitlements on retirement).<sup>170</sup>

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<sup>160</sup> Mainly in instances where, although dissolution could be ordered, 'another course would achieve a more just result': *Mullins v Laughton* [2003] Ch 250 at [108] per Neuberger J.

<sup>161</sup> *Partnership Act 1890* (UK) ss 35(a), (b) and (f) respectively.

<sup>162</sup> See, for example, *Whitwell v Arthur* (1865) 35 Beav 140; 5 ER 848.

<sup>163</sup> *Sadler v Lee* (1843) 6 Beav 324; 49 ER 850.

<sup>164</sup> *Handyside v Campbell* (1901) 17 TLR 623.

<sup>165</sup> Peden and Carter (n 122) at 280.

<sup>166</sup> See, for example *Brew v Rozano Holdings Ltd* [2009] BCCA 346 at [27].

<sup>167</sup> Thereby confirming the fact of dissolution because *Syers v Syers* orders can only be made after dissolution, as an alternative to a formal winding-up.

<sup>168</sup> [2003] Ch 250 at [108].

<sup>169</sup> Banks (n 117) at 24-71.

<sup>170</sup> In *Rutt v Head* (1996) 20 ACSR 160 Santow J refused to dissolve a two-man partnership because the partnership deed contained a withdrawal option. The partner seeking the dissolution had contrived the breakdown and his lack of clean hands and the lack of a complete deadlock between the partners militated against a formal winding up.

Lord Millett's objection on this third ground is, therefore, also not as damning as it might appear at first glance.

### Does it Matter?

The short answer to the question, 'Does it matter?' is, 'Yes it does'. The partnership relationship is fiduciary in nature and also involves unlimited liability for the debts and other obligations of the partnership,<sup>171</sup> a statutory agency under which each partner is generally bound by the acts of his or her co-partners,<sup>172</sup> and a range of other ancillary statutory provisions that impose some form of obligation or potential liability. They include provision for matters such as liability for acts done or instruments executed on behalf of the firm,<sup>173</sup> responsibility for admissions or representations made by a partner,<sup>174</sup> and deemed receipt of notice.<sup>175</sup>

Except in partnerships at will where termination can be effected quickly and easily by simple notice, requiring partners who are clearly disinclined to remain in partnership with those who, by their actions, have indicated a clear unwillingness, inability or outright refusal to continue in the partnership or, at least, to do so while abiding by the terms of the partnership agreement, unless and until they can obtain a court order for dissolution, seems almost unconscionable. It exposes them to unnecessary risks of ongoing contractual, tortious and other liability, it prevents them from taking steps to reduce that liability by using the Act's (post-dissolution) notification provisions<sup>176</sup> and it imposes both unnecessary delay and potentially significant cost to bring about an end to a partnership which, in reality has already ceased to function in any realistic sense. It could even be seen to undermine the fundamental concepts that underlie the fiduciary nature of partnership relationships.

In that context it is salutary to recall the words of Bacon VC in *Helmore v Smith*:

Their mutual confidence is the life-blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on.<sup>177</sup>

If that mutual trust no longer exists and there are grounds, such as an acceptance of repudiatory breach, on which the general law would allow the underlying contract to terminate, it is difficult to see why the law should impose further impediments to immediate dissolution.<sup>178</sup>

That concern is also reflected in the statement in *Lindley & Banks on Partnership*<sup>179</sup> that:

... on Lord Millett's and Neuberger J's approach, the partnership and the excluded partner's liability as a member thereof will necessarily continue until such time as an order has been made under s 35 of the 1890 Act ... and the excluded partner will, if held liable to a third party, have to seek an indemnity from his co-partners ... [t]he efficacy of [which] will necessarily be dependent on the financial status of the other partners (citations omitted).<sup>180</sup>

Referring to Neuberger's comment to the effect that there would be a period of uncertainty as to the effectiveness of the repudiation and acceptance until a court has ruled on the matter, *Lindley & Banks*

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<sup>171</sup> *Partnership Act 1890* (UK) ss 9-13.

<sup>172</sup> *Ibid* s 5.

<sup>173</sup> *Ibid* s 6

<sup>174</sup> *Ibid* s 15.

<sup>175</sup> *Ibid* s 16.

<sup>176</sup> In particular under ss 36 and 37.

<sup>177</sup> (1886) 35 Ch D 436 at 444.

<sup>178</sup> This argument underpinned the decision in *Lien v Clontarf Residential Pty Ltd* [2019] 1 Qd R 107 that a joint venture relationship which was described as 'closely analogous to a partnership' had terminated by acceptance of the defendant's repudiatory conduct. See, in particular at [192] and [198]-[200] per Jackson J.

<sup>179</sup> *Banks* (n 117) at 24-09. The same reservation was expressed in the 18<sup>th</sup> edition and, although Neuberger J rejected it in *Mullins v Laughton* (at [92]), McColl JA subsequently cited it with apparent approval in *Ryder v Frohlich* (at [130]).

<sup>180</sup> *Banks* (n 117) at 24-09.

goes on to note:

Yet surely, uncertainty with a probable absence of continuing liability is preferable to uncertainty with a *guarantee* of continuing liability.<sup>181</sup>

In reality Neuberger J's concern can be readily catered for by existing general law provisions which allow terminations to be challenged and, if shown to be unwarranted, to be set aside. Normal contractual remedies for breach can then be pursued by any partner adversely affected by a wrongful termination.

The other possible alternative argument, that the innocent party or parties could seek interim injunctions to prevent the offending partner or partners interfering in the firm's business until the application for dissolution can be dealt with, is similarly flawed. Doing that would merely impose additional cost and delay — without providing any obvious compensating benefit.

There is one further, if allied, problem with Neuberger J's concern. Unlike the situation when partnerships at will are dissolved by notice, and the validity of the dissolution is then challenged but upheld (when the dissolution can be backdated to the date of the notice<sup>182</sup>), when dissolution is ordered under s 35 it normally takes effect only from the date on which the decision is delivered.<sup>183</sup> While there are good reasons for this rule<sup>184</sup> it means that the innocent partner(s) will remain liable for firm obligations incurred during the intervening period, and have no guarantee of indemnity.

## Conclusion

The critical difference between the UK and Australian approaches is in their conflicting views about whether a distinction should be drawn between the contract of partnership and the partnership relationship — perhaps best encapsulated by Murphy JA's statement in *Fazio v Fazio* that, 'It seems to me with respect, that if, at law, the contract from which the relation 'springs' ... has been validly terminated at law ... it is difficult, at least prima facie to envisage that relationship subsisting'.<sup>185</sup>

The Australian courts seem to have taken a more pragmatic approach, perhaps best expressed by Ipp JA in *Ryder v Frohlich* where he said 'whatever technical labels one may choose — acceptance of repudiation, abandonment, agreement by conduct, unilateral act, or some other doctrine — common sense rebels against the notion that the appellants can now be permitted to assert that the partnership was not terminated as the judge found'.<sup>186</sup>

In the end result, it may well be that Lord Millett's views will be formally accepted, particularly in the UK, either in the form in which they were expressed or with some qualification, such as that which Southin JA appears to have applied in *Brew v Rozano Holdings Ltd*.<sup>187</sup> However, in the absence of a detailed 'adversarial argument' in a dispute where the question is squarely in contention and the outcome depends entirely on the answer, that should not be presumed.

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<sup>181</sup> Ibid.

<sup>182</sup> *Kirby v Carr* (1838) 3 Y & C Ex 184; *Unsworth v Jordan* [1896] WN (Pt 2) 5; *Yard v Yardoo Pty Ltd* [2007] VSCA 35 at [104]; *Reynolds v Medway* [2013] NSWSC 206 at [40].

<sup>183</sup> *Besch v Frolich* (1842) 1 Ph 172; 41 ER 597 a case involving termination on the grounds of lunacy. See also *Lyon v Twedell* (1881) 17 Ch D 529 at 530-31 per Jessel MR, James and Lush LJ. That case involved the dissolution of a medical partnership on the ground of disputes between the partners. It was held that where there is no distinct breach of the partnership articles, the dissolution will not be made retrospective, but will be ordered from the date of the judgment.

<sup>184</sup> See *Lyon v Twedell* (1881) 17 Ch D 529 at 530-31.

<sup>185</sup> [2012] WASCA 72 at [412].

<sup>186</sup> [2004] NSWCA 472 at [12]. See also *Trustee for Allway Unit Trust v R&D Airconditioning Pty Ltd* [2018] SASC 46 at [83].

<sup>187</sup> See n 33 above.