OUTER HOUSE, COURT OF SESSION

[2024] CSOH 97

P890/24

OPINION OF LORD BRAID

In the Petition by

RODNEY VINCENT MCALLISTER

Petitioner

for

an order dissolving the firm of Panda Rosa Metals, for the appointment of a judicial factor on the estates thereof; and for the appointment of a judicial factor *ad interim*

Petitioner: Ower KC; Stronachs LLP
Second Respondent: Barne KC; Ledingham Chalmers LLP
Third and Fourth Respondents: Thomson KC, Massaro; Aberdein Considine and Company
***Interim* Judicial Factor: Lord Davidson of Glen Clova, Campbell; BBM Solicitors Ltd**

31 October 2024

[1] On 22 October 2024, having heard counsel for all parties (save the first respondent, who has not entered the process) I recalled the appointment of Alexander Iain Fraser as judicial factor *ad interim* on the estates of Panda Rosa Metals, a partnership having its principal place of business at 44 Canal Road, Aberdeen, that appointment having previously been made by me on 2 October 2024. This opinion sets out, in full, my reasons for doing so.

Background

[2] The petitioner, together with his father (David McAllister Senior, hereafter DM), his mother (the first respondent) and three of his brothers (the second to fourth respondents), were until 2019 partners in the firm Panda Rosa Metals, which carried on the business of scrap metal dealers in Aberdeen. That firm (a partnership at will) was dissolved on 19 December 2019 on the death of DM. Subsequently, as the parties agree (one of the few matters on which they do agree) a new partnership at will was formed by the surviving partners, also known as Panda Rosa Metals, which has carried on the scrap metal business since then.

[3] Differences have arisen between the petitioner and the second to fourth respondents to the extent that the petitioner now seeks dissolution of the partnership in terms of section 35(c), *et separatism* 35(d) *et separatism* 35(f) of the Partnership Act 1890 and the appointment of a judicial factor (and *interim* judicial factor) on the sequestrated partnership estate. On 2 October 2024, on the petitioner's *ex parte* motion, which was not intimated to the respondents, having heard from counsel for the petitioner I appointed Alexander Iain Fraser as *interim* judicial factor with the "usual powers". (In passing, I observe that although that is the phrase commonly used in interlocutors appointing a judicial factor, those words seem to me to be a recipe for confusion or uncertainty, and so the interlocutor of 2 October 2024 specified that the usual powers were those set out in section 4(1) of the Trusts (Scotland) Act 1921, under exception of the power to sell heritable property which the factor would otherwise have had.) The appointment was subject to the factor finding such caution as the accountant of court may require. The accountant of court was satisfied as regards caution by 7 October 2024 and an official certified copy interlocutor was then issued enabling the *interim* judicial factor to embark upon his duties from that date. The petition

was served on the respondents on 8 October 2024, and the *interim* judicial factor has been in the saddle, so to speak, since that date. If only to illustrate the extreme, some might say draconian, nature of the remedy, particularly in relation to an entity which is still trading (as Panda Rosa Metals is), it is worth noting at this stage that I was told that in the two weeks since his appointment, the *interim* factor has already incurred costs totalling more than £100,000, including outlays of some £30,000: costs for which the partnership is potentially liable (at least, if the appointment is, in the fullness of time, made permanent, about which more anon).

The basis on which the *interim* appointment was made

[4] By way of general overview, at the *ex parte* hearing the picture painted by the petitioner's senior counsel (of whom, for the avoidance of doubt, no criticism was made by senior counsel for the respondents, nor is any criticism made by me) was one in which the petitioner was being denied access to financial information about the firm in circumstances where, for want of a better term, dubious payments were being made out of the firm's funds by the second to fourth respondents to themselves and others, and the petitioner was effectively being denied any role in the management of the firm. This was in a context where he averred that whereas he had originally held a 10% share in the respective firms which existed immediately before and after the death of DM, the first respondent had transferred to him her 45% share (made up of her original 20% share, and DM's 25% share), resulting in his holding a 55% share. Thereafter, the petition contained the following specific allegations:

i) That since the death of DM there had been significant *ad hoc* payments to the second respondent and to unknown third parties and that the second respondent

refused to respond to the petitioner's queries about regular withdrawals of monies from the firm's accounts;

ii) That the petitioner had the following concerns as to the operation of the business:

a) the firm's accounting and financial systems were inadequate and not appropriate for a firm of its size;

b) the petitioner had limited access to those accounting and financial systems;

c) the petitioner could not reasonably ascertain from the limited financial information which had been provided to him what profits were generated by the firm;

d) the firm was presently suffering from very significant cash flow problems, an issue which did not previously arise;

e) very significant partners' drawings were taken in the financial years ending in 2022 and 2023 (the position in respect of the year ending 2024 being unknown);

f) the capital base deterioration appeared to be the root cause of the cash flow problems and there was an urgent need for an injection of working capital.

iii) That one of the two members of staff employed as a book keeper was convicted of embezzlement of approximately £1.5 million from the firm between June 2015 and October 2021, this having happened on the second respondent's watch;

iv) That in 2023 the petitioner noticed that regular sizeable payments began to be made from the firm's account to "Barclaycard" (the use of quotation marks carrying the implication that perhaps the payments were not in truth being made to Barclaycard) and that the second respondent, the only person who routinely made and authorised payments out of the firm's accounts, refused to provide the

petitioner with any information in relation to those payments; the petitioner "suspected" that the payments to "Barclaycard" were made by the second respondent notionally paying a fictional (sic) supplier for scrap which was not being received by the firm; prior to 2020 the approximate annual purchase of scrap at the Canal Road site was £2 million but since 2020, taking account of the payments to "Barclaycard" the Canal Road site's total annual purchase costs had increased to approximately £5 million;

v) That payments of around £2,000 per week had been made to one David Stuart, a retired crab fisherman and a friend of the second respondent; payments amounting to approximately £240,000 had been made to him since 2020 purportedly for the supply of scrap; to the best of the petitioner's knowledge David Stuart did not supply scrap metal and had never done so; the second respondent refused to provide the petitioner with any information in relation to those payments;

vi) That substantial sums (in excess of £2 million) had been withdrawn in capital from the firm by the second to fourth respondents; and in addition significant sums had been paid to Linda McAllister, a sister of the petitioner and second to fourth respondents, (and the daughter of DM and the first respondent) who had formerly been an employee but who had stopped working for the firm in September 2022;

vii) That in August 2021 the second respondent's son, David McAllister III, incorporated a company which traded as Big Bear Metals and which was a direct competitor of the firm;

viii) That the petitioner's accountants had reviewed such financial information of the firm as had been made available to the petitioner but it was insufficient to allow

those accountants to form a view about the performance of the business of the firm; the information provided showed that the firm was unable to make payment of a debt in the region of £2.83 million due to the estate of the late DM;

ix) That the firm owned a number of properties, its interests in which were recorded in the firm's fixed asset register. Certain issues arose with that register including the fact that it was not possible to identify some of the properties from the description in the register.

[5] Additionally, I was informed that the respondents had excluded the petitioner from the Harehill site, which he had traditionally run. They had sold stock to the domestic market rather than overseas, resulting in a lower price being obtained.

[6] On the basis of that information, I was persuaded that the situation was sufficiently urgent to justify the appointment of a judicial factor *ad interim* (although I did not sequestrate the partnership estate, which I considered was inappropriate, if not incompetent, prior to dissolution of the firm). I was referred by senior counsel to Gloag and Henderson, *The Law of Scotland* (15th Ed), paragraph 42.03, where it is stated that there is no limit to the circumstances in which a factor may be appointed, but that the instances of such appointments include the appointment of a factor on a partnership estate. *Carabine* v *Carabine* 1949 SC 521 was one such example: in that case, the partnership, between a husband and wife, had already been dissolved and, as the Lord Justice Clerk (Thomson) put it at page 527, the respondent, who had continued to run the business since dissolution, had not the slightest intention of settling up the partnership affairs unless he was subjected to pressure, and it was both necessary and expedient that the court intervene. The necessity in the present case was said to be that there was deadlock between the partners and that it was necessary for an *interim* judicial factor to preserve the estate before it was dissipated further.

The motion for recall

[7] When the case called before me again on 22 October, on the respective motions of the second, and third and fourth, respondents to recall the *interim* judicial factor's appointment, I had the benefit of answers/draft answers, together with affidavits and certain documentation lodged by those respondents. Senior counsel for the respondents painted a very different picture to that painted in the petition.

[8] The respondents made two discrete headline points: first, that the petitioner had not made a full and frank disclosure of the complete circumstances in his application to the court, such that the appointment should be recalled with no opportunity to argue the matter *de novo*; and, second, that in any event the circumstances did not merit the extreme remedy of appointment of an *interim* judicial factor, which was a remedy of last resort; all the more so when the partnership was still continuing to trade and had not been dissolved.

[9] On the first of these, the respondents submitted that the petitioner had failed to disclose that there were genuine disputes in relation to a number of issues. One of these was in relation to the share of profits to which each partner was entitled. Following the death of DM that had not been agreed. The petitioner's claim to own a 55% share of the firm was flawed, inasmuch as DM had not been a partner in the present firm and so could not have a 25% share in it which was capable of being passed on. The respective shares held by each partner in the firm was a matter of dispute, and had been for some time, which the petitioner had failed to disclose. The petitioner had also failed to disclose that the capacity of the first respondent to transfer property was in any event also a matter in dispute.

[10] As regards the merits of the appointment, and the specific assertions in the petition, the respondents' position, broadly speaking, was as follows:

i) The allegation that the petitioner had not been afforded access to the partnership accounting and financial information was simply and demonstrably untrue. A letter of authority had been provided to the partnership accountants, Johnston Carmichael, signed by all the partners on 23 and 30 March 2023, authorising that firm to provide to any partner and/or his/her nominated agent, any and all financial information and documents that he/she may require relating to the partnership. Information containing SAGE records, had subsequently been provided to the petitioner on 2 September 2023. Nowhere in the petition, or in the petitioner's affidavit which accompanied it, had that been disclosed.

ii) To the extent that the firm had suffered from cash flow issues, they were caused by the petitioner, who had deliberately stock piled stock at the Harehill premises. Those difficulties were resolved by the second to fourth respondents selling the stock, transforming a credit balance of £39 in July 2024 to a seven figure sum just one month later. That had not been disclosed. Further, the second to fourth respondents disputed that it was more profitable to sell scrap to the overseas market than domestically. Even though a higher price might be obtained, that was offset by higher costs.

iii) Although significant drawings had been taken by the respondents, the petitioner, too, had withdrawn a significant sum (albeit that had been disclosed); the draft accounts for 2023, the most recent draft accounts which were available but which had not been lodged by the petitioner, showed, per the balance sheet, net assets of well into seven figures, and a healthy turnover. Comparison of the capital accounts of the partners showed that the petitioner's capital account was the lowest of all the partners by some margin. It was explained that the reason the

accounts were in draft form was because the respective capital shares had not been agreed.

iv) The second respondent could not be blamed for the embezzlement; rather, the fictitious sales had all gone through Harehill, which is where the petitioner was based and so all the transactions were available for him to scrutinise as the person in charge there. The suggestion that the second respondent was negligent in allowing the embezzlement to occur, and the insinuation that he even colluded in the crime, were simply not made out.

v) As for the Barclaycard payments, as the petitioner was aware, smaller suppliers of scrap had until recently been paid by means of electronically crediting credit cards using a Barclaycard machine. This occurred daily. Every few days, the firm would clear the debt to Barclaycard. There had previously been a Barclaycard machine at Harehill but the petitioner had stopped using it. He was well aware of this system, which had been discontinued in August 2024 when the petitioner stated that he was uncomfortable with its use. None of this had been disclosed in the petitioner's affidavit.

vi) David Stuart was not a crab fisherman but was a project engineer employed offshore. He was well known to all of the McAllister family, including the petitioner. He had sold scrap to the firm for more than 30 years as the petitioner was well aware. On occasion he would arrange for an articulated lorry to take scrap to the firm.

vii) The firm had authorised all payments to the partners and to Linda McAllister. DM had promised Linda that she had a "job for life" in recognition of the help she had given her parents and had made the other partners promise to look after

Linda. The firm came to an arrangement with her that rather than pay her salary for the rest of her life, she would receive a one-off payment of £80,000 plus one year's pay. All of the partners, including the petitioner, were aware of that promise, and the subsequent arrangement.

viii) As regards Big Bear Metals, it was not a direct competitor of the firm; the second respondent did not accept that he had allowed and authorised the removal of scrap metal from the firm's Canal Road premises, to Big Bear Metals. There was a single incident involving an employee who had dishonestly appropriated scrap metal for his own use and he was dismissed.

ix) The averment that the firm was unable to pay a debt due to the estate of the late David McAllister was simply wrong. That was not a debt due by the new partnership, but by the surviving partners of the old one.

x) The suggestion that the petitioner was excluded from the management of the firm was unjustified. He was invited to all partners' meetings but declined to attend.

[11] In response, senior counsel for the petitioner spent some time commenting on the second respondent's affidavit, and on the various points made by the respondents, listed above, many of which the petitioner disagreed with and put forward a contrary position (by way of example only, he did not agree that he was a friend of David Stuart, although on that particular matter, messages between him and David Stuart, lodged by the respondents, perhaps suggest otherwise; nor did he agree that Mr Stuart had organised lorry-loads of scrap metal deliveries). I do not propose to narrate the petitioner's comments in detail; they merely serve to underline that there are many disputes between the partners, none of which the judicial factor is able to resolve, none of which the court is able to resolve at this stage, and many of which are not even relevant to the present process. One new factual matter

was raised by senior counsel for the petitioner (although no offer to amend the petition was made). It had come to the petitioner's attention that within no more than 15 minutes of the petition having been served, very substantial payments of £200,000 and £100,000 had been made to the third and fourth respondents respectively, and that after having been told by the *interim* judicial factor that no payments were to be made out of the firm's bank account. This heightened the petitioner's fear that the firm's assets were being depleted to his detriment.

[12] On that matter, senior counsel for the third and fourth respondents informed me that those withdrawals had been agreed at a partners' meeting (to which the petitioner had been invited by email, but had declined to attend) on 3 October 2024 and that an instruction had been given to the relevant member of staff (Yvonne Carmichael) on 7 October 2024, on her return from holiday, which she had not actioned until 8 October. The timing was mere coincidence.

Submissions

[13] Senior counsel for the respondents (who adopted each other's submissions) submitted that the failure to disclose material information was such that the appointment of the *interim* judicial factor should be recalled and no opportunity afforded to the petitioner to argue the matter *de novo.* In particular, the demonstrably untrue assertion that he had not been afforded access to accounting information was sufficient of itself to justify that outcome.

[14] However they also submitted that, in any event, the circumstances were not of such urgency as to justify the appointment of a judicial factor at this stage. Sequestration of a partnership estate with the appointment of a judicial factor *ad interim* was the most extreme

remedy the court could offer for the protection of funds in jeopardy: *McCulloch* v *McCulloch* 1953 SC 189, LP Cooper at 192. It was a remedy of last resort. At best for the petitioner, the petition disclosed circumstances which might justify dissolution by the court under section 35 of the 1890 Act, but different criteria had to be satisfied to justify appointment of a judicial factor. Other remedies were available to the petitioner, including interdict (if his position was, as it appeared to be, that the partnership assets were being dissipated) or dissolution of the partnership at his own hand. The test for appointment of an *interim* judicial factor was one of necessity: *Gow* v *Schulze,* (1877) 4 R 928, Lord Deas at 933. That test was not met here. Disputes between partners, such as those relating to an accounting between them, were not a proper basis for the appointment of a judicial factor: *Elliot* v *Cassils (*1907) 15 SLT 190, Lord Guthrie at 192. There were legitimate disputes between the parties, which it was no part of the factor's function to resolve. If the parties could not resolve the disputes themselves, separate litigation would be required. Although appointment of a judicial factor might in some circumstances be justified where there was no effective management of an estate, or management was deadlocked, or there was an estate which required to be preserved pending a resolution of disputes about it - *Institute of Chartered Accountants in Scotland* v *Kay* 2001 SLT 1449, Lord Carloway, at 1451 - that was not, or at least not yet, the situation in the present case, where decisions were being taken by the partners at meetings to which the petitioner was invited. *En passant*, counsel observed that in *Institute of Chartered Accountants in Scotland* v *Kay*, Lord Carloway had opined that, in general, intimation of a motion for *interim* orders ought to be given to a respondent in order that he had the opportunity to be heard on the motion before potentially losing his estate.

[15] Applying the law to this case, to the extent that the partners were in dispute, none of those disputes could be resolved by the *interim* factor or in the present process, but would

require to be litigated separately. Many of the issues raised by the petitioner had been known about for years, and there was no urgency to appoint a judicial factor, let alone an *interim* judicial factor, now. Moreover, the continuing appointment of the *interim* judicial factor was causing damage to the business of the firm. The scrap metal field was one in which there was little customer loyalty. If there was a hiatus in trading, customers would take their business elsewhere. The continued appointment of the *interim* judicial factor would result in the value of the firm being significantly depleted, which was to no-one's benefit.

[16] Senior counsel for the petitioner submitted that there had not been a material failure to disclose many of the issues complained about by the respondents, where either the petition or the affidavits tendered in support of it contained at least some information (for example, in relation to the Barclaycard payments). However, she was constrained to concede that many of the petitioner's concerns were based on nothing more than suspicion, and as such could not properly be founded upon. Moreover, she was unable properly to explain away the fact that the petitioner had been afforded full access to all of the firm's accounting information by the respondents. She submitted that any failure to disclose was not so serious as to prevent the court from considering the matter *de novo* and that the continued appointment of the factor was necessary to preserve the estate. She renewed the motion she had made at the *ex parte* hearing, essentially for the same reasons. The petitioner's concern was that the assets of the partnership were being dissipated and that if he were to dissolve the firm, there would be nothing left. An *interim* factor was necessary to conserve the estate. It was not contended that the factor could resolve any of the disputes between the parties.

Decision

Full and frank disclosure

[17] The law is clear. There is a duty of full and frank disclosure on the part of any person seeking an urgent remedy from the court at an *ex parte* hearing: *Bell* v *Inkersall Investments Limited* 2006 SC 507, LJC Gill at paras [19] and [20]; *Scottish Ministers* v *Stirton* 2008 SLT 505, Lord Glennie at para [16], where he also pointed out that the duty is not only on the applicant's representatives but on the applicant himself. Where there is a failure to make full and frank disclosure, it may be so serious that the only proper response is to discharge the order even though on all the evidence the test for making the order is now met: *Stirton*, para [27]; *Mex Group Worldwide Limited* v *Ford* 2024 SLT 901, Lord Sandison at para [44]. In other words, depending on how heinous the failure is, the court may either decline entirely to consider any fresh application for an *interim* order, which application would require it to take into account the material which ought to have been, but was not, disclosed; or it may consider the matter *de novo*, which course to adopt must be determined on a case by case basis, depending on what is required in the interests of justice.

[18] While the affairs of the partnership are mired in confusion, not least down to the informal way in which it is managed, there is no getting away from the fact that the petitioner did fail to disclose that, whatever his other complaints, he had been given full access to the accounting records of the firm and was being invited to partners' meetings. It is common ground between the parties that the firm's accounting and financial practices leave a great deal to be desired - senior counsel for the *interim* judicial factor offered the observation that the financial governance of the firm was as poor as he had seen - from which it follows that no inference adverse to the respondents can be drawn from the fact

that the petitioner's accountant may be unable to answer all of the petitioner's queries about the financial performance of the firm. That is a product not of the respondents' stonewalling of the petitioner but of the firm's antediluvian accounting and financial procedures, for which the petitioner is as responsible as the other partners. Nonetheless, the fact is that the petitioner plainly has been allowed complete access to all the financial information that there is. The problem which that non-disclosure presents for the petitioner is that all of his other complaints were viewed through the prism of his being deliberately kept in the dark. The non-disclosure inevitably had a material bearing on the outcome of the *ex parte* hearing.

[19] Whether there was a failure to disclose other matters is less clear cut, for example, the petitioner did disclose that there had been ongoing negotiations between the parties; and it does appear that certain disputes may only have come out of the woodwork very recently. One thing I am clear about is that had the *ex parte* hearing been intimated, and the original motion opposed, the court would have had fuller and more complete information that it in fact had in relation to such matters as, for example, the Barclaycard payments, where the petitioner's affidavit if not positively misleading was somewhat economical with the truth as to the complete background. A similar observation might be made about the averments regarding David Stuart. On balance, I have reached the view that the failure in disclosure was so significant that the appointment of the *interim* factor ought to be recalled for that reason alone.

[20] Finally, on the question of intimation, I respectfully echo the observation of Lord Carloway that in general, motions for the appointment of an *interim* judicial factor should be intimated and the respondents given the opportunity to be heard before any such order is made, particularly in cases where the partnership is still trading.

Circumstances meriting appointment of* interim *judicial factor?

[21] Strictly speaking, any further consideration of the matter is not required, since I have found that the petitioner is not entitled to have the application considered *de novo.* However, lest I am wrong in that view and since parties made full submissions on whether a *de novo* appointment was justified, I have also considered whether the circumstances as they are now presented to me do in fact merit the appointment of an *interim* judicial factor.

[22] As the authorities referred to at both hearings make clear, the test for appointment of an *interim* judicial factor is one of necessity. It is instructive to consider the circumstances in which the court has previously concluded (or declined to conclude) that the test was met. In *Carbine*, above, as previously noted, the partnership had already been dissolved and the respondent was continuing to run the business with no intention of settling the partnership affairs. In *McCulloch*, above, the partnership had been dissolved and numerous disputes between the partners had already come before the courts before an *interim* judicial factor was appointed. In *Gow* v *Schulze*, above, the partnership had been dissolved and questions of accounting had arisen between the partners, the court holding that these could not be resolved by a factor, and the petition for sequestration of the partnership estate and appointment of a judicial factor was refused. Differing views were expressed by the court as to whether it was, or was not, more onerous to appoint a judicial factor to an on-going business than to one which had already been dissolved. Lord Deas said, at 933, that there may be stronger reasons for appointing a judicial factor on a going business than where nothing remained to be done other than an accounting between the partners; whereas Lord Shand, also at 933, expressed the contrary view. In *Elliot* v *Cassils* (1907) 15 SLT 190, the partnership had already been dissolved, and the disputes between the partners founded upon for the purposes of the petition to appoint a judicial factor were (a) a question as to the

(mis)use of partnership funds for the respondents' separate business, (b) the respondents' right to credit themselves with certain funds, (c) a question whether the petitioner drew more than he was entitled to draw and (d) whether the respondents had credited the partnership with all the sums collected by them from the firm's debtors. These questions (and others) were all the subject of ongoing litigation in Glasgow Sheriff Court.

Lord Guthrie refused the petition.

[23] While it is plain from the authorities as a whole that the circumstances in which an *interim* judicial factor may be appointed are not fixed, and the opinion of Lord Deas, above, provides some support for the notion that there may be circumstances in which it is necessary to appoint a judicial factor to a partnership which is still trading, I tend to agree with the Lord Shand view that it is likely to be more difficult to establish necessity where there is an ongoing business, particularly one which is profitable, bearing in mind that the mere fact of the appointment may bring about the partnership's demise, to no-one's benefit; or, as Lord President Cooper put it, in *Elder* v *Elder and Watson Ltd* 1952 SC 49, at 54, in the context of a Companies Act petition, the cure may be worse than the disease.

[24] Thus, while it is not an absolute bar to the appointment of an *interim* factor that the partnership is still trading - that must be so, otherwise the *interim* appointment would not have been made in the first place - that is a significant factor which must be taken into account. It is obvious that the parties have many disputes and grievances with each other. One fundamental one is in relation to the respective share each has in the partnership. Application of first principles shows that the route by which the petitioner claims a 55% share is flawed, since, as the second respondent submitted, DM never had a 25% share in the current partnership, and so, by definition, had no share in it which was capable of being transmitted to the first respondent or, through her, to the petitioner. This has a bearing since

it considerably reduces the value of the petitioner's interest in the firm. The parties' inability to agree what their respective shares in the partnership are has meant that the accounts have not been finalised for some years, but the draft accounts to August 2023 show that the petitioner's capital account is smaller by some margin than those of each of the other respondents. To use the modern vernacular, he appears to have less skin in the game than they do. This inevitably colours the view taken of substantial capital payments to the other partners, since there is nothing inherently suspicious about partners in a firm withdrawing sums to which they are entitled.

[25] Other disputes relate to the manner in which the partnership business is being conducted: such as, whether it is more lucrative to sell scrap overseas, or domestically. That seems to me to be a matter for the firm to resolve internally, rather than a matter for the courts. It is also significant that the grievances are not all one-sided, the respondents taking issue with the petitioner's stockpiling of stock; again, an internal partnership matter. Further, whereas the petitioner claims that the second to fourth respondents are intent on denying him that to which he is entitled, equally, those respondents are aggrieved at the manner in which the petitioner came to acquire title to Harehill, which may, or may not, be a partnership asset; that too is a matter in dispute. To the extent that the disputes are a matter for the courts, the petitioner (and for that matter, the respondents) have other remedies available to them. The authorities show that resort should be had to those other remedies before it would be appropriate to appoint a judicial factor. The judicial factor could not resolve any of the huge litany of disputes between the partners. The petitioner's original aim was said to be to conserve the estate and prevent it from being dissipated further, but while that may be a straightforward matter where a partnership has already been dissolved and is no longer trading, it is far less straightforward where it continues to trade; and it is

far from certain in the present case that the *interim* factor would continue to trade, and if so, for how long; or indeed, what level of costs he would incur. In that connection, I am also mindful of the fact that firm has some thirty employees and their interests cannot be ignored. This may well be a case where, as LP Cooper put it, the proposed cure is worse than the disease. Finally, having heard the respondents' side of the story, it no longer seems to me that it can be said that there is such deadlock between the partners as to justify appointment of a factor at this stage. Disagreement on many issues is not the same as deadlock.

[26] For all these reasons, I have concluded that the circumstances do not justify the continuing appointment of an *interim* judicial factor, and had I been considering the matter *de novo*, I would have recalled the appointment in any event.

Expenses

[27] On the unopposed motion of the respondents, I found them entitled to their expenses of the motion for recall from the petitioner. I also found the petitioner liable for the *interim* judicial factor's fees and outlays. A practical concern having been raised by counsel for the *interim* factor that the petitioner might not meet those, potentially leaving the factor out of pocket, I allowed him to retain the sum of £140,000 from the partnership funds meantime, that approach not being opposed by any of the respondents. If the petitioner fails to meet the judicial factor's fees and outlays in due course, an argument may have to be had as to whether it would be fair to expect the firm to meet those fees and outlays but that is a question for another day.

Concluding remarks

[28] One matter which did give me some pause for thought was the withdrawal of £300,000 to the second and third respondents after the petition had been served, allegedly in ignorance of it. However, while that may well be capable of founding an inference that the respondents were attempting to put money beyond the control of the *interim* factor, it does not follow that, absent the appointment, they were not entitled to withdraw the sums. Put another way, something which happened after the *interim* appointment had been made cannot, of itself, justify the continuation of that appointment if the circumstances which gave rise to the appointment can no longer support it.

[29] However, that matter leads on to another, which is the question of other remedies. To the extent that the petitioner obliquely relied upon vague assertions of fraud in his affidavit, although not in his petition, it is now accepted that he may not legitimately do so and that would also be the position in any future litigation which he might raise. However, if he were able to make properly founded elements of fraud, based upon fact rather than suspicion or supposition, he may have other remedies available to him, in particular in relation to his stated apprehension that assets of the firm are being dissipated. That, too, is a question for another day.

[30] Finally, as I said at the close of the hearing, it is clearly in all parties' interests that the petition be resolved as soon as possible, if only because the spectre of dissolution and sequestration of the partnership estates continues to hang over the firm, and it is imperative that if the petition is to be insisted in, it progresses with all due haste.