

Anna Birtwistle and Clare Murray
examine how to assess a partner's true status

Status symbol

provided the alcohol or was aware it was to be consumed, and was either present or absent in light of the previous conditions, it could be argued that he would have assumed liability as the Ministry of Defence did in *Jebson v MoD* [2000] 1 WLR 2055 (CA (Civ Div)) as it would have been foreseeable that the party guest's appreciation of risk would have been clouded by the alcohol.

A duty would also arise if a child attempted the same manoeuvre as the claimant, as she would be incapable of fully appreciating the risks inherent to diving and would be unaware of the likelihood of sustaining a life-altering neck injury. In such circumstances, the private homeowner may have a duty to either place the pool out-of-bounds or to supervise the minor's swimming.

While the outcome for Ms Grimes is tragic, the case reaffirms the protection given to defendants and landowners who might currently be drowning in a sea of negligence or occupiers' liability claims. Some might call it common sense, others an open and obvious risk, but in the delicate balance between allowing individual autonomy and paternalistically protecting claimants from themselves, liability will generally fall on the party that assumed the responsibility for the activity. Sometimes, though, allowing such freedoms has its own cost.

Kris Lines is a senior lecturer at Staffordshire University, and Jon Heshka is an associate professor at Thompson Rivers University in Canada. Contact: kris.lines@staffs.ac.uk; jheshka@tru.ca

Salaried, fixed share, junior equity: it is not always clear whether someone is a genuine partner or in reality an employee. The issue of true status is a significant one: it is likely to inform, for example, whether the individual is entitled to benefit from employee-specific protections (e.g. unfair dismissal and statutory maternity rights), whether they are subject to the duty of good faith, the likelihood of enforceability of their restrictive covenants, as well as their tax status.

Two recent Employment Appeal Tribunal decisions, *Williamson & Soden Solicitors v Briars* [2011] and *Tiffin v Lester Aldridge LLP* [2010] have demonstrated the challenge of distinguishing between partners and employees and confirm yet again that the courts will undertake a thorough investigation of the facts when determining status and will pay little notice to the label applied by the parties.

Key to the EAT's decision that Mr Briars was an employee rather than a genuine partner included the fact that he had no risk of losses of the firm, made no capital contribution, was subject to a significant degree of control and was at one stage put at risk of redundancy. The EAT clarified that there is no requirement for tribunals first to determine whether someone is a partner within the section 1 definition in the Partnership Act 1890 before considering if they have employment status. It was for tribunals to determine how best to approach the issue of such status.

In contrast, Mr Tiffin was found to be a true partner in *Lester Aldridge* for reasons including that he was entitled to vote at

partner meetings, could sign cheques on behalf of the firm, made a contribution of capital and was entitled to a share of profits and to a share in the residue of the firm in a winding up. Importantly, the EAT held that no minimum threshold is required to meet partnership status in respect to level of profits, capital contribution or involvement in management, all of which in Mr Tiffin's case were limited.

These cases further emphasise that each case will turn on its own facts and the substance of the relationship. Key issues determining partner/employee status remain unchanged, for example: whether they receive fixed remuneration or participate in the profits and losses of the firm; the degree of control under which they operate; their own control and influence over management decisions; the right to hire and fire, and to sign cheques; and whether they contribute capital and share in the proceeds on a winding up.

Although discrimination protections apply to partners as well as employees, certain other claims such as whistleblowing detriment, apply to 'workers'. This is a wider definition than employees and case law has not yet decided whether LLP members or general partners will be treated as falling within the 'worker' category – and views of practitioners remain hotly divided on this issue.



Anna Birtwistle and Clare Murray (pictured) specialise in employment and partnership law at CM Murray LLP cm-murray.com