

1

Partnership in General

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1 THE NATURE OF PARTNERSHIP

1.1 English partnership law is to be found in the rules of law and equity relating to partnership which were codified and to some extent amended by the Partnership Act 1890¹. That Act defined partnership (subject to exceptions) as follows:

1(1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

So a ‘partnership’ does not mean a body or association; it means a relationship between separate component persons. In England and Wales (as opposed to Scotland² and other civil law jurisdictions) a partnership is not a

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legal persona or entity³, though for some purposes it may be deemed to be so for tax or other statutory purposes⁴ and may be sued as if it were⁵.

It merely comprises its members⁶; unlike a company it cannot have property vested in itself or create a floating charge over its assets⁷. Contracts taken in its name are enforced against its members; without those members it has no existence.

‘Partner’ is not defined by the Act, but implicitly it means one of those ‘persons’ in the definition above.

‘Firm’ is the correct term for the body of partners as a whole:

4(1) Persons who have entered into a partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

The requirements for the existence of a partnership (‘a business in common with a view of profit’) will be considered in the next chapters. Partnerships can be created in widely varying circumstances, either expressly or by inadvertence. Two art dealers agreeing once to buy a picture together will constitute a firm for that purpose, as will an international network of accountants, or the members of a family running a restaurant together. The result of this variety is that the main principles of partnership law are drawn broadly. They may be compressed into two:

- (i) subject to contrary agreement between them, each partner owes a duty of good faith to the others; and
- (ii) irrespective of agreement between them, every partner is an agent of the other partners for the purpose of the business of the partnership.

This book will explain and qualify those principles.

1 The Partnership Act 1890 is set out in Appendix A to this book. It was described by Harman LJ as a ‘model piece of drafting’ in *Keith Spicer Ltd v Mansell* [1970] 1 WLR 333 at 335. Lindley LJ was of the view that it made no great change in the law save in the mode of making a partner’s share of the partnership assets available for his debts: Supplement to *A Treatise on the Law of Partnership* (1891) p 2.

2 Section 4(2) of the Partnership Act 1890 which is printed as Appendix A to this book.

3 *Re Sawers, ex p Blain* (1879) 12 Ch D 522; *Meyer & Co v Faber (No 2)* [1923] 2 Ch 421; *R v Holden* [1912] 1 KB 483; *Re Vagliano Anthracite Collieries Ltd* (1910) 79 LJ Ch 769; contrast a company, *Saloman v A Saloman & Co Ltd* [1897] AC 22.

4 Eg where the firm itself is appointed an auditor: see para 9.9 below, or registered under s 45(1) of the Value Added Tax Act 1974: see *Revenue and Customs Commissioners v Pal* [2006] EWHC 2016 (Ch D: Patten J), but as to the nature and effect of such registration see *Scrace v Revenue and Customs Commissioners* [2006] EWHC 2646 (Ch).

5 See para 21.12 below.

6 Per James LJ in *Smith v Anderson* (1880) 15 Ch D 247 at 273; *Pooley v Driver* (1876) 5 Ch D 458 at 471.

7 Save under the Agricultural Credits Act 1928 mentioned at para 8.48 below.

2 THE HISTORY OF PARTNERSHIP

- A The origins 1.2
- B The statutes of 1865, 1890 and 1907 1.3
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A The origins

1.2 Partnership law is as old as commerce itself¹. The medieval borough courts and fair courts of *pie powder* were enforcing something like it in the 13th century. In the 15th, merchants from the Italian cities brought to northern Europe the foundations of the law of banking and commercial partnership, and by the 16th century the international nature of business meant that 'Italian Law Merchant' was recognised in Paris and London². There were two principal forms of partnership. The first was the *Commenda*, whereby an investor, the *Commendator*, evaded the usury laws by putting money into a business in return for a share in the profit, but was liable for no more than his investment. This developed in France into the *Société en Commandite* or limited partnership, but it did not find favour in England. The other was the *Societas*³ which in France became the *Société en nom collectif* or ordinary partnership, in which all members were equally responsible for the debts and could bind the firm.

Foreign notions of commercial law were accepted in the English common law courts where they blended with the English law merchant, 'the accumulated product of the customs of trade to which sanction has from time to time been given by decisions of the courts'⁴, and were taken up by the Court of Chancery in the 17th century.

In 1691 the Commissioners for Trade had reported to the House of Commons on the inadequacy of the machinery for deciding 'controversies between merchants concerning accounts'⁵. A large part of English commerce was then being conducted by partnerships. Daniel Defoe, writing in 1697⁶, advocated the creation of a new 'court merchant' to regulate disputes between merchants and tradesmen. His complaints about procedural inefficiency went unheeded, but nonetheless both the common law courts and the Court of Chancery were evolving modern notions of partnership law, largely unassisted by statute. The principal partnership action, the action for an account, was then available (with characteristically different drawbacks and procedure) both at law and in equity. But the action for an account at law had fallen out of favour by the time section 34(3) of the Judicature Act 1873 came into effect and assigned partnership actions to the Chancery Division.

¹ And is commended in Holy writ: Luke ch 5 v 10.

² Holdsworth *A History of English Law* (7th edn, 1955), vol V, p 84.

³ See Justinian's Institutes, title 'De Societate', referred to by Page Wood V-C in *Blisset v Daniel* (1853) 10 Hare 493 at 523.

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4 Per Cockburn LJ in *Goodwin v Roberts* (1875) LR 10 Exch 337 at 352.

5 Commons Journals xi 696.

6 *Essay upon Projects*.

B The statutes of 1865, 1890 and 1907

(a) *The Law of Partnership Act 1865, 'Bovill's Act' (repealed)*

1.3 Bovill's Act¹ was passed to reverse the presumption that the existence of certain payments out of the profits of a business would constitute the recipient a partner or liable as such for the debts of the business. It became known as the Limited Partnership Act, which was a misdescription because its effect was not to confer any limited liability upon any partner. Its scope was somewhat extended by section 2(3) of the 1890 Act.

1 Repealed by the Partnership Act 1890 but printed in Appendix I to this work. Its provisions explain the reasoning behind decisions before 1890. Bovill's Act was 'supposed by every one concerned to make a material change in the law, but really added little or nothing to the effect of *Cox v Hickman*'; per Sir Frederick Pollock in the preface to the fifth (1890) edition of his *Digest of the Law of Partnership*.

(b) *The Partnership Act 1890*

1.4 The 1890 Act¹ represents the law of England and Wales today. It was an Act which was largely declaratory of the existing law²; its innovations are insignificant³. Almost all of it remains in force today. Section 46 of the Partnership Act 1890 shows that it did not revoke the earlier law:

The rules of Equity and Common Law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.

It codifies much (but by no means all) of the previous law with admirable terseness. Its drawbacks were that it provided no mechanism for limited partnerships⁴, and it drew no distinction between professional or 'civil' partnerships and business or 'commercial' partnerships, unlike most foreign jurisdictions. Its model was the commercial partnership through which so much English trade had hitherto been conducted. It applied to Ireland and with insignificant variations it applied to Scotland, and Irish and Scottish decisions on the Act are accordingly valuable although not strictly binding in England and Wales⁵.

The draftsman of the 1890 Act, Sir Frederick Pollock, modestly stated in the preface to the fifth (1890) edition of his *Digest of the Law of Partnership*: 'It will be doubted whether the Act will add much to the knowledge of the law possessed by practicing members of the Chancery Bar.' Although the previous

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law upon which the Act was based will be discussed in this book it is worth mentioning that the very purpose of the Act was to make most of such citation unnecessary. As Lord Herschell said in the House of Lords less than six months after the Partnership Act 1890 came into force⁶:

I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of this enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence ...

Sir Frederick Pollock's account of the origin and history of the Partnership Act 1890 is in his preface to the 11th Edition of his *Digest of the Law of Partnership* (1920), the last edited by himself, and there he remarks:

The Act, therefore, has to be read and applied in the light of the decisions which have built up the existing rules.

Sir Nathaniel (later Lord) Lindley published in 1891 a supplement to his well-known *Treatise on the Law of Partnership* in which he identified the changes introduced by the 1890 Act as follows⁷:

Section 23 introduces a new method of making a partner's share in the partnership assets available for the payment of his separate judgement debts.

Probably the assignment or mortgage by a partner of his share in the partnership assets does not in any case dissolve the partnership nor give the other partners a right to dissolve.

The power of the court to decree the dissolution of a partnership is extended by s 33(f) and perhaps also by s 33(e).

It is doubtful whether the doctrine of holding out has been extended by the words 'knowingly suffered' in ss 14(1) and 38.

Possibly s 15 has made the admissions of a partner concerning the partnership affairs made in the ordinary course of business evidence against his co-partners in criminal cases.

Section 16 may have made notice to a partner who habitually acts in the partnership business notice to the firm, though he was not acting in the partnership business when he received the notice.

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- 1 Set out with current amendments in Appendix A to this work.
- 2 Per Farwell J in *British Homes Assurance Corpn Ltd v Paterson* [1902] 2 Ch 404 at 410.
- 3 Section 23 was mostly new, empowering a charging order to be made over a partner's share, and the provisions of ss 1 to 4 of Bovill's Act (see Appendix I of this book) were re-enacted rather more broadly in s 2(3) of the 1890 Act (Appendix A). See also paras 2.20 and 2.22 below.
- 4 A deficiency remedied in Canada in 1849, in New South Wales in 1892, but not in England until the Act of 1907. Limited partnerships are dealt with in chapter 24 of this book.
- 5 For a discussion of Scottish, Irish and foreign firms see para 1.10ff below.
- 6 In *Bank of England v Vagliano Bros* [1891] AC 107 at 145, with reference to the Bills of Exchange Act 1882.
- 7 Page 115. He also identified, in the same place but at greater length, the doubtful points of law settled by the Act.

(c) *The Limited Partnerships Act 1907*

1.5 This Act¹ introduced into English law the possibility that a person might be a partner in a firm but liable only to the extent of the capital he had invested, as in the French *Société en commandite*; and, as in the latter, the privilege of limited liability might be forfeit if the limited partner involved himself in the management of the firm². But the Act arrived too late to be of much commercial significance, because it was overshadowed by the Companies Act of the same year which introduced private limited companies. Businessmen saw the benefit of trading with unfettered limited liability through a limited company, and the pre-eminence of the partnership as the vehicle for trade had ended. Company law developed separately from partnership law from which it had originally sprung³.

- 1 Printed as Appendix B to this work. Sir Frederick Pollock, in his 1879 draft of what was to be the 1890 Act, included provisions for the creation of limited partnerships, but in 1882 a Select Committee declined to proceed with them. They were left out of the Bill notwithstanding the enthusiasm with which limited liability was advocated by the Duchess of Plaza-Toro in *The Gondoliers* (1889) Act II. For this reference I am grateful to my friend David Rees.
- 2 Limited partnerships are discussed in chapter 24.
- 3 The first (1860) edition of *Lindley on Partnership* was entitled *A Treatise on the Law of Partnership, including its application to Companies*.

C Later development

(a) *The Commonwealth*

1.6 Before the 20th century most countries within what was to become the Commonwealth had enactments similar to the Partnership Act 1890. They inherited England's rejection of the continental tendency to divide partnerships into civil, commercial and other categories¹. The courts of the Commonwealth provide authorities which are valuable although not strictly

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binding in the English courts. For instance in the field of joint ventures² Australian law may have been influenced by the law of those states of the USA that will not permit corporations to be partners. In spite of these differences a modern Commonwealth case is often as useful to the English practitioner as an ancient English one.

- 1 The rejection is not an absolute one. English law draws a certain distinction between the implied authority of partners in trading and non-trading partnerships as discussed in chapter 19. Joint ventures are discussed at para 2.40ff above.
- 2 In *Regalian Properties plc v London Docklands Development Corpn* [1995] 1 WLR 212 at 231 Rattee J held that the Australian case of *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880 was not good English law.

(b) The limited company

1.7 Throughout the 20th century the limited company continued to be preferred to a partnership as the vehicle for commercial, but not professional¹ business. The advantages were:

- limited liability;
- relative ease of accumulating profits and holding property.

The disadvantages of a limited company were:

- greater formality of registration and the requirement of annual returns;
- public access to accounts;
- tax disadvantage;
- the weak position of a minority member.

Today the partnership is enjoying a revival against the rigidity of the limited company because it is 'tax-transparent' and because of its suitability for flexible and short-term commercial arrangements.

- 1 Until late in the century most professions barred their members from practising under the cloak of limited liability.

(c) Limited Liability Partnerships

1.8 At the end of the 20th century some large negligence claims led to some accountancy firms threatening to register themselves abroad with limited liability, and a few did so. The then government did not trouble the Law Commission with the matter but with an admirable enthusiasm for the protection of professionals rather than their clients, introduced a bill which became the Limited Liability Partnerships Act 2000. It is discussed in detail in chapter 25. It created a new legal entity called a Limited Liability Partnership ('LLP')¹ and enabled regulations² to be made which applied (in amended

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form) much Companies Act regulation to them. It laid down no structure for their internal organisation, but imposed the obligation of registration and filing annual accounts.

1 LLPs are discussed in chapter 25 below.

2 See the Limited Liability Partnerships Regulations 2001, printed as Appendix H to this book, discussed in chapter 25.

(d) *The Law Commissions*

1.9 On 10 October 2003 the Law Commission and the Scottish Law Commission agreed a joint report on Partnership Law and proposed a draft bill to replace the 1890 Act. The report made some useful proposals for some minor alterations in the law, and a major proposal to give separate legal personality to all English partnerships, whether the partnership was created expressly or merely by implication or operation of law. This suggestion did not receive the support of the legal profession as a whole, and on 20 July 2006 Ian McCartney, Minister for Trade, Investment and Foreign Affairs at the DTI, stated that the government would not take forward the proposals except for some which related to limited partnerships and which are mentioned in chapter 24 below.

3 FOREIGN FIRMS AND COMPANIES

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A Foreign companies and apparent companies

1.10 Under section 1(2)(a) of the Partnership Act 1890 companies registered under the Companies Acts are excluded from the definition of partnership for the purposes of the Act. Most foreign companies are not so registered, but this has not resulted in the English courts treating them as partnerships. The reason is that the English courts recognise the status of a foreign corporation duly registered under the law of a foreign country¹. The question whether a foreign entity is a corporation, and any other question as to its constitution, must be decided according to the relevant foreign law,

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which is the law where the entity was created². So a Delaware Limited Partnership is likely to be recognised as a limited partnership by the English courts³. Where a partnership is situated depends upon where its business is carried on or principally carried on⁴.

1 Para 1.14 below; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, 297; *Bonanza Creek Gold Mining Co Ltd v R* [1916] 1 AC 566, PC; *Henriques v General Privileged Dutch Co Trading to West Indies* (1728) 2 Ld Raym 1532, 1535.

2 *Von Hellfeld v Rechnitzer and Mayer Frères & Co* [1914] 1 Ch 748; *The Saudi Prince* [1982] 2 Lloyd's Rep 255; *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; *Associated Shipping Services Ltd v Department of Private Affairs of HH Sheikh Zayed Bin Sultan Al-Nahayan* (1990) Financial Times, 31 July.

3 See para 24.7 below.

4 *Laidley's Trustees v Lord Advocate*; CPR, Pt 7 PD 5A.1(2).

B Scottish and Irish partnerships

1.11 In Scotland the firm is a legal entity¹ as it is not in England, although an individual Scottish partner may be charged on a decree of diligence directed against the firm. He is not a principal, as in England, but is an agent of the firm and of his partners². The nature of the entity that is a Scottish partnership or a Scottish limited partnership is obscure because it is uncertain whether it is the same entity that exists before and after a change of its membership³. Subject to this and some minor provisions relating to execution and bankruptcy⁴, the Partnership Act 1890 applies in Scotland as it does in England. The 1890 Act applied also to what is now Eire and Northern Ireland. But partnership law in those jurisdictions has developed separately⁵, and their authorities are not binding in England.

1 Section 4(2) of the Partnership Act 1890; s 740 of the Companies Act 1985 states that references in the Act to a body corporate do not include a Scottish partnership. This implies that without that provision such a partnership should be regarded as corporate. For consideration of when a legal entity is not a corporation see Lord Oliver in *J H Rayner v Department of Trade (The Tin Council Case)* [1990] 2 AC 418 at 504, citing *Chaff & Hay Acquisition Committee v JA Hemphill & Sons Pty Ltd* (1947) 74 CLR 375 at 385 (for which reference I am grateful to my friend Sir David Richards).

2 See Peter Gibson J in *Memec plc v IRC* [1998] STC 754 at 765.

3 See Park J in *Major (Inspector of Taxes) v Brodie* [1998] STC 491; *Badger v Major* (1997) STC (SCD) 218, and Lord Maxwell in *Jardine-Paterson v Fraser* (1974) SLT 93 at 97.

4 See ss 9, 23 and 47 of the Partnership Act 1890; set out in Appendix A.

5 The only valuable work on Irish partnership law is Michael Twomey *Partnership Law* (2000).

C Isle of Man and Channel Islands

1.12 The principles of Manx partnership law are those of England¹. In Jersey the position is less clear. Although in relation to contract generally

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French (or Norman) law is preferred to English², the court has relied upon English authorities on partnership law³, and Jersey has a Limited Partnerships Law⁴ that seems to echo aspects of English partnership law, and in particular the partnership is not a legal entity.

1 *Labouchere v Tupper* (1857) 11 Moo PCC 198; *Buckmaster and Moore v Fado Investments Ltd* [1986] PCC 95.

2 *La Motte Garages v Morgan* [1989] JLR 312.

3 *Cooley v Wood* (1993) unreported; *Golder v Le Quesne and Thacker* (1993) unreported.

4 See the Limited Partnerships (Jersey) Law 1994.

D The nature of foreign partnerships

1.13 Firms in many states in the USA which have adopted the Revised Uniform Partnership Act ('RUPA')¹ have status as legal entities; those in most Commonwealth countries do not. In France, Belgium, Greece, Norway and Sweden a partnership may acquire legal personality by registration. In Switzerland a general partnership must be registered; it is not a corporation, but in certain respects it is an entity separate from its members, so that it can make contracts in its own name and own property². The distinction between the French *Société en Commandite* and the *Société en nom collectif* has been mentioned in para 1.2 above. Germany and other continental jurisdictions draw a distinction between a *BGBGesellschaft* or non-commercial association or partnership including a professional firm, and a *HGBGesellschaft* which is a trading partnership. The German 'silent partnership' (*Stille Gesellschaft*) has some analogy with an English limited partnership³. The status of English limited partnerships abroad, and of foreign limited partnerships in England, is considered at para 24.7 below.

1 RUPA has unfortunately not been enacted in every state in identical form. Its predecessor, the Uniform Partnership Act (1914), which remains in force in many states, was unclear as to whether the partnership was a legal entity.

2 A claim in England against a Swiss partnership was discussed in *Oxnard Financing SA v Rahn* [1998] 1 WLR 1465, CA.

3 Its description by Robert Walker J is quoted in *Memec v IRC* [1998] STC 754 at 759.

E Recognition by the courts of England and Wales

1.14 The English court affords recognition to a foreign entity according to the terms of its constitution¹; if the constitution renders the general partners in a company liable, then the English courts will hold them liable if the company trades within the jurisdiction². But the English courts will not recognise the purported jurisdiction of a foreign court over a British subject who is neither resident in that country nor submits to its jurisdiction, so a

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decision of such a court that a British person is not a partner there is not binding on him in the UK³. Jurisdiction is discussed at paras 15.1 and 21.20 below. A foreign partnership may be wound up as an unregistered company⁴ if it has assets in England⁵ or if there is a connection with England and there are persons who would benefit from the winding-up order⁶. The situs of a claim for account after dissolution where the partners reside in different jurisdictions is the place of the principal place of business⁷.

- 1 Para 1.10 above; *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] QB 282; *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114; *Re Senator Hanseatische Verwaltungsgesellschaft mbH* [1996] 2 BCLC 562.
- 2 *Johnson Matthey & Wallace Ltd v Ahmad Alloush* (1984) 135 NLJ 1012 cited by Lord Oliver in the Tin Council case *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 509.
- 3 *Emanuel v Symon* [1908] 1 KB 302 discussed by the Court of Appeal in *Adams v Cape Industries plc* [1990] Ch 433 at 515.
- 4 Section 220 of the Insolvency Act 1986. Insolvency is discussed in chapter 22.
- 5 *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112.
- 6 *Re A Company (No 003102 of 1991)* [1991] BCLC 539; *Re Compania Merabello San Nicholas SA* [1973] Ch 75.
- 7 *Luchmeechund v Mull* (1860) 3 LT 603.

F Procedure against foreign firms

1.15 The Civil Procedure Rules provide that a firm may be sued in its firm name only when the partners carried on ‘business within the jurisdiction’¹. Otherwise the firm must be sued in the names of its individual partners as discussed in chapter 21. The English courts will accept jurisdiction in a dispute between partners if the relevant defendants have been served with the proceedings and (as against other member states of the 1968 European Conventions) if the partnership has its ‘seat’ in the UK as a Member State².

- 1 See Para 5A to PD to Part 7 discussed in chapters 15 and 21. This meaning of the paragraph is characteristically less clear than the meaning of its predecessor in Order 81(1) RSC, but no change in the practice was intended by the change in the rules. In *Von Hellfeld v Rechnitzer and Mayer Frères & Co* [1914] 1 Ch 748 where the foreign firm did not trade within the jurisdiction, and a writ against it in its own name was set aside by the Court of Appeal.
- 2 See the Civil Jurisdiction and Judgments Act 1982, Sch 1, Art 16(2) (now ‘Brussels I Regulation’). Jurisdiction over claims between partners are dealt with in chapter 15 below.

