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# Legal Problems Associated with the Identification of Partnerships\*

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## Introduction: The Identification Conundrum

The issue of determining whether a partnership exists between two or more participators or not is a centuries-old legal challenge.<sup>1</sup> The purpose of this paper is to review the current state of play with regard to the current treatment of that particular question by the courts in English Law.<sup>2</sup> It is important to note that this problem of identification is not unique to English law, as the basic partnership model has been transported to and transplanted into many common law jurisdictions across the world over the past 150 years.<sup>3</sup> Indeed, the relevant statutory provisions in the Partnership Act 1890 have been copied word for word in many overseas legal regimes in Australasia, Canada, Ireland and in African jurisdictions and, moreover,

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<sup>1</sup> See generally E Berry, *Partnership and LLP Law* (2<sup>nd</sup> edn, Wildy Simmonds and Hill Publishing 2018) 10-21; G Morse, *Partnership Law* (8th edn, Sweet & Maxwell 2015) Ch 2. For less up to date perspectives see CD Drake, *Law of Partnership* (3<sup>rd</sup> edn, Sweet & Maxwell 1983) Ch 2; D Milman and T Flanagan, *Modern Partnership Law* (Croom Helm 1983) Chs 1-4. The interpretation challenge may arise in different guises – for example, the law might have to determine when might a limited company justifiably be viewed as a “quasi partnership”. See *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 for guidance on this matter. For discussion see B Rider, ‘Partnership Law and its Impact on Domestic Companies’ (1979) 38(1) CLJ 148. The quasi partnership identification problem persists so as to challenge the courts even to this day – see for example *Estera Trust (Jersey) Ltd v Singh* [2018] EWHC 1715 (Ch).

<sup>2</sup> We will examine some Scottish legal authorities pertinent to this question as the Partnership Act 1890 applies in Scotland – for explanation of how the Bill (belatedly) was extended to Scotland see A Rodger, ‘The Codification of Commercial Law in Victorian Britain’ (1992) 108(4) LQR 570, 578. The Scottish partnership firm (albeit unregistered) enjoys legal personality according to s 4 of the Partnership Act 1890. But it must be conceded that the idea of the courts “creating” a legal person through a process of legal determination in disputed circumstances sits uneasily in many minds.

<sup>3</sup> Of course, partnership in various forms, was well known to Roman Law. Thus, there is similarity to be found in Civil Law jurisdictions. This transition from Roman Law is largely due to the scholarship of RJ Pothier, whose *Treatise on the Contract of Partnership* (1765) drawing upon Roman Law provided the foundation for Civil Codes. South African partnership law relies heavily upon Pothier.

have remained largely unchanged over the decades.<sup>4</sup> This “common law of partnership”, coupled with the lack of limited liability for partners, means that there is little scope for the disruptive forces of regulatory competition coming into play.<sup>5</sup> There is reported case law from many jurisdictions to reflect the ubiquity of this particular categorisation issue.<sup>6</sup> The subject under study in this paper therefore has global relevance in terms of commercial discourse. It has a particular resonance in the Small and Medium Enterprise (SME) sector, as it is in that context that disputes as to partnership often arise because of the informality of business relationships and a relative lack of understanding of the law.

At heart we are talking about the legal characterisation of a very intimate commercial relationship; within the boundaries of Partnership Law similar challenges of characterisation for the courts arise with regard to the questions of whether an admitted partnership is one at will or for a fixed term, or whether an admitted partnership encompasses a particular business operation carried on by one of the participators. We are not concerned in this discussion either with the position governing limited partnerships or limited liability partnerships: contested issues of identification do not arise here because of the formal registration requirement in both cases.<sup>7</sup>

### **The Reasons Why Disputes as to Contested Partnership Arise**

Definitional fluidity is one central reason for the existence of this phenomenon. The fundamental problem is that the orthodox view is that a partnership is a relationship determined by the law and not by the overt labels used by the parties to describe their nexus. It involves an objective assessment based upon the substance of the relationship. To quote the terms of Partnership Act 1890 section 1(1) – “partnership is the relation that subsists between persons carrying on a business in common with a view of profit”. All of these statutory elements need to be present for a partnership

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<sup>4</sup> Some common law jurisdictions have developed their own definitions. So, for example, the 1932 Indian Partnership Act s. 4 definition does differ by placing explicit emphasis on agreement between the parties to share profits; this may be due partly to the fact that the statutory definition of partnership in that jurisdiction dates back to the now repealed Indian Contracts Act 1872, s 239 and thus predates the UK 1890 Act. Another exception is the US definition originally found in the Uniform Partnership Act, s 6(1) which stated that a partnership is an association of two or more persons to carry on as co-owners a business for profit. The 1997 Revised Uniform Partnership Act adopts much the same approach in s. 202 but stresses that the intention of the parties is immaterial

<sup>5</sup> On this issue and its potential for LLPs and limited partnerships see M Siems, ‘Regulatory Competition in Partnership Law’ (2009) 58(4) ICLQ 767.

<sup>6</sup> See for example *Le Page v Kamex Developments* (1979) 105 DLR (3d) 84n affirming (1977) 78 DLR 3d 223 (Canada), *McKenzie v McKenzie* [1921] NZLR 319 (New Zealand), and *Harvey v Harvey* [1970] HCA 11 (Australia).

<sup>7</sup> See Limited Partnerships Act 1907, s 5 and Limited Liability Partnerships Act 2000, s 2(1)(a). Though in the case of an LLP there is the equally vexing issue as to whether an LLP member can be an employee – see Limited Liability Partnerships Act 2000, s 4(4) and *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32 for discussion.

to be legally recognised.<sup>8</sup> That said, Lord Millett in *Hurst v Bryk*<sup>9</sup> made the perceptive observation that there must be an underlying contract before a partnership can ever be said to exist. This is an important precondition to bear in mind, and one which has dominated the most recent judicial thinking on the subject.

This difficulty of identification is exacerbated by the fact that general partnerships do not require any form of registration in order to come into being in English Law. Nor indeed do they need to be based upon a written deed, or even on an explicit verbal agreement – they can be inferred by the law from a degree of interaction between players. The Statute of Frauds 1677 did not extend to partnerships. The “accidental partnership” phenomenon thus can come into play.<sup>10</sup> Agreement may be inferred from conduct where there are no contra-indicators. There is also no requirement for a profit to be made in order for a partnership to exist: profit must be the goal of the relationship, not the outcome of the nexus between the parties, as s 1(1) of the 1890 Act makes perfectly clear. The reality is that some partnerships never make a profit; but they still remain very much partnerships in the eyes of the law. There is also no need for active participation of every partner in the partnership business: a sleeping partner with an entirely dormant role is still a partner in the eyes of the law. This is because a dormant partner’s contribution to the venture may not involve the provision of labour. These definitional concessions all promote further uncertainty for the courts in undertaking the task of determination.

Even where there are explicit indicators as to the intention of the parties to create a partnership or not, they can be displaced if they do not reflect the reality of the substantive relationship – we note the comments of Megarry J in *Stekel v Ellice*<sup>11</sup> to this effect. This particular case featured the old chestnut as to whether a “salaried partner” in a firm of accountants could, in the eyes of the law, be classified as a true partner.<sup>12</sup> After some deliberation Megarry J concluded on the facts that a partnership relationship had indeed come into being.<sup>13</sup> There were a number of clear indicators in the agreement between the parties that partnership was intended as the basis of the relationship and the fact that one of the parties was to be rewarded differently was not critical. The fact that there were only two parties in play here from the outset might have been significant to the outcome. Moreover, labels cannot

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<sup>8</sup> A point well made by Lord Glennie in the Court of Session (Inner House) in *Worby v Campbell* [2017] CSIH 49.

<sup>9</sup> [2002] 1 AC 185 at 194.

<sup>10</sup> See D Milman ‘Partnerships (1): Problems with Identification’ (1983) 4 Co Law 199. At the end of the day the author felt that the term “constructive” rather than “accidental” was a more accurate descriptor, though the word “accidental” undoubtedly carries more dramatic effect. Conversely, there is also the syndrome of “accidental dissolution” to note – on this see Partnership Act 1890, s 34 and *Hudgell Yeates & Co v Watson* [1978] 2 All ER 363.

<sup>11</sup> [1973] 1 WLR 191 at 199. See also the comments of Lord Halsbury in *Adam v Newbigging* (1880) 13 App Cas 308 at 315 and Cozens-Hardy MR in *Weiner v Harris* [1910] 1 KB 285 at 290. The downplaying of the parties’ intentions is emphasised by s 202 of the 1997 Revised Uniform Partnership Act in the USA.

<sup>12</sup> Compare *Briggs v Oates* [1990] ICR 473. The issue was revisited by the Employment Appeal Tribunal in *Morrison v Aberdeen Considine & Co* [2018] UKEAT 0018\_17\_2908, 18 July 2018.

<sup>13</sup> Compare *Cobbetts LLP v Hodge* [2009] EWHC 786 (Ch).

retrospectively transform a partnership relationship into something less or vice versa.<sup>14</sup> The word “partnership” may not figure in a documented contractual arrangement but nevertheless a partnership may result from that interaction.<sup>15</sup> Thus, taking all of these variables into account, there is further scope for a lack of clarity to intrude.

The concept of a partnership at will<sup>16</sup> also allows for additional flexibility in that the lack of a specified term of duration in any alleged partnership agreement cannot by itself be viewed as a critical factor. This might be a critical issue in other relational contracts. Further complications are caused where the collaborators are close family members and where loose language is in play in describing their interactions – a person may thus be described as “a partner” without realising the legal significance of that relationship. Cultural changes linked to the decline of marriage and the rise of other legally sanctioned relationships have added to this terminological opaqueness in discourse. Having made that cautionary point, it is not to be suggested that a legally recognised partnership relationship between family members is impossible; indeed, such family partnerships are quite common as the reported case law indicates.<sup>17</sup>

All commercial lawyers recognise that uncertainty breeds litigation. A contention that a partnership exists can arise for a variety of reasons, many of which may be opportunistic. The “share of assets” assertion or a “profits claim” are the most common scenarios in which a contention of partnership arises. Here the claim will be made by an alleged participator or some third party having an interest in assets (such as a trustee in bankruptcy). This type of assertion is made because under s. 24(1) of the Partnership Act 1890 partners share in the firm’s capital equally. There can be issues as to when the partnership actually commenced, as this could impact upon the question as to whether a particular asset did or did not become partnership property.<sup>18</sup>

An alternative scenario might be described as a “liability claim”: this is much rarer in practice.<sup>19</sup> The clue here is provided by the Partnership Act 1890 s. 9 which states that all partners in the firm are jointly liable for the firm’s debts and obligations. There is also the obligation imposed by s. 24(1) to contribute equally to losses. Here the claim is usually made by outside third party, but again it could be raised by a

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<sup>14</sup> On this matter see *Saywell v Pope* [1979] STC 824.

<sup>15</sup> See *Walker West Developments Ltd v Emmett* (1979) 252 EG 1171 and *Wilson v Dodd* [2012] EWHC 3727 (Ch) at para [253] per Stephen Morris QC (sitting in the High Court). Note also the High Court of Australia ruling in *Canny Gabriel Advertising v Volume Sales Finance* [1974] 131 CLR 321 where a joint venture arrangement was found to constitute a partnership.

<sup>16</sup> See Partnership Act 1890, s 26(1).

<sup>17</sup> See for instance *Ham v Ham* [2013] EWCA Civ 1301. We should also note that infants can become partners; *Lovell and Christmas v Beauchamp* [1894] AC 607.

<sup>18</sup> See here the decision of Asplin J in *Coward v Phaestos Ltd* [2013] EWHC 1292 (Ch) where it was held that the partnership commenced prior to the date of the formal partnership agreement thereby bringing an asset within the scope of the partnership.

<sup>19</sup> For a rare example of this scenario see *M Young Legal Associates v Zahid* [2006] EWCA Civ 613.

participator looking for someone to bear a share of losses accruing to the business venture.

There may be other reasons for the matter to come before the courts – for example, it may be necessary to disprove a partnership in order to succeed in a restitutionary claim, as was the case in *Valencia v Lupar*,<sup>20</sup> which we discuss below. The existence or otherwise of an alleged partnership could be important for tax purposes. There may be regulatory issues in play; this could for example be important with regard to legal requirements for the lawful conduct of solicitors' practices.<sup>21</sup> A claim alleging partnership might be made in order to show a breach of work permit regulations and therefore to undermine any suggested contract.<sup>22</sup> Finally, there may be continuance issues involved where an accepted partnership relationship appears to have been carried on beyond the agreed term; has a mutually recognised partnership been carried over in such a way as one of the erstwhile partners refuses to recognise it.

### Guidance on Characterisation Contained in the Partnership Act 1890

Before looking at the treatment of this issue in 1890 Act we should briefly note the pre-1890 position in English Law. The institution of partnership has existed in English Law for centuries. The initial view at common law was to favour the implication of a partnership relationship where business people cooperated in potentially profit-making ventures. A share of the profits often led to the inevitable conclusion that losses were also to be divided, as *Waugh v Carver*<sup>23</sup> intimated. Fortunately, *Cox v Hickman*,<sup>24</sup> which was a judicial departure from *Waugh v Carver*,<sup>25</sup> took a more circumspect view. Here there was no partnership where a firm's creditors were being repaid in stages via the business profits. This holistic perspective was then largely confirmed by Bovill's Act 1865 (28 and 29 Vict cap. 86), a largely superfluous piece of legislation if ever there was one. The trend from 1860 onwards in English Law is therefore away from inferring partnership, unless the totality of the evidence directs the judge to that conclusion. This reflects the economic priority of encouraging financial alliances to support effective business ventures. A similar economic priority was apparent in the introduction of limited

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<sup>20</sup> [2012] EWCA Civ 396.

<sup>21</sup> We could note here a limiting factor: the court will be unlikely to infer a partnership between parties where to do so would produce the conclusion that an unlawful act had been committed. The so-called *Highwayman's Case of Everet v Williams* (1725), unreported but rescued from obscurity by a note in (1893) 9 LQR 197, and more recently by Lord Walker of Gestingthorpe in *Moore Stephens v Stone Rolls Ltd* [2009] UKHL 39 at para [187] shows that illegal partnerships will not be enforced by the English courts. That said, there is no bar against a partnership engaged in activities that might be frowned upon – *Newstead v Frost* [1980] 1 All ER 363 being the exemplar here.

<sup>22</sup> On this see *Lewis v Narayanasamy* [2017] EWCA Civ 229.

<sup>23</sup> (1793) 2 H Bl 235. The court here approved the comments of De Grey CJ in *Grace v Smith* (1775) 2 Wm Bl 997. One possible reason why partnership might have been more inferred in the past is that financing a business and taking a slice of profits in return might have brought the case within the usury prohibition. This prohibition was repealed by statute in 1854.

<sup>24</sup> (1860) 8 HLC 268.

<sup>25</sup> (N 23).

liability through the incorporation of a company by statute in the form of the Limited Liability Act 1855 (18 and 19 Vict c 133).

We have already noted the epigrammatic definition contained in the Partnership Act 1890, s 1(1). This brief statement is amplified by the “business” component of this definition being fleshed out by s. 45. It includes every trade, occupation or profession.<sup>26</sup> However, this subsidiary definition in s 45 is not exclusive; it might for example encompass speculation in a variety of forms. The Act<sup>27</sup> does not specify that the business must be lawful; but, as we noted above, an unlawful partnership business would not be enforceable at law. In a case of alleged partnership it is important to determine what precisely the business is, as this can be vital to deciding the fundamental characterisation issue of whether there is or is not a partnership. This was the critical factor in play in *Khan v Miah*.<sup>28</sup> Here a group of individuals agreed to acquire a property which was to be refurbished and then run as a restaurant. The High Court felt that the elements of partnership were present once the venture had commenced with the acquisition of the site. The Court of Appeal (by a two to one majority) disagreed and ruled against partnership. But the appeal to the House of Lords succeeded and the first instance partnership finding was restored. The commencement of trading at the restaurant was not essential. Lord Millett in a caustic comment accused the majority in the Court of Appeal of “nominalism” in identifying what the partnership business was.

Apart from the well-known definition in s. 1, we have some assistance apparently provided by s. 2 of the 1890 Act. Section 2 identifies a number of situations where a partnership may exist, but the statutory provision then often goes on to indicate that these are cases where there is not necessarily a partnership. In particular, joint ownership of property<sup>29</sup> and the sharing gross returns<sup>30</sup> do not amount to partnership. Annuitants, and those in receipt of deferred payment for the sale of goodwill are also dealt with in such a way so as to largely exclude them from the risk of being dragged into the partnership orbit (see s. 2(3)(e) here).

What is the relevance of the receipt of a profit share to the determination of the characterisation issue? This is now seen as a prima facie indicator of partnership, but is not conclusive (s. 2(3)). A business that is not intended to make a profit (such as a charitable concern) cannot form the basis for a partnership.<sup>31</sup> Special provision made for creditors, who have lent money to be firm to be repaid at a variable rate

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<sup>26</sup> The definition of business in s 2 of the Uniform Partnership Act in the USA was couched in similar terms and this similarity is carried over into s 101(1) of the Revised Uniform Partnership Act 1997. This definition of business is mirrored in the UK in s 18 of the Limited Liability Partnerships Act 2000.

<sup>27</sup> Strangely, s 2 of the Limited Liability Partnerships Act 2000 does make this point crystal clear.

<sup>28</sup> [2000] 1 WLR 2123. Compare *Ilott v Williams* [2013] EWCA Civ 645 – the parties must be carrying on a business (however defined) and not merely preparing to carry on a business.

<sup>29</sup> See for example *Davis v Davis* (1894) 70 LT 265. See also the Canadian case of *Le Page v Kamex Developments* (1979) 105 DLR (3d) 84n affirming (1977) 78 DLR 223.

<sup>30</sup> See here *Cox v Coulson* (1916) 114 LT 599.

<sup>31</sup> *Pitreaive Golf Club v Penman* 1934 SLT 247.

linked to the firm's profits,<sup>32</sup> and employees paid on a commission basis, serves to further weaken the prospect of any presumption of partnership from arising. Compare the old rule in *Waugh v Carver*<sup>33</sup> where profit-sharing was critical. Even under a post 1865 perspective a lender who is repaid via a profit share, but then interferes too closely in the running of the business, risks being labelled as a partner.<sup>34</sup> Conversely, there is no requirement for profit sharing to operate in order for a partnership to exist. This important point was determined by the Court of Appeal in *M. Young Legal Associates Ltd v Zahid*<sup>35</sup> where it was noted that the definition in s. 1 of the 1890 Act had actually departed from the existing common law which had required profit sharing. A partner may thus be rewarded by a fixed sum payment rather than by means of a variable profit share.

Can a single commercial interaction form the basis of partnership under English Law? We know that the alleged partners must have carried on business "in common" according to the s. 1(1) definition. This particular terminology, which must not be overlooked,<sup>36</sup> might at first sight indicate that a degree of continuity is anticipated as a partnership prerequisite—but on closer analysis that is not necessarily so; *Winsor v Shroeder*<sup>37</sup> testifies to that in that an arrangement by two parties to buy, renovate and then resell a house was found by Woolf J to be a partnership. Partnerships can, accordingly, be founded upon isolated transactions.<sup>38</sup> Megarry J accepted this as a possibility in obiter comments in his judgment in *Mann v D'Arcy*.<sup>39</sup> This possibility is also recognised by the terms of s. 32(b) of the Partnership Act 1890 (which deals with dissolution). The point is clearly settled.

Having reflected upon ss. 1 and 2 of the Act we must ask the question, are these statutory characterisation rules of much use in practice today? The Law Commissions<sup>40</sup> (2003) had certain doubts about their utility,<sup>41</sup> but, having taken on board responses to consultation, recommended their retention (see para 4.53), albeit with some stylistic amendment to reflect modern language usage. For instance, the term "relation" should be replaced by "association". In truth, section 2 does not feature prominently in much of the modern case law.<sup>42</sup> The key characterisation tools

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<sup>32</sup> See Partnership Act 1890, s 2(3)(d) and *Re Young, ex parte Jones* (1896) 75 LT 278. Although such a person may not be a partner they may suffer consequences by being treated as a deferred creditor under s 3 of the 1890 Act – see *Re Fort, ex parte Scofield* (1897) 77 LT 274.

<sup>33</sup> (N 23).

<sup>34</sup> See *Pooley v Driver* (1877) 5 Ch D 458 here.

<sup>35</sup> [2006] EWCA Civ 613.

<sup>36</sup> A point emphasised by Lord Glennie in *Worhey v Campbell* [2017] CSIH 49 at paras [64]-[66].

<sup>37</sup> (1979) 129 NLJ 1266.

<sup>38</sup> Note also the position with regard to fraudulent trading where single transactions can be regarded as carrying on a business for the purposes of s 213 of the Insolvency Act 1986 – *Re Gerald Cooper Chemicals Ltd* [1978] Ch 262.

<sup>39</sup> [1968] 1 WLR 893. See also *Re Abenheim* (1913) 109 LT 219.

<sup>40</sup> *Partnership Law* (Cm 6015, 2003).

<sup>41</sup> Even before 1890 there were doubts about the value of abstract definitions – see the comments of Baggallay LJ in *Walker v Hirsch* (1884) 27 Ch D 460 at 463.

<sup>42</sup> A rare exception is to be found in the Scots case of *Worhey v Campbell* [2017] CSIH 49.

have in fact always been manufactured by the courts using their undoubted commercial “nous”.

Finally, we must reiterate that a pre-trading transaction can itself found a partnership relationship. So, in *Khan v Miah*<sup>43</sup> Lord Millett made the perceptive point that in that case the business involved the purchase and fitting out of the restaurant and not just the running of it once it was operational. This conclusion was followed up subsequently in *Christie Owen and Davies plc v Raobgle Trust Corp.*<sup>44</sup> Here the Court of Appeal ruled that a property development business had commenced as soon as the property had been acquired; there was no need for the later development phase to have been undertaken in order for the partnership to have commenced.

### **Modern Judicial Approaches to Partnership Determination**

The statutory guidance is therefore only of limited assistance in practice. As a result of this vacuum, the issue of determination of partnership often falls into the lap of the court to resolve by applying traditional analytical techniques and established jurisprudence. This, of course, fits in with the underlying policy of the 1890 Act which was to preserve a role for the common law in partnership matters; s. 46 of the Act stresses this continuity aspect. It is thus a mixed issue of law and fact for the judiciary. It may be observed that there is some evidence that appellate courts are reluctant to interfere with first instance determinations.<sup>45</sup>

Although there are judicial pronouncements from the higher courts suggesting a flexible interpretation of the concept of partnership, when it gets down to individual hard cases the most common outcome in a contested case is a finding of **no partnership**. One reason for this is that the court by finding a partnership exists may be converting a purely contractual arrangement into a fiduciary relationship.<sup>46</sup> As Lord Millett observed in *Hurst v Bryk*<sup>47</sup> a partnership is something more than just a contractual relationship. The consequences of achieving this elaboration of the nexus between the parties may be unexpected and far-reaching. Strict fiduciary obligations

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<sup>43</sup> [2000] 1 WLR 2123.

<sup>44</sup> [2011] EWCA Civ 1151. It really is a question of degree and identification of the true nature of the business – see Arden LJ in *Ilott v Williams* [2013] EWCA Civ 645 where the acts were found to be preparatory to the commencement of the business. Certainly, a mere intention or agreement to go into business as partners would not count without more as evidencing that a partnership had arisen.

<sup>45</sup> See *Ilott v Williams* (supra) at para [18] per Arden LJ. For an unusual example of an appellate court taking a different approach see *Khan v Miah* (n 28) where the majority of the Court of Appeal departed from the first instance finding, only then to be heavily criticised by Lord Millett in the House of Lords which unanimously restored the partnership finding made at first instance.

<sup>46</sup> A partnership finding will also mean that the provisions of the Partnership Act 1890 will apply unless the parties have made a contrary arrangement on a particular issue. But not all of the provisions of the 1890 Act are excludable – see Lord Glennie in *Worbey v Campbell* [2017] CSIH 49 at para [72].

<sup>47</sup> [2002] 1 AC 185.



can come into play.<sup>48</sup> So, for example, there is the duty to render true accounts as contained in s. 28 of the 1890 Act.

It is time now to consider some examples of recent judicial practice in the UK courts. We start off our survey with a look at the Court of Appeal decision in *Cayzer v Beddow*.<sup>49</sup> The point at stake here was whether negotiations between parties have developed far enough as to trigger legal consequences or equitable intervention. The court concluded that this was more a case of company promoters preparing for the setting up of a registered company with it having the object of buying up veterinary practices, rather than one of partnership. In so deciding the appellate court departed from the view taken at first instance; this may have been due to the fact that the partnership point had not been properly pleaded. This ruling mirrors the conclusion arrived at by the Court of Appeal in *Keith Spicer Ltd v Mansell*<sup>50</sup> some 50 years ago.

This conclusion makes commercial sense: it would discourage the setting up of limited companies, which in truth are intended to avoid personal liability for business debts, if the very process by which such companies are set up itself could lead to personal liability.<sup>51</sup> This case law is reinforced by the Court of Appeal judgment in *Ilott v Williams*<sup>52</sup> where it was held that acts which were merely preparatory to the setting up of an asset management firm in a limited partnership format could not be viewed as forming the basis for an immediate general partnership. Finally, *Achom v Lalic*<sup>53</sup> makes a similar point: Newey J pointed out that agreeing to run a business as a joint venture using a corporate vehicle is not the same as entering a partnership.

The most common stumbling block to a claim of partnership is the fact that the relationship lacks any contractual foundation in the eyes of the law. For instance, in *Greville v Venables*<sup>54</sup> the Court of Appeal (upholding a first instance determination) ruled that no partnership contract had been agreed in a case where two parties were admittedly planning to enter into a partnership to establish a horse stud farm. An attempt to introduce the idea of a partnership to be implied from conduct got nowhere as it contradicted the genuine express intention of the parties that the partnership agreement had yet to be concluded. Again, in *McPhail v Bourne*<sup>55</sup> Morgan J ruled

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<sup>48</sup> *Baird's case* (1870) LR 5 Ch App 725 at 733 per James LJ. In the years to come this may be less of an issue if the approach of Leggatt LJ towards the importation of a duty good faith into commercial contracts succeeds in winning over judicial colleagues – for the latest ruling on the subject in connection with relational contracts see *Al Nehayan v Kent* [2018] EWHC 333 (Comm).

<sup>49</sup> [2007] EWCA Civ 644.

<sup>50</sup> [1970] 1 All ER 462.

<sup>51</sup> We should also note s 1(2)(a) of the 1890 Act which specifically excludes members in a limited company from being characterised as partners. But they may be “quasi partners” as a result of a judicial concept developed post 1890 – see (n 1) above. There is no need to bring partnership law into this pre-incorporation context as Company Law provides a customised solution to the enforceability of pre-incorporation contracts by introducing a presumption of personal liability for promoters – see Companies Act 2006, s 51.

<sup>52</sup> [2013] EWCA Civ 645.

<sup>53</sup> [2014] EWHC 1888 (Ch).

<sup>54</sup> [2007] EWCA Civ 878.

<sup>55</sup> [2008] EWHC 1235 (Ch). See also *Wilson v Dodd* [2012] EWHC 3727 (Ch).

against making a partnership finding as there was no evidence of an intention to create legal relations between the four young musical performers at the centre of the litigation. There was no express oral agreement to create an immediate partnership and a partnership could not be inferred from conduct. A similar result pertained in *Worbey v Campbell*<sup>56</sup> where the Scottish courts found that there was no concluded partnership to set up a gay dating app, as there was no evidence of a business in common having been conducted and no binding contractual relationship having been undertaken. The need for the venture to be conducted in common was seen as particularly important as it excluded many speculative commercial relationships from the definition of partnership.

A slightly different scenario presented itself to the court in *Valencia v Llupor*,<sup>57</sup> but again the result was that no partnership was found to exist. This case featured a prospective partnership involving a restaurant and money that had been advanced in anticipation of the partnership. Unusually, the financier wanted to deny partnership and instead to have his money returned by a restitutionary route. The first instance and appellate courts both concluded that it was always intended that a partnership agreement would be drawn up and that no relationship would exist before then. In effect, therefore, everything provisionally agreed was “subject to contract” and purely provisional. Thus, there was no binding contract concluded at this stage of the negotiations and therefore there could be no partnership.

Cultural considerations were, it is submitted, relevant considerations arising in *Khan v Khan*,<sup>58</sup> which featured a family dispute involving a retail firm. Master Bowles noted that in certain cases young family members often give up career options and work for low wages with the expectation that eventually they will become partners in the family firm at some point in time. But that was not the scenario presented here; the family member who was asserting partnership was rewarded generously as a senior employee and was not a partner. Although he had left school at 16 and had joined the family business, he had been treated as a well-remunerated employee for many years under the PAYE scheme. The fact that he may also have been permitted to make occasional drawings from the firm could be explained by family generosity and did not undermine the employment status.

Another authority of some interest is *Younes v Chrysanthou*,<sup>59</sup> where there was a lack of substantive evidence of a partnership between two international entrepreneurs in spite of the magnitude of the commercial transactions involved. The case concerned entitlement to a large facilitation fee and that depended in part whether a partnership existed. The court observed that the loose labelling of parties

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<sup>56</sup> Supra. For comment see JS Liptrap, ‘Mobile Dating Applications and Partnership Law: *Worbey v Campbell* [2018]’ (2018) 22(2) Edin L Rev 274.

<sup>57</sup> [2012] EWCA Civ 396. See also *Achom v Lalic* [2014] EWHC 1888 (Ch) – there was no partnership here as the court had ruled that there was no contract.

<sup>58</sup> [2015] EWHC 2625 (Ch).

<sup>59</sup> [2016] EWHC 3269 (QB).

to a business a relationship as “partners” is not enough to determine the issue.<sup>60</sup> In spite of a history of collaborative dealings between the parties, the court declined to find a partnership existed.

In *Lewis v Narayanasamy*<sup>61</sup> the Court of Appeal, upholding the finding made at first instance, concluded that the claimant was an employee and not a partner in a firm of solicitors. The evidence here was contradictory and it was not surprising that the appellate court followed the first instance lead. In so doing, the Court of Appeal chose to disregard the status of the parties as treated in the firm’s accounts as this evidence was displaced by other matters. The lack of any managerial input by the claimant was seen as an important determining factor by Sir Colin Rimer when reviewing the facts before the court.

One of the more significant of the recent authorities is *Dutia v Geldof*,<sup>62</sup> which featured a group of individuals planning to set up a private equity fund to support new business ventures in Africa. Some of the participants had already established an LLP and they were in discussion with the claimant (a consultant with expertise in the field) about the possibility of him joining the venture. Nugee J found that there was no partnership here because the making arrangements for a party to have an economic interest in an LLP did not of itself amount to creating a partnership. There was no carrying on a partnership business in common at this preliminary stage of negotiations. Nugee J observed that not every form of cooperation between business persons amounts to a partnership. The court cannot infer a partnership simply because the conduct is consistent with a partnership; there must be an agreement to enter a partnership (as opposed to some other commercial relationship) and the courts do not like inferring any sort of contractual relationship without clear evidence.

In *Kiwak v Reiner*<sup>63</sup> the High Court also found that there was no concluded agreement that the parties would undertake a joint venture partnership to acquire property in London, and therefore no partnership arose at this preliminary stage of negotiations. The advance of money in anticipation the finalisation of a concluded joint venture partnership agreement was not decisive of the matter.

In summary, we have reviewed<sup>64</sup> at least 18 reported cases over the past 10 years or so where the partnership characterisation issue arose in the UK courts. These

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<sup>60</sup> Much the same point, albeit in a slightly different context, was made by Popplewell J in *Edgeworth Capital (Luxembourg) SARL v Aabar Investments PJS* [2018] EWHC 1627 (Comm) at para [55]. See also *Wilson v Dodd* [2012] EWHC 3727 (Ch).

<sup>61</sup> [2017] EWCA Civ 229.

<sup>62</sup> [2016] EWHC 547 (Ch).

<sup>63</sup> [2017] EWHC 3018 (Ch).

<sup>64</sup> Identification of relevant authorities to review is not always easy as English partnership cases tend to be distributed through the various divisions of the High Court. This reflects the diversity of situations in which partnership issues can arise. Scottish cases tend to be less scattered around in terms of where they are reported.

examples cover the broad spectrum from fairly casual business cooperation (sometimes in a family context), through more sophisticated commercial dealings involving large sums of money to fully fledged professional relationships. Of these examples, a partnership was found to exist in about a third of these cases. On one level, and bearing in mind what was said above, this relatively high percentage may appear surprising, but on closer analysis of the facts of the cases, these findings were entirely fitting. Those cases where partnership was confirmed are largely self-defining and the only surprise may be that they ever came before the courts for judicial determination. They do however deserve some individual consideration to explain why the litigation ensued and why the finding of partnership was reached by the court. So, in *M. Young Legal Associates Ltd v Zahid*<sup>65</sup> a critical factor was the perceived relevance of the solicitors' practice rules in this case. The Court of Appeal concluded that the parties had genuinely intended to comply with said professional rules and that particular evidential finding then pointed them to the existence of a partnership. In *Khan v Miah*<sup>66</sup> the partnership business was on proper analysis much wider than that envisaged by the Court of Appeal as it covered not merely the operation of the restaurant but also its acquisition and refurbishment.

*Rowlands v Hodson*<sup>67</sup> is again, it is submitted, a clear-cut example. This featured a successful attempt by a counterparty to impose liability via the court making a partnership determination. A partnership finding by Arnold J at first instance<sup>68</sup> was upheld on appeal. The need to comply with the demands of solicitors' practice rules was once again a significant factor in play. The existence of a signed partnership deed for membership of a firm of solicitors could not be rebutted by the offering up of what was claimed to be contradictory extrinsic evidence. The court observed that the fact that the party did not take up an allocated profit share (which in fact was only fixed at a rate of 1% of net profits) was immaterial and did not exclude partnership. There was also insufficient evidence before the court that the defendant had left the partnership. The onus on defendant to show this had happened was not in fact discharged.

An even clearer case, it is contended, is that found in the facts of *Rees v Dartnall*<sup>69</sup> where there was a partnership finding made by the High Court. The evidence before the court showed the existence of a joint bank account with joint equal drawings from the firm's takings, the acquisition of property jointly from profits (which were shared equally), and tax treatment which indicated the existence of partnership. The partners had for a 20 year period been working together, having both been employees in the same firm prior to the creation of their partnership. This was compelling. It was also reinforced by an unchallenged assertion made several years before the case came to court that a partnership existed.

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<sup>65</sup> [2006] EWCA Civ 613.

<sup>66</sup> (N 28).

<sup>67</sup> [2009] EWCA Civ 1042.

<sup>68</sup> Reported sub nomine *Hodson v Hodson* [2009] EWHC 430 (Ch).

<sup>69</sup> (25 February 2009, unreported decision of Jonathan Gaunt QC).

In *Christie Owen & Davies plc v Raobgle Trust Corp*<sup>70</sup> the Court of Appeal concluded that a partnership had been established to acquire a property (currently run as a convalescent home) with a view to redevelopment and changing its potential usage in the future. That partnership commenced on acquisition of the property and did not depend upon the final execution of the scheme.

Before leaving this matter where partnership was found to exist, we should note also the case of *Cheema v Jones*<sup>71</sup> where a partnership at will finding was forced on the courts as this medical practice could not have continued to operate without a partnership foundation. This conclusion of the Deputy High Court was upheld by the Court of Appeal. It is important to remember that the dispute did not involve the complete denial of the existence of partnership, but rather questioned the terms on which that partnership was based. The terms of the old partnership were not carried over to the new relationship as the evidence suggested that such a consequence was not intended. Reading between the lines it shows the reluctance of the appellate courts to upset first instance findings and to lock parties into a durable partnership relationship, rather than a transient one which could be dissolved by the giving of unilateral notice.

### The Fall-back Argument(s)

In reality a contention that a partnership exists is often no more than a means to an end: i.e. securing an appropriate remedy, such as an account.<sup>72</sup> In a number of cases involving claims to assets/or profits the claimant runs a second line of argument as an alternative to an assertion of partnership. It suggests that if the court finds no partnership exists then it might for example find that the case is governed by the *Pallant v Morgan* equity (named after the eponymous case).<sup>73</sup> Such a claim involves proving that one party to a frustrated joint venture acquisition scheme has gained an advantage from the efforts of the other non-acquiring party and therefore should be treated as a constructive trustee of any benefit gained from acting alone<sup>74</sup>. The prospects of success here are still tenuous as there are many hurdles to surmount. This is typified by *Cayzer v Beddow*<sup>75</sup> where the evidence indicated that the discussions as to the setting up of the company had not progressed sufficiently far

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<sup>70</sup> (N 44).

<sup>71</sup> [2017] EWHC 1156 (Ch); [2017] EWCA Civ 1706.

<sup>72</sup> Ironically a denial of partnership might open up restitutionary remedies – *Valencia v Llupar* [2012] EWCA Civ 396. Such remedies might be quicker and more effective than implementing a partnership account.

<sup>73</sup> Reported in [1953] Ch 43. There is a rich literature on this subject – see J Ugguchioni, ‘Buyer Beware: Failed Joint Venture Negotiations and Involuntary Business Partnerships’ [2011] 2 JBL 160; M Lower, ‘The *Pallant v Morgan* Equity’ [2012] (5) Conv 379; M Yip, ‘The *Pallant v Morgan* Equity Reconsidered’ (2013) 33(4) Leg Studies 549; AW Grower, ‘Explaining the *Pallant v Morgan* Equity’ [2016] (6) Conv 434.

<sup>74</sup> The governing principles are exemplified by cases such as *Cobbe v The Yeomans Row* [2008] UKHL 55 and *Banner Homes v Luff* [2000] Ch 372.

<sup>75</sup> [2007] EWCA Civ 644.

so as to trigger the *Pallant v Morgan* equity. Similarly, in *Kiwak v Reiner*<sup>76</sup> both the partnership contention and the remedial claim based on the *Pallant v Morgan* equity failed in the High Court. However, the court felt that money paid in advance of a proposed partnership could be returned via the relatively simple device of a resulting trust. This, of course, is a lesser remedy that would not take on board any loss of anticipated profit. In *Achom v Lalic*<sup>77</sup> the claim alleging partnership failed, but the possibility of restitutionary relief was accepted in principle by the court as money had been paid over in the mistaken belief that there was a contract/partnership, though quantification was not finally determined. The *Pallant v Morgan* claim had been rejected by Newey J as there was no evidence that the party asserting it had in fact acted to his detriment.

Restitutionary remedies may thus be an option if money has been paid over in anticipation of the creation of a partnership. This was accepted by the court in *Valencia v Llupar*<sup>78</sup> where the litigation was designed to deny partnership in order to trigger a restitutionary remedy. Claims alleging misrepresentation and seeking damages may also be brought into play. More generally, it may be that the individual who is the focus of the partnership assertion might be subject to fiduciary duties in some other capacity thereby achieving the same result for the claimant.<sup>79</sup>

Proprietary estoppel may also offer the claimant an equivalent remedy<sup>80</sup> in some instances, particularly where a farm or other form of land occupancy is involved in the alleged partnership business. But, it is clear from cases like *Achom v Lalic*<sup>81</sup> that the courts are not keen on expanding this remedial option in business situations. Commercial lawyers are always anxious about introducing quasi property rights into a business relationship.

On the “liability perspective”, an outsider<sup>82</sup> may have recourse to a claim alleging liability by holding out pursuant to s. 14 of the Partnership Act 1890. That is not however an easy line of argument. What is required here is that the defendant knows that he or she is being held out as a partner. Reliance on the part of the outsider must also be established before the claim can succeed. The nearest recent case we can cite here by way of illustration is *Elite Business Systems UK Ltd v Price*,<sup>83</sup> where it was clear that there was no partnership in existence between father and son (who had set up a mobile phone business). In this particular instance, a s. 14 claim by an outsider succeeded at first instance before HHJ Chambers QC, but then failed on appeal as

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<sup>76</sup> [2017] EWHC 3018 (Ch).

<sup>77</sup> (N 53).

<sup>78</sup> (N 20).

<sup>79</sup> See *Cobbetts LLP v Hodge* [2009] EWHC 786 (Ch) here. In this case the partnership status was not established, but the individual was found by Floyd J to be an employee owing fiduciary duties.

<sup>80</sup> There is no direct authority to cite here but note the somewhat analogous case of *Thompson v Thompson* [2018] EWHC 1338 (Ch).

<sup>81</sup> [2014] EWHC 1888 (Ch).

<sup>82</sup> But not a participator – Lloyd LJ in *Greville v Venables* (n 54) at para [41])

<sup>83</sup> [2005] EWCA Civ 920.

there was no evidence that defendant father knew he was being held out as a partner by his son in certain financial documentation prepared by the son. Thus, there was no clear and unequivocal representation by the father and so no estoppel.

Reviewing the modern case law on partnership identification we can detect subtle changes of emphasis from the criteria found in the 1890 Act definition. The need for a contractual foundation has come to the fore. The “profit” element has been clarified by emphasis on the receipt of income from the business, rather than requiring a variable profit share as a prerequisite. The concept of “business” has become more nuanced; we now understand that what is to be regarded as the business is very much a subjective concept dependent upon the facts of individual cases. It may indeed be a single transaction. The element of carrying on a business “in common” has morphed into the idea that partners should have some managerial participation<sup>84</sup> though that might be largely passive, by, for example, having the right of exercise of a veto. It should be remembered that under s. 24(5) of the Partnership Act 1890 all true partners have a default right to enjoy managerial participation. The requirement of common participation, which reflects an intimate nexus, can exclude certain commercial relationships. These changes in judicial emphasis have cancelled each other out; some limit the possibility of a partnership finding, whereas others promote that prospect.

### Reform?

This question of partnership identification has been a longstanding problem in English Law causing a fair amount of disruptive litigation over time. Our survey of recent reported case law shows that difficulties of identification still persist in a variety of commercial contexts. The courts have been unable to devise a fool-proof litmus test. One doubts whether such a definitive tool exists. Could the issue of characterisation be resolved more easily without the need for expensive and unpredictable litigation? Is legislative reform possible?<sup>85</sup>

Sir Frederick Pollock,<sup>86</sup> the inspiration behind the Bill that eventually became the Partnership Act 1890, favoured formal requirements for the creation of partnership, but these were dropped as the Partnership Bill progressed slowly through its various iterations before being enacted.<sup>87</sup>

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<sup>84</sup> This is not a new idea – see the comments of Lindley LJ in *Walker v Hirsch* (1884) 27 Ch D 460.

<sup>85</sup> See J Thurston, ‘Partnership Act 1890: Time for Reform?’ [1988] JBL 155; E Deards, ‘Partnership Law in the Twenty-first Century’ [2001] JBL 357, E Berry, ‘The Partnership Bill 2003: Unnecessary Tinkering or Much-Needed Reform?’ [2005] JBL 70.

<sup>86</sup> Pollock produced his celebrated *Digest of Partnership Law* in 1877. For an in-depth study of the legal career of this leading jurist see N Duxbury, *Frederick Pollock and the English Juristic Tradition* (OUP 2004). Pollock provides his own summary of the background to the legislative saga in JWC Turner (ed), *Pollock on Partnership* (14<sup>th</sup> edn, Stevens 1944) iv-vii.

<sup>87</sup> Pollock was paid by the Associated Chambers of Commerce to do preliminary work on what became the Bill. He had hoped it would be reformist in nature, but at the end of the day it became more of a codification, an outcome that he lamented. For explanation see Duxbury (n 86) 279-280.

This matter has attracted the attention of those institutions charged with keeping the law under review. The Law Commissions,<sup>88</sup> some 15 years ago, in their overview of Partnership Law proposed the following definition of partnership – “an association formed when two or more persons start to carry on a business together under a partnership agreement” [para 4.17]. This recommendation is then carried over by clause 1(2) of the proposed Bill (which was appended to the Law Commissions’ Report). A partnership agreement is defined by clause 1(1) as “an agreement between two or more persons for carrying on business together with the objective of making a profit”. These proposals and this draft Bill failed to make the statute book which must say something about whether there was perceived to be a need for reform. Quite frankly, this new definition would have changed little apart from stressing the requirement of agreement and confirming that partnership is triggered when the parties *commence* to implement the agreement. Case law has confirmed these elements.

A more draconian requirement that all partnerships be registered could undoubtedly provide resolution to this problem. But is this solution introducing a sledgehammer to crack a nut? The Law Commissions in their consultations floated the idea of a registered partnership, but then in the light of lukewarm/hostile responses rejected such a new variant as the registered partnership – see paras 3.42 and 13.29 of the Report. There is no surprise that this curious proposal was never pursued. Furthermore, would such a formal requirement exclude the potential for equitable intervention by the courts to achieve the same result via concepts such as constructive trust? If so, any such reform would be questionable.

This characterisation conundrum facing the courts in cases of alleged partnership is not unique and such questions are not easy to resolve in a number of diverse situations – witness the constant disputes over whether a land interest is a lease or a licence;<sup>89</sup> whether a labour nexus involves an employee/employer or self-employed relationship;<sup>90</sup> whether a loan security is capable of being construed as either a fixed or floating charge.<sup>91</sup> A comparable challenge regularly encountered concerns the possibility of recognising (or, more accurately, of introducing) implied terms<sup>92</sup> in a contract and whether there is a duty good faith between the parties in contract. Such disputes are unavoidable and have to be managed by the courts on a daily basis.

Does the relative ease of incorporation and the availability of new customised partnership models in the UK post millennium change the position with regard to this question? The short answer is “no”. The tranche of recent case law after 2000 which we note above attests to that reality. In the future, if moves to introduce good

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<sup>88</sup> *Partnership Law* (CM 6015, 2003).

<sup>89</sup> See *Car Park Services Ltd v Bywater Capital (Winetavern) Ltd* [2018] NICA 22.

<sup>90</sup> See *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29.

<sup>91</sup> See *NatWest Bank v Spectrum Plus Ltd* [2005] UKHL 41.

<sup>92</sup> The courts, having flirted with a constructive approach in recent times, are currently leaning against the importation of implied terms – see for example *Bou-Simon v BGC Brokers LP* [2018] EWCA Civ 1525 (which featured a loan agreement linked to a partnership relationship).



faith requirements into relational contracts prosper, some of the impetus for litigation on the partnership point will be lost.

At the end of the day the question we must ask ourselves when contemplating legislative reform is whether the game is worth the candle. The brutal reality is that this question of determining partnership in contested cases is a problem that we (and the courts) will have to live with. It is an inevitable consequence of our flexible system of general partnership. The principles of common law and equity are available to achieve justice in individual cases. Keeping the law flexible will help it to deal with changing modes of communication derived from technological advances. It may well be that some of the steam will go out of the issue if the courts move towards imposing fiduciary duties upon joint venturers<sup>93</sup> and introducing a principle of good faith in contract. That said, in spite of the attractions of maintaining the status quo, renewed efforts should be made to ensure business collaborators, particularly those operating in the SME sector, are alert to the issue and the dangers of an unintended drift into partnership. Improved entrepreneurial education may be the best way forward in terms of avoiding the hazards of partnership characterisation litigation.

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<sup>93</sup> As the Court of Appeal did in *Ross River Ltd v Waveley* [2013] EWCA Civ 910. Some joint ventures might amount to a partnership, whereas others may not – for discussion of this difficult dividing line see *University Court of the University of St Andrews v Headon Holdings Ltd* [2017] CSIH 61, which is the subject of a case comment by J Bailey and B Munro, ‘Partnerships, Joint Ventures and Duties of Disclosure: *The University Court of the University of St Andrews v Headon Holdings Limited*’ (2018) 22(2) Edin L Rev 282.

Keywords: Public-private partnership (PPP), concession, public-private partnership agreement, property rights, financial provision, subsidizing, government guarantee, infrastructure bonds, collateral legal relations. As a result of collaboration between non-commercial companies with the public sector, the given companies were forced to impose certain regulations on their own business activity and profits distribution. The state in turn was granting these companies with tax shields and breaks. In the 19th century Russia practiced the interaction between public and private capital collaboration in the form of concessions. 2 A simple partnership liquidation is the liquidation of a solvent partnership in which all partners have equity capital and all gains and losses are realized and recognized before any distributions are made to the partners. In simple partnership liquidations, only one cash distribution is made and the amounts distributed to individual partners are equal to their predistribution capital account balances. 3 The priority ranking for the distribution of assets in liquidation pursuant to UPA is Rank I Rank II Amounts owed to creditors other than partners and amounts owed to partners other than for Identify the entity characteristics of partnerships. Importance of Partnership Law. It would be difficult to conceive of a complex society that did not operate its businesses through organizations. Partnership is an ancient form of business enterprise, and special laws governing partnerships date as far back as 2300 BC, when the Code of Hammurabi explicitly regulated the relations between partners. Partnership was an important part of Roman law, and it played a significant role in the law merchant, the international commercial law of the Middle Ages. In the nineteenth century, in both England and the United States, partnership was a popular vehicle for business enterprise. But the law governing it was jumbled.