

At the same time, it must be recognised that section 44(a) of the Act does contemplate that if, on a general dissolution, there are sufficient funds available, there will be an ultimate division of the profits for the benefit of all the partners.<sup>54</sup>

### E. THE NORMAL INCIDENTS OF PARTNERSHIP

2-12 Reference has already been made to the sharing of profits as one of the normal incidents of partnership.<sup>55</sup> Other attributes will be found similarly described in the authorities. Thus, in *Memec v. I.R.C.*,<sup>56</sup> Peter Gibson L.J. described the “characteristics of an ordinary English partnership” in these terms:

“(1) the partnership is not a legal entity<sup>57</sup>; (2) the partners carry on the business of the partnership in common with a view of profit . . .<sup>58</sup>; (3) each does so both as principal and (see s.5 of the 1890 Act) as agent for each other, binding the firm and his partners in all matters within his authority; (4) every partner is liable jointly with the other partners for all the debts and other obligations of the firm (see s.9 of the 1890 Act); and (5) the partners own the business, having a beneficial interest in the form of an undivided share in the partnership assets . . . including any profits of the business.”

In *Dollar Land (Cumbernauld) Ltd. v. C.I.N. Properties Ltd.*,<sup>59</sup> Lord Coulsfield listed as potential key features: (1) mutual agency; (2) participation in profits; (3) sharing of losses; (4) common capital and (5) the basic non-assignability of the partnership relation,<sup>60</sup> whilst in *Dreyfus v. C.I.R.*<sup>61</sup> the existence of mutual agency was regarded as a “very common characteristic” of partnership. Various other formulations will be found in the authorities.

2-13 There is, however, a danger that what are, in truth, normal incidents or characteristics of partnership are wrongly perceived as prerequisites to the existence of that relationship, thus distorting the application of section 1(1) of the 1890 Act.<sup>62</sup> As Lord Coulsfield made clear in *Dollar Land (Cumbernauld) Ltd. v. C.I.N. Properties Ltd.*<sup>63</sup>:

“ . . . it is undoubtedly true that there is no one provision or feature which can be said to be absolutely necessary to the existence of a partnership, so that the absence of that feature inevitably negates the existence of a partnership . . . ”<sup>64</sup>

<sup>54</sup> See *infra*, paras 25–44 *et seq.* In earlier editions of this work reference was made at this point to s.39, rather than s.44; however the former section contains no reference to profits.

<sup>55</sup> See *supra*, para. 2–10.

<sup>56</sup> [1998] S.T.C. 754, 764e–f. See also *Swift v. Revenue & Customs Commissioners* [2010] S.F.T.D. 553.

<sup>57</sup> *per contra*, in Scotland: Partnership Act 1890, s.4(1).

<sup>58</sup> Peter Gibson L.J. naturally cross-referred to *ibid.* s.1(1) at this point.

<sup>59</sup> 1996 S.L.T. 186 (OH).

<sup>60</sup> This concept is referred to as *deluctus personae* in Scots law: see further *Miller's Partnership* (2nd ed.), pp. 16 *et seq.*, 204, 205.

<sup>61</sup> (1929) 14 T.C. 560, 574 *per* Lord Hanworth M.R. See also *ibid.* p. 579 *per* Lawrence J.

<sup>62</sup> This warning was cited with apparent approval by Arnold J. in *Hodson v. Hodson* [2009] P.N.L.R. 23, at [12], affirmed at [2010] P.N.L.R. 8.

<sup>63</sup> 1996 S.L.T. 186, 195F.

<sup>64</sup> It goes without saying that Lord Coulsfield should not be taken to have suggested that the express requirements set out in the Partnership Act 1890, s.1(1) do not need to be satisfied in all cases.

Thus, there must always be a *view* of profit for a partnership to exist<sup>65</sup> but, as was made abundantly clear in by the Court of Appeal in *M. Young Legal Associates v. Zahid*<sup>66</sup> and in *Hodson v. Hodson*,<sup>67</sup> a *sharing* of profits between the partners is not a necessary ingredient. The position is the same with the sharing of losses.<sup>68</sup> Again, whilst mutual agency may properly be regarded as a central feature of the law of partnership,<sup>69</sup> it is clearly something which flows from the partnership relation, not the other way around. In *Holme v. Hammond*,<sup>70</sup> Cleasby B. rightly rejected the notion that agency was the foundation of the idea of partnership,<sup>71</sup> and expressed the view that:

“agency is deduced from partnership rather than partnership from agency. But neither does partnership always imply this mutual agency.”<sup>72</sup>

Of course, if the position were otherwise, a limited partnership could not properly be regarded as a partnership within the meaning of the 1890 Act, since a limited partner in general has *no* authority to bind the firm.<sup>73</sup>

The proposition that a partnership cannot exist unless all the partners undertake personal liability for the debts and obligations of the firm<sup>74</sup> is, in the current editor's view, equally fallacious, since not only can such personal liability be negated by express contract, but a limited partner will also, in the normal course, undertake no personal liability whatsoever,<sup>75</sup> yet will still be regarded as a partner in the eyes of the law.

Finally, in *Hodson v. Hodson*,<sup>76</sup> it was held that participation in management by all partners is not essential, given the recognition long accorded to so-called “sleeping” partners.<sup>77</sup>

<sup>65</sup> See *supra*, paras 2–07 *et seq.*

<sup>66</sup> [2006] 1 W.L.R. 2562. Both *Memec v. I.R.C.*, *supra*, and *Dollar Land Cumbernauld Ltd. v. C.I.N. Properties Ltd.*, *supra*, were cited without success in that case.

<sup>67</sup> [2010] P.N.L.R. 8. There a partner had a 1% profit entitlement but in practice chose to waive it.

<sup>68</sup> In contrast, a sharing of losses is inconsistent with a contract of service and points to some other contractual relationship, e.g. a partnership or other joint venture: see *Todd v. Adam* [2002] 2 All E.R. (Comm) 97 (CA), a decision concerning share fishermen.

<sup>69</sup> Partnership Act 1890, s.5: see *infra*, paras 12–01 *et seq.*

<sup>70</sup> (1872) L.R. 7 Ex. 218.

<sup>71</sup> *ibid.* p. 234. In this context, it is interesting to note that mutual agency appears not to have been an original feature of *societas* in Roman law, but was only introduced by Justinian.

<sup>72</sup> *ibid.* p. 233. Similarly, in *Dollar Land (Cumbernauld) Ltd. v. C.I.N. Properties Ltd.*, *supra*, Lord Coulsfield, having listed the various features noted *supra*, para. 2–10, warned (at p. 195B) that it was “a mistake to put too much emphasis on the question of mutual agency” and went on to observe (at p. 195F–G) that “the absence of one or even more of these features might be reconcilable with the existence of a partnership.” See also *Phillips v. Revenue & Customs Commissioners* [2010] S.F.T.D. 332 at [53]. The Partnership Act 1890 itself clearly contemplates that mutual agency may, to a greater or lesser extent, be excluded: *ibid.* ss.5, 8. See further, *infra*, paras 12–04, 12–138 *et seq.* For a different (and, in many ways, more extreme) perspective on the place of mutual agency in the law of partnership, see *Pooley v. Driver* (1876) 5 Ch. D. 458, 476 *per* Jessel M.R.

<sup>73</sup> See the Limited Partnerships Act 1907, s.6(1), considered *infra*, paras 30–03 *et seq.* In the current editor's view this cannot merely be explained away as a consequence of an express statutory provision, since a limited partnership is a “firm” (*ibid.* s.3) and the Partnership Act 1890 and partnership law generally is applicable to such partnerships (*ibid.* s.7).

<sup>74</sup> See the Partnership Act 1890, s.9, *infra*, paras 13–02 *et seq.*

<sup>75</sup> See the Limited Partnerships Act 1907, s.4(2), *infra*, paras 30–07 *et seq.*

<sup>76</sup> [2009] P.N.L.R. 23. This decision was affirmed at [2010] P.N.L.R. 8 (CA), albeit without specifically referring to this point.

<sup>77</sup> See *infra*, paras 13–53 *et seq.*

transaction and says 'Is this, in point of law, really a partnership?' It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is.<sup>17</sup>

If the agreement is not in writing the intention of the parties must naturally be ascertained from their words and conduct.<sup>18</sup> Moreover, in construing any agreement, account must be taken of any subsequent modifications which may have been introduced by the parties, whether intentionally or unintentionally.<sup>19</sup>

Equally, where no agreement at all has been concluded, the court may adopt a very different approach. Thus, in *Greville v. Venables*<sup>20</sup> the claimant wanted to be a partner but the defendant had refused. The Court of Appeal declined to infer a partnership by conduct and rejected an attempt to rely on the "labelling" principle.

### Joint ventures

5-06

The courts tend to adopt a strangely inconsistent attitude towards joint ventures. Although partnerships and joint ventures obviously have a number of common characteristics, in some instances the two expressions appear to be used interchangeably,<sup>21</sup> whilst in others the joint venture is recognised as a relationship quite separate and distinct from partnership.<sup>22</sup> In the current editor's view, whilst it can properly be said that all partnerships involve a joint venture,<sup>23</sup> the

<sup>17</sup> *Quaere* whether it is a precondition that a party to the agreement should challenge the existence of a partnership. In *Launahurst Ltd. v. Larner* [2010] EWCA Civ 334 (Lawtel 30/3/10), the Court of Appeal was unwilling to uphold a finding that an entire agreement clause in a contract with a self-employed contractor was a sham when he had not himself taken the point.

<sup>18</sup> However, the evidence will frequently be insufficient to prove that a partnership exists: see, for example, *Swiss Air Transport Co. Ltd. v. Palmer* [1976] 2 Lloyd's Rep. 604; *McPhail v. Bourne* [2008] EWHC 1235 (Ch) (Lawtel 13/6/08); also note *Bennett v. Lincoln* [2005] J.L.P. 125 (where the position was governed by Jersey customary law. And see also *Eames v. Stephell Properties Ltd.* [1967] 1 W.L.R. 593; *Scott v. Ricketts* [1967] 1 W.L.R. 828; *Johnston v. Heath* [1970] 1 W.L.R. 1567; *Vater v. Tarbuck* (1970) 214 E.G. 267.

<sup>19</sup> Partnership Act 1890, s.19. See also *infra*, paras 10-12 *et seq.*

<sup>20</sup> [2007] EWCA Civ. 878 (Lawtel 12/9/07) at [40] *per* Lloyd L.J.

<sup>21</sup> See, for example, *Dollar Land (Cumbernauld) Ltd. v. C.I.N. Properties Ltd.* 1996 S.L.T. 186 (OH); *Cayzer v. Beddow* [2007] EWCA Civ 644 (Lawtel 29/6/07); also *Mair v. Wood* 1948 S.C. 83, at pp. 86 *per* the Lord President, 89, 90 *per* Lord Keith. In *Small v. Fleming* 2003 S.C.L.R. 647 (OH), Lord Macfadyen described a joint venture as a "species of partnership" and went on to hold that a joint venture could not exist in the absence of agreement on all the terms. This seems odd, given the very general requirements of the Partnership Act 1890, s.1(1), to which he specifically referred. The decision in *Cayzer v. Beddow*, *supra*, is very much to the same effect: see *ibid.* at [56]. *cf.* *Chirnside v. Fay* [2007] P.N.L.R. 6 (Sup. Ct. of New Zealand), where a joint venture was held to exist even though not all the details had been contractually agreed: see [91] *per* Blanchard and Tipping JJ. They in fact treated the joint venture as analogous to a partnership (*ibid.* [71]), whilst Elias C.J. held that it was "indistinguishable from a single transaction partnership" (*ibid.* [14]). A joint venture unsuccessfully alleged in *Kilcarne Holdings Ltd. v. Targetfollow (Birmingham) Ltd.* [2005] P & C.R. 8 was "not simply a contract for a partnership": *ibid.* at [204] *per* Lewison J.

<sup>22</sup> *Hampton & Sons v. Garrard Smith* [1995] 1 E.G.L.R. 23 (CA); also *Ross River Ltd. v. Cambridge City Football Club Ltd.* [2007] EWHC 2115 (Ch) (Lawtel 1/10/07); *Rosenberg v. Nazarov* [2008] EWHC 812 (Ch) (Lawtel 10/4/08) at [58] *per* Thomas Ivory Q.C., sitting as a deputy judge of the Chancery Division; *Daniels v. Deville* [2008] EWHC 1810 (Ch) (Lawtel 5/8/08) at [36] *per* Lindsay J.

<sup>23</sup> *Whywait Pty Ltd. v. Davison* [1997] 1 Qd. R. 225, 231.

converse proposition manifestly does not hold good.<sup>24</sup> This is demonstrated by the unreported decision in *Spree Engineering and Testing Ltd. v. O'Rourke Civil and Structural Engineering Ltd.*,<sup>25</sup> in which a distinction was drawn between a so-called non-integrated joint venture, which would not involve a partnership, and an integrated joint venture, which would, in general, constitute the joint venturers as partners. However, the use of such terminology should not be allowed to obscure the need in every case to scrutinise the parties' arrangements<sup>26</sup> in order to identify whether the requirements of section 1(1) of the Partnership Act 1890<sup>27</sup> are satisfied and whether their relationship displays any of the normal indicia of partnership.<sup>28</sup>

It naturally follows that it is not possible to avoid partnership merely by describing the participants as joint venturers; the label will be ignored and the court will look to the substance of the transaction rather than its outward form.<sup>29</sup> Equally, it cannot be assumed that the participants in a transaction described as a joint venture do not each intend to carry on their own separate businesses: such situations are by no means unknown, e.g. share farming and oil exploration ventures.<sup>30</sup>

## 2. CO-OWNERSHIP

### Co-owners not necessarily partners

As is clearly established by section 2(1) of the Partnership Act 1890, a partnership will not necessarily subsist between the co-owners of property,

5-07

<sup>24</sup> Note, however, that Richards J. ultimately declined to express a view on this proposition in *Shanshal v. Al-Kishtaini* (Lawtel 16/6/99) although this does not appear from the report in *The Times*, June 16, 1999. A subsequent appeal was allowed on other grounds: see [2001] 2 All E.R. (Comm.) 601 (CA). *cf.* *Todd v. Adams* [2002] 2 All E.R. (Comm) 97 (CA) at [78] *per* Neuberger J. There the issue was whether share fishermen could be regarded as joint venturers, but the question of partnership was not even raised.

<sup>25</sup> Unreported May 18, 1999 (QBD).

<sup>26</sup> Such arrangements will include not only any agreement entered into between the parties, but also the way in which they have subsequently conducted their affairs: see, for example, *Hibernia Management and Development Co. v. Newfoundland Steel Inc.* (1996) 140 Nfld. & P.E.I.R. 90, 107.

<sup>27</sup> See *supra*, paras 2-01 *et seq.*

<sup>28</sup> Note, in this context, the views expressed by Lord Coulsfield in *Dollar Land (Cumbernauld) Ltd. v. C.I.N. Properties Ltd.*, *supra*, p. 195F; also *Ness Training Ltd. v. Triage Central Ltd.* 2002 S.L.T. 675 (OH). And see further, *supra*, paras 2-12, 2-13.

<sup>29</sup> See *Paterson v. McKenzie* [1921] G.L.R. 43; *Canny Gabriel Castle Jackson Advertising v. Volume Sales (Finance)* (1974) 131 C.L.R. 321; *Spree Engineering and Testing Ltd. v. O'Rourke Civil and Structural Engineering Ltd.*, *supra*; *Ness Training Ltd. v. Triage Central Ltd.*, *supra*.

<sup>30</sup> See further, as to share farming agreements, *infra*, para. 5-16. Another example cited in earlier editions of this work is that of underwriters assuming a fractional proportion of an insurance liability under the terms of a single policy (albeit dependent on the precise terms of that policy): *Tyser v. Shipowners Syndicate (Reassured)* [1896] 1 Q.B. 135. Similarly, the joint ownership and operation of a ship would not necessarily create a partnership. And note also *Hibernia Management and Development Co. v. Newfoundland Steel Inc.*, *supra*.

*Outgoing partners*

- 5-64 The presence of a partner's name on the firm's notepaper, etc.,<sup>279</sup> in compliance with the requirements of the 2006 Act, obviously provides a ready means whereby the continuing partners may, following his departure from the firm, hold him out as still remaining a member thereof. However, it has already been seen that an outgoing partner is not bound to secure the destruction of all such notepaper and other documentation in order to free himself from potential liability on that account,<sup>280</sup> although it would be otherwise if he authorised its use.<sup>281</sup>

## 6. GENERAL AND PARTICULAR PARTNERSHIPS

- 5-65 It is now only rarely necessary to draw a formal distinction between general and particular partnerships, in the manner traditionally adopted by writers on partnership law.<sup>282</sup> Nevertheless, there are still many cases in which persons enter into a partnership limited to a particular trade, transaction or adventure where the distinction may be of relevance.<sup>283</sup>

*Partnership for one transaction*

- 5-66 If persons who are not partners in any other business share the profits and losses (or merely the profits) of a particular trade, transaction or adventure, they will become partners to that extent and to that extent only.<sup>284</sup> Thus, if two solicitors, who are not partners, are jointly retained to conduct litigation in a particular case, and they agree to share the profit costs arising therefrom, they will become partners only so far as concerns the conduct of that case.<sup>285</sup> In the same way, a partnership may be limited to the purchase and sale of a particular asset,<sup>286</sup> the working of a patent either at large<sup>287</sup> or confined to a particular area,<sup>288</sup> the development of a plot of land,<sup>289</sup> the exploitation of a contract of

<sup>279</sup> See generally, *ibid.* ss.1203, 1204; and see *supra*, para. 3-33.

<sup>280</sup> *Tower Cabinet Co. v. Ingram* [1949] 2 K.B. 397.

<sup>281</sup> *ibid.*

<sup>282</sup> This classification can be traced to the following passage in the Digest—"Societates contrahuntur sive universorum bonorum, sive negotiationis alicujus, sive vectigalis, sive etiam rei unius" (Partnerships are contracted either in the whole of the goods of the respective partners, or in some particular speculation, or in a state concession or even in a single piece of property): Dig. xvii, tit. 2 (*pro socio*), 1-5 pr. However, save for the purpose noted in the text, Lord Lindley considered such classification "not worth enlarging upon".

<sup>283</sup> These partnerships are referred to in the Partnership Act 1890, s.32(b). See *infra*, paras 24-15 *et seq.*

<sup>284</sup> See *Re Abenheim* (1913) 109 L.T. 219, 220 *per* Phillimore J.; *Mann v. D'Arcy* [1968] 1 W.L.R. 893; also *De Berkow v. Smith* (1793) 1 Esp. 29; *Smith v. Watson* (1824) 2 B. & C. 401; *Heyhoe v. Burgh* (1850) 9 C.B. 431. See, as to partnerships in profits only, *supra*, para. 5-27.

<sup>285</sup> *Robinson v. Anderson* (1855) 20 Beav. 98 and, on appeal, 7 De G.M. & G. 239; *McGregor v. Bainbrigg* (1848) 7 Hare 164.

<sup>286</sup> *Oppenheimer v. Frazer & Wyatt* [1907] 2 K.B. 50.

<sup>287</sup> *Lovell v. Hicks* (1837) 2 Y. & C.Ex. 472.

<sup>288</sup> *Ridgway v. Philip* (1834) 1 Cr.M. & R. 415.

<sup>289</sup> *Fenston v. Johnstone (Inspector of Taxes)* (1940) 23 T.C. 29; *Walker West Developments Ltd. v. F. J. Emmett* (1979) 252 E.G. 1171; *Whywait Pty Ltd. v. Davison* [1997] 1 Qd.R. 225.

service<sup>290</sup> or the sowing, cropping, harvesting and sale of a particular crop.<sup>291</sup> In all such cases, the rights and liabilities of the partners are governed by the same principles as apply to general partnerships,<sup>292</sup> albeit that they may be quantitatively (even if not qualitatively) less extensive.

The scope of any such partnership will naturally depend on the terms of the agreement into which the parties have entered as well as upon their subsequent conduct. This is illustrated by the decision in *J. & J. Cunningham v. Lucas*,<sup>293</sup> where the claimants had purchased potatoes from suppliers in Holland for resale in this country. Originally the potatoes were to be shipped in two vessels, but one vessel was damaged and a larger vessel was substituted. More potatoes were purchased in order to fill the substituted vessel. The claimants claimed that the defendants had agreed to enter into a joint venture whereby all the potatoes would be marketed in this country and the claimants and the defendants would share any loss or profit equally. The defendants claimed that only part of the cargo was agreed to be the subject of the joint venture. *McNair J.*, after considering all the circumstances, held that the claimants had established their claim and directed an account to be taken accordingly.

## 7. SUB-PARTNERSHIPS

Lord Lindley defined a sub-partnership as follows:

"A sub-partnership is as it were a partnership within a partnership; it presupposes the existence of a partnership to which it is itself subordinate. An agreement to share profits only constitutes a partnership between the parties to the agreement. If, therefore, several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is to constitute what is called a *sub-partnership*, that is to say, it makes the parties to it partners *inter se*; but it in no way affects the other members of the principal firm."<sup>294</sup>

Thus, a sub-partnership is, conventionally, a partnership in a share of another partnership and, whilst it is of a derivative nature, the sub-partnership normally operates outside the confines of the main partnership.<sup>295</sup> However, there is, in theory, no reason why a sub-partnership should not be formed between a group

<sup>290</sup> *E. Rennison & Son v. Minister of Social Security* (1970) 114 S.J. 952.

<sup>291</sup> *George Hall & Son v. Platt* (1954) 47 R. & I.T. 713.

<sup>292</sup> See *Reid v. Hollinshead* (1825) 4 B. & C. 867, and the cases cited *supra*, nn. 286 and 287.

<sup>293</sup> [1957] 1 Lloyd's Rep. 416.

<sup>294</sup> This principle was stated thus by civilian lawyers: "*Socius mei socii, socius meus non est*" (The partner of my partner is not my partner).

<sup>295</sup> In *Ex p. Barrow* (1815) 2 Rose 255, Lord Eldon stated the law thus: "I take it to have been long since established, that a man may become a partner with A where A and B are partners and yet not be a member of that partnership which existed between A and B. In the case of *Sir Chas. Raymond* [(1734)], a banker in the city, a Mr Fletcher agreed with Sir Chas. Raymond that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held that he was no partner in that partnership; had no demand against it; had no account in it; and that he must be satisfied with a share of the profits arising and given to Sir Chas. Raymond." See also *Bray v. Fromont* (1821) 6 Madd. 5; *Ex p. Dodgson* (1830) Mont. & Mac. A. 445.

only itself be an act of discrimination,<sup>85</sup> but may also prevent a claim of justification.<sup>86</sup> Whilst the cost of making such adjustments will be borne by the firm, including the disabled partner, his share of that cost must be reasonable.<sup>87</sup>

8-19 For the purposes of the legislation, a disability amounts to “a physical or mental impairment which has a substantial and long-term adverse effect on [a person’s] ability to carry out normal day-to-day activities”,<sup>87a</sup> although this must be read subject to certain detailed provisions set out in a schedule.<sup>88</sup>

It seems clear that action can be taken which adversely affects a partner suffering from a disability without committing an act of discrimination provided that his disability *genuinely* played no part in the other partners’ decision.<sup>89</sup> Equally, the Court of Appeal has stated that the purpose of the legislation is not to treat the disabled as objects of charity, so that where a firm requires any partner who is absent by reason of incapacity for a prolonged period to forfeit all or part of his profit share, it is unlikely that the duty to make adjustments will require a disabled partner automatically to be exempted from the operation of such a provision.<sup>90</sup>

Similar considerations arise regarding the nature, proof and consequences of unlawful disability discrimination as were considered in relation to sex discrimination.<sup>91</sup>

where the existence of the disability is not known and could not reasonably be expected to be known to the firm, see *ibid.* s.6B(3)(b) [Equality Act 2010, Sched. 8, para. 20] and *Secretary of State for the Department of Work and Pensions v. Alam* [2010] I.C.R. 665, again a decision concerning the equivalent provision applicable to employees.

<sup>85</sup> *ibid.* s.3A(2), as added by the Disability Discrimination Act 1995 (Amendment) Regulations 2003, reg. 4(2) [Equality Act 2010, s.21(2)].

<sup>86</sup> *ibid.* s.3A(6), as added by *ibid.* [Equality Act 2010, s.21(2)]. Note that the defence may still succeed if the justification applies irrespective of any adjustments.

<sup>87</sup> *ibid.* s.6B(4) [cf. the Equality Act 2010, Sched. 8, Pt. 2, para. 7]. This is, of course, distinct from the power of the Tribunal to exempt a disabled partner who is the subject of discrimination from any obligation to contribute thereto under *ibid.* s.17A(2)(c), as renumbered by the Disability Discrimination Act 1995 (Amendment) Regulations 2003, reg. 9(1) [Equality Act 2010, 124(2)(c), (3)].

<sup>87a</sup> See *Patel v. Oldham Metropolitan Borough Council* [2010] I.C.R. 603 (EAT).

<sup>88</sup> *ibid.* s.1(1); Sched. 1, as amended by the Disability Discrimination Act 2005, s.18, Sched. 1, Pt. 1, para. 36, Sched.2 [Equality Act 2010, s.6(1)]. Note also that official guidance as to what constitutes a disability was issued in 2006 pursuant to *ibid.* s.3, as amended [Equality Act 2010, s.6(5)]. As to past disabilities, see *ibid.* s.2, Sched. 2, as amended [Equality Act 2010, s.6(5), Sched. 1, Pt. 1, para. 9]. Where a condition no longer causes any impairment, the issue will be whether it is likely to recur, as to which see *ibid.* Sched. 1, para. 2(2) [Equality Act 2010, Sched. 1, Pt. 1, para. 2(2)] and *Richmond Adult Community College v. McDougall* [2008] I.R.L.R. 227 (CA). As regards the effect of sickness, note *Chacon Navas v. Eures Colectividades SA* (C13/05) [2006] 3 C.M.L.R. 40 (ECJ). A tribunal can find that a claimant is disabled on the evidence before it, even if this is on a different basis from that argued by him: *Ministry of Defence v. Hay* [2008] I.C.R. 1247 (EAT).

<sup>89</sup> *HM Prison Service v. Johnson* [2007] I.R.L.R. 951 (EAT) at [63], [64].

<sup>90</sup> See *O’Hanlon v. Commissioners of HM Revenue & Customs* [2007] I.C.R. 1359 (CA), an employment case.

<sup>91</sup> See *supra*, paras 8-14 *et seq.* For the equivalent references see the Disability Discrimination Act 1995, s.16A, as added by the Disability Discrimination Act 1995 (Amendment) Regulations 2003, reg. 15(1) (former partners), 3B, 6A(2), as respectively added by *ibid.* regs. 4(2), 6 (harassment), 55 as amended (victimisation), 17A(1C), as renumbered and added by *ibid.* reg. 9 (burden of proof), 17A(1), as renumbered by *ibid.*, also *ibid.* Sched. 3, Pt. 1, para. 2(1), as substituted by *ibid.* reg. 29(2)(b) (jurisdiction) and 17C, Sched. 3A, paras 1(1), (2), as respectively added by *ibid.* reg. 16(1), (2), Sched. (consequences of unlawful discrimination on contracts) [the Equality Act 2010, ss.108(1) (former partners), 26, 44(3), (4) (harassment), 27, 44(5), (6) (victimisation), 136 (burden of proof), 120(1) (jurisdiction), 142(1), 144(1) (effect on contracts)].

#### (4) Religious or belief-based discrimination

It is unlawful for a firm<sup>92</sup> to discriminate against a partner or prospective partner on the grounds of his or her religion or beliefs (or lack thereof)<sup>93</sup> and, in this case, the form of the legislation in all material respects closely follows that adopted in the Sex Discrimination Act 1975<sup>94</sup> and the issues which arise will be similar to those considered in relation thereto.<sup>95</sup> 8-20

#### (5) Sexual orientation-based discrimination

It is also unlawful for a firm<sup>96</sup> to discriminate against a partner or prospective partner on the grounds of his or her sexual orientation<sup>97</sup> and, again, the legislation follows the same pattern as in the Sex Discrimination Act 1975<sup>98</sup> and gives rise to the same issues.<sup>99</sup> 8-21

#### (6) Age discrimination

It is unlawful for a firm<sup>100</sup> to discriminate against a partner or prospective partner 8-22

<sup>92</sup> As to the meaning of “firm” in this context, see the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), reg. 14(6), (7) [Equality Act 2010, s.46(2)]. See, as to the implications, *supra*, paras 8-11, 8-12.

<sup>93</sup> See *ibid.* regs. 2(1), 3(1), as substituted by the Equality Act 2006, s.77(1) [Equality Act 2010, ss.10, 13, 19]. Note that a philosophical or similar belief may qualify for protection: *Grainger plc v. Nicholson* [2010] 2 All E.R. 253.

<sup>94</sup> The provision equivalent to the Sex Discrimination Act 1975, s.11 is to be found in the Employment Equality (Religion or Belief) Regulations 2003, reg. 14 [Equality Act 2010, s.44]. See, as to the power of the Tribunal to recommend the exoneration of a complainant partner from any obligation to contribute towards his own compensation, *ibid.* reg. 30(1)(c) [Equality Act 2010, s.124(2)(c), (3)] and, as to direct and indirect discrimination and justification under the “legitimate aim” test, *ibid.* reg. 3(1), as amended by the Equality Act 2006, s.77(2) [Equality Act 2010, ss.13, 19]. Note the consideration of the legitimate aim test in *Islington LBC v. Ladele* [2009] I.C.R. 387 (EAT), affirmed at [2010] 1 W.L.R. 955 (CA), albeit not a partnership case.

<sup>95</sup> See *supra*, paras 8-14 *et seq.* For the equivalent references see *ibid.*, regs. 21 (former partners), 5, 14(2) (harassment), 4 (victimisation), 29 (burden of proof), 27, 28 (jurisdiction) and 35, Sched. 4, para. 1(1), (2) (consequences of unlawful discrimination on contracts) [Equality Act 2010, ss.108(1) (former partners), 26, 44(3), (4) (harassment), 27, 44(5), (6) (victimisation), 136 (burden of proof), 120(1) (jurisdiction), 142(1), 144(1) (effect on contracts)].

<sup>96</sup> As to the meaning of “firm” in this context, see the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661), reg. 14(6), (7) [Equality Act 2010, s.46(2)]. See, as to the implications, *supra*, paras 8-11, 8-12.

<sup>97</sup> See *ibid.* reg. 2(1), 3(1) [Equality Act 2010, ss.12, 12, 19]; note also *English v. Thomas Sanderson Blinds Ltd.*, *The Times*, January 5, 2009 (CA) (a case of harassment).

<sup>98</sup> The provision equivalent to the Sex Discrimination Act 1975, s.11 is to be found in the Employment Equality (Sexual Orientation) Regulations 2003, reg. 14 [Equality Act 2010, s.44]. See, as to the power of the Tribunal to recommend the exoneration of a complainant partner from any obligation to contribute towards his own compensation, *ibid.* reg. 30(1)(c) [Equality Act 2010, s.124(2)(c), (3)] and, as to direct and indirect discrimination and justification under the “legitimate aim” test, *ibid.* reg. 3(1) [Equality Act 2010, ss.13, 19].

<sup>99</sup> See *supra*, paras 8-14 *et seq.* For the equivalent references see *ibid.*, regs. 21 (former partners), 5, 14(2) (harassment), 4 (victimisation), 29 (burden of proof), 27, 28 (jurisdiction) and 35, Sched. 4, para. 1(1), (2) (consequences of unlawful discrimination on contracts) [Equality Act 2010, ss.108(1) (former partners), 26, 44(3), (4) (harassment), 27, 44(5), (6) (victimisation), 136 (burden of proof), 120(1) (jurisdiction), 142(1), 144(1) (effect on contracts)].

<sup>100</sup> As to the meaning of “firm” in this context, see the Employment Equality (Age) Regulations 2006 (SI 2006/1031), reg. 17(6), (7) [Equality Act 2010, s.46(2)]. See, as to the implications, *supra*, paras 8-11, 8-12.

it may be of use in determining, as between the partners, whether a given transaction is to be regarded as a partnership transaction or not.”

In practice, such declarations tend not to be included in modern agreements, save in relation to cheques.<sup>194</sup>

#### F. THE PREMIUM

- 10-43 Although a reference to premiums<sup>195</sup> has been retained, they are now rarely, if ever, encountered and most certainly could not be considered “usual”. If a premium is to be paid, the agreement should identify both the time and manner of payment<sup>196</sup> and the circumstances in which it is to be returned, whether on dissolution or otherwise.<sup>197</sup>

#### G. PARTNERSHIP PREMISES<sup>198</sup>

- 10-44 It is desirable, but not in all cases essential, to identify the premises from which the firm will carry on business and the manner in which decisions in relation to those and any other premises will in the future be taken.<sup>199</sup>

##### *Premises owned by one or more partners*

- 10-45 What is of greater importance is to ensure that the occupation rights of the firm are clearly established where the premises are to remain in the sole ownership of one or more of the partners.<sup>200</sup>

If a lease in favour of the firm is to be granted, then it must be in writing.<sup>201</sup> The termination of such a lease may, however, not be without difficulty<sup>202</sup> and its existence may conceivably have adverse inheritance tax consequences.<sup>203</sup>

If the agreement omits any reference to such occupation rights then, in the absence of any other evidence, it will not be assumed, merely because the

<sup>194</sup> See the *Encyclopedia of Professional Partnerships*, Precedent 1, cl. 6(3).

<sup>195</sup> This expression is not defined in the Partnership Act 1890: see further, as to its meaning, *infra*, para. 25-07.

<sup>196</sup> e.g. if it is payable in instalments, will they continue even if the partnership is dissolved? See also *infra*, para. 25-15.

<sup>197</sup> See the Partnership Act 1890, s.40 and *Handyside v. Campbell* (1901) 17 T.L.R. 623, 6234 per Farwell J. See also *infra*, para. 25-11.

<sup>198</sup> See the *Encyclopedia of Professional Partnerships*, Precedent 1, cl. 4.

<sup>199</sup> See *Clements v. Norris* (1878) 8 Ch.D. 129.

<sup>200</sup> The importance of this is underlined by the decision in *Latchman v. Pickard* [2005] EWHC 1011 (Ch) (Lawtel 12/5/05).

<sup>201</sup> *Rye v. Rye* [1962] A.C. 496.

<sup>202</sup> See *Sykes v. Land* (1984) 271 E.G. 1265; *Featherstone v. Staples* [1986] 1 W.L.R. 861; cf. *Brenner v. Rose* [1973] 1 W.L.R. 443. An agreement that such a lease will be surrendered in the event of a dissolution may well not be effective: see *Joseph v. Joseph* [1967] Ch. 78 and *infra*, para. 18-48. Note, however, that the termination of a tenancy by notice to quit given on a consensual basis as between landlord and head tenant will not be treated as an effective surrender and will, therefore, also terminate the sub-tenant's rights: *Barrett v. Morgan* [2000] 2 A.C. 264 (HL).

<sup>203</sup> See *infra*, paras 36-31 *et seq.*

premises are indispensable to the partnership business, that they belong to the firm<sup>204</sup> or are subject to the firm's right to: (i) a lease or tenancy<sup>205</sup> or, where that is still relevant,<sup>206</sup> (ii) an exclusive licence to occupy within the meaning of the Agricultural Holdings Act 1986.<sup>207</sup> It will rather be inferred that each individual partner who is not beneficially interested in the premises has been granted a non-exclusive licence to enter them in order to carry on the partnership business.<sup>208</sup> Such licences would seem to be contractual in nature and might, as a matter of implication, not be terminable during the currency of the partnership, particularly if it can be shown that the partnership business can only be carried on from those premises and that the termination of the licences would strike at the substratum of the partnership agreement.<sup>209</sup> In such circumstances the only effective way of determining the licences would be to dissolve the partnership but, even then, they would prima facie continue until the winding up is complete,<sup>210</sup> although this will not always be the case.<sup>211</sup>

It should also be noted that premises owned in this way may now in some cases be deemed to be partnership property for the purposes of stamp duty land tax and a charge to the tax may be incurred when they “become” partnership property.<sup>212</sup>

##### *Covenant against assignment, etc.*

Where leasehold premises owned by a partner are occupied by the firm, there will be no breach of a covenant against assignment, underletting, parting with or sharing possession if that partner merely permits his co-partners to go into occupation for the purposes of carrying on the partnership business.<sup>213</sup> The position may be otherwise if an assignment of the tenancy to the firm can be

<sup>204</sup> *Eardley v. Broad*, *The Times*, April 28, 1970 and (1970) 215 E.G. 823. See also *infra*, para. 18-34.

<sup>205</sup> *Rye v. Rye*, *supra*. A tenancy was inferred in *Pocock v. Carter* [1912] 1 Ch. 663, but this can no longer be considered good law.

<sup>206</sup> Where the licence was granted after September 1, 1995, it cannot attract the protection of the Agricultural Holdings Act 1986: Agricultural Tenancies Act 1995, s.4(1), as amended by the Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006 (SI 2006/2805), art. 12(2)-(5). By definition, an implied tenancy under the latter Act could not be created, since as well as fulfilling the “business conditions” (*ibid.* s.1(2)), a tenancy thereunder must either fulfil the “agricultural condition” (*ibid.* s.1(3)) or the “notice conditions” (*ibid.* s.1(4)): *ibid.* s.1(1). It would be impossible to fulfil either of the latter conditions unintentionally.

<sup>207</sup> *Harrison-Broadley v. Smith* [1964] 1 W.L.R. 456. A contrary view was advanced in *Harrison v. Wing* [1988] 29 E.G. 101, 103, but the point appears not to have been fully argued, since their Lordships make no reference to the decision in *Harrison-Broadley v. Smith*. See also *Bahamas International Trust Co. Ltd. v. Threadgold* [1974] 1 W.L.R. 1514. It is considered that occupation pursuant to such a licence would properly fall to be disregarded for the purposes of the eligibility test under the Agricultural Holdings Act 1986, s.36(3)(b) in relation to other land: see *ibid.* Sched. 6, para. 6(1)(e). *Per contra*, perhaps, if the licence cannot be terminated whilst the partnership continues: see an article by Michele Slatter in [1986] Conv. 320.

<sup>208</sup> *Harrison-Broadley v. Smith*, *supra*.

<sup>209</sup> cf. the position where the firm has a tenancy: *Brenner v. Rose* [1973] 1 W.L.R. 443; *Sykes v. Land* (1984) 271 E.G. 1265; *Featherstone v. Staples* [1986] 1 W.L.R. 861.

<sup>210</sup> See *infra*, para. 25-04.

<sup>211</sup> See *Latchman v. Pickard* [2005] EWHC 1011 (Ch) (Lawtel 12/5/05), albeit a decision made on an interim application.

<sup>212</sup> See *infra*, paras 38-04, 38-10.

<sup>213</sup> *Gian Singh & Co. v. Nahar* [1965] 1 W.L.R. 412 (PC), where, however, there appears to have been merely a covenant against assignment and subletting; also *Knapdale (Nominees) Ltd. v. Donald*, 2000 S.C.L.R. 1013 (OH). See also *infra*, para. 18-60.

value, unless that conclusion is warranted by the true construction of the agreement or by the surrounding circumstances; similarly in the case of the expression "true value".<sup>816</sup>

*The anomalous decision in Bennett v. Wallace*

10-173 The decision in *Bennett v. Wallace*<sup>817</sup> concerned the treatment of work in progress on the dissolution of a firm of solicitors. Under the partnership agreement, the capital contribution of one partner (W) was to be the amount shown in the accounts of his previous practice, in which the assets would, at W's option, be shown at market value or book value. In the event, no value was attributed to work in progress in those accounts, but the partners were nevertheless in agreement that it should be taken into account on the dissolution and had, in fact, agreed the value to be ascribed to it. The dispute centred on the question whether an allowance should be made for the *opening* value of work in progress. The court conventionally held that, in an accounting between partners, all assets had to be taken into account,<sup>818</sup> but then went on<sup>819</sup>:

"... it would appear to us to be inherent in the nature of a partnership that all assets brought into the partnership should be included in the accounting between the partners both at the start and at the end of their relationship unless there is some agreement to the contrary."

Although superficially attractive, this proposition is, in the current editor's view, highly questionable. It seems to presuppose that movements in the value of off balance sheet assets over the life of the partnership should be ignored. Thus, if A and B were to admit C to their partnership in 2000 at a time when the work in progress of the AB partnership was worth £100,000 and C were to retire in the year 2010 when the value had increased to £200,000, he would, according to *Bennett v. Wallace*, be entitled to a share of the increase in value in the sum of £100,000. A and B would retain their right to the original opening value of £100,000. Yet, the reality might be that, during the life of the ABC partnership, its fortunes waned and the value of its work in progress fell to, say, £50,000. It was due to the efforts of all the partners that the value had then increased from £50,000 to £200,000. On what basis should C properly be excluded from sharing in the £150,000 of work in progress that he has helped to build up? Why should the value of A and B's original "investment" be artificially protected?

The only alternative would be to trace the movements in the value of the relevant asset over the life of the partnership and to divide the notional increase/decrease in value year by year. Not only would this be prohibitively expensive in terms of valuer's fees but in many instances it would be impossible to reconstruct the history of the firm in this way, particularly if there have been a number of admissions and retirements in the meantime.

<sup>816</sup> *Re White* [2001] Ch. 393 (CA).

<sup>817</sup> 1998 S.C. 457 (2nd Div.). See also, as to this case, *infra*, para. 17-04.

<sup>818</sup> Given the agreement between the partners, such a finding was strictly unnecessary. It should be noted that the court also referred to the decision in *Roberston v. Brent* [1972] N.Z.L.R. 406, in which it was held that work in progress in a solicitors' firm cannot exist as an asset on a partner's retirement. The court shared the current editor's views as to whether this decision was correct in principle and whether it, in any event, would be followed today: see 1998 S.C. 462D-E. See further, *supra*, para. 10-158 n. 739.

<sup>819</sup> 1998 S.C. 462F-G.

A principle of law which is potentially arbitrary in its operation or which is dependent on evidence which is inherently unlikely to be available cannot, in the current editor's view, be justified.<sup>819a</sup> The partnership owns an asset. All partners are, in right of their shares, interested in that asset<sup>820</sup> and entitled to share in any value which may be ascribed to it. That, it is submitted, has always been the position<sup>821</sup> and should remain so.

*Special balance sheet to be drawn up*

10-174 It will, perhaps, be apparent from the foregoing that, in cases where the entitlement of an outgoing partner is expressly directed to be determined by reference to a special set of accounts drawn up as at the date of his departure,<sup>822</sup> all the assets should properly be included therein at their fair or market value,<sup>823</sup> unless that would be inconsistent with the true construction of the agreement<sup>824</sup> or with an established course of conduct adopted by the partners on previous retirements, etc.<sup>825</sup> The fact that goodwill and work in progress have been omitted from the firm's annual accounts will, of itself, be irrelevant.<sup>826</sup>

Where this is not the partners' intention, the agreement should clearly state the basis on which the accounts are to be prepared, even if this merely takes the form of a requirement that the partners should adhere to the same accounting principles and practices as are adopted when drawing up normal annual accounts.<sup>827</sup>

In *Montgomery v. Cameron & Greig*,<sup>828</sup> it was held, on a true construction of the agreement, that so-called "termination accounts" would be binding on the outgoing and continuing partners if they were prepared in accordance with the agreement and in good faith, *even if the partners had not approved them*. One key factor was that the agreement expressly required the firm's annual accounts to be approved but was silent in relation to the termination accounts. The editor has some doubts as to the correctness of this decision.

(4) *Revaluation of Assets*

10-175 It has already been seen that, when construing partnership agreements, there is a tendency for the court to lean in favour of assets being revalued when a partner dies or otherwise leaves the firm,<sup>829</sup> even if there is no presumption to that effect. In recognition of this, partners may decide to include an express revaluation provision in their agreement, with a view to ensuring that the outgoing partner is

<sup>819a</sup> But see *Drake v. Harvey*, *supra*.

<sup>820</sup> See *infra*, paras 19-01 *et seq.*

<sup>821</sup> See *infra*, para. 17-04.

<sup>822</sup> A variation on this theme allows the outgoing partner or the continuing partners to insist on the preparation of a special account within a specified period, failing which the former's entitlement will be determined by reference to the firm's normal annual accounts.

<sup>823</sup> See *supra*, para. 10-172.

<sup>824</sup> See *Re White* [2001] Ch. 393, *supra*, para. 10-169; *Drake v. Harvey* [2010] EWHC 1446 (Ch) (Lawtel 17/6/10).

<sup>825</sup> See *supra*, para. 10-167.

<sup>826</sup> Following the introduction of FRS5/UITF40 (see *infra*, para. 22-07), cases in which income attributable to work in progress is omitted will be a rarity. Note also the decision in *Robertson v. Brent* [1972] N.Z.L.R. 406: see *supra*, para. 10-158 n. 739.

<sup>827</sup> Such a formula was adopted in *Smith v. Gale* [1974] 1 W.L.R. 9. A similar view of the agreement was taken in *Champion v. Workman*, June 20, 2001 (Lawtel 22/8/01), noticed *supra*, para. 10-163.

<sup>828</sup> [2007] CSOH 63 (OH). See also *supra*, paras 10-73, 10-74 and *infra*, para. 10-77.

<sup>829</sup> See *supra*, paras 10-162 *et seq.*

is to be conducted and it is only in the absence of agreement that the default provisions set out in the Act will apply.<sup>1339</sup>

#### Persons bound by the arbitration agreement

10-271

An arbitration agreement will be binding on the partners and, as a general rule, on their personal representatives,<sup>1340</sup> as well as any person entitled to enforce rights under the partnership agreement by virtue of the Contracts (Rights of Third Parties) Act 1999,<sup>1341</sup> e.g. an annuitant.<sup>1342</sup> An incoming partner will be bound as soon as he comes a signatory to or bound by a partnership agreement containing an arbitration clause, even if the dispute arose prior to his admission.<sup>1343</sup>

However, it was formerly the position that the assignee or mortgagee of a partnership share was not bound by an arbitration clause in the partnership agreement as regards his statutory right to an account on a dissolution<sup>1344</sup> save, perhaps, where the clause in terms extended to persons claiming under a partner.<sup>1345</sup> Now that such an extension is applicable in all cases,<sup>1346</sup> it would appear that an assignee or mortgagee should be bound to have the account taken by an arbitrator.<sup>1347</sup>

#### Construction and scope of arbitration agreement

10-272

An arbitration agreement will fall to be construed in the same way as any other contract,<sup>1348</sup> but the House of Lords in *Fiona Trust & Holding Corp. v. Privalov*<sup>1349</sup> made clear that there will be an assumption that all disputes will fall within the ambit of such an agreement. Accordingly, whilst the expression "dispute or difference" is likely to be construed more widely than the word "dispute" appearing alone,<sup>1350</sup> little may in practice turn on this.

Arbitration clauses in partnership agreements tend to be drawn in a wide form and are likely to cover any dispute arising between partners or between them and a former partner.<sup>1351</sup> In most instances, the clause will, either expressly or by necessary implication, authorise the arbitrator to order a dissolution of the firm

<sup>1339</sup> *ibid.* s.4(2).

<sup>1340</sup> *ibid.* s.8(1).

<sup>1341</sup> Contracts (Rights of Third Parties) Act 1999, s.8. And see *Nisshin Shipping Co Ltd. v. Cleaves & Co Ltd.* [2004] 1 Lloyd's Rep. 38.

<sup>1342</sup> See further *supra*, paras 10-188, 10-259.

<sup>1343</sup> See *CMA CGM SA v. Hyundai Mipo Dockyard Co. Ltd.* [2009] 1 All E.R. (Comm) 568, which concern a novated shipbuilding contract.

<sup>1344</sup> Partnership Act 1890, s.31(2). See further, *infra*, para. 19-56.

<sup>1345</sup> As to the position prior to the 1996 Act, see *Bonnin v. Neame* [1910] 1 Ch. 732 (a decision under the Arbitration Act 1889, s.4, when the grant of a stay was discretionary).

<sup>1346</sup> See the Arbitration Act 1996, s.82(2); also *Schiffahrtsgesellschaft Detlev Von Appen GmbH v. Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep. 279 (CA); *Through Transport Mutual Insurance Association (Eurasia) Ltd. v. New India Assurance Co Ltd.* [2005] 1 C.L.C. 376.

<sup>1347</sup> See also *infra*, para. 19-50.

<sup>1348</sup> See *supra*, paras 10-03 *et seq.* In particular, the expression "dispute" will be given its ordinary and common-sense meaning: *Halki Shipping Corp. v. Sopex Oils Ltd.* [1998] 1 W.L.R. 727 (CA).

<sup>1349</sup> [2007] Bus. L.R. 686. Note, however, that these comments were made in the context of international commercial arbitrations. See also *Norscot Rig Management Pvt Ltd. v. Essar Oilfields Services Ltd.* [2010] 2 Lloyd's Rep. 209.

<sup>1350</sup> See *Amec Civil Engineering Ltd. v. Secretary of State for Transport* [2005] 1 W.L.R. 2339 (CA). And see also *Jagger v. Decca Music Group Ltd.* [2005] F.S.R. 26; *Tjong Very Sumito v. Antij Investments Pte Ltd.* [2010] 2 All E.R. (Comm) 366 (CA).

<sup>1351</sup> *Wedlake Bell v. Jones* [2007] EWHC 1143 (Ch) is an example of such a case.

under section 35 of the Partnership Act 1890.<sup>1352</sup> By way of illustration, in *Phoenix v. Pope*<sup>1353</sup> the clause was in this form:

"All disputes which shall arise between the partners or between any one or more of them and the personal representatives of any other or others of them or between their respective personal representatives and whether during or after the determination of the partnership so far as concerns any one or more or all of them and whether in relation to the interpretation of these presents or to any act or omission of any of the parties to the dispute or as to any act which ought to be done by the parties in dispute or any of them or in relation to any other matter whatsoever touching the partnership affairs shall be referred to a single arbitrator to be appointed by the partners or other parties to the dispute or if they cannot agree then to a single arbitrator to be nominated by the President of the Law Society for the time being at the request of any partner or other party to the dispute. And the provisions of the Arbitration Act 1950 or any statutory modification thereof shall apply and the partners shall be bound by any decision of the said arbitrator."

Goff J. was satisfied that the clause was apt to cover a dissolution claim and, after reviewing the authorities, concluded that there was no basis on which it could be said that questions of dissolution automatically fell outwith an arbitrator's jurisdiction.<sup>1354</sup> The old cases in which the court declined to allow questions of dissolution to be the subject of a reference<sup>1355</sup> can no longer be relied on, since they were decided under a wholly different regime in which the grant of a stay of proceedings was discretionary.<sup>1356</sup>

Other points of construction arise less frequently in partnership cases but, in *Ellis v. Coleman*,<sup>1357</sup> Lawrence Collins J. had no hesitation in holding that the expression "partners" in an arbitration clause extended not only to current but also to former partners in the firm.

It should also be noted that a transaction set off may not fall within the scope of an arbitration clause if it arises out of a different contract.<sup>1358</sup>

#### Arbitration agreement generally no defence

Lord Lindley wrote that an arbitration agreement:

"... is one which (independently of the Common Law Procedure Act of 1854<sup>1359</sup>) cannot be effectually set up as a defence to any action relative to a matter agreed to

<sup>1352</sup> See *infra*, paras 24-47 *et seq.*

<sup>1353</sup> [1974] 1 W.L.R. 719.

<sup>1354</sup> He held that the principle had been established in the following cases: *Russell v. Russell* (1880) 14 Ch.D. 471; *Walmsley v. White* (1892) 40 W.R. 675; *Vawdrey v. Simpson* [1896] 1 Ch. 166; *Olver v. Hillier* [1959] 1 W.L.R. 551. Note that, in *Hutchinson v. Whitfield* (1830) 78, where there was a provision that the partnership could only be dissolved by deed, it was held that a reference by deed and a subsequent award under seal dissolving the partnership did bring about a dissolution, even though the reference did not mention dissolution. The decision is an extraordinary one and is unlikely to be of any general application.

<sup>1355</sup> *Cooker v. Catchpole* (1864) 10 Jr.(N.S.) 1068; *Joplin v. Postelthwaite* (1889) 61 L.T.(N.S.) 629; *Turnell v. Sanderson* (1891) 64 L.T.(N.S.) 654 (disapproved by Goff J. in *Phoenix v. Pope*, *supra*); *Barnes v. Youngs* [1898] 1 Ch. 414; note also the Scottish decision *Roxburgh v. Dinardo*, 1981 S.L.T. 291.

<sup>1356</sup> See the Arbitration Act 1996, s.9, *infra*, para. 10-274.

<sup>1357</sup> [2004] EWHC 3407 (Ch) (Lawtel 10/12/04).

<sup>1358</sup> See *Econet Satellite Services Ltd. v. Vee Networks Ltd.* [2006] 2 All E.R. (Comm) 1000, although this decision turned on the terms of the UNCITRAL rules. A more liberal approach was adopted *Norscot Rig Management Pvt Ltd. v. Essar Oilfields Services Ltd.*, *supra*. Inevitably, the ultimate decision will turn on the terms of the arbitration clause.

<sup>1359</sup> The forerunner of the Arbitration Acts 1889 and 1950 and, now, the Arbitration Act 1996.

10-273

### Actions for damages

12-95 Whilst section 10 of the Partnership Act 1890 clearly establishes the liability of the firm for damages in respect of a fraud committed by a partner in the ordinary course of its business,<sup>364</sup> it is still necessary to prove an *actionable* fraud.<sup>365</sup> Constructive fraud, *i.e.* a combination of a false statement made innocently by one partner and knowledge of the true facts on the part of another partner, is not sufficient<sup>366</sup>; moreover, it would seem that damages on the basis of innocent misrepresentation would not be recoverable in such a case.<sup>367</sup> Where, however, one partner, who knows the true facts, expressly authorises another partner, who has no such knowledge, to make a false statement,<sup>368</sup> or deliberately stands by in the knowledge, expectation or hope that he will make such a statement, that statement, although made innocently, would be treated as a fraudulent misrepresentation made by the firm.<sup>369</sup> Similarly, where the partner who makes the statement is reckless in not consulting his co-partners before doing so.<sup>370</sup>

### Other remedies

12-96 Lord Lindley observed that:

"... there is no doubt that a firm can be compelled to restore property, or refund money, obtained by it by the misrepresentation of one of its members. Nor in such a case is it necessary to prove that the misrepresentation was fraudulent as well as false."<sup>371</sup>

Thus, in *Rapp v. Latham*,<sup>372</sup> Parry, who was the active partner in a firm of wine and spirit merchants, had received a substantial sum of money from a customer

<sup>364</sup> In such a case, the firm will be liable to the same extent as the partner responsible for the fraud. See *supra*, para. 12-89. It should be noted that, whilst Lord Lindley, writing in the Supplement to the 5th ed. of this work, said of the section: "... it removes the doubt as to whether a firm is or is not liable in an action of damages for the fraud of one of its members, if committed by him in the ordinary course of the business of the firm, by making the firm liable in every case in which the partner himself is liable", in subsequent editions the same view was expressed more tentatively, namely, that the section "seems clearly to make a firm liable....".

<sup>365</sup> In *Scarborough Building Society v. Howes Percival* (1998) 76 P. & C.R. D4 (CA), a partner in a firm of solicitors had participated in a conspiracy to defraud, but this was treated as a case of tort rather than fraud. It is interesting to note that Roch L.J. cited *National Commercial Banking Corporation of Australia Ltd. v. Batty* (1986) 65 A.L.R. 385 as "authority for the proposition that the mere fact that an act of a partner is fraudulent will not of itself take that act out of the normal course of his firm's business". Were the position otherwise, there would be little scope for liability under s.10.

<sup>366</sup> See *Armstrong v. Strain* [1952] 1 K.B. 232, where an unsuccessful attempt was made to prove fraud by linking an innocent misrepresentation as to the state of a property made by an agent on behalf of the owner (but without his knowledge) with the owner's awareness of the true state of the property. And see also *supra*, para. 12-28.

<sup>367</sup> The Misrepresentation Act 1967, s.2(1) gives a remedy only where damages would have been recoverable if the misrepresentation had been made fraudulently, which for the above reasons they would not. *Quaere*, could the firm in any event rely on the reasonable belief of the partner who made the statement? Having regard to the terms of the Partnership Act 1890, s.10, the current editor tentatively submits that it could.

<sup>368</sup> See *London County Freehold Properties Ltd. v. Berkeley Property Investment Co. Ltd.* [1936] 2 All E.R. 1039.

<sup>369</sup> See *Ludgater v. Love* (1881) 44 L.T. 694.

<sup>370</sup> See *Armstrong v. Strain* [1952] 1 K.B. 232, 244 *per* Singleton L.J. See also *supra*, n. 366.

<sup>371</sup> See *Arkwright v. Newbold* (1880) 17 Ch.D. 301; *Redgrave v. Hurd* (1881) 20 Ch.D. 1.

<sup>372</sup> (1819) 2 B. & A. 795.

to be applied in the purchase and sale of wine. He falsely and fraudulently represented that he was carrying out various transactions on the customer's behalf and accounted to him for the supposed proceeds. There was, however, a considerable sum unaccounted for, which Parry alleged had been invested in the purchase of wine. The customer sought to recover this amount against Parry and his partner, Latham. Notwithstanding an attempt by Latham to argue that he was not affected by Parry's fraud, on the basis that the fictitious purchases and sales were not made in the ordinary course of trade and were, therefore, not partnership transactions, it was held that Latham was liable to the customer. The decisions in *Lovell v. Hicks*<sup>373</sup> and *Blair v. Bromley*<sup>374</sup> are to the same effect.

### False accounts rendered by partner

The cases cited in the previous paragraph would appear to demonstrate that a false and fraudulent account rendered by a partner, in the name of the firm and within the scope of its business, would have bound all the partners even prior to the Partnership Act 1890<sup>375</sup> and there is no reason to suppose that the current position is any different, having regard to the provisions of sections 10 and 15 of that Act.<sup>376</sup>

### Cases where the firm is not liable

#### Statute of Frauds Amendment Act 1828, section 6

By section 6 of the Statute of Frauds Amendment Act 1828, a firm is not liable for a false and fraudulent representation as to the character or solvency of any person unless the representation is in writing and signed by all the partners.<sup>377</sup> It has been decided that the signature of one partner in the firm name will not bind any partner other than himself<sup>378</sup> and it is submitted that the same decision would still be reached today, notwithstanding the terms of section 10 of the Partnership Act 1890.<sup>379</sup>

<sup>373</sup> (1837) 2 Y. & C.Ex. 472.

<sup>374</sup> (1847) 2 Ph. 354. Lord Lindley pointed out that the case "was in fact decided by the Lord Chancellor [*Lord Cottenham*] expressly upon the ground that persons who, having a duty to perform, present to those who are interested in the performance of it that it has been performed, make themselves responsible for all the consequences of non-performance; and as one partner may bind another as to any matter within the limits of their joint business, so he may by an act which, though not constituting a contract by itself, is on equitable principles considered as having all the consequences of one". See also, as to this case *infra*, para. 12-119. And see *Moore v. Knight* [1891] 1 Ch. 547.

<sup>375</sup> Lord Lindley put it very tentatively: "Whether accounts, rendered by one partner in the name of the firm and showing that money is in the hands of the firm when in truth he has misapplied it, are to be treated as representations of the firm, is a question which has given rise to much discussion and upon which the cases are not uniform. But on the whole it is conceived that if the accounts relate to matters within the scope of the partnership business the firm is bound by them." He also referred to *Devaynes v. Noble, Baring's Case* (1816) 1 Mer. 611; *Marsh v. Keating* (1834) 2 Cl. & F. 250; *De Ribeyre v. Barclay* (1857) 23 Beav. 107, contrasting those decisions with *Hume v. Bolland* (1832) 1 Cramp. & M. 130 and *Sims v. Brutton* (1850) 5 Ex. 802, noted *infra*, para. 12-111.

<sup>376</sup> See *supra*, paras 12-21, 12-88.

<sup>377</sup> See as to the scope of the section, *Banbury v. Bank of Montreal* [1918] A.C. 626; also *Diamond v. Bank of London and Montreal Ltd.* [1979] Q.B. 333.

<sup>378</sup> See *Williams v. Mason* (1873) 28 L.T.(N.S.) 232; *Swift v. Jewsbury* (1874) L.R. 9 Q.B. 301; *Hirst v. West Riding Union Banking Co.* [1901] 2 K.B. 560.

<sup>379</sup> See *Keen v. Mear* [1920] 2 Ch. 574, a decision which turned on the application of the Partnership Act 1890, s.5 and the Statute of Frauds 1677, s.4 (it being held that the former section did not override the provisions of the latter).

12-97

12-98



was issued, unless he acknowledged service as a partner or was served with the proceedings as a partner within or, with permission,<sup>334</sup> outside the jurisdiction.<sup>335</sup> What is, however, unclear is whether the judgment can be executed against a non-resident on whom the claim form was served outside the jurisdiction in a case where permission was *not* required,<sup>336</sup> although the better view must be that the permission of the court is required in such a case.<sup>337</sup>

#### Execution with permission, etc.

**14-92** Subject to the exceptions noted above, execution can only issue against the separate estate of any other partner with the permission of the court.<sup>338</sup> If, on the hearing of the judgment creditor's application for such permission, a dispute as to liability arises, *e.g.* in a case of alleged holding out,<sup>339</sup> the court can, as under the old rules, direct a trial of that issue.<sup>340</sup> The above procedure is, however, optional: the judgment creditor may, if he wishes, bring a separate action against an alleged partner founded on the judgment in the previous action and, in due course, execute any judgment obtained therein.<sup>341</sup>

It is no longer necessary to obtain permission to execute a judgment obtained by one firm against another, if they share one or more members in common, provided that one of the conditions set out in the preceding paragraph is satisfied.<sup>342</sup>

#### Receiver already appointed

**14-93** Where the court has already appointed a receiver in respect of the partnership assets,<sup>343</sup> permission to issue execution must be obtained in that action.<sup>344</sup> In an appropriate case, the receiver will be directed to pay the judgment creditor out of moneys coming into his hands<sup>345</sup> or the judgment creditor will be given a charge on such moneys for his debt and costs.<sup>346</sup>

<sup>334</sup> See *supra*, para. 14-18.

<sup>335</sup> CPR 70PD, para. 6A.3, *infra*, para. A2-09.

<sup>336</sup> *i.e.* under *ibid.* r. 6.33 (as amended by the Civil Jurisdiction and Judgments Regulations 2009, regs. 30, 31).

<sup>337</sup> As noted *supra*, para. 14-21, it would seem that the requirements of *ibid.* 70PD, paras 6A.2 and 6A.3 are, by definition, not satisfied so that *ibid.* para. 6A.4 would apply.

<sup>338</sup> CPR 70PD, para. 6A.4, *infra*, para. A2-09. The application for permission will be made under CPR Pt 23. See also *Davis v. Morris* (1883) 10 Q.B.D. 436.

<sup>339</sup> See, generally, the Partnership Act 1890, s.14, *supra*, paras 5-35 *et seq.*

<sup>340</sup> See *Davis v. Hyman & Co.* [1903] 1 K.B. 854. This is, however, no longer specifically provided for in the CPR; *cf.* RSC Ord. 81, r. 5(5).

<sup>341</sup> *Clark v. Cullen* (1882) 9 Q.B.D. 355.

<sup>342</sup> RSC Ord. 81, r. 6(1)(b) has not been replicated in the current rules on enforcement.

<sup>343</sup> See *infra*, paras 23-153 *et seq.*

<sup>344</sup> The current editor does not believe that this requirement has altered under the CPR.

<sup>345</sup> *Mitchell v. Weise* [1892] W.N. 139.

<sup>346</sup> *Kewney v. Attrill* (1886) 34 Ch.D. 345. Such a charging order gives the judgment creditor priority over the general body of creditors in the application of the partnership assets: *Newport v. Pougher* [1937] 1 Ch. 214. *Quaere*, would such an order be set aside as a transaction at an undervalue (within the meaning of the Insolvency Act 1986, ss.239, 339) on the application of the trustee in bankruptcy or liquidator of an insolvent partner? It is tentatively thought not: see *Re Gershon & Levy* [1915] 2 K.B. 527 (a decision under the Bankruptcy Act 1914, s.45).

#### Amending judgment with a view to execution

If proceedings have been commenced against a firm in the firm name but have at all times been treated as brought against an individual defendant trading under that name,<sup>347</sup> the court will not, once judgment by consent has been obtained in the latter form and execution levied against the defendant, amend that judgment into a judgment against the firm, with a view to enabling the claimant to issue execution against someone whom he has since discovered to be a partner.<sup>348</sup>

#### Third party debt orders

An interim or final third party debt order<sup>349</sup> may be made against a firm carrying on business within the jurisdiction, even if one or more of the partners are resident outside the jurisdiction.<sup>350</sup> However, the interim order must be served on a partner within the jurisdiction, a person authorised by a partner to accept service or on some other person who has control or management of the partnership business.<sup>351</sup> Where the firm is required to appear on a hearing fixed to consider whether a final order should be made, it can appear by any partner.<sup>352</sup>

#### Charging orders

A charging order can be made against any partnership property within the jurisdiction.<sup>353</sup> The interim charging order must again be served on a partner within the jurisdiction, a person authorised by a partner to accept service or on some other person who has control or management of the partnership business.<sup>354</sup> Where an order requires the firm to appear before the court, it can appear by any partner.<sup>355</sup>

#### (b) Manner of Execution

Where a judgment has been obtained against two or more partners jointly, a writ of execution should be issued against all of those partners,<sup>356</sup> even though it may be levied on any one or more of them.<sup>357</sup> Lord Lindley pointed out:

<sup>347</sup> *i.e.* as if brought under CPR 7APD, para. 5C.2, *infra*, para. A2-06.

<sup>348</sup> *Munster v. Cox* (1885) 10 App.Cas. 680. Although this was a decision under the old rules of procedure, the current editor sees no reason why a court should adopt a different approach under the CPR.

<sup>349</sup> CPR rr.72.4, 72.8. This procedure replaced the former garnishee order. See, as to applications for an interim order, *ibid.* r. 72.4.

<sup>350</sup> This is no longer specifically stated in *ibid.* Pt. 72 but must follow from *ibid.* 72PD, para. 3A.2(1), *infra*, para. A2-10; *cf.* RSC Ord. 81, r. 7(1).

<sup>351</sup> *ibid.* 72PD, para. 3A.2, *infra*, para. A2-10. *Semble* service on a person who was merely held out as a partner and has not been found to be a partner will not suffice. Note that service under *ibid.* para. 3A.2(3) need not be at the firm's principal place of business, unlike the position under *ibid.* r. 6.5(3)(c)(ii), *infra*, para. A2-01 and noticed *supra*, para. 14-14.

<sup>352</sup> *ibid.* 72PD, para. 3A.2, *infra*, para. A2-10.

<sup>353</sup> *ibid.* 73PD, para. 4A.1, *infra*, para. A2-12.

<sup>354</sup> *ibid.* para. 4A.2, *infra*, para. A2-12. And note also *supra*, para. 14-95, n. 351.

<sup>355</sup> *ibid.* para. 4A.3, *infra*, para. A2-12.

<sup>356</sup> See *Penoyer v. Brace* (1698) 1 Lord Ray. 244; *Clarke v. Clement* (1796) 6 T.R. 526; 2 Wms.Saund. 72, 1; Bac.Ab.Exec.G. 1.

<sup>357</sup> See *Abbot v. Smith* (1760) Wm.Blacks 974, 949 *per* De Gray C.J.; also *Herries v. Jamieson* (1794) 5 T.R. 553, 556 *per* Lord Kenyon.

court will have regard only to the external perspective and will not concern itself with the internal financial arrangements between the partners; *sed quaere*.

19-66

Be that as it may, there is no doubt that the doctrine of constructive trusts remains unaffected by the statutory provisions referred to in the preceding paragraph.<sup>256</sup> Thus, if the assignment were effected verbally and the assignee were then admitted to the partnership and treated as entitled to the assignor's share, it is difficult to see why a constructive trust should not arise in the former's favour.<sup>257</sup>

The application of stamp duty land tax to various partnership transactions has, of course, reduced the importance of the issues canvassed above, since the existence or otherwise of a document evidencing an assignment is no longer determinative of whether a charge to tax can be imposed.<sup>258</sup> Equally, there is now little scope for SDLT to be charged on the transfer of a partnership share.<sup>259</sup>

Since a transfer of a share does not normally affect the assigning partner's continued membership of the firm,<sup>260</sup> there will be no impact on the *legal* title to any partnership assets which may be vested in him on trust for the firm. The position may, however, be different where the transfer is linked to the partner's retirement from the firm, when it may be necessary, *as a wholly separate matter*, to ensure that he also gives up his trusteeship and vests the relevant assets in one or more of the continuing partners.<sup>261</sup>

<sup>256</sup> Law of Property Act 1925, s.53(2); Law of Property (Miscellaneous Provisions) Act 1989, s.2(5)

<sup>257</sup> For an analogous situation which did not involve a partnership, see *Hameed v. Qyyum* [2009] B.P.I.R. 35.

<sup>258</sup> See further, *infra*, paras 38-02 *et seq.*

<sup>259</sup> See *infra*, paras 38-12 *et seq.* Note also, as to the treatment of such a transfer for value added tax purposes, *infra*, paras 37-27, 37-28.

<sup>260</sup> See *supra*, paras 10-110, 19-57.

<sup>261</sup> This will usually be secured pursuant to the so called "further assurance" obligation: see *supra*, para. 10-244.

## THE FINANCIAL RIGHTS AND DUTIES OF A PARTNER

In taking partnership accounts it is necessary to differentiate between those expenses and losses which, as between the partners, are chargeable to the firm and those which are properly chargeable to one or more of the partners on an individual basis. Once the expenses and losses of the former class have been identified, it must be determined in what shares they are to be borne by the partners. This chapter is devoted to a consideration of these and other related issues which must be addressed when ascertaining a partner's financial rights and duties *vis-à-vis* his co-partners.

20-01

### The fundamental principles

Writing prior to the Act, Lord Lindley observed that the following principles form the basis for this branch of partnership law:

20-02

"... it must always be borne in mind that every member of an ordinary firm is, to a certain extent, both a principal and an agent. He is liable as a principal to the debts and engagements of the firm, and in respect of them he is entitled to contribution from his co-partners; for they have no right to throw on him alone the burden of obligations which, *ex hypothesi*, are theirs as much as his.<sup>1</sup> Again, each member as an agent of the firm is entitled to be indemnified by the firm against losses and expenses bona fide incurred by him for the benefit of the firm, whilst pursuing the authority conferred upon him by the agreement entered into between himself and his co-partners.<sup>2</sup> On the other hand, a partner has no right to charge the firm with losses or expenses incurred by his own negligence or want of skill, or in disregard of the authority reposed in him."<sup>3</sup>

### Partnership Act 1890, section 24

The above principles are clearly reflected in section 24 of the Partnership Act 1890 which, so far as material, provides as follows:

20-03

"24. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:

- (1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

<sup>1</sup> See *Lefroy v. Gore* (1844) 1 Jo. La T. 571; *Spottiswoode's Case* (1855) 6 De G.M. & G. 345; *Robinson's Case* (1856) 6 De G.M. & G. 572.

<sup>2</sup> See further, as to such agency, *supra*, paras 12-01 *et seq.*

<sup>3</sup> *Bury v. Allen* (1845) 1 Colly. 589; *Thomas v. Atherton* (1878) 10 Ch.D. 185. See further *infra*, paras 20-10 *et seq.*

would serve no useful purpose.<sup>282</sup> In such an action, it will, of course, be open to the defendant partner to show that the money is his or even that a larger sum is due to him. In one case, the court even short circuited the normal procedure and proceeded straight to the identification of objections, rather than starting the accounting process *ab initio*.<sup>283</sup> An area where there is, however, considerably more doubt is the availability of an account in the case of a breach of a restraint covenant by a former partner, although the better view appears to be that such a remedy will, in an appropriate case, be available.<sup>284</sup>

Where, on the other hand, a claim is made by one partner against another in some other capacity, e.g. as trustee, this principle may not apply. Such was the position in *Hurst v. Bennett*.<sup>285</sup> There, following a dissolution,<sup>286</sup> four partners who were trustees of the firm's lease sought to enforce an express indemnity against one of the other partners (H) by means of a statutory demand. An attempt to have the statutory demand set aside<sup>287</sup> on the basis that money might be due to H on the taking of dissolution accounts was rejected.<sup>288</sup>

### Other persons entitled to an account

23-77 *Assignee/mortgagee of share*: An assignee or mortgagee of a partnership share will, so long as the partnership continues, have no right to seek an account of partnership transactions.<sup>289</sup> However, once the partnership has been dissolved, he will be entitled to an account as from the date of dissolution.<sup>290</sup> Where, unusually, a partner has an express right to assign his share and thereby to constitute the

<sup>282</sup> See *Brown v. Rivlin*, unreported, February 1, 1983 (C.A.T. No. 56); [1984] C.L.Y., p. 138; *Marshall v. Bullock*, *supra*. *Hurst v. Bryk*, *supra*, is another example: there, at first instance, Carnwath J. refused to order accounts *inter alia* on the basis that detailed accounts had been prepared by the partnership accountants and the claimant had failed to take any substantial objection thereto: see *supra*, para. 23-75. See also the observations of the Court of Appeal in the subsequent proceedings, *Hurst v. Bennett* [2001] B.P.I.R. 287 at [45], [49], [56].

<sup>283</sup> *Montgomery v. Cameron & Greig* [2007] CSOH 63 (OH) at [35], [36] *per Lord Reed*.

<sup>284</sup> See *supra*, para. 10-235.

<sup>285</sup> [2001] B.P.I.R. 287 (CA).

<sup>286</sup> As to the circumstances in which the partnership came to be dissolved, see *Hurst v. Bryk* [2002] 1 A.C. 185 (HL).

<sup>287</sup> Under the Insolvency Rules 1986, r. 6.5(4)(a).

<sup>288</sup> In terms of the establishment of a general principle, the decision is not entirely satisfactory. The trustee partners relied on an express indemnity given in their favour by the firm, i.e. all the partners including themselves: see also *Hurst v. Bryk* [2002] 1 A.C. 185, 196-197 *per Lord Millett*. Three special factors were in operation, namely: (1) in earlier proceedings, Carnwath J. had, in fact, determined H's percentage share of the firm's debts and liabilities, including, in particular, the rent under the lease, although this appears not to have been a final determination (see [2001] B.P.I.R. 287 at [22], [31] *per Arden L.J.*); (2) there was at least some doubt whether dissolution accounts could still be taken (*ibid.* at [17] *per Arden L.J.*, [50] *per Sir Christopher Staughton*, [56] *per Peter Gibson L.J.*); and (3) the court appears to have thought it unlikely that any sums would ultimately be due to H, even if dissolution accounts were taken (*ibid.* at [41], [42] *per Arden L.J.*, [49] *per Sir Christopher Staughton*), [56] *per Peter Gibson L.J.*). Had the position been otherwise, the decision might have resulted in a grave injustice to H. It is not possible simply to ignore the trustee partners' own obligation to bear a share of the rent. If, on the taking of the accounts, it had been found that, in net terms, they owed money to H, but H had nevertheless been forced to pay them his share of the rent *qua* trustees, the result would have been insupportable. *A fortiori*, if the trustees were made bankrupt in the meantime, as was alleged to be a possibility: *ibid.* [29].

<sup>289</sup> Partnership Act 1890, s.31(1), *supra*, paras 19-51 *et seq.* And see also, as to the rights of a creditor who has obtained a charging order over a partner's share, *ibid.* s.23, *supra*, paras 19-37 *et seq.*

<sup>290</sup> *ibid.* s.31(2); and see *supra*, para. 19-56.

assignee as a partner in his place,<sup>291</sup> the assignee will be entitled to an account from the other partners.<sup>292</sup>

*Creditors, legatees, etc. of deceased partner*: Although a partnership creditor can, in effect, seek an account of a deceased partner's share as against his personal representatives and the surviving partners, with a view to obtaining payment out of the estate,<sup>293</sup> the deceased's separate creditors, legatees and next-of-kin do not enjoy an equivalent right. Their only remedy lies against the personal representatives, unless the latter have colluded with the surviving partners or are otherwise unable or unwilling to seek an account from them.<sup>294</sup>

*Employee*: An employee who is remunerated by means of a share of profits, e.g. a salaried "partner",<sup>295</sup> has a right to an account.<sup>296</sup> 23-78

*Personal representatives*: An account may be sought by or against the personal representatives of a deceased partner.<sup>297</sup>

*Sub-partner*: A sub-partner will have no right to an account against the head partnership or any member of it, other than the person with whom he is in partnership.<sup>298</sup>

*Trustee in bankruptcy/liquidator*: An account may be sought by or against the trustee or liquidator of an insolvent partner.<sup>299</sup>

### Scope of account

The scope of the account will naturally vary according to the subject matter of the dispute. Lord Lindley explained: 23-79

"The account which a partner may seek to have taken, may be either a general account of the dealings and transactions of the firm, with a view to a winding up of the partnership; or a more limited account, directed to some particular transaction as to which a dispute has arisen."

<sup>291</sup> See *supra*, paras 19-60 *et seq.*; also, *supra*, paras 10-258 *et seq.*

<sup>292</sup> See *Fawcett v. Whitehouse* (1829) 1 R. & M. 132, 148 *per Lord Lyndhurst L.C.*; *Redmayne v. Forster* (1866) L.R. 2 Eq. 467.

<sup>293</sup> *Wilkinson v. Henderson* (1833) 1 M. & K. 582. See also *infra*, paras 26-32 *et seq.*

<sup>294</sup> See *infra*, para. 26-34.

<sup>295</sup> See further, as to the status of such "partners", *supra*, para. 5-54.

<sup>296</sup> See *Harrington v. Churchward* (1860) 6 Jur.(N.S.) 576; *Turner v. Bayley* (1864) 4 De G.J. & S. 332; *Rishton v. Grissell* (1870) L.R. 10 Eq. 393. Although Lord Lindley expressed an unqualified view in favour of such a person's right (*qua* employee) to an account, the terms of Bovill's Act left some room for doubt; no such doubt persists under the Partnership Act 1890, s.2(3)(b), *supra*, para. 5-02. *Semble*, there will be no right to an account if the salaried partner's entitlement is to a fixed sum payable out of profits.

<sup>297</sup> *Heyne v. Middlemore* (1665) 1 Rep. Ch. 138; *Hackwell v. Eustman* (1616) Cro.Jac. 410; *Beaumont v. Grover* (1701) 1 Eq.Ab. 8, pl. 7; *Addis v. Knight* (1817) 2 Mer. 117.

<sup>298</sup> *Raymond's case*, cited in *Ex p. Barrow* (1815) 2 Rose 252, 255; *Brown v. De Tastet* (1819) Jac.

<sup>299</sup> *Raymond's case*, cited in *Ex p. Barrow* (1815) 2 Rose 252, 255; *Brown v. De Tastet* (1819) Jac.

<sup>299</sup> See *Addis v. Knight* (1817) 2 Mer. 117; *Wilson v. Greenwood* (1818) 1 Swan. 471.

24-03 In contrast, the expression "general" dissolution is used to denote a dissolution involving a full scale winding up, which may well have been brought about at the instance of one partner, against the wishes of the others. When a firm is referred to as "in dissolution", this usually indicates that a general dissolution has taken place, but that the winding up of its affairs is still continuing. Once the winding up is complete and the accounts are finally settled as between the partners,<sup>8</sup> there will be nothing left which could properly be referred to as a partnership, whether in dissolution or otherwise.

The above distinction between a technical and a general dissolution was accepted without demur in *HLB Kidsons v. Lloyd's Underwriters*,<sup>9</sup> when considering the potential application of section 38 of the Partnership Act 1890<sup>10</sup> on a change in a firm.

This and subsequent chapters are primarily concerned with dissolution in the second sense.

### Causes of dissolution

24-04 The general dissolution of a partnership may be brought about in a number of well recognised ways, which can be classified into the following groups:

1. By mutual agreement of the partners. Thus, whatever duration may have been agreed at the outset, the partners can, if they so wish, bring the partnership to an end at an earlier date.<sup>11</sup> However, unanimity is a prerequisite.<sup>12</sup>
2. By the exercise of an express power to dissolve reserved by the agreement.<sup>13</sup>
3. By rescission for fraud or misrepresentation.<sup>14</sup>
4. By the service of notice or the occurrence of some other determining event prescribed by the Partnership Act 1890.<sup>15</sup> It should, however, be appreciated that the relevant provisions of the Act can, for the most part, be excluded by agreement.<sup>16</sup>
5. By order of a court of competent jurisdiction or, where relevant, by an arbitration award.<sup>17</sup>

<sup>8</sup> See *supra*, paras 23-74 *et seq.* and *infra*, paras 25-44 *et seq.*

<sup>9</sup> [2009] 1 All E.R. (Comm) 760 at [16] *per* Judge Mackie Q.C. sitting as a judge of the Chancery Division. Note that the distinction also appears not to have been challenged in *Summers v. Smith*, March 27, 2002 (Lawtel 2/4/02) at para. [65].

<sup>10</sup> See, as to this section *supra*, paras 13-61 *et seq.*

<sup>11</sup> If authority were required for this self evident proposition, reference should be made to the Partnership Act 1890, s.19, *supra*, para. 10-12. See also *infra*, para. 24-93.

<sup>12</sup> It is not possible for a majority to vary the terms of the partnership unless they have an express power so to do: see *supra*, para. 10-12. *cf.* the terms of the Partnership Act 1890, s.24(8), *supra*, paras 15-04 *et seq.*

<sup>13</sup> Such a power may be explicit in its terms (see *supra*, paras 10-137 *et seq.*) or may merely authorise a majority to take any decision in relation to the partnership's affairs, including the decision to dissolve (see *supra*, paras 10-102 *et seq.*).

<sup>14</sup> See *supra*, paras 23-52 *et seq.*

<sup>15</sup> *Ibid.* ss.26(1), 32-34, *infra*, paras 24-15 *et seq.*

<sup>16</sup> Partnership Act 1890, s.19, *supra*, para. 10-12; see also *infra*, paras 24-15, 24-19, 24-30, 24-32. It is, however, impossible to exclude *ibid.* s.34, even though the practical effects of that section may be avoided: see *infra*, paras 24-44, 24-45.

<sup>17</sup> Partnership Act 1890, s.35, *infra*, paras 24-47 *et seq.* As to the power of an arbitrator to order a dissolution, see *supra*, para. 10-272.

Subsequent sections of this chapter principally concentrate on dissolutions brought about in the fifth and sixth ways.

### The doctrine of repudiation

#### Application of the doctrine

24-05 Whether a partnership could be dissolved by an innocent partner's acceptance of his partners' repudiatory breach of the partnership terms had been a vexed issue for many years and has only relatively recently been resolved in favour of the proposition that the doctrine does *not* apply,<sup>18</sup> even though some doubts and difficulties remain.<sup>19</sup>

Although it is clear that partnership is a relationship which arises out of an agreement (express or implied),<sup>20</sup> it is fair to say that the editors of this work had, over the years, expressed doubts as to whether the normal contractual doctrine of repudiation would have any application in a partnership context.<sup>21</sup> Such doubts were, however, emphatically rejected by Harman J. in *Hitchman v. Crouch Butler Savage Associates*,<sup>22</sup> where he held that the doctrine applied to partnership agreements in the same way as to other contracts, and the application of the doctrine also appeared to have been recognised by Nourse J. in *Fulwell v. Bragg*.<sup>23</sup>

It therefore came as no particular surprise that, when *Hurst v. Bryk*<sup>24</sup> came before Carnwath J. and the Court of Appeal, it was common ground between the partners that the doctrine *was* applicable<sup>25</sup> and, moreover, that acceptance of a repudiatory breach would bring about a dissolution of the firm.<sup>26</sup> In that case, all the partners bar one<sup>27</sup> had served notice to retire from the firm with effect from May 31, 1991. It was held that, as a matter of construction, the partnership would have been dissolved at the expiration of those notices.<sup>28</sup> The defendants nevertheless decided to bring the partnership to an end at an earlier date and, without the claimant's consent, they all executed an agreement which provided for the dissolution of the firm as at October 31, 1990 and then purported to carry that agreement into effect. These actions were held to be a repudiation of the partnership agreement which the claimant was entitled to, and did, accept and this part of the decision was not challenged in the House of Lords.<sup>29</sup> The more contentious question was whether the claimant was, by virtue of his acceptance

<sup>18</sup> *Hurst v. Bryk* [2002] 1 A.C. 185 (HL); *Mullins v. Laughton* [2003] Ch. 250, noted *infra*.

<sup>19</sup> See *infra*, paras 24-07, 24-08.

<sup>20</sup> *Hurst v. Bryk*, *supra*, p. 194 *per* Lord Millett. Although he rightly pointed out that the Partnership Act 1890, s.1 makes no reference to contract (see *ibid.*), this does, perhaps, ignore Lord Lindley's analysis of what lies at the heart of the relationship: see *supra*, paras 2-07, 2-15.

<sup>21</sup> Indeed, Lord Millett in *Hurst v. Bryk*, *supra*, referred to this fact at p. 194.

<sup>22</sup> (1983) L.S. Gaz. 550 (judgment being delivered on November 19, 1982). It should be noted that an appeal from this decision was, ultimately, allowed on other grounds: see (1983) 127 S.J. 441 and *supra*, para. 10-123.

<sup>23</sup> (1983) 127 S.J. 171 (judgment being delivered on December 23, 1982).

<sup>24</sup> [1999] Ch. 1 (CA). The decision of Carnwath J. is not reported.

<sup>25</sup> See [1999] Ch. 9 *per* Peter Gibson L.J.

<sup>26</sup> It is clear that this point was not argued: see *ibid.* pp. 3, 4.

<sup>27</sup> Not, ironically, the claimant.

<sup>28</sup> See [1999] Ch. 9-10 *per* Peter Gibson L.J.

<sup>29</sup> See [2002] 1 A.C. 196.

**Capital profits**

25-32 Section 42(1) of the Partnership Act 1890 has no application where the profits realised by the continuing or surviving partners are of a *capital* nature. This was established in *Barclays Bank Trust Co. Ltd v. Bluff*.<sup>123</sup> There a father and son carried on a farming business in partnership. The father died, thus dissolving the firm. There was a substantial delay in winding up the partnership affairs, during which time the son continued to carry on the business and the value of the farm appreciated considerably. It was held that the father's executor was entitled, at its election, to interest at the rate of five per cent on the father's share of the partnership assets or to a share of the profits accruing in the ordinary course of carrying on the business since the date of death, *i.e.* profits arising from the use of the farm land and buildings, but that those profits did not include any capital profits which might be realised on a sale of the land and buildings, to a share of which the father's estate was entitled quite apart from the provisions of section 42.<sup>124</sup> It should, however, be noted that the position might have been different if the land and buildings had been trading stock.<sup>125</sup>

To the same effect was the decision in *Emerson v. Estate of Emerson*,<sup>126</sup> where it was held that compensation received for the slaughter of livestock following the outbreak of foot and mouth disease constituted capital profits, so that section 42 had no application.

**Remuneration for services**

25-33 Prior to the Partnership Act 1890, Lord Lindley pointed out that:

"... in taking an account of subsequent profits, the partner by whose exertions they have been made is usually allowed compensation for his trouble,<sup>127</sup> unless he is, in the proper sense of the word, a trustee, and guilty of a breach of trust, when no such compensation is allowed."<sup>128</sup>

<sup>123</sup> [1982] Ch. 172, where the unsatisfactory Irish decision of *Meagher v. Meagher* [1961] I.R. 96 was distinguished. The facts in *Meagher v. Meagher* were similar to those in *Barclays Bank Trust Co. Ltd v. Bluff*, save that the premises in question were part of the trading stock of the firm and had been sold prior to the action. The Supreme Court of Eire held that: (1) the value of the deceased partner's share at the date of dissolution should be based on the actual proceeds of sale with such deductions as the facts might justify; (2) the increased value of the assets should be treated as profits; and (3) any interest payable under the Partnership Act 1890, s.42(1) should be calculated on the value of the deceased partner's share as at the date of his death. However, the difficulties inherent in the decision were avoided when it came to the point of ascertaining the value of the deceased partner's share, since the court made no attempt to separate the capital and profit elements therein.

<sup>124</sup> See also *Chandrouite v. Gajadhar* [1987] A.C. 147 (PC); *Popat v. Shonchhatra* [1997] 1 W.L.R. 1367 (CA); *Sandhu v. Gill* [2005] 1 W.L.R. 1979 at [7] and [2006] Ch. 456 (CA) at [10] *per* Neuberger L.J. and [102] *per* Mummery L.J. *cf.* the position of a retired partner: see *Sobell v. Boston* [1975] 1 W.L.R. 1587.

<sup>125</sup> See [1982] Ch. 172, 183 *per* H.E. Francis Q.C. (sitting as a deputy judge of the Chancery Division).

<sup>126</sup> [2004] 1 B.C.L.C. 575 (CA).

<sup>127</sup> *Brown v. De Tastet* (1819) Jac. 284; *Yates v. Finn* (1880) 13 Ch.D. 839. See also *Cook v. Collingridge* (1822) Jac. 623; *Featherstonhaugh v. Turner* (1858) 25 Beav. 382; *Mellersh v. Keen* (1859) 27 Beav. 236.

<sup>128</sup> *Burden v. Burden* (1813) 1 Ves. & Bea. 170; *Stocken v. Dawson* (1843) 6 Beav. 371 and (1848) 17 L.J.Ch. 282. But see *Cook v. Collingridge* (1822) Jac. 607, 622-623 *per* Lord Eldon.

Such an allowance is still afforded where an order is made under section 42.<sup>129</sup>

**Election to take interest in lieu of profits**

25-34 If a claim to a share of profits is not sustainable<sup>130</sup> or the outgoing partner or his estate so elects, simple interest will be payable at the rate of five per cent, a rate which has remained unchanged over the years.<sup>131</sup>

An election for the payment of interest will not, of itself, deprive the outgoing partner or his estate of his rightful share of any increase in the value of the partnership assets (save, perhaps, for stock in trade) between the date of dissolution and the date of sale. This was clearly established in *Barclays Bank Trust Co. Ltd v. Bluff*.<sup>132</sup>

**Personal representatives unable to sue**

25-35 Although the rights conferred by section 42(1) of the Partnership Act 1890 ought properly to be enforced by the deceased partner's personal representatives, if this is not, for whatever reason, possible, the persons interested in his estate may do so.<sup>133</sup>

**Alien enemy**

25-36 Where a partnership is dissolved by the outbreak of war,<sup>134</sup> any partner who is treated as an alien enemy will not be deprived of his rights under section 42(1) of the Partnership Act 1890, but will not be in a position to enforce those rights until the hostilities are over.<sup>135</sup>

**Exclusion of right to profits**

25-37 It is clear that the right of election under section 42(1) of the Partnership Act 1890 may be excluded by the partnership agreement.<sup>136</sup> Moreover, it is also provided that the right to a share of profits is not available where the continuing

<sup>129</sup> See the Partnership Act 1890, s.46; *Page v. Ratcliffe* (1897) 75 L.T. 371; *Manley v. Sartori* [1927] 1 Ch. 157; *Popat v. Shonchhatra* [1995] 1 W.L.R. 908, 913H *per* Neuberger J. (this was not challenged in the Court of Appeal: see [1997] 1 W.L.R. 1367, 1373H-1374A); *Ryder v. Frohlich* [2004] NSWCA 472 at [202]; *Sandhu v. Gill* [2005] 1 W.L.R. 1979 at [10] and [2006] Ch. 456 (CA) at [8], [102]. See also *Castle v. Castle* [1951] G.L.R. 541. Equally, if there are no profits, there will be no option to take a share of profits and no allowance can be made: see *supra*, paras 25-26, 25-27. See also *Castle v. Castle* [1951] G.L.R. 541. Note that, whilst in *Emerson v. Estate of Emerson*, *supra*, an allowance was made in the amount of the loss borne by the surviving partner in carrying on the business, this was not a case falling with s.42.

<sup>130</sup> See *supra*, paras 25-26 *et seq.*

<sup>131</sup> It has been suggested that the rate should be increased: see *supra*, para. 25-30, n. 119.

<sup>132</sup> [1982] Ch. 172. See further, *supra*, para. 25-32.

<sup>133</sup> See *Travis v. Milne* (1851) 9 Hare 141; *Beningfield v. Baxter* (1887) 12 App.Cas. 167, 178-179.

And see *infra*, para. 26-34.

<sup>134</sup> See *supra*, paras 4-04 *et seq.*

<sup>135</sup> *Hugh Stevenson & Sons Ltd v. Aktiengesellschaft für Cartonnagen-Industrie* [1918] A.C. 239; *Gordon v. Gonda* [1955] 1 W.L.R. 885.

<sup>136</sup> The subsection contains the words "in the absence of any agreement to the contrary": see *supra*, para. 25-24.

amount so contributed.<sup>11</sup> An initial contribution must be made *immediately* upon entry into partnership<sup>12</sup> and may consist of cash<sup>13</sup> or property. Any contribution of property must be fairly and honestly valued, so that the requisite particulars can be submitted for registration purposes.<sup>14</sup> What is not possible is for two or more limited partners to make a *joint* capital contribution, unless it is clearly allocated between them and registered accordingly.<sup>15</sup>

### Change in liability of partners

- 29-05 Provided that the partnership at all times comprises at least one general partner and one limited partner,<sup>16</sup> any partner is free to change his status from general to limited partner or vice versa.<sup>17</sup>

### Capacity

- 29-06 Any person who has the capacity to become a partner in an ordinary firm<sup>18</sup> may enter into a limited partnership as either a general or a limited partner.

Although the Act of 1907 specifically provides that a body corporate may be a limited partner,<sup>19</sup> it does not extend the powers of such a body. However, even if a particular company's constitution does not, on its true construction, authorise it to become a limited partner, its *capacity* to do so will be unaffected.<sup>20</sup> There is no reason to suppose that a limited company cannot be a general partner<sup>21</sup>; indeed this is a common occurrence.<sup>22</sup>

### Business of the partnership

- 29-07 Any lawful business<sup>23</sup> which could be carried on by the members of an ordinary partnership without infringing any statute or rule of law may properly be carried on by a limited partnership. If it would be illegal for an unqualified

<sup>11</sup> *ibid.* s.4(2).

<sup>12</sup> See *MacCartaigh v. D* [1985] I.R. 73, where the limited partners did not contribute capital until some time after the date of their admission and, as a result, fell to be treated as general partners during the intervening period. But see also, *infra*, para. 30-07.

<sup>13</sup> A bank guarantee is not cash: *Rayner & Co. v. Rhodes* (1926) 24 L.L. Rep. 25.

<sup>14</sup> Limited Partnerships Act 1907, s.8A(2)(d) (as substituted by the Legislative Reform (Limited Partnerships) Order 2009, art. 5, as regards limited partnerships registered after October 1, 2009), *infra*, para. A3-09. See also the Perjury Act 1911, s.5 and *infra*, para. 29-24.

<sup>15</sup> The Limited Partnerships Act 1907, s.8A(2)(d) is very specific in referring to the "amount of the capital contribution of each limited partner". In its original form, *ibid.* s.8(g), referred to the "sum contributed by each limited partner". Were an undivided share in a joint capital sum to be contributed by two partners, it would be impossible to allocate it between them in the absence of some specific agreement. See also *ibid.* s.9(1)(f), *infra*, para. A3-12 and the Limited Partnerships (Forms) Rules 2009, Sched., Pt 1, Form LP5, *infra*, para. A4-04; also *infra*, para. 29-19. Equally, there is no reason why a joint capital account should not be maintained internally, although even this is not without its problems: see *supra*, para. 7-09.

<sup>16</sup> Limited Partnerships Act 1907, s.4(2), *infra*, para. A3-04.

<sup>17</sup> *ibid.* ss.9(1)(g), 10; *infra*, paras A3-12, A3-13; and see *infra*, paras 29-26, 29-28, 30-13.

<sup>18</sup> See *supra*, paras 4-01 *et seq.*

<sup>19</sup> Limited Partnerships Act 1907, s.4(4), *infra*, para. A3-04.

<sup>20</sup> Companies Act 2006, s.39(1). See further *supra*, para. 4-20.

<sup>21</sup> See *supra*, para. 11-07. *Quaere*: could it be argued that, because the Limited Partnerships Act 1907, s.4(4) expressly authorises a body corporate to be a *limited* partner, there is an implication that such a body may not be a general partner? In the view of the current editor, such an argument would not be sustained.

<sup>22</sup> See, for example, *Blythe Limited Partnership v. Customs & Excise Commissioners* [1999] S.T.I. 1178 (where both general and limited partners were companies).

<sup>23</sup> As to the meaning of the word "business", see the Limited Partnerships Act 1907, s.3 (*infra*, para. A3-03), applying the Partnership Act 1890, s.45. As to what businesses are lawful, see *supra*, paras 8-01 *et seq.*

person without more to be a member of the firm,<sup>24</sup> that illegality is unlikely to be cured by ensuring that he only participates in the business *qua* limited partner.

The general nature of the partnership business and any change therein must be registered.<sup>25</sup> Provided that this requirement is satisfied, there is no reason why a number of different businesses should not be carried on by the same firm.

### Commencement of business

It has already been seen that, for a partnership to exist, a business in common must be carried on, even though trading need not necessarily have commenced.<sup>26</sup> The question therefore arises whether a partnership must actually exist as such *before* it can seek registration under the 1907 Act. This is not entirely clear since the Act requires the application for registration to be signed or otherwise authenticated "by or on behalf of each partner"<sup>27</sup> and, as previously noted, to state the general nature of the partnership business,<sup>28</sup> which is certainly indicative of such a requirement, but also directs that the application be made to the registrar for the part of the UK "in which the principal place of business of the limited partnership is to be situated".<sup>29</sup> The latter reference is entirely logical as it is the principal place of business of the limited partnership, not any predecessor partnership which is in point.<sup>30</sup> Although prospective limited partners would doubtless be concerned if liabilities were to be incurred before registration (and their own limitation of liability) was in place, in practice, the issue is an academic one, since the registrar has not historically taken the point, even if it exists,<sup>31</sup> and seems unlikely to do so in future. Equally, it is the view of the current editor that, consistently with the approach adopted by the House of Lords in *Khan v. Miah*,<sup>32</sup> it could properly be said that the act of applying for registration is, in itself, a sufficient preparatory act to demonstrate that a business is being carried on and, thus, to satisfy the requirements of section 1(1) of the Partnership Act 1890.<sup>33</sup>

### Firm name

A limited partnership must have a firm name and that name and any change in it must be registered.<sup>34</sup>

<sup>24</sup> *e.g.* a dentists' or solicitors' partnership: see *supra*, paras 8-42, 8-52.

<sup>25</sup> Limited Partnerships Act 1907, ss.8A(2)(a) (as added by the Legislative Reform (Limited Partnerships) Order 2009, art. 5, as regards limited partnerships registered on or after October 1, 2009), 9(b), *infra*, paras A3-09, A3-12: see also *infra*, paras 29-19, 29-25.

<sup>26</sup> See *supra*, paras 2-02 *et seq.*

<sup>27</sup> Limited Partnerships Act 1907, s.8A(1)(c) (as added by *ibid.*), *infra*, para. A3-09. The original wording was "a statement signed by the partners": *ibid.* s.8.

<sup>28</sup> See *supra*, para. 29-07.

<sup>29</sup> Limited Partnerships Act 1907, s.8A(1)(d). The original wording in *ibid.* s.8 referred to the part of the UK in which the principal place of business "is situated or proposed to be situated". See further *infra*, para. 30-18.

<sup>30</sup> Similarly in the case of *ibid.* s.8C(4) (as added by the Legislative Reform (Limited Partnerships) Order 2009, art. 7, as regards limited partnerships registered on or after October 1, 2009), *infra*, para. A3-11, which provides that a certificate is conclusive evidence of the *existence* of a limited partnership, not of any predecessor firm.

<sup>31</sup> See *Blythe Limited Partnership v. Customs & Excise Commissioners* [1999] S.T.I. 1178, where the firm had clearly been registered before a partnership came into existence.

<sup>32</sup> [2000] 1 W.L.R. 2123. See further *supra*, paras 2-03, 13-20.

<sup>33</sup> See generally, *supra*, paras 2-01 *et seq.*

<sup>34</sup> Limited Partnerships Act 1907, ss.3, 8A(1)(a) (as added by the Legislative Reform (Limited Partnerships) Order 2009, art. 5, as regards limited partnerships registered after October 1, 2009), 9(1)(a), *infra*, paras A3-03, A3-09, A3-12. See also *infra*, paras 29-25, 29-26.

It naturally follows that the status of a firm's registration (or non-registration) may need to be reviewed following any change in its membership, depending on the nature of the partners' other business interests.<sup>55</sup> Equally, it may be incumbent on HMRC, when applying the above principles, to ensure that the identity of the true partners is ascertained, if necessary by making further enquiries: they could not properly insist on cancelling the registration of one firm because it appears to have the same composition as another firm, if there is evidence in their possession which indicates that the real position is otherwise.<sup>56</sup>

37-12 Since section 45(1) of the Value Added Tax Act 1994 is a permissive and procedural provision, a change in the name of a firm will not affect its registration (even though that change should be notified to HMRC)<sup>57</sup> nor the liability of the partners under an assessment made in the registered name. Thus, an assessment was upheld in *Scrace v. Revenue & Customs Commissioners*,<sup>58</sup> where the partners had been compulsorily registered in a name which was not in use during part of the period covered by the assessment.

Equally, it should be noted that registration of two or more persons as partners under the section does not, *per se*, mean that they are all to be treated as partners in law or render them liable as such. In *Revenue & Customs Commissioners v. Pal*,<sup>59</sup> four supposed partners had allowed their names to be entered on form VAT 2 and they had been registered on that basis. In the event, it was demonstrated that only two of them were actually partners in the business. It was held that, despite the registration, the two non-partners were not liable on an assessment issued against the four, whether on the basis of holding out<sup>60</sup> or otherwise. However, the assessment was held to be valid as against the two partners who had been properly registered as such. It follows that the dangers identified above could exist in a case where there appear to be two separate firms with different memberships but, on a true analysis, the actual partners in each firm are identical.

### Attempts to avoid registration

37-13 Given the position set out above, it might be thought that registration could be avoided by fragmenting a business whose turnover is likely to exceed the registration limits into a number of "separate" partnership businesses, none of which have a complete identity of partners. However, if HMRC are satisfied that the fragmentation is artificial and that each firm is making taxable supplies whilst carrying on activities which should properly be regarded as a single business, they may direct that all the firms should henceforth be treated as a single taxable person for registration purposes,<sup>61</sup> thereby constituting a deemed global

<sup>55</sup> Where two firms have identical partners and thus a single registration, a change resulting from the departure of one partner from, or the admission of a new partner to, one of those firms will automatically cause them to become separate taxable persons and their respective taxable supplies, etc., will no longer fall to be aggregated.

<sup>56</sup> See *Yasin and Hussain v. Customs & Excise Commissioners* [1999] S.T.I. 239. See also *Revenue & Customs Commissioners v. Pal* [2008] S.T.C. 2442, noted *infra*.

<sup>57</sup> See *infra*, para. 37-14.

<sup>58</sup> [2007] S.T.C. 269.

<sup>59</sup> [2008] S.T.C. 2442.

<sup>60</sup> *i.e.* under the Partnership Act 1890, s.14: see paras 5-35 *et seq.*

<sup>61</sup> Value Added Tax Act 1994, Sched. 1, paras 1A(1) (as added by the Finance Act 1997, s.31(1)), 2(1). For this purpose, HMRC will look at the extent to which the persons carrying on the fragmented business are "closely bound to one another by financial, economic and organisational links": *ibid.* Sched. 1, para. 1A(2), as added by the Finance Act 1997, s.31(1); also *Venuebest Ltd. v. Customs & Excise Commissioners* [2005] V. & D.R. 92. However, it is no longer necessary for HMRC to be

partnership comprising all the members of the constituent firms.<sup>62</sup> If any of those firms is already registered, its registration will be cancelled.<sup>63</sup> Supplementary directions may be issued if the existence of other elements of the fragmented business come to the attention of HMRC at a later date.<sup>64</sup>

Such a direction can equally well be made where one or more parts of the fragmented business are carried on by individuals or companies, *e.g.* if a partnership is dissolved by agreement and its assets are distributed *in specie* between the former partners in such a way as to permit the various elements of the business to be carried on by them.

### Changes in the firm

37-14 Once a firm has registered, no account is in general taken of any subsequent change in its members.<sup>65</sup> This will apply equally whether registration is in the name of the firm or in the names of the individual partners, although in the latter case the current editor understands that an appropriate amendment will be made in the registration to delete or add the name of the outgoing/incoming partner.<sup>66</sup> It should, however, be noted that such a change may in certain circumstances cause a firm's registration to be cancelled,<sup>67</sup> as well as affecting the registrability of other businesses carried on by the partners.<sup>68</sup>

Even though changes in the firm are ignored for registration purposes, the partners must within 30 days notify HMRC of:

- (i) any change in the name or trading name of the firm;

satisfied that the main reason for the fragmentation exercise is the avoidance of a liability to be registered. A direction under para. 2(1) cannot have retrospective effect: *Elder and Elder v. Customs & Excise Commissioners* (1999) VAT Decision 15881; also *Newton and Newton (t/a R.E. Newton) v. Customs & Excise Commissioners* [2001] S.T.I. 1231. An attempt to invoke the paragraph failed in *Trippitt v. Customs & Excise Commissioners* [2002] S.T.I. 214; also in *Turner v. HMRC* [2005] S.T.I. 1446, because the directions were incorrectly issued. And see, generally, *Lewis v. The Commissioners* (MAN/88/260) [1989] S.T.I. 271; *Jervis v. The Commissioners* (MAN/88/596) [1989] S.T.I. 784; *Chamberlain v. Customs & Excise Commissioners* [1989] S.T.C. 505; *West End Health and Fitness Club v. The Commissioners* (EDN/89/70) [1989] S.T.I. 869; *Horsman v. The Commissioners* (1990) V.A.T.T.R. 151; *Hundsdoerfer v. The Commissioners* (1990) V.A.T.T.R. 158. Interestingly, HMRC in practice seem more likely to argue that the substance of the relationship between the proprietors of the various constituent parts of the allegedly fragmented business is one of partnership, rather than making a direction under this paragraph: see, for example, *Burrell v. Commissioners of Customs & Excise* [1997] S.T.C. 1413; *Garton and Davies (t/a The Dolly Tub) v. Customs & Excise Commissioners* [2000] S.T.I. 41; *Newton and Newton (t/a R.E. Newton) v. Customs & Excise Commissioners*, *supra*; *Skelton Waste Disposal v. Customs & Excise Commissioners* [2002] S.T.I. 215; *Barton v. Customs & Excise Commissioners* [2003] S.T.I. 1583; *Wild v. Revenue & Customs Commissioners* [2009] S.T.C. 566. *Semble*, the same result could not be achieved by applying the principles enunciated in *W. T. Ramsay Ltd. v. I.R.C.* [1982] A.C. 300 and *Furniss v. Dawson* [1984] A.C. 474; see also *Customs & Excise Commissioners v. Faith Construction Ltd.* [1990] 1 Q.B. 905 and *supra*, para. 34-11.

<sup>62</sup> *ibid.* para. 2(7)(f).

<sup>63</sup> Value Added Tax Act 1994, Sched. 1, para. 2(5).

<sup>64</sup> *ibid.* para. 2(4), as amended by the Finance Act 1997, s.31(2).

<sup>65</sup> *ibid.* s.45(1), *supra*, para. 37-07. As to the liability of partners in respect of tax following a change, see *ibid.* s.45(2), (3), considered *infra*, para. 37-34.

<sup>66</sup> HMRC will, as a matter of practice, require a fresh form VAT 2 to be completed.

<sup>67</sup> *Customs & Excise Commissioners v. Glassborow* [1975] Q.B. 465. See also *Weakley v. The Commissioners* (LON/2/73/145); 93 Taxation 343. And see *supra*, para. 37-11.

<sup>68</sup> Particular care must be taken to ensure that the business of one firm has not been brought under the registration of another, thus requiring tax to be charged on all its supplies, etc.: see *J.O.W. & E.M. Harris v. Advanced Structural Maintenance & Repair Co. and Harris & Harris v. The Commissioners* (CAR/76/220), *supra*, para. 37-11.