

**The Law Commission**  
**Consultation Paper No 161**

**The Scottish Law Commission**  
**Discussion Paper No 118**

**LIMITED PARTNERSHIPS ACT 1907**  
**A Joint Consultation Paper**

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This joint consultation paper, completed on 28 September 2001, is circulated for comment and criticism only. It does not represent the final views of the two Law Commissions.

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**THE LAW COMMISSION**

**THE SCOTTISH LAW COMMISSION**

**LIMITED PARTNERSHIPS ACT 1907**

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# ABBREVIATIONS

In this consultation paper the following abbreviations are used:

<b>1890 Act</b>	Partnership Act 1890
<b>1907 Act</b>	Limited Partnerships Act 1907
<b>Delaware Act</b>	Delaware Revised Uniform Limited Partnership Act
<b>DTI</b>	Department of Trade and Industry
<b>Guernsey Law</b>	The Limited Partnerships (Guernsey) Law 1995 to 1997
<b>Jersey Law</b>	Limited Partnerships (Jersey) Law 1994
<b>Joint Consultation Paper</b>	Partnership Law: A Joint Consultation Paper (2000) Law Com No 159; Scot Law Com No 111
<b><i>Lindley and Banks</i></b>	R C I'Anson Banks (editor), <i>Lindley and Banks on Partnership</i> (17th ed 1995)
<b>LLP</b>	Limited Liability Partnership
<b>NSW Act</b>	Partnership Act 1892 (New South Wales) as amended by Partnership (Limited Partnership) Amendment Act 1991
<b>Ontario Act</b>	Ontario Limited Partnerships Act 1990
<b><i>Prime and Scanlan</i></b>	T Prime and G Scanlan, <i>The Law of Partnership</i> (1st ed 1995)
<b>The Myners Review</b>	Paul Myners, Institutional Investment in the UK: A Review (6 March 2001) (available from HM Treasury: <a href="http://www.hm-treasury.gov.uk">http://www.hm-treasury.gov.uk</a> )
<b><i>Twomey</i></b>	MTwomey, <i>Partnership Law</i> (1st ed 2000)

# PART I

## INTRODUCTION

### THE TERMS OF REFERENCE

- 1.1 This consultation paper forms part of the joint review of partnership law which the Law Commission and the Scottish Law Commission have undertaken at the request of the Minister of State at the Department of Trade and Industry (“DTI”). We have already published a detailed consultation paper on the general law of partnership.<sup>1</sup> Our terms of reference were:

To carry out a review of partnership law, with particular reference to: independent legal personality; continuity of business irrespective of changes of ownership; simplification of solvent dissolution; a model partnership agreement; and to make recommendations. The review is to be conducted under the present law of partnership, namely the Partnership Act 1890<sup>2</sup> and the Limited Partnerships Act 1907.<sup>3</sup>

### THE ROLE OF LIMITED PARTNERSHIPS

- 1.2 The United Kingdom was much slower than many other countries to introduce a business institution in the form of a partnership in which some of the partners could have limited liability.<sup>4</sup> Continental jurisdictions had long since had the *société en commandite* and similar institutions.<sup>5</sup> The enactment of the Limited Partnerships Act 1907 coincided with the introduction of the private company. The latter, together with the general partnership, have become the standard vehicles for small businesses.
- 1.3 In June 2001 there were 8,898 limited partnerships registered in England and Wales<sup>6</sup> of which Companies House estimates approximately 3,000 – 4,000 are still functioning.<sup>7</sup> Companies House for Scotland estimates that there are 3,555

<sup>1</sup> Partnership Law: a Joint Consultation Paper (2000) Law Com No 159; Scot Law Com No 111 (referred to in this paper as the “Joint Consultation Paper”).

<sup>2</sup> Which we refer to in this paper as the “1890 Act”.

<sup>3</sup> Which we refer to in this paper as the “1907 Act”.

<sup>4</sup> *Lindley and Banks*, para 28-01; *Prime and Scanlan* pp 342 – 343.

<sup>5</sup> The partnership *en commandite* or limited partnership is a partnership in which the dormant partners, or *commanditaires*, finance the business and are liable only to the extent of their investment in the partnership. The active members or *commandités* are jointly and severally liable for all of the obligations of the partnership.

<sup>6</sup> Companies House records. As there is no de-registration system for limited partnerships it is impossible to determine accurately the number of dormant limited partnerships. We make recommendations for reforming the register of limited partnerships below, see paras 3.11-3.31 below.

<sup>7</sup> The number of limited partnerships is small when compared with the number of partnerships (684,645) and trading companies both private and public (738,325). See Small and Medium Enterprise (SME) Statistics for the UK 1998 (August 1999) DTI, Table 23.

limited partnerships in Scotland and that most of them are still functioning. The large number of functioning partnerships in Scotland may be explained by the use of limited partnerships in agricultural tenancies.<sup>8</sup> The use of a partnership which the landlord as limited partner can terminate, for example on the death of the general partner, is a device by which parties can avoid the security of tenure provisions of legislation relating to Scottish agricultural holdings. Although the number of limited partnerships remains small in both jurisdictions, there has been an increase in the use of limited partnerships in recent years as vehicles for venture capital investment.

- 1.4 On 26 May 1987 the Inland Revenue and the DTI approved a statement on the use of limited partnerships as a vehicle for venture capital investment funds.<sup>9</sup> Since then, limited partnerships have become the standard structure used by venture capitalists not only for United Kingdom funds but also for European funds.<sup>10</sup> Due to their separate personality,<sup>11</sup> Scottish limited partnerships have also been used as vehicles for investment in Lloyds since 1997.<sup>12</sup> Guernsey has recently amended its limited partnership law to give partners in a limited partnership the right to elect that the partnership shall have legal personality.<sup>13</sup> We understand that a reason for giving the option was to allow such partnerships to be used for carrying on business as underwriting members of Lloyds, while preserving the option of a partnership without legal personality for certain other investment vehicles.
- 1.5 The limited partnership is a useful vehicle for investors who do not wish to take an active role in the management of their funds. They may use it to create an investment fund under the control of a general partner who alone has unlimited

<sup>8</sup> See C M Blight, "Land Tenure Forty Years On" (1989) 34 JLSS 463; A Stockdale and A J Lang, "The Limited Partnership Tenancy in Scotland" (1996) Vol 9 No 7 Farm Management 336.

<sup>9</sup> The statement explains that a limited partnership established for the purpose of raising funds for investment into companies will be regarded as carrying on a business and will represent a partnership within the definition in s 1 of the Partnership Act 1890 for the purposes of United Kingdom taxation (contrast the discussion in paras 3.8-3.10 below). The income and capital gains arising within the partnership will be subject to tax upon receipt by the partnership as the income and gains of the partners who are entitled to them.

<sup>10</sup> Our attention has also been drawn to the use of the limited partnership structure for a fund set up to provide a bridge between university research funding and investment in product development. The Sulis Seedcorn Fund was established in December 1999 with initial contributions from the Universities of Bath and Bristol, The Wellcome Trust and HM Treasury (see <http://www.bath.ac.uk/Research/sulis-innovation/contacts.htm>). The two universities are limited partners, and the fund manager is general partner. (We are grateful to Carol Dent, Chief Executive of the Fund for this information).

<sup>11</sup> At present in the UK only Scottish partnerships have separate personality, but one of the provisional proposals of the Joint Consultation Paper is the introduction of separate legal personality in English law: see para 4.17.

<sup>12</sup> The Lloyds' membership bye-laws only permit separate legal persons to be Lloyds names, thereby excluding English limited partnerships and general partnerships.

<sup>13</sup> The Limited Partnership (Guernsey) (Amendment) Law 2001.

liability for the partnership's obligations. The limited partner is only liable to the extent of his contributions, provided he does not take part in the management of the partnership business.<sup>14</sup> The limited partnership offers the investor privacy, as the accounts of the partnership are not generally disclosed.<sup>15</sup> Like other partnerships, it also provides the benefit of fiscal transparency – the partnership is not treated as an entity distinct from its members for the purpose of income tax or capital gains tax.<sup>16</sup>

- 1.6 Over the last 10 years, limited partnerships have been used increasingly for property investment.<sup>17</sup> The tax-transparent structure of the limited partnership makes it an attractive vehicle for institutional investors, such as pension funds or insurance companies, which are partially or wholly tax-exempt. It enables them to invest jointly with tax-paying entities, such as property companies, without losing their tax advantages. The same features have made them suitable for use in urban regeneration projects, bringing together public authorities (such as English Partnerships), institutional investors and property developers.<sup>18</sup> Notwithstanding the increased use of limited partnerships in the property field, there appears to be continuing pressure for the creation of a new business vehicle for this purpose, comparable to the Real Estate Investment Trust in the United States.<sup>19</sup> Although the consideration of an alternative to limited partnerships is not within our terms of reference, we would welcome comments on whether changes to the law of limited partnerships might help to fill this perceived gap.

<sup>14</sup> 1907 Act, s 6(1).

<sup>15</sup> Although the Partnerships and Unlimited Companies (Accounts) Regulations 1993 (SI 1993 No 1820) require the accounts of a limited partnership to be audited and disclosed where each of its members is (a) a limited company, or (b) an unlimited company, or a Scottish firm, each of whose members is a limited company (section 3(1)). The regulations apply to comparable foreign entities (section 3(4)).

<sup>16</sup> See paras 2.26-2.27 below.

<sup>17</sup> The Estates Gazette 9th June 2001 (p 58 ff) included a series of articles on limited partnerships in property development. It was estimated that limited partnerships accounted for some £10bn of property investments, with shopping centres and retail warehousing forming the largest category: "... investors are using limited partnerships to get exposure to assets that are otherwise too large, too risky or too scarce for them to take on solo" (*ibid*, p 69). One of the perceived disadvantages of investment through limited partnerships is lack of liquidity: there is no established market for trading in shares in them.

<sup>18</sup> For example, the English Cities Fund, established as a limited partnership by Amec plc, English Partnerships and Legal and General Assurance. The need for such initiatives was underlined by the White Paper "Our towns and cities – delivering an urban renaissance" (Nov 2000) DETR Cm 4911.

<sup>19</sup> For a recent study of the Real Estate Investment Trust and other comparable models, see Arthur Andersen, Donald Robertson and Andrew Scott, "Property Securitisation in the UK" (2000) (commissioned by the Investment Property Forum). They comment that "a key problem for both commercial and residential investment has been illiquidity in the markets leading to under-investment and price volatility"; and conclude that "the economic benefits of introducing tax-transparent vehicles for securitised property investment would be very significant."

- 1.7 The limited partnership performs a different role from that of the limited liability partnership (“LLP”), which has recently been introduced into the United Kingdom.<sup>20</sup> The LLP is designed as a business vehicle for professional or trading partnerships. It enables partners, who are actively involved in the business of their partnership, to limit their liability for the partnership’s debts and obligations.<sup>21</sup> Although it is treated as a partnership, it is subject to accounting and other rules closer to those of a company. The LLP was introduced in response to concerns by professional practitioners about their possible exposure to massive claims for damages arising from the alleged negligence of one or more of their partners.<sup>22</sup> Following an initiative by two large accountancy firms to introduce a limited liability partnership based in Jersey, the DTI published a consultation paper on the LLP in 1997.<sup>23</sup> The Limited Liability Partnerships Act 2000 was enacted in July 2000.<sup>24</sup>

### **THE NEED FOR REFORM**

- 1.8 Unlike the 1890 Act,<sup>25</sup> the 1907 Act has not been regarded as a model of draftsmanship. In the view of Michael Twomey, it “raises more questions than it answers regarding the legal treatment of limited partnerships and their members.”<sup>26</sup> Twomey goes on to say that:

The source of much of the confusion is the fact that the 1907 Act creates a new type of partner, the limited partner, but applies many of the provisions of the 1890 Act to that partner... this was done, without due effort being made to weave those differing provisions together to produce a coherent body of law suitable for a limited partnership.<sup>27</sup>

- 1.9 These theoretical weaknesses do not seem to have caused great difficulty in practice. This is probably because (unlike general partnerships) limited partnerships have been largely used for the specialised purposes noted above. The partners have therefore been able to devise suitable agreements to mitigate the

<sup>20</sup> See Limited Liability Partnerships Act 2000.

<sup>21</sup> Unlike the limited partnership, which offers limited liability only to the partners who are *not* actively involved in the business.

<sup>22</sup> See, for example, *ADT Limited v Binder Hamlyn* [1996] BCC 808.

<sup>23</sup> Limited Liability Partnership – A New Form of Business Association for Professionals (Consultation Paper, URN 97/597, February 1997). The LLP has since been extended to businesses other than professional businesses.

<sup>24</sup> The Limited Liability Partnerships Act 2000 came into force on 6 April 2001 (SI 2000 No 3316).

<sup>25</sup> “A model piece of legislation”: *per* Harman LJ, *Keith Spicer Ltd v Mansell* [1970] 1 All ER 462 at p 463. Our review of partnership law has however confirmed suspicions that the 1890 Act contains serious inconsistencies in its treatment of partnerships on a change of membership.

<sup>26</sup> *Twomey*, para 28.05.

<sup>27</sup> *Twomey*, para 28.08.

deficiencies of the statutory scheme.<sup>28</sup> Indeed, commentators have strongly emphasised the dangers of using the limited partnership structure without a formal agreement.<sup>29</sup> In considering possible reforms, it seems reasonable to assume that this advice will be heeded. Thus we are not, as with general partnerships, seeking to provide a default code for a large number of (mainly small) businesses for whom the statutory rules are the sole basis on which their affairs are regulated.<sup>30</sup>

1.10 As a result of our preliminary consultations with, amongst others, the venture capital industry, a number of significant practical problems with the 1907 Act have been identified. The review of partnership law provides an opportunity to put forward remedies.<sup>31</sup> This opportunity occurs against a background in which various jurisdictions – including Bermuda, the Cayman Islands, Delaware, Guernsey, Ireland, and Jersey – have introduced or modernised legislation on limited partnerships. The venture capital industry in the United Kingdom is the largest and most developed in Europe.<sup>32</sup> But other European jurisdictions are developing structures in a bid to increase their share of the European venture capital industry.<sup>33</sup> In Ireland, the Investment Limited Partnerships Act 1994 was introduced to create a new form of collective investment scheme and provides a convenient structure within which to invest and withdraw capital. The Act enables funds to be pooled by investors with limited liability, and managed by a third party. This facilitates, amongst other things, diversification of asset investment. The Irish investment limited partnership is in many ways different to the English partnership: it can be listed on the Irish stock market and because of this, is subject to greater regulation.<sup>34</sup>

1.11 A strong case has been made for updating the 1907 Act to enable the UK to continue to maintain its competitive position in the venture capital market. A recent Treasury report, while confirming the importance of limited partnerships

<sup>28</sup> For example, there are established styles for partnership agreements for limited partnerships in Scottish agricultural tenancies. See Gill and Foz, *Agricultural Holdings Styles* (1997) pp 3 – 15.

<sup>29</sup> *Lindley and Banks*, para 28–08; *Twomey*, para 28.05.

<sup>30</sup> Joint Consultation Paper, para 1.17. The main small business use of limited partnerships appears to be for Scottish agricultural tenancies, for which solicitors have standard forms.

<sup>31</sup> The issues dealt with in this consultation paper are relevant to all limited partnerships and are not restricted to the venture capital industry. For an outline of the issues covered in this paper see paras 1.17-1.22 below.

<sup>32</sup> It accounted for 49% of total European venture capital investment in 1998. For further information on this subject see: <http://www.3igroup.com/essentialreading/themarket/>

<sup>33</sup> There is an interesting parallel in Australia, where competition from other states for inward investment led New South Wales to enact the Partnership (Limited Partnership) Amendment Act 1991: see Ian Ramsay, “The Expansion of Limited Liability: a Comment on Limited Partnerships” (1993) 15 *Sydney Law Review* 537 at p 546. The subsequent use of limited partnerships was inhibited by amendments to Commonwealth tax legislation in 1992, which required them to be taxed as companies.

<sup>34</sup> See *Twomey*, paras 29.133–176.

to the private equity industry in the United Kingdom, has also drawn attention to the problems caused by the use of a “generic and rather archaic” piece of legislation.<sup>35</sup> It refers in particular to the difficulty caused by the 20-partner limit and the uncertain status of limited partners engaged in overseeing investment activity.<sup>36</sup>

1.12 In order to assist us in evaluating the case for reform, we would welcome further comments, and supporting evidence, on the following issues:

- (1) Have we correctly identified the principal uses of limited partnerships in modern business and, if not, what other uses should we take into account?**
- (2) Have we correctly identified (in the succeeding Parts of this consultation paper) the main priorities for reform and, if not, what other matters should be considered?**
- (3) What are likely to be the main practical and economic benefits of reform?**

#### **CONTINUED USE OF THE DESCRIPTION “LIMITED PARTNERSHIPS”**

1.13 For completeness, consideration should perhaps be given to the continued use of the description “limited partnerships” following the enactment of the Limited Liability Partnerships Act 2000. The first LLPs in the United Kingdom were registered in the first half of 2001. Although the role of an LLP is different to that of a limited partnership, there may be sufficient similarities between these two forms of business vehicle to cause confusion. For example, both vehicles aim to limit liability, are tax transparent, have to be registered and use the words ‘limited’ and ‘partnership’ in their names.

1.14 On the other hand, the use of the term “limited partnerships” is well established in the United Kingdom and other jurisdictions and it seems unlikely to cause confusion to those directly interested. We are not currently persuaded of any need for change. However, we invite comments on the following:

- (1) Should the revised 1907 Act continue to use the description “limited partnership”?**
- (2) If not, suggestions are invited for a replacement term and for a suitable abbreviation thereof. Possibilities include: investment partnership (ip), limited investment partnership (lip), and mixed partnership (mp).**

<sup>35</sup> The Myners Review. In the 2000 Budget, the Chancellor asked Paul Myners to investigate possible distortions in institutional investment decision-making. Mr Myners published his report on 6 March 2001.

<sup>36</sup> See paras 4.8-4.33 below.

## **COMPARATIVE LAW**

- 1.15 Another general issue concerns the form of any new legislation for England and Scotland. As already noted, other common law jurisdictions have given a lead in developing modern codes for limited partnerships. Of those mentioned, the most detailed is probably the Delaware Revised Uniform Limited Partnership Act.<sup>37</sup>
- 1.16 More direct assistance is likely to be gained from legislation in jurisdictions with closer links to the United Kingdom, and from regimes which, like the 1907 Act, have roots in the 1890 Act. Useful legislation includes the Limited Partnerships (Jersey) Law 1994, the Limited Partnerships (Guernsey) Law 1995 to 1997, the Ontario Limited Partnerships Act 1990, and the Partnerships Act 1892 (New South Wales) as amended by the Partnership (Limited Partnership) Amendment Act 1991.<sup>38</sup> We will refer to these sources, where appropriate, when discussing the individual issues. Some relevant extracts are set out in Appendix B.

## **THE STRUCTURE OF THE CONSULTATION PAPER**

- 1.17 In this consultation paper we consider possible reforms both in order to update the law and to remove doubts which have caused concern to users of this business vehicle and their advisers. The paper comprises six Parts. Part II gives a brief overview of the existing law relating to limited partnerships. Part VI lists the consultation questions we ask and our provisional proposals. We set out proposals for reform in Parts III to V, which are summarised below.
- 1.18 Part III discusses the formal requirements for establishing and operating a limited partnership. In this Part we address the following matters:
- (1) whether a body corporate can be a general partner;
  - (2) whether a general partner can also be a limited partner;
  - (3) whether the term “business” includes investment activities;
  - (4) the requirements for registration;
  - (5) what link with the United Kingdom should be required for a limited partnership registered in the United Kingdom;
  - (6) the conclusiveness of the certificate of registration;
  - (7) the names of limited partnerships (including disclosure of status as a limited partnership); and

<sup>37</sup> Which we refer to in this paper as the “Delaware Act”. This was an expanded version of the model prepared by the National Conference of Commissioners on Uniform State Laws: see Uniform Limited Partnership Act (1976, with 1985 amendments). A review of the Uniform Limited Partnership Act is currently under way: see the National Conference of Commissioners on Uniform State Laws (USA) website ([www.nccusl.org](http://www.nccusl.org)).

<sup>38</sup> We refer to these sources respectively as the “Jersey Law”, the “Guernsey Law”, the “Ontario Act” and the “NSW Act”.

- (8) the consequences of default.
- 1.19 Part IV examines and makes provisional proposals on the liability and role of the limited partner and the possibility of withdrawal of capital. The matters which we address in this Part include the following issues:
- (1) the scope of protection for a limited partner;
  - (2) what constitutes “management”, and whether there should be a statutory list of “safe” activities;
  - (3) capital withdrawal;
  - (4) duration of liability after withdrawal; and
  - (5) agency.
- 1.20 Part V discusses the rights and obligations of partners between themselves. In this Part we address the following issues:
- (1) matters requiring consent of limited partners;
  - (2) fiduciary duties;
  - (3) share of profits and losses;
  - (4) retirement and assignment/assignation; and
  - (5) dissolution and winding up.
- 1.21 The 1907 Act can be found in Appendix A. Appendix B contains some excerpts of legislation from other jurisdictions, to which we refer in this paper.
- 1.22 The proposals we make in this paper have been informed by the Joint Consultation Paper, to which we cross-refer and of which we assume knowledge.

#### **ACKNOWLEDGEMENTS**

- 1.23 We thank the individuals and organisations listed in Appendix C for the information and advice they provided. We are particularly grateful to Roderick I’Anson Banks for his assistance as consultant.

## **PART II**

# **A BRIEF OVERVIEW OF LIMITED PARTNERSHIPS**

### **NATURE AND FORMATION**

- 2.1 A limited partnership is an ordinary partnership with certain modifications made by the 1907 Act. To obtain the benefit of limited liability the conditions in the 1907 Act must be satisfied. This results in active partners being fully liable and those who merely invest having limited liability. In other respects, a limited partnership is governed by general partnership law.<sup>1</sup>
- 2.2 A limited partnership must have one or more “general partners” and one or more “limited partners”. A limited partner must make a contribution of capital (of cash or property) immediately upon entry into partnership.<sup>2</sup> It does not matter that the limited partner’s contribution is nominal.<sup>3</sup>
- 2.3 A limited partnership must have a name, which must be registered, as must any change of name.<sup>4</sup> The name need not disclose the fact that the partnership is limited.
- 2.4 The duration of a limited partnership is generally governed by ordinary partnership rules.<sup>5</sup> However, a limited partner does not share the general partner’s right (where the partnership is not for a fixed term) to give notice at any time to dissolve the partnership.<sup>6</sup> Furthermore, a limited partnership is not dissolved by the death or bankruptcy of a limited partner.<sup>7</sup>
- 2.5 In English law a limited partnership is not a legal entity,<sup>8</sup> but in Scots law, like other partnerships, it has separate personality. The Joint Consultation Paper proposed provisionally that English law should be amended so as to confer separate legal personality on partnerships as a matter of law (without registration).<sup>9</sup> We are currently considering the responses to that proposal.

<sup>1</sup> 1907 Act, s 7. The relevant principles of partnership law are explained in the Joint Consultation Paper, paras 2.1 – 2.50.

<sup>2</sup> 1907 Act, s 4(2). The size of the contribution may subsequently be increased.

<sup>3</sup> In *Dickson v MacGregor* 1992 S.L.T. (Land Ct.) 83 and *MacFarlane v Falfield Investments Ltd* 1996 SC 14 it was £10.

<sup>4</sup> 1907 Act, ss 3, 8 and 9.

<sup>5</sup> See 1907 Act, s 7. See also Joint Consultation Paper, paras 2.27 – 2.36.

<sup>6</sup> 1907 Act, s 6(5)(e); see 1890 Act, ss 26(1) and 32(c).

<sup>7</sup> See further paras 5.31-5.33 below.

<sup>8</sup> See *Re Barnard* [1932] 1 Ch 269 at p 272.

<sup>9</sup> Joint Consultation Paper paras 4.17-4.32.

However, we invite any further views, in the present context, on the following question:

**Would the introduction of separate personality for partnerships in English law have any special advantages, disadvantages or other implication for limited partnerships?**

**Registration**

- 2.6 Limited partnerships must be registered as such in accordance with the 1907 Act. A registration statement must contain the firm's name; the general nature and principal place of business; the full name of each partner; the term, if any, and the date of commencement; a statement that the partnership is limited and the description of every limited partner as such; and the sums contributed by each limited partner and whether paid in cash or otherwise. It must be signed by "the partners", which appears to mean all the partners, both general and limited<sup>10</sup> and lodged with the registrar.<sup>11</sup> Any person has the right to inspect the registration statement.<sup>12</sup> A certificate of registration, or a registered extract from the register, is receivable as evidence in any proceedings.<sup>13</sup>
- 2.7 Section 9 provides for submission of statements of changes to the registered particulars. It applies where there is a change in the firm name, the general nature of the business, the principal place of business, the partners or the name of a partner, the "term or character" of the partnership, the sum contributed by any limited partner, a change of any partner from limited to general partner, or vice versa. The statement must be signed "by the firm" and sent within seven days of the change. In default the general partners are liable to a fine (not more than one pound per day while the default continues).<sup>14</sup>

**RIGHTS AND OBLIGATIONS OF THE PARTNERS BETWEEN THEMSELVES**

- 2.8 The freedom to agree the terms of a partnership is generally preserved for a limited partnership by the 1907 Act. For example, notwithstanding the restriction on the liability of limited partners, as respects third parties, to the amount of his contribution, agreement may be reached between the partners that, as between themselves, any trading losses of the firm will be divided without limitation.<sup>15</sup>

<sup>10</sup> 1907 Act, s 8.

<sup>11</sup> The registrar of limited partnerships is the same person as the registrar of companies: 1907 Act, s 15.

<sup>12</sup> 1907 Act, s 16(1). It is questionable whether registration is notice to third parties of the registered particulars: see *Lindley and Banks*, para 29–29. This issue is discussed at paras 3.27–3.30 below.

<sup>13</sup> 1907 Act, s 16(2)

<sup>14</sup> 1907 Act, s 9(2).

<sup>15</sup> The courts have given effect to such an agreement, in a tax context, in *Reed v Young* [1986] 1 WLR 649. The House of Lords held that while the limited partner's liability to creditors is limited to the amount of his contribution, the limited partner may incur greater trading

- 2.9 A limited partner may not take part in the management of the partnership business. If he does, he forfeits his limited liability status. The limited partner does, however, have the right to inspect the partnership books, to “examine into” the state and prospects of the business and to “advise with” the partners thereon.<sup>16</sup>
- 2.10 Once capital is contributed to the firm there is no requirement for it to be retained by the limited partners; it may be divided between some or all of the partners as agreed.<sup>17</sup> The partners are free to increase or decrease the firm’s capital, subject to compliance with registration requirements.<sup>18</sup> But a limited partner’s withdrawal of capital while he remains a member of the firm renders him liable for the debts and obligations of the firm up to the amount which he has received back.<sup>19</sup>

### **DISSOLUTION AND WINDING UP**

- 2.11 Generally, a limited partnership may be dissolved in the same way as an ordinary partnership. However, the 1907 Act makes three qualifications to the ordinary rules. First, it is provided that the death or bankruptcy of a limited partner will not dissolve the firm.<sup>20</sup> Secondly, the other partners cannot dissolve a partnership on the grounds that a limited partner has allowed his share to be charged for his own debts.<sup>21</sup> Thirdly, a limited partner cannot dissolve the firm by notice unless he is given an express power to do so.<sup>22</sup> The latter two provisions are stated to be subject to contrary agreement, express or implied.<sup>23</sup>

### **DEALING WITH THIRD PARTIES**

#### **Authority**

- 2.12 A general partner has the same implied authority to bind the firm as a member of an ordinary partnership.<sup>24</sup>

losses for which tax relief could be claimed. Subsequently, the Income and Corporation Taxes Act 1988, s 117 restricted loss relief to the amount which that partner has at risk in the partnership, thereby reversing *Reed v Young* for tax purposes.

<sup>16</sup> 1907 Act, s 6(1). For the meaning of “advise with”, see paras 4.30-4.31 below.

<sup>17</sup> *Lindley and Banks*, para 31-09.

<sup>18</sup> 1907 Act, s 9(1)(b).

<sup>19</sup> 1907 Act, s 4(3).

<sup>20</sup> 1907 Act, s 6(2). This is not expressed to be subject to contrary agreement, but see para 5.32 below. It seems likely that the effect is to prevent a general dissolution of the partnership rather than to lock into the partnership indefinitely the contribution of the dead or bankrupt partner, *Lindley and Banks*, para 31-20, 21.

<sup>21</sup> 1907 Act, s 6(5)(c). Cf Partnership Act 1890, s 33(2).

<sup>22</sup> 1907 Act, s 6(5)(e).

<sup>23</sup> 1907 Act, s 6(5). Cf Partnership Act 1890, s 33(2).

<sup>24</sup> See Joint Consultation Paper, paras 2.12 – 2.16.

2.13 A limited partner has no power to bind the firm and may not take part in its management.<sup>25</sup> Thus, any admission or representation by a limited partner will not be evidence against the firm. The firm will not automatically have notice of anything of which the limited partner has notice.

### **Liability for debts and obligations**

2.14 A general partner has the same liability for the debts and obligations of a limited partnership as a member of an ordinary partnership.<sup>26</sup>

2.15 A limited partner's liability for the debts and obligations of the firm is limited to the amount of his contribution.<sup>27</sup> The size of his contribution may be increased.<sup>28</sup>

2.16 A limited partner may be liable for more than his contribution in two situations:

(1) if the firm is not registered in accordance with the 1907 Act, in which case a limited partner will be deemed to be a general partner,<sup>29</sup> or

(2) if he participates in the firm's management, in which case he will be liable as a general partner for as long as he participates.<sup>30</sup>

2.17 If, during the continuance of the partnership, he withdraws or receives any of his contribution, the limited partner is liable up to the amount so withdrawn or received.<sup>31</sup>

2.18 If the limited partner's original contribution is lost in the course of carrying out the firm's business, there is no express requirement that the partners replace any lost capital out of profits. It seems therefore that any subsequent receipt of profits by a limited partner should not be treated as a repayment of lost capital.<sup>32</sup>

2.19 The 1907 Act does not make clear the circumstances in which a limited partner's liability for future debts ends. Provisions touching on this issue are the

<sup>25</sup> 1907 Act, s 6(1).

<sup>26</sup> 1907 Act, ss 4(2) and 7.

<sup>27</sup> We consider possible uncertainties as to the scope of this protection in paras 4.34-4.49 below.

<sup>28</sup> 1907 Act, ss 4(2) and 9(1)(f).

<sup>29</sup> 1907 Act, s 5. This provision was applied strictly by the Irish High Court in *MacCarthaigh v Daly* [1985] IR 73, with the result that protection was lost where a limited partner made his contribution, not at the commencement of the partnership (as required by s 4(2)), but some months later.

<sup>30</sup> 1907 Act, s 6(1).

<sup>31</sup> 1907 Act, s 4(3). Although there is some uncertainty as to the effect of s 4(3), the intention seems to be that the overall liability, following withdrawal, is still limited to the amount of the original contribution: see *Lindley and Banks*, para 30-12; *Twomey*, para 28.110.

<sup>32</sup> *Lindley and Banks*, para 30-14, which refers to the "more cautious" view to the contrary, taken in earlier editions. See para 4.38 ff below.

prohibition of withdrawal of the limited partner's contribution,<sup>33</sup> and the provision that the death or bankruptcy of a limited partner does not dissolve the partnership,<sup>34</sup> neither of which is stated to be subject to agreement to the contrary. The implication seems to be that the liability, up to the contribution, continues indefinitely.

- 2.20 However, the better view may be that these matters, as between the partners, are subject to the general power to settle "mutual rights and duties" by agreement.<sup>35</sup> Accordingly, where the partners so agree, and as long as the change in the firm is duly registered, the liability of a former limited partner for future debts and obligations may come to an end on his retirement, notwithstanding that he may have had his contribution returned.<sup>36</sup> He will remain liable for debts incurred before his retirement.
- 2.21 The liability of a limited partner for future debts and obligations may in any event be ended by the assignment or (in Scotland) assignation of his share.<sup>37</sup> This assignment or assignation requires the consent of the general partners and must also be advertised in the appropriate Gazette<sup>38</sup> and registered.<sup>39</sup>

#### **RELATED ISSUES**

- 2.22 For completeness, we mention three aspects of law affecting limited partnerships which may raise relevant considerations, although they are not directly within our terms of reference.

#### **Insolvency**

- 2.23 In English law the Insolvency Act 1986, as applied to partnerships by the Insolvent Partnerships Order 1994, does not generally distinguish between limited and ordinary partnerships.<sup>40</sup> One consequence is that even though a limited partner cannot participate in the firm's management, limited partners are

<sup>33</sup> 1907 Act, s 4(3).

<sup>34</sup> 1907 Act, s 6(2).

<sup>35</sup> 1890 Act, s 19; 1907 Act, s 7.

<sup>36</sup> See *Lindley and Banks*, para 30–17. It remains open to question whether, in the absence of agreement, there is a right to withdraw the contribution of a former limited partner, for example following death: see *ibid*, para 30–18.

<sup>37</sup> 1907 Act, s 6(5)(b). Although the sub-section mentions the transfer of "rights", not liabilities, the implication seems to be that the assignee steps into the shoes of the assignor in respect of future liabilities: see further para 4.43 and paras 5.22–5.28 below.

<sup>38</sup> 1907 Act, s 10(1). In England and Wales it is the London Gazette, in Scotland the Edinburgh Gazette and in Northern Ireland the Belfast Gazette.

<sup>39</sup> 1907 Act, s 9(1).

<sup>40</sup> Our terms of reference do not include consideration of insolvent winding up: see para 1.1 above.

treated as officers of the firm, so as to be, for example, subject to the sanctions of the Company Directors Disqualification Act 1986.<sup>41</sup>

- 2.24 There is special provision to protect an insolvent member who is a limited partner. A petition against a limited partner may be dismissed if he either lodges in court sufficient money or security to meet his liability for the debts and obligations of the partnership, or satisfies the court that he is no longer under any liability in respect of such debts and obligations.<sup>42</sup>
- 2.25 In Scots law the Bankruptcy (Scotland) Act 1985 provides for the sequestration of partnerships, including limited partnerships.<sup>43</sup> A petition to sequester a limited partnership may be brought by a creditor on apparent insolvency or at any time by any other person. It appears to be competent for a limited partner as well as a general partner to petition for the sequestration of a limited partnership.<sup>44</sup>

### **Taxation**

- 2.26 As with an ordinary partnership a limited partnership is “tax transparent”.<sup>45</sup> This is one of the main attractions for its use in the venture capital industry, and in property investment.<sup>46</sup>
- 2.27 However, there are some differences in the treatment of limited partners, as compared to ordinary partners in a general partnership or general partners in a limited partnership. As noted above, a limited partner may not set off any trading loss against income derived from non-partnership sources to the extent it exceeds the aggregate amount of his capital contribution and any undrawn profits for the time being in the firm.<sup>47</sup>

<sup>41</sup> Insolvent Partnerships Order 1994, Art 3. This apparent anomaly may not be significant in practice, since the grounds for disqualification orders under the Company Directors Disqualification Act 1986 presuppose some actual involvement in the management of the business.

<sup>42</sup> Insolvency Act 1986, s 125A(7), as substituted by the Insolvent Partnerships Order 1994.

<sup>43</sup> Bankruptcy (Scotland) Act 1985, s 6(4) and Bankruptcy (Scotland) Regulations 1985, reg 12(2).

<sup>44</sup> Bankruptcy (Scotland) Act 1985, s 8(2) and Bankruptcy (Scotland) Regulations 1985, reg 12(4).

<sup>45</sup> See the Income and Corporation Taxes Act 1988, s 111, as substituted by the Finance Act 1994, s 215(1). For the purposes of income tax, each partner is regarded as carrying on his own trade, profession or business. The partnership is not treated as an entity distinct from its members. The partners must each submit a return showing the profits earned by their involvement in the partnership. This share in the profits is determined by reference to the partner's interest in the partnership during that period. In relation to capital gains, see the Taxation of Chargeable Gains Act 1992, s 59.

<sup>46</sup> See paras 1.5-1.6 above.

<sup>47</sup> See para 2.8 n 15 above. The Income and Corporation Taxes Act 1988, s 117(1), as amended by the Capital Allowances Act 1990, Sched 1 para 8, also imposes restrictions on

## **Collective Investment Scheme**

- 2.28 It seems clear that a limited partnership established for investment purposes is a “collective investment scheme” as defined in section 75 of the Financial Services Act 1986,<sup>48</sup> unless one of the statutory exceptions applies in a particular situation.<sup>49</sup> If it is a collective investment scheme, the general partner will need to seek authorisation under the Financial Services Act 1986, unless he is exempt or the partnership is managed by some other authorised person.<sup>50</sup>
- 2.29 From 30 November 2001,<sup>51</sup> these issues will be governed by the Financial Services and Markets Act 2000 which establishes a new system of regulation under the Financial Services Authority. Again, it seems likely that the new rules will cover most limited partnerships for investment purposes. “Collective investment scheme” is defined in broad terms. It covers arrangements for the participants to receive profits or income from property where the participants do not have “day-to-day control over the management of the property”;<sup>52</sup> but the Treasury is empowered to exclude categories by Order.<sup>53</sup>

## **Comments**

- 2.30 Under our terms of reference we are not directly concerned with these three matters. However, consultees are invited to draw attention to any issues which it is thought should be taken into account in our consideration of the working of the 1907 Act in relation to:

- (1) insolvency;**
- (2) taxation; or**
- (3) the Financial Services and Markets Act 2000.**

the use of certain capital allowances by limited partners. See *Lindley and Banks*, para 34–72.

<sup>48</sup> See *Lindley and Banks*, para 29–32. The limited partners are taking part in “arrangements” to enable them to participate in profits from property, and they do not have “day to day control over the management of the property”.

<sup>49</sup> For example, one exception is where each of the participants carries on a business other than investment business and enters into arrangements for commercial purposes related to that business: see Financial Services Act 1986, s 75(6)(b).

<sup>50</sup> It is not clear whether the shares of the limited partners are to be regarded as “units” in a “unit trust scheme”: *ibid*, s 75(8). In any event, regulations exclude “limited partnership schemes” from the application of special tax provisions relating to unit trusts: see Income Tax (Definition of Unit Trust Scheme) Regulations 1988 (SI 1988 No 267), Income and Corporation Taxes Act 1988, s 469.

<sup>51</sup> This was the date announced on 12 July 2001 for bringing into effect the main provisions of the new Act: HM Treasury Press Notice, 12 July 2001.

<sup>52</sup> Financial Services and Markets Act 2000, s 235(1),(2).

<sup>53</sup> *Ibid*, s 235(5); see Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001 No 1062).

# **PART III**

## **REQUIREMENTS FOR ESTABLISHING AND OPERATING A LIMITED PARTNERSHIP**

### **COMPOSITION**

#### **Bodies corporate**

- 3.1 Section 4(4) of the 1907 Act expressly confirms that a body corporate may be a limited partner. It does not provide that a body corporate may be a general partner. This raises the question whether the omission is deliberate. Companies House routinely registers limited partnerships which have companies as general partners. This practice is in line with the general principle summarised by Lord Lindley:

There is no general principle of law which prevents a corporation from being a partner with another corporation or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorised by its constitution.<sup>1</sup>

- 3.2 This is still the position.<sup>2</sup> Consequently, it seems that any person<sup>3</sup> who has the capacity to enter into a general partnership may become a partner in a limited partnership as no restrictions are imposed by the 1907 Act.<sup>4</sup> It seems desirable that this should be made clear. If a limited partnership's only general partner is a limited company, one consequence is that all the partners will have limited liability. Furthermore, such a company may have been set up as a vehicle owned and directed by the limited partners, through which they indirectly participate in management.<sup>5</sup>

- 3.3 We therefore invite views on the following:

<sup>1</sup> This quotation is set out in *Lindley and Banks*, para 4–19.

<sup>2</sup> See, for example, *Pinkey v Sandpiper Drilling Ltd* [1989] ICR 389 (partnerships between companies) and *Scher v Policyholders' Protection Board* [1994] 2 AC 57 (partnerships between companies and individuals).

<sup>3</sup> A company is a person within the meaning of that word in section 1(1) of the 1890 Act. See the Interpretation Act 1978, s 5 and Sched 1. In Scotland a partnership has separate personality. We see no reason why a Scottish limited partnership (and English limited partnership if English law were to adopt separate personality in the future) should not be a partner in a limited partnership.

<sup>4</sup> It must be borne in mind that the capacity of a company is limited by the *ultra vires* rules, and the 1907 Act does not confer powers which are not present in the memorandum of association or articles of a company.

<sup>5</sup> See, for example, Amanda Howard, "In search of the Holy Grail", *Legalease Special Report* (2000) Property 12. This article compares the limited partnership to other legal vehicles used for property investment.

- (1) Should section 4(4) be expanded to provide expressly that a body corporate may be a limited or a general partner?**
- (2) Does there need to be any restriction on the right of limited companies to be general partners in limited partnerships?**

### **Dual functioning of a general partner as a limited partner**

3.4 Section 3(3) of the 1907 Act defines a general partner as:

any partner who is not a limited partner.

3.5 Should the same person be able to be both a general and a limited partner? The statutes enacted in Jersey and Guernsey allow this dual functioning,<sup>6</sup> but do not explain the consequences in any detail. The purpose may simply be to give the general partner the right to invest on the same terms as the limited partners, without affecting his other responsibilities.<sup>7</sup> It might also be relevant where a person is acting in more than one capacity. For example, a general partner, who is also a trustee or executor, might wish to invest as a limited partner in that separate capacity.

3.6 It might be thought that allowing a person to be a general and limited partner at the same time would defeat the purpose in drawing a distinction between the two types of partners, or at least make it very difficult to maintain the distinction in practice. We are not aware of any pressure for change in this respect to the 1907 Act.

3.7 Accordingly, we express no provisional view, but invite answers to the following questions:

- (1) Should the definition of “general partner” in the 1907 Act be changed so as to allow the same person to be both a general and limited partner?**
- (2) In what circumstances would such a change be beneficial, and to whom?**

<sup>6</sup> See Jersey Law, Art 6; Guernsey Law, as amended, s 2(2). In each case, it is provided that: “A person may be both a general and limited partner”. It seems clear also, from the provisions of the USA Revised Uniform Limited Partnership Act 1976, amended in 1985, that a limited partner may also be a general partner under that scheme: see s 303.

<sup>7</sup> The Ontario Act provides that a person who is both a general and a limited partner has the same rights and liabilities as a general partner, save that “in respect of his contribution as a limited partner he has the same rights against the other partners as a limited partner.” (section 5(2)). It is hard to see how a person can be both a general and a limited partner unless in different capacities. It is difficult to identify the benefit of limited liability to a limited partner, when he has unlimited liability as a general partner. Limited liability is normally of value in insolvency and then the general partner is the one who suffers.

## CARRYING ON BUSINESS

- 3.8 There is no legal definition of “carrying on business” with regard to limited or general partnerships. Section 45 of the 1890 Act defines business as including “every trade, occupation, or profession”. In the Joint Consultation Paper<sup>8</sup> we proposed that there is no need to redefine the term “business”, as the term is sufficiently wide to cover all commercial undertakings and seems apt to include investment as a commercial venture. We referred to *Smith v Anderson*.<sup>9</sup> Although it was held, on the particular facts of that case, that a trust formed for the purpose of investment was not carrying on a business, this was on the grounds that the purpose was “once for all investing certain money”, rather than “obtaining gain from a repetition of investments.”<sup>10</sup> It was accepted that the position would have been different if the “real object of the deed was that the partners should speculate in investments.”<sup>11</sup>
- 3.9 Differing views have been expressed, both in responses to the Joint Consultation Paper, and in preliminary consultation for this paper. Some have suggested that there is doubt among those who use limited partnerships as investment vehicles as to whether carrying on investment activities falls within the ambit of carrying on business for the purposes of the 1907 Act.<sup>12</sup> Others have expressed surprise that this is still seen as an issue, and suggest that the lack of a precise definition gives desirable flexibility.<sup>13</sup>
- 3.10 Although our present view remains as expressed in the Joint Consultation Paper, we would welcome any further views in the present context, given the involvement of limited partnerships in investment activity. We invite views on the following question:

**Do respondents agree that the 1890 Act definition of “business” is adequate also for the purposes of the 1907 Act (without express reference to “investment”)?**

## REGISTRATION

- 3.11 Limited partnerships must be registered as such, otherwise every limited partner is deemed to be a general partner.<sup>14</sup> Registration gives third parties a means to

<sup>8</sup> See Joint Consultation Paper, para 5.10.

<sup>9</sup> (1880) 15 Ch D 247.

<sup>10</sup> *Per* Brett LJ, *ibid*, at p 279.

<sup>11</sup> *Per* Cotton LJ, *ibid*, at p 283. Similarly, in *Hitchins v Hitchins* (1998) 47 NSWLR 35, the Supreme Court of New South Wales distinguished between investment and “elements of engaging in trade and a flow of transactions which could be thought of as carrying on a business”: see *Twomey*, para 2.47.

<sup>12</sup> In Jersey, for example, a limited partnership may be formed for “any lawful purpose” (Art 3(1)).

<sup>13</sup> For tax purposes, the position has been clarified by the Revenue Statement referred to in para 1.4, n 9 above.

<sup>14</sup> 1907 Act, s 5.

find out whether a partnership is general or limited and, if the latter, which of the partners are limited partners. The policy of the 1907 Act is to limit the liability of limited partners to the amount contributed by them in capital or cash to the partnership. The identification of each limited partner and his contribution allows third parties to take steps to find out whether he has withdrawn his capital contribution or engaged in management.

### **Information to appear on the register**

- 3.12 Currently the following particulars of a limited partnership must be registered:<sup>15</sup>
- (1) the firm name;
  - (2) the general nature of the business;
  - (3) the principal place of business;
  - (4) the full name of each of the partners;
  - (5) the term, if any, for which the partnership is entered into, and the date of its commencement;
  - (6) a statement that the partnership is limited, and the description of every limited partner as such; and
  - (7) the sum contributed by each limited partner, and whether paid in cash or how otherwise.
- 3.13 There does not appear to be any practical need to add further information to this list. For example, we are not aware of any reason to require disclosure of the partnership agreement which, like that of an ordinary partnership, is a private document regulating the rights and obligations of the partners *inter se*. These are of no concern to a third party.
- 3.14 The requirement to register the principal place of business raises particular issues which we address in the next section.
- 3.15 Rather than there being any need to increase the amount of information which is disclosed, a case can be made for a reduction. For example, we are not clear what, if any, practical benefits there are in citing the general nature of the business.<sup>16</sup> A third party will normally know the nature of the business of a partnership with which he deals. However, the administrative burden this places on limited partnerships is not particularly weighty.

<sup>15</sup> 1907 Act, s 8.

<sup>16</sup> It can be argued that the need to register the general nature of the business may give a third party an indication of whether or not a partner is acting in the 'ordinary course of business'. Any benefit that this may provide will depend on whether third parties avail themselves of the opportunity to inspect the register.

3.16 The need to maintain an up-to-date list of limited partners imposes a greater burden, but is of more obvious utility. Under the United States' Revised Uniform Limited Partnership Act there is no obligation to register limited partners, nor is there in Jersey or Guernsey.<sup>17</sup> However, the number and identity of limited partners may be of relevance if limited partners fail to comply with any requirements necessary to preserve their limited liability status. The identity of a limited partner may be of relevance if the limited partner takes part in the management of the partnership and thereby incurs personal liability for the obligations of the partnership.<sup>18</sup>

3.17 We invite views on the following questions:

- (1) Should the requirement for a description of the general nature of the business be maintained?**
- (2) Should the requirement to register the names of limited partners be maintained?**
- (3) Should any other change be made to the requirements for information to be registered?**

#### **Principal place of business**

3.18 As seen above, one of the matters required to be registered is the “principal place of business”.<sup>19</sup> This also determines the part of the United Kingdom in which registration is to take place. Section 8 of the 1907 Act provides:

The registration of a limited partnership shall be effected by sending by post or delivering to the registrar at the register office in that part of the United Kingdom *in which the principal place of business is situated* or proposed to be situated a statement signed by the partners... *(emphasis added)*.

3.19 The policy behind the requirement that a limited partnership registered in the United Kingdom should have a business presence there is far from clear. The most sensible comparison is with a United Kingdom registered company. There is no requirement that it should maintain any place of business, principal or otherwise, in the United Kingdom. Instead, it must have a registered office in the United Kingdom which acts as the official site of the company so that, for example, legal proceedings can be served there. This appears to be the most logical way to treat limited partnerships.

<sup>17</sup> The Australian statutes follow the 1907 Act in requiring the limited partners to be named. See, for example, NSW Act, s 54.

<sup>18</sup> 1907 Act, s 6(1).

<sup>19</sup> A firm's *principal* place of business may be regarded as its administrative headquarters from which the central control and management of the firm is carried on; this is a question of fact: *Palmer v Caledonian Railway Co* [1892] 1 QB 823; *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455.

Other countries generally require a registered office, but not a place of business, in the jurisdiction.<sup>20</sup>

- 3.20 There may in any event be technical difficulties arising from the reference to a “principal place of business”, in its application to subsequent changes, either within the United Kingdom, or outside. For example, where a limited partnership is to carry on business in both England and Scotland, it seems that a decision has to be made which is to be the “principal place of business” for the purpose of deciding where to make the initial registration.<sup>21</sup> However, it is unclear what the effect is of a subsequent change in the principal place of business, say, from England to Scotland. Does the limited partnership need to re-register entirely in the Scottish register, or is an amendment to the registered particulars in the English register sufficient? There is no express provision on this in the 1907 Act. Further, since the principal place of business is a question of fact,<sup>22</sup> the choice of the partners may not be determinative.
- 3.21 This problem is linked to another possible uncertainty arising from section 8. A limited partnership could initially site its principal place of business in the United Kingdom and then move offshore. There is no express provision in the 1907 Act to prevent this, provided the change in the principal place of business is registered.<sup>23</sup> Accordingly, the general view appears to be that there is no requirement that the limited partnership must *maintain* its principal place of business, or indeed conduct any business, in the United Kingdom.<sup>24</sup> If this is correct, it reduces still further any rationale for the requirement for registration of a principal place of business, rather than a registered office.
- 3.22 We invite views on the following provisional proposals:
- (1) The requirement for the registration of a principal place of business, initially in the United Kingdom, should be abolished and instead be replaced by the requirement to have a United Kingdom registered office.**
  - (2) Registration should be at the register office in the part of the United Kingdom in which the registered office is or is to be sited.**

### **The establishment of a limited partnership**

- 3.23 Until the limited partnership is registered, it will be a general partnership,<sup>25</sup> provided it satisfies the definition of partnership in section 1 of the 1890 Act. Yet

<sup>20</sup> Jersey Law Art 4(3)(b) and Art 8; NSW Act, s 54(2)(b); Delaware Act, s 17–104.

<sup>21</sup> Cf the Insolvency Act 1986, s 221(2) and (3), which assumes that the same company may have more than one “principal place of business” in different parts of the UK.

<sup>22</sup> See para 3.18, n 19 above.

<sup>23</sup> 1907 Act, s 9(1)(c).

<sup>24</sup> See *Lindley and Banks*, para 29–19; *Twomey*, para 28.27.

<sup>25</sup> 1907 Act, s 5.

section 8 of the 1907 Act appears to envisage the registration of a “proposed” limited partnership, which is not a partnership within the meaning of the 1890 Act because the partners have not yet embarked on the venture on which they have agreed. Thus putative partners can “propose” to site a place of business in the United Kingdom and be registered as a limited partnership. It is possible therefore that there will be doubt when the limited partnership comes into existence.<sup>26</sup>

3.24 It is also unclear when the registration formalities are complete. Is this when the registrar receives the prescribed statement in accordance with section 8 of the 1907 Act, or when the statement is filed and a certificate issued in accordance with section 13?<sup>27</sup>

3.25 Once a certificate is issued, it is admissible as evidence in all legal proceedings<sup>28</sup> but is not conclusive evidence that the partnership is registered in accordance with the 1907 Act. This contrasts with the effect of the certificate of incorporation of a limited company.<sup>29</sup> It seems desirable that there should be some protection for the limited partners. Although they are required to sign the original application, they are unlikely to be closely involved in the details and they are not responsible for subsequent amendments.<sup>30</sup> We think that there is an argument for making the certificate conclusive evidence at least of the formation of the limited partnership, in order to protect limited partners who were not responsible for the inaccuracies. Differing approaches are adopted in other jurisdictions. For example, Guernsey law makes the certificate conclusive evidence of “compliance with the requirements ... as to registration and of all matters stated in it”.<sup>31</sup> In New South Wales, the certificate is conclusive evidence that the limited partnership was formed on the date stated, but conclusive as to other particulars “unless the contrary is established”.<sup>32</sup>

<sup>26</sup> Under the law of general partnership, whether parties who propose entering into a business venture in partnership together have actually done so, is a question of fact: *Khan v Miah* [2000] 1 WLR 2123 at p 2126 *per* Lord Millett. The question is whether the parties had actually embarked upon the venture on which they had agreed: *ibid*, at p 2128. It is arguable that the activity involved of preparing a registration of a limited partnership is itself sufficient for this purpose.

<sup>27</sup> The current editor of *Lindley and Banks* considers that the latter is merely a ministerial act which would not affect the status of the limited partnership: para 29–23. By contrast, in Jersey it is provided specifically that the limited partnership does not come into being until the certificate is issued: Jersey Law, Art 4(1).

<sup>28</sup> 1907 Act, s 16(2).

<sup>29</sup> Companies Act 1985, s 13(7) makes such a certificate conclusive evidence that the requirements in respect of registration have been complied with.

<sup>30</sup> See para 3.47 below, where we provisionally propose that general partners should be made expressly responsible for all registration formalities.

<sup>31</sup> Guernsey Law, s 9(2).

<sup>32</sup> NSW Act, s 58(4).

3.26 The latter approach seems to preserve a reasonable balance and to provide greater certainty to the users of limited partnerships. We invite views on the following provisional proposals:

- (1) A limited partnership should exist from the date of registration of the statement signed by partners, as stated in its certificate of registration.**
- (2) The certificate of registration should be conclusive evidence that the limited partnership was duly formed on the date stated.**
- (3) The certificate of registration (whether original or as amended) should be conclusive as to other particulars, unless the contrary is proved.**

#### **Notice of change of status**

3.27 Where a general partner retires the change must be registered,<sup>33</sup> and where he changes his status from a general to a limited partner notice must also be given in the Gazette.<sup>34</sup> Until these requirements are satisfied, the change will be of no effect.

3.28 There is some doubt whether this will be sufficient in all cases to limit the general partner's liability. In particular, it is not certain how far registration of the prescribed particulars, available for public inspection,<sup>35</sup> constitutes notice. On one view, the 1907 Act can be seen as a self-contained statement of all the steps necessary to obtain limited status, so that no further notice is required.<sup>36</sup> However, this is far from clear. As we shall see, at present, a limited partnership need not disclose its status in its name.<sup>37</sup> A person may deal with such a partnership without knowing that it is a limited partnership. Consequently, it is advisable that notice of a change in status of a partnership from ordinary to limited, or of a general partner to limited partner, is given to customers of the ordinary partnership. If this is not done, such third parties may be able to hold a

<sup>33</sup> 1907 Act, s 9.

<sup>34</sup> Section 10 (1) of the 1907 Act provides: "Notice of any arrangement or transaction under which any person will cease to be a general partner in any firm, and will become a limited partner in that firm, or under which the share of a limited partner in a firm will be assigned to any person shall be forthwith advertised in the Gazette, and until notice of the arrangement or transaction is so advertised the arrangement or transaction shall, for purposes of this Act, be deemed to be of no effect."

<sup>35</sup> 1907 Act, s 16.

<sup>36</sup> This is the view suggested in *Prime and Scanlan*, p 352 but the authors accept that "the safe practical course is to give specific notice to creditors".

<sup>37</sup> See para 3.33 below.

limited partner in the 'new' firm liable for obligations incurred after the change, if he was known to be a partner in the ordinary partnership.<sup>38</sup>

3.29 The main gap in the 1907 Act which leads to difficulties is the absence of any requirement for a limited partnership to give notice of its status in its name. We shall be provisionally proposing that this should be necessary in the future.<sup>39</sup>

3.30 If this change to the name of a limited partnership is made, and all changes in the composition of a partnership must be registered, is there any further need to publish a notice in the Gazette? This seems to be an additional administrative burden which serves no useful practical function. A system of registration is a sufficient public record of the changes. Consequently, we propose that section 10<sup>40</sup> be repealed and invite views on the following provisional proposals:

**(1) Section 10 of the 1907 Act should be repealed.**

**(2) The revised 1907 Act should make it clear that the steps listed in the Act constitute a complete mechanism by which partnerships can become limited, and changes in status and composition can be made, without any further requirement for notice.**

## COMPANIES HOUSE

### De-registration

3.31 Companies House has no power to de-register a limited partnership. This may create two difficulties: first, over time the register becomes progressively out of date; secondly, a company cannot use the same name as a limited partnership while such name remains on the Companies Act index. It would seem sensible to have a provision similar to that applying to companies to enable defunct partnerships to be struck off.<sup>41</sup> The procedure would need to ensure that limited partners, as well as general partners, were given an opportunity to object.

**Should the Registrar of Companies have a power to de-register limited partnerships in similar circumstances to those applying to companies under Companies Act 1985, section 652?**

<sup>38</sup> 1890 Act, s 36(1) provides that a person dealing with a firm after a change in its constitution is entitled to treat all "apparent members of the old firm" as still being members until he has notice. An advertisement in the Gazette is notice only to persons "who had no dealings with the firm" before the advertisement: s 36(2). This appears to apply to limited partnerships, in the absence of anything to the contrary in the 1907 Act: 1907 Act, s 7.

<sup>39</sup> See paras 3.33-3.34 below.

<sup>40</sup> For the provisions of s 10 of the 1907 Act, see para 3.27 n 34 above. It applies also to the assignment/assignation of an interest in a limited partnership, to which the same reasoning would apply.

<sup>41</sup> Cf Companies Act 1985, s 652, which contains a procedure by which the Registrar may strike off a company where he has reason to think that it is "not carrying on business or in operation".

### **Name of limited partnership**

- 3.32 A limited partnership's choice of name is largely unregulated. Although the name of the limited partnership is registered on the Companies Act index,<sup>42</sup> limited partnerships are not governed by the rules of the Companies Act 1985 restricting company names.<sup>43</sup> Consequently, it is possible for a limited partnership to be registered with the same name as a limited company or another limited partnership. We are not aware if this possibility causes problems in practice. We invite comments on:

**Should there be any restriction on the names which may be registered for limited partnerships, and if so what restrictions?**

### **Disclosure of limited liability status**

- 3.33 A necessary safeguard for any limitation of liability is that the nature of the entity is sufficiently disclosed. It is a significant omission that the name of a limited partnership need not indicate its status.<sup>44</sup> Although the registration of a limited partnership is effected by posting or delivering to the register a statement containing prescribed particulars,<sup>45</sup> which may be inspected by any person, it is questionable whether this constitutes notice to third parties of the nature of the partnership or of the registered particulars. The 1907 Act itself recognises that this is not sufficient notice of matters requiring to be registered as, in addition to the requirement that changes be registered,<sup>46</sup> certain changes must also be advertised in the Gazette.
- 3.34 If a third party is put on notice that he is dealing with a limited partnership he will then have the opportunity to consult the register. We invite views on the following provisional proposals:

- (1) The name of a limited partnership must end with 'limited partnership', 'limited firm', or a suitable abbreviation, possibly, 'lp'; and**
- (2) All documents issued by the limited partnership must use the name with this suffix.**

<sup>42</sup> Companies Act 1985, s 714.

<sup>43</sup> Companies Act 1985, s 26 prohibits the registration of certain categories of name, including a name which is the same as one already appearing in the list (s 26(1)(c)). There are no equivalent restrictions on similar names for businesses generally: see Business Names Act 1985, s 2.

<sup>44</sup> See, by way of contrast, s 5(1)(b) of the Guernsey Law and Article 7(1) of the Jersey Law. In New South Wales, it is provided that documents issued by the partnership must include the words "a limited partnership" adjacent to the name: NSW Act, s 75(1).

<sup>45</sup> 1907 Act, s 8.

<sup>46</sup> 1907 Act, s 9.

## **Holding out**

- 3.35 A related issue is whether the use of a limited partner's name in the firm name amounts to a representation of general partner status, rendering the limited partner liable on the basis of "holding out".<sup>47</sup>
- 3.36 *Lindley and Banks* sees:
- no justification for suggesting that, as a general proposition of law, the mere use of a limited partner's name *must* involve a representation that he is a partner of one kind rather than another.<sup>48</sup>
- 3.37 This view is supported by reference to the omission in the Business Names Act 1985 of any provisions dealing with limited partnerships. The effect of the Act is that all partners' names (including those of limited partners), if not all included in the firm name, must be included on business documents, as well as on a notice displayed on the partnership premises.<sup>49</sup> The Act makes no provision for distinguishing between general and limited partners on such documents. It would be surprising if compliance with the requirements of the Business Names Act 1985 were of itself to be treated as a "holding out" of the limited partners, and thus as exposing them to greater liability than that prescribed in the 1907 Act.
- 3.38 One potential solution to this problem might be to amend the Business Names Act 1985, so that the requirement to name the partners does not include the limited partners.<sup>50</sup> In any event, in the absence of authority on this point, we believe that statutory clarification is required. We consider that "holding out" ought not to be inferred from the mere inclusion of the names of the limited partners in the name of the firm, or in business documents as required by the Business Names Act 1985. It may not be necessary to clarify the point if our proposal to include in the name of a limited partnership words which indicate that it is such a partnership is supported as that would put the third party on notice to inspect the register.
- 3.39 Therefore, we invite views on the following questions:

**(1) Should the Business Names Act 1985 be amended so as to remove or limit the requirement to give details of limited partners?**

<sup>47</sup> See 1890 Act, s 14 whereby anyone who "suffers himself to be represented as a partner in a particular firm" is liable as a partner.

<sup>48</sup> *Lindley and Banks*, para 29–09.

<sup>49</sup> Business Names Act 1985, s 4. The business documents must also give an address in Great Britain for each partner for the effective service of documents relating to the business: s 4(1)(a)(iv). For a discussion of the Business Names Act 1985, in the context of partnerships, see Joint Consultation Paper, Part XXI.

<sup>50</sup> See *Twomey*, para 28.41. The obligation to name all limited partners will become more onerous if the 20 partner limit is removed.

- (2) Alternatively, should there be statutory clarification that the inclusion of the name of a limited partner in the firm name or in the particulars disclosed under the Business Names Act 1985 does not by itself hold out a limited partner as a general partner.**

#### **FILING OF ACCOUNTS**

- 3.40 An obvious contrast with the disclosure requirements of companies is that the accounts of a limited partnership do not need to be audited nor published. There is, however, an important exception to this general position. The Partnerships and Unlimited Companies (Accounts) Regulations 1993<sup>51</sup> provide that for certain partnerships' annual accounts, an annual report and an auditor's report should be prepared, just as if the firm were a company formed and registered under the Companies Act 1985. This requirement applies to any partnership governed by the laws of any part of Great Britain, in which each of its members is:
- (1) a limited company, or
  - (2) an unlimited company, or a Scottish firm, each of whose members is a limited company.<sup>52</sup>
- 3.41 Each corporate partner must append a copy of the required accounts to its own annual accounts before they are delivered to the Registrar of Companies. This is in effect a form of consolidation,<sup>53</sup> rather than a form of disclosure designed to aid third parties.
- 3.42 We make no proposals for change in this respect.

#### **CONSEQUENCES OF DEFAULT**

- 3.43 Section 5 of the 1907 Act treats any limited partnership which is not registered in accordance with the Act as a general partnership. In that case, every limited partner is deemed to be a general partner with unlimited liability. It seems that the same result will follow both where there has been no application to register and where there has been registration but the particulars which are registered under section 8 are inaccurate. In the latter case, the partnership will not be registered in accordance with the Act and section 5 will therefore apply.
- 3.44 If the particulars change, section 9 prescribes that a statement, signed by the firm, specifying the nature of the change, must be sent by post or delivered to the

<sup>51</sup> SI 1993 No 1820.

<sup>52</sup> These regulations extend to comparable foreign entities (section 3(4)).

<sup>53</sup> A corporate general partner may actually have to consolidate his accounts under Part VII of the Companies Act 1985. Views differ on whether this is strictly necessary. This is a matter of interpretation of the relevant statutory provisions which derive from the Seventh Council Directive on Company Law 83/349/EEC. It is not within our terms of reference to make recommendations in this area.

registrar within seven days. If this is not done, each general partner is liable to a daily fine for the duration of the default.<sup>54</sup> It does not in terms state that a failure to comply with section 9 brings section 5 into play, so that the limited partners lose their limited liability. However, that appears to be the result, since in that event the partnership ceases to be registered in accordance with the Act. In the words of the current editor of *Lindley and Banks*:<sup>55</sup>

There would seem no logical reason to distinguish between an unregistered firm and a firm which is registered with inaccurate particulars, at least so long as the default continues.

- 3.45 This could have severe, and unexpected, consequences. For example, if a partnership is continued after a fixed term elapses, it is converted into a partnership at will.<sup>56</sup> If this change to the term of the partnership has to be registered,<sup>57</sup> the continuance of the business by the general partners without such registration (with or without the knowledge of the limited partners) might inadvertently turn all the limited partners into general partners.<sup>58</sup> Similarly, it seems unduly harsh to deprive limited partners of their limited liability protection for what may be no more than an administrative mistake, or a comparatively trivial change, for example, the change of name on marriage.
- 3.46 Such consequences also seem to be inconsistent with the control that a general partner has over the registration procedures. A limited partner has no inherent power to amend the registration statement, nor to ensure that the general partner does so. Such administrative responsibility is clearly within the general partner's province. This is the rationale behind the statutory penalty of a fine for the general partner who is in default of the registration requirements. Arguably the potential fines against the general partner should be sufficient sanction to ensure compliance, without imposing disproportionate penalties on limited partners. In any event, the 1907 Act would benefit from clarity in this area. Our provisional proposal is that the inaccuracies in the section 8 particulars and any default or inaccuracy in registration of changes in a partnership should not by

<sup>54</sup> 1907 Act, s 9(2).

<sup>55</sup> *Lindley and Banks*, para 29–27.

<sup>56</sup> See 1890 Act, s 27. Presumably only the general partners would have the power to dissolve it by notice: 1907 Act, s 6(5)(e).

<sup>57</sup> J B Miller, *The Law of Partnership in Scotland* (2nd ed 1994) p 616 argues that such a change may not need to be registered if the continuation of the term of the partnership is regarded as a normal incident of a partnership for a specified period and thus covered in terms of the initial registration. This does not seem to fit very easily with the express provision of section 9(1)(e) which requires the registration of any change in the “term or character of the partnership”. We cannot see why a change from a fixed term to an indefinite one does not fall within this.

<sup>58</sup> Another possibility is that the participation of a limited partner in the management of the firm constitutes a change which should have been registered, and therefore removes the limited liability protection from all the limited partners: see *Prime and Scanlan*, pp 352–353. We doubt this. The 1907 Act spells out the precise consequences of taking part in the management for the individual partner concerned. Section 9(1)(g) of the 1907 Act seems directed to an actual agreed change in status rather than to a limited partner being treated “as though he were a general partner” (1907 Act, s 6(1); emphasis added).

themselves remove the limited liability of the limited partners. Any default in registration should continue to result in a possible penalty for the general partner(s).<sup>59</sup>

3.47 Under section 8 of the 1907 Act, “the partners” (meaning, apparently, *all* the partners, both general and limited) must sign the original registration statement. We think that, consistent with the management responsibilities of the general partner, it should be sufficient if only the general partner(s) sign this statement.<sup>60</sup> Similarly, section 9(1) could be amended to make clear that the obligation is on the general partner(s) to sign an amending statement.<sup>61</sup> The possible sanction of a fine for the general partner(s) should also be reflected in the time limit for submitting changes. Seven days seems unduly tight. Twenty one days would be more realistic.<sup>62</sup> Finally, the level of the fine of £1 for every day of default is unrealistically small if it is to act as both a deterrent and a sanction. By contrast failures to register particulars under the Companies Act 1985 are punishable by a fine up to £1000 with a daily default fine of £100 for continued contravention.<sup>63</sup>

3.48 We invite views on the following provisional proposals:

- (1) General partners should be fully responsible for the registration formalities and should have exclusive authority to sign the original registered particulars and any amendments.**
- (2) The time for filing amendments with the registrar should be increased from 7 to 21 days.**
- (3) Where in default of registration formalities, the general partner(s) should be liable for daily fines similar to those which apply to companies.**
- (4) Default in registration formalities should not of itself remove the limited liability of the limited partners.**

<sup>59</sup> In Guernsey, if there is a default in complying with the requirement to give notice of change in the registered particulars, the partnership and each general partner is guilty of an offence and “the change may not be relied on by the partnership or by any general partner or former partner thereof so as to affect adversely the rights of any third person or limited partner” (s 10(2)(a) and (b)). Section 10(1)(b) gives 21 days for notice of a change to be filed.

<sup>60</sup> Practice differs in other jurisdictions. In Jersey, all the general partners must sign the original declaration, but a single general partner may sign the amendment (Jersey Law, Art 4(2); Art 5(1)). In New South Wales, the original application must be signed by “each proposed partner”; but a statement of change may be signed by the general partners (or a general partner authorised by the general partners), unless it relates to the admission or contribution of a limited partner, in which case it must be also signed by that partner: NSW Act, s 54, s 56.

<sup>61</sup> 1907 Act, s 9 requires the statement to be signed “by the firm” (not “the partners”, as under s 8). Thus, limited partners who have no power to bind the firm are not apparently included: 1907 Act, s 6; see *Lindley and Banks*, para 29–26.

<sup>62</sup> As in Jersey Law, Art 5(1).

<sup>63</sup> Companies Act 1985, s 352(5) and Sched 24.

# **PART IV**

## **LIABILITY OF A LIMITED PARTNER**

### **INTRODUCTION**

4.1 The essential feature of a limited partnership is that the liability of the limited partners for the debts and obligations of the partnership is limited to the amount of their contributions. This protection is lost if a limited partner takes part in management. A number of potential problems will be considered in this Part:

- (1) the scope of the protection;
- (2) what constitutes “management”;
- (3) capital withdrawal;
- (4) duration of liability after withdrawal; and
- (5) agency.

### **SCOPE OF PROTECTION**

4.2 The 1907 Act generally limits the liability of a limited partner to the amount of his contribution. Section 4(2) achieves this by providing simply that the limited partners:

shall not be liable for the debts or obligations of the firm beyond the amount so contributed.

4.3 This has to be read in the context of the provisions of the 1890 Act, under which every partner is personally liable for the debts and obligations of the firm<sup>1</sup> and for loss or injury caused by any wrongful acts or omissions, or for penalties incurred, in the ordinary course of its business.<sup>2</sup> The ordinary rules apply to limited partnerships, “except so far as they are inconsistent with the express provisions of the 1907 Act”.<sup>3</sup> It has been suggested that there may be some uncertainty how far the ordinary rules have been effectively excluded:

One of the criticisms which can be levelled at the 1907 Act is that, although limiting the liability of a limited partner in this way, it does not expressly exclude the personal liability of every limited partner for the debts and obligations of the firm. ... The 1907 Act does not contain any provision protecting the limited partner or his separate

<sup>1</sup> Partnership Act 1890, s 9.

<sup>2</sup> Partnership Act 1890, s 10.

<sup>3</sup> 1907 Act, s 7.

property from execution or other proceedings for enforcing a partnership debt.<sup>4</sup>

- 4.4 We do not see this as a real concern. The clear intention of the Act is that except when protection is lost under the Act, a creditor of the firm can only obtain personal judgement against a limited partner to the extent of his contribution. This purpose would be defeated unless it is also read as excluding any form of enforcement against the limited partner.<sup>5</sup> We are not aware that this has given rise to any serious doubt in practice. For, example, in *Re Barnard*<sup>6</sup> it was held, in the case of a bankrupt limited partnership with a single general partner, that there was no joint liability, because he alone was liable for the debts. The protection of the limited partner was assumed to be effective for all purposes.
- 4.5 Our provisional view is that the effect of the legislation is sufficiently clear on this issue. It would seem desirable, however, for there to be provision, in the Act or rules of court, to ensure that a judgment against the firm is framed in appropriate terms to protect the position of the limited partners.<sup>7</sup>
- 4.6 As a separate issue, we note that in Jersey a limited partner, by participation in management, incurs liability to the creditors of the partnership only on the insolvency of the partnership.<sup>8</sup> This approach treats the limited partner in a similar way to a contributory to a limited company. This gives the limited partner greater protection. However, we do not see any strong policy reason for depriving a creditor of recourse against a limited partner's assets while the limited partnership remains in business, if that partner has, by his actions, lost the limitation on his liability.
- 4.7 Consequently, we invite views on the following questions:

- (1) Is there a further need to clarify the effect of section 4(2), by stating that it excludes any form of financial liability, direct or indirect, beyond the amount of the limited partner's contribution?**
- (2) Should express provision be made to ensure that the position of the limited partner is protected in any order against the firm, and, if so, in what form?**

<sup>4</sup> *Twomey*, para 28.95.

<sup>5</sup> *Lindley and Banks*, suggests that the position is "analogous to that of a married woman who had, prior to the Law Reform (Married Women and Tortfeasors) Act 1935, contracted debts which could only be met out of her separate estate": para 30–22.

<sup>6</sup> [1932] 1 Ch 269.

<sup>7</sup> See *Lindley and Banks* para 30–23 (giving the analogy of the order made against a firm including a minor in *Lovell v Beauchamp* [1894] AC 607) and *Twomey*, para 28.95 (citing the Queensland Partnership (Limited Liability) Act 1988, s 21(2), which provides that a judgment against a partnership cannot be enforced against a limited partner except with leave of the court).

<sup>8</sup> Jersey Law, Art 19.3.

**(3) Where a limited partner loses his status as such, by participation in management or otherwise, should he nonetheless enjoy protection except in the event of the insolvency of the partnership?**

**MANAGEMENT**

**Definition of management**

4.8 The 1907 Act gives little guidance as to what activities short of “management”, are permissible for limited partners.<sup>9</sup> Section 6(1) of the 1907 Act provides:

A limited partner shall not take part in the management of the partnership business, and shall not have the power to bind the firm:

Provided that a limited partner may by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business, and may advise with the partners thereon.

If a limited partner takes part in the management of the partnership business he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner.

4.9 Recent codes in other jurisdictions have tended to spell out in some detail lists of activities which are not to be regarded as amounting to participation in management. The American Uniform law contains a very detailed list, which has been used, in expanded form, in Delaware.<sup>10</sup> It also appears to have provided the basic model for Jersey and Guernsey. Others, such as New South Wales, are more concise.

4.10 The Delaware model appears to be the least restrictive.<sup>11</sup> Indeed, on one view, it appears to allow almost unlimited scope, subject to the terms of the partnership agreement, for the limited partners to be involved in controlling the business. The premise seems to be that the relationship within management of general and limited partners is largely an internal matter, and that the position of third parties is adequately protected by the existence of general partners with unlimited liability.

4.11 It is open to argument what precise purpose is served by strict control over management activities by the limited partner and whether any participation by a limited partner in the management of the firm should have the draconian consequence of unlimited liability. If the general partners still have unlimited

<sup>9</sup> For a discussion of the term “being concerned in the management”, under the Company Directors Disqualification Act 1986, see *Re Market Wizard Systems (UK) Ltd* [1998]2 BCLC 282 at p 298 ff.

<sup>10</sup> Section 303(b).

<sup>11</sup> Regardless of the substance, the expansive drafting style is unlikely to be seen as a suitable model for UK legislation.

liability and the limited partners act under their general control and consent, why should a third party have a greater degree of protection? However, the present division of responsibilities, and the sanctions, are well-established features of the limited partnership, and we are not aware of any call for radical change.

- 4.12 On the other hand, there are legitimate criticisms of the lack of clarity in the 1907 Act. A limited partner is allowed to “examine into” the state and prospects of the business and to “advise with” the general partners on those matters. The precise meaning of the words “advise with” is particularly obscure.<sup>12</sup> The limited partner may engage in informed communications about the business but cannot, it appears, safely seek to *influence* or *persuade* management in its direction of the firm.<sup>13</sup> The dividing line between “advising” and “persuading” is not an easy one. Thus, there seems to be an implication that the limited partner is more than a mere passive investor but the extent of the permitted activity is not certain.
- 4.13 We understand this lack of clarity is considered a major defect in the law of limited partnerships in the United Kingdom. It is important that an investor should know the limits of his permitted participation in the conduct of the firm’s business. For example, we understand that the venture capital industry is particularly concerned whether a limited partner, who is also a director or employee of a general partner company, or who takes part in an investors’ meeting which can veto certain decisions of the general partners, is rendered liable as a general partner. There is also a concern that limited partners ought to be able to have a say in the selection of an investment manager. We have already referred to the Myners Report for the Treasury<sup>14</sup> which highlighted the need to clarify the scope of the role limited partners can play in overseeing investment activity.
- 4.14 This uncertainty becomes particularly significant in view of the more detailed guidance offered in the laws of other jurisdictions. To the extent that this is perceived as a major practical difficulty, the United Kingdom suffers a competitive disadvantage. Our proposals in the following paragraphs provisionally identify “safe harbour” activities which the limited partner should be allowed to engage in without affecting his limited liability status and which would allow a limited partner to play an investment advisory role.<sup>15</sup> We invite consultees to comment on any issues which are specific to limited partner

<sup>12</sup> The Oxford English Dictionary refers to “advise with” as having the meaning “consult with”.

<sup>13</sup> *Lindley and Banks* (para 31-04, n 17) suggests that the words “connote discussion and interchange of view falling short of any attempt to *influence* management decisions”. Similarly, *Twomey* (para 28.79) suggests that they allow the limited partner “to establish, by questioning the general partners, the reasons for their management decisions”, but do not extend to “persuasion” which “would clearly constitute his being involved in the management of the firm”.

<sup>14</sup> See para 1.11 n 35 above.

<sup>15</sup> See paras 4.20-4.33 below.

involvement in investment advice which may not have been dealt with in this Part.

- 4.15 An alternative view is that lists which purport to set out permitted activities cause practical difficulties as the boundaries are reached, and that a list of prohibitions would give greater clarity. However, as far as we are aware, the approach adopted in other jurisdictions, of listing permitted activities, has not caused problems.
- 4.16 We invite views from consultees on the following issues:

- (1) Should the legislation provide further guidance as to the activities by a limited partner which do not involve “management”?**
- (2) If so, should this be in the form of a list of permitted activities, or a list of prohibitions?**

### **Knowledge of third party**

- 4.17 In some jurisdictions, for example Jersey and Delaware,<sup>16</sup> the extended liability of the limited partner is dependent on the knowledge of a third party of his participation in management. Thus, the Jersey Law makes the unlimited liability of a limited partner for taking part in the management of the firm conditional on two further contingencies:

A limited partner shall be liable under paragraph (3) only to a person who transacts with the limited partnership with actual knowledge of the participation of the limited partner in the management of the limited partnership and who then reasonably believed the limited partner to be a general partner.<sup>17</sup>

- 4.18 The argument in favour of this approach is that a third party should not be in a better position merely because a limited partner takes part in the management of the firm, when the decision of the third party to deal with the limited partnership has been made on the basis that the general partners (and the general partners alone) are liable. Against this, it can be said that the conceptual basis for the limited liability of limited partners is dependent not on the *particular* knowledge and belief of a *particular* third party, but simply on the limited partner’s lack of managerial responsibility. The clarity of this division of responsibilities might be diminished by introducing a criterion of knowledge on the part of third parties. We are not aware of any call for change in this respect. Our provisional view is not to follow the Jersey precedent.
- 4.19 We ask consultees whether they agree with our provisional view that:

**The loss of protection for a limited partner, who takes part in management, should not be contingent upon knowledge of a third party dealing with the partnership.**

<sup>16</sup> Jersey Law, Art 19(4); see also Delaware Act, s 17–303.

<sup>17</sup> Article 19(4).

### **What activities should be defined as “safe”?**

- 4.20 Assuming some further guidance is desirable, a view needs to be taken as to how detailed this should be. The Jersey Law contains a list of activities which do not constitute taking part in the management of a limited partnership. There are similar provisions in Guernsey. In the Delaware Act there is a long list of activities which do not involve participation in control.<sup>18</sup> Our provisional view is that there is no need for such an elaborate enumeration of “safe” activities as is found in the Delaware Act and that the Jersey law offers a better model. The concept of “management” does not seem generally to give rise to difficulty, and it may be obscured rather than clarified by a very detailed definition.
- 4.21 In considering this issue, it is useful to draw a distinction between: (1) direct involvement in decision-making, where the difference between “ordinary matters” and other matters is particularly relevant; (2) indirect participation, including consultation and advice; and (3) other activities.

### ***Ordinary and extra-ordinary matters***

- 4.22 Section 6(5) of the 1907 Act provides:

Subject to any agreement express or implied between the partners

(a) any difference arising as to the *ordinary matters* connected with the partnership business may be decided by *a majority of the general partners*; (emphasis added).

This is to be contrasted with the equivalent rule for partnerships generally, that, subject to the partnership agreement:

Any difference arising as to *ordinary matters* connected with the partnership may be decided *by a majority of the partners*, but no change may be made in the nature of the business without the consent of all existing partners.<sup>19</sup> (emphasis added).

- 4.23 It appears to be implicit that the responsibility of the general partners for “ordinary matters” of the business<sup>20</sup> can be equated broadly with “management”; and that limited partners are not precluded from participating in decisions on other “extra-ordinary” matters, such as a change in the nature of the business. Twomey gives further examples:

... it is thought that decisions by the limited partner on the basic structure and organisation of the partnership, such as a change in the objectives of the partnership, an increase in the firm’s capital, a change to the duration of the firm, a change to the terms of the

<sup>18</sup> See Appendix B.

<sup>19</sup> Partnership Act 1890, s 24(8).

<sup>20</sup> The question of what is an “ordinary matter” in the general partnership law is discussed in the Joint Consultation Paper, para 12.34 ff. Examples are given of “extra-ordinary” matters often treated as requiring a 75% majority, or unanimity, in partnership agreements.

limited partnership agreement, conversion of a general partner to a limited partner and *vice versa* would not be regarded as management decisions.<sup>21</sup>

### ***Decision-making***

4.24 As between the partners, the right of the limited partners to participate in decision-making, whether by voting in partnership meetings, or by giving or withholding consent, is a matter for the partnership agreement.<sup>22</sup> However, the agreement cannot define what is or is not a “management” decision for the purpose of the limited partner’s protection from liability.

4.25 The question arises whether the partners should be given specific protection in relation to their participation in particular categories of “extra-ordinary” decision, and, if so, which. For example, in Jersey law, it is provided that “participation in management” does not include:

(e) approving or disapproving an amendment to the partnership agreement; or

(f) voting on, or otherwise signifying approval or disapproval of, one or more of the following –

(i) the dissolution and winding up of the limited partnership,

(ii) the purchase, sale, exchange, lease, pledge, hypothecation, creation of a security interest, or other dealing in any asset by or of the limited partnership,

(iii) the creation or renewal of an obligation by the limited partnership,

(iv) a change in the nature of the activities of the limited partnership,

(v) the admission, removal or withdrawal of a general or a limited partner and the continuation of the limited partnership thereafter, or

(vi) transactions in which one or more of the general partners have an actual or potential conflict of interest with one or more of the limited partners.<sup>23</sup>

4.26 Another approach is for general protection to be given for participation in decisions made at general meetings. Thus, for example, the NSW Act provides that a limited partner does not “take part in management” merely because he:

<sup>21</sup> *Twomey*, para 28.80.

<sup>22</sup> The scope of any “default” provisions is considered at paras 5.3-5.11 below.

<sup>23</sup> Jersey Law, Art 19(2).

if authorised by the partnership agreement, participates in general meetings of all the partners.<sup>24</sup>

- 4.27 Our provisional view is that it would be desirable for the Act to put beyond doubt that certain categories of decision are permissible for the limited partners (subject to the partnership agreement), without threatening their protection from liability. However, we also think it important that these categories should be ones which can be justified as falling clearly outside the ambit of “ordinary matters”, so as not to obscure the natural meaning of the term “management”.
- 4.28 Most of the categories in the Jersey list seem to us to satisfy this test. We have doubts, however, about categories (ii) and (iii). On balance, we think that the decisions on the sale and purchase of assets, and on the incurring and discharging of debts, are often too intertwined with the day-to-day running of a business to be listed as definitive events which do not constitute management.<sup>25</sup>
- 4.29 In Part V we shall be discussing whether or not a limited partner should have a right to dismiss a general partner.<sup>26</sup> We shall also be referring to various matters which we believe should, in the absence of agreement to the contrary, need the consent of the limited partners.<sup>27</sup> Giving such consent should not constitute management. There are also other matters on which the limited partners ought to be able to vote, particularly transactions in which there is or may be a conflict of interest between a general partner and a limited partner.

### **Advice**

- 4.30 We believe that it is of practical importance that the limited partner’s right to “advise with” the general partners<sup>28</sup> on the state and prospects of the partnership business should be clarified and expanded. Investors may reasonably wish to be certain that participation in an investors’ committee, with the power to be both active in offering advice and more detached in approving matters, is permitted. A model may be found in the legislation in Jersey<sup>29</sup> which provides that a limited partner does not participate in management by:
- (b) consulting and advising a general partner with respect to the activities of the limited partnership; and

<sup>24</sup> NSW Act, s 67(3)(e).

<sup>25</sup> Where a limited partnership is used as an investment business, decisions on the purchase and sale of assets are central to carrying on the business, and seem therefore to be part of the management function.

<sup>26</sup> Paras 5.7-5.11 below.

<sup>27</sup> Paras 5.3-5.6 below.

<sup>28</sup> 1907 Act, s 6(1).

<sup>29</sup> Jersey Law, Art 19(5)(b) and (c).

- (c) investigating, reviewing, approving or being advised as to accounts or affairs of the limited partnership ...<sup>30</sup>

4.31 A provision along these lines should be sufficient to make clear that limited partners could participate in advisory committees.<sup>31</sup>

***Other matters***

4.32 We are aware that there is concern that a limited partner may incur unlimited liability indirectly, either by working for the partnership or the general partner, or by having another relationship, for example, as shareholder or director in a corporate general partner. We can see no objection to an express statutory provision to clarify these matters.<sup>32</sup>

4.33 There may be other matters which justify special provision, for example, in pre-consultation discussions it was suggested that it might be helpful if a limited partner were able, without incurring liability by participation in management, to arrange the appointment of an agent to wind up the limited partnership if the general partner omitted to do so. It was also suggested that if the Registrar of Companies were empowered to de-register a limited partnership,<sup>33</sup> a limited partner should be able without incurring such liability to take steps to preserve the registration, again if the general partner failed to act. We make no recommendations but invite suggestions. Accordingly, we invite views on the following provisional proposal, and question:

**(1) It should be provided in the statute that doing any one or more of the following acts should not mean that a limited partner participates in the management of the firm:**

- (a) consulting and advising a general partner on the activities of the limited partnership;**
- (b) investigating, reviewing or approving the firm's accounts or affairs or being advised on these matters;**
- (c) being a contractor, agent or employee of the firm (if it has separate legal personality as in Scotland) or of the general partner; or being a director of or shareholder in a corporate general partner; or**
- (d) (where the consent of limited partners is needed), voting on, or approving or disapproving:**

<sup>30</sup> Guernsey law is to similar effect: s 12(4)(d) and (e).

<sup>31</sup> The Delaware Act goes further by providing expressly that management does not include serving on a committee of the limited partnership (s 17-303(b)(7)).

<sup>32</sup> Such as Jersey Law, Art 19(5)(a) and Delaware Act, s 17-303(8) (b) and (c). See Appendix B.

<sup>33</sup> See para 3.31 above.

- (i) the winding up of the limited partnership,**
- (ii) an amendment to the partnership agreement,**
- (iii) a change in the nature of the activities of the limited partnership,**
- (iv) the admission, removal or withdrawal of a general or a limited partner and the continuation of the limited partnership thereafter, or**
- (v) a transaction involving an actual or potential conflict of interest between a general and a limited partner.**

**(2) Should any other activities be defined as not involving management?**

#### **CAPITAL WITHDRAWAL AND LIABILITY OF LIMITED PARTNER AFTER LEAVING THE FIRM**

4.34 Considerable doubt surrounds the right of limited partners to withdraw their capital contributions, and the consequences for their liabilities, whether before or after they leave the firm. Section 4(3) of the 1907 Act provides:

A limited partner shall not during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and if he does so draw out or receive back any such part shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back.

The effect of section 4(3) seems to be that a limited partner's overall liability is still fixed at the original level of his contribution (not that there is an additional liability for the amount of the withdrawal).<sup>34</sup> This places a limited partner in an analogous position to that of a shareholder in a limited company.

4.35 The purpose of this restriction, no doubt, is to provide a form of comfort to a third party dealing with the firm. Conceptually, the purpose of the limited partner's capital contribution is analogous to the capital subscribed by shareholders in limited companies. There are, of course, strict corporate rules aimed at preserving this capital; dividends may be paid only as long as the integrity of this capital is respected.<sup>35</sup> For a limited partnership, the crucial

<sup>34</sup> Cf *Lindley and Banks*, para 30–12.

<sup>35</sup> To ensure that money invested by shareholders is not returned to them before a company is wound up, the Companies Act 1985 lays down rules as to what funds are available for the payment of dividends. Section 263(1) of the Companies Act 1985 provides that: "A company shall not make a distribution except out of profits available for the purpose". The term 'distribution' is defined in s 263(2) and includes all distributions of assets to members except for the specified exclusions listed in the section. The exclusions include reduction of capital (which requires the approval of the court).

difference is that it is only partially a limited liability vehicle, since the general partner remains personally liable for all the firm's debts and obligations. That, in practice, is likely to be the primary protection for third parties.<sup>36</sup>

4.36 It is also important to remember that capital contributions to limited partnerships, as to companies, are not inviolable. Such capital is not a ring-fenced sum available as a minimum resource for creditors. It is at risk from trading and is intended to be at risk. Thus, while section 4(3) provides protection for third parties against the withdrawal of contributions, there is no equivalent protection against their loss in the ordinary course of trading.<sup>37</sup>

4.37 Against that background, a number of issues need to be considered:

- (1) Is there, or should there be, any obligation to restore lost capital out of profits?;
- (2) When can capital be withdrawn?;
- (3) Liability following assignment or, in Scotland, assignation;
- (4) Should there be any time-limit to the limited partner's liability?

### **Lost capital**

4.38 There is some uncertainty as to what payments constitute "directly or indirectly" a return of the limited partner's contribution. Although earlier editions of *Lindley and Banks* argued that such a return could include interest on capital or share of profits, the present editor doubts that sums paid out of profits could be a return of capital.<sup>38</sup> It will be an issue of fact whether a payment is a return of capital. It will become more difficult to infer such a payment when the original capital contribution has been lost. In principle, since the 1907 Act has no requirement to replace lost capital out of profits, it seems that a payment of subsequent profits is not to be treated as a return of previously lost capital.

4.39 Clearly, this diminishes the protection theoretically available to third parties. As has been noted, although third parties are protected by section 4(3) against deliberate withdrawal of contributions, they have no protection against loss in the ordinary course of business. Arguably, there is a case for making the restoration of lost capital contributions a first charge on profits, so that the protection theoretically available to the third parties is made good. We note that in some jurisdictions the limited partner's liability is dependent, not on an actual

<sup>36</sup> Except in cases when the general partner is a limited company (see para 3.2 above), but that fact will be apparent from the register.

<sup>37</sup> In practice, we understand, the restrictions in s 4(3) may be side-stepped by ensuring that the majority of capital is introduced by way of loan, rather than "contribution". See, for example, Andrew Levene and Claire Treacy, "Collective Investment – is a limited partnership what you want?" *Tax Journal*, 18 October 1999.

<sup>38</sup> *Lindley and Banks*, para 30–13.

contribution (which may be lost), but on an agreement to contribute.<sup>39</sup> However, even then, the third person has no way of knowing the extent to which the amount shown in the register has already been contributed and expended in meeting other liabilities.<sup>40</sup>

4.40 On balance, we doubt if this is a problem of practical importance. As we have said, third parties are much more likely to see their protection as resting on the unlimited liability of the general partners. We do not therefore propose changes which might simply introduce unnecessary complication. However, we would be interested in any contrary evidence. Accordingly, we invite views on the following questions:

- (1) Should there be any restriction on the payments to limited partners (whether out of profits or otherwise) where the contributions have been lost in the course of business?**
- (2) Should the liability of the limited partner be dependent on agreed contributions rather than actual contributions?**
- (3) Should any other change be made to the rules relating to contributions of limited partners?**

#### **When may capital be withdrawn?**

- 4.41 There has been some uncertainty as to the effect of section 4(3) where a limited partner ceases to be a member of the partnership, whether under a provision of the agreement permitting retirement, or for some other reason, such as death.<sup>41</sup> There has been a suggestion that the words “during the continuance of the partnership” in section 4(3) mean that the restrictions continue to apply to the partner who has left, until the firm is subject to a general dissolution. This was the view taken in earlier editions of *Lindley and Banks*.<sup>42</sup>
- 4.42 The alternative, and preferable, view is that the words refer to the continuance of the partnership *of which he is a member*.<sup>43</sup> This is a reference to the fact that, under the existing law, there is a “technical” dissolution whenever there is a change of

<sup>39</sup> For example, in New South Wales, the statement in the register is of “an amount of capital, or the value of any property, that the limited partner has agreed to contribute to the partnership”: NSW Act, s 54(2)(g). The liability of the limited partner is limited to that amount: s 60(1).

<sup>40</sup> See, NSW Act, s 60(2), which provides that, where an actual contribution is made by the limited partner to meeting debts of the partnership, his liability is reduced to “such part of the amount shown in the register as remains unpaid.”

<sup>41</sup> We assume for these purposes that the agreement can provide for such an eventuality without causing a general dissolution of the partnership.

<sup>42</sup> *Lindley and Banks*, para 31–20.

<sup>43</sup> *Ibid*, para 31–21: the current editor relies on the principle that, technically, whenever a partner dies or retires, a new partnership comes into existence and the prohibition ceases to apply.

membership. The liability of the leaving partner continues only up to the time of that technical dissolution, not until the general dissolution of the firm as a whole. Otherwise, the section would have the surprising result that, even following the death or bankruptcy of a limited partner, he or his estate would be obliged to leave the capital in the partnership, and would continue to be liable up to that amount, during the whole life of the partnership.<sup>44</sup> Thus, we think it is clear that the 1907 Act does not restrict the withdrawal of the limited partner's capital when he leaves the partnership, and (subject to amendment to the register and notice, see above) he bears no liability for future debts.<sup>45</sup> This will need to be clarified in a new Act. Continuing liability for debts previously incurred is a separate matter, which we address below.

### **Liability following assignment/assignation**

- 4.43 The 1907 Act permits a limited partner to assign his share, with the consent of the general partners, and provides that thereupon the assignee "shall become a limited partner with all the rights of the assignor."<sup>46</sup> The Act is silent as to the effect on the obligations of the assignor. The reference to the transfer of "rights" suggests that the assignor remains liable for past debts, and the assignee is liable only for future debts.<sup>47</sup> It appears therefore that a creditor will retain his right of action against the assignor for any debts or obligations incurred before the assignee formally becomes a limited partner. This subject is considered further in the next Part.<sup>48</sup>

### **Duration of liability**

- 4.44 If a former limited partner does withdraw his contribution, he (or his estate) will remain liable up to the amount withdrawn for any debts or obligations which have been incurred prior to his departure.<sup>49</sup> In other words, a former limited partner, who has received his contribution back on ceasing to be a member, has no fixed time limit for his exposure to personal liability for previous debts.<sup>50</sup> The

<sup>44</sup> This could be *ad infinitum*: see *Twomey*, para 28.51.

<sup>45</sup> The wording may need to be reconsidered, if effect is given to our provisional recommendation that a partnership should have a continuing legal personality: see Joint Consultation Paper, para 4.17. The position may be less clear-cut in Scots law, given the uncertainty whether a change in membership of a partnership necessarily results in the creation of a new partnership: see *ibid*, paras 2.34 – 2.35. Clarification of Scots law will be needed in any event.

<sup>46</sup> 1907 Act, s 6(5)(b), subject to any contrary agreement.

<sup>47</sup> *Twomey*, para 28.102; *Lindley and Banks*, para 30–12, 21 (previous editors took a different view). In Scots law, the liabilities of the assignor or cedent may be available as a defence to any enforcement by the assignee of an assigned right.

<sup>48</sup> See paras 5.22-5.28 below.

<sup>49</sup> *Lindley and Banks*, para 30–20.

<sup>50</sup> It should, though, be noted that the liability is capped to the level of the contribution, and will naturally recede as limitation periods for possible claims expire or in Scotland as such claims prescribe.

capital contribution cannot apparently be withdrawn, even on departure from the firm, without incurring a matching liability for an indefinite period.

- 4.45 This aspect of the legislation seems to create undue uncertainty for limited partners. A limited partner, who leaves the partnership and withdraws his capital while the firm is solvent, would remain personally liable for this if the firm becomes insolvent some years after his departure.<sup>51</sup>
- 4.46 Other jurisdictions have addressed this problem, by imposing time-limits on such liability. The Jersey Law is a possible model. It allows the return of a limited partner's contribution provided the partnership is solvent at the time of and immediately following the payment.<sup>52</sup> Article 17(2) provides:

For a period of six months from the date of receipt by a limited partner of any payment representing a return of contribution or part thereof received by such limited partner such payment shall be repayable by such limited partner with interest at the prescribed rate to the extent that such contribution or part thereof is necessary to discharge a debt or obligation of the limited partnership incurred during the period that the contribution represented an asset of the limited partnership.<sup>53</sup>

- 4.47 The Jersey Law also requires a limited partner to repay to the partnership a payment which represents a share of the profits if he received it when the firm was not solvent.<sup>54</sup> The obligation to repay subsists for a period of six months after the date of receipt of the payment.<sup>55</sup> In addition, Article 14(2) of the Jersey statute provides that the limited partner may only receive his share of the profits if, at the time when and immediately after payment is made, the limited partnership is solvent.
- 4.48 Different time-limits are used in different jurisdictions: the Guernsey law sets a twelve month period and the Delaware Act sets three years.<sup>56</sup> All provide certainty to the limited partners, but all the periods are necessarily somewhat arbitrary. There is no sound principle on which one can reconcile the competing claims of certainty (desired by investors) and reasonable protection (desired by creditors of an insolvent partnership).

<sup>51</sup> This assumes that the debt or obligation outstanding at the time the firm becomes insolvent was incurred when the limited partner was a member of the firm, and that the limitation period has not expired, or, in Scotland, the firm's obligation has not prescribed.

<sup>52</sup> Art 17(1).

<sup>53</sup> Art 2 defines a limited partnership as being insolvent "when the general partner is unable to discharge the debts and obligations of the limited partnership (excluding liabilities to partners in respect of their partnership interests) as they fall due out of the assets of the limited partnership without recourse to the separate assets of a general partner not contributed to the limited partnership".

<sup>54</sup> See Art 14.

<sup>55</sup> Jersey Law, Art 17.

<sup>56</sup> Guernsey Law, s 21(2); Delaware Act, s 17-607.

4.49 We invite views on the following question:

**Should there be a time-limit to the liability of a limited partner following withdrawal of his contribution and, if so, how long and subject to what qualifications?**

# **PART V**

## **RIGHTS AND OBLIGATIONS OF PARTNERS**

### **INTRODUCTION**

- 5.1 This Part is primarily concerned with relations between partners, limited or general. For the reasons given in Part I, we proceed on the basis that these matters will normally be regulated by a partnership agreement, and that it is unnecessary for the Act to provide a “default” code. However, there are aspects of the 1907 Act and the general law which have particular implications for relations between partners in limited partnership. These are addressed in this Part.
- 5.2 The following matters require consideration:
- (1) Matters requiring consent of limited partners;
  - (2) Fiduciary duties;
  - (3) Agency;
  - (4) Profits and losses;
  - (5) Retirement and assignment (assignment); and
  - (6) Dissolution and winding up.

### **WHAT MATTERS NEED THE CONSENT OF LIMITED PARTNERS?**

- 5.3 This is essentially an internal matter for agreement between the partners. As the law stands, there are few “default” rules. Under 1890 Act:
- (1) the consent of the limited partners (as well as the general partners) is needed for any change to the nature of the business;<sup>1</sup> and
  - (2) any change in the partnership agreement needs the consent of the limited partners (as well as the general partners).<sup>2</sup>
- 5.4 Conversely, the 1907 Act itself provides (again subject to agreement to the contrary) that differences on “ordinary matters” may be decided without

<sup>1</sup> 1890 Act, s 24(8): “Any difference arising as to the ordinary matters connected with the business partnership may be decided with the majority of the partners, but *no change may be made in the nature of the partnership business without the consent of all existing partners.*” The 1907 Act s 6(5)(a) qualifies the first part (see paras 4.22-4.23 above), but does not affect the italicised words.

<sup>2</sup> 1890 Act, s 19: “The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of *all the partners*, and such consent may be either express or inferred from a course of dealing”. This is not affected by the 1907 Act.

reference to the limited partners;<sup>3</sup> and that a new partner (general or limited) may be introduced without the consent of the existing limited partners.<sup>4</sup>

- 5.5 We have already referred to other “extraordinary” matters, in which (if our proposals are accepted) limited partners may be involved without participating in “management”.<sup>5</sup> As discussed in the Joint Consultation Paper,<sup>6</sup> such matters will normally be provided for by well-drawn partnership agreements. We are not, however, currently persuaded of the need for any of these points to be included by way of additional “default” provisions for limited partnerships. Our earlier proposals in this paper are designed simply to ensure that those drawing up partnership agreements will have greater certainty as to which matters *can* be made subject to the consent of limited partners, without risking extended liability.
- 5.6 We invite views on the following proposals:

**(1) In the absence of an agreement to the contrary, the consent of limited partners should be needed (as at present) for:**

**(a) any change to the nature of the business; and**

**(b) any change to the partnership agreement.**

**(2) No further consent requirements should be imposed as “default” provisions.**

#### **Admission and dismissal of general partners**

- 5.7 General partners can appoint another general partner without the consent of the limited partners,<sup>7</sup> but the consent of all the general partners is necessary.<sup>8</sup> As general partners incur unlimited liability as a result of the actions of one of their number, it is right that they should be concerned about the identity of such persons. Of course, limited partners also need to have confidence that the general partners are competent to manage their investment.<sup>9</sup> Provision for their consent might usefully be included in the agreement, but we see no reason for it to be required by the Act.
- 5.8 Similarly, it is currently the case that additional limited partners can be introduced without the consent of limited partners, although the consent of the

<sup>3</sup> 1907 Act, s 6(5)(a).

<sup>4</sup> 1907 Act, s 6(5)(d).

<sup>5</sup> See para 4.23 above.

<sup>6</sup> Para 12.34.

<sup>7</sup> 1907 Act, s 6(5)(d).

<sup>8</sup> 1907 Act, s 7 and 1890 Act, s 24(7).

<sup>9</sup> The 1879 Partnership Bill contained a “default” provision requiring the consent of limited partners for the appointment of general partners, but this was not reproduced in the Act.

general partners is required. The general partners' liability is generally unaffected by additional limited partners.<sup>10</sup> However, a limited partner may be concerned that his interest in the partnership should not be diluted by the creation of numerous additional limited partners. Again, however, we regard a stipulation for the consent of the limited partners as a matter for agreement, rather than requiring a "default" rule.

- 5.9 If, contrary to the above, limited partners are to be given a default power of veto over the appointment of general partners, should they also be given the power to dismiss a general partner and appoint a replacement? We have already proposed that voting by limited partners on the removal of a general partner should not be treated as "management", for the purpose of liability.<sup>11</sup> This leaves it open for the partnership agreement to make provision governing these matters. Even if it were desirable, it would be difficult to propose a satisfactory "default" regime.
- 5.10 Ultimately, if the limited partner is unhappy with the management, his remedies under the Act are to assign his interest (with the consent of the general partners),<sup>12</sup> or, more drastically, to seek a dissolution of the firm under the court's ordinary partnership jurisdiction.<sup>13</sup>
- 5.11 In the light of the above discussion, we ask whether respondents agree with our provisional view that:

**A revised 1907 Act should not include any further "default" provisions relating to the rights of limited partners over the admission or dismissal of general partners.**

## **FIDUCIARY DUTIES**

### **General partners**

- 5.12 The principal duty of the general partner is to manage the business of the limited partnership. He must exercise this power with the utmost good faith, and has the same fiduciary duties as an ordinary partner in an ordinary partnership. All the comments and provisional recommendations on the duty of good faith, the duties in sections 28 – 30 of the 1890 Act,<sup>14</sup> and the duty to exercise reasonable

<sup>10</sup> The addition of a limited partner will normally bring more funds into the partnership without exposing it to risk. But there is always the possibility that the limited partner may, by engaging in management, cause loss to the partnership and expose both himself and the general partners to liability.

<sup>11</sup> Para 4.33(1)(d)(iv) above.

<sup>12</sup> 1907 Act, s 6(5)(b): see paras 5.22-5.28 below.

<sup>13</sup> 1890 Act, s 35; 1907 Act, s 7.

<sup>14</sup> The duty to render accounts (s 28); accountability for benefits derived from transactions concerning the partnership or partnership property (s 29); and duty not to compete with the firm (s 30).

skill and care, discussed in Part XIV of the Joint Consultation Paper, apply to general partners in a limited partnership.<sup>15</sup>

### **Limited partners**

- 5.13 In theory the same duties apply to limited partners, as there are no provisions in the 1907 Act which displace them.<sup>16</sup> Given that limited partners are essentially passive investors whose role in the firm is strictly delineated, however, they are unlikely to be of any practical relevance; they are not agents of the firm or their partners. In some cases the duties may be thought unduly restrictive. For example, it might not be thought necessarily inconsistent with the scheme of the 1907 Act for a limited partner to carry on a competing business. Yet, if it is done without the consent of the general partners, the 1890 Act requires the profits to be accounted for to the firm.<sup>17</sup>
- 5.14 Any qualifications to the general rules can be set out in the partnership agreement. This seems to us the preferable course. As partners in a common venture with rights to share information, the limited partners must in principle be subject to some obligations of a fiduciary nature to the general partners. In our view, the ordinary principles of partnership law are sufficiently flexible to adapt to their special position. We do not therefore propose any further legislative guidance.
- 5.15 However, we invite views on the following questions:

**(1) Should there be any statutory qualification to the existing fiduciary duties (whether under the Partnership Act 1890 or otherwise) which a limited partner owes to his partners or to the firm?**

**(2) If so, what additional qualifications or limitations should there be?**

### **PROFITS AND LOSSES**

- 5.16 There are no specific rules in the 1907 Act for the sharing of profits and losses.<sup>18</sup> Consequently, it seems, section 24 of the 1890 Act applies, so that, in the absence

<sup>15</sup> We are reviewing our provisional recommendation in relation to the duty to exercise reasonable skill and care in the light of consultation responses and are considering a more restricted default rule than that provisionally proposed in the Joint Consultation Paper, para 14.32.

<sup>16</sup> 1907 Act, s 7.

<sup>17</sup> 1890 Act, s 30. On the other hand, the limited partner's right to inspect the books and "examine into" the state of the firm may give him an unfair advantage.

<sup>18</sup> See *Reed v Young* [1986] 1 WLR 649 (concerning the treatment of losses for tax purposes), where the House of Lords emphasised the distinction between accounting losses on the one hand and liabilities to third parties on the other. Although s 117 of the Income and Corporation Taxes Act 1988 now restricts loss relief to the amount which a partner has at risk in the partnership, the principle that partners can agree between themselves to share trading losses remains.

of agreement to the contrary, partners will share equally in the profits and trading losses of the firm.<sup>19</sup> In practice, an important purpose of the partnership agreement will be to define the respective rights of the partners to profits.

- 5.17 This does not mean that, on a general dissolution of the firm, limited partners would have to contribute to the firm beyond their capital contributions in order to meet the firm's liabilities to third persons.<sup>20</sup> It does, however, mean that during the currency of the partnership business their share of future profits may be reduced by their allocated share of past losses (as was the effect of the agreement in *Reed v Young*). To this extent there may be a difference between the treatment of profits and losses for accounting purposes during the continuance of the firm, and the rights and obligations of partners on a general dissolution.
- 5.18 There may be some advantage in an express provision that partners *prima facie* share profits and losses, but that a limited partner is not obliged to pay to the firm a further amount in respect of any losses, whether capital or otherwise, beyond the amount of his capital contribution. In other words, a limited partner may have his share of any losses incurred by the partnership debited against his entitlement to future profits but has no corresponding obligation to contribute money to the firm. To this extent sections 24(1) and 44(a) of the 1890 Act would not apply to limited partners. A limited partner would meet his share of a firm's losses indirectly by setting it off against his share of profits in subsequent years.
- 5.19 We invite views on the following question:

**Should a revised 1907 Act provide, in the absence of agreement to the contrary, that a limited partner's share of any losses should be debited against his share (if any) of future profits?**

## **RETIREMENT**

### **General partners**

- 5.20 The rights of a general partner are governed by the ordinary law, which is not modified by the 1907 Act.<sup>21</sup> Thus, in a partnership at will, but not one for a fixed term, he has the right to give notice at any time to determine the partnership.<sup>22</sup> It is common for partnership agreements expressly to provide that the retirement of

<sup>19</sup> *Twomey*, para 28.123. He uses the term "trading losses" to emphasise the important distinction between the fact that partners, including limited partners, "may be liable *inter se* for the trading losses of the firm" and the fact that they have limited liability as respects third parties.

<sup>20</sup> *Reed v Young* [1986] 1 WLR 649 at pp 655 – 656, *per* Lord Oliver. It was noted that the way that a matter was treated in the accounts of the firm did not affect the liability of the limited partner to contribute to the firm's debts beyond his capital contribution. On the other hand, where a limited partner is indebted to the firm, for example, by overdrawing, he would have to pay his debt to the firm on a general dissolution.

<sup>21</sup> We have discussed the right of a partner to retire in Part VI of the Joint Consultation Paper.

<sup>22</sup> 1890 Act, s 26.

a partner will not dissolve the partnership between the remaining partners. We have proposed that, subject to agreement to the contrary, the right of a partner in an ordinary partnership of undefined duration should be to withdraw from the partnership, rather than determine the partnership as a whole; but that (apart from agreement) there should be no such right in a partnership of fixed duration.<sup>23</sup> We see no reason why the same provisions should not apply to limited partners, although in practice such matters are likely to be governed by the agreement.

- 5.21 Where a general partner retires, the change must be registered;<sup>24</sup> where he changes his status from a general to a limited partner, notice must also be given in the Gazette.<sup>25</sup>

### **Assignment/assignment by, and retirement of, limited partners**

- 5.22 Section 6(5) (b) of the 1907 Act provides:

A limited partner may, with the consent of the general partners, assign his share in the partnership, and upon such assignment the assignee shall become a limited partner with all the rights of the assignor.

This provision is subject to any agreement between the partners. Thus, the partners may agree that a limited partner will have a right to assign without obtaining the consent of the general partner(s) at the time of the assignment or assignment.<sup>26</sup> This assignment or assignment must be registered<sup>27</sup> and notice given in the Gazette.<sup>28</sup> Until the assignment has been registered and advertised, the assignment/assignment is of no effect as regards third parties.

- 5.23 In addition, it seems that a limited partner may exercise the ordinary right of a partner to assign his interest in a firm, under section 31 of the 1890 Act.<sup>29</sup> This does not require the general partners' consent.<sup>30</sup> However, the section 31 assignee would only be entitled to receive the assignor's share of the profits and would not step into the shoes of the limited partner for any other purpose.

<sup>23</sup> Joint Consultation Paper, para 6.18–6.19.

<sup>24</sup> 1907 Act, s 9.

<sup>25</sup> 1907 Act, s 10(1). We propose the repeal of s 10: see para 3.30 above.

<sup>26</sup> The limited partner's right to assign is important in a number of contexts, particularly where limited partnerships are used in investment. In agricultural holdings, it is also important, allowing the landlord to sell his land and assign his interest in such partnerships to the purchaser of the land.

<sup>27</sup> 1907 Act, s 9(1)(d).

<sup>28</sup> 1907 Act, s 10.

<sup>29</sup> 1890 Act, s 31 provides that such an assignment does not give the assignee any rights to interfere in the business or inspect the accounts, but entitles him only to receive the assignor's share of profits.

<sup>30</sup> *Lindley and Banks*, para 31–17; *Twomey* para 28.116–118.

Consequently, there seems to be no need to register the change (or advertise in the Gazette, if, contrary to our proposal, that requirement is retained<sup>31</sup>). As the assignor will remain a limited partner with unchanged liability, the other partners and third parties will not be prejudiced if this type of assignment or assignation is permissible.

5.24 We believe that it is desirable that the interaction of these two provisions should be clarified and that they be reduced to a single provision governing the right of the limited partner to assign. Since the interest of a limited partner in the partnership is likely to be principally as an investment, it is important that the right to realise the interest should be clearly expressed. Suitable models can be found in other jurisdictions. For example, the Ontario Act provides expressly that “a limited partner’s interest is assignable”.<sup>32</sup> It then distinguishes between assignment carrying only a right to profits, which does not require consent; and assignment to a “substituted limited partner”, which requires consent of all the other partners (or specific provision in the agreement), and transfers all the rights and liabilities of the assignor.

5.25 Introducing a similar provision here would remove the uncertainty inherent in the 1907 Act, which is silent as to the effect of an assignment (assignation) on the obligations of the assignor. It seems to be assumed that when a limited partner assigns his share, he remains liable for any past debts and the new limited partner is liable for only future debts of the firm.<sup>33</sup> Section 6(5)(b) simply states that “the assignee shall become a limited partner with all the rights of the assignor” and does not appear to displace the general position under the 1890 Act, whereby a partner remains liable for debts which were incurred while he was a partner. There is no reference in the 1907 Act to the liability of the assignee for the obligations of the assignor following an assignment or assignation.<sup>34</sup> We believe that the current position would benefit from statutory clarification, such as can be found in Ontario law.<sup>35</sup>

5.26 A further question for consideration is whether it is necessary for a general partner to give his consent to an assignment or assignation which makes the assignee a limited partner. Limited partners have few rights, and so it could be

<sup>31</sup> See para 3.30 above. Section 10 of the 1907 Act provides that until notice has been given in the Gazette, an assignment is of no effect “for the purposes of this Act”; thus it does not appear to restrict a section 31 assignment (or assignation) with its more limited consequences.

<sup>32</sup> Ontario Act, s 18(1) (see Appendix B).

<sup>33</sup> See *Twomey*, para 28.102 and para 4.43 above.

<sup>34</sup> *Ibid.*

<sup>35</sup> See also the Irish Investment Limited Partnerships Act 1994, where it is provided that the assignee shall “as of the date of assignment become a limited partner with all the rights and obligations of the assignor” (Section 18(2)).

argued that their identity is normally of no concern to the general partner.<sup>36</sup> But the general partner does have a fiduciary relationship with the limited partners. He has undertaken personal liability in the running of the business for their benefit. To the extent that this remains a personal relationship between partners he could quite reasonably object to such a burden if the beneficiaries change. In our provisional view, the default position should require the consent of all the general partners for an assignment or assignation by a limited partner. That provision would be variable by the partnership agreement.<sup>37</sup>

5.27 The 1907 Act does not contain any special provision governing the retirement of a limited partner from a firm. Much may depend on the circumstances of the particular partnership. We see no need for default rules as between parties. The position as respects third parties was considered in the previous Part.<sup>38</sup>

5.28 We invite views on the following provisional proposals:

**The rights of a limited partner to assign his share (under section 6(5)(b) of the 1907 Act, section 31 of the 1890 Act, or otherwise) should be set out in a single section, generally reproducing the existing law. In particular:**

- (1) The rights, liabilities and obligations of assignee and assignor, following an assignment (assignation) should be expressed in the new section;**
- (2) There should be a default position, requiring the consent of all the general partners, for an assignment (assignation) of a limited partner's interest (where it involves substitution), variable by the partnership agreement; and**
- (3) As between partners, consent to the retirement of a limited partner should be left to agreement.**

## **DISSOLUTION AND WINDING UP**

### **Duration**

5.29 The rules determining the duration of a limited partnership are substantially the same as those applying to ordinary partnerships.<sup>39</sup> Unless it is for a fixed term, a

<sup>36</sup> The general partner would have an interest in the identity and competence of the limited partner if he is authorised to act as agent for the firm (or if he participates in management).

<sup>37</sup> This is the approach taken by, for example, the Delaware Act, s 17-704 and Jersey Law, Art 21 (see Appendix B).

<sup>38</sup> See paras 4.34-4.49 above.

<sup>39</sup> 1890 Act, s 26 and s 32. Section 26 is discussed in the Joint Consultation Paper at paras 6.16-6.20; s 32 is discussed in paras 6.8-6.20 and 6.54-6.55. We provisionally propose at para 6.19 that references to partnerships for "fixed terms" and "at will" should be replaced, respectively, by references to partnerships of "defined duration" and "undefined duration".

limited partnership will be at will. A limited partnership at will may be dissolved on notice by a general partner, but (unless the agreement provides otherwise) not by a limited partner.<sup>40</sup> The winding up is conducted by the general partners, unless the court otherwise directs.<sup>41</sup>

- 5.30 The term, if any, of a limited partnership must be included in the registration statement.<sup>42</sup> Any change in the “term or character” of the partnership must also be notified to the Registrar.<sup>43</sup> If the partnership is for a fixed term, the expiry of that term has the same consequence as for an ordinary partnership. If the business of the firm is continued thereafter, the firm will be converted into a limited partnership at will.<sup>44</sup> As we have already discussed,<sup>45</sup> it seems that failure to register this change may result in the limited partners losing their liability protection and being treated as general partners. We have already made proposals to limit the effect of such default.<sup>46</sup>

### **Death or bankruptcy of a partner**

#### ***General partner***

- 5.31 Subject to an agreement to the contrary, the death or bankruptcy of a general partner dissolves the limited partnership.<sup>47</sup>

#### ***Limited partner***

- 5.32 The 1907 Act provides that the death or bankruptcy of a limited partner will not dissolve the firm.<sup>48</sup> Although (unlike other parts of section 6) this is not stated to be subject to contrary agreement, there appears to be nothing to exclude the general right of the partners, with consent of all, to vary their mutual rights and duties.<sup>49</sup>
- 5.33 As we have already suggested,<sup>50</sup> the effect of the section seems to be simply that there is no *general* dissolution of the partnership. It does not preclude the limited partner (or his estate) from withdrawing his contribution, nor leave him exposed

<sup>40</sup> 1907 Act, s 6(5)(e).

<sup>41</sup> 1907 Act, s 6 (3).

<sup>42</sup> 1907 Act, s 8(e).

<sup>43</sup> 1907 Act, s 9(e).

<sup>44</sup> 1890 Act, s 26. See *Lindley and Banks*, para 29–14.

<sup>45</sup> See para 3.45 above.

<sup>46</sup> See para 3.48(4) above.

<sup>47</sup> 1890 Act, s 33(1); 1907 Act, s 7.

<sup>48</sup> 1907 Act, s 6(2).

<sup>49</sup> 1890 Act, s 19: see *Twomey*, para 28.47.

<sup>50</sup> Para 2.11, n 20 above.

to further liability.<sup>51</sup> As between the partners, we see no need to propose any alteration to the 1907 Act.

### **Charging order on a partner's share**

#### ***General partner***

- 5.34 If the general partner allows his share of the partnership property to be charged for a separate debt, the other partners have the option to dissolve the partnership.<sup>52</sup> This seems to be an option which must be exercised by the other partners unanimously.<sup>53</sup> It seems, therefore, that the agreement of the limited partners is also required.<sup>54</sup>
- 5.35 We can see no reason why the limited partner should not be permitted to join in exercising the option to dissolve the partnership conferred by section 33(2) of the 1890 Act (without this involving “management”). To resolve any doubt on this point, we invite views on the following proposal:

**The revised 1907 Act should make it clear that the limited partner can (along with the other partners) exercise an option to dissolve the partnership if a general partner allows his share of the partnership property to be charged for a separate debt; and that this does not involve “management”.**

#### ***Limited partner***

- 5.36 Subject to a contrary agreement, the other partners cannot dissolve a partnership if a limited partner has allowed his share to be charged for his own debts.<sup>55</sup> We see no need to alter this provision and suggest no change.

### **Dissolution by the court**

- 5.37 Generally the court's jurisdiction to dissolve and wind up a limited partnership is the same as that for an ordinary partnership. Section 35 of the 1890 Act contains the following grounds on which a court may order the dissolution of a partnership:
- (a) [When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or

<sup>51</sup> See *Twomey*, para 28.127.

<sup>52</sup> 1890 Act, s 33(2).

<sup>53</sup> See Joint Consultation Paper, paras 6.52–53, where we propose an amendment to make this clear.

<sup>54</sup> See *Lindley and Banks*, para 32–05; *Twomey*, para 28.129. It is thought that the exercise of such an option would not constitute “management” (1907 Act, s 6) or the service of a “dissolution notice” (1907 Act, s 6(5)(e)).

<sup>55</sup> 1907 Act, s 6(5)(c).

next friend or person having title to intervene as by any other partner]:<sup>56</sup>

- (b) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract:
- (c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business:
- (d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him:
- (e) When the business of the partnership can only be carried on at a loss:
- (f) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

5.38 The 1907 Act modifies ground (a) by providing that the mental disorder of a limited partner is not a ground for dissolution by the court unless such partner's "share cannot otherwise be ascertained and realised".<sup>57</sup> Consequently, if the remaining partners are to avoid a dissolution on the grounds of the mental incapacity of a limited partner, they either have to buy his share or arrange for its sale to a third party.

5.39 The 1907 Act does not modify the remaining grounds for dissolution. This gives rise to the question whether these grounds adequately take the special status of the limited partner into account. Our provisional view is that they are adequate, but we invite views on the following questions:

- (1) Should there be other reasons for dissolution of a limited partnership beyond those provided for by section 35 of the 1890 Act?**
- (2) If so, what should these reasons be, and how should they be provided for in the revised 1907 Act?**

<sup>56</sup> Section 35(1) has been repealed as regards England and Wales by the Mental Health Act 1959, s 149(2) and Sched 8. It is still in force in Scotland but requires to be updated to reflect current mental health procedures.

<sup>57</sup> 1907 Act, s 6(2).

## **Winding up**

5.40 Unless the court directs otherwise, the task of winding up the affairs of a dissolved limited partnership will be entrusted to the general partners.<sup>58</sup> The limited partner, like any other partner, has a right to apply for an order that the affairs of the partnership should be wound up under the supervision of the court.<sup>59</sup> However, in view of the express provision in the 1907 Act, it seems unlikely that such an order would be made, in the absence of special circumstances, such as misconduct by the general partners.<sup>60</sup>

5.41 We do not see any need for further clarification. However, we invite views on the following questions:

**(1) Should the Act define the circumstances in which a limited partner is allowed to apply to court for an order that the affairs of the partnership be wound up under the supervision of the court?**

**(2) If so, what circumstances should be so defined?**

5.42 In the Joint Consultation Paper<sup>61</sup> we proposed that there should be a new system for winding up the affairs of a solvent dissolved partnership under court supervision. As part of this new system we proposed the appointment of an officer (provisionally called a partnership liquidator), with powers and duties modelled on those of the liquidator in a members' voluntary winding up of a company. We see no reason why such a machinery should not be available equally in a limited partnership. However, we invite views on the following question:

**In the event that a partnership liquidator is introduced into general partnership law, should limited partners have the right to vote for such an appointment, or should limited partners simply have the right to apply to the court for dissolution?**

<sup>58</sup> 1907 Act, s 6(3) (excluding any who are bankrupt: 1890 Act, s 38).

<sup>59</sup> 1890 Act, s 39, discussed in Joint Consultation Paper, para 8.29 ff.

<sup>60</sup> See *Lindley and Banks*, para 32–16. Other reasons might be the death or bankruptcy of a sole general partner (either before or during the winding up).

<sup>61</sup> Paragraphs 8.44–8.60.

# **PART VI**

## **SUMMARY OF ISSUES FOR CONSULTATION**

- 6.1 In this Part we summarise the issues on which we seek the views of readers. Some readers may not wish to comment on all issues: their remarks are no less welcome. We would be grateful for comments not only on the matters specifically listed below, but on any other points raised by this consultation paper. It would be very helpful if, when responding, readers could indicate either the paragraph of the summary that follows to which their remarks relate, or the paragraph of this consultation paper in which the issue was originally raised.

### **PART I**

#### **THE NEED FOR REFORM**

- 6.2 In order to assist us in evaluating the case for reform, we would welcome further comments, and supporting evidence, on the following issues:
- (1) Have we correctly identified the principal uses of limited partnerships in modern business and, if not, what other uses should we take into account?
  - (2) Have we correctly identified (in the succeeding Parts of this consultation paper) the main priorities for reform and, if not, what other matters should be considered?
  - (3) What are likely to be the main practical and economic benefits of reform?

(Paragraph 1.12)

#### **CONTINUED USE OF THE DESCRIPTION “LIMITED PARTNERSHIPS”**

- 6.3 We invite comments on the following:
- (1) Should the revised 1907 Act continue to use the description “limited partnership”?
  - (2) If not, suggestions are invited for a replacement term and for a suitable abbreviation thereof. Possibilities include: investment partnership (ip), limited investment partnership (lip), and mixed partnership (mp).

(Paragraph 1.14)

## **PART II**

### **NATURE AND FORMATION**

6.4 We invite views on the following question:

Would the introduction of separate personality for partnerships in English law have any special advantages, disadvantages or other implication for limited partnerships?

(Paragraph 2.5)

### **RELATED ISSUES**

6.5 Under our terms of reference we are not directly concerned with the following three matters. However, consultees are invited to draw attention to any issues which it is thought should be taken into account in our consideration of the working of the 1907 Act in relation to:

- (1) insolvency;
- (2) taxation; or
- (3) the Financial Services and Markets Act 2000.

(Paragraph 2.30)

## **PART III**

### **COMPOSITION**

#### **Bodies Corporate**

6.6 We invite views on the following:

- (1) Should section 4(4) be expanded to provide expressly that a body corporate may be a limited partner or a general partner?
- (2) Does there need to be any restriction on the right of limited companies to be general partners in limited partnerships?

(Paragraph 3.3)

#### **Dual functioning of a general partner as a limited partner**

6.7 We express no provisional view, but invite answers to the following questions:

- (1) Should the definition of “general partner” in the 1907 Act be changed so as to allow the same person to be both a general and limited partner?
- (2) In what circumstances would such a change be beneficial, and to whom?

(Paragraph 3.7)

## **CARRYING ON BUSINESS**

6.8 We invite views on the following question:

Do respondents agree that the 1890 Act definition of “business” is adequate also for the purposes of the 1907 Act (without express reference to “investment”)?

(Paragraph 3.10)

## **REGISTRATION**

### **Information to appear on the register**

6.9 We invite views on the following questions:

- (1) Should the requirement for a description of the general nature of the business be maintained?
- (2) Should the requirement to register the names of limited partners be maintained?
- (3) Should any other change be made to the requirements for information to be registered?

(Paragraph 3.17)

### **Principal place of business**

6.10 We invite views on the following provisional proposals:

- (1) The requirement for the registration of a principal place of business, initially in the United Kingdom, should be abolished and instead be replaced by the requirement to have a United Kingdom registered office.
- (2) Registration should be at the register office in the part of the United Kingdom in which the registered office is or is to be sited.

(Paragraph 3.22)

### **The establishment of a limited partnership**

6.11 We invite views on the following provisional proposals:

- (1) A limited partnership should exist from the date of registration of the statement signed by partners, as stated in its certificate of registration.
- (2) The certificate of registration should be conclusive evidence that the limited partnership was duly formed on the date stated.
- (3) The certificate of registration (whether original or as amended) should be conclusive as to other particulars, unless the contrary is proved.

(Paragraph 3.26)

### **Notice of change of status**

6.12 We invite views on the following provisional proposals:

- (1) Section 10 of the 1907 Act should be repealed.
- (2) The revised 1907 Act should make it clear that the steps listed in the Act constitute a complete mechanism by which partnerships can become limited, and changes in status and composition can be made, without any further requirement for notice.

(Paragraph 3.30)

### **COMPANIES HOUSE**

6.13 We invite views on the following questions:

- (1) Should the Registrar of Companies have a power to de-register limited partnerships in similar circumstances to those applying to companies under Companies Act 1985, section 652?
- (2) Should there be any restriction on the names which may be registered for limited partnerships, and if so what restrictions?

(Paragraph 3.32)

### **Disclosure of limited liability status**

6.14 We invite views on the following provisional proposals:

- (1) The name of a limited partnership must end with 'limited partnership', 'limited firm', or a suitable abbreviation, possibly, 'lp'; and
- (2) All documents issued by the limited partnership must use the name with this suffix.

(Paragraph 3.34)

### **Holding Out**

6.15 We invite views on the following questions:

- (1) Should the Business Names Act 1985 be amended so as to remove or limit the requirement to give details of limited partners?
- (2) Alternatively, should there be statutory clarification that the inclusion of the name of a limited partner in the firm name or in the particulars disclosed under the Business Names Act 1985 does not by itself hold out a limited partner as a general partner.

(Paragraph 3.39)

## **CONSEQUENCES OF DEFAULT**

6.16 We invite views on the following provisional proposals:

- (1) General partners should be fully responsible for the registration formalities and should have exclusive authority to sign the original registered particulars and any amendments.
- (2) The time for filing amendments with the registrar should be increased from 7 to 21 days.
- (3) Where in default of registration formalities, the general partner(s) should be liable for daily fines similar to those which apply to companies.
- (4) Default in registration formalities should not of itself remove the limited liability of the limited partners.

(Paragraph 3.48)

## **PART IV**

### **SCOPE OF PROTECTION**

6.17 We invite views on the following questions:

- (1) Is there a further need to clarify the effect of section 4(2), by stating that it excludes any form of financial liability, direct or indirect, beyond the amount of the limited partner's contribution?
- (2) Should express provision be made to ensure that the position of the limited partner is protected in any Order against the firm, and, if so, in what form?
- (3) Where a limited partner loses his status as such, by participation in management or otherwise, should he nonetheless enjoy protection except in the event of the insolvency of the partnership?

(Paragraph 4.7)

## **MANAGEMENT**

### **Definition of management**

6.18 We invite views on the following issue:

- (1) Should the legislation provide further guidance as to the activities by a limited partner which do not involve "management"?
- (2) If so, should this be in the form of a list of permitted activities, or a list of prohibitions?

(Paragraph 4.16)

### **Knowledge of third party**

6.19 We ask consultees whether they agree with our provisional view that:

The loss of protection for a limited partner, who takes part in management, should not be contingent upon knowledge of a third party dealing with the partnership.

(Paragraph 4.19)

### **What activities should be defined as “safe”?**

6.20 We invite views on the following provisional proposal, and question:

- (1) It should be provided in the statute that doing any one or more of the following acts should not mean that a limited partner participates in the management of the firm:
  - (a) consulting and advising a general partner on the activities of the limited partnership;
  - (b) investigating, reviewing or approving the firm’s accounts or affairs or being advised on these matters;
  - (c) being a contractor, agent or employee of the firm (if it has separate legal personality as in Scotland) or of the general partner; or being a director of or shareholder in a corporate general partner; or
  - (d) (where the consent of limited partners is needed), voting on, or approving or disapproving:
    - (i) the winding up of the limited partnership,
    - (ii) an amendment to the partnership agreement,
    - (iii) a change in the nature of the activities of the limited partnership,
    - (iv) the admission, removal or withdrawal of a general or a limited partner and the continuation of the limited partnership thereafter, or
    - (v) a transaction involving an actual or potential conflict of interest between a general and a limited partner.
- (2) Should any other activities be defined as not involving management?

(Paragraph 4.33)

## **CAPITAL WITHDRAWAL AND LIABILITY OF LIMITED PARTNER AFTER LEAVING THE FIRM**

### **Lost capital**

6.21 We invite views on the following questions:

- (1) Should there be any restriction on the payments to limited partners (whether out of profits or otherwise) where the contributions have been lost in the course of business?
- (2) Should the liability of the limited partner be dependent on agreed contributions rather than actual contributions?
- (3) Should any other change be made to the rules relating to contributions of limited partners?

(Paragraph 4.40)

### **Duration of liability**

6.22 We invite views on the following question:

Should there be a time-limit to the liability of a limited partner following withdrawal of his contribution and, if so, how long and subject to what qualifications?

(Paragraph 4.49)

## **PART V**

### **WHAT MATTERS NEED THE CONSENT OF LIMITED PARTNERS**

6.23 We invite views on the following proposals:

- (1) In the absence of an agreement to the contrary, the consent of limited partners should be needed (as at present) for:
  - (a) any change to the nature of the business; and
  - (b) any change to the partnership agreement.
- (2) No further consent requirements should be imposed as “default” provisions.

(Paragraph 5.6)

### **Admission and dismissal of general partners**

6.24 We ask respondents whether they agree with our provisional view that:

A revised 1907 Act should not include any further “default” provisions relating to the rights of limited partners over the admission or dismissal of general partners.

(Paragraph 5.11)

## **FIDUCIARY DUTIES**

### **Limited partners**

6.25 We invite views on the following questions:

- (1) Should there be any statutory qualification to the existing fiduciary duties (whether under the Partnership Act 1890 or otherwise) which a limited partner owes to his partners or to the firm?
- (2) If so, what additional qualifications or limitations should there be?

(Paragraph 5.15)

## **PROFITS AND LOSSES**

6.26 We invite views on the following question:

Should a revised 1907 Act provide, in the absence of agreement to the contrary, that a limited partner's share of any losses should be debited against his share (if any) of future profits?

(Paragraph 5.19)

## **RETIREMENT**

### **Assignment (assignation) by, and retirement of, limited partners**

6.27 We invite views on the following provisional proposals:

The rights of a limited partner to assign his share (under section 6(5)(b) of the 1907 Act, section 31 of the 1890 Act, or otherwise) should be set out in a single section, generally reproducing the existing law. In particular:

- (1) The rights, liabilities and obligations of assignee and assignor, following an assignment (assignation) should be expressed in the new section;
- (2) There should be a default position, requiring the consent of all the general partners, for an assignment of a limited partner's interest (where it involves substitution), variable by the partnership agreement; and
- (3) As between partners, consent to the retirement of a limited partner should be left to agreement.

(Paragraph 5.28)

## **DISSOLUTION AND WINDING UP**

### **Charging order on a partner's share**

6.28 We invite views on the following provisional proposal:

The revised 1907 Act should make it clear that the limited partner can (along with the other partners) exercise an option to dissolve the partnership if a general partner allows his share of the partnership property to be charged for a separate debt; and that this does not involve "management".

(Paragraph 5.35)

### **Dissolution by the court**

6.29 We invite views on the following questions:

- (1) Should there be other reasons for dissolution of a limited partnership beyond those provided for by section 35 of the 1890 Act?
- (2) If so, what should these reasons be, and how should they be provided for in the revised 1907 Act?

(Paragraph 5.39)

### **Winding up**

6.30 We invite views on the following questions:

- (1) Should the Act define the circumstances in which a limited partner is allowed to apply to court for an order that the affairs of the partnership be wound up under the supervision of the court?
- (2) If so, what circumstances should be so defined?

(Paragraph 5.41)

6.31 We invite views on the following question:

In the event that a partnership liquidator is introduced into general partnership law, should limited partners have the right to vote for such an appointment, or should limited partners simply have the right to apply to the court for dissolution?

(Paragraph 5.42)

# **APPENDIX A**

## **LIMITED PARTNERSHIPS ACT 1907**

### ARRANGEMENT OF SECTIONS

1. Short title
2. ...
3. Interpretation of terms
4. Definition and constitution of limited partnership
5. Registration of limited partnership required
6. Modifications of general law in case of limited partnerships
7. Law as to private partnerships to apply where not excluded by this Act
8. Manner and particulars of registration
9. Registration of changes in partnerships
10. Advertisement in Gazette of statement of general partner becoming a limited partner and of assignment of share of limited partner
11. ...
12. ...
13. Registrar to file statement and issue certificate of registration
14. Register and index to be kept
15. Registrar of joint stock companies to be registrar under Act
16. Inspection of statements registered
17. Power of Board of Trade to make rules

# Limited Partnerships Act 1907

## 1907 CHAPTER 24

An Act to establish Limited Partnerships. [28th August 1907]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

### **Short title**

**1** This Act may be cited for all purposes as the Limited Partnerships Act 1907.

**2** ...

### **Interpretation of terms**

**3** In the construction of this Act the following words and expressions shall have the meanings respectively assigned to them in this section, unless there be something in the subject or context repugnant to such construction:-

"Firm," "firm name," and "business" have the same meanings as in the Partnership Act 1890:

"General partner" shall mean any partner who is not a limited partner as defined by this Act.

### **Definition and constitution of limited partnership**

**4** - (1) . . . Limited partnerships may be formed in the manner and subject to the conditions by this Act provided.

(2) A limited partnership shall not consist . . . of more than twenty persons, and must consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons to be called limited partners, who shall at the time of entering into such partnership contribute thereto a sum or sums as capital or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed.

(3) A limited partner shall not during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and if he does so draw out or receive back any such part shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back.

(4) A body corporate may be a limited partner.

### **Registration of limited partnership required**

**5** Every limited partnership must be registered as such in accordance with the provisions of this Act, or in default thereof it shall be deemed to be a general partnership, and every limited partner shall be deemed to be a general partner.

### **Modifications of general law in case of limited partnerships**

**6** – (1) A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm:

Provided that a limited partner may by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business, and may advise with the partners thereon.

If a limited partner takes part in the management of the partnership business he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner.

(2) A limited partnership shall not be dissolved by the death or bankruptcy of a limited partner, and the lunacy of a limited partner shall not be a ground for dissolution of the partnership by the court unless the lunatic's share cannot be otherwise ascertained and realised.

(3) In the event of the dissolution of a limited partnership its affairs shall be wound up by the general partners unless the court otherwise orders.

(4) . . .

(5) Subject to any agreement expressed or implied between the partners-

(a) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the general partners;

(b) A limited partner may, with the consent of the general partners, assign his share in the partnership, and upon such an assignment the assignee shall become a limited partner with all the rights of the assignor;

(c) The other partners shall not be entitled to dissolve the partnership by reason of any limited partner suffering his share to be charged for his separate debt;

(d) A person may be introduced as a partner without the consent of the existing limited partners;

(e) A limited partner shall not be entitled to dissolve the partnership by notice.

### **Law as to private partnerships to apply where not excluded by this Act**

**7** Subject to the provisions of this Act, the Partnership Act 1890, and the rules of equity and of common law applicable to partnerships, except so far as they are inconsistent with the express provisions of the last-mentioned Act, shall apply to limited partnerships.

### **Manner and particulars of registration**

**8** The registration of a limited partnership shall be effected by sending by post or delivering to the registrar at the register office in that part of the United Kingdom in which the principal place of business of the limited partnership is situated or proposed to be situated a statement signed by the partners containing the following particulars:-

- (a) The firm name;
- (b) The general nature of the business;
- (c) The principal place of business;
- (d) The full name of each of the partners;
- (e) The term, if any, for which the partnership is entered into, and the date of its commencement;
- (f) A statement that the partnership is limited, and the description of every limited partner as such;
- (g) The sum contributed by each limited partner, and whether paid in cash or how otherwise.

### **Registration of changes in partnerships**

**9** - (1) If during the continuance of a limited partnership any change is made or occurs in-

- (a) the firm name,
- (b) the general nature of the business,
- (c) the principal place of business,
- (d) the partners or the name of any partner,
- (e) the term or character of the partnership,
- (f) the sum contributed by any limited partner,
- (g) the liability of any partner by reason of his becoming a limited instead of a general partner or a general instead of a limited partner,

a statement, signed by the firm, specifying the nature of the change, shall within seven days be sent by post or delivered to the registrar at the register office in that part of the United Kingdom in which the partnership is registered.

(2) If default is made in compliance with the requirements of this section each of the general partners shall, on conviction under the Magistrates' Courts Act 1952, be liable to a fine not exceeding one pound for each day during which the default continues.

### **Advertisement in Gazette of statement of general partner becoming a limited partner and of assignment of share of limited partner**

**10** - (1) Notice of any arrangement or transaction under which any person will cease to be a general partner in any firm, and will become a limited partner in that firm, or under which the share of a limited partner in a firm will be assigned to any person, shall be forthwith advertised in the Gazette, and until notice of the arrangement or transaction is so advertised the arrangement or transaction shall, for the purposes of this Act, be deemed to be of no effect.

(2) For the purposes of this section, the expression "the Gazette" means-

In the case of a limited partnership registered in England, the London Gazette;

In the case of a limited partnership registered in Scotland, the Edinburgh Gazette;

In the case of a limited partnership registered in Ireland, the Belfast Gazette.

**11 . . .**

**12 . . .**

**Registrar to file statement and issue certificate of registration**

**13** On receiving any statement made in pursuance of this Act the registrar shall cause the same to be filed, and he shall send by post to the firm from whom such statement shall have been received a certificate of the registration thereof.

**Register and index to be kept**

**14** At each of the register offices herein-after referred to the registrar shall keep, in proper books to be provided for the purpose, a register and an index of all the limited partnerships registered as aforesaid, and of all the statements registered in relation to such partnerships.

**Registrar of joint stock companies to be registrar under Act**

**15** The registrar of joint stock companies shall be the registrar of limited partnerships, and the several offices for the registration of joint stock companies in London, Edinburgh, and [ Belfast ] shall be the offices for the registration of limited partnerships carrying on business within those parts of the United Kingdom in which they are respectively situated.

**Inspection of statements registered**

**16** – (1) Any person may inspect the statements filed by the registrar in the register offices aforesaid, and there shall be paid for such inspection such fees as may be appointed by the Board of Trade, not exceeding [5p] for each inspection; and any person may require a certificate of the registration of any limited partnership, or a copy of or extract from any registered statement, to be certified by the registrar, and there shall be paid for such certificate of registration, certified copy, or extract such fees as the Board of Trade may appoint, not exceeding [10p] for the certificate of registration, and not exceeding [2p] for each folio of seventy-two words, or in Scotland for each sheet of two hundred words.

(2) A certificate of registration, or a copy of or extract from any statement registered under this Act, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars (whom it shall not be necessary to prove to be the registrar or assistant registrar) shall, in all legal proceedings, civil or criminal, and in all cases whatsoever be received in evidence.

**Power to Board of Trade to make rules**

**17** The Board of Trade may make rules (but as to fees with the concurrence of the Treasury) concerning any of the following matters:-

- (a) The fees to be paid to the registrar under this Act, so that they do not exceed in the case of the original registration of a limited partnership the sum of two pounds, and in any other case the sum of [25p];
- (b) The duties or additional duties to be performed by the registrar for the purposes of this Act;
- (c) The performance by assistant registrars and other officers of acts by this Act required to be done by the registrar;
- (d) The forms to be used for the purposes of this Act;
- (e) Generally the conduct and regulation of registration under this Act and any matters incidental thereto.

## **APPENDIX B**

# **EXAMPLES OF LAW FROM OTHER JURISDICTIONS**

The following excerpts illustrate how other jurisdictions deal with the issues of management, control and assignment. We discuss management and control in Part IV of this consultation paper at paragraphs 4.8-4.33 and assignment (in Scotland, assignation) in Part V at paragraphs 5.22-5.28.

The following web-sites contain useful information about, and in some cases the text of, some of the legislation set out in this appendix or referred to elsewhere in the consultation paper:

Delaware	<a href="http://www.legis.state.de.us/">http://www.legis.state.de.us/</a>
Jersey	<a href="http://www.jerseyfsc.org/leg8.htm">http://www.jerseyfsc.org/leg8.htm</a>
New South Wales	<a href="http://www.austlii.edu.au/au/legis/nsw/consol_act/">http://www.austlii.edu.au/au/legis/nsw/consol_act/</a>
Ontario	<a href="http://www.e-laws.gov.on.ca/">http://www.e-laws.gov.on.ca/</a>

### **DELAWARE**

#### **Delaware Revised Uniform Limited Partnership Act (Title 6, Chapter 17 of the Delaware Code)**

##### **Section 17-303. Liability to third parties.**

(a) A limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he participates in the control of the business. However, if the limited partner does participate in the control of the business, he is liable only to persons who transact business with the limited partnership reasonable believing, based upon the limited partner's conduct, that the limited partner is a general partner.

(b) A limited partner does not participate in the control of the business within the meaning of subsection (a) of this section by virtue of his possessing or, regardless of whether or not the limited partner has the rights or powers, exercising or attempting to exercise 1 or more of the following rights or powers or having or, regardless of whether or not the limited partner has the rights or powers, acting or attempting to act in 1 or more of the following capacities:

(1) To be an independent contractor for or to transact business with, including being a contractor for, or to be an agent or employee of, the limited partnership or a general partner, or to be an officer, director or stockholder of a corporate general partner, or to be a limited partner of a partnership that is a general partner of the limited partnership, or to be a trustee, administrator, executor, custodian, or other fiduciary or beneficiary of an estate or trust which is a general partner, or to be a trustee, officer, advisor, stockholder or beneficiary of a business trust which is a general partner or to be a member, manager, agent or employee of a limited liability company which is a general partner;

(2) To consult with or advise a general partner or any other person with respect to any matter, including the business of the limited partnership, or to act or cause a general partner or any other person to take or refrain from taking any action, including by proposing, approving, consenting or disapproving, by voting or otherwise, with respect to any matter, including the business of the limited partnership.

(3) To act as surety, guarantor or endorser for the limited partnership or a general partner, to guaranty or assume one of more obligations of the limited partnership or a general partner, to borrow money from the limited partnership or a general partner, to lend money to the limited partnership or a general partner, or to provide collateral for the limited partnership or a general partner;

(4) To call, request or attend or participate at a meeting of the partners or the limited partners;

(5) To wind up a limited partnership pursuant to § 17-803 of this title;

(6) To take any action required or permitted by law to bring, pursue or settle otherwise terminate a derivative action in the right of the limited partnership;

(7) To serve on a committee of the limited partnership or the limited partners or partners or to appoint, elect or otherwise participate in the choice of a representative or another person to serve on any such committee, and to act as a member of any such committee directly or by or through any such representative or other person;

(8) To act or cause the taking or refraining from the taking of any action, including by proposing, approving, consenting or disapproving, by voting or otherwise, with respect to 1 or more of the following matters:

a. The dissolution and winding up of the limited partnership or an election to continue the limited partnership or an election to continue the business of the limited partnership;

b. The sale, exchange, lease, mortgage, assignment, pledge or other transfer of, or granting of a security interest in, any asset or assets of the limited partnership;

c. The incurrence, renewal, refinancing or payment or other discharge of indebtedness by the limited partnership;

- d. A change in the nature of the business;
- e. The admission, removal or retention of a general partner;
- f. The admission, removal or retention of a limited partner;
- g. A transaction or other matter involving an actual or potential conflict of interest;
- h. An amendment to the partnership agreement or certificate of limited partnership;
- i. The merger or consolidation of a limited partnership;
- j. In respect of a limited partnership which is registered as an investment company under the Investment Company Act of 1940 [15 U.S.C. 81a-1 et seq.], as amended, any matter required by the Investment Company Act of 1940, as amended, or the rules and regulations of the Securities and Exchange Commission thereunder, to be approved by the holders of beneficial interest in an investment company, including the electing of directors or trustees of the investment company, the approving or terminating of investment advisory or underwriting contracts and the approving of auditors;
- k. The indemnification of any partner or other person;
- l. The making of, or calling for, or the making of other determinations in connection with contributions;
- m. The making of, or the making of other determinations in connection with or concerning, investments, including investments in property, whether real, personal or mixed, either directly or indirectly, by the limited partnership; or
- n. Such other matters as are stated in the partnership agreement or in any other agreement or in writing;

(9) To serve on the board of directors or a committee of, to consult with or advise, to be an officer, director, stockholder, partner (other than a general partner of a general partner of the limited partnership), member, manager, trustee, agent or employee of, or to be a fiduciary or contractor for, any person in which the limited partnership has an interest or any person providing management, consulting, advisory, custody or other services or products for, to or on behalf of, or otherwise having a business or other relationship with, the limited partnership or a general partner of the limited partnership; or

(10) Any right or power granted or permitted to limited partners under this chapter and not specifically enumerated in this subsection.

(c) The enumeration in subsection (b) of this section does not mean that the possession or exercise of any other powers or having or acting in other capacities by a limited partner constitutes participation by him in the control of the business of the limited partnership.

(d) A limited partner does not participate in the control of the business within the meaning of subsection (a) of this section by virtue of the fact that all or any part of the name of such limited partner is included in the name of the limited partnership.

(e) This section does not create rights or powers of limited partners. Such rights and powers may be created only by a certificate of limited partnership, a partnership agreement or any other agreement or in writing, or other sections of this chapter.

(f) A limited partner does not participate in the control of the business within the meaning of subsection (a) of this section regardless of the nature, extent, scope, number or frequency of the limited partner's possessing or, regardless of whether or not the limited partner has the rights or powers, exercising or attempting to exercise 1 or more of the rights or powers or having or, regardless of whether or not the limited partner has the rights or powers, acting or attempting to act in 1 or more of the capacities which are permitted under this section.

**Section 17-702. Assignment of partnership interest.**

(a) Unless otherwise provided in the partnership agreement:

(1) A partnership interest is assignable in whole or in part;

(2) An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights or powers of a partner;

(3) An assignment of a partnership interest entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled, to the extent assigned; and

(4) A partner ceases to be a partner and to have the power to exercise any rights or powers of a partner upon assignment of all of his partnership interest. Unless otherwise provided in a partnership agreement, the pledge of, or granting of a security interest, lien or other encumbrance in or against, any or all of the partnership interest of a partner shall not cause the partner to cease to be a partner or to have the power to exercise any rights or powers of a partner.

(b) The partnership agreement may provide that a partner's interest in a limited partnership may be evidenced by a certificate of partnership interest issued by the limited partnership and may also provide for the assignment or transfer of any partnership interest represented by such a certificate and make other provisions with respect to such certificates.

(c) Unless otherwise provided in a partnership agreement and except to the extent assumed by agreement, until an assignee of a partnership interest becomes a partner, the assignee shall have no liability as a partner solely as a result of the assignment.

(d) Unless otherwise provided in the partnership agreement, a limited partnership may acquire, by purchase, redemption or otherwise, any partnership interest or other interest of a partner in the limited partnership. Unless otherwise provided in the partnership agreement, any such interest so acquired by the limited partnership shall be deemed cancelled.

**Section 17-704. Right of assignee to become limited partner.**

(a) An assignee of a partnership interest, including any assignee of a general partner, may become a limited partner if and to the extent that:

- (1) The partnership agreement so provides; or
- (2) All partners consent.

(b) An assignee who has become a limited partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a limited partner under the partnership agreement and this chapter. Notwithstanding the foregoing, unless otherwise provided in the partnership agreement, an assignee who becomes a limited partner is liable for the obligations of his assignor to make contributions as provided in § 17-502 of this title, but shall not be liable for the obligations of his assignor under subchapter VI of this chapter. However, the assignee is not obligated for liabilities, including the obligations of his assignor to make contributions as provided in § 17-502 of this title, unknown to the assignee at the time he became a limited partner and which could not be ascertained from the partnership agreement.

(c) Whether or not an assignee of a partnership interest becomes a limited partner, the assignor is not released from his liability to the limited partnership under subchapters V and VI of this chapter.

**JERSEY**

**Limited Partnerships (Jersey) Law 1994**

**ARTICLE 19**

**Limited partner's liability to creditors**

(1) Except as provided in this Law, a limited partner is not liable for the debts or obligations of the limited partnership.

(2) A limited partner is not liable as a general partner unless he participates in the management of the limited partnership.

(3) Subject to paragraph (4), if a limited partner participates in the management of the limited partnership in its dealings with persons who are not partners, that limited partner shall be liable in the event of the insolvency of the limited partnership for all debts and obligations of the limited partnership incurred during the period that he participated in the management of the limited partnership as though he were for that period a general partner.

(4) A limited partner shall be liable under paragraph (3) only to a person who transacts with the limited partnership with actual knowledge of the participation of the limited partner in the management of the limited partnership and who then reasonably believed the limited partner to be a general partner.

(5) A limited partner does not participate in the management of a limited partnership within the meaning of this Article by doing one or more of the following—

- or (a) being a contractor for or an agent or employee of the limited partnership or of a general partner or acting as a director, officer or shareholder of a corporate general partner;
- (b) consulting with and advising a general partner with respect to the activities of the limited partnership;
- (c) investigating, reviewing, approving or being advised as to the accounts or affairs of the limited partnership or exercising any right conferred by this Law;
- (d) acting as surety or guarantor for the limited partnership either generally or in respect of specific obligations;
- (e) approving or disapproving an amendment to the partnership agreement; or
- or (f) voting on, or otherwise signifying approval or disapproval of, one more of the following—
  - (i) the dissolution and winding up of the limited partnership,
  - (ii) the purchase, sale, exchange, lease, pledge, hypothecation, creation of a security interest, or other dealing in any asset by or of the limited partnership,
  - (iii) the creation or renewal of an obligation by the limited partnership,
  - (iv) a change in the nature of the activities of the limited partnership,
  - (v) the admission, removal or withdrawal of a general or a limited partner and the continuation of the limited partnership thereafter, or

- (vi) transactions in which one or more of the general partners have an actual or potential conflict of interest with one or more of the limited partners;
  - (g) bringing an action on behalf of the limited partnership pursuant to paragraph (3) of Article 28.
- (6) Paragraph (5) shall not import any implication that the possession or exercise of any other power by a limited partner will necessarily constitute the participation by such limited partner in the management of the limited partnership.

## **ARTICLE 21**

### **Assignments**

(1) A limited partner shall not assign his interest, in whole or in part, in the limited partnership unless—

- (a) all the limited partners and all the general partners consent or the partnership agreement permits it; and
- (b) the assignment is made in accordance with the terms of the consent or the partnership agreement, as the case may be.

(2) An assignee of the interest, in whole or in part, of a limited partner does not become a limited partner in the limited partnership until his ownership of the assigned interest is entered in the register referred to in sub-paragraph (a) of paragraph (4) of Article 8, and until so entered he has none of the rights of a limited partner exercisable against the partnership or against any of the partners other than the assignor.

(3) Subject to paragraph (4), on becoming a limited partner, an assignee acquires the rights and powers and is subject to all the restrictions and liabilities that his assignor had in respect of the assigned interest immediately before the assignment.

(4) On becoming a limited partner an assignee shall not assume any liability of the assignor arising under paragraph (3) of Article 14, paragraph (2) of Article 17 or paragraph (3) of Article 19 and, notwithstanding any term of the partnership agreement or any other agreement to the contrary, no such assignment shall relieve the assignor of any liability under those paragraphs.

## **ONTARIO**

### **Limited Partnership Act 1990**

Interest assignable

18. (1) A limited partner's interest is assignable.

Limited partner

(2) A substituted limited partner is a person admitted to all the rights and powers of a limited partner who has died or who has assigned the limited partner's interest in the limited partnership.

Rights of assignee

(3) An assignee who is not a substituted limited partner has no right,

(a) to inspect the limited partnership books;

(b) to be given any information about matters affecting the limited partnership or to be given an account of the partnership affairs,

but is entitled only to receive the share of the profits or other compensation by way of income or the return of the contribution to which the assignor would otherwise be entitled.

#### Manner of becoming a substituted limited partner

(4) An assignee may become a substituted limited partner,

(a) if all the partners, except the assignor, consent in writing thereto; or

(b) if the assignor, being so authorized by the partnership agreement, constitutes the assignee a substituted limited partner.

#### Idem

(5) An assignee, who is otherwise entitled to become a substituted limited partner, becomes a substituted limited partner when the record of limited partners is amended.

#### Rights, liabilities of substituted limited partner

(6) A substituted limited partner has all the rights and powers and is subject to all the restrictions and liabilities of the limited partner's assignor, except any liability of which the limited partner did not have notice at the time the limited partner became a limited partner and which could not be ascertained from the partnership agreement, the declaration or the record of limited partners.

#### Liability of assignor

(7) The substitution of an assignee as a limited partner does not release the assignor from liability under section 16 or 30. R.S.O. 1990, c. L.16, s. 18.

## **APPENDIX C**

# **INDIVIDUALS AND ORGANISATIONS WHO HAVE ASSISTED WITH THE PROJECT**

3i Group

SJ Berwin & Co

Berwin Leighton

A W Blaikie (Clayton UTZ Sydney)

Chris Brown (Igloo Regeneration)

Christian Hook (Dundas & Wilson, Solicitors)

Carol Dent (Sulis Innovation Ltd)

David Goldberg QC (Gray's Inn Tax Chambers)

Cliff Hawkins (UBS Asset Management Ltd)

D Hawkins, D Lloyd, C Luck and C Quinn (Nabarro Nathanson)

Penny Hubbard (Mills and Reeve)

Colin Ives (Smith & Williamson)

John MacFarlane (McGrigor Donald, Solicitors)

Alan Magnus (DJ Freeman)

Ian Melrose (National Farmers' Union of Scotland)

John Powell QC (4 New Square)

Larry Ribstein, Professor of Law, George Mason University

Michael Smith (Scottish Landowners' Federation)

Justice Stein (NSW)

Kathleen Stewart (Semple Frasier, Solicitors)

Benjamin Thomson (Noble & Co Ltd)

Michael Twomey