

# A Practitioner's Guide to the Partnership Act 1890

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28 February 2019

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# Vehicles with the word "partnership"

There are three "partnership" vehicles:-

- **Partnerships (also known as General Partnerships) (Partnership Act 1890)**
- **Limited Partnerships (Limited Partnerships Act 1907)**
- **Limited Liability Partnerships (Limited Liability Partnership Act 2000)**

# The Law on Partnership

- **1890 Act**
- **Section 46 of the 1890 Act – *"The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act"*.**

# When is there a partnership?

**Section 1 of the 1890 Act -**

***"Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."***

**Crucial wording is:-**

- **persons**;
- **carrying on business**;
- **in common**;
- **for profit**.

# When is there a partnership?

## Carrying on business

**Khan v Miah 2000 1 W.L.R 2123**

## In common

**Worbey v Campbell [2017] CSIH 49**

## With a view of Profit

**M Young Legal Associates Ltd v Zahid (A Firm) 2006 EWCA Vic 613**

**Hodson v. Hodson 2010 P.N.L.R 8**

# Additional Rules for determining the existence of a partnership

## Section 2 of the 1890 Act -

"In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such.

# Additional Rules for determining the existence of a partnership

**(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such.**

**(c) A person being the widow, widower, surviving civil partner or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such.**

**(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto.**

**(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such."**

# Additional Rules for determining the existence of a partnership

## Factors pointing to partnership

- Partnership Agreement - Hodson v. Hodson 2010 P.N.L.R 8
- Accounts - Rees v Dartnall [2009] EWHC 3923 (Ch)
- Bank Accounts - Rees v Dartnall [2009] EWHC 3923 (Ch)
- Property - Khan v Miah 2000 1 W.L.R 2123
- Other evidence - Munro v Stein 1961 S.C. 362 at 362, Mahmood, Petitioner 2010 G.W.W 37-743

# Types of Partnerships

## Section 32 of the 1890 Act:

- Partnership at will
- Fixed term partnership
- Partnership for a single adventure or undertaking
- Cases
  - Moss v Elphick [1910] 1.K.P. 846
  - Maillie v Swanney 2000 S.L.T. 464
  - Walters (Inspector of Taxes) v Bingham [1988] F.T.L.R

# Partners and liabilities

## **Section 9 of the 1890 Act -**

**"Every partner in a firm is jointly liable with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner."**

# Partners and liabilities

## Section 5 of the 1890 Act

**"Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership. The acts of every partner, who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner".**

# Partners and liabilities

- in the usual way business of the kind carried on by the firm
- has in fact no authority ... AND the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner

**JJ Coughlan Ltd v Ruparelia [2003] EWCA Civ 1057**

**Bank of Scotland v Henry Butcher & Co [2003] EWCA Civ 67**

# Partners and liabilities

## **Section 10 of the 1890 Act:-**

**"Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act".**

## **Section 12 of the 1890 Act:**

**"Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections".**

**Kirkintilloch Equitable Cooperative Society Ltd v Livingstone 1972 S.C. 111**

**Flynn v Robin Thompson & Partners 2000 97(6) L.S.G. 36**

# Partners and liabilities

## Section 17 of the 1890 Act

**"(1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.**

**(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.**

**(3) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted."**

# Partners and liabilities

## Importance of notification

### Section 36 of the 1890 Act

**"(1) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.**

**(2) An advertisement in the [London] [Edinburgh] [Belfast] Gazette ... shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised."**

**Welsh v Knarston, 1973 S.L.T. 66.**

**Barfoot v Goodall (1811) 3 Camp. 147**

**Must notify HMRC - Jamieson v Her Majesty's Customs & Excise 2001 WL 1751128**

# Partners and liabilities



# Separate Legal Personality

## Section 4(2) of the 1890 Act

**"In Scotland a firm is a legal person distinct from the partners of whom it is composed..."**

**Perpetual Succession and Third Party Contracts – the unknown.**

## Contracts with the house

**Mrs Eliza Lawson or Alexander and Another v James Lawson and Others (James Lawson's Trustees) 1890 17 R 571**

**Inland Revenue v Graham's Trustees [1971 S.C. \(H.L.\) 1](#); [1971 S.L.T. 46](#)**

**Moray Estates Development Co v Butler 1999 S.L.T. 1338**

# Fiduciary Duties

**Common law duty and some statutory provisions:**

**Section 28 of the 1890 Act:**

**"Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives".**

**Section 29 of the 1890 Act:**

**"Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connexion."**

**Section 30 of the 1890 Act**

**"If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business."**

# Fiduciary Duties



# Historical liabilities and the transmission presumption

**Scottish Pension Fund Trustees Ltd v Marshall Ross & Munro [2018] CSIH 39**

**Law Commission 2000 – “Where the business taken over is substantially the same as the old firm, and where that business is continued without interruption, there appears to be a general presumption that the new partnership takes over the whole liabilities as well as the assets”.**

**Three criteria**

- 1. Practically the same partnership.**
- 2. No interruption.**
- 3. No assets in the original partnership.**

# Salaried partners/fixed equity partners and loss of employment rights

**Morrison v Aberdeen Considine UKEAT/0018/17/JW**

**In favour of being a partner:**

- **signed successive partnership agreements;**
- **whether the partnership agreement truly reflected the relationship between the parties;**
- **accepted that she identified herself as a partner in the firm both internally and externally;**
- **authority to sign on behalf of the firm and also supervise and manage others;**
- **transferred the ownership of her home from joint names to the name of her husband;**
- **her remuneration was taken out of the profits of the firm;**
- **profits reduced when firm decrease in profits of the firm; and**
- **paid income tax under schedule D which is as self employed.**

# Salaried partners/fixed equity partners and loss of employment rights

**In favour of being an employee:**

- not required to pay any capital towards the partnership;**
- not entitled to attend equity partnership meetings;**
- was indemnified for any loss or firm obligations; and**
- claimed that she could not refuse work, had no one to delegate work to and did not generate business for the firm; however, the respondent's evidence challenged these assertions.**

**On appeal, held that the tribunal can take the partnership agreement as a starting point against which it could test consistent and inconsistent factors.**

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