

A brief introduction to Partnerships in Scotland

Stephen Chan

Partner, Harper Macleod LLP & Author of “A Practical Guide to Partnership Law in Scotland”

10 January 2019

Separate Legal Personality

In Scotland a partnership has separate legal personality. Section 4(2) of the Partnership Act 1890:

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

In England a partnership has no separate legal personality. *Sadler v Whiteman* [1910] 1AB868 at 889:

"In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity..."

The things that a Scottish partnership can do

- 1 own property;
- 2 hold rights and assume obligations;
- 3 sue and in itself can be sued;
- 4 be a partner in another partnership;
- 5 have a partner in common with another firm whilst remaining separate from that firm;
- 6 be a debtor or creditor; and
- 7 enter into contracts with the partners who can thus be creditors or debtors of the firm.

The perplexing issue of continuing legal personality

J.B. Miller, *The Law of Partnership in Scotland*, 2nd edn, p.470:

"separate legal personality does not carry with it the attribute of perpetual succession which is a feature of a fully corporate body; and thus a change in the membership of the firm means a new firm".

Contracts with the house

Contract continues with a partnership if the contract indicates that it is with the partnership viewed as a continuing entity as it may be constituted from time to time with changes in partners.

Two criteria:

- 1 was the intention of the other party to the contract that it intends to contract with the house, as opposed to the partnership consisting of only those partners at the time; and
- 2 that the business remained substantially the same firm and business as at the time the contract was entered into.

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

Principal and Agents Relationship

Section 5 of the 1890 Act provides that:-

"Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership."

Insolvency

In Scotland, bankruptcy legislation applies to the partnership being insolvent.

s.6(4) of the Bankruptcy (Scotland) Act 2016:

"The sequestration of the estate of a partnership is—

- (a) by debtor application made by the partnership where the partnership is apparently insolvent,*
- (b) by debtor application made by the partnership with the concurrence of a qualified creditor or qualified creditors, or*
- (c) on the petition of—*
 - (i) a temporary administrator,*
 - (ii) a member State liquidator appointed in main proceedings,*
 - (iii) a trustee acting under a trust deed, or*
 - (iv) a qualified creditor or qualified creditors, if the partnership is apparently insolvent."*

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”*.

The three criteria

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

Contact details

Name Stephen Chan

Title Partner

t: +44 (0)131 247 2520

e: stephen.chan@harpermacleod.co.uk