
Characteristics of partnerships

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1.1 Introduction

1.1.1 Types of business medium

The established business media in the United Kingdom are sole traders, partnerships and companies. Sole traders by definition tend to be relatively small concerns, as do partnerships, although a number of professional partnerships overturn this assumption. Companies cover the full spectrum of business sizes.

Chapters 1 to 5 of this Guide cover partnerships; **Chapters 6 to 12** cover companies. Since 6 April 2001, a new business medium has been in existence, known as the 'limited liability partnership'. This is discussed in **Chapter 35**. As limited liability partnerships are a hybrid of company and partnership law concepts, it is recommended that they are not studied until partnerships and companies have been covered.

In this chapter, we will look at the rules for determining whether a partnership has come into existence as well as the formalities with which businesses which will be run through partnerships must comply. (This Guide will not consider the rules relating to limited partnerships created under the Limited Partnership Act 1907.)

We will not look separately in this chapter, or in the ones which follow, at sole proprietorships. However, many of the formalities to which partnerships are subject (for example, in relation to the choice of a business name) apply equally to sole proprietors.

1.2 Relevant law

Much of the law relating to partnership is to be found in the Partnership Act (PA) 1890. The Act was mainly declaratory of the law of partnership as it had developed up to 1890. The Act does not provide a complete code of partnership law, and indeed s. 46 specifically provides that: '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.'

1.3 Definition of partnership

The definition of a partnership is to be found in s. 1(1) PA 1890 which states: 'Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.' (A registered company is specifically excluded from the definition by s. 1(2).) To satisfy the definition, two or more persons must be carrying on a business. It follows from this that an agreement to run a business in the future does not constitute an immediate partnership, nor does the taking of preliminary steps to enable a business to be run. 'Business' is defined by s. 45 PA 1890 as including 'every trade, occupation or profession'.

Section 2 PA 1890 lays down certain 'rules for determining the existence of a partnership'. These provide that:

- (a) Joint or common ownership of property 'does not of itself create a partnership' even where profits from the property are shared (s. 2(1)).
- (b) The sharing of *gross* returns does not of itself create a partnership (s. 2(2)). A person is not, therefore, a partner in a business merely because he receives commission on sales which he has introduced.
- (c) The receipt of a share of *profits* is *prima facie* evidence of partnership (s. 2(3)). This topic is dealt with in 2.6.

It should be noted that a written partnership agreement is *not* a prerequisite for the existence of a partnership. The existence of a partnership is *always* a question of fact.

1.4 Nature of partnership and terminology

A partnership is, in law, a very different type of institution from a company. The most significant difference is that partners have unlimited liability for the debts of the partnership, whereas the liability of shareholders for company's debts is limited. (The liability of partners to creditors is considered in **Chapter 3**.) Partnerships, unlike companies, are not required to go through any registration process when they are formed and, again unlike companies, they are under no obligation to make their accounts public.

A partnership is not a separate legal entity from its partners (in contrast to companies, which are legally distinct from their shareholders). However, to a limited extent in relation to litigation (see **Chapter 3**) and taxation (see **Chapter 13**), the existence of the partnership is recognised as being independent of the individual members.

As a means of recognising the differences which exist between a partnership and a company, the former is commonly referred to as a *firm*.

1.5 Number of partners

Until quite recently the maximum number of persons who could be members of a particular partnership was usually 20 (s. 716 Companies Act (CA) 1985). Numerous exemptions to this limit existed, in particular for certain professions, including solicitors and accountants. This rule was abolished completely in late 2002, so that no limits apply in any circumstances.

1.6 Capacity

Generally speaking, any person including a minor (person under 18) is legally capable of forming a partnership with any other person. Companies as well as individuals can, provided their objects clause gives them the power to do so, enter into a partnership with other companies or with individuals. (This Guide will not consider any rules applicable where one or more companies are members of a partnership.)

1.7 Duration of partnership

Most partnerships are partnerships 'at will'. This means that no particular period is agreed upon as being the time during which the partnership is to last. A partnership at will can be dissolved by notice by any partner unless there is an agreement to the contrary (see ss. 26(1) and 32(c) PA 1890).

A partnership for a fixed term or for a term defined by reference to some event (e.g., the completion of some particular job) is also possible. Such a partnership cannot generally be dissolved by notice.

There may sometimes be difficulty in deciding when a partnership begins. Because of the way partnership is defined, this is essentially a question of fact. The terms of a partnership agreement as to commencement may be evidence (though not conclusive) of when a partnership begins.

1.8 Partnership name and publicity of information

A partnership is entitled (subject to what is said below) to choose any name which it wishes. There is nothing in partnership law corresponding with the requirement that a company should have a corporate name which is registered with the Registrar of Companies (see 7.5.3.1).

The law relating to partnership names is now contained in the Business Names Act (BNA) 1985. The Act permits the free use of certain names and requires approval for others. In addition it contains rules requiring publicity as to the membership of partnerships in certain circumstances.

1.8.1 Automatically permitted names

If the business of a partnership is carried on under a name which consists of the surnames of all the partners, no restrictions apply (s. 1 BNA 1985). This is also the case where the name consists of the partners' surnames together with 'permitted additions' and nothing else. The permitted additions are:

- (a) the forenames or initials of the partners;
- (b) the addition of an 's' to a surname to signify that there is more than one partner with that name; and/or
- (c) a statement that the business is being carried on in succession to the business of a former owner.

Where the name of the partnership does not consist solely of the surnames of the partners, or of the surnames of the partners together with permitted additions, then the disclosure requirements of s. 4 BNA 1985 will apply and in some cases approval of the name is required under ss. 2 and 3.

1.8.2 Disclosure requirements of s. 4 BNA 1985

Any partnership which uses a business name (other than one permitted under s. 1 BNA 1985) is required to state the name of each partner (together with an address for service in Great Britain) on:

- (a) every business letter;
- (b) order for goods or services;
- (c) invoice;
- (d) receipt; and
- (e) written demand for payment of a debt (s. 4(1)(a) BNA 1985).

The same information must also be given by a notice in a prominent position at each place of business of the partnership (s. 4(1)(b) BNA 1985). The same information must also be given (in writing) to anyone with whom the partnership has had dealings or negotiations and who asks for the information (s. 4(2) BNA 1985).

The requirement of including names and addresses in letters, etc., does not apply to a partnership with more than 20 members provided that, instead of the partners' names, the letter states the address of the principal place of business and that the names and addresses of the partners can be inspected there.

1.8.3 Approval under ss. 2 and 3 BNA 1985

Section 2 BNA 1985 makes it an offence to carry on business (without the approval of the Secretary of State) under a name which suggests a connection with the Government or a local authority, or which includes a word specified in regulations made under the Act. Section 3 gives the Secretary of State power to make such regulations. Regulations have been made under the Act which specify scores of words for which approval is required.

Partners who are starting a business and who wish to use a business name should consult the regulations. If they find that their name includes a word covered by the regulations they should first write to the government department or other body (if any) which is to be consulted in relation to that word asking it whether it objects. They should then

apply to the Secretary of State for approval stating that they have made such a request and enclosing a copy of any reply that they have received from the government department or other body that they have consulted.



Interactive online exercises (Student Learning Activities) which complement the topics covered in this chapter are available at www.oxfordtextbooks.co.uk/orc/lpcbuisness08_09.