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Geoffrey Morse

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GEOFFREY MORSE

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PREFACE

It is now twenty years since I wrote the first edition of this book. If I had been told in 1985 that twenty years later I would be completing the sixth edition, I would simply have suggested that the individual concerned seek medical advice. The study and development of partnership law in England at that time seemed to be ailing with very few, if any, reported cases and no apparent official interest. Further, by far the best of the more academic books on the subject, *Pollock on Partnership* edited by Professor Jim Gower, was way out of date. The genesis of this book was therefore to fill a perceived gap and to provide a one-off, accessible, but hopefully penetrating analysis of the precepts of English partnership law for law students. As such it had no footnotes and few headings—it was meant to be read rather than consulted.

But from those earliest times I discovered that English partnership law, as encapsulated in the 1890 Partnership Act, was still alive and extremely well in most other common law jurisdictions, ie in virtually every former (and the few remaining) colonies of the former British Empire. With the exception of the United States, even the most sophisticated of those independent countries, such as Singapore, New Zealand, the anglophone Provinces of Canada, and the States of Australia, still retained the text of the 1890 Act. Having radically altered their inherited company laws, those countries had apparently seen no need to amend their partnership laws. (South Africa is a strange exception, using English partnership concepts but without the Act). Nor could it be said that this almost universal policy was simply one of inertia based on the premise that partnership was an obsolete and moribund business form. Far from it. The law reports from those countries proved that partnership litigation was both active and often at the cutting edge, raising issues apparently dormant in England.

The wonderful consequence of all this was that courts of those countries provided a wealth of material on partnership law which was, and is, of direct relevance to English law. Those cases have continually both illuminated and expanded our understanding of our own apparently 'franchised' partnership law. They continue to do so today. Nearer home, the courts of Scotland and the Republic of Ireland have also produced illuminating cases, and, in this edition, I have included an extremely useful decision from the Isle of Man on the

current issue of the vicarious liability of a firm for breaches of trust. All this is not to decry the obvious reawakening of interest in partnership law in England over the past fifteen years or so. This is particularly manifest in the apparently increasing activity in this area of litigation in the English courts (although it must be said that the explosion in electronic access to the courts' decisions must have been a factor in this). In particular, several such partnership disputes have been taken to the appellate courts although some of those decisions have not always been to this writer's liking. In particular, tribute should be paid to Lord Millett, recently retired from the House of Lords, who has played a very active role in seeking to clarify several difficult issues of partnership law. Where I have ventured to disagree with his views, I am conscious of the fact that I can only do so because he has so cogently confronted the problem involved—a feature not always shared by some of his judicial colleagues.

Twenty years on, therefore, I find that the book has grown organically, both in content and purpose. Apart from the obvious changes, such as the arrival of LLPs, there have been more subtle developments. The book's initial purpose has not changed, it is still intended to serve as a student text; but its role is now far wider and I am aware that the readership has proved to be far more diverse than just law students. It can never be, nor should it be, a full practitioner manual; but it can, hopefully, serve as guide for legal practitioners and others as to the basic, but often tricky, tenets of partnership law. This is especially so in its use of other common law sources, both to illuminate existing problems and to raise others. It has perhaps taken a change of publisher to focus my attention on this fact and so in this edition, for the first time, there are footnotes, far more headings, and a division into numbered paragraphs. Even though I was reluctant at first, I am now persuaded that this is the correct thing to do.

In the preparation of this edition, I have continued to be amazed at the vitality of partnership law across the common law world. High level judicial debate still surrounds issues as to the limits of the vicarious liability of partners for breaches of contract, torts, and equitable wrongs by one or more of their number. In what circumstances, for example, will the 'firm' be liable for guarantees, the embezzlement of trust funds, or even an assault outside a court room? How exactly do ss 10, 11, and 13 of the Act fit together? Further, the flexibility of the fiduciary duties applied in full to partners inter se is continually stressed and adapted to new situations. How do those duties apply to the actions of a committee of the partners, for example? This constant flexibility and development contrasts well with the extremely ill advised decision by the UK Government to codify (and so ossify) directors' duties to their companies. The comments by the Ontario Court of Appeal in their recent decision in *Rochberg v Truster* amply state my views. Then there are newly arising issues of

choice of forum and jurisdiction in international partnership disputes which have been raised (in one example by the courts of the Cayman Islands) and need answering.

It might be thought that more basic concepts such as the definition of a partnership and the application of normal contractual doctrines to the partnership agreement might be settled. But that is simply not so. The interface between tax avoidance and partnerships continues to raise issues in Canada as to the exact meaning of a business with a view of profit. There are also debates as to the standard of care owed by one partner to another. The contractual doctrine of novation as applied to partners has also been before the courts, but most interesting of all, are the clear observations by Lord Millett that acceptance by one partner of the repudiatory breach of contract by the other does not automatically end the partnership, although under contract law it ends the contractual relationship between them. Queried initially by the Law Commissions, this has since been applied as a proposition of law by Neuberger J in a subsequent case, but it has been doubted, in my view correctly, in very clear terms by the NSW Court of Appeal in Sydney and in at least one other academic commentary apart from this book. This putative development of a relationship independent of the contract and which survives its end suggests that partnership is a quasi entity. There are indeed many cases where a type of de facto entity is tacitly accepted—but the fundamental rule remains that a partnership does not have legal personality.

Nor apparently will it have one in the foreseeable future. In 2003, the Law Commissions of England and Wales and of Scotland duly produced their Final Report on both Partnership Law and that applicable to Limited Partnerships, of which much was expected in the previous edition of this book. They also produced a draft bill. There was almost unanimous support for the vast majority of their recommendations, which would have both greatly simplified the law and provided for far more sensible procedures, especially for the potentially expensive and time-consuming process of dissolution. The Act would have been modernized and some redundant, and/or misleading, sections expunged. Above all there would have been a presumption of continuity where at least two partners remained after the exit of another. That would have accorded both with common belief and common sense. But on one issue there was strong, and apparently fatal, opposition from the specialist Bar—that of giving all but a special limited partnerships legal personality. (Scottish partnerships already have a form of such personality).

The subsequent reaction of the DTI to the Law Commissions' Report has been nothing short of scandalous. Having sat on it for a time, they published,

in 2004, a Consultation Paper, not on the merits of the proposals, but on the economic and regulatory impact of them. Nothing more has since been heard and both the Consultation Paper and the whole issue of partnership law disappeared from public view when the Department revamped its website. If you search hard enough there is a page ostensibly dedicated to the responses to the 2004 Consultation but it is in practice (at least I found) unobtainable. It is not therefore, to use their appalling home page jargon, apparently a 'hot topic'.

So for the sake of a single issue the whole Report appears to have been lost. There were those of us who continually pointed out to both sides that, although desirable from a common sense point of view, legal personality was not a *sine qua non* of the other proposals—continuity being much more important. It is true that some of the proposals were written on the basis of the introduction of legal personality but they could easily as well be rewritten without it, although I admit that this would have continued the existing dichotomy between England and Wales and Scotland. But that does not seem to present much of an issue in practice. In the event, however, everyone involved seems to have shrugged their shoulders and carried on. The fabled Sir Humphrey Appleby would indeed have been delighted by such glorious inactivity.

We had to wait over a hundred years for this stillborn review of partnership law—let us hope that our distant descendants have more luck next time. On the other hand, at least it means that half the civilized world do not have to alter their own Partnership Acts—at least not in the one area of law where they still seem keen to keep up with us, merely to achieve that. Perhaps, however, they will use and adapt the Law Commissions' generally excellent analysis and sensible proposals with more skill, courage, and resolve than our law makers can manage. In this edition I have summarized several of the Commissions' proposals simply on the basis that they cast light on some current issues and defects. The confusion which flows from the lack of a legal personality, which most people assume exists, will continue.

This dissatisfaction with the lack of legal personality in English partnerships is not new, however. Professor Burdick in his book on *The Law of Partnership*, published in 1899 in Boston by Little, Brown and Company, wrote at page 2:

> The law of merchants recognized a partnership as an entity separate and distinct from the members composing it; such is still the mercantile conception of a firm. This quasi person holds the title to the firm property. It acquires rights and incurs obligations of its own. It may deal even with its own members, thus becoming their creditor or debtor. But the common law flouts all such notions. It refuses to personify the firm. A partnership is but an association of individuals. It cannot contract with its members, because a man cannot contract with himself. To this

> conflict of views is due much of the confusion and perplexity which characterize some of the branches of our partnership law.

Holdsworth in his epic *History of English Law* (1937) states that one of the reasons why the common law succeeded over the law of merchants (a Venetian invention) in this respect was the insularity and late development of English commerce vis-à-vis continental Europe. Alternatively it may be suggested perhaps that it represented the triumph of the doctrinaire interests of lawyers over the common sense of merchants. *Plus ça change, plus c'est la même chose.*

In preparing this, the sixth edition of a book which has always given me by far the most pleasure in writing in my career, I am grateful to the Dean and members of the Law Faculty and Carolyn Wee of the CJ Koh Law Library, all at the National University of Singapore, for their hospitality and the use of their excellent library resources and facilities for two periods in 2003 and 2005. I am also grateful for the many companionable hours spent in that preparation in my study at home with the venerable but determined family Burmese cat, Rum. Only on rare occasions did she attempt to add her undoubted and ancient wisdom to the text by strolling across the keyboard. I am also grateful for the opportunity to have been able to discuss various issues with and benefit from the advice of Sandra Frisby, Stephen Girvin, and Yeo Hwee Ying. The responsibility for all the text, however, is solely mine and I have endeavoured to encapsulate the law as known to me on 15 September 2005.

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October 2005

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