

# 11|SB



## LLPoints to Consider

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## The Nature of LLPs

### A General

1. The LLP was an entirely new form of legal entity when it was brought into being by the Limited Liability Partnerships Act 2000, which came into force on 6th April 2001. The Limited Liability Partnerships Regulations 2001 (SI 2001/1090) together with the Limited Liability Partnerships (Amendment) Regulations 2005 (SI 2005/1989) and 2007 (SI 2007/2073) supplement the statute and apply to LLPs, with modifications, substantial parts of the Companies Act 1985, the Insolvency Act 1986 and sundry other statutes.
2. LLPs will be affected by the overhaul of company law embodied in the Companies Act 2006, but to what extent is currently uncertain, because it has not yet been decided how much of the Companies Act 2006 will be applied to LLPs. Most of what follows, however, will remain applicable after the 2006 Act is fully in force.
3. The origin of the LLPA 2000 is the pressure exerted on the government during the 1990s by the business community and in particular the larger professional firms, for a form of structure which avoided the necessity for partners to be personally liable without limit for the liabilities of the firm. There were fears that in a culture of steadily increasing litigiousness - especially against professionals - and given the amounts involved, a

situation was developing in which partners in firms would face claims in numbers, and amounts, which overwhelmed their professional indemnity insurance cover, leaving them exposed to a constant risk of financial ruin. The big accountancy firms were in the vanguard. What finally pushed the government into action was the realization that the largest accountancy firms were preparing to move their bases offshore, which would involve a serious loss of commercial prestige and revenue. Guess who incorporated first on the commencement day, becoming the proud possessor of LLP registration no OC300001? Ernst & Young LLP.

4. The legislation was introduced in a hurry, and is not well drafted. For example, section 4(4) provides that a member of an LLP shall not be an employee of the LLP “unless, if he and other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership” This is a nonsense, because the concepts of partnership and employment are mutually exclusive and there are no circumstances in which a partner is employed by his fellow partners.
5. Note that the Act does not put in place a comprehensive default regime, as the Partnership Act 1890 does for partnerships and the Companies Act 1985 does for companies. There are some default provisions in reg 7 (see below) but they are rudimentary. One leading author describes the Act as “Third world legislation”.

6. Note also that although the Law Commission in 1996 and the DTI in its consultation paper in 1997 limited their consideration to professional partnerships, the statute applies to all businesses, providing, as Lord Phillips of Sudbury said in the Lords “.....your two-man cowboy building outfit with a uniquely flexible and light-framed means of screwing the public”. That particular fear does not seem to have been realized; cowboy builders were adept at cheating their customers before 2000 and do not seem to have perceived a need to incorporate themselves as LLPs in order to continue doing so.
7. An LLP is much more like a limited company than a partnership; indeed its description as a “partnership” is arguably a misnomer:
  - (i) an LLP is a separate legal entity, unlike a partnership. It has no existence until it is incorporated;
  - (ii) an LLP has to file annual audited accounts and annual returns at Companies House;
  - (iii) The Directors Disqualification Act 1986 applies in full to members of LLPs;
  - (iv) The insolvency regime applicable to LLPs is similar in all important respects to that applicable to companies;
  - (v) It is specifically provided in section 1(5) of the LLPA 2000 that save as provided by that Act or any other enactment “*the law relating to partnerships does not apply to Limited Liability Partnerships*”.

8. On the other hand LLPs are different from limited liability companies:
- (i) the capital of an LLP is not divided into shares;
  - (ii) the accounting regime requires less detail about the individual finances of members than is required of the directors of companies;
  - (iii) Save when insolvent, the tax treatment of LLPs is completely different from that of companies. LLPs are “tax transparent”; members are individually taxed, rather than the LLP being liable to pay corporation tax;
  - (iv) there is no requirement for annual general meetings to approve the accounts; and indeed little prescription for internal governance generally, this being left to individual LLP agreements.
9. The basic distinction between partnerships and LLPs is, perhaps, that whereas partnership is defined as a relationship (“*the relation which subsists between persons carrying on a business with a view of profit*” - section 1(1) of the Partnership Act 1890), an LLP is a free-standing entity brought into being by incorporation. This enables it, rather than the members, to be the repository of liabilities.
10. But the existence of a separate entity means that the relationship of the members of an LLP to each other is fundamentally different from the relationship which partners have with each other. Members of an LLP are agents of the LLP (LLPA 2000 section 6(1)) but, unlike partners, they are

not agents of each other. This has two consequences:

- (i) members owe fiduciary duties to the LLP but not necessarily to each other; and
- (ii) members are not liable to third parties (eg clients) for losses caused by the negligence of another member.

11. The first consequence can be avoided by express provisions in the LLP agreement that members are to owe one another fiduciary duties (see Part 2 below). The second consequence could also be avoided in the same way, but it is unlikely that this would be done, because it would nullify one of the main benefits of the LLP structure.

## **B The limitation of members’ liability**

12. This is the defining feature of LLPs. It has two aspects: (i) members’ personal liability for breach of contract, fraud, or negligence; and (ii) members’ liability if the LLP becomes insolvent.

### **(i) liability for breach of contract, fraud or negligence**

13. **Breach of contract:** absent contrary agreement, members are not personally liable in respect of the LLP’s breach of contract, since they are not, unlike partners, parties to the contract.

14. **Fraud:** a member will not be liable for the fraud of the LLP, unless the fraud is committed by himself, in which case, by analogy with the authorities in relation to directors of companies, he will be personally liable in addition to the LLP (see the judgment of Lord Hoffmann in *Standard Chartered Bank vs Pakistan National Shipping Corporation (No 2)* [2003] AC 959, [2002] 1 All ER 173, reversing the decision of the Court of Appeal.
15. **Negligence:** this is clearly important to members of professional firms. As stated, members are not personally liable in respect of the negligence of other members. Whether they are personally liable, in addition to the LLP, in respect of their own negligence, is, surprisingly, uncertain:
- (i) When the LLPA 2000 was in draft, a suggestion was made that it should specifically provide that wrongs done by a member, including negligence, were to be the liability of the LLP alone and not the member. This suggestion was rejected, and section 6(4) provides:  
*“(4) Where a member of a limited liability partnership is liable to any person (other than another member of the limited liability partnership) as a result of a wrongful act or omission of his in the course of the business of the limited partnership or with its authority, the limited liability partnership is liable to the same extent as the member.”*
  - (ii) On the face of it this subsection implies that the member will be liable as well as the LLP. There are indications that, at least initially,

this is what the government intended: Lord McIntosh of Haringey, in the second reading of the Bill in the House of Lords, said *“A member of an LLP who is a professional will owe a duty of care to his clients. If he gives bad advice to his clients he will be potentially liable for the whole of his assets”* (Hansard, 9th December 1999);

- (iii) However, in the Committee stage Lord McIntosh made clear that the government felt that the liability of a member should be decided according to the principles applicable to the liability of a director, as stated by the House of Lords in *Williams vs Natural Life Health Foods Ltd* [1998] 1 WLR 830; ie that, to be liable, there must be such an assumption of personal responsibility by the director as to create a special relationship between him and the claimant. In the Commons second reading the responsible minister, Dr. Howells, stated *“If he [the member] is found to be negligent, he will be liable to exactly the same punishments, and to be pursued in the same way, as the director of a company”*;
- (iv) If we go back to the subsection, we can see that it only applies where the member is liable for his wrongful act or omission. It does not provide that the member is liable for his wrongful act or omission.
- (v) Generally, of course, a professional person is liable to his client for his own negligence. Moreover the scope of professional liability can extend beyond clients; there is a substantial body of authority

that a professional person has a duty of care to a non-client who foreseeably relies on his advice, - see the summary in the judgment of May LJ in *Merrett vs Babb* [2001] 3 WLR 1, where a surveyor employed by a surveying firm (which had gone out of business) was held to owe a duty of care to a purchaser of property who relied on his negligent survey, which had been carried out for and on the instructions of the mortgagee. *Merrett* is a surveyor case, and it is fairly clear that the imposition of a duty of care in that and similar cases is more a matter of policy than the result of any coherent principle. *“Coherence must sometimes yield to practical justice”* (per May LJ at para 42). If an LLP member is not to be liable to clients for his negligence it hardly fits with extensions of liability beyond clients.

- (vi) Two policies clash here; (a) the long-established policy that professionals should be liable to those whom they advise, and (b) the policy expressed by the government that members of LLPs are to be personally liable to the same extent as directors of companies, which is an aspect of the wider policy of limiting liability which underlies the whole concept of LLPs. If this matter were tested in the courts, policy considerations are likely to be uppermost. It is difficult to predict what the court’s ruling would be.
- (vii) An old friend who is the senior partner of a large firm has expressed the view *“Is not the limitation of liability for negligence illusory in that the [member] giving the advice has an unlimited personal duty of*

*care to the client and his fellow [members] are hardly likely to hang the negligent [member] out to dry, in case it is their turn next!”* If that analysis is correct, and members cross-indemnify each other against negligence claim, then if, as my friend assumes, a member remains liable in respect of his own negligence, a claim against any member will be a claim against all the members, and the principal benefit of being an LLP would indeed be illusory. This factor might influence the court against holding that such liability exists;

- (viii) There is no doubt what the government intended, as revealed in *Hansard*; it intended that the liability of members would be coextensive with the liability of company directors. The difficulty is that this is not what the statute says; the statute is silent;
- (ix) On balance, my view is that the court is likely to uphold the intention of the legislature as revealed by *Hansard*. But it is a clear possibility that the ruling would go the other way and the traditional liability of professionals will be upheld; especially if the test case is on hard facts engendering sympathy for a wronged client with no recourse (eg because the LLP’s PI cover has been exceeded or is not applicable and it has limited assets).
- (x) If members’ liability for their own negligence is to be coextensive with that of company directors, the road leads back to *Natural Life*. Paradoxically, in this context the *Natural Life* case is best analysed (as it was by Lord Hoffman in *Standard Chartered Bank*) not as a case

on the separate legal personality of a company, but as a case about whether or not an agent (Mr Mistlin, the director) had assumed personal responsibility for the actions of the company (sending the claimants the financial projections) which were the basis of its liability to the claimants. *“Just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the Hedley Byrne rule [liability for negligent misstatement] without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal responsibility”* (Lord Hoffmann in *Standard Chartered Bank* at para 21).

(xi) When a client instructs a solicitor who is a member of an LLP, the retainer is with the LLP. In giving advice the solicitor is acting as agent of the LLP. The question therefore is; by acting on behalf of the client, is the solicitor assuming personal responsibility for his actions so as to create a special relationship between himself, as agent, and the client, sufficient to fix him with liability under this principle? In my view a court is likely to hold that he is not.

16. One commentator says that “Carefully written letters of engagement, and a minimization of moves whereby an individual can be said to have become so personally identified with the act or omission in question as to make him liable, should be effected...one of the things which went against the hapless Mr Babb...was that he had signed the report in his own

name....Anything which helps to build the view that it is the incorporated entity of the LLP which is dealing with the customer or client will help to keep personal risk down”. One obvious step is to require every client to sign a client care letter in which he agrees that he is instructing the LLP, not any individual solicitor, and that he will look to the LLP and not any individual member for redress if he should have cause for complaint. There is no reason in principle why such a term should not be upheld. However, if the courts decide that members are liable in respect of their own negligence there is a clear danger that any such term might be held unenforceable by reason of being “unfair” within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 (providing the Claimant is able to characterise himself as a consumer).

17. In most cases, of course, a member’s PI insurance and/or the LLP’s PI insurance will meet the cost of a successful negligence claim by an ex-client. But one of the reasons why LLPs came into existence was the inadequacy of PI insurance as a means of protection; and if a claim arises which exceeds the PI cover or if for some reason it is not available, the issue discussed above will be far from academic for the member concerned.

## **(ii) members’ liability if the LLP becomes insolvent**

18. Members are likely to make some monetary contribution to the LLP, even if it is only in respect of start-up costs. Any contribution they make will represent an entitlement to a share of the LLP’s capital or assets. That share, of course,

will be available to creditors if the LLP becomes insolvent (the members themselves can prove as creditors in respect of their capital shares). But there is no statutory requirement for the LLP to have any particular amount of capital; and it is obviously in the interests of the members that the assets available to creditors should be kept as modest as possible. To this end, if the members contribute substantial amounts they will probably do so by way of loan, and if a bank makes a loan it will be secured by a charge over such assets as there are, further disadvantaging creditors.

19. There are some circumstances in which members have an extra liability. Section 1(4) of the LLPA provides that "*The members of a limited liability partnership have such liability to contribute to its assets in the event of its being wound up as is provided for by virtue of this Act*". Apart from the extremely rare situation (CA 1985 s 24, applied by reg 4 of and sch 2 to the 2001 Regulations) where an LLP carries on business with only one member, in which case the single member is liable jointly and severally with the LLP for liabilities contracted after the situation has continued for more than six months, the only circumstances provided for by virtue of the Act in which the member can be liable over and above the amount of his capital share are
  - (i) Misfeasance: Chapter X of the Insolvency Act 1986 is applied to LLPs and this includes s 212 (summary remedy against delinquent directors, s 213 (fraudulent trading) and s 214 (wrongful trading);
  - (ii) Recoupment from members on insolvency pursuant to s 214A. This provision is unique to LLPs. In summary, the liquidator may apply to

the court for an order that a member repay to the LLP up to the amount of his last two years' remunerations and other withdrawals, if at the time he received the remuneration or made the withdrawals the member knew or had reasonable grounds for believing that the LLP was unable to pay its debts. The liquidator has to prove this to the satisfaction of the court. It is unlikely that liquidators will have the inclination or the finance to bring a section 214A application save in very obvious cases.

20. The circumstances in which a member will be liable on the insolvency of the LLP for more than the amount of his capital share are, therefore, pretty limited.
21. There are, of course, other ways in which members may be at risk. Firstly, the LLP agreement may oblige members to make contributions to the LLP in the event of cash-flow difficulties, and these may (although it is not obvious why this should be) provide for the contributions to be by way of capital rather than loan. Secondly, if an LLP has only modest assets a bank is unlikely to make a loan to it save on the security of personal guarantees from the members.

## **C Taxation of LLPs**

22. A major difference between LLPs and limited companies is that LLPs are "tax transparent"; the LLP itself is not taxed, but its members are. This was

enacted because the government feared a low take-up if LLPs were to be taxed in the same way as limited companies. The members are individually taxed and are able to bring their personal tax allowances into account in computing their tax liability. This position only changes if a liquidator is appointed or a winding-up order is made by the court, in which events the LLP becomes taxable as a company.

23. The transfer of an existing business from a partnership to an LLP, and the transfer of assets between an existing partnership and an LLP are free of adverse tax consequences, in that they are put on the same footing as transfers between partnerships and only give rise to a cessation, or a chargeable gain in circumstances where a transfer between partnerships would have done so. These concessions do not apply if the business and assets are transferred from an LLP back to a partnership, so unless partners/members are prepared to endure serious tax consequences the transition from a partnership to an LLP may prove to be irrevocable.

## **D Creation and Operation of LLPs**

### ***Formation***

24. An LLP is created on incorporation by registration at Companies House. An "incorporation document" is presented. This is not the LLP agreement but is a document in approved form which is subscribed by two or more persons "*associated for carrying on a lawful business with a view to profit*"

(LLPA 2000 s 2(1) (a)), which states that such lawful business is being carried on by two or more persons, specifies which members are to be "designated members", and states the name and address of every member, and the name and registered office of the LLP. The LLP must have a registered office. All changes in the identity or the address of members must be notified to the registrar.

25. The name of the LLP must have the suffix "Limited Liability partnership" or "LLP" or "llp" or, if it is a Welsh LLP the Welsh equivalent ("Partneriaeth Atebolrwydd Cyfyngedig" "PAC" or "pac", since you ask). The Business Names Act 1985 applies, with slight modifications, to any LLP that uses a business name which is not its full corporate name without additions; therefore, inter alia, if there are fewer than 20 members their names must be displayed at the place of business and on the letterhead and other business documents. The name can be changed after registration, which must be done by the members unanimously unless the LLP agreement specifies otherwise.
26. The public may inspect the information kept at Companies House. As stated, this includes members' private addresses; but there is a procedure (Companies Act 1985 ss 723B-723F, applied to LLPs by the Limited Liability Partnerships (No. 2) Regulations 2002 (s1 2002/913)) whereby members can seek "confidentiality orders" if they can show that they are potentially vulnerable (eg to assault or criminal damage in the case of an LLP concerned with research using animals). From 1st October 2009 (the

currently intended date, albeit there is as yet no commencement order so stipulating) the new Companies Act 2006 ss 240-242 will be in force. The effect of these sections is, broadly speaking, that directors' residential addresses will not be available to the public. There is no reason to think that this regime will not be applied to LLPs.

27. The LLP agreement, however, is private. It is not filed with the registrar and is not available for inspection.

### **Members**

28. Members are the LLP equivalent of partners. New members may be added at any time, by agreement with the existing members (s 4(2)). There is no need for such agreement to be in writing. A member can be a natural or a legal person. A member ceases to be a member by death, or dissolution if a legal person, or as provided for in the LLP agreement, "*...or, in the absence of agreement with the other members as to cessation of membership, by giving reasonable notice to the other members.*" (s 4(3)).
29. The statutory leaving provision prevents anyone being locked into membership against their will, but it is rudimentary and clearly intended merely as a backstop to cover the possibility that the LLP agreement does not comprehensively deal with retirement as a member. This is dealt with in Part 2.

30. Section 5 provides that save for the default provisions set out below, "*the mutual rights and duties of the members of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its members*" shall be governed by the LLP agreement.
31. There are 10 default provisions in regs 7(1) to 7(10). In summary they are as follows:
1. all members share equally in capital and profits.
  2. members have an indemnity from the LLP for liabilities from ordinary activities.
  3. all members may participate in the LLP's management.
  4. no members are entitled to remuneration from the LLP.
  5. new members need unanimous consent.
  6. a simple majority can decide anything except a change in the nature of the LLP's business, for which unanimity is required.
  7. the LLP's books are to be kept at its place of business and available to all members;
  8. members must render true account and full information with regard to everything affecting the LLP to their fellow members;

9. if a member without the consent of the LLP carries on any business of the same nature and competing with the LLP he must account for and pay over to the LLP all profits made in such business;
10. members must account to the LLP for any benefit derived without the LLP's consent from any transaction concerning the LLP or involving use of the LLP's property, name or business connection.
32. Other than as above there are no provisions at all in the statute and the regulations regarding governance of LLPs.
33. Designated members: there must be at least two designated members. If there are not at least two at all times (eg if there are two, and one resigns) all the members become designated members (s 8(2)). The role and status of designated members is not defined in any one place in the statute or the regulations. They are clearly intended to be a class of members who carry out administrative functions; there are a variety of such functions which can only be performed by designated members and the punishment for failure to perform such functions falls only upon them. But they do not have any extra powers. Generally, being a designated member is a thankless task. It is clearly desirable to limit their numbers, even in a large LLP, so that administrative responsibility is narrowly focused in order to minimise the chances of any mistakes and identify culpability. There is no reason why the LLP agreement should not make provision for some appropriate compensation for designated members.

### *Unfair prejudice provisions*

34. The unfair prejudice provisions of the Companies Act 1985 (ss 459-461, now 994-6 of the CA 2006) are applied to LLPs, in the view of one writer as an attempt to compensate for the fact that there is no default provision enabling a member to realise his capital share on retirement or expulsion. There are conceptual difficulties regarding the application of these provisions. For example an ex-member (who may be the kind of person most in need of the court's help) has no right to apply. More importantly, if the LLP does not have provision in the LLP agreement for the exiting member to realise his capital share, how can the complainant member, who has signed the LLP agreement, contend that the affairs of the LLP are being or have been conducted in a way which is unfairly prejudicial to him? It is probably preferable to exclude this jurisdiction in the LLP agreement, which is permitted.

### *Accounts and auditing*

35. Regulation 3 incorporates the majority of the provisions of Part VII of the Companies Act 1985, with the modifications set out in Schedule 1 to the regulations. Note that CA 1985 s 232 and sched 6, regarding personal financial details of directors and members of the company, are excluded.
36. There is a duty to file annual returns, but the contents of these are minimal; the date the return is made up, the address of the registered office, the

names and addresses of all members, identification of the designated members, and the address where the register of debenture holders is kept if not at the registered office.

37. There is a duty to prepare and file audited accounts, which must contain a report by the auditors, be signed by the designated members on behalf of all the members, and be delivered to the registrar. A "Small LLP" - defined as one whose turnover is less than £2.5m per year, whose balance sheet total is less than £5.6m and which has less than 50 employees can produce an abbreviated balance sheet instead of a profit and loss account and full balance sheet. If its turnover is less than £1m its accounts need not be audited. A "Medium LLP" - less than £11.2m, £5.6m and 250 employees - can abbreviate the accounts to a limited extent, and need not show the accounting policies on the face of the accounts.
38. The extent of financial disclosure was quite a battlefield during the passage of the Act. The government was adamant that the price of limited liability was that the public should be protected by the publication of information about the LLPs finances which is akin to that required of limited companies. The policy behind the regulations as finally framed is to enable the financial state of the LLP to be seen - so that it will be clear if it is being propped up only by injections of members' funds, or conversely, is being bled dry by the members - but not to reveal the private financial affairs of individual members. Thus, the following must be disclosed:

- (i) the aggregate amount on loan to the LLP by members;
- (ii) the aggregate amount owed by the LLP to members in relation to profits;
- (iii) any other amounts outstanding between the members and the LLP (as to which full details must be given)

39. It is also provided that the average number of members during the year must be specified - which will enable anyone inspecting the accounts to calculate at once the average profit-share which has been enjoyed by members - and the accounts must also state the amount of profit paid to the member with the largest profit share (though that member need not be identified).
40. A Statement of Recommended Practice (SORP) in relation to LLPs was issued in March 2006 by the Consultative Committee of Accountancy Bodies (CCAB).

### ***Insolvency, winding up and investigation***

41. For the purposes of insolvency the LLP is treated like a limited company. Regulation 5 applies all the provisions of Parts I to IV and VI to VII of the First Group of Parts of the Insolvency Act 1986, with the modifications set out in Schedule 3 to the regulations. Voluntary arrangements and administration orders may be made, receivers and managers appointed,

and creditors' voluntary and members' voluntary resolutions, or compulsory liquidation orders, made. There can be no winding up save by the appointment of a liquidator. Members of an LLP cannot wind up the business themselves; the LLP continues in existence until wound up in accordance with the modified provisions of the Insolvency Act 1986.

42. The Registrar may strike the LLP off the register if he has reasonable cause to believe that it is not carrying on business, or if two or more designated members apply to him after the LLP has been dormant for three months.
43. The power of the Secretary of State to investigate a company under Part XIV of the Companies Act 1985 is extended to LLPs. He may order an investigation on the application of the LLP or at least one-fifth of the current members, and must do so if the court declares that the LLP's affairs ought to be investigated.

### ***The Company Directors' Disqualification Act 1986***

44. This is applied by regulation 4(2) with the modifications set out in Schedule 2 to the regulations.

### ***Other statutory provisions applied to LLPs***

45. The regulations specify various other provisions of the Companies Act 1985 which are applied to LLPs (Schedule 2) and various provisions of other

statutes as set out in the regulations and the Schedules Schedule 5 to the 2001 Regulations. Note the two sets of amendment regulations noted above. It is something of a morass. There is a publication which sets out in full the LLP Act 2000 and the 2001 Regulations, together with the relevant sections of the Companies Act 1985, the Insolvency Act 1986 and the Company Directors' Disqualification Act 1986 as modified by the 2001 Regulations in relation to LLPs. This is Douglas Armour's book "Limited Liability Partnerships: The New Legislation". However this has not been updated since 2001.

46. Practitioners considering switching to LLP status will be assisted by consulting the Law Society's booklet on LLPs, published by the Professional Ethics section and currently updated to July 2006.

## **E Conclusions**

47. There are attractions in LLP status, chief among which, obviously, is the limitation on the personal liability of members. A creditor confronted by an LLP is in a weak position; if the LLP has been properly organised there will be little for the creditor to recover should he put the LLP into liquidation, and in most instances this consideration is likely to result in the creditor agreeing to take a large discount by way of compromise.
48. Such talk is music to the ear of any commercial man. But although LLPs were introduced primarily to benefit professionals, there are issues which

professionals need to consider carefully before making a change to LLP status.

49. For example: will the ethos of partnership be eroded, so that although initially members who are used to being partners carry on helping each other as though they were still partners, over time a different atmosphere develops in which there is no such co-operation and individual members get no help in dealing with crises because their fellow-members bear no shared liability for the consequences?
50. Another matter to consider is this; how real is the protection against liability afforded by an LLP? Is a reputable solicitors LLP really going to allow a situation to occur in which an ex-client with a justified claim is left without recourse, with all the reputational consequences that is likely to involve?
51. Remember also that partners who become members of LLPs enter a regime in which they must comply with a number of statutory requirements and procedures, with personal liability for fines if there is non compliance. One writer states *"Many people becoming members in an LLP will be coming afresh to the world of such procedural requirements, especially if they have come from the relatively informal background of a partnership...Members should ensure that they take the trouble to inform themselves of what their responsibilities are, and what systems are in place for ensuring that the necessary steps are taken"*.

52. There is certainly a lot to consider, especially as some significant changes to LLPs may be about to be enacted. If my old friend's experience is typical, it seems that proper consideration is not being given in some instances *"While many law and accountancy firms have converted to LLP status (save for the very big firms) I have yet to hear a convincing argument for doing so. Managing Partners I have spoken to say things like "it shows the firm is forward looking" or "lateral hires ask about it on recruitment interviews" (in my view merely because they think it is the right question to ask)...the ability to charge assets eg wip does not seem to impress the bankers or landlords I speak to who would invariably also insist on the personal covenant of the partners"* .

**Don McCue**

## **(i) LLP Agreements**

### **A. Is it Necessary to have one?**

1. The Limited Liability Partnerships Act 2000 (“the Act”) and the Limited Liability Partnership Regulations 2001, S.I. 2001/1090 (“the Regulations”) do not require the existence of a written or other formal agreement. On the contrary, s.5(1) of the Act provides merely that the mutual rights and duties of the members of an LLP (i.e. as between members), and the mutual rights and duties of an LLP and its members (i.e. as between the LLP and its members), shall be governed “by agreement between the members, or between the limited liability partnership and its members”, without requiring such agreement to be in writing or formalised in any other way, something which Parliament did not consider to be required by policy considerations.
2. Indeed, Regulation 2 of the Regulations (the interpretation Regulation) defines an LLP agreement as “... any agreement express or implied between the members of the limited liability partnership or between the limited liability partnership and the members of the limited liability partnership which determines the mutual rights and duties of the members, and their rights and duties in relation to the limited liability partnership.” Therefore this contemplates not only that the terms of an LLP agreement can be agreed orally but even that they can be implied, e.g. from the

conduct of the LLP members. Accordingly if the members have conducted the affairs of the LLP in a particular way (e.g. in relation to sharing of profits or participation in management), this can be interpreted as their implied agreement as to their rights and duties in accordance with the way in which the affairs of the LLP have been conducted.

### **B. Should there be a written LLP agreement?**

3. It is suggested that there should always be a written and signed agreement for the following reasons in particular:
  - (1) It avoids or at least minimises disputes as to what was or was not an agreed term of the LLP. In the absence of a written agreement, even casual conversations can be alleged to give rise to agreement on particular aspects and disputes as to what was or was not said on a particular occasion can ultimately only be determined after oral evidence before an appropriate court or arbitrator. Indeed, even the conduct of the parties on a particular occasion or occasions can be argued to give rise to an implied agreement consistent with that conduct, even if that may not have been the intention at the time of at least some of the members.
  - (2) In the absence of agreement on particular aspects, the default provisions in Regulation 7 of the Regulations will be applicable as regards rights and duties of the members and of the LLP, even if that

was not the intention of some or even all of the members and their inclusion is not desirable for the particular LLP in question.

- (3) A written agreement can clarify the precise intended nature and extent of the LLP and its business and what the members can or cannot do outside the scope of the LLP and avoid disputes that may often arise in that regard. For example, if an LLP is intended to be the vehicle only for a specific property development or investment, without any obligation on the part of the members to afford to the LLP or its members the opportunity to be involved in further potential developments or investments of which any member may become aware, then this can be made very clear in the written agreement. Similarly, whether or not the members are to be permitted to carry on similar but separate businesses outside the LLP without being in any way accountable to the LLP can be made clear in the LLP agreement.
- (4) In the absence of unanimous agreement between members (which, unlike the position involving other agreements between members, must be recorded in writing), members will have the right to apply to the Court for relief under the unfair prejudice provisions of ss.459 - 461 of the Companies Act 1985: see s.459(1A) of the Companies Act 1985; the corresponding provisions in the Companies Act 2006 in respect of companies (in force as from 1st October 2007) are contained in ss.994 and 996. In other words, if the members wish to

exclude the right of a member to petition the Court for relief on the ground of unfair prejudice, any agreement between the members to that effect must not only be unanimous but must also be recorded in writing. Although the agreement to that effect need only be "recorded", and need not itself be, in writing (therefore a document, e.g. a minute, not signed by all the members would be sufficient), the best way of recording such an agreement so as to avoid any potential issue as to whether the exclusion was or was not unanimously agreed (a very important decision to make) would be to have such a provision in the LLP Agreement itself.

- (5) Such an agreement could clarify whether or not the members are to owe duties of good faith to each other (in addition to such duties to the LLP itself), an issue not yet decided by the courts in a case where there is no express agreement in that regard. A significant factor in arriving at this decision is whether members want the right to sue other members directly or whether this should be done only through the LLP.
- (6) An LLP agreement can clarify the entitlement of an outgoing member in differing circumstances (whether on retirement, expulsion, death or other specified circumstances). Although s.7 of the Act provides that members of an LLP who cease to be members may not interfere in the management or administration of any business or affairs of the LLP but that this does not affect any right to receive

an amount from the LLP in that event, that does not state what (if anything) that right might be. Like much in the Act and the Regulations, it begs the question. Similarly, although s.4(3) enables a member to cease to be a member by giving reasonable notice to the other members, it does not provide what financial entitlement that member may have upon ceasing to be a member. In particular, it does not give him a right to be paid out his share of the capital or assets of the LLP. On one view of the matter, if a member leaves an LLP without any agreement as to the financial consequences, his capital will accrue to the other members and the surplus value of the assets will remain with the LLP until appropriated to members (thereby leaving him with nothing): see the discussion in *Hoiles v Hood* [2007] EWHC 1616 (Ch) at paras. [57] - [61] and [67] where, however, Morgan J. did not have to decide the matter. The uncertainty in this regard makes it desirable for the LLP agreement to provide expressly what (if anything) is to be the financial entitlement of any outgoing member of the LLP, particularly when the right to petition the court on the ground of unfair prejudice only applies to a member of an LLP so that he will no longer have locus standi to petition after ceasing to be a member of an LLP upon giving notice under s.4(3) of the Act. Furthermore, s.4(3) requires the giving of “reasonable notice” and, unless defined in the LLP agreement, there is substantial room for argument as to what constitutes “reasonable” notice in any particular context.

4. Whereas in the case of an ordinary partnership (where there are no formal requirements for its establishment) it is often understandable that no written agreement is ever entered into, since such partnerships are often commenced informally without the benefit of professional advice, it is less excusable for LLPs to be subject to no written agreement when there are in any event formal requirements that have to be met in order that the LLP can be incorporated pursuant to s.2 of the Act. The temptation for members to get the LLP started and sort out the agreement afterwards should be avoided since it may never be sorted out before disputes arise.

### C. Terms to be included in an LLP agreement

5. It is not the purpose of this Bulletin to set out all of the terms which might be included in a written LLP agreement. They will in any event depend upon the particular LLP and its business/profession; the terms appropriate for a single venture LLP will differ substantially from those appropriate for an LLP of solicitors. To a large extent the terms may be similar to provisions in ordinary partnership agreements, amended to take account of the different legal nature of an LLP. However, it is suggested that consideration should be given to the possible inclusion of provisions of the following kind (in no particular order):
  - (1) **Entire Agreement:** A clause providing for the written agreement to contain all of the terms of the LLP, superseding all previous discussions

and agreements, and permitting variations only if in writing and signed by all of the members. The effect of an “entire agreement” clause is to give rise to a binding agreement between the parties that the full contractual terms are to be found in the document and not elsewhere, and accordingly any promises or assurances made in the course of negotiations (which in the absence of such a clause might have effect as a collateral warranty) would have no contractual force; so that the effect of such a clause is to denude of legal effect what would otherwise constitute a collateral warranty: see *Inntrepreneur Pub Co v East Crown Limited* [2000] 2 Lloyd’s Rep 611 at paras. [7] and [8]. Such a clause would avoid or at least minimise the risk of members asserting that other matters were agreed (perhaps in casual conversations) which were not contained in signed documents or variations (see para. 3(1) above). If such a provision is to be included, care needs to be taken, in order to avoid negating the effect of such a clause vis-à-vis new members, that all new members on admission sign a document accepting and agreeing to all of the written terms; and provision for such a document should be included in the LLP agreement itself, which can also usefully authorise the Designated Members to sign such a document on behalf of all of the members of the LLP as well as on behalf of the LLP itself. Query whether unanimity should be required for the admission of all new members (as per the default provision in Regulation 7(5) of the Regulations) or whether majority agreement should suffice; this may depend on the

size and nature of the LLP.

- (2) **Default provisions:** A provision excluding the default provisions in Regulation 7 of the Regulations (see para. 3(2) above). Instead, if any of those provisions are to be terms of the agreement, then they should be set out expressly so as to avoid any doubt about the extent to which they are terms of the agreement.
- (3) **Scope of the LLP:** In order to avoid disputes as to what members may or may not do outside the LLP, the precise nature and extent of the LLP should be identified (see para. 3(3) above). In particular, if it is to be only a single venture LLP, then this should be made plain, as well as the fact (if it be the case) that nothing is to oblige any member to introduce any other venture into the LLP, whether or not information in respect thereof was acquired while or in his capacity as a member of the LLP. Also to be made plain should be the extent (if any) to which members are to be entitled to carry on other activities (including, if intended, competing activities) while members of the LLP. The ownership of assets (whether by the LLP or by individual members) should also be clarified.
- (4) **Exit Procedures:** In order to avoid the possibility of a member being unwillingly locked into an LLP, these should provide for all circumstances where a member might want to give up his membership of the LLP (including, if a member is to be entitled to retire voluntarily, what notice would have to be given by him) and

what is to be the financial entitlement (if any) of the outgoing member: see para. 3(6) above. For example, if he is to be paid out his share of the LLP assets, it should be specified whether this should be on a pro rata basis or on the basis of a deduction for a minority interest. Also to be covered should be the financial entitlement in the event of death, bankruptcy etc (the circumstances referred to in s.7 of the Act which, it is to be noted, do not include the making of an IVA against a member). If there is to be a right of expulsion, this right and the grounds upon which it may be exercised (whether fault based or non-fault based) should be expressly set out: in the absence of such an express provision, there is no right of expulsion (see Regulation 8 of the Regulations). The possible inclusion of restrictive covenants/garden leave provision should also be considered, as to which the same considerations arise as in the case of ordinary partnership agreements.

- (5) **Unfair Prejudice:** A decision needs to be made whether or not to exclude the right to petition the Court for appropriate relief on the ground of unfair prejudice (see para. 3(4) above). It is suggested that if the agreement contains appropriate provisions entitling a member to leave the LLP and to be fully compensated in respect thereof, there may be no need to retain a right to petition the Court. We are all only too aware of how proceedings relating to limited companies under the old section 459 of the Companies Act 1985 can prove so acrimonious and costly (perhaps involving interim

injunction proceedings) and can hinder or even destroy the business of the company pending the conclusion of such proceedings. It is largely because of the hostile litigation culture engendered by s.459 that the opponents of its inclusion in respect of LLPs successfully persuaded the Government to allow an opt out, something it was not originally prepared to do.

- (6) **Dispute Resolution:** An arbitration provision sufficiently wide to cover all potential disputes relating to the LLP may be considered a speedier and more satisfactory (e.g. private), though not necessarily cheaper, way of resolving disputes than having the matter determined in ordinary court proceedings. It is to be noted that in *Re A Company (No. 5758 of 2003)* [2003] EWHC 2790 (Ch.), a case involving an LLP which was subject to a formal agreement in writing excluding the right to petition for relief on the ground of unfair prejudice, the Court held that the statutory right to apply for a winding up of the LLP on the just and equitable ground could not be excluded by an agreement, but nevertheless it was appropriate in the Court's discretion to grant a stay to enable the dispute to be resolved pursuant to a widely drawn arbitration provision in the LLP agreement. Consideration could also be given to the inclusion of a mediation clause (to have effect at the outset of any dispute so as to try and obviate the need to implement the arbitration provision). Such a clause in appropriate terms is enforceable: see Colman J. in *Cable & Wireless Plc v IBM United Kingdom Limited* [2002] 2 ALL ER

(Comm) 1041 at paras. [23] - [24], [28] and [32]. Furthermore, determination by an expert (e.g. an accountant) may be more appropriate than arbitration in the case of matters that are simply a question of valuation or accounting, if the parties are prepared to accept in the interests of finality the very limited grounds upon which an expert determination can be challenged.

- (7) **Duties of Members:** An appropriate provision could clarify the thorny issue of whether members are to owe (in particular, fiduciary) duties only to the LLP or to each other individually as well (and, if so, to what extent - for example, the full range of fiduciary duties need not necessarily be owed to other members individually): see para. 3(5) above. It is also desirable to spell out the extent of any duty of care owed by members to the LLP and/or to each other: such a duty is not one of the default provisions in Regulation 7. Consideration might also be given to limiting liability of a member to the LLP to the extent of any insurance cover.
- (8) **Designated Members:** The agreement should specify who are to be the Designated Members for the purposes of the Act and should provide for the replacement of Designated Members. For example, if not all members are to be Designated Members, then provision should be made for the appointment of new Designated Members in the event of an existing Designated Member or Members leaving the LLP, in order to avoid a situation whereby the number of Designated Members falls below 2 so that all of the members then

become Designated Members under s.8(2) of the Act. It may also be appropriate to provide (as in the case of a large ordinary partnership) for a Chief Executive or Senior Member with appropriate duties and powers and for his appointment and removal and/or for a Management Committee and its constitution and operation. In addition, if some of the members are not to have proper shares (e.g. "salaried" or "fixed share" members), then their position needs to be provided for in the agreement; there is no requirement in the Act or the Regulations that every member of an LLP must be entitled to a share of the profits of the LLP.

- (9) **Management:** If only some of the members are to be involved in management, then this should be specified to exclude the default provision in Regulation 7(3) of the Regulations that each member may take part in management. Similarly, the Agreement should stipulate if any of the members are to be employed by the LLP (see s.4(4) of the Act) and/or should be entitled to remuneration (contrary to the default provision in Regulation 7(4) of the Regulations). The Agreement can also provide what decisions can be by a majority (and specify the required majority) and what decisions have to be unanimous.
- (10) **Transfer from ordinary partnership:** In the event that the LLP is taking over from an existing ordinary partnership, there need to be appropriate provisions e.g. as to the transfer and ownership of

assets (clarifying whether assets are to be owned by the LLP or by individual members) and the replacement of rights of the former ordinary partners by rights qua members of the LLP.

- (11) **Meetings:** It may be appropriate to provide for separate meetings of Designated Members and ordinary members or of managing members and non-managing members, reflecting to some extent the distinction between meetings of shareholders and directors of limited companies.
- (12) **Accounting obligations:** Since they differ from those of an ordinary partnership, it is desirable to include appropriate provision for compliance with the statutory obligations and Code of Conduct obligations for solicitor LLPs.

## (ii) LLPs of solicitors

- 6. Recognition of Solicitor LLPs (who by 30th August 2007 represented 17.4% of all solicitor firms) is now dealt with by the Solicitors' Recognised Bodies Regulations 2007 made under s.9(2) of the Administration of Justice Act 1985 and which came into force on 1st July 2007. These Regulations contain, in particular, the following relevant provisions:
  - (1) The Solicitors Regulation Authority ("the SRA") may grant an application for initial recognition or renewal of recognition if satisfied that the

applicant complies with various stated conditions: Regulation 2.1.

- (2) The SRA may refuse an application if satisfied that a member of the LLP is not a suitable person by reason of his character, conduct or associations, or if for any other reason the SRA thinks it proper in the public interest not to recognise the LLP: Regulation 2.2. Therefore the unsuitability of just one member can result in a refusal of recognition for the whole LLP.
  - (3) Recognition lasts for 3 years: Regulation 4.1.
  - (4) Recognition may be revoked in the event of error or fraud or if the LLP has ceased to be eligible for recognition: Regulation 7.
  - (5) There is a power of waiver on the part of the SRA: Regulation 10. This is unlikely to be lightly granted save perhaps on a very temporary basis.
- 7. Rule 14 of the 2007 Solicitors' Code of Conduct ("the Code") sets out the requirements applicable to LLPs of solicitors. It includes the following relevant provisions:
    - (1) Members must take all reasonable steps to ensure that the LLP complies with Rule 14 and they (and employees) must not cause, instigate or connive at any breach of the Code: Rule 14.01(3) and (4). Therefore professional obligations cannot be circumvented simply by acting through an LLP.

- (2) The business of the LLP is restricted to professional services of the sort provided by individuals practising as solicitors and/or lawyers of other jurisdictions and, in the case of conveyancing or probate services reserved to qualified persons by the Solicitors Act 1974, to LLPs where at least one member is a solicitor with a practising certificate or a registered European lawyer ("REL") or a recognised body corporate: Rule 14.02. Therefore the legitimate scope of a solicitors' practice cannot be extended simply by acting through an LLP.
- (3) All the members of the LLP must be solicitors with practising certificates, RELs, registered foreign lawyers, non-registered European lawyers, recognised bodies and/or European corporate practices. The LLP must have at least two members (subject to a 6 months amnesty in the event of death) and at least one member who is a solicitor with a practising certificate, an REL, a company with a director who is a solicitor with a practising certificate or an REL or an LLP with a member who is a solicitor with a practising certificate or an REL (subject to a 14 days amnesty in the event of death): Rule 14.05(1) - (3).
- (4) A member is not entitled to create a charge or other third party interest (query whether this includes an option) over his interest in the LLP: Rule 14.05(5). This is to prevent non-lawyers exercising control over the LLP until, at least, the new era of the Legal Services Act 2007 (passed on 31st October 2007) comes into being, although even then it is anticipated that initially non-lawyer members will be limited to 25%. However a charge may be granted or assignment made to a member's bank on a member's right to receive back his or her capital investment (see Guidance Note 14 to Rule 14).
- (5) The LLP must have at least one practising address in England and Wales and its registered office at such address: Rule 14.06. Therefore an LLP which has no office in England and Wales does not have to and, indeed, cannot, be a recognised body.
- (6) The LLP has various obligations to provide information and notifications to the SRA: Rule 14.07.
8. An LLP is, for the purposes of practice, in the same position as a solicitor of an ordinary partnership of solicitors and subject to similar legal and professional requirements of conduct and otherwise, including compliance with the Solicitors' Indemnity Insurance Rules (with a minimum level of cover of £3m.), the Solicitors' Accounts Rules and the statutory requirements to submit an accountant's report and to contribute to the Compensation Fund.
9. A service company wholly owned by an LLP which provides services only to the LLP and not to clients does not need to be a recognised body, although its books must be made available on request to the SRA. Therefore separate recognition for such a service company is not required.
10. It is common for wills to provide that "partners" in a particular firm of solicitors or any successor firm should be executors and trustees of a

testator's will. These days it is not uncommon for solicitors' practices to be transferred to LLPs (which, of course, have no partners but only members) and the question therefore arises as to the effect of the clause in the will appointing the testator's executors and trustees after transfer to the LLP, assuming that no amendment to the will has taken place to take account of the change of the solicitors from an ordinary partnership to an LLP. This issue arose in the case of *Re Rogers (deceased)* [2006] 2 ALL ER 792, a decision of Lightman J. and a test case, the costs of which were partly borne by the Law Society. As the Judge pointed out in para. [8] of his judgment, "The problem raised is of general application to firms of solicitors which have reconstituted themselves as limited liability partnerships .

11. Lightman J. pointed out that on a strict construction of the relevant clause, the members of the LLP did not qualify for appointment as executors. Nevertheless, he added in para. [13] that for testators adopting such a clause, the legal distinction between a solicitors' partnership and a solicitors' (confusingly named) limited liability partnership and between a profit sharing partner in a solicitors' partnership and a profit sharing member of a limited liability partnership was likely totally to escape them, unless given a lesson in the law which they might well not follow. He added that even if they did grasp the distinction, they were likely to regard it as a distinction without any relevant difference for their purposes. In the circumstances he felt able to take a practical and commonsense view in eliciting and giving effect to the intention manifested by the testatrix in that case and expressed himself satisfied (para [14]) that the terms of the relevant clause in the will

were apt to embrace the profit sharing members of the LLP (the equivalent to partners in the previous partnership); but he added that just as such a clause included only profit sharing partners in the case of an ordinary partnership, it included only profit sharing members when transposed to an LLP. He concluded at para [15] that to avoid any doubts or questions arising in the future, testators would be well advised to state expressly in their wills or codicils what their wishes were in the event of conversion of any appointed firm of solicitors or successor firms into LLPs; and if they did wish in the event of such conversion to appoint as executors members of the LLP, to state expressly whether they wished to appoint employees (as well as profit sharing) members of the LLP. Probate lawyers be warned.

### **(iii) Miscellaneous**

12. As regards legal proceedings involving LLPs, just a reminder that provisions in the CPR and/or in the Companies Acts in respect of companies regarding service of documents, security for costs and derivative actions (note the new Rule 19.9 as from 1st October 2007) apply also to LLPs, although the Government does not propose to apply the new derivative action provisions in Part 11 of the Companies Act 2006 to LLPs.
13. A practical word of warning. It is understandable to want to make contracts on behalf of an LLP in anticipation of the commencement of business before incorporation formalities have been completed and then to assume

after incorporation that the contracts will take effect on behalf of the LLP. However, the law regarding company pre-incorporation contracts applies equally to LLPs. Although s.5(2) of the Act provides that an agreement made before the incorporation of an LLP between the persons who subscribed their names to the incorporation document may impose obligations on the LLP (to take effect at any time after its incorporation), that does not affect pre-incorporation contracts made between the (then not yet formed) LLP and third parties. In such cases, as in the case of companies, the contract takes effect (subject to any agreement to the contrary) as one with the person purporting to act for or as agent for the LLP who is personally liable on the contract accordingly (s.36C of the Companies Act 1985). That person is also usually able to sue on the contract as well as simply being liable thereon: see *Braymist v Wise Finance Co. Ltd* [2002] Ch 273. However, post-incorporation the LLP cannot simply ratify the agreement since a nullity cannot be ratified.

14. Therefore in order to regularise the position post-incorporation, there should be an express novation between the LLP, the individual and the third party whereby it is agreed by all three that the LLP shall replace the individual and the contracting party so that the individual will no longer be a party to the contract or entitled to enforce the same or be liable thereon but it will be the LLP which is instead so entitled and liable. For the LLP merely to act post-incorporation on the basis of the contract is not sufficient to constitute a novation implied or otherwise; something more specific than that is required.

## (iv) Update

15. On 1st October 2007 there came into force the Limited Liability Partnerships (Amendment) Regulations 2007 which merely applied to LLPs certain of the new investigation provisions of the Companies (Audit, Investigations & Community Enterprise) Act 2004.
16. The Companies Act 2006 has now come partly into force, but with many of its provisions not now coming into force until October 2009. In November 2007, the Government issued a consultation document on its proposals for the application of the 2006 Act to LLPs. It said that in applying the 2006 Act, it wanted to ensure that LLPs remain an attractive corporate vehicle for businesses; that they maintain an identity distinct from companies; and that the Regulations are up to date, coherent (that would make a nice change!) and strike the right balance between the interests of those who want to become LLPs and those who will do business with them.
17. In particular, the consultation, which closed on 6th February 2008 (sorry too late to have your say now) related to:
  - a. The possibility of simplifying the Regulations, to make them easier to access and more coherent; that would certainly be welcome bearing in mind the user unfriendly way in which the Regulations at present apply to LLPs but then modify company legislation, whereas it is now

proposed that the provisions, as modified to take account of the particular characteristics of LLPs, should be set out in full.

- b. The application of the provisions of the 2006 Act where there are corresponding provisions in the Companies Act 1985 applied to LLPs and where the Government proposes to apply these again (with modifications for some) to LLPs.
- c. New provisions of the 2006 Act which the Government proposes to apply to LLPs following the existing approach of applying provisions in the 1985 Act which concern LLPs' relations with third parties.
- d. Provisions of the 2006 Act which are new, but which the Government does not propose to apply to LLPs as they relate to the internal management of companies.

18. The Government proposes to apply the provisions on accounts and auditors, cross-border mergers directive and (subject to consultation responses) e-communications from October 2008, for which draft regulations will be published as soon as possible after the close of the consultation. It is proposed to publish in mid-2008 further draft regulations (for consultation) for the main implementation of the 2006 Act for LLPs in October 2009.

19. Further matters appearing from the consultation document include the following:

- a. As at 31st May 2007, there were approximately 25,219 active LLPs

on the Register. Between March 2006 and May 2007, there were 10,321 newly registered LLPs.

- b. Subject to the results of the consultation, the Government proposes (inter alia) as follows:
  - i. To apply to LLPs the provisions of the 2006 Act as far as possible to replace the provisions currently applied to LLPs from the Companies Act 1985 (thereby resulting in little change) and, as regards the accounts of LLPs, there will be separate regulations relating respectively to small LLPs and medium-sized and large LLPs, reflecting the position of limited companies.
  - ii. To apply to members of LLPs the provisions of the 2006 Act relating to addresses of directors available for public inspection but not otherwise to change the incorporation process.
  - iii. To reduce the deadline for filing accounts from 10 to 9 months and apply other changes relating to LLP accounts as from 6th April 2008.
  - iv. Not to subject members of LLPs to the same duties as are now imposed upon directors of companies under the 2006 Act on the basis that the position of members is not truly analogous to that of directors.

20. The Corporate Manslaughter and Corporate Homicide Act 2007 was passed on 26 July 2007 after much political football activity between the House of Commons and the House of Lords and is due to come into force on 6 April 2008. The offence of corporate manslaughter applies to LLPs (and indeed to ordinary partnerships in addition) as well as to limited companies. Therefore potential criminal liability cannot be avoided by being an LLP instead of a limited company.

21. In the case of *Re The Inertia Partnership LLP* [2007] BCC 656, an LLP was wound up by the Court on the Petition of the Financial Services Authority on the grounds that it had been carrying on unauthorised investment business, that it was insolvent and that it was just and equitable to make a winding-up order. The Judge applied the same principles as in the case of a public interest Petition by the Secretary of State under section 124A of the Insolvency Act 1986.

### **Edward Cohen**

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*Edward Cohen* practises in commercial and chancery litigation and advisory work, including commercial contracts of all kinds, partnerships and LLPs, company law issues including shareholder disputes, media, entertainment and sport including recording, publishing, agency and management contracts, professional negligence, civil fraud, including injunction proceedings, banking, guarantees and other securities, arbitration law and practice, commercial property, corporate and personal insolvency, breach of employment duties and IT disputes. His wide-ranging practice enables him to advise and act in individual cases involving simultaneously different areas of law. He is known for his meticulous preparation, paperwork and advocacy and he has appeared in reported decisions ranging from the House of Lords through to the Court of Appeal and Courts of first instance involving diverse legal issues. He appeared as junior counsel at all stages up to and including the House of Lords in the leading contract case of *Walford v Miles* [1992] 2 AC 128, a decision establishing the unenforceability under English law of agreements to negotiate/agreements to agree. More recently he led the successful resistance to an appeal before the Privy Council in *Knox v Deane* [2005] UKPC 25, a case involving a pre-emption clause in a company's articles of association. Edward is well known for his dedicated support of Newcastle United FC.

Edward has been recommended as a leading Commercial Chancery practitioner in Chambers & Partners for several years.

**Don McCue** conducts contract litigation of all kinds, particularly building and engineering, motor industry and sale of goods cases. He also specialises in partnership disputes, professional negligence actions against lawyers, accountants, architects and surveyors, and disputes between former cohabitants about beneficial interests in property. Other recent cases involve undue influence, unjust enrichment and estoppel. He is client friendly and known for his ability to assimilate a complex brief and respond rapidly with tactics and strategy.



In 2006-2007 he advised and represented Opel AG and Renault SA, who manufacture the Vivaro van, in relation to a demand for £500,000 by a disgruntled parts supplier which was not entitled to the money but was threatening to cease supply of the part unless it was paid. Since that would have brought the production line to a halt within hours, causing loss of £1 million per day, Opel/Renault paid up; but they brought an action for recovery of the money based on economic duress, which was contested. Opel/Renault succeeded at trial in December 2007.

Don has been involved recently in a number of Supreme Court Costs Office cases involving challenges to the validity of Conditional Fee Agreements, the most recent of which went by “leapfrog” to the Court of Appeal.

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