



Agricultural Law Association

Consultation Response

Limited Partnerships: Reform of Limited Partnership Law

Introduction

The Agricultural Law Association is the UK's largest professional organisation devoted to the law and business of the countryside. Membership of ALA is open to any professional of whatever discipline advising in rural business. The Association focuses on the law in a non-partisan, apolitical way in order to promote knowledge, understanding and development amongst those who advise rural businesses. The Association has many members who practice in Scotland and has a Scottish Committee devoted to legal and business issues as they impact on agricultural and rural businesses in Scotland.

Background

We are fully supportive of the UK Government's desire to stamp out economic crime and illegal activity and are aware of media attention in relation to certain types of limited partnerships which have recently been formed. Transparency is important and solicitors and other professionals are regulated by the Law Society of Scotland or other organisations and subject to Anti-Money Laundering regulations and other regulatory mechanisms, including the Persons of Significant Control legislation. We are keen that while any abuse of limited partnerships is tackled, that the UK should remain competitive and attractive for legitimate businesses and that full use is being made of existing enforcement powers.

Our key concern is the consequential impact of any reform as a result of this review and that is the focus of this submission. In particular we are concerned that unintended consequences could flow from changes to the limited partnership framework and/or legislation affecting a certain type of agricultural tenancy in Scotland.

Box A on Page 16 of the consultation document summarises the use of Scottish limited partnerships in agriculture. We feel that it is important to emphasise that the arrangements summarised in Box A were in very widespread use in Scotland from the 1970s until 2003. Many of the limited partnership arrangements that are still in place will have been in place for 30 or more years. It is also important to realise that the use of Scottish limited partnerships in this way was entirely standard practise (the great majority of leases over a very long period of time were granted on this basis) and that the courts had held (*MacFarlane -v- Falfield Investments Limited* 1998 S.L.T.145) that such arrangements were perfectly valid. We do not believe that there has been any suggestion that the limited partnerships used in these agricultural situations have been involved in any illegal purpose.

By way of emphasis, a limited partnership was established comprising the landowner (the limited partner) and the farmer (the general partner). The farm was let to the limited partnership. The

limited partnership is therefore the tenant. All farming activity is however carried out by the general partner, very often in his own name. It is likely that any VAT registration, livestock registration or similar will be in the name of the general partner rather than the limited partnership. In the great majority of cases the limited partnership will not “trade” and will have no accounts. In most cases the limited partnership will not have a bank account. The general partner, although he is not in fact the tenant, will act as if he is the tenant and in most cases will have no knowledge or understanding about the limited partnership legislation or issues such as that raised by the Persons of Significant Control legislation. The general partner will, in perhaps the majority of cases, have instructed a solicitor to deal with the taking of the lease but will have had no contact with his solicitor regarding the limited partnership/the tenancy since the lease commenced.

It is not known to what extent general partners in these circumstances have submitted returns required by the Persons of Significant Control regulations nor the extent to which the Registrar has been able to communicate with all such general partners. We are not aware of any enforcement action having been taken against such general partners as a result of their failure to comply with the regulations applying to limited partnerships.

It is also understood that there are something in the region of 2,382 limited partnerships used in connection with agricultural businesses in Scotland other than in the leasing scenario summarised in Box A (this figure was provided by a Scottish Government representative at the roundtable discussion on the Consultation held at Burness Paull’s office in Edinburgh on 16 July 2018). It will be important to know what the structure of these limited partnerships are and the extent to which they involve the occupation of farm land by the limited partnership in case they too are potentially adversely affected by any changes.

Against this background we are concerned to ensure that any reform of limited partnership law avoids any unintended consequences in the field of Scottish agriculture and that any changes do not constitute an administrative burden.

Question 1: Can you provide any additional evidence to help explain the trends in registrations of limited partnerships across the UK in recent years?

The Agricultural Holdings (Scotland) Act 2003 (Section 70) effectively removed the agricultural law benefit of letting land to a limited partnership with effect from 28th November 2003. It is thought unlikely that any Scottish limited partnerships have been registered since 28th November 2003 for the agricultural letting purpose referred to above. We would therefore not imagine that agricultural letting has contributed towards the trends in registrations of limited partnerships over recent years and we have no suggestions that might explain these trends.

Question 2: Do you agree that presenters should be required to demonstrate they are registered with an AML supervisory body? Please explain your answer, and provide evidence on its potential impacts.

We believe that it is important that the professionals presenting applications for registration of limited partnerships are registered with an AML supervisory body. We agree therefore that it is appropriate that presenters should be required to demonstrate such registration and we do not think that this will have a significant impact particularly on those acting legitimately.

Whilst it is not anticipated that there will be an agricultural tenancy requirement for the creation of future Scottish limited partnerships we would consider than an amendment to the Form LP5 so as to

provide for the presenter to include details of their AML regulation (membership of the Law Society of Scotland or similar) perhaps along with a statement to the effect that the presenting agent has carried out the relevant Anti-Money Laundering checks would be beneficial. In the majority of cases involved in Scottish agricultural leasing there will be no cash transactions involving the limited partnership.

Question 3: How should this measure be applied to registrations from overseas?

We consider that applications from overseas will require to meet the same criteria and if the relevant UK AML requirements are not met in the jurisdiction concerned the registration would have to be presented by a party within the EU who did qualify.

Question 4: Would it be better to require a limited partnership's principal place of business (PPoB) to remain in the UK, or alternatively to allow the PPoB to be based anywhere but require a UK based service address? Please evidence your answer, including if possible, an assessment of the likely costs of compliance.

We would imagine that in every case where a Scottish limited partnership was used in connection with an agricultural lease that the PPoB will be the farm that is the subject of the lease. We do not imagine any circumstances where the PPoB in such cases would leave the UK (or indeed leave Scotland).

So far as the Scottish limited partnership used in the agricultural leasing context is concerned therefore we would suggest that the PPoB should remain in Scotland and that the PPoB should be the address for service of any document on the limited partnership.

Question 5: If a new requirement of a UK-based service address were introduced, but existing operation of the PPoB retained, what if any, transparency requirements should be put in place relevant to the PPoB?

There is already a requirement for transparency with regard to Scottish limited partnerships (as a result of the Scottish Partnerships (Register of People with Significant Control) Regulations 2017). We see no reason why this requirement should not be extended to every limited partnership within the UK.

Question 6: Should all limited partnerships be required to file an annual confirmation statement?

As stated in our response to question 5 Scottish limited partnerships are already subject to such a requirement. We have a concern however as to how fully that requirement is understood by general partners, to what extent the requirement is being met and what, if any, action is being taken in circumstances where the annual return is not made.

In the case of the Scottish limited partnership used in connection with an agricultural tenancy the general partner may have limited information with regard to the limited partnership in his possession and be reluctant to take professional advice on receipt of a reminder from Companies House because of costs. We think that it is important to ascertain the extent to which there has been a formal response to the requests for annual reporting from the existing Scottish limited partnerships and how any failure to respond is being handled.

We are keen to avoid any additional administrative burden being placed on the general partners who are involved in farming businesses where profit levels are low and, in many cases, entirely dependent on EU funding to return a profit.

Question 7: If you are in favour of an annual confirmation statement, what information should be included and who should file it? Please consider whether that should be for the whole partnership or the difference in requirements for general partners against limited partners – including corporate partners.

The confirmation statement required by Companies House (Form SLP CS01) simply requires the limited partnership number and the limited partnership name in full. This should be completed and submitted by the general partner. The limited partner is not permitted to take part in the management of the partnership business and does not have power to bind the firm (Limited Partnerships Act 1907 Section 6(1)).

Question 8: Is there is a case for limited partnerships to have to prepare accounts and reports in line with the requirements for private companies, as is already the case for qualifying partnerships?

We do not believe that this is necessary. In the agricultural leasing arrangement where the general partner will almost certainly trade in his own name (or in the name of a general partnership) there will be no accounts for the limited partnership and it would be administratively burdensome and expensive to prepare accounts in circumstances where accounts are not otherwise necessary.

The general partner has unlimited liability and it would not be appropriate for what are in essence private accounts to be lodged with Companies House and thereby become public. We do not think it is necessary for more detailed reports or accounts to be lodged in the case of limited partnerships.

Question 9: Do you agree with the proposal to give the Registrar a power to strike off partnerships from the Register of Companies?

The striking off of a partnership would result in the loss of limited liability and the conversion of the Scottish limited partnership into a general partnership. This would result in the limited partner losing his limited liability as a result of the act or default of the general partner. This could create a very significant liability in the hands of the limited partner.

We agree that it would be useful if limited partnerships that had been dissolved (by the submission of a form LP6) to be removed from the Register. This could presumably be done in respect of every limited partnership where a validly completed form LP6 had been submitted. Otherwise we feel that it is going to be necessary for there to be a series of warnings and investigations over an extended period prior to striking off occurring. It may be necessary for the limited partner also to be informed of the proposed striking off so that the limited partner can advise the general partner of what is required. The limited partnership agreement will, in most cases not anticipate any such change in legislation and leave the limited partner unable to take action to protect his position without falling foul of Section 6(1) of the Limited Partnerships Act 1907.

Consideration might be given as to whether the Scottish Tenant Farming Commissioner (<https://landcommission.gov.scot/tenant-farming/>) might have a role in both publicising the position and in contacting the general partners of Scottish agricultural Limited Partnerships to emphasise the risks of not responding and possibly also to endeavour to advise the limited partner of the position if

the general partner fails to respond. The Commissioner is however appointed by virtue of the Land Reform (Scotland) Act 2016 and has no specific statutory role in these circumstances.

There may be ECHR consequences of the removal of limited liability from the limited partners as a result of striking off. We would consider striking off and the loss of limited liability a disproportionate consequence in circumstances where there has been an administrative failing by the general partner.

It would be important to realise as well that in the agricultural leasing context, the conversion of the limited partnership to a general partnership could prejudice the ability of the former limited partner to recover possession of the farm that is let to the limited partnership with significant financial consequences for the former limited partner. The UK Supreme Court held that the removal of the limited partner's ability to recover vacant possession of a farm through the enactment of the Agricultural Holdings (Scotland) Act 2013 breached the human rights of the landlord/limited partner in *Salvesen -v- Riddell* 2013 S.C. (U.K.S.C.) 236.

We are unsure as to the justification for striking off. If the problem that is to be addressed is what has been identified by the press, the problem has already occurred and striking off is really only throwing out the baby with the bathwater and does not address the problem or prevent its recurrence. If there has been illegal activity it might be more appropriate for the relevant partners to be prosecuted rather than reacting by striking off the limited partnership. That is perhaps mirrored in the provisions of the Companies Acts relating to criminal activities involving limited companies and there does not appear to be any reason to treat limited partnerships differently.

That said it is clear that the Registrar should have the ability to remove a limited partnership from the Register when it has been dissolved.

Question 10: Are there any other factors or criteria that the Registrar could consider in order to conclude that the partnership is not carrying on a business or in operation?

We are not aware of any such factors or criteria.

Question 11: What operational and legislative procedures could be put in place to mitigate concerns of strike off done in error?

We think that it is important to ensure that the prospect of an erroneous strike off is very unlikely to occur and we do not think therefore that Companies House can be the sole judge of when that happens. Mere dormancy cannot be a justification for striking off – as mentioned above many of the limited partnerships established in connection with agricultural leasing in Scotland will have been dormant since establishment, often decades in the past.

The extent to which the position created by a strike off in an agricultural lease situation can be remedied (for example by the reinstatement of the limited partnership on the Register) is unclear. It may be, for example, that the striking off of the limited partnership may terminate the agricultural lease meaning that any new lease created would be different from that which existed (there would not be security of tenure) and it would no longer be possible to create a new lease in favour of a limited partnership (as a result of the Agricultural Holdings (Scotland) Act 2003). This could lead to a significant loss of value in the hands of the general partner.

One solution, to avoid the difficulty with regard to the striking off of partnerships involved in agricultural leases, would be to only apply the striking off provisions to limited partnerships registered after 28th November 2003.

The Registrar should be required to take formal action following on from the failure of the general partner to make a return before striking off can take place. The apparent failure to impose sanctions for failure to comply with the reporting requirements of the Scottish Partnerships (Register of People with Significant Control) Regulations 2017 sets an unfortunate precedent, acting as a disincentive to comply.

Consideration should also be given to involving the Tenant Farming Commissioner in the process (see answer to question 9).

The Agricultural Law Association would be very happy to work with the Department for Business, Energy & Industrial Strategy to ensure that any changes to the law regulating Limited Partnerships is proportionate and does not impose an unacceptable administrative burden on Scottish agriculture.

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