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RECONCEPTUALISING SCOTTISH LIMITED PARTNERSHIP LAW

Jonathan Hardman*

Author: Dr Jonathan Hardman, School of Law, University of Edinburgh

Jonathan.hardman@ed.ac.uk

Orcid identifier: [orcid.org/ 0000-0002-1794-0424](https://orcid.org/0000-0002-1794-0424)

Abstract: Scottish limited partnerships (SLPs) have been the focus of much press and government attention due to their use for fraudulent activity. Recent developments appear to have slowed the speed of incorporation of new SLPs. However, this article argues that current reforms may not help tackle existing fraudulent SLPs. This does not matter as existing arguments from partnership law can be applied to combat fraudulent SLPs. By viewing the limited partnership as a general partnership with some additional features, we can identify that fraudulent SLPs have ceased to exist, and SLPs which have moved entirely offshore may have lost their separate legal personality. That this has been so far missed can be traced to current organisational theory. The current received wisdom is that separate legal personality is a gift from the state. However, the Scottish example demonstrates that this cannot be universally stated to be the case. This article therefore identifies the implications of reconceptualising the SLP for wider organisational theory and identifies options for state gift thinkers to reformulate their wider claims. Either the claim that separate legal personality derives from the state needs to be diluted to near tautology, or it needs to be limited in geographical extent. Both have theoretical and practical implications, and impact future law reforms.

Keywords: Partnership Law, Scottish Limited Partnerships, Organisational Law, Separate Legal Personality, Scots law

Bio: Dr Jonny Hardman is Lecturer in International Commercial Law at the Law School, University of Edinburgh. Prior to commencing as a full time academic, he was a solicitor in private practice with 10 years experience, and an Honorary Lecturer at the University of Glasgow. His research interests lie in private business organisations, corporate transactions and rights in security. He is particularly interested in economic approaches to the law and differences between English and Scots law. He has published extensively on both of these subjects.

RECONCEPTUALISING SCOTTISH LIMITED PARTNERSHIPS

JONATHAN HARDMAN*

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1. Introduction

Between 2016 and 2018 significant attention was drawn to Scottish Limited Partnerships (“SLPs”) due to their increased use for potentially fraudulent activity. As a result, the Department of Business, Energy & Industrial Strategy undertook two periods of frenetic activity. In the first period, it pushed to apply the existing company law regime of “persons of significant control”¹ registers to SLPs.² The second period of activity involved BEIS undertaking to resolve more deeply-rooted issues of limited partnership law.³ This second period is still ongoing. The first period of activity appears to have been successful: registrations of SLPs were reduced by 80%.⁴ This may well limit new fraudulent SLPs being registered, but what more can be done about existing fraudulent activity by entities registered as SLPs?

This article seeks to propose some solutions from a partnership law perspective and identify implications for wider organisational law theory. This article argues that SLPs are not, in fact, a

*Lecturer in International Commercial Law, University of Edinburgh. I am grateful to Professors Laura Macgregor and David Cabrelli for their helpful comments on the earlier drafts of this article. I am also grateful to Elspeth Berry for her insightful comments on aspects of the subject matter of this article, and to the editors and anonymous reviewer for their helpful comments. All errors remain the sole responsibility of the author.

¹ See Companies Act 2006 ss790A – 790ZG.

² Culminating in the Scottish Partnerships (Register of People with Significant Control) Regulations 2017 (SI 2017/694).

³ See Department for Business, Energy & Industrial Strategy “Limited Partnerships: Reform of Limited Partnership Law” 30 April

2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/703603/limited-partnerships-review-of-limited-partnership-law.pdf, Department for Business, Energy & Industrial Strategy “Limited Partnerships: Reform of Limited Partnership Law – The Government response to the consultation” December 2018.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762849/government-response-limited-partnerships.pdf.

⁴ See DBEIS “Limited Partnerships: Reform of Limited Partnership Law” (n 3 above), p17; “Reforms proposed to prevent limited partnerships being used for money laundering purposes” 2018 *Company Lawyer* 252 at 252.

discrete type of business vehicle. Instead, they are merely a general partnership with some additional features: registration of a limited partnership provides some additional features to a general partnership. However, this does not change the nature of the vehicle. If the limited partnership fails to be a valid general partnership then it, too, ceases to be. Viewing SLPs in this way is novel. It allows conceptual clarity about the nature of the SLP. From this clarity springs several practical implications. It also expands the arguments available to law reformers and enforcement to combat fraudulent use of SLPs. This is because it allows for extrapolation from partnership law: an SLP's existence can be challenged if it exists for fraudulent purposes, and an SLP's separate legal personality can be challenged if the SLP is offshored. Further, it means that there may be less inherently "wrong" with the SLP as a form of business entity than current analysis implies.

This article also advances wider company law scholarship. A recurring dominant theory is that a modern company's characteristics are a gift from the state. This is argued normally on the grounds that separate legal personality cannot be obtained without incorporation. However, Scots partnership law has long acknowledged separate legal personality as a function of, and rooted in, private ordering. As such, Scots law did not need the introduction of company incorporation by registration. Due to a "sliding doors" moment in Scottish legal history, Scots law nearly did not even need registration to obtain limited liability. Factoring the Scottish experience into the wider theory of separate legal personality provides new insights to the wider theory. This analysis casts doubt on the normative claims that are made as to the importance of the state in the modern company. Either this analysis needs to be limited to the elements of incorporation not already available elsewhere, or it needs to be limited in geographical extent. Either of these approaches undermine the normative purity of the theoretical argument. In addition, the latter opens the possibility that the theoretical basis for company law is different between England and Scotland. Such a conclusion would have severe implications for the ability to provide universal and coherent law reform both sides of the Tweed.

To advance these arguments, part 2 reviews SLPs: what they are, how they are different from English limited partnerships, why they are attractive and how they are open to abuse. Part 3 reviews abuse of the SLP and steps taken to resolve it. Part 4 provides an alternative and novel conceptualisation of SLPs through a textual analysis of their statutory basis. Part 5 applies this alternative conception to provide additional arguments for law enforcement to combat fraudulent SLPs. Part 6 applies the previous analysis to the theory of separate legal personality. It also identifies that the Scottish experience undermines various theories that the modern company is

merely a gift from the state. Part 7 highlights the importance of these findings to future analysis and reforms of SLPs, as well as for company law more broadly.

2. Overview of Scottish Limited Partnerships

Our first issue is to identify what an SLP is. This will help us understand, conceptually, where its features originate from. The limited partnership was Sir Frederick Pollock's way of introducing the European *partnership en commandite* into UK law.⁵ It enabled certain partners in a partnership to obtain limited liability in respect of their investment. In exchange, their exclusion from management of the business was required.⁶ Limited partnerships were introduced after limited liability became the norm for companies.⁷ As such they “*have long been the poor relation of trading with limited liability*”⁸ because they were completely overshadowed by the company which remained the dominant form of business entity with limited liability.

Is a limited partnership its own type of business entity, distinct from the general partnership? Alternatively, is it merely a general partnership with some additional features? From the partnership law perspective, Lindley and Banks refer to it as a “form of partnership”,⁹ which now has “four distinct species”.¹⁰ Elspeth Berry calls a limited partnership a business organisation, “combining key disadvantages of both companies and general partnerships.”¹¹ This seems to imply the former. Conversely, company law texts present limited partnerships as solely partnerships: Gower states “*the limited partnership is a true partnership, which is governed by the 1890 Partnership Act and the common law of partnership, except insofar as is necessary to give effect to its particular features*”.¹² Palmers

⁵ See F Pollock, *Essays on Jurisprudence and Ethics* (London: Macmillan, 1882) p100; L.C.B. Gower, *Pollock on Partnership* (London: Stevens & Sons Limited, 1952 15th edition) pxi.

⁶ Limited Partnerships Act 1907, s4(2) and 6(1). For the historical approach, see discussion in D. Milman and T. Flanagan *Modern Partnership Law* (London: Croon Helm, 1983) p152; Gower (n 5 above) p187. For the Scottish approach, see G Brough, *Partnership* (Edinburgh: W Green, 1994) p609. For the modern analysis, see R Panson Banks *Lindley and Banks on Partnership* (London: Sweet & Maxwell, 2017 20th edition) para 34-01.

⁷ Limited Liability Act 1855 and Joint Stock Companies Act 1856.

⁸ P Bailey “BEIS Suspects crooked cuckoos in the limited partnerships next and consults on reform” 2018 Company Law Newsletter 407. See also “*These commercial mongrels were introduced into modern English law by the Limited Partnerships Act 1907 being inspired by the French societa en commendite. However their impact was immediately neutralised by the introduction of private companies in the following year.*” Milman & Flanagan (n 6 above) p150-151. In any event, limited liability for business ventures was available by registration prior to the introduction of the 1907 act.

⁹ Banks (n 6 above) para 29-01.

¹⁰ Banks (n 6 above) para 29-02. For historical commentary from partnership law texts deeming a limited partnership to be a separate type of entity see also Milman & Flanagan (n 6 above) p151; Gower (n 5 above) p186; Brough (n 6 above) p608; G. Hesketh, *Underhill's Principles of the Law of Partnership* (London: Butterworths, 1966 8th edition) p151; J. A. Strahan and N. H. Oldham, *The Law of Partnership* (London: Sweet & Maxwell, 1927, 5th edition) p12.

¹¹ E Berry, “Limited partnership law and private equity: an instance of legislative capture?” (2019) 19 *Journal of Corporate Law Studies* 105 at 105.

¹² P L Davies and S Worthington *Gower Principles of Modern Company Law* (London: Sweet & Maxwell, 2016 10th edn) para 1-5.

states “*the limited partnership is a partnership.*”¹³ Taking each of these positions in the round, partnership law commentators tend to view the limited partnership as a distinct category of business vehicle, whereas company law commentators tend to view the entity as part of the general category of partnerships. Nevertheless, it is unclear whether the latter consider them to be a type of general partnership, or one of the many vehicles that fall under the wider rules of partnership (alongside a general partnership). This lack of clarity makes it challenging to analyse the SLP as a business organisation.

Both English limited partnerships and SLPs are governed by the Limited Partnerships Act 1907. The 1907 act states that partnership law applies to limited partnerships unless the 1907 act expressly states otherwise.¹⁴ Accordingly the provision of the Partnership Act 1890 which confirms that Scottish partnerships enjoy separate legal personality but English partnerships do not¹⁵ applies equally to limited partnerships.¹⁶ This is the primary difference between an English limited partnership and an SLP. Separate legal personality means, ultimately, that the law treats the business entity as if it was a natural person.¹⁷ There are, of course, limitations to this – a non-natural person cannot marry or adopt children.¹⁸ Additionally, certain characteristics that natural persons have are not inherent to companies, and can only be imputed onto a company due to the identity of shareholders or directors, if at all.¹⁹ Separate legal personality has been described as a “*convenient heuristic formula*” to describe an entity which is capable of contracting with third parties,

¹³ G Morse and others *Palmers Company Law* (London: Sweet & Maxwell, 2019 release 164) para 1.206.1. For further company law texts which refer to limited partnerships being a type of partnership, see A Gamble and G Kelly “The Politics of the Company” in J. Parkinson, A. Gamble & G. Kelly eds *The Political Economy of the Company* (Oxford: Hart, 2000) p31; D Kershaw, *Company Law in Context: Cases and Materials* (Oxford: OUP, 2012 2nd edition) p13; S. Worthington, *Sealy & Worthington’s Text, Cases, & Materials in Company Law* (Oxford: OUP 2016 11th edition) p24; C A Cooke, *Corporation, Trust & Company* (Manchester: Manchester University Press, 1950) p111; R Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (Cambridge: Cambridge University Press, 2010), p19-20.

¹⁴ Limited Partnerships Act 1907 s7. See discussion in Banks (n 6 above) para 30-01; Milman & Flanagan (n 6 above) p151; Brough (n 6 above) p621; Gower (n 5 above) p190.

¹⁵ Partnership Act 1890 s4(2).

¹⁶ *Re Barnard* [1932] 1 Ch 269 at 272 confirmed that English limited partnerships do not obtain separate legal personality. For the Scottish position, see discussion in L Macgregor “Partnerships and Legal Personality: Cautionary Tales from Scotland” [2020] 20 *Journal of Corporate Law Studies* 237. Initially, it was intended that the Partnership Act 1890 only applied to English law, but in its final passage through Parliament it was extended to Scots law – see A Rodger “The Codification of Commercial Law in Victorian Britain” (1992) 108 *Law Quarterly Review* 570 at 578.

¹⁷ See S M Bainbridge, *The New Corporate Governance in Theory and Practice* (Oxford: Oxford University Press, 2008), p25; L E Talbot, *Critical Company Law* (Abingdon: Routledge, 2008), pp23-29.

¹⁸ In the Scottish context, see Children (Scotland) Act 1995 s15(4), and Adoption and Children (Scotland) Act 2007 s28(1).

¹⁹ For example, race in the US – see *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1058 (9th Cir. 2004); R R W Brooks “Incorporating Race” (2006) 106 *Columbia Law Review* 2023 at 2076-2079.

being sued, and provides priority to the entity's creditors over the creditors of the owners.²⁰ These features are all present for an SLP.²¹

Limited partnerships generally are popular in private equity because they enable limited liability whilst also being tax transparent.²² This avoids the double tax charge which arises in companies as company profits are taxed, and then any distributions to shareholders are also taxed. In addition, filing requirements are lower for limited partnerships than corporate vehicles and annual accounts do not have to be filed.²³ Accordingly, limited partnerships themselves are popular investment vehicles.²⁴ The separate legal personality afforded to SLPs provides advantages for SLPs over English limited partnerships, which explains why they are used for legitimate and illegitimate purposes.

First it means that an SLP can hold title to an asset (be it land, shares or any other asset) in its own name. As such it avoids incurring the administrative burden of holding title through nominee companies, as is the practice for English limited partnerships.²⁵

Second, historically, separate legal personality for SLPs helped market participants create more complicated structures. Partnerships used to have a cap on the number of partners,²⁶ which was

²⁰ See R Kraakman et al *The Anatomy of Corporate Law: A comparative and functional approach* (Oxford: Oxford University Press, 2017 3rd edition) pp5-8.

²¹ See the discussion in Macgregor (n 16 above) 241- 244 which cites authority that a Scottish partnership can contract, hold assets, sue, and has some form of priority for its creditors. Given that laws pertaining to partnerships apply to SLPs unless otherwise stated (n 14 above), these features also apply to SLPs. Macgregor, however, notes that whilst the Scottish partnership can do these things, it frequently does not, often relying on individual partners holding property on trust. Macgregor uses this to argue that we should not use these criteria in a "tick box" manner but instead look behind the underlying label to establish a wider concept of whether the entity can act together as a group (at 244). However, for our purposes, it is sufficient to note that SLPs enjoy the features which are attributed to having separate legal personality.

²² Berry (n 11 above) 106 – 108; L Gullifer and J Payne *Corporate Finance Law: Principles and Policy* (Oxford: Hart, 2020 3rd edition) pp810-812. For the usual terms contained in a venture capital limited partnership agreement, see D Cumming and S Johan "Venture Capital and Corporate Governance" in M Wright, D S Siegal, K Keasy and I Filatotchev (eds) *The Oxford Handbook of Corporate Governance* (Oxford: Oxford University Press 2014) pp 515-535.

²³ Unless required under Partnership (Accounts) Regulations 2008 (SI 2008/569) reg.4(1) – i.e. if all partners are corporate vehicles. See discussion in J Hardman *A Practical Guide to Granting Corporate Security in Scotland* (Edinburgh: W Green, 2018) paras 2-36 – 2-37.

²⁴ Gullifer and Payne (n 22 above) pp810-812; Davies and Worthington (n 12 above) para 1-5. For a Scottish take, see N Grier *Company Law* (Edinburgh: W Green, 2014 4th edition) para 1-24.

²⁵ See Banks (n 6 above) para 30-02; J Anderson and A Deitz, "Seeking a Wider Public – Ironically for Some, New Private Equity Funds are Submitting to the Rigours of the Public Capital Markets" (2006) 25 *International Financial Law Review* 44 at 45; LCN Legal "An introduction to limited partnership funds: who does what" available at <https://lcnlegal.com/an-introduction-to-limited-partnership-funds-who-does-what/>. In general partnerships, it is usual for certain partners to hold property on trust for themselves and the other partners – see Banks (n 6 above) para 18-63.

²⁶ Companies Act 1985 ss716 -717. See N Stolowy and S Schrameck "The contribution of European Law to national legislation governing business law" (2011) *Journal of Business Law* 614 at 621; J J Henning, "Limited Partnerships Reform: Part 2" (2011) *Company Lawyer* 208 at 211.

20 before its abolition.²⁷ It is quite common for investment funds to be set up so that limited partnerships are, themselves, limited partners of other limited partnerships. This is especially the case for two specific private equity vehicles. First, there is often a “co-invest” vehicle under which the investment managers invest on the same terms as investors. Second, there is also often a “carry” vehicle under which the investment managers obtain proportionately higher returns than investors if certain hurdles are met.²⁸ If structuring an investment using only English limited partnerships, the lack of separate legal personality meant that each partner of the carry and co-invest vehicles counted towards the 20 partner limit. If, however, SLPs were used then the carry vehicle would “use up” only 1 space of the 20-partner limit for the limited partnership, as would the co-invest vehicle. As such, for historical and practical reasons, the separate legal personality of the SLP provides a clear benefit to its utility in business. This makes it more popular than its English counterpart for investment.

3. The Money Laundering Crisis & Resolution

We have explored what an SLP is, where it originates from and why it is so popular. Our next step is to explore what has gone wrong with the use of SLPs. This is important to understand why the business entity of the SLP is under so much pressure to reform. Beginning in July 2016, the Herald (a Scottish newspaper) ran a high-profile campaign to highlight high use of fraud using the SLP.²⁹ Its initial article stated:

*“At least a dozen agencies in Latvia, Ukraine and Russia are selling Scottish limited partnerships (SLPs) along with Certificates of Good Standing, essentially references from Britain’s Companies House confirming that the SLPs are bona fide. Such papers are then used to secure bank accounts in, say, Riga, Latvia or Nicosia, Cyprus.”*³⁰

²⁷ Such cap was abolished by The Regulatory Reform (Reform of 20 Member Limit in Partnerships etc) Order 2002 (SI 2002 /3203) reg 2. It is likely that such a cap acted as a deterrent on the use of the limited partnership form – J Freedman “Limited Liability: Large Company Theory and Small Firms” (2000) 63 *Modern Law Review* 317 at 321.

²⁸ J A McCahery and E P M Vermeulen “Conservatism and innovation in venture capital contracting” (2012) *European Business Organization Law Review* 261 at 268; D J Cooke *Private Equity: Law and Practice* (London: Sweet & Maxwell, 2011 4th edition) p380; G Yates and M Hinchclife *A Practical Guide to Private Equity Transactions* (Cambridge: Cambridge University Press, 2010) p62; S Biggs “Private equity: a practical guide” (2008) 8 *Legal Information Management* 247. The general partner can sometimes fulfil the role of the carry vehicle – Gullifer and Payne (n 22 above) p811.

²⁹ For a list of the articles in the Herald’s campaign, see Department for Business, Energy & Industrial Strategy “Review of Limited Partnership Law: A call for evidence” (January 2017), Annex B. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583800/review-of-limited-partnerships-law-call-for-evidence.pdf. This provides a then-near-exhaustive list of journalism articles which highlight such fraud. This list consists entirely of articles from the Herald.

³⁰ D Leask “Fears grow over Scottish firms used for money-laundering in former Soviet Union” *Glasgow Herald* 16 July 2016, available at <https://www.heraldscotland.com/news/14623297.fears-grow-over-scottish-firms-used-for-money-laundering-in-former-soviet-union/>.

Certificates of good standing have a relevance in several jurisdictions.³¹ They lack that status in the UK. Nonetheless, Companies House will issue a certificate of good standing for payment of a specified fee.³² This service is only available for a company and never for a limited partnership.³³ It therefore seems likely that the certificate in question is a certificate of registration rather than a certificate of good standing.

The reason that these agencies utilised the SLP was to enable Russian money to flow to the Caribbean. Former Soviet states have restricted access to offshore tax havens. However, an SLP with Caribbean partners provided a conduit for money laundered funds to flow.³⁴ A joint report by Bellingcat and Transparency International stated:

“Introduced in 1907, the SLP remained relatively under-used until very recently. According to data from Companies House, between 1907 and the end of 2006 there had been just 4,458 registrations; at the close of 2016 there had been more than that in a single year (5,215) ... The number of SLPs rose by 23,625 (430%) between 2006 and 2016...compared to 5 per cent for other types of limited partnership. 70 per cent of SLPs incorporated during this growth period (16,461) are registered at just 10 addresses.”³⁵

Unfortunately, there is a lack of academic research about abuse of the SLP form from an organisational law perspective. The Herald articles are helpful as they resulted in the UK government’s call for evidence into misuse of the SLP form.³⁶ However they are not academic sources and utilise several anecdotes. Some qualitative empirical analysis has been undertaken by criminal law academics.³⁷ Whilst this demonstrates the perception of a problem, it lacks a quantitative aspect. An important (and over-due) in-depth academic analysis by Elspeth Berry is forthcoming that outlines why partnership vehicles have been used for fraud and what fraudulent partnerships have done, analyses the government’s proposed reforms, and advocates twin track

³¹ See R D Francis, A F Armstrong, and H S Grow “Incumbency and Corruption” (2019) 40 Company Lawyer 139 at 140 – 141.

³² See <https://www.gov.uk/guidance/order-certified-copies-and-certificates-from-companies-house>.

³³ The relevant provision is Companies Act 2006 s1065, without an equivalent in either the Limited Partnership Act 1907 or The Registrar of Companies (Fees) (Limited Partnerships and Newspaper Proprietors) Regulations 2009.

³⁴ Transparency International and Bellingcat “Offshore in the UK: Analysing the Use of Scottish Limited Partnerships in Corruption and Money Laundering” (June 2017, ISBN: 978-1-910778-67-8), p4-6 available at <https://www.transparency.org.uk/publications/offshore-in-the-uk/>.

³⁵ Transparency International and Bellingcat (n 34 above) p6.

³⁶ DBEIS (n 29 above).

³⁷ This is, however, rather light touch and is therefore difficult to draw any definitive conclusions in respect of the SLP form itself (as compared to other business vehicles) – e.g. see fleeting references in L Campbell “Dirty cash (money talks): 4AMLD and the money laundering regulations 2017” (2018) Criminal Law Review 102; N Lord, K Van Wingerde and L Campbell “Organising the Monies of Corporate Financial Crimes via Organisational Structures: Ostensible Legitimacy, Effective Anonymity, and Third-Party Facilitation” (2018) 8 Administrative Sciences 17.

regulatory and ethical solutions to the wrongdoing.³⁸ That article will be important reading for those seeking a forensic principled account of the features of partnership vehicles that make them attractive for fraudsters, as well as solutions to the problem. In this article, we will explore specific analysis of the proposals for reform of the SLP. We will review partnership law to argue that current law enforcement agencies may be making assumptions about SLPs which prove to not be the case. We will also review wider implications for corporate law theory.

Quantitative investigative journalism has been undertaken by Bellingcat (on its own and with Transparency International). Given the lack of alternative sources of quantitative empirical data on the subject, this paper shall rely primarily on the reports compiled by Bellingcat and the government statistics and public records they derive from. The rise in the number of registrations of SLPs seems to have started when UK companies required at least 1 natural director.³⁹ Transparency International and Bellingcat looked at all 5,215 SLPs incorporated in 2016. They concluded that 4,918 (94%) had only corporate partners, and the vast majority had no UK partners, with 3,677 (71%) controlled by companies incorporated in jurisdictions with high secrecy risks. Only 271 (5%) of such SLPs had general partners registered in the UK.⁴⁰ Transparency International and Bellingcat identify several key case studies in which SLPs had played a large part in frauds.⁴¹

To combat this, Transparency International and Bellingcat suggested making SLPs subject to the “Person of Significant Control” regime. This regime applies to companies. Transparency International and Bellingcat also proposed requirements for greater transparency in respect of SLPs. They also proposed that more detail be provided to the public register to identify the SLP’s limited partners and general partners.⁴²

³⁸ E Berry “Partnership Law: Used, Misused or Abused?” *European Business Organization Law Review*, forthcoming, especially parts 3 and 4.

³⁹ Companies Act 2006, s155; N J Lord, L J Campbell and K Van Wingerde “Other People’s Dirty Money: Professional Intermediaries, Market Dynamics and the Finances of White-Collar, Corporate and Organized Crimes” (2019) 59 *British Journal of Criminology* 1217 at 1231. For an overview of policy reasons underpinning such change, please see J L Yap “De facto directors and corporate directorships” (2012) 7 *Journal of Business Law* 579.

⁴⁰ Transparency International and Bellingcat (n 34 above) p 9.

⁴¹ Transparency International and Bellingcat (n 34 above) p7, p11, p p13-14. Similarly examples also appear in the Herald articles (see DBEIS (n 29 above)), and in Campbell (n 37 above).

⁴² Transparency International and Bellingcat (n 34 above) pp17 -21.

Not all SLPs reviewed were established for fraudulent purposes. Between 2015 and 2016, 659 SLPs were set up with explicit links to legitimate financial structures. Of these, 72.8% were registered by one law firm, Burness Paull LLP.⁴³

Reforms were implemented quickly. In January 2017 the government issued a call for evidence on limited partnerships, which expressly cited the Herald's campaign.⁴⁴ By June 2017, procedures were in place to require SLPs to publish information as to the identity of any persons with significant control in the SLP.⁴⁵ This reflected the Bellingcat proposal.

The reforms appear to have stifled new registrations of SLPs. Since the transparency reforms were introduced, registrations of SLPs have reduced by 80%.⁴⁶ In April 2018, the government consulted more widely on SLPs. Noting the apparent misuse of the SLP, the Department of Business, Energy and Industrial Strategy proposed a series of further reforms for SLPs. First, they would need to be registered by a presenter who is subject to anti-money laundering regulations.⁴⁷ Second, they proposed increasing reporting and transparency requirements.⁴⁸ Third, they proposed enabling SLPs to be struck off the public register.⁴⁹ Fourth, they proposed that the principal place of business of an SLP (or "PPoB")⁵⁰ must remain in the UK, or alternatively requiring each SLP to have a fixed service address in the UK.⁵¹ In December 2018, DBEIS published the response to this consultation.

The first three suggestions received almost universal acceptance.⁵² However, the fourth proposal did not. 26 of the 41 respondents to the government consultation stated that:

*"making it mandatory for the PPoB (the primary location where business is carried out) to remain in the UK jurisdiction where it was registered would have a detrimental impact on the venture capital industry and make LPs unattractive to investors"*⁵³

⁴³ Bellingcat "Smash & Grab: The UK's Money Laundering Machine, a Bellingcat Investigation" September 2019, available at <https://www.bellingcat.com/wp-content/uploads/2019/09/Smash-and-Grab-The-UKs-Money-Laundering-Machine.pdf> p5.

⁴⁴ DBEIS (n 29 above); see discussion in L Campbell "Dirty cash (money talks)" (n 37 above).

⁴⁵ Scottish Partnerships (Register of People with Significant Control) Regulations 2017 (SI 2017/694); <https://www.gov.uk/government/news/scottish-limited-partnerships-to-reveal-identity-of-owners-thanks-to-new-laws>.

⁴⁶ See DBEIS "Limited Partnerships: Reform of Limited Partnership Law" (n 3 above), p 20; "Reforms proposed to prevent limited partnerships being used for money laundering purposes" 2018 Company Lawyer 252 at 252.

⁴⁷ DBEIS "Limited Partnerships: Reform of Limited Partnership Law" (n 3, April 2018) Ch 2.

⁴⁸ Ibid ch 4.

⁴⁹ Ibid ch 5.

⁵⁰ See Limited Partnership Act 1907 s8A(2)(e).

⁵¹ DBEIS "Limited Partnerships: Reform of Limited Partnership Law" (n 3, above, April 2018), ch 3.

⁵² DBEIS "Limited Partnerships: Reform of Limited Partnership Law – The Government response" (n 3 above, December 2018) p8, pp11-15.

⁵³ Ibid p9.

This view is concerning, for reasons that will be elaborated upon in sections 4 and 5. On 5 May 2019, DBEIS consulted on bringing these reforms into a wider reform of transparency, including those rules which apply for public companies.⁵⁴

The reforms which have already been enacted, as shown above, have reduced numbers of newly registered SLPs. But levels of compliance by existing SLPs with their new requirements are low. Bellingcat report that one third of SLPs incorporated between 1 January 2016 and 31 October 2017 have ignored the requirements. Approximately one third said they would not be able to identify the persons of significant control. The final third named a variety of overseas nationals, overseas corporates and even other SLPs as their persons of significant control.⁵⁵ So the tools that law makers currently have deployed to expand the reach of law enforcement is rather of mixed effect: two thirds have not provided the appropriate details. If this trend carries into future government proposals, then we have difficulty with existing SLPs.

How effective will the government's proposals for SLPs be? The first government proposal, to require presenters to be subject to anti-money laundering regulations, will not deal with existing SLPs as they only apply to newly registered SLPs. If the current reporting and transparency obligations have so far been ignored, it is likely that future increased obligations are also ignored. This means that the second government proposal seems likely to only provide further compliance obligations that will be ignored. This means that it, too, will not resolve issues for existing SLPs. Being able to strike SLPs off the register (the third proposal) would be helpful, as Elspeth Berry has discussed⁵⁶ – but it is likely to be a time-consuming effort. The relevant SLP would need to be identified and then struck off by following the mechanics of this new statutory procedure. To avoid accidental over-zealous striking off, there are likely to be time periods for the SLP to dispute the process.⁵⁷ In addition, dissolution on these terms would just result in the SLP's existence ending, and may not provide the necessary constraints to avoid wrongdoing or hold wrongdoers adequately to account.⁵⁸ Restricting SLPs from registering their principal place of business

⁵⁴ Department for Business, Energy & Industrial Strategy “Corporate Transparency and Register Reform” (May 2019).

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819994/Corporate_transparency_and_register_reform.pdf.

⁵⁵ Bellingcat “How the British Government’s Attempts to Fight Corruption and Money Laundering are already failing” 14 November 2017, available at <https://www.bellingcat.com/news/uk-and-europe/2017/11/14/british-governments-attempts-fight-corruption-money-laundering-already-failing/>.

⁵⁶ Berry (n 38 above) section 5i.

⁵⁷ Analogous powers to the Registrar of Companies in respect of companies requires effectively a three month periods (Companies Act 2006 s1000) – the Registrar has to send one notice to the relevant company, wait 14 days, send a second notice, wait 14 days, publish a notice in the relevant Gazette, wait two months and then can strike off the company.

⁵⁸ There is no reason to assume that dissolution will necessarily be linked to a removal of limited liability for limited partners, whereas such personal liability is necessary to act as an incentive for compliance - see J Armour, J Gordon

offshore would not seem to have much effect: not many SLPs have registered an offshore principal place of business under the current regime.⁵⁹ Accordingly, the current and proposed reforms have helped prevent future fraudulent SLPs. they do not affect current fraudulent SLPs and so do not seem to provide law enforcers with the necessary tools required to combat fraudulent SLPs.

4. Partnership Analysis

The proposals to combat fraudulent SLPs are not likely to be effective in doing so for existing SLPs. However, it may be that existing features of SLPs already provide some tools to combat fraudulent SLPs. In this section, we will interpret existing rules for SLPs to provide law enforcers with more arguments to help them combat fraudulent SLPs.

All analysis appears to proceed from the presumption that there exists a valid SLP on the grounds that the SLP is on the public register.⁶⁰ But this is not necessarily the case. By undertaking a textual analysis of the legislation that governs the SLP, the Limited Partnerships Act 1907, we can review this assumption. In this section, we will argue that existing SLPs used for fraudulent purposes may have automatically dissolved.

The 1907 act states clearly that the laws of general partnerships apply equally to limited partnerships unless expressly excluded by the act.⁶¹ Accordingly, a limited partnership (including an SLP) is a general partnership plus some additional rules. It is from this approach that the separate legal personality of the SLP arises: under general partnership law, Scottish firms have separate legal personality whereas English firms do not.⁶² As Elspeth Berry has noted, this makes SLPs particularly attractive, both to legitimate business and to wrongdoers.⁶³ The additional limited partnership rules enable certain of the partners to enjoy limited liability⁶⁴ in exchange for their exclusion from the management of the firm.⁶⁵

& G Min, "Taking Compliance Seriously" (2020) 37 Yale Journal on Regulation 1. This is likely to be exacerbated by an absence of corporate veil to pierce – in a corporate context, see S Ottolenghi "From Peeping Behind the Corporate Veil, to Ignoring it Completely" (1990) 53 Modern Law Review 338.

⁵⁹ DBEIS "Limited Partnerships: Reform of Limited partnership Law" (n 3 above) April 2018, pp27-31.

⁶⁰ For example, DBEIS (n 29 above) p9; Transparency International & Bellingcat (n 34 above) p4. From the perspective of criminal law commentary, partnerships are normally included in discussion of "corporate crime", and included as "corporate entities" – e.g. L Campbell "Corporate Liability and the Criminalisation of Failure" (2018) 12 Law and Financial Markets Review 57 at 57.

⁶¹ Limited Partnerships Act 1907 s7. See discussion in all sources cited at n 14 above.

⁶² Partnership Act 1890 s4(2).

⁶³ Berry (n 38 above) section 2

⁶⁴ Limited Partnerships Act 1907 s4(2A).

⁶⁵ Limited Partnerships Act 1907 s6(1). See discussion in all sources cited at n 6 above.

How these traits are acquired by the SLP is important to establish whether the SLP retains them. These traits are bestowed on a limited partnership when the partnership is registered.⁶⁶ The use of this word is important.⁶⁷ Companies are incorporated rather than registered.⁶⁸ They have been ever since establishment of companies by registration with the government was permitted.⁶⁹ Limited liability partnerships are similarly incorporated.⁷⁰ The act of incorporation is an act to create something new; something where before there was nothing.⁷¹ Thus prior to incorporation of a company, there is no entity: law does not deem there to be a partnership of the shareholders in advance of incorporation.⁷² The word “incorporation” was commonplace in company legislation in advance of the 1907 act,⁷³ and this word could have been chosen. Had it been chosen; it would be clear that limited partnerships fell into the same category as companies: it was the act of the Registrar of Companies issuing the certificate which created the entity.

Incorporation was not chosen as the word to explain the interaction between the Registrar of Companies and limited partnerships, instead the word “registration” was.⁷⁴ As a result of a simple difference in wording we can reconceptualise the limited partnership. Limited partnerships are not their own distinct form of legal organisation. They are merely general partnerships plus some additional features. Partnerships need to be registered to obtain those features. The act of registering your partnership with the Registrar of Companies and meeting the various tests (including, inter alia, having your firm name ending “limited partnership” or “LP”)⁷⁵ bestows on your partnership the special features of a limited partnership. This is primarily the limitation of liability for a category of partners. Unlike a company, which only exists once Companies House has filed the paperwork,⁷⁶ conceptually a limited partnership must exist prior to its registration, but

⁶⁶ Limited Partnerships Act 1907 s5.

⁶⁷ See discussion in The Law Commission and Scottish Law Commission “Partnership Law” (Law Com 283, Scot Law Com 192), November 2003 para 15-14.

⁶⁸ Companies Act 2006 s16.

⁶⁹ Joint Stock Companies Act 1845, sXXV; Joint Stock Companies Act 1956 sXIII.

⁷⁰ Limited Liability Partnership Act 2000, s3.

⁷¹ See discussion of the “*mysterious right called incorporation*” in E M Dodd “For Whom are Corporate Managers Trustees” (1932) 65 Harvard Law Review 1145 at 1160; “*a legal entity created by the act of incorporation*” in M M Blair and L A Stout “A Team Production Theory of Corporate Law” (1999) 85 Virginia Law Review 247 at 250; W T Allen “Our Schizophrenic Conception of the Business Corporation” (1992) 14(2) Cardozo Law Review 261; Davies and Worthington (n 12 above) para 4-34- 4-38.

⁷² Morse et al (n 13 above) para 2.1545.

⁷³ Such word was used ever since the case of *Suttons’ Hospital* (1612) 77 E.R. 960 - see Cooke (n 13 above) p67. Not choosing the word “incorporate” for limited partnerships is likely to be deliberate – incorporation under English law has been associated with separate legal personality (see discussion in section 6 below), which is not something that English limited partnerships have traditionally enjoyed.

⁷⁴ More accurately, companies legislation states that the effect of registration was incorporation, whereas the 1907 act states that the features of limited partnership are bestowed upon registration – compare Companies Act 2006 s16 to Limited Partnerships Act 1907 s8.

⁷⁵ Limited Partnerships Act 1907 s8B.

⁷⁶ Companies Act 2006 s16.

only as a general partnership until the formalities of such registration are complied with. Viewing an SLP's creation this way clarifies that the SLP is merely a general partnership with some additional features. This clarity helps us analyse SLPs.

Indeed, this is not a new conception. As originally enacted, s5 of the 1907 Act stated that if there was a default in registering the limited partnership, it “*shall be deemed to be a general partnership, and every limited partner shall be deemed to be a general partner*”.⁷⁷ This was held to mean that a general partnership was needed in advance of a limited partnership.⁷⁸ Indeed, it was held by the House of Lords that the act of preparing to commence trading was sufficient to create a general partnership.⁷⁹ The precise wording of the section also created a perceived risk that such a “default” may not be noticed prior to, nor cured by, the act of registration. As such, there was perceived to be a risk that registering the limited partnership was no guarantee that there was no such default.⁸⁰ The Law Commission and the Scottish Law Commission proposed that the business of a limited partnership only commences on the date of the issue of the certificate.⁸¹ This was not enacted, but the offending words in s5 were deleted.⁸² Since this amendment, it is thought by some that the problem of a partnership starting before registration has been resolved.⁸³ However the dominant view is that a general partnership is still required as a pre-requisite to a limited partnership.⁸⁴ This is because the reform was targeted at ensuring that an unknown default in registration did not affect the limited liability of limited partners. It therefore did not attempt to clarify the pre-registration status of the limited partnership. Had it done so, then perhaps the conceptualisation of a SLP as a general partnership with some additional features would be changed.

What, then, is the actual effect of registration? It is important to understand this to understand whether all registered SLPs remain, in fact, valid SLPs. Once registration formalities are complied with, the registrar shall register the limited partnership.⁸⁵ It shall also issue a certificate of registration.⁸⁶ That certificate has to state the name of the limited partnership, registration number,

⁷⁷ Limited Partnerships Act 1907, s5.

⁷⁸ See *Rayner & Co. v Rhodes* (1926) 24 Ll.L.R. 25; The Limited Partnership Act (Law Com Consultation Paper No 161, SLC Com DP No 118) (2001) para 3.23; Milman and Flanagan (n 6 above) p152; Strahan and Oldham (n 10 above) p230; “*The protection of the Act may be lost altogether by passive default in omitting to register*” Gower (n 5 above) p189.

⁷⁹ *Khan v Miab* [2000] 1 W.L.R. 2123.

⁸⁰ See E Berry, “Death by a thousand cuts or storm in a teacup? The reform of limited partnership law” [2011] *Journal of Business Law* 578 at 580.

⁸¹ Partnership Law (Law Com No 283, SLC Com No 192) (2003), para 15:17 – 15:21.

⁸² Legislative Reform (Limited Partnerships) Order 2009 (SI 2009/1940) Art 8.

⁸³ E.g. Henning, (n 26 above) at 211-212.

⁸⁴ See E Berry “Limited Partnership law in the United States and the United Kingdom: teaching an old dog new tricks?” 2013 *Journal of Business Law* 160 at 166; Banks (n 6 above) para 29-13.

⁸⁵ Limited Partnerships Act 1907 s8.

⁸⁶ Limited Partnerships Act 1907 s8C(1).

date of registration and that the limited partnership is a limited partnership.⁸⁷ This certificate is “conclusive evidence that a limited partnership came into existence on the date of registration.”⁸⁸ This change was introduced at the same time as the reform noted above. It was introduced to resolve the concern noted above of some latent and unknown defect in registering the limited partnership. It meant that would-be limited partners could be certain that their partnership obtained the benefits of limited liability as at the date of certificate.⁸⁹ The certificate is conclusive evidence that this once occurred. However, it says nothing about the continuing status of the SLP. This is important because this article argues that some SLPs may not, in fact, retain the status bestowed upon them by registration.

The certificate of registration is therefore conclusive proof that the pre-existing general partnership acquired the additional characteristics that a limited partnership has on the date that the certificate was given. Once more, this is different from the company formulation. The company formulation also provides that the certificate is conclusive evidence “that the company is duly registered under this Act.”⁹⁰ This does not appear in the equivalent provisions in the updated 1907 act.⁹¹ As a result, a certificate of registration of a limited partnership is not conclusive proof that the partnership still exists. Indeed, this was not its aim. As noted above, the purpose of its introduction was to remove fears that somehow an unknown defect meant that limited partners did not have limited liability. As such, the certificate states that the features of a limited partnership had been bestowed on the otherwise general partnership as at the date of registration. The certificate is not intended to demonstrate that a putative limited partnership in any way retained those characteristics.⁹² This is important, because it may mean that fraudulent SLPs have lost these characteristics without the public register reflecting that they have.

This is different from the position in respect of a company. Seeing a certificate of registration of a limited partnership tells us that as at the date of the certificate a pre-existing partnership acquired the additional characteristics bestowed upon a limited partnership. However, seeing a certificate of incorporation of a company tells us that the company exists.⁹³ As a result, any person is entitled to ask the Registrar of Companies for a certificate of incorporation at any time to obtain a certificate in respect of any company.⁹⁴ There is no equivalent provision for limited partnerships.

⁸⁷ Limited Partnerships Act 1907 s8C(3).

⁸⁸ Limited Partnerships Act 1907 s8C(4).

⁸⁹ Henning (n 26 above); Berry (n 80 above); Berry (n 84 above).

⁹⁰ Companies Act 2006 s15(4).

⁹¹ Limited Partnerships act 1907 s8C(4); see discussion in Henning (n 26 above).

⁹² See Berry (n 80 above); Henning (n 26 above); Berry (n 8 above).

⁹³ Unless this is supplanted by a dissolution under Companies Act 2006 s1000, s1001 or s1003.

⁹⁴ Companies Act 2006 s1065.

It is not needed because the certificate of registration is limited in its effect. Indeed, the certificate of registration only applies as at the date that the general partnership became a limited partnership.

Further evidence for SLPs being general partnerships with some additional features can be seen in the addresses that need to be provided to the public register. Companies and LLPs have a “registered office”. Such registered office can only change when relevant notices have been filed and processed by the Registrar of Companies.⁹⁵ A limited partnership, on the other hand, has a principal place of business. If the PPOB changes, then there is an obligation to deliver to the registrar a statement of any changes.⁹⁶ Once again we see a difference in emphasis. For companies and LLPs, the change only is effectual when registered. However, for LPs the change factually occurs and is merely notified *ex post* to the Registrar of Companies. This difference further evidences that limited partnerships are “general partnerships plus” rather than constituting a distinct and separate type of business entity. It reflects the reality that incorporated vehicles live and die by the public register. On the other hand, an LP pre-supposes an existing continuing “live” partnership upon which extra features are bestowed. Accordingly, the fact that not many SLPs tell Companies House that their PPOB is outside Scotland/the UK,⁹⁷ does not mean in and of itself that the SLP has not, in fact, moved its PPOB offshore. Indeed, if the general manager offshores and carries out the business of the SLP purely offshore, then the PPOB has, as a matter of fact and law, moved offshore.

This argument, that the SLP is merely a general partnership with some additional features, is also evidenced by the processes for dissolution and removal from registers. Companies and LLPs can be dissolved and removed from the public registers.⁹⁸ Limited partnerships cannot be.⁹⁹ Instead, filings can be made which state that the limited partnership now has no limited partners and no general partners. The limited partnership will, however, remain on the register forever.¹⁰⁰ This further demonstrates the limited role of the public register for limited partnerships – the register does not even purport to tell you whether a limited partnership is a “live” limited partnership or not. However, it does not need to. Instead it is solely concerned with whether (and when) an existing partnership historically obtained extra rights. In other words, the register is not trying to

⁹⁵ Companies Act 2006 s86 and s87, and The Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009.

⁹⁶ Limited Partnerships Act 1907 s9(1).

⁹⁷ DBEIS “Limited Partnerships: Reform of Limited Partnership Law – The Government response” (n 3 above, December 2018) p8, pp11-15.

⁹⁸ Companies Act 2006 ss1000, 1001 and 1003.

⁹⁹ This is, obviously, subject to proposed reform referred to above.

¹⁰⁰ Berry (n 84 above) at 166; Bank (n 6 above) para 29-33; P Bailey “Companies House update to prevent criminality – but is it already too late?” 2019 Company Law Newsletter 1.

tell us that an SLP remains a live business entity. This is important because it enables additional tools to challenge fraudulent SLPs with: they may not even be valid SLPs.

What, then, is the dissolution process for an SLP? The 1907 act provides that a limited partnership shall not be dissolved by the death or bankruptcy of a limited partner.¹⁰¹ The importance of this is in the negative – everything else that would dissolve a general partnership will also dissolve a limited partnership.¹⁰² Indeed, Lindley and Banks state:

*“A limited partnership will in general be dissolved by any event which would dissolve an ordinary partnership, subject to certain specific exceptions which only relate to the limited partners.”*¹⁰³

This is coherent with the analysis advanced – the limited partnership is predicated on there being a general partnership to which the 1907 act applies limited liability. This means that the rules for dissolution of partnerships generally apply to SLPs.

Accordingly, the provision of the Partnership Act 1890 which states:

*“A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership”*¹⁰⁴

applies equally to SLPs. This provision is usually triggered by a failure of a professional practice to comply with the profession’s relevant legislation,¹⁰⁵ or in respect of specific legislation about contracting with enemy aliens during times of war.¹⁰⁶ However, it also applies to a partnership which has as its object obtaining profit from illegal means.¹⁰⁷ As Elspeth Berry notes, this underscores the fact that limited partnerships were never intended to facilitate wrongdoing.¹⁰⁸ A limited partnership which was established legally (say, by a formation agent) which then changed its firm business to something unlawful (say, by being run for fraudulent purposes), would trigger this provision and so be automatically dissolved. It would cease to be a limited partnership. The same rules apply if the purpose of the initial formation was illegal.¹⁰⁹ Berry notes that the reforms of certificates of limited partnerships could have included provisions that issue of a certificate was

¹⁰¹ Limited Partnerships Act 1907 s6(2).

¹⁰² See Banks (n 6 above) para 7.2. The principal exception to this being a notice of a charge of a partners’ share: which terminates a general partnership (Partnership Act 1890 s33(2)) but will not terminate a limited partnership if undertaken by a limited partner (Limited Partnerships Act 1907 s6(5)(c)).

¹⁰³ Banks (n 6 above) para 32-02.

¹⁰⁴ Partnership Act 1890 s34.

¹⁰⁵ E.g. *Hudgell Yeates & Co v Watson* [1978] QB 451; *Hill v Clifford* [1907] 2 Ch. 236.

¹⁰⁶ E.g. *Stevenson and Sons v Aktiengesellschaft für Cartonnagen-Industrie* [1918] AC 239.

¹⁰⁷ For example smuggling (*Biggs v Lawrence* (1789) 3 TR 453; *Stewart v Gibson* (1838) 7 Cl&F 707), or illegal export in breach of prohibition (see the English case of *Foster v Driscoll* [1929] 1 KB 470 (this rule applies even if the illegality is not actually achieved – at 510) and the Scottish case of *Lindsay v Inland Revenue* 1933 SC 33).

¹⁰⁸ Berry (n 38 above) section 2.

¹⁰⁹ *Everet v Williams* 2 Pothier on Obligations 3 9 LQR 197.

evidence of a partnership existing. This would have removed any argument that pre-existing fraudulent partnerships had never existed at all. However, those enacting the reforms chose not to do so.¹¹⁰

Whether an SLP started unlawfully or became unlawful, English law holds that obligations between partners in an illegal partnership (and, where the partnership is a separate legal person, between them and the partnership) will be unenforceable.¹¹¹ Scots courts have adopted this analysis wholesale. Thus, when faced with a purported partnership to import whiskey into the US during prohibition, in *Lindsay v Inland Revenue*, the Lord President of the Court of Session stated:

*“There are many transactions which are illegal in the sense that the obligations upon which they depend are not such as the law will enforce. I think it is plain that a contract of partnership, the object of which is to trade in a way which necessarily involves resort to fraud on the Customs Authorities of this country, is not a contract which this country's law will enforce.”*¹¹²

It seems likely that a court would no more enforce a contract of partnership in respect of an SLP whose object was to perpetrate money laundering or other illegal activity.

In *Lindsay*, profits on the illegal trade were still taxable, despite their illegality. This has been used as a proposition to state that the legal personality of the partnership continues post illegal event pending the completion of its dissolution.¹¹³ Scots law is confused in this regard. On the one hand, a House of Lords decision in 1971 held that separate legal personality immediately terminated upon dissolution of the partnership.¹¹⁴ On the other hand, recent authority has held that a partnership's separate legal personality survives dissolution to enable its affairs to be wound up.¹¹⁵

Bailey has argued that this could be said to arise from the joint and several liability of the partners for the obligations of a partnership. This would leave the partnership enjoying no rights under any

¹¹⁰ Berry (n 80 above) at 581. It is, of course, implicit in the wording of the certificate that registration cures any issue caused by a lack of a pre-existing partnership. After all, the precise wording is that the certificate is “conclusive proof” that a limited partnership came into being (Limited Partnership Act 1907, s8C). However, this is far from certain. One reading is that the certificate is merely conclusive proof that additional features were provided to an otherwise existing partnership – under such reading, in the absence of the existing general partnership, the features had nothing to be added to, and so were never added.

¹¹¹ *Biggs v Lawrence* (1789) 3 T.R. 454.

¹¹² *Lindsay v Inland Revenue* 1933 SC 33 at 40, per Lord President Clyde.

¹¹³ See H MacQueen and Lord Eassie (eds) *Gloag and Henderson: The Law of Scotland* (Edinburgh: 14th edn) para 45.01.

¹¹⁴ *Inland Revenue v Graham's Trustees* 1971 SC (HL) 1.

¹¹⁵ *Sheveleu v Brown and Ducker* [2018] CSIH 68. This case has been criticised as not fitting squarely within *Inland Revenue v Graham's Trustees* – see J Bailey “Phantom Partnerships and Post-Dissolution Profits: *Sheveleu v Brown and Ducker*” 23 *Edinburgh Law Review* 230. It also does not sit well with criminal law – a partnership was held instantly dissolved on the death of a partner, and so incapable of being indicted for breach of health and safety in *Balmer v HM Advocate* 2008 SCCR 765. However, it avoids practical complications which arise if separate legal personality just vanishes, and gives stronger effect to Partnership Act 1980, s38, which provides that post-dissolution of a partnership, each partner has continuing authority to wind up its affairs.

of its contracts.¹¹⁶ In any event, any such survival is purely limited to the winding up of the affairs of the partnership and does not enable new contracts to be entered into.¹¹⁷ The precise delineation of when separate legal personality ends or survives, and to what extent, is unclear.¹¹⁸ At most, however, any continuing legal personality would be merely limited in respect of realising and distributing the SLP's assets. This is, however, enough to help challenge fraudulent SLPs.

If the SLP was fraudulent or illegal, the distribution of assets would be in respect of an illegal partnership agreement, meaning that no court would enforce its distribution. This has long been the case in Scotland, as evidenced by an 1852 case involving an illegal pawnbroking partnership, in which Lord Cuninghame stated:

*“If the partners carried on the business in an illegal manner, the share of such a trade could no more be claimed for and sued on in a court of law, than the balance due on smuggling adventures.”*¹¹⁹

In sum, it is unclear whether the separate legal personality of an SLP survives its dissolution triggered by illegality. However, this does not matter as any attempt by a partner to enforce any right they have to a distribution from such SLP would be rejected by the courts.

Whenever the precise end of the SLP's separate legal personality occurs, the eventual result is the same. This is that the traits of separate legal personality noted above are removed from the vehicle. Accordingly, there is no person to sue or be sued, no person to contract with, and no entity with separate creditors. In other words, any limited partnership which was registered for a fraudulent purpose, or whose purposes became fraudulent after registration, is no limited partnership. This is true whether the partners knew about it at all¹²⁰ and despite what the public register may appear to say.

5. Partnership Arguments for Law Enforcement

Section 4 identified that an SLP is just a general partnership with certain additional features. It also identified that, regardless of the public register, SLPs cease to exist by the same events that end partnerships, including illegality. This means that there are additional legal arguments which already

¹¹⁶ Bailey (n 115 above) at 235. For an SLP, this would of course mean that the general partner(s) was/were liable as limited partners would not be.

¹¹⁷ *Dickson v National Bank of Scotland* 1917 SC (HL) 50 at 52 per Lord Finlay “*the survivors cannot undertake new transactions on behalf of the firm*”; *Inland Revenue v Graham's Trustees* 1971 SC (HL) 1 at 21 per Lord Reid “*the surviving partners have no right to bind the assets of the dissolved firm by making new bargains or contracts*”; *Lajo Properties v Green* 1997 SLT 225.

¹¹⁸ Compare G L Gretton “Who Owns Partnership Property?” 1987 *Juridical Review* 163 with L Macgregor “The Role of Agency in Scottish Partnerships” in A J M Steven, R G Anderson and J MacLeod (eds) *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (Edinburgh: Avizandum, 2017) at pp97-100.

¹¹⁹ *Fraser v Hill* (1852) 14 D. 335 at 346.

¹²⁰ *Hudgell Yeates & Co. v Watson* [1978] Q.B. 451.

exist for cracking down on fraudulent SLPs. Rather than (or, perhaps, in addition to) requiring all entities with a certificate stating that they were once SLPs to disclose who owns them,¹²¹ law enforcement could challenge a vehicle's claims to be an SLP at all. This is, of course, predicated on knowledge of fraudulent activity. However, publicising to the marketplace that having a certificate stating that you were once an SLP does not automatically mean that you remain one is helpful in and of itself. Doing so would result in third parties being more inquisitive in their interactions and understanding the limitations of a certificate of registration.

There is precedent for such an approach from company law. The Bubble Act of 1720¹²² prohibited persons acting as companies without approval from the state, effectively retarding the development of joint stock companies.¹²³ By 1825, ingenious lawyers were adept at skirting around these prohibitions in a way which was thought by all to be compliant with the Bubble Act.¹²⁴ These processes were used publicly and blatantly in several promotions. One such promotion was of a proposed company known as the Equitable Loan Company. This company had many high-profile promoters, including several MPs. The grant of the official charter for the Equitable Loan Company was expected to be a formality. A case between two shareholders on the interpretation of the Equitable Loan Company's deed of settlement was raised to clarify the meaning of the provisions only.¹²⁵ However the court delved more deeply into the legality of the Equitable Loan Company. Harris states that "*Lord Eldon astonished Counsel by turning his attention from the content and interpretation of the deed to the question of the legality of the company altogether.*"¹²⁶

As a result, the promoters of the Equitable Loan Company were unexpectedly prosecuted under the Bubble Act. When dealing with fraudulent SLPs it is perhaps time that each law enforcer embraces their inner Lord Eldon. Rather than presume that an SLP is a valid vehicle, it is time to "look under the bonnet" of purported SLPs. It is worth questioning whether the taint of illegality dissolved the firm. If so, then the separate legal personality of the SLP is removed. Whilst this may continue post the illegality, it will only do so to wind up the SLP itself. This will involve liquidating the SLP's assets and ingathering funds. However, if the SLP were set up for an illegal or unenforceable purpose then, as noted above, obligations between partners, and between the firm and partners, are not enforceable. This would provide difficulties for the fraudulent SLP when it

¹²¹ The reforms which have been currently implemented.

¹²² Royal Exchange Assurance Act 1720 (6 Geo. I c.18 (1720)).

¹²³ Royal Exchange Assurance Act 1720 s18; P G Mahoney, "Contract or Concession? An Essay on the History of Corporate Law" 34 Georgia Law Review 873.

¹²⁴ See J F Wilson, *British business history, 1720-1994* (Manchester: Manchester University Press, 1995) p45.

¹²⁵ *Josephs v Pebrer* 3 B&C 639.

¹²⁶ Harris (n 13 above) 243.

comes to the dissolution process: if the court will not enforce illegal contracts within the partnership, then this must include the distribution of a fraudulent SLP's assets.

In other words, it is possible that the SLP's separate legal personality survives long enough to let it ingather its assets. However, this is not certain and even if it was so, the distribution of those assets would not be enforceable. Were this merely a private matter between the SLP and its members, then this would not be helpful as the SLP could just quietly distribute its assets. However, liquidated sums will likely be held in a bank account, meaning that any distributed proceeds will need to be effected by a third-party financial institution. Perhaps financial institutions should be made aware that distributions of any assets from the accounts of any fraudulent SLPs to its members are unenforceable.¹²⁷ Should a financial institution refuse to make such a payment, a court will not force them to do so.

Such illegality would also remove the limited liability of the SLP. A limited partnership is a partnership which, through certain registration formalities, has been granted the privilege of limited liability for certain of its partners. It follows that the extinction of the partnership element after the conclusion of such registration formalities must automatically extinguish the privilege of limited liability.

Accordingly, illegality ends an SLP. This must be predicated on being able to evidence that certain SLPs have acted illegally. However, there is an additional argument which may be deployed in respect of SLPs which no longer have any connection to Scotland. This is another Eldon-esque implication of re-conceptualising a limited partnership as a general partnership plus. It is likely to, however, be uncomfortable for the 26 of 41 respondents who objected to DBEIS' fourth proposal from April 2018. The majority of cross-border analysis is dedicated to attracting investors into a jurisdiction by making your rules for acknowledgment of business entities as open and expansive as possible.¹²⁸ However, we could easily look to analyse the existing rules for SLPs in a way which runs counter to this. An SLP is able to own property in its own name as it has separate legal

¹²⁷ *Dickson v National Bank of Scotland* 1917 SC (HL) 50 involved a firm of solicitors placing a deposit with a bank on behalf of their clients. The firm was dissolved. The House of Lords held that, under Partnership Act 1890 s38, individual partners had authority to continue to sign withdrawals on behalf of the dissolved firm. However, in that case all business was entirely legitimate. It is submitted that the effect of illegal partnership being not enforceable as between the parties would mean that any such continuation of authority would only be applicable to ingather assets into the SLP, but that attempts at dissolution of assets from the SLP to its members would be unenforceable.

¹²⁸ In the context of limited partnerships see J A McCahery and E P M Vermeulen "Limited Partnership Reform in the United Kingdom: A Competitive, Venture Capital Oriented Business Form" (2004) 5 European Business Organization Law Review 61.

personality.¹²⁹ It has separate legal personality because it is a Scottish vehicle.¹³⁰ Does this mean that if it ceases to be ‘Scottish’ then it ceases to enjoy separate legal personality?

There are two major international private law theories which are relevant to identifying the governing law of incorporated business entities. First, some jurisdictions adhere to the “seat” theory which holds that the governing law of an entity is the governing law of the jurisdiction in which that entity carries out its main activities. Second, some jurisdictions adhere to the “incorporation” theory which holds that the governing law of an entity is the governing law of the jurisdiction in which that entity is incorporated.¹³¹ The UK holds to the incorporation theory.¹³² However, limited partnerships are not incorporated anywhere. They are registered, conceptually to provide an additional feature to an otherwise general partnership. If the partnership then “offshores” to a different jurisdiction, then the fact that the limited partnership is registered at Companies House in Edinburgh does not make it retain any Scottish identity which it would have lost were it a general partnership.

There does not seem to be, of course, anything which prevents a limited partnership from moving its principal place of business offshore.¹³³ Elspeth Berry has raised a number of concerns about altering this.¹³⁴ The question, however, is what the effect of doing so is. The Privy Council recently held:

*“the time has come to recognise that as a general rule the common law will recognise and give effect to limitations of liability which arise under an entity’s constitutive law by reason of the particular status or capacity in which its members or officers assume an obligation. The Board would not confine this rule to entities which have separate legal personality but would apply it to partnerships, including firms registered under the Limited Partnerships Act 1907 or similar foreign legislation”*¹³⁵

¹²⁹ The ability for a partnership to hold land is a relatively new development under Scots law due to issues with the Land Register – these were resolved by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 s70. For the position prior to this section, see Gretton (n 118 above). It remains unusual for a partnership to hold land in its own name but usual to hold other assets in the name of the firm – see G L Gretton and K G C Reid, *Conveyancing* (Edinburgh: W Green & Sons, 2018 5th edition) para 28-01. A similar issue still applies in respect of a Scottish partnership’s inability to hold title to a ship in its own name, due to the specific wording of maritime legislation – see *Duncan v The MFV Marigold PD 145* [2006] CSOH 128, para 14.

¹³⁰ Partnership Act 1890, s4(2).

¹³¹ See discussion in Böckli et al “The Consequences of Brexit for Companies and Company Law” March 2017, University of Cambridge Faculty of Law Research Paper No. 22/2017 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926489).

¹³² See D Prentice “Incorporation Theory – the United Kingdom” (2003) 14 *European Business Law Review* 631.

¹³³ See discussion in Banks (n 6 above) para 29-35, footnote 211.

¹³⁴ Berry (n 38 above) section 5h.

¹³⁵ *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, at [88] – [89].

Several potentially fraudulent SLPs only had non-UK general partners and did not undertake any activity within Scotland.¹³⁶ Does such an SLP's "constitutive law" remain Scots law? If we had a company which was incorporated (rather than an SLP which merely provided additional rights upon registration) then the answer would be a clear yes.¹³⁷ However, for SLPs we need to ask the question of partnership law.

Would a once-Scottish partnership which no longer has any connection to Scotland remain a Scottish partnership? If not, then it may lose the separate personality bestowed upon it as a Scottish partnership. The Civil Jurisdiction and Judgments Act 1982 has several tests for establishing where the seat of an entity is. These tests are relevant for establishing the jurisdiction of the court, rather than applicable law of the business entity. However, in the absence of an "incorporation" of an SLP, the laws applicable to a business entity will, as a matter of Scots law, be those of its domicile, which is inherently linked to the legal system whose courts have jurisdiction over the SLP.¹³⁸ This means that (as SLPs lack an "incorporation"), the legal system that Scots law considers has jurisdiction over an SLP also provides the applicable law for the SLP.¹³⁹ Accordingly, jurisdictional rules for establishing the seat of the SLP have important implications.

For most purposes, an entity has its seat in the UK if:

"(a) it was incorporated or formed under the law of a part of the United Kingdom and has its registered office or some other official address in the United Kingdom; or

¹³⁶ See Transparency International & Bellingcat (n 34 above) pp4-6.

¹³⁷ Its registered office would remain in its initial jurisdiction of incorporation – see Companies Act 2006 s114, and as such it would remain incorporated in Scotland and so governed by Scots law (see also *Re Tayside Floorcloth Co.* 1923 SC 590). This is further elaborated upon in *Carse v Coppin* 1951 SC 223, in which it is stated that the governing law of a company is that of its place of incorporation, per the Lord President at 241.

¹³⁸ P Beaumont and P McEleavy, *Anton's Private International Law* (Edinburgh: W Green, 2011 3rd edition) para 25.35. Scottish discussion of applicable law to partnerships and the court's jurisdiction is intrinsically intermingled – a partnership with its business in India was considered an Indian partnership for the Indian courts to wind up in *Fairweather v Mactaggart* (1893) 20 R. 738, and so nothing to do with Scottish courts or Scots law. Scottish courts have similarly permitted a winding up of the Scottish element of a partnership which operated in England and Scottish in *Rothfield v Cohen* 1919 1 SLT 138, noting that the English courts would need to wind up the English aspects of the partnership under English law at 140. Matters relating to the governing law of business entities is excluded from the Rome I Convention (Regulation (EC) No 593/2008 – see Art 1(f)), and therefore this historic law remains relevant – see *Anton* paras 10.52-10.55.

¹³⁹ The link between a partnership's domicile and its governing law as a matter of Scots law is expressly discussed in *Muir v Collett* (1862) 24 D. 1119 at 1122-1123. This conflation between jurisdiction and governing law also applies in the context of the insolvency of incorporated companies – see *Carse v Coppin* 1951 SC 223, where Lord Carmont stated at 243-244 "*company's domicile is created by registration; it is, so to say, born in Scotland, and however widespread its activities and contacts with other legal systems in the days of its vigour, to Scotland it must come to be laid to rest when its days are done, and according to Scots law should its affairs be wound up.*" This demonstrates the link between jurisdiction and governing law. The phenomenon of governing law being chosen by reference to jurisdiction is noted in Collins (eds), *Dacey, Morris and Collins on The Conflict of Laws* (London: Sweet & Maxwell, 2012 15th edition) para 1-004.

*(b) its central management and control is exercised in the United Kingdom.*¹⁴⁰

How would this apply to an offshored SLP? First, as discussed above, an SLP is not incorporated. There is an argument that it was somehow formed under Scots law. However, under paragraph (a) this is not enough. In addition, there needs to be some official address in the UK. An SLP with an offshore PPOB does not have a registered office or some other official address in the UK. This is the case even if the register has not been updated to reflect that the PPOB has, as a matter of fact, changed. It has also removed its central management and control outside the UK. Accordingly, by moving general partners and (normally as an inevitable result) factually moving principal place of business offshore, the seat of the SLP has left the UK for jurisdictional purposes. The link noted above between jurisdiction of courts and governing law of partnerships means it will lose the “Scottishness” of the SLP and may therefore lose its separate legal personality.

A more complicated version of this jurisdictional test also applies intra-UK. Within the UK, a limited partnership’s seat is in the jurisdiction where:

“(a) it has its registered office or some other official address in that place; or

(b) its central management and control is exercised in that place; or

*(c) it has a place of business in that place.”*¹⁴¹

Accordingly, an SLP with its PPOB in England, central management (normally the general partner) in England and only a place of business in England will also lose its Scottishness. In other words, the same issue arises if an SLP has only English general partners, no Scottish operation, and an English principal place of business. In such circumstances an SLP will lose its Scottishness under this test.

Different formulations apply for interactions with the EU and the UK, for the purposes of allocating jurisdiction as between EU member states under the Brussels I Regulation. Under these rules, the SLP’s seat would be in the UK if it was incorporated or formed in the UK or its central management and control is in the UK.¹⁴² This enables more entities to have their seats within the UK. This is because the requirement seen in limb (a) of the first test outlined above to also have some official address in the UK is removed. Under this test, an SLP offshored to the EU retains its Scottishness if it could be said to be formed under Scots law. This would be of relevance to an

¹⁴⁰ Civil Jurisdiction and Judgments Act 1982 s42(3). For discussion in a Scottish context see *Anton* (n 138 above) paras 8.191-8.192; for discussion in an English context see *Dacey, Morris and Collins* (n 139 above) para 11-079.

¹⁴¹ Civil Jurisdiction and Judgments Act 1982 s42(5).

¹⁴² Civil Jurisdiction and Judgments Act 1982 s43(2). For a Scottish discussion see *Anton* (n 138 above) paras 8.51-8.52; for an English discussion see *Dacey, Morris and Collins* (n 139 above) para 11-007.

SLP with a PPOB, and a general partner, outside Scotland but within the EU. The intra-UK rules for allocating jurisdiction under the Brussels I Regulation also follows that split: if it is “formed” under Scots law then it will retain the Scottishness of its separate legal personality.¹⁴³ This formulation is also extended to allocating jurisdiction to all companies under the Lugano convention.¹⁴⁴ Accordingly an SLP with a Scots law governed partnership agreement would seem to be sufficient to retain its Scottishness if offshored to the EU or any signatory to the Lugano Convention.

However, it seems that an SLP which is offshored to a non-EU country which is not a signatory to the Lugano Convention (such as the Caribbean or Russia) will not have its seat in the UK for the purpose of this legislation. Given that SLPs are not incorporated, and that jurisdiction and applicable law overlap in the absence of incorporation, it seems that this offshoring may be sufficient to remove their “Scottishness”, and thus mean they no longer qualified as SLPs. If they lose their Scottishness then they lose the separate legal personality of the SLP. They would remain listed as SLPs on the public register, of course, but so does every limited partnership even after its dissolution – we have seen that presence on the public register is not a signal that a limited partnership is “live”. Accordingly, existing UK rules could already mean that SLPs which are offshored to certain jurisdictions lose their separate legal personality. This is not a comparatively unusual position. For example, the ECJ has upheld as valid a Hungarian law which stated that a Hungarian limited partnership could not transfer its (equivalent of its) principal place of business outside Hungary.¹⁴⁵ DBEIS is consulting to make the same change. However, this rather misses the point: the UK may already achieve the same end by effect. You can offshore your SLP if you want, but the effect of doing so is that it might cease to be an SLP. Interestingly, tax law provides a quasi-analogous outcome for taxation of LLPs: they are only tax transparent so long as they carry on a trade, profession or business with a view to a profit – otherwise they lose their tax transparency.¹⁴⁶

So, if an offshored SLP loses its “Scottishness” it loses the separate legal personality which Scottishness provides it, unless the jurisdiction to which it is offshored also provides separate legal

¹⁴³ Civil Jurisdiction and Judgments Act 1982 s43(3); For a Scottish discussion see *Anton* (n 138 above) paras 8.51-8.52 and 8.189-8.196; for an English discussion see *Dacey, Morris and Collins* (n 139 above) para 11-007.

¹⁴⁴ Civil Jurisdiction and Judgments Act 1982 S43A.

¹⁴⁵ *Cartesio* (C-210/06) [2008] E.C.R. I-9641. For an overview of current EU law of transferring seats of business entities, see J Benedetti and A Van Waeyeberge “Structural consequences of cross-border company seat transfers within the EU in the latest Court of Justice case law: *Polbud*” (2019) 44(3) *European Law Review* 416.

¹⁴⁶ Income Tax (Trading and Other Income) Act 2005 s863; Corporation Tax Act 2009 s1273. See recent discussion in *The Commissioners for Her Majesty’s Revenue and Customs v Inverclyde Property Renovation LLP* [2020] UKUT 161 (TCC). The analogy is not quite perfect, as the LLP still exists as a separate person, merely its tax treatment changes. The author is grateful to Elspeth Berry for identifying this analogy.

personality for general partnerships. On a theoretical level, this would mark the dissolution of the SLP and its winding up.¹⁴⁷ This would cause the theoretical issues identified above (does the SLP temporarily retain its separate legal personality pending its winding up, or is it immediately deemed terminated?). However, on a practical level, however, it would result with the SLP as a legal person needing to transfer property from being owned by the SLP to the general partner, or elsewhere, as it will no longer be a separate person. This act of transfer would be something that law enforcers would be able to track. In addition, the SLP will cease to exist as a separate legal person. Third parties therefore would no longer have a vehicle to contract with. In such a situation, as noted above, it is unclear the precise point in time in which the separate legal personality would end. It would certainly seem arguable that certain aspects of existing contracts entered into by the SLP extended beyond the necessary dissolution of the SLP. In turn, it seems arguable that the relevant parts of such contracts would be frustrated by impossibility of performance on the grounds that one party to the contract has ceased to exist.¹⁴⁸ This would be coherent with a 1971 case: where a partnership held a lease and a partner died, the House of Lords held that the partnership terminated immediately, and thus it lost its lease.¹⁴⁹

There are three key reasons why the analysis advanced so far in this article is important. First, it provides us with clarity in analysis. Identifying the correct genus of legal concepts or entities is conceptually important. Often, criticisms are made that too many concepts are conflated together, which undermines clarity of legal analysis and argument.¹⁵⁰ However, excessive atomisation of concepts can also miss overlaps between similar items in the same genus.¹⁵¹ Accordingly,

¹⁴⁷ Limited Partnership Act 1907 s6(3).

¹⁴⁸ For a Scottish example in the context of a death of a person, see *Smith v Riddell* (1886) 14 R 95, as discussed in W McBryde *The Law of Contract in Scotland* (Edinburgh: SULI, 2007, 3rd edn) para 26.05; for an English example of incapacity in contract see *Notcutt v Universal Equipment Co (London)* [1986] 1 WLR 641, as discussed in McBryde para 21.30. Similarly, any future contracts purported to be entered into by the SLP would be impossible and therefore void – e.g. *Sibson & Kerr v Ship "Barcraig" Company, Limited* (1896) 24 R 91 (which involved a lost ship), in which Lord Young stated: “Perhaps I should say that I rather approve of the view...that there being nothing to shew that the vessel was in existence at the date of this contract, but everything to suggest the reverse, the contract consequently was void altogether from the beginning, and never came into operation at all.” at 98-99; McBryde paras 20.11 – 20.15.

¹⁴⁹ *Inland Revenue v Graham's Trustees* 1971 SC (HL) 1.

¹⁵⁰ The basic concept of this issue arises from the work of Hohfeld in private law. See W N Hohfeld, “Some fundamental Legal Conceptions as Applied in Judicial Reasoning” 23 (1913) Yale Law Journal 16; A L Corbin, “Jural Relations and Their Classification” 30 (1920) Yale Law Journal 226. Hohfeld identified conflation of concepts and then proposed a schema to resolve such conflation. For our purposes, the initial problem of conflation is sufficient – it can result in unreflexive blending, slippage and ambiguity between concepts - P Schlag, “How to do things with Hohfeld” 78 (2005) Law and Contemporary Problems 185. Hohfeld’s analytical journey started with an enquiry into what rights and duties shareholders in the US enjoyed and owed – see W N Hohfeld, “The Nature of Stockholders’ Individual Liability for Corporation Debts” (1909) 9 Columbia Law Review 285 and W N Hohfeld, “The Individual Liability of Stockholders and the Conflict of Laws” (1909) 9 Columbia Law Review 492.

¹⁵¹ Biology often refers to the necessity to have a balance of both “lumpers” and “splitters”. Lumpers are those who pull similar animals into the same genus, and splitters are those who identify minor differences between similar types of animals, to separate them into different genera – see V McKusick “On lumpers and splitters, or the nosology of genetic disease” (1969) 12(2) Perspectives in Biology and Medicine 298; G G Simpson *The Principles of Classification and a Classification of Mammals* (New York: American Museum of Natural History, 1945) 23.

identifying the true nature of the SLP provides us with conceptual clarity that was previously lacking, which is academically beneficial in and of itself. Second, this clarity provides with it a series of practical implications. The foregoing has argued some possible international private law implications. However, accurate delineation as to the type of business vehicle can dictate tax treatment,¹⁵² affect prescription and limitation of claims,¹⁵³ and (perhaps most obviously) affect duties owed between partners to each other.¹⁵⁴ Accordingly, clarity as to the conceptual nature of the SLP allows for extrapolation into a number of practical areas. Third, it helps law reformers target necessary reforms to SLPs more accurately, as they can commence from a position of conceptual clarity and avoid some of the traps that seem to currently have been fallen into.

6. Wide Implications for Organisational Law

So far, this article has identified that SLPs are merely partnerships with additional features. It then provided a series of potential arguments for law enforcers based on partnership law to argue that the SLP has ceased to exist. These arguments have not been raised yet. It is possible that such arguments have not been raised because the problem of fraudulent SLPs is approached from the perspective of organisational theory underpinned by English law. If so, then the analysis advanced by this article is important to, and has implications for, the theoretical framework for organisational law. This includes company law. Macgregor has recently demonstrated the distinct development of separate legal personality for partnerships in Scotland, and its wider relevance for the theory of entity shielding.¹⁵⁵ The foregoing analysis demonstrates that the separate legal personality of SLPs is relevant for conceptualising separate legal personality even more broadly. What, then, is the dominant view that organisational theory has of separate legal personality?

Analysis of separate legal personality has had three distinct phases. The first was the backdrop of a debate as to the codification of German law in the German Civil Code.¹⁵⁶ This code was based

¹⁵² When the Law Commission proposed to provide separate legal personality to English partnerships (Partnership Law (Law Com No 283, SLC Com No 192) (2003), ch 5.), one of the primary objections was the tax treatment – Berry (n 80 above) 594. This demonstrates how market participants view tax treatment of legal vehicle as being of paramount importance. For a further discussion of tax treatment of partnerships in cross border contexts, see J Hattingh “The tax treatment of cross-border partnerships under model-based bilateral double tax conventions: a case and methodology” (2010) 6 Cambridge Student Law Review 16, especially at pp 17-19 and pp29-32.

¹⁵³ In Scotland, prescription of claims against partnerships can be linked to their date of dissolution of the partnership – Prescription and Limitation (Scotland) Act 1973 s6 and Sch 2, para 1(3), as discussed in D Johnston *Prescription and Limitation of Actions* (Edinburgh: SULI, 2012 2nd edn) paras 6.78-6.89.

¹⁵⁴ Partners owe fiduciary duties to each other partner and to the firm itself - *Helmore v Smith* (1886) 35 Ch D 436 at 444. This has been held to apply to limited partnerships (*BGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296 at para 11) but not to LLPs - *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch).

¹⁵⁵ Macgregor (n 16 above).

¹⁵⁶ See R Harris “The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Business” (2006) 63 Washington and Lee Law Review 1421 at 1422.

on views espoused by Savigny, originating in Roman law and followed by Pope Innocent IV, that a corporate legal person was a legal fiction.¹⁵⁷ Viewing a company as a legal fiction meant that it had no collective will of its own, and that law was able to (and needed to) look through that fiction frequently. Accordingly, this fiction must come from, and the terms of that fiction were able to be decided by, the state. Powers of fictional legal persons should be interpreted narrowly to be only those expressly conferred upon them by the state.¹⁵⁸ von Gierke disagreed and instead argued, based on a Germanic medieval tradition, that corporate legal personality meant that that a company was, in fact, a real entity. If it was a real entity, then the state was less important to the edges of the legal person and had less locus to intervene.¹⁵⁹

The second stage occurred when this analysis moved to the UK, being when the von Gierke tradition was adopted into English law analysis by Maitland.¹⁶⁰ This was supported by Pollock – who concluded his article in favour of the real theory with

*“My only regret is that he asks himself whether ‘the Fiction theory has been officially discarded.’ The time has come, I think, to ask whether any English court ever officially or semi-officially adopted it, and I make bold to answer in the negative.”*¹⁶¹

Pollock argued that courts frequently considered the will of artificial groups. In addition, English courts had had the option to deny the “realness” of the legal personality of the company but had frequently failed to do so.¹⁶² In addition, the early cases on incorporation undermined the concept of the fiction theory.¹⁶³ The two sides of the debate rarely directly engaged with each other.

¹⁵⁷ S M Watson “The Corporate Legal Person” (2019) 19 (1) Journal of Corporate Law Studies 137 at 150; Harris (n 156 above) at 1427; J Dewey “The Historic Background of Corporate Legal Personality” (1926) 35 Yale Law Journal 655 at 665.

¹⁵⁸ There is a theoretical difference between the legal fiction theory and the notions of state concession, but commentators frequently conflate the two together to the point at which these differences become irrelevant – see M H Hager “Bodies Politic: The Progressive History of Organizational “Real Entity” Theory” (1989) 50 University of Pittsburgh Law Review 575 at 580; Harris (n 156 above) at 1424; W W Bratton “Berle and Means Reconsidered at the Century’s Turn” (2001) 26 Journal of Corporate Law 737 at 742.

¹⁵⁹ See J E Friedlander, “Corporations and Kulturkampf: Time Culture as Illegal Fiction” (1996) 31 Connecticut Law Review 31 at 78; R Harris (n 156 above) at 1425.

¹⁶⁰ See F W Maitland “The Corporation Sole” (1900) 16 Law Quarterly Review 355; F W Maitland “The Crown as Corporation” (1901) Law Quarterly Review 131; Harris (n 156 above) at 1433.

¹⁶¹ F Pollock, “Has the Common Law Received the Fiction Theory of Corporations” (1911) 27 Law Quarterly Review 219 at 235.

¹⁶² Pollock (n 161 above) at 224.

¹⁶³ “Indeed it is plain, so far as motives of policy had anything to do with the decision, that the Court intended to give a generous support and liberal construction to the charter in favour of a munificent and deserving foundation. Need we say again that this doctrine is wholly repugnant to the first and most important consequence of the Fiction theory, namely, that a corporation has only that capacity which is expressly conferred upon it?” Pollock (n 161 above) at 229.

However, it has been said that “[b]eginning in the 1890s and reaching a high point around 1920, [this was] a virtual obsession in the legal literature.”¹⁶⁴

This stage was brought to an abrupt halt with an article in 1926 from John Dewey, a philosopher not a lawyer. Dewey argued that the debate was entirely misconceived. He argued that, in either event, the incidents of separate legal personality are whatever the law provides as such.¹⁶⁵ This explained the lack of direct engagement as the debate was filled with legally irrelevant factors. Accordingly, commentators frequently argued at cross purposes. This resulted in Dewey concluding “Each theory has been used to serve the same ends, and each has been used to serve opposing ends.”¹⁶⁶ There were other critiques of the debate,¹⁶⁷ which resulted in a shift of emphasis: if the edges of the corporate legal person were legally malleable, then it was necessary to move to the internal dynamics of such a legal person.¹⁶⁸

This debate has become tacitly more relevant since, sparking a third stage. The rise of the “nexus of contracts” approach to company law¹⁶⁹ and arguments that organizational law enables asset and entity shielding, which are otherwise not possible,¹⁷⁰ can be seen as the modern descendants of the real entity and fictional theories respectively.¹⁷¹ The difference now is that the modern contractarian approach can preclude the state altogether – the state is not even involved normatively in the creation of the legal person.¹⁷²

The organisation theory of corporate legal personality has been most recently directly reviewed by Watson.¹⁷³ Watson is less interested in the metaphysical abstract of separate limited personality

¹⁶⁴ M J Horwitz, *The Transformation of American Law, 1870 -1960: the crisis of legal orthodoxy* (Oxford: Oxford University Press, 1992) at p101.

¹⁶⁵ Dewey (n 157) above. For the abrupt stop, see B R Cheffins, *The Trajectory of (Corporate Law) Scholarship* (Cambridge: Cambridge University Press, 2003) at 38; Bratton (n 158 above) 741- 743; Harris (n 156 above) 1474.

¹⁶⁶ Dewey (n 157 above) at 669. He also stated “The fact of the case is that there is no clear cut line, logical or practical, through the different theories have been advanced and which are still advanced on behalf of the ‘real’ personality of either ‘natural’ or associated persons.” Dewey (n 157 above) 669; Harris (n 156 above) 1474-1475.

¹⁶⁷ See for example M Radin “The Endless Problem of Corporate Personality” (1932) 32 *Columbia Law Review* 643; P Vinogradoff “Juridical Persons” (1924) *Columbia Law Review* 594.

¹⁶⁸ This cleared the way for Berle & Means’ analysis of separation of ownership and control (See A A Berle and G C Means, *The Modern Corporation and Private Property* (New York: Transaction, 1932) becoming the dominant analytical framework – see Bratton (n 158 above).

¹⁶⁹ For an overview see M J Jensen and W H Meckling “Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure” (1976) 10 *Journal of Financial Economics* 305; F H Easterbrook and D R Fishel “The Corporate Contract” (1989) 89 *Columbia Law Review* 1416; M Eisenberg “The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm” (1998) 24 *Journal of Corporate Law* 819.

¹⁷⁰ See H Hansmann and R Kraakman “The Essential Role of Organizational Law” (2000) 110 *Yale Law Journal* 387; H Hansmann and R Kraakman “Organizational Law as Asset Partitioning” (2000) 44 *European Economic Review* 807.

¹⁷¹ Cheffins (n 165 above) p72.

¹⁷² This was a theory which obtained some traction in the US prior to Dewey – see V Morawetz, *A Treatise on the Law of Private Corporations* (Boston: Little, Brown, 1886 2nd edition) at p1-2 – but this did not make its way to the UK at the time – Harris (n 156 above) 1468.

¹⁷³ Watson (n 157 above).

decried by Dewey, but instead in the historical origin of a company formed by registration. Watson reviews the abstract theories and concludes that:

*“the process of incorporation...was and is akin to the process around petitioning for charters for chartered joint stock companies. A concession by the state given if that process was followed made the modern company a legal person and legal entity in the same way as a concession made in the chartered joint stock company a legal person and legal entity.”*¹⁷⁴

This is because incorporation gives the modern company something which it otherwise would not have. This is often justified on the grounds that the attributes of the modern company cannot be achieved through purely contractual ends.¹⁷⁵ If Watson is correct then this would impact the intervention of the state in activities of companies. Ultimately, if the modern company arises from the state, then the state has more locus to intervene in the activities of the company than would arise if the company merely arose from private activity.¹⁷⁶

Watson’s argument is heavily based on the process of incorporation. The process of incorporation has long been used as an argument in favour of the state gift/fiction approach. For example, it has been said that the formalistic approaches of the House of Lords judges in *Salomon*¹⁷⁷ demonstrate that the process of incorporation (which is set by the state) represents the basis of corporate personality under English law.¹⁷⁸ That “incorporation” is the gift of the state has been the received wisdom for a long period of time. In 1916 Holdsworth stated:

*“A corporation has received a privilege from the State, and, in return for that privilege, it can be submitted to such rules as may seem necessary to protect both its members and the public. Its existence is well known, and enquiries can easily be made into its conduct. It is difficult to regulate an unincorporated society, because, if it is proposed to subject it to legal liability, it is apt to dissolve into its component parts, and leave the injured person to the impossible remedy of suing a large number of persons who, individually, are not worth suing.”*¹⁷⁹

¹⁷⁴ Watson (n 157 above) at 153. Watson focuses on three interpretations of the origin of separate legal personality: that it arises from the state, that it arises contractually and that it arises from a real perspective (n 157 above) at 140. The first of these can be related neatly to the traditional fiction approach (which became embedded with state gift approaches), and the latter two variants of the traditional real entity approach – the difference being that the second considers that the state is not involved in the initial creation of the real entity, whereas the third considers that the state may be involved in such initial creation.

¹⁷⁵ M T Moore “Private Ordering and Public Policy: The Paradoxical Foundations of Corporate Contractarianism” (2014) 34(4) Oxford Journal of Legal Studies 693.

¹⁷⁶ Mahoney (n 123 above); A Wolfe, “The Modern Corporation: Private Agent or Public Actor?” (1993) 50 Washington & Lee Law Review 1673.

¹⁷⁷ *Salomon v Salomon & Co* [1897] AC 22 (HL).

¹⁷⁸ Harris (n 156 above) 1464 – 1466; all essays in R Grantham and C Rickett (eds) *Corporate Personality in the 20th Century* (Oxford: Hart, 1998).

¹⁷⁹ W S Holdsworth, “Early History of Commercial Societies” (1916) 28 Juridical Review 305 at 342-342.

For Holdsworth, the core of the 'privilege' received by the company is separate legal personality. This is granted by the state, which justifies more state intervention in the modern company. Indeed, this was historically the rationale for introducing incorporation by registration under English law, arising from a report delivered by Bellenden Ker in 1837 into partnership law. By this time, the Bubble Act had been repealed. Private joint stock companies were freely operating again. Bellenden Ker stated in respect of the repeal of the Bubble Act:

*"A considerable advance was undoubtedly made towards improvement, by the removal of a bad measure, but still no attempt was made for the introduction of a good one, although the importance and necessity of such a measure were generally admitted."*¹⁸⁰

This report therefore included joint stock companies in its ambit, and expressly refers to them as a "type of partnership."¹⁸¹ In particular, the report examined difficulties in litigating against large numbers of partners. It also explored whether limited partnerships, based on continental forms, should be introduced into the UK.¹⁸² However, its key consideration was how to deal with the somewhat ethereal concept of a "company." It was concerned with who is entitled to act on its behalf and who was entitled to defend the company.

The Bellenden Ker report referred to a case¹⁸³ to highlight the real issue that arose in respect of the incorporeal nature of the company. This case is a precursor to Holdsworth's concerns about the difficulties in regulating unincorporated societies. It involved a shareholder attempting to dissolve a joint stock company. The 14 directors of the company each filed long, separate answers which contained a lot of detail. The court held that all 300 other shareholders should have the ability to answer separately should they wish:

*"The result was, that it became impossible to proceed with a suit in which the plaintiff might, as a preliminary measure, have had to take office-copies of 300 answers, each with a long schedule, and where on every alteration of the firm, by death &c., he would have to revive his suit, &c."*¹⁸⁴

To remedy this evil, Bellenden Ker wished to centralise the company into one simple point of contact that parties would be able to use to sue the company. As a result, a register of joint stock companies with partnership of over 15 members should be created. Partnerships over such size should be required to register. Upon such registration, the company should be able to be sued in

¹⁸⁰ Bellenden Ker "Report on the Law of Partnership" 1 March 1837 p6.

¹⁸¹ Bellenden Ker (n 180 above) p5.

¹⁸² Bellenden Ker (n 180 above) p1.

¹⁸³ *Van Sandau v Moore* 1 Russell's Reports 441.

¹⁸⁴ Bellenden Ker (n 180 above) p6.

the name of any partner.¹⁸⁵ Bellenden Ker noted that limited liability would not be provided to such companies, so no minimum capital requirements were necessary.¹⁸⁶ Thus, for Bellenden Ker, the key public policy purpose for enabling incorporation by registration was to enable a company to obtain separate legal personality and so more easily be sued. This report was included as an appendix for the Gladstone report which ultimately resulted in the creation of incorporation by registration in the Joint Stock Companies Act 1844.¹⁸⁷ Limited Liability, however, was not introduced until 1855, some 11 years later.¹⁸⁸ Therefore, the main purpose for enabling incorporation by registration, and the rationale for the claim that the modern company is a gift from the state, was the public good created by separate legal personality under English law.

If separate legal personality is considered inherently linked to a state gift, it is easy to understand how the arguments advanced earlier in this article have been missed. If separate legal personality depends entirely on the state then, once the state has gifted separate legal personality, the state must be involved in its removal. If state involvement (by incorporation through registration) was necessary for separate legal personality, then it is a natural corollary that state involvement (by dissolution) is necessary for such separate legal personality to cease to exist. In other words, from an English historical and theoretical standpoint, it is logical to presume that the act of registration is inherently linked to the separate legal personality of the SLP. It is also logical to presume that so long as the SLP remains duly registered then it will retain its separate legal personality. However, under a textual analysis of the legislation this is not the case for SLPs. This means that SLPs do not adhere to a state gift approach of separate legal personality: which is the current dominant theory.

Indeed, this is not the case for Scots law more generally. For Scots law, separate legal personality arises because of a private bargain. Macgregor has shown¹⁸⁹ that it has done for a long time. If Scots law acknowledges the creation of separate legal personality by private arrangement, it must also acknowledge that separate legal personality can fall away without express involvement from the state. The companies registration legislation only applied to Scotland in 1856.¹⁹⁰ This was when the concepts of separate legal personality and limited liability were combined into one centralised statute. As Scots law already acknowledged separate legal personality for partnerships, it did not

¹⁸⁵ Bellenden Ker (n 180 above) p8.

¹⁸⁶ Bellenden Ker (n 180 above) p9.

¹⁸⁷ Harris (n 13 above) p273.

¹⁸⁸ L De Koker "The Limited Liability Act of 1855" 2005 *Company Lawyer* 130.

¹⁸⁹ Macgregor (n 16 above).

¹⁹⁰ Joint Stock Companies Act 1856.

matter if joint stock companies in Scotland were classified as partnerships. This is because the ill identified by Bellenden Ker did not arise in Scotland. As Clark stated in 1866:

*“[S]o satisfactorily did the Scottish law of joint stock companies work before the introduction of the Registration Acts, that, except for the purpose of obtaining limited liability and more precision in management, the want of such enactments was scarcely felt; while in England the evils of the existing system had become so intolerable that legislative interference was altogether indispensable.”*¹⁹¹

Accordingly, there was no need for Scots law to introduce incorporation by registration to achieve the public good required in England. Indeed, in Scotland, the words “partnership” and “company” were used interchangeably prior to 1856.¹⁹² Against this background, even the Bubble Act has been described as “dead-letter so far as Scotland was concerned”.¹⁹³ State involvement in the law of business entities in Scotland only became necessary when limited liability became available to companies in the 1850s. Even this was almost unnecessary. Scots law had a “sliding doors” moment for partnerships in 1757, in a case known as the Arran Fishing Case.¹⁹⁴ Forty fishermen in the West of Scotland formed a partnership. Each partner agreed to pay £50, and delegated management of the partnership to certain ‘directors’ of the partnership. A provision in the partnership agreement stated:

*“provided, nevertheless, that nothing herein contained shall be understood to import a power to the directors to compel any partner or subscriber to pay or contribute any more money to the stock than the sum by him subscribed.”*¹⁹⁵

A creditor of the partnership sued two or three of the partners in respect of the creditor’s contract with the partnership. There are two different reports of the judgment. According to one report, the case was dismissed on the grounds that the wrong people had been sued.¹⁹⁶ The other case report, however, states that the court also decided “*that the several partners were not liable beyond the amount of their subscriptions.*”¹⁹⁷ The second case report has been verified by the notes of Lord Kilkerran.¹⁹⁸ Robertson Christie stated:

¹⁹¹ F Clark, *A Treatise on the Law of Partnership and Joint-Stock Companies According to the Law of Scotland*, (Edinburgh: T&T Clark, 1866), p6.

¹⁹² See J Robertson Christie “Joint Stock Enterprise in Scotland Before the Companies Acts” (1909-1910) 21 *Juridical Review* 128 at 129.

¹⁹³ Robertson Christie (n 192 above) 137.

¹⁹⁴ *Stevenson v MacNair* (1757) 5 Bro. Sup. 340.

¹⁹⁵ Robertson Christie (n 192 above) 139.

¹⁹⁶ *Stevenson v MacNair* 1757 Mor. 14560; Robertson Christie (n 192 above) 140.

¹⁹⁷ *Stevenson v MacNair* 1756 Mor 14561; Robertson Christie (n 192 above) 141.

¹⁹⁸ *Stevenson v MacNair* (1757) 5 Bro. Sup. 340 at 340.

*“[T]he Scottish judges thus at this early date arrived at a limitation of liability which they supported on a reasoned basis. The principle... would cover the recognition of partnership en commandite, which ultimately received full legislative sanction in the Limited Partnership Act of 1907.”*¹⁹⁹

In other words, in the Arran Fishing Case, a form of common law SLP was already acknowledged by the court. Frustratingly, this case was not followed by the Scottish courts.²⁰⁰ So when Ayr Bank (which was not incorporated) collapsed, the court required the partners to contribute to the shortfall.²⁰¹ In other words, not only did Scots law not require incorporation to provide separate legal personality, it almost did not require incorporation for limited liability.

This is important because it challenges the dominant narrative. The Scottish experience undermines normative claims that separate legal personality has always developed as a gift of the state. Under initial English companies acts, incorporation granted separate legal personality. Separate legal personality was already available by private bargain in Scotland. Later companies acts enabled limited liability for shareholders, which had (albeit briefly) been acknowledged in Scotland. It is not unusual in company law commentary for separate legal personality and limited liability to be conflated together. Even Gower’s company law states that:

*“It follows from the fact that a corporation is a separate person that its members are not as such liable for its debts. Hence, in the absence of express provision to the contrary, the members will be completely free from any personal liability for the company’s debts.”*²⁰²

With respect to this leading text, limited liability does not follow from separate legal personality. Instead it is a different conceptual feature of the company. This phrase has appeared ever since the second edition of the textbook,²⁰³ but now has a footnote indicating that this is not the case for Scotland. Given the 11-year time gap noted above between the introduction of incorporation by registration to enable a company to have a separate legal personality and the introduction of limited liability, this was not always the case in England either.

The Scottish position undermines Watson’s normative conclusion that the origin of corporate legal personality is a gift from the state as its features are not available elsewhere. Scots law provides evidence for the modern take on real entity theory: the state is not necessary to create the separate

¹⁹⁹ Robertson Christie (n 192 above) 143-144.

²⁰⁰ R Anderson “Partnerships, LPs and LLPs” in I G MacNeil ed *Scots Commercial Law* (Edinburgh, 2014) p 136; Macgregor (n 16).

²⁰¹ *Douglas, Heron, and Company, v Alexander Hair* 1778 Mor. 14605.

²⁰² Davies and Worthington (n 12 above) para 2-9.

²⁰³ L C B Gower *Modern Company Law* (London: Stevens & Sons Ltd, 1957, Second Edition) 66.

legal personality of the firm nor to regulate its activities.²⁰⁴ Whether we can square this with Watson's claim that incorporation is a gift of the state, once again, depends on analysis of the word "incorporation". We refer above to incorporation as being the creation of something where otherwise there was not. Within this, however, there would seem to be two possible interpretations. First, we can consider that incorporation creates a new thing which could not be created elsewhere by other means. Second, we can consider that incorporation creates a new thing (a particular company with a specific company number), whether or not the same characteristics could be acquired elsewhere.

Watson intends the argument to extend to the first.²⁰⁵ However, Scots law shows that this cannot be the case. All that market participants needed to do to obtain separate legal personality was have a Scottish partnership. This could potentially be achieved in some circumstances just by adopting Scots law as the governing law of the partnership agreement. This could not definitively be said to be the case for limited liability. However, Watson predicates the argument on separate legal personality. For example she states "[t]he recognition that the modern company is a separate legal entity is a legacy from antecedent corporations' law that we can trace back at least as far as Lord Coke."²⁰⁶ This means that legal personality comes purely from the state, but it is not true under Scots law. This means that separate legal personality cannot be said to, universally, derive only from the gift of the state.

If the first option (that the state gives something you cannot attain by other means) ceases to be valid, this leaves us with the second option. This is to reduce the importance of incorporation to merely being the creation of a new company, whether the characteristics of such company could be achieved elsewhere or not. In other words, we must adopt a take redolent of Dewey: the state gives you what the state gives you. This retains the state gift argument – a new company is not created until the Registrar of Companies (a state official) incorporates the company. However, it is purely descriptive of the legal regime and undermines the normative weight of Watson's claim. Ultimately, this reformulation risks tautology as it effectively argues that being a company is a state gift because you only obtain a company when the state official processes the forms. It is not an argument that there is something inherent in incorporation (or separate legal personality) which the state has to provide because law does not enable it to arise elsewhere, or through other legal means.²⁰⁷ In other words, to adopt such an approach dilutes the force of the argument to be that

²⁰⁴ See Macgregor (n 16 above).

²⁰⁵ This is one of the ways that she debunks the private ordering version of the real entity theory Watson (n 157 above) 160.

²⁰⁶ Watson (n 157 above) 165.

²⁰⁷ Dewey's explanation for the irresolution of the debates between the two theories at the time he was writing – "person signifies what law makes it signify" (Dewey n 157 above) at 655 - strongly overlaps with recasting Watson's theory

separate legal personality for the specific legal vehicle of the company comes from the state, as do all aspects of the company.²⁰⁸ But this attribute can be obtained by other means, and is not unique to the company.²⁰⁹

There is an alternative conception which does not water down the force of Watson's logic, merely its application. We could limit Watson's argument to English law. Under English law, it is the case that separate legal personality is only obtainable by incorporation, which is undertaken by the state. Under Scots law, it is not. Watson's argument can proceed entirely unamended if limited to only English law and not Scots law. This would, however, create a fundamental conceptual difference between English and Scottish companies. An English company's characteristics are, normatively, solely a gift from the state; a Scottish company's characteristics also arise under private ordering.

Acknowledging a difference in the basis of company law between English and Scots law has implications for company law developments. Features of English companies would originate as a gift from the state, and features of Scottish companies would originate by private ordering. Conceptually, this interpretation would justify state intervention in English company law much more than would be allowed under Scots company law. This may prove difficult given that English and Scottish companies are governed by the same legislation.²¹⁰

In addition, such a conception would remove some of the normative force of Watson's arguments. They would become merely descriptions of a legal system, rather than theoretical arguments of universal application. As such, any change to the application of the law would translate to a change in the theory. Separate legal personality for partnerships is mostly seen as a matter of convenience and practicality in England.²¹¹ In 2003, there was a proposal to give separate legal personality to English partnerships.²¹² Had this occurred, Watson's arguments would be limited to historical weight within the English jurisdiction. As separate legal personality could then be obtained by other means, the theoretical weight behind the argument that the company was a gift from the state would be undermined.

as "the state gives you what it gives you". In each case, re-casting the debate removes the normative force from the argument.

²⁰⁸ For example, under this line of analysis the state would gift the company its name and registered office, as these do not change until the registrar of companies processes a form to change them (Companies Act 2006 s81(1) and s87 respectively). This does not mean that names or addresses per se are gifts from the state.

²⁰⁹ In the same way that all legal persons have a name and most have a residence.

²¹⁰ Companies Act 2006, s1.

²¹¹ Partnership Law (Law Com No 283, SLC Com No 192) (2003), ch 5. More accurately, the lack of separate legal personality is seen as a matter of inconvenience and impracticality.

²¹² (n 211 above) Appendix A.

In conclusion, the Scottish historical perspective provides a major disruption to contemporary corporate law theory. Once we factor Scottish separate legal personality, there are fewer options available to those who argue that the modern form of company is a gift from the state. Ultimately, they have a choice. First, they can water down their arguments to near tautology. This can be achieved by shifting the emphasis away from the state providing characteristics which cannot be otherwise obtained, towards the state enabling merely the specific legal vehicle in question. This weakens the force of their argument. Second, they can limit the territorial application of such arguments to only apply to English law and not Scots law. This undermines the universality of their theoretical approach.

Watson states that:

“A modern form of concession theory that identifies the modern company as a persona ficta most accurately identifies the unique source of corporate legal personality. Companies would not be separate legal entities and legal persons were it not for a statute.... Institutional and real entity theories that recognise how the company changes as it operates in the world, and participant theories, that identify the contractual and agency-based natures of the external activities of the company, have their place so long as it is recognised that the modern company owes its existence and status as a legal person to a statute and therefore to the state.”²¹³

This statement is only true if we subject it to one of two caveats. First, the analysis could be limited so that this only applies to a company’s corporate status. This would mean that it did not apply to the wider theoretical construct of separate legal personality in business entities. This would render the foregoing statement true as there would not be an entity prior to incorporation. However, this approach concedes that the same advantage could be obtained by different means.

Second, this statement could be limited in geographic extent to England only. Each of these have their downsides and undermine the claim to be of universal normative truth. One option waters down the argument to a description of the existing paperwork involved in obtaining a company number. The other option is to acknowledge a fissure in theoretical company law at the Tweed. This fissure has not yet been discovered. However, if it exists it is of significant import for the theoretical basis for interventions in the activities of companies north and south of the border.

7. Conclusion

Entities registered as SLPs have been involved in fraudulent activities, and this is a clear wrong to be remedied. This wrong can arise from two possible issues: either there is a structural flaw in the

²¹³ Watson (n 157 above) 166.

legal framework of SLPs which needs to be resolved, or fraudsters are falsely claiming to use SLPs in ways that are not already permitted by the current framework. On a conceptual level, the former requires changes to the legal framework for the business entity. Conversely the latter requires more effective enforcement of the legal framework. Existing analysis of the problem with SLPs has proceeded based on the former, whereas this article has demonstrated that there are at least a few arguments for the latter. At its core is one simple question: is registration sufficient evidence of the existence of an SLP, or do we need to look deeper?

A textual analysis of the Limited Partnerships Act 1907 reveals that a limited partnership is not a distinct business entity in and of itself, but a general partnership upon which additional features are added. Once we reconceptualise a limited partnership in such a way, we can gain more clarity as to what a limited partnership is.

By reconceptualising the limited partnership as merely a “general partnership plus” we obtain conceptual clarity as to the nature of an SLP, from which we can extrapolate further features of an SLP. Further to this, we can also see additional arguments that law enforcers have in respect of fraudulent SLPs. If the SLP’s business is, on set up or afterwards, illegal then the SLP no longer exists. It may exist to ingather its assets for dissolution and distributions. However, all obligations on it to distribute those proceeds to partners are unenforceable. If it has offshored, then it may lose its Scottishness and with it its separate legal personality. This means its property will no longer be able to be held by the SLP and as part of the winding up process will need to be transferred. Each of these are powerful weapons for law enforcement. The threat of such activity is also important.

Ultimately, SLPs have received a bad press because fraudsters have used them. Obtaining transparency will help enforcers see through these vehicles to trace fraudulent activity. This is helpful in and of itself: the shining light of publicity and transparency has resulted in the fraudsters scuttling away from the use of SLPs. However, it is possible that fraudsters were not looking for a carefully collaborated set of legal characteristics from their choice of vehicle. Instead, they may simply have required some form of official looking certificate and a register on which the entity will appear. If so, the use of SLPs rather than English limited partnerships, or any other vehicle with tax transparency and low filing requirements, may have been accidental in the first place.

In any event, it would be helpful to tidy up the register. This can be done in two ways. First, as proposed by the government, defunct limited partnerships should be able to be removed from the public register. This can be extended – it should be possible for parties to be able to petition the court to remove limited partnerships from the register. Second, the certificates issued for limited

partnerships currently look very similar to certificates of incorporation for companies. However, their effect and meaning are different in law. Clarifying further on the face of the certificate its limitations will inform third parties. This will help them become able to start asking their own questions. If counterparties dealing with SLPs become aware that a certificate is not the end of the matter, their own diligence may reduce fraudulent activity by SLPs.

The approaches proposed by this article may have been missed due to the modern dominant theory of separate legal personality. That Scotland allows separate legal personality by a private arrangement has a significant impact on organisational theory. It undermines the argument that the modern company provides characteristics that are inherently gifts from the state. An English company obtains separate legal personality and limited liability from incorporation and can obtain neither elsewhere. This is only the case for limited liability in Scotland and, even then, historic case law has held that limited liability may be available by private contract. This means that those arguing in favour of a modern “state gift” theory must reformulate their universal proposition. It either must become that the state gifts to modern companies only things the specific legal entity incorporated, which has features which normally could be obtained elsewhere. Alternatively, it must be limited in territorial extent to English law. The former will weaken the strength of the theory, the latter will make it descriptive and so reactive to legal changes.

The arguments advanced in this article may provide a few more arguments to help fight fraudsters. Their effect is, however, of dubious importance - perhaps all fraudsters required was a certificate and a register. If we update both of these then the issue may resolve itself. In addition, in order to deploy any of the weapons proposed by this paper, law enforcers need to know about fraudulent activity: a Catch 22. But informing the public that a certificate and presence on a public register does not, in and of itself, mean that a valid SLP exists will help those transacting with SLPs to raise the required questions. We can also shift the debate on reform of SLPs: perhaps the core legal rules work, but are not sufficiently enforced. In any event, all involved in the dialogue need to stop assuming that a certificate of registration of a limited partnership is in any way evidence that the limited partnership still exists. This will help provide a necessary additional tool to help combat criminal misuse of the corporate vehicle.²¹⁴ Whilst interesting in and of themselves, SLPs provide broader insights to organisational law theories: we either need separate English and Scots law company theory, or have a modern “Dewey moment” and reduce the weight of normative claims made.

²¹⁴ See Lord et al (n 37 above).