

Note on the benefits & negatives of a Limited Liability Partnership

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| 1 | What is a Limited Liability Partnership (“LLP”)? | <ul style="list-style-type: none"> • LLP’s were created by the Limited Liability Partnerships Act 2000 (LLPA 2000). • They represent a vehicle for two or more persons intending to carry on a lawful business with a view to making a profit. • Individuals within an LLP are known as members rather than partners. • Partnership law does not generally apply to LLPs. • Members of an LLP would ordinarily enter into a LLP Agreement (the equivalent to the Partnership Agreement that partners of an ordinary partnership would enter into). |
| 2 | What are the pros? | <p>a) Clearly the biggest benefit is the fact that the members of the LLP have (subject to a few exceptions noted in section 3 below) limited liability. Indeed, an LLP is responsible for its liabilities, while each member's liability will, generally, be limited to the amount that it has agreed to contribute to the LLP itself.</p> <p>b) Unlike an ordinary partnership, an LLP has its own legal identity separate from its members and as a consequence, and in its own right can:</p> <ul style="list-style-type: none"> ○ enter into contracts ○ sue or be sued ○ hold property, and ○ grant a floating charge or debenture over partnership property <p>c) In many respects linked to the above point, if previously unincorporated practitioners (whether operating as singled handed GPs or as a partnership) were to incorporate as an LLP they could, subject to any restrictions in the relevant contracts or regulatory requirements/ prohibitions, assign or transfer their existing contracts to the LLP itself.</p> <p>d) An LLP has historically been used as a choice of form of corporate entity (over and above a company limited by shares) for many given they attract preferential tax treatment as although it is regraded as having its own legal identity in law, for tax purposes an LLP is normally treated as a partnership for tax purposes.</p> <p>Subject to specific circumstances that would alter the general approach, this is beneficial as with a company limited by shares you find that i) the company pays corporate tax on profits and then ii) the shareholders pay tax when extracting money from the company (done via dividends). An LLP is not taxed on its profits and instead the members are taxed on their share of the profits that it (the LLP) generates.</p> |



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| 3 | What are the cons? | <p>a) The PMS and GMS Regulations do not recognise LLPs as an entity capable of holding GMS or PMS contracts. Changes in legislation will therefore be required before they become a viable option.</p> <p>b) It is likely that any GP practice that incorporates as an LLP will face potential uncertainty as to whether commissioners</p> <p>➤ <i>Could legally transfer their existing core contract into the LLP.</i></p> <p>As a starting point, and assuming LLPs were recognised as a legal entity capable of holding a core contract, there is currently no automatic right to transfer or assign a core contract between legal entities within the GMS or PMS Regulations.</p> <p>With this being the case there are really only two alternate options available:-</p> <ul style="list-style-type: none"> • Seeking a contract variation (variations being allowed under the GMS and PMS Regulations) to change the named party from the individuals to the LLP; or • Bringing the original core contract to an end and having a new one issued to the LLP. <p>There is some doubt, and certainly some inconsistency amongst commissioners, as to whether a change in the contracting party can legitimately be achieved by way of a contract variation.</p> <p>As a consequence, and unless the GMS and PMS Regulations are amended to allow core contracts to be assigned or transferred to an LLP from individuals or a partnership, it is highly likely that the only way in which practitioners could move their core contract into an LLP is to have new contract put in place.</p> <p>➤ <i>Could avoid some form of procurement procedure laid out in the Public Contracts Regulations 2015 (“the PCR”).</i></p> <p>The PCR effectively places contracting authorities under an obligation to advertise and pursue some form of procurement process where they are awarding contracts. As a consequence, if commissioners were to cancel and reissue core contracts then they would have no alternative but to follow the advertising and procurement requirements in the PCR.</p> <p>But what about if a contract was transferred or varied? This is a bit less unclear and a complete and full opinion on this issue alone will be needed if GPC decide to push ahead with the process of lobbying for change in relation to LLPs.</p> <p>Regulation 72 of the PCR specifically states that public contracts may be modified without a new procurement procedure being followed in six specified circumstances.</p> <p>One such circumstance is where the contractor is replaced as a consequence of either i) an unequivocal review clause or option contained in the contract, or ii) a complete or partial succession into the position of the initial contractor where the new operator fulfills the criteria for qualitative selection initially established at the time the contract was</p> |
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| | | <p>awarded.</p> <p>On the face of it this would enable a successor body to take over a core contract but it is certainly conceivable that this could be challenged on the grounds that LLPs were not, at the time the contract was originally issued to the contractors, identified as a body capable of holding the same.</p> <p>c) Positive action needs to be taken to establish an LLP. This differs from ordinary partnerships that are deemed to be established automatically where two or more people come together to run a business with a view to making a profit. The positive actions involve the submission of forms at Companies House (known as Form LL IN01).</p> <p>d) There are ongoing disclosure and filing requirements that must be satisfied. These include:</p> <ul style="list-style-type: none"> ○ Formally notifying Companies House of a change of member; ○ Formally notifying Companies House of a change in the accounting reference date; ○ Submitting an annual return (identifying the members, registered office address and where the records of the LLP are kept) ○ A requirement that all websites and stationery refer to the LLP, its registered LLP number (which will be issued by Companies House when incorporated), registered address etc. <p>e) The limited liability protection may be lifted where members have:</p> <ul style="list-style-type: none"> ○ given personal guarantees, or ○ been found to be: <ul style="list-style-type: none"> ▪ negligent, or ▪ guilty of wrongful or fraudulent trading (effectively trading despite being in an insolvent position). <p>f) Members of an LLP would need to have an LLP Agreement. If they fail to do so they will be governed by the default provision as identified in the LLPA 2000 (i.e. the principal legislation). This would be an unsatisfactory position for GPs to find themselves in. To name some of the issues that the default position creates:-</p> <ul style="list-style-type: none"> ○ All members share equally in the capital and profits; ○ No majority of members can expel another member; ○ There are no effective limits on what a member can commit the LLP to (e.g. entering into contracts over a set amount) ○ It doesn't cater for GP specific provisions (including sessional commitments of the members, the need to remain on the performers list, suspension etc.) |
| | <p>Other considerations</p> | <p>Transferring of contracts.</p> <p>Leaving aside the possible issues discussed in section 3 (b) above in connection with how commissioners may treat core contracts that are “transferred” it is worth considering what a practice may face if it were to seek to transfer its staff contracts and any premises lease agreements into an LLP.</p> <p>Staff.</p> |

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| | | <p>In the event that an existing practice were to incorporate as an LLP the partners / practitioner would need to (or at the very least would be deemed to) transfer the business they operated as a going concern to the LLP.</p> <p>As part of this the partners / practitioner will need to follow the requirements under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). This requires the staff to be consulted and informed on the changes that are taking place, the date they will take place (or proposed date) and the legal, social and economic implications of the transfer of the business to the LLP. This should just represent an administrative task but nevertheless it is a task that must be followed.</p> <p>Leases.</p> <p>Most landlords will be exceptionally cautious of accepting an LLP as a tenant (given its limited liability status) without personal guarantees being given from the individual members.</p> <p>This is something that the GPs will need to negotiate. Such negotiations tend to be easier where a new lease is being entered into. They do, however, prove more difficult where GPs are seeking to “assign” an existing lease that is in their personal names into a newly formed LLP. That said, the GPs can offer ‘sweeteners’ including a rent deposit or a time limited guarantee.</p> |
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Concluding comments:

As a legal entity, the use of an LLP could well help mitigate “last man/ woman standing issues”.

As mentioned above, LLPs have their own legal identity which are capable, in their own right, of entering into and/or holding contracts. With this being the case GPs incorporated in this way could look to ensure that all i) staff contracts , ii) commercial contracts (such as Peninsula, equipment hire or IT systems) and ii) premises agreements (leases) vest with the LLP.

Having regard to the above, and assuming none of the circumstances in section 3 (e) apply, if the practice became unviable and had to close the subsisting liabilities held by the LLP would rest with the LLP itself. If the LLPs assets were insufficient to meet these liabilities then an individual member would not pick up the shortfall. Their liability is limited to the sums they have contributed to the LLP itself.

Notwithstanding the above it is important to consider the following:-

- i) GPs are already entitled to establish corporate entities (in the form of companies limited by shares). These entities are similarly entitled to enter into and hold contracts. They also have limited liability status. The exposure of shareholders to liability (on the basis that the nominal value of the shares in the company are all fully paid up) is limited to their share capital.

It is, however, important to note that in many industries where partnerships were the traditional model of ownership (such as the legal profession), LLPs have undoubtedly proven the choice ‘incorporated’ vehicle to use given their tax treatment and the fact that they prove less of a divergence from the traditional partnership model.

- ii) There would need to be a change in the PMS and GMS Regs to allow these contracts to be held by LLPs.
- iii) There is a risk that commissioners would have to carry out a procurement exercise to facilitate the change in the contracting party to an LLP.

Disclaimer:

- This membership guidance note is for information, gives general or limited guidance only and should not be relied upon solely or treated as a complete and authoritative statement in respect of its subject matter.
- Members are advised to seek legal advice if they are considering the establishment of an LLP as a vehicle through which they run their practice.

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