The Evolution Of The Partnership And The Predator Partner

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"*Whilst I am grateful to counsel and solicitors for their presentation and assistance in this matter, the legal battles raging between these two brothers are unedifying, unpleasant and exceptionally wasteful. They must obviously be inflicting pain and harm on others, as well as themselves. I urge them on both sides, with the assistance of their lawyers, to give peace (of some sort) a chance; and whatever the feelings and obstacles, to make supreme efforts to resolve or at least reduce their remaining differences, before it is too late*."
So said the judge in the recent case of Campbell v Campbell,[fn] Campbell v Campbell [2017] EWHC 182 (Ch).[/fn] an English partnership dispute case (with a significant international element) that was fought hard all the way to trial, and with the prospect of a long and expensive post-trial accounting exercise still to come.

The Campbell case concerned a general partnership (under the Partnership Act 1890). Since its creation in 2002 the UK limited liability partnership (LLP) has been available as a trading entity and has been widely embraced in many sectors as an alternative to general partnerships. More recently, some partnerships and LLPs have converted to limited liability companies.

The result is that most cases that now present as "partnership disputes" involve LLPs, and many now involve limited companies. In this article I lump all of the different types of owners of these entities together as "partners", not least as it is now common for more than one entity type to be involved in a single dispute. Each entity type has its own separate set of laws, and increasing internationalization

means that in some cases the dispute spans two or more jurisdictions. The Campbell case, though essentially an English general partnership dispute, also involved numerous limited companies and other assets in six jurisdictions, with litigation in three of them.

With greater complexity comes new opportunities for raising issues, taking positions, blurring dividing lines and other devilment. This and other elements have accelerated the evolution of the creature I call the “predator partner”.

In a bygone age most partners were all-powerful and largely irreplaceable. Partnership was for life, profits were easier to come by, and antecedents were at least as highly prized as business acumen.

Then along came a couple of recessions, numerous business insolvencies and, in the professions, the introduction of those dreaded implements of management – time-recording and billing targets.

Together with the transfer of businesses into corporate entities came the corporatization of management. Many partnerships saw conversion to LLP to be a stepping stone along the path to a new era of structured business governance.

The model partner in such a business is often required to confine his activities within his own limited domain, reporting to his head of department, who in turn reports on upwards. The previously flat, egalitarian, collegiate structure of partnership has changed shape dramatically to become a steep-sided, hierarchical pyramid. Most partners don’t see or hear what is going on at the summit, let alone ascend to it.

On the face of the modern partnership/LLP/shareholder agreement the playing field has tilted alarmingly in favour of the business entity. In many cases a partner’s remuneration is decided by a small committee, a partner may be exited without cause via a majority vote of the board, and when he is exited he may be deprived of a share of the true value in the business, and forbidden from any conduct that might result in clients or customers leaving with him.

Thus the typical all-powerful and largely irreplaceable partner of yore has evolved to become a powerless, placeholder partner, keeping the chair warm for the next incumbent of his post. He is the counterpoint to, and the prey of, the predator partner.

This has radically altered how many partnership disputes, especially in the professions, tend to arise and are resolved. Unless a placeholder, prey partner has deep pockets and a lot of gumption, or some gross injustice has been perpetrated that simply has to be corrected, many such disputes tend to resolve themselves on a basis that is more the product of management magnanimity than force of arms.

In these days of consumer protection, all-encompassing regulation and ever-narrowing margins, it is harder to accumulate wealth. To supplement the income coming out of the increasingly shallow pockets of clients and customers, predator partners sometimes resort to perfectly legal methods of transferring value from their business partners to themselves.

Those at the helm of a business are in a position over time to introduce ever more stringent provisions into its governing agreement, all in the name of benefiting all partners by strengthening the business at the expense of the rights of the individual.

The majority of business leaders who hold the fate of their colleagues in their hands use their power responsibly and reasonably, but some use it to increase their personal wealth. Discretions must be exercised within certain limits, but the extent of those limits is often arguable.

In the course of a dispute the “take from your partners” predator partner may not get everything he wants, but he will get more benefit out of the eventual resolution than he would have received had he not raised an issue.

Other species of predator partner do not bother with carefully planned restructuring or seizing and exercising power by formal means. Still within the bounds of legality is the “everything is ambiguous” predator partner. Vague and equivocal understandings, often reached orally, are the seedbeds of disputes. In many cases, when the time comes for an informal agreement to be honoured, it crumbles into dust before the eyes of the prey partner who thought he had understood what had been agreed.

At least the “everything is ambiguous” predator partner admits what he said. He just casts doubt on what he meant. But the “I didn’t say that” predator partner simply presents an alternative version of what was said and done. In such cases careful forensic analysis of whatever documentary and electronic evidence may exist may point to the truth. But many a mediation proposal has been rejected on

the grounds that until full disclosure has been given the “I didn’t say that” partner will simply keep denying the truth.

If the partners can be persuaded to mediate, what can the mediator do to reconcile the opposing sides? To stretch the metaphor, the predator will usually expect to devour the prey. It is in his nature. He may see the mediation as an opportunity to weaken his prey, by causing his prey to expend money and energy on the mediation, while the predator advances menacingly and refuses to compromise.

While some predator partners can appear to be almost deranged in their determination to win, at any cost, in a twisted way safeguarding their reputation may be important to them. If word of their modus operandi gets out they may have trouble inveigling their next victim or keeping any other colleagues they like to regard as placeholders under control.

I have known cases in which a brutal compulsory exit has been followed by a series of voluntary exits by key partners who are either voting with their feet or acting by way of self-preservation, before the next snap of the jaws. Compromise terms that conceal the truth or present it in a different light, that is confidentiality clauses, non-disparagement clauses, and agreed statements as to what has just happened, may be worth a lot of money to the predator partner or partners.

While predator partners do not set out to appear generous and considerate, they might be prepared to agree terms that give that impression, if they can be persuaded that there may be advantages for them in doing so.

Respect, another valuable commodity, tends to fall into two categories, namely respect that is freely given, and respect that is given only grudgingly or out of fear. The latter form of respect is essentially a set of submissive behaviours that is required by the person who demands the respect, which he uses to control others. Such demanders of respect may be prepared to give something of value in a compromise, in return for ingratiation, a humble apology or other forms of prostration.

Predators may also be persuaded that the prey does not warrant the chase. In sectors such as private equity, in which participants make sums of money that dwarf the remuneration of the average business owner, negotiations can sometimes be brought to a successful close by pointing out that while the participants are arguing over a point with a value of x, they could be engaged

earning 10 times x.

Business partnerships and their partners will keep evolving. The law is also evolving in turn. 2016 saw the first ever instance of equitable forfeiture being applied to seize the profit share of a misbehaving English LLP member. [fn] Hosking v Marathon Asset Management LLP [2016] EWHC 2418 (Ch).[/fn] There will be other evolutions as time goes by.