

BUSINESS ORG NOTES

WEEK 3 – unincorporated forms e.g. partnerships

Partnerships

- Founded upon agreement of parties, express or implied
- Partners may be natural or corporate persons
- Must be carrying on business in common – implies a repetition of acts
 - Requirement that each partner must be a principle in the business
- Not necessary that each partner have the conduct of transactions or be active in the business since it is possible to have a sleeping partner
- Objective of profit is an essential feature of partnership

Determining existence of partnership

- Section 2(1): rules for determining if a partnership exists
- Rules are not conclusive
- **Parties characterisation of their relationship**: the legal status which partners have sought to assign – relevant but not decisive
 - If parties intended to do all the things that would constitute them partners in law, no effect will be given to their declared intention not to become partners
- **Sharing net profits** – prima facie evidence of partnership, but does not of itself make them a partner in business
- **Sharing of losses** – equal contribution to losses in the absence of agreement to the contrary (s 24(1)(1))
 - Sharing of losses not essential to finding of a partnership – can still exist although one or more partners agree to indemnify the others against loss
 - Indemnity will not alter the liability of each partner as principal for the debts and obligations of firm
- **Status of principle** – those acting in partnership do so as agents of all the partners, who are the principles, even if “sleeping”
 - Also a possibility of persons to allow themselves to be held out as partners of a firm even when they are not partners: s 14
- **Management participation** – ways in which persons deal with each other, are treated in internal management and participate in control or management decisions is also significant
 - This is not essential since there are sleeping partners who are still principles
- **Mutual trust and confidence** – the way they deal with each other and arrangements they make for decisions or to settle disputes can show absence of such trust
 - This feature and consequent fiduciary obligations can be displaced by a contrary provision in the partnership agreement – therefore mutual trust and confidence is not strictly essential

- **Contribution to capital** – not strictly essential e.g. a partner may contribute know-how or an agreement to work in the business full time instead of contributing capital
 - Joint or part ownership of property does not of itself create a partnership, whether profits made by its use are shared or not

CASE: Re Megevand, Ex parte Delhasse

- Every element of partnership was in this relationship, but other provisions in the contract prevented it from having this operation: parties meant relation of lender and borrower and not of partners
- However, the use of the word “lend” and the reference to the Act were a mere shame
- The agreement was in truth and substance an agreement for a real partnership

CASE: Badeley v Consolidated Bank

- No longer right to infer either partnership or agency from the mere fact that one person shares the profits of another
- When you look at the transaction with a view to ascertain the real true nature of it, it is evident it was a bona fide loan upon security, and not a participation in profits with a view to create a partnership

Principle characteristics in determining a partnership

- Two legal characteristics of a partnership are essential:
 - Absence of distinct entity status for partnership
 - Unlimited liability of partners for firm debts and other obligations
- Other features are associated with and characteristic of a partnership, but can be altered

Requirement 1

- A partnership is not recognised by law as a distinct legal entity:
 - Firm and its members do not have a distinct entity status – any capacity of acquiring rights and obligations independent of those of the individual partners
 - Rights and liabilities of a partnership are not more than the aggregate of individual partners
 - A firm can therefore not be convicted of a crime, but its individual members can be personally liable
- A partner cannot be both a principle and an employee of a firm
- Partnership does not have perpetual succession; its duration is determined by the default rules
- Partnership property must be held and applied exclusively for the purposes of the partnership and in accordance with the partnership agreement
- A firm, as an association of persons, comes to an end on the death or retirement of one of them

Requirement 2

- Each partner has unlimited liability to the creditors of a partnership – rule is not affected by agreement between parties

Agency authority to bind fellow partners

- Partner may bind the firm under s 5
- Two main grounds for liability of a principal with respect to the dealings by an agent with an outside:
 - Where the agent has actual authority
 - Where agent has ostensible or apparent authority
- Actual authority: involves an agency created by consensual agreement
- Implied actual authority: can be implied from the usual or customary authority involved in the relationship between principle and agent, may also arise from special features of the relationship, or from an actual course of dealing which establishes an actual authority outside what is usual
- S 5(1) imposes no liability on partners for acts done by a partner who is acting on their behalf only, and not on behalf of the firm
- Ostensible authority provides some protection for the outsider and scope for confident reliance upon the authority of a professing agent
 - Principle is said to have represented to the 3rd party that the agent is authorised to enter into transactions with the outsider, even though the agent may have no actual authority
- S 5(1) on ostensible authority: every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership
 - This section excludes liability where the third party knows the agency has no authority or does not know or believe the agent to be a partner

Limited partnerships

- Creation of 2 classes of partner: general and limited
- Limited partners contribute to capital and share profits but do not participate in management
 - If they take part in management, they assume unlimited liabilities of general partners
 - Registration of limited partnerships is required: condition on limitation of liability
- General partners have unfettered control over the partnership business, subject to terms of partnership agreement

Other characteristics of partnership

- No person may be introduced as a partner without the consent of all existing partners
- If a partner dies, the deceased representatives or heirs have the right to become partners, in the absence of contrary agreement
- Thus, partnership interest is often not freely transferrable in the absence of the consent of the other partners