

AGENCY

This Qu requires disc on whether A has been created, if it was, with what type of auth & did the A (.X..) act within the scope of authority and lastly if A breached scope of auth the remedies available to Pr's/TP's if breached

STEP 1: DEF: Capacity of 1 person to create legal relations btw Pr & TP
Internl Harvester Co of Aus P/L v Carrigan's Hazeldene Pastoral Co

STEP 2: ID THE PARTIES Principal (Pr), Agent (A), Third Party (TP)

STEP 3: ID TYPE OF AGENCY 1) **Special/Ltd** = for particular trans or purp or for trans outside normal course of bus 2) **Gen** = power ltd to trade, profn or bus of partclr kind: must be w/i normal course of bus 3) **Universal** = under a general POA where A can do any actions specified/authorised by Pr 4) **Del Credere** = A guarantees Pr payment for goods from TP.

STEP 4: HOW IS THE A CREATED A can be created in a #(5) of ways, inc express or implied agreement or app by estop. From the facts it appears that no express Agmnt has been given to [X] either verbly or in form of writing/deed (**Crabtree-Vickers P/L v Aust'n Direct Mail**; **Scott v Davis**)

1) **Express:** Pr expressly (oral/written) gives A auth (**Scott**) 2) **Implied:** by agreement or conduct (**Hely-Hutchinson v Brayhead Ltd**) = can be implied from: circ's || Pr's conduct 2 achieve Pr's purp || thru actions / rel 'ships based on what is usual or customary || to give business efficacy (**ANZ Bank v Ateliers de Constructions Electriques de Charleroi**) || rules eg stock exchange (**Mercantile Credits Ltd v Jarden Morgan Aus Ltd**) 3) **Apparent/Ostensible or A by Estoppel:** Creates the appea of an A by words or actions when in reality it doesn't exist (**Freeman & Lochyer v Buckhurst Park Properties (Mangal) Ltd**; **Tooth v Laws**) 4) **Oper'tn of Law (Agency of Necessity):** Even where parties did not intend to create A, the law can recognise it. In **Emergency:** 4 Req's: (i) existing K (ii) an emergency (iii) A cannot comm w PR to get Pr's instruct (iv) A must act in good faith (**Great Nth'n Railway Co v Swaffield** - horse case & hld v's **Springer v Great Western Railway Co** not hld as cld have comm'd w Pr) 5) **Ratification** = Pr can confirm/ratify an act done by an A for Pr which wasn't orig'ly bind'g on Pr which is equivlnt of orig auth (**Frank v Brown**) 10 **Pre'reqs for Ratifctn:** 1) A must K as an A on behalf of Pr & TP must know this = TP must know A is an A 4 Pr 2) Pr must be named/ID'd when K made w TP = Rati can't occur when there is an undisc Pr ((Pr's name not mentd so failed: **Keighley, Maxsted & Co v Durant**) 3) Pr must exist at time of K otherwise A runs risk of being treated as Pr (**Kelner v Baxter & Black v Smallwood**) 4) Pr must have legal cap to enter K (eg K signed by minor) 5) Rati must be w/i reas time = must occur b/4 time fixed for performance of K 6) Ratifi is not effective if orig trans is a void K = no amount of rati can make void K good 7) Rati will not make a forged sign good, BUT a person who knows their signature has been forged may be estopped from denying the forgery is gen if they knowingly lead others to believe that the signature is genuine 8) Pr must have full knowledge: Rati is not possible if Pr doesn't have full knowledge of A's actions (**Lederberger v Mediterranean Olives Financial** - signing tax returns is not ratifi of contents) 9) Rati must apply to the whole K: partial rati carries no validity 10) Rati can only be retrospective (**Bolton Partners v Lambert**: Rati hld. Pr granted order of SP against TP, bc Pr's rati relatd back to when A accepted TP's offer - which was when the K was made)

STEP 5: ID TYPE & SCOPE OF AUTH 3 types of A auth, actual, implied

and apparent/ostensible. From the facts it is clear that... 1) **Actual** = conferred by Pr either expressly or by action (**Crabtree**: Qu1: Was there valid K as Peter didn't have act or app auth 2 comit Co. Hld No. .: No K. Qu2: Did Bruce Jnr have act or app auth Hld No. .: No K. Only 3 man mgmt. team or full board had auth. 2) **Implied** = A has auth to do anything

incidl (extra's nec. to fill the gaps) to carrying out acts w/i A's act auth (**Hely-Hutchinson v Brayhead Ltd**). May b implied: to give bus effic (based on exist'g trade or custom or consi course of past dealings); where Pr held A out as having ostensible auth; where A is presumed bc of operation of law eg spouses; where A acts in accord w usual auth of A's of that class (MD/CEO/Bnk Mgr **First Energy (UK) Ltd v Hungarian International Bank Ltd**); where a person acts as A of necessity. Eg's

ANZ case: banking of CHQ's was implied AA to give bus effic; **Hely:** TP won V Pr for losses in failed take over bid as A (CEO/default MD) has imp AA based on past dealings & Title/Role; 3) **App/Ostensible (A by Estoppel)** = Pr creates appear of A by acts, words or conduct when in reality it doesn't exist. The rule in **Crabtree-Vickers P/L v Aust'n Direct Mail** was that if A not been proply delegated then liab rests w A not Pr. .: case has been criticized b/c how can a TP know whether person hold'g themslvs out has act auth? Per Turw & ltr codfd in 129CA rule is TP's can assume that anyone held out by a Co as A has auth & several subsequent cases have ruled to protect a TP who has dealt w an A who has app auth & they give effect to the reasonable expec. of parties & common bus practices btw parties. They recog that Co is resp. for A's & its unrealistic for TP's to check the auth of each A (**Panorama Develpts (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd**; **Pacific Carriers Ltd v BNP Paribas and Heperu Pty Ltd v Morgan Brooks Pty Ltd**). **App on basis of title (GM/MD/Sec/CEO)** must meet 3 Step Rule of Law from **Freeman**

STEP 6: DUTIES OF A's TO PR/LIABILITY A must: 1) Follow Pr's instruc's or A in breach & liable to TP (**Torre Asset Funding Ltd v The**

Royal Bank of Scotl& = A in breach 2) Act in pers. not deleg unless auth (**John McCann & Co v Pow**) 3) Exercise due care, skill & diligce. Breach creates K'tual & ACL liabty (**Keppel v Wheeler**: Pr awarded damages in diff btw 2 prices 4 breach of A's duty 2 Pr; **Mitor Investmts** care below standard). **Dargusch v Sherley Invest'mts P/L:** Rule: A must disclose to Pr any advice given & get Pr's consent. Held: Breach & A not entitled to commission) 4) Act in Pr's inter'st. If breached can sue for K'tual & fiduci duty & under ACL (**Hewson v Sydney Stock Exchange** = Running own bus (share trading) & stock brokr'g=comercial morality comprid; **Lintrose Nominees Pty Ltd v King** = Cannot serve 2 Pr's as temptation for A to favour one at expense of other) 5) Maintain confid (any breach which results in loss can allow Pr to sue under K's or civil liabi's (**Weld-Blundell v Stephens**) 6) Keep seper & propr acct's 7) Not make a secret profit ie all \$'s received must be given in full to Pr (**Regal (Hastings) Ltd v Gulliver**) 8) Not rec secret commiss (A is bribed/induced 2 reveal sensi comms info do smthng) creates K'tual & crim liability, Pr not pay A, cancel A, sue4frau

STEP 7: DID THE AGENT ACT WITHIN THE SCOPE OF AUTHORITY? <Subject to impl auth being detrmnd by Crt, would then need to assess if X has acted w/i the scope of A authority. On the facts...Yes bus efficANZ>

STEP 8: LIABILITY Did X breach duties owed in step 6? <.: to detrmn ultimate liability it must be detrmnd if X has breached any duties to Pr as A. Here, X has breached owed to Pr in the fiduciary relationship>

STEP 9: A'S RIGHTS VERSUS PR 1) To receive payment/commission (**MoneywoodP/LvSalamon Nominees P/L**) 2) To indemnity (holds A inno against actions if auth'd) & reimbursmt 3)of lien (A has right of lien withhld goods) & 4) of stoppage in transit = if Pr hasn't not cleared due payments.

STEP 10: LIABILITY OF A'S & PR'S TO TP'S Gen Rule: A cannot sue or be sued on a K btw Pr & TP where: * A discloses to TP, A relatisp & name(s) of Pr; OR *A discloses A relatisp but doesn't name Pr (**DOUP**)

DOCTRINE OF UNDISCLOSED PR: 7 limitations:Clashes w rule that only parties to a K have rights under K. Occurs where A & TP K .: A doesn't disclose to TP that they r acting as an A for their Pr. .: , TP thinks solely dealing w A as a Pr in their own right. Under DOUP, although Pr is undisc, may still be able to sue & be sued on TP/A K, but it is ltd by 7 principles:

1) A must be acting w/i authority & have act auth at time of K'ing 2) A must adduce evidence to show who Pr is/existence of Pr so that Pr can sue or be sued (**Humble v Hunter**: son signed as owner of ship (Pr) BUT UDPr (mum & owner of ship) could not sue on A/TP K as oral evi not adm to show A signed on behalf of UDPr; **White v Baycorp Advantage Busi Infor Services Ltd**: A rental K btw lessor of copier (Konica = A) & customer (TP) made on behalf of finance customer (UDPr) allows for Pr to enforce K against the TP if they arrear in payments. .: , in this case it was leasing a copier & so b/c there was nothing in their K to show otherwise it didn't matter whether the A or Pr was enforcing payment of the debts owed) 3) K does not excl possi of an UDPr: UDPr cannot enforce A/TP K if K involves something personal to A & ID of the person w whom TP is dealing is critical to K (**Said v Butt**: Pr (Said) banned (ie k excl) from attending theatre so asked A to buy tix 4 Pr in A's name. Pr refusd entry & sued MD (TP) for not letting in. Since Pr's ID wasn't disc there was no K w Pr & DOUP did not let Pr sue the TP) 4) Defences for

JOINT VENTURES

STEP 1: DEFINITION <JV is described as an assoc of 2+ persons (natural/Corp) who **agree by K** to engage in a com (usually adhoc but can be specific task/time/term/ongoing) undertaking for joint profit by combining respective resources (**Brian P/LvUnited Dominions Corp Ltd**)

Distinctions between JV & Pship: **1)** JV = Individual Liability (avoids general liability) || **2)** Parties in JV keep their separate id || **3)** JV involves sepa ventures for each of the parties || **4)** Assets are owned separately & not together || **5)** Parties receive their share of profits separately (sharing of profits does not **in itself** create Pship) || **6)** Each party must discharge their own separate liabilities in regards to the venture (**Cox v Coulson**). <Under a JV, liab for debts & obli for each party is sep & parties are not mgrs., Prs or A's for each other (**Cox v Coulson**) & if truly determ by Crt as JV, there is no fidc duty btw parties (**Farrah Constrs P/Lv Say-DeeP/L**)

Where there is profit sharing & a more integrated business structure = a greater likelihood that JV will be a Pship (**Canny Gabriel Castle Jackson Advert'ing P/L v Volume Sales (Finance) Ltd (Canny)**)

Sglt transaction = more likely to be JV but not complity indic'tive (**Canny**)

OR P'SHIP? = s5(1) PA: 3 parts: "carrying on" "a business" "view of profit"

JV ADVANTAGES: Liabty for debts is sep., acc to fin services & new cust technolg's, control of own liab, disposal own share, maintn own bus priv, can transfer/assign rights w/o consent of other JV, can conduct sep. business & **can compete in diff areas w JV** (**Hospital Products LtdvUS Surgical Corp'tn**), flex'bly w tax as can receive \$'s sep'ly, Fid = dont owe same ° of confi & mutual trust to co-ventures as P's/ rec profs sep

JV DISADVANTAGES: Parties able to avoid fiduciary duties, no support in legisl reg's, potential conflicts & disputes w/o the help of a written Pship Agree'mt, JV's can fail if objectives not clear to all parties or if imbalance btw what parties bring to JV eg in financial resources, expertise or time.

STEP 2: DO PARTIES IN JV HAVE FIDUC DUTIES W EACH OTHER?

Depends on: 1) Form which particlr JV takes || 2) Obli's which JV's have undertaken: hld **may** b FD bfre Admnt signed (**UDC LtdvBrian P/L 1985**: (1) JV **may** be analysed as a Pship (even if parties called it a JV) (2) If **fiduc. obli** is alleged then may entail a duty of discl. over common inter (granting of: MG over l& or security by way of charge over an asset) ⊗ single undertaking w a view to make a profit **can be a P'ship** if the **3 elements of P'ship r satisfied**: **UDC Ltd v Brian Pty Ltd [1985]**. **Held:** JV was PShip so fid duty owed ∴ as B unaware MG, ent to ½ profits like PS). **NB:** descri agree'mt as JV doesn't make it so (**Canny**) **Hld:** P: \$'s shared. **Hospital Pro:** Hld: Breach of K as didn't fulfil order BUT no Fid Duty owed

STEP 3: TERMINATION OF JV - LOOK FOR ANY BREACHES OF K!

Period of JV expires || Grounds specified in the JV Agreement (that they made) occur || JV unable to achieve goals || Losses resulting in continuation of JV unviable || Failure of JV party to fulfil their obligations

Tests for Pship: If any of the **below fail** then structure is a JV:

⊗ carry on business in common? ⊗ mutual agency? (ie 1 holds them's vs out as A for firm)? ⊗ holding out btw P's based in each State (disclaimer in place = No = JV)? ⊗ Tax trn filed nationally? (No = JV) ⊗ Profits shared w other P's in other States? (No = JV) (**Duke Group v Pilmer**).

ASSOCIATIONS

STEP 1: DEF <X, Y & Z have formed the ... club when they agreed to join together in the pursuit of... (**Smith v &erson**) which falls within 1 of recog categories of purposes, here being [social, religious, eductnl, lit'ry artistic, charitable, scifi, adv & prom of soc, cult, poli, trade] (**R v Judges of FCOA ; Ex parte Wtrn Austr'In Nat. Fball League (Inc)** (**Adamson's Case**)).

AD Uninc: No formalities, inexp. Priv & confi **Inco:** can K in assoc name, can borrow \$, enter K's, buy prop, gain gov fund, perp'tl succession, ltd legal liab **DIS Uninc:** No perpet'l succ'sn/interst not transmsbl, comm mem may be sued pers (but can offset against \$'s of club) **Inco:** expens's from annl audit/fil rtns, compl with legi, should take out public liability insurance.

Defi'g Char of Assoc (NFP organ): (Conservative & Unionist Central Office v Burrell): **1)** Must be mems of assoc (who are obli'd to comply w mutual rigts & assoc's based in rules of assoc'n; a Com'te w Presi, Treas & Sec & Gen members = everyone else) **2)** Must be K bin ding mems (mutual Agmnt to work towards cer goals; divi of rules/officer eg treasur, mgr, who does \$'s, how will decisions be taken/recrd) **3)** Consti armgmt 4 meetngs of mems & apptmnt of comites & Offi **4)** Ability for mems to join leave at will **5)** Perp'tual exist reg/less of chge in composit (**prov they r Incorp**) **6)** Must be a hist'cl mo in time when creatd by # of pers coming toghtr 2 form assoc **NB: Unin'd: 1, 2, 6 esst!**

Procdr to form Assoc: Uninc Little formly req'd, must have mutual undr standing of mems adopt name & Consti &/or set of rules or by-laws, reg w ACNC if want tax conces. & DGR status **Inco** Rgrt Co=lgI ent (**s21(a), 25**), hve seal, keep ade accts, hold an GM, lodge an rtn, inc in name (**s29**)

STEP 2: PROFIT? Aims must not inv mems making direct pecuniary profit for selves, unless chartbl aim (**Adamson's**: is Assoc if trading activity (fete) is incidental to other principal activity (ie the eduartistic/charitable aim). **Financial gain is permissible: just not for members** If does =law will deny status of assoc: **Sal/Bene's**: allowed accord'g 2 market price 4 services prov'd. Above market price = making profit (**Adamson's**).

STEP 4: LIABILITY Gen presume: Mems dont intend to be K'tually bound (**Cameron v Hogan**: expulsion frm NLP so sought injunc so had to prove K'tual rel. Hld: No K). **Remedy:** aggrieved mems = Crt can issue decltry relief **Exceptions:** **Reputn at stake or physicl /mind injury** (**Plentyv7thDy Adventist Church of Point Pirie**) || Comte mems acting w/i auth will be pers liable on K's they entered into (**Bradley Egg Farm v Clifford**: sngl - single act *Cf: **Carlton Cricket & Football Social Club v Joseph**: NOT - actions on behalf of org spanning over 21 years. **Torts:** pers liable **Incorporated Assoc's s5(1) Associations Incorporations Act 1981(Qld):** An association can be formed if: **(a)** has 7+ members **(b)** is **NOT** a Corp, Pship or school organisation **AND (c)** IS not for profit! **NB: s5(1)(c) is qualified by s4 (negatively framed factors below): s4(1) NOT** formed or carried on for the purpose of financial gain (**ie not 4 pecuniary gain!**) for its members merely because: **(a)-(h)**, **(a)** makes a fin gain & not divided amongst mems **(c)** provides its members with facilities or services (eg café on premises but \$'s recycled into accts) || Trades w its: **(d)** mems **(e)** public but trade is NOT substantial **(f)** makes a financial gain **∴ more of these that r met = more likely to be 4 profit and be considered a JV**

FRANCHISING

Purpose: regulate conduct of participants in franchising towards each other & to ensure they r sufficiently informed b/f entering into a franchise.

Elements & Def: Per **s9 CA** & **cc4&5 Franchising Code of Conduct (FCOC)**, a franchise is an Agmnt under which a F'or grants a F'ee for a fee the right to carry on a bus, supplying or distributing goods or serv's under a sys or mark'tg plan substantially detmnd, contld or suggtd by F'or **under an assocd TM, advertising, comm'l symbol or other (IP)**.

3 Types of Franchise: **1)** Product = trade name franchise: indep distrib'tr using manuf. trade name/mark eg Caltex || **2)** Processing/Manufacturing = where know-how, ess'tl ingredient provided eg Coke || **3)** **System**= manner of doing business & franchisor grants entire system of bus eg Maccas.

ADVANTAGES: benefit from existing name & reputn = increases chance of sml bus success, can compete w bigger comps as has economies of scale, access to group marketing/advertising etc, access 2 estab'd/proven bus model, access to mgt support/training, may b easier to secure finance

DISADVANTAGES: Being locked into binding F agreement, F'or opening new F'ees in same area, F'ors locking F'ees in to set ↑prices for stock or spec'fng goods to be sold, inadeq. assistance from F'or, misrep. by F'or

Key Provisions from FCOC ✓ **c4** Elements of franchise ✓ **c5** Definition ✓ **Obligation for F'or & F'ee & to Act in Good Faith: c6 NEW & SIGNIFICANT (eg 7-11, F'ees breached as underpaid staff, mispre staff hrs. Also Burger King/CorvHungryJack'sP/L: BK breached ✓ PRE-K'tual disc req's:cc8-11: Requirm't 4 F'or to maintain disclosure doc: c8(1) ✓ Purpos of disc doc: c8(2) ✓ 9(1) F'or must give F'ee copy of: (a) FCOC (b) disc doc (c) copy of FA ✓ 10 F'ee able to seek leg adv ✓ 11 F'or must give F'ee copy of Info stamnt **POST-K'tual disc req's: cc13-17: c13 & 14(2)(a)** F'or must give F'ee copy of lease ✓ 11 F'or must give F'ee copy of docs re MG/loans/sec dep to TP's ✓ 16 if F'ee reqsts **disc doc** F'or must give w/i 2mth signing FA. **Termntn: ✓ in cooling off=26 ✓ By Breach by F'ee:27 ✓ No Brch by F'ee:c28 ✓ spec circ: 29 ✓ 33 freedm 2 form assoc **Disp Resltn:cc34-45):******

Poss Bus Structures 4 Franchise **1)** Sole trader **2)** Pship **3)** Co (= best)

FA's- typical coverage: Extent of F'ise: Oblis of parties & length of F'ise eg how & what & where, season specific dem&s (ie world cup products for 2 mths) **Trademark/logo:** Protec'n & market'ng: Hamburglar not in Au but Mc Café is **Territorial exclus'ns:** eg not in train stations/airports = reserved 4 F'or **Paymnt arrang'mts:** upfront/royalty on profits, freq, currcy **Temporal effect on royalties:** Ⓢ based effect, value of F'ise < w yrs so this is how royalty is calculated & effect time has on royalty. **Min. perf parameters** eg sell x # of profits in y period of time **Comptn restraints:** post term rest'ts re knowhow/sens. info/IP use **Interpretation/choice of law:** Home jurisdtn: if in Aus = Aus law cant have foreign law. If starts here then still regltd by **FC**

Leasing arrangmnts: Indep w a L&lord or owned by F'or (buy out cl)

BREACH: Misrep c20 (Freeman) ✓ Non-compl' w c11(1) ≠ FA void: **Mastr Education Services Pty Ltd v Ketchell. **Remains uncertain as to which instances of non-compliance may invalidate a FA.** 1st mediate**

Dymocks Franchise System (NSW) v Todd: Can terminate FA due to 1 party's expression of **inability or unwillingness to meet K'tual requ's** of FA to be **anticipatory breach of FA** which equals **repudiation**, where you can then sue for damages as **Dymocks F'ise Sys vTodd** did & won.