

WEEK 3: PARTNERSHIP AND THE NATIONAL LEGISLATIVE FRAMEWORK

Chapter 1 – Partnership

1.1 Definition Of Partnership

Partnership Act s 1(1): ‘the relation which exists between persons carrying on business in common with a view of profit’

- Persons who have entered into business are collective a ‘firm’
- Partnership is a relationship founded upon agreement of parties (express or implied)
 - Partners may be natural or corporate persons, but must be carrying on ‘business in common’
 - *Smith v Anderson*: Carrying on business means repetition of acts, and excludes acts performed that are never repeated
- Each partner must be principal in societas (common bond) between associates, however, they do not need to be active (sleeping/dormant partners)
- Requirement of profit: essential feature of partnership (distinguishes from other forms of non-profit clubs, joint ventures etc.)

1.2 Rules and Indicia for Determining Existence of Partnership

Partnership Act s 2(1): Several specific rules to which regard must be had in determining existence of partnership

- Parties’ characterisation of their relationship: Relevant, but not necessarily decisive
 - *Wiltshire v Kuenzli*: Look at actions. If they’ve done everything relevant to become partners, then their declared intent to not become partners is no longer relevant
 - *Re Megevand; Ex parte Delhasse*: M and S had a business partnership agreement. D lends them a sum of money, stating that it is by way of ‘loan only.’ D was to share in percentage of profit, was able to inspect books, and losses were to be borne by all 3. Held: ‘If ever there was a case of partnership this is it’
 - *Badeley v Consolidated Bank*: Badeley loaned money to Smith and Smith assigned his plant machinery and other items as security. Badeley to get 10% interest and profits. Similar to case above, but can’t term business, just take over (if S bankrupt). Also didn’t share in losses. Held: *Genuine loan, not a partnership*
- Sharing net profits: *Prima facie evidence of partnership*
 - *Partnership Act s 2(1)(3)*: Number of instances where share of profits does not of itself make recipient a partner:
 - Payment of debt out of accruing profits of partnership
 - Remunerations of servants or agents by share of profit of business
 - Annuities to widow or children of deceased former partner paid from partnership profits
 - Advance of money by way of loan to persons carrying on business with interest varying profits or by share of profits of business provided that contract is in writing and signed by parties
 - Receipt of portion of profits in consideration of sale of goodwill of business
- Sharing of losses: However, not essential to finding partnership
 - Indemnity will not alter liability of each partner as principal for debts and obligations of firm in suit of persons external to partnership
- Status of principal: *PA* carries implication – those acting partnership do so as agents of all partners, who are principles, even if dormant/sleeping
 - Also provides for liability of persons who allow themselves to be held out as partners of firms, even though they are not partners
 - *Cox v Hickman*: The liability of one partner for the acts of his co-partner is in truth the liability of a principal for the acts of his agent
- Management participation: Decisions taken out by supposed partners can be influential, indicating existing partnership. Not essential, since there may be sleeping/dormant partners

- Ways in which persons deal with each other, treated by internal management of business, participate in control/management decisions
- Mutual trust and confidence: Not strictly essential
 - *Birchnell v Equity, Trustees, Executors and Agency Ltd*: Mutual confidence of partners is the life blood of the concern
 - May be displaced by contrary provision in particular partnership agreement, perhaps even to point of excluding fiduciary relationship
- Contribution to capital: Not strictly essential
 - Common to find no capital contribution by partner, but to find contribution of know-how/agreement to work full-time in business
 - Similarly, partnership may involve no capital stuck, but mere sharing of expenses/profits
 - *PA s 2(1)*: Joint or part ownership of property does not of itself create partnership

1.3 Principal Characteristics of a Partnership

Two distinct characteristics in Aus and English law are fundamental:

- Absence of distinct legal entity status; and
- Unlimited liability of partners for firm debts and other obligations

Absence of distinct legal entity:

- Rights and liabilities of partnership no more than collective of those of individual partners
 - Cannot acquire rights/obligations independent than those of individual partners
 - Therefore, firms, as such, cannot be convicted of crime/commit torts/incur contractual obligations → but individual partners can
- Legal consequences:
 - Partner as principal of firm cannot also be employee of firm
 - Partnership does not have continuous succession → duration determined by default rules in Act, subject to any special agreement made by partners
 - Partnerships cannot own property
 - Nevertheless: Common reality to consider partnerships as having existence distinct from members
 - Firms strictly come to end with death of one partner → although partner agreements can overrule

Partners bear unlimited liability for debts/obligations incurred by partnerships

- Rule is not affected by any agreement between partners
- Common law of agency distinguishes between two main grounds of liability:
 - (1) Where agent has actual authority from principal: express or implied
 - Involve agency created by consensual agreement between principal and agent, scope or which includes any power implications from words used, usages of trade or course of dealings made between principal and agent
 - *PA s 5(1)*: Imposes no liability on partners for acts done by other partner who is acting on own behalf only
 - (2) Where agent has ostensible (or apparent) authority
 - Provides some protection to outsiders and scope for reliance upon authority of professing agent
 - Most clearly perceived in case where principal, through specific representation, represents that agent has authority to bind principal in transaction → however, principal may have no direct dealings with third party
 - *PA s 5(1)*: Excludes liability where third party knows that agent has no authority to act for firm in particular matter, or does not know or believe agent to be partner
- Limited partnerships allow for limitation of liability of some partners:
 - Principal feature: Creation of two classes of partner → general and limited partners
 - Limited partners: Contribute to capital/share profits, but have no right to participate in management
 - ❖ *PA s 67*: If they do take part in management, then assume unlimited liabilities of general partners

- ❖ *PA s 67(2)*: Liability limited to capital contributions to firm
- General partners: Unfettered control over conduct of partnership business

1.4 Other Unincorporated Forms of Association Compared

Unincorporated non-profit associations: e.g. clubs (not partnerships, not associations for gain)

- Major issue: Extent of personal liability of members of committee of unincorporated association
 - *Peckham v Moore*: Peckham (rugby player) entered into contract with a club. He sustained an injury and applied for workers' compensation. Action against the club failed on grounds that it was not a person recognised by law. **Held: Could not take action against club, but could take action against individuals of committee that were in place at the time of injury**

Unincorporated joint ventures: e.g. single venture activity, large-scale contractual joint venture, one-off action

- Sometimes difficult to determine whether relationship between joint ventures makes them partners. Generally: Partnerships → Profit. JV → Shared product. In particular, the fiduciary duties that are a key feature of partnerships are not typically a feature of JV. However: Below case
 - *United Dominions Corporation Ltd v Brian Pty Ltd*: Joint venture for development of land between UDC and Brian (Brian did not know about/receive any profits). **Held: In Brian's favour → UDC had fiduciary relationship to Brian. Relationship itself gives rise to fiduciary obligations**
 - Fiduciary obligations may arise during negotiations for partnership or joint venture before any agreement has been concluded if parties acted upon proposed agreement (as in this case)

1.5 The Fiduciary Obligations of Partners

Birtchnell: 'A stronger case of fiduciary relationship cannot be conceived than that which exists between partners'

PA s 28-30: Restates equitable obligations: **Requires partners to render true accounts + full info concerning partnerships to other partners**

- Even if association determined not to be partnership, relationship between ventures may be fiduciary → determined by relying on equitable rules which govern fiduciary relationships generally
 - Key considerations:
 - Nature and incidents of legal structure parties have adopted (such as contractual JV or incorporated company)
 - Whether there exists special kind of vulnerability or reliance between parties
 - Whether there exists strong degree of trust and custodianship between them

Dean v MacDowell: Partners are not bound to account to his co-partners for profits made by him carrying on separate business of his own