

Partnership Law – WEEK 10

A. Business Relationships

I. Introduction to the law of agency

Introduction

- The law of agency is a branch of the law of contract
- Agency is a relationship whereby one person (principal- P) authorises another person (agent – A) **to act on their behalf**, to bring the principal into a contractual relationship with a third party (TP)



- There are three necessary factors on commercial dealings for an individual to deal through others: LOCATION, TIME AND EXPERTISE

The relevance of the law of agency

- This is an important area both principals and agent to each other
- In a partnership, partners of the other partners and may bind them (as an agent can bind his or her principal); and
- A partner is also a principal and may be bound by the acts of the others (as a principal may be bound by the acts of an agent)

Authority of agents		
<ul style="list-style-type: none"> ❖ The term used by the law to describe the extent of an agent's power is authority ❖ Agents must stay within authority In order to bind the principal ❖ An agent may have: <ul style="list-style-type: none"> ➢ Actual authority ➢ Apparent or ostensible authority 	Actual authority <ul style="list-style-type: none"> ❖ Definition: Authority a principal has given the agent ❖ This can be done by: <ul style="list-style-type: none"> ❖ Express words, either written or spoken ❖ Implied ❖ Implied authority will arise where: <ul style="list-style-type: none"> ❖ Such authority is needed to carry out "necessary" activities associated with express authority; or ❖ Where no express authority is given and someone is appointed to a position, such authority that falls within the scope of activities of that position 	Apparent or ostensible authority <ul style="list-style-type: none"> ❖ This is authority that the agent appears to have from the view point of the third party with whom the agent is dealing ❖ It is not authority given by the principal but rather the appearance of authority from the perspective of the third party ❖ Hiện nay, apparent authority được dịch phổ biến là 'thẩm quyền hiển nhiên'. Tuy nhiên, cách dịch này có vẻ chưa chính xác vì apparent trong tiếng Anh vừa có nghĩa là 'đương/hiển nhiên' (obvious), vừa có nghĩa là 'bề ngoài' (seeming). Lý do một thẩm quyền được coi là apparent là bởi vì hành vi của người được đại diện khiến cho người đại diện có vẻ [bề ngoài] như đang thay mặt cho người được đại diện.

Look at the agreement btw the principal and the agent to determine whether there is the actual authority.

Look at that person's perspective to determine whether there is the apparent authority.

		<p>CASE: Panorama Developments v Fidelis</p> <p>❖ Facts:</p> <ul style="list-style-type: none"> ➤ A company secretary (THU KY) of Fidelis hired expensive car from PD for his own private use ➤ He told the hire coy (PD) he was hiring them on behalf of Fidelis ➤ When the hire coy (PD) sued Fidelis for payment of the hire, Fidelis refused ➤ Fidelis argued the coy secretary lacked authority to enter into the contracts ➤ The hire-car company sued Fidelis to recover the hiring charges <p>It is succeeded because</p> <p><u>The secretary had no actual authority to enter into such agreements and was using the cars for his own purposes FACT</u></p> <p>❖ The Court Appeal held that entering into contracts like this was within the usual authority of this secretary.</p> <p>❖ The Court said that a company secretary is an officer of the company with wide responsibilities. They may be seen to have authority to make representations and enter contracts on behalf of the company in respect of day-to-day administration of the company. This would include such routine matters as hiring cars.</p> <p>⇒ So whilst a company secretary may not have actual authority to do such things, he or she has apparent authority</p>
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Business organisations

Sole Trader	- A business owned and operated by one person
Partnership	The relationship that exists between persons (from two to twenty persons) carrying on a business in common with a view to making a profit
Company	- An association of persons formed for a common business purpose, which has an existence separate from the persons who comprise it

II. Formation of partnership

a) Formation

- ❖ Partnership is created by agreement – express (oral or written) or implied
- ❖ A formal partnership agreement (accountants, doctors, lawyers etc) might deal with membership, capital, entitlement, management, accounts, dissolution, dispute resolution, goodwill, etc)
 - Many p'ship agreements are **less formal** (eg H-W run café)
 - **PA has an *interstitial* role – that is, it plugs gaps in any partnership agreement**
 - **Number and name** (CACL 16.30 and 16.70)
- **Corps Act s115** – max no. is 20 except where it is a **professional practice** (see footnote 6 p366)
- **Name** – Registration of the name is required under **Business Names Reg'n Act** unless the name consists of the full name of each partner

b) Natural and definition

Natural

- ❖ If no partnership agreement has been made by the parties the courts have to decide if a partnership exists.
- ❖ Why it is important to know if there is a partnership?
- ❖ One party might want to share the profits (I am a partner and therefore I am entitled to a share) or not share the losses (I am not a partner and therefore I do not have to share the losses)
- ❖ How does a Court decide: see **ss5 and 6 of the Act**:
 - **Section 5** defines a partnership as '*the relation that exists between persons:*'
 - *carrying on a business (1)*
 - *in common (2)*
 - *with a view of profit' (3)*

<p>Section 5 defines a partnership as <i>‘the relation that exists between persons: carrying on a business (1) in common (2) with a view of profit’ (3)</i></p>	<p>Carrying on a business</p> <ul style="list-style-type: none"> ❖ Repetitive or regular acts done in relation to ‘any trade, occupation or profession’ ❖ Business is any “trade, occupation or profession” (cf hobby) ❖ Carrying on Repetition is the key – a one-off transaction is more likely to be a joint venture ❖ Need a pattern or series of acts: 	<p>CASE: Khan v Miah</p> <ul style="list-style-type: none"> ❖ Facts: <ul style="list-style-type: none"> ➢ K invested in a restaurant venture with M etc. They did many things before restaurant opened. Then relationship ended. ➢ WAS IT IS A PARTNERSHIP? => it is a partnership because the work of finding, acquiring and fitting out the restaurant begins long before it opens. There is no rule that the parties to a joint venture do not become a partner until the actual trading commences. <i>The Court held that the correct question in determining whether the parties had been “carrying on a business” was not whether the restaurant had commenced trading, but whether the parties has embarked (bat tay vao) on the venture</i> ➢ A partnership was formed at that time it is a partnership because the work of finding, acquiring and fitting out the restaurant begins long before it opens) and therefore K was entitled (as a partner) to a share of the capitals ad the profits generated by the partnership until it ended.
<p>‘with a view to profit’ (CACL 16.160)</p> <ul style="list-style-type: none"> ▪ Need to intend to make a profit – even if you don’t <p>members of sporting clubs, societies or charitable orgs are not ‘partners’</p>	<p>“in common”- needs to be a “mutuality of rights and obligations”</p> <ul style="list-style-type: none"> ❖ The business must be operated <i>by or on behalf of all the partners.</i> ❖ All members need <i>not</i> be active in management as long as it is being carried on on their behalf. ❖ Share the goods and the bads together. 	<p>CASE: Degorgio v Dunn (CACL 16.150)</p> <ul style="list-style-type: none"> ❖ Facts <ul style="list-style-type: none"> ➢ Degorgio and Dunn formed a rock band. After the band was disbanded thi thang defendant lap 1 nhom moi de hat bai, noi plans voi thang plaintiff va moi no vao chung ➢ Degorgio argued that he and Dunn had formed a p’ship ➢ The plaintiff argued that upon the formation of the second band, the plaintiff and the defendant carried on the business in common and, therefore, he was entitled to a share of profits ❖ Why did it matter whether it was a partnership? <ul style="list-style-type: none"> ➢ Because if there was a partnership the plaintiff would have been entitled to a share of the profits ❖ Decision? Why? <ul style="list-style-type: none"> ➢ The Court held that the business was run with a view of profit but WAS NOT in common with reciprocal rights and obligations. ➢ Because: P did not share establishment fee, he chose fixed fees, he went overseas for 17 months and was not involve in anyway in business.

c) Evidence of a partnership-statutory rules

Section 6: The Statutory Rules ▪ The Partnership Act provides that in determining whether or not a p'ship exists "regard shall be had" to the following rules (CACL 16.170)		
Rule 1—common ownership: s6(1) – CACL 16.180	Rule 2—sharing of gross returns: s6(2)	Rule 3—profit sharing: s6(3)(a) – (e) – CACL 16.200 & 16.220
Common or joint ownership of property (like land or buildings) does not necessarily mean that the common owners are in a partnership....must be <i>carrying on business in common</i> (see s5)	Sharing of gross returns does not mean the sharers are in a partnership (eg real estate agents who receive a wage based on the annual gross profits of the agency): <i>Cribb v Korn</i> (CACL 16.190) Farmer – Owner (Cribb) – Worker (Korn) Why was it important for K to show that C was a partner with K's employer?-this would have entitled the worker to compensation from C on the basis that C and his employer were partners	Sharing of profits is not conclusive proof of p'ship but creates a strong presumption (<i>prima facie evidence</i>) that there is a partnership ; the other party has the onus of proving there is not a partnership The Act gives examples where the presumption does not operate: s6(3)(a)-a debt repaid in instalments out of profits s6(3)(d)-a loan with interest dependent on profits

d) Rights and duties of partners to each other

- ❖ **Partnership agreement (if any)** (CACL 16.260)
 - The partnership agreement is sovereign (if there is one and it is clear on the issue in dispute)
- ❖ **General rights and duties under P'ship Act: s28** (CACL 16.270):
 - Share equally in capital and profits and losses: s28(1)
 - Firm indemnifies every partner for firm-related expenses: s28(2)
 - Every partner may take part in management: s28(5)
 - No partner entitled to remuneration: s28(6)
 - No person can be introduced without consent of all: s28(7)
 - Decisions to be decided by majority: s28(8)
 - Books to be kept at the place of business and all have access: s28(9)
 - Restriction on right to expel a partner: s29

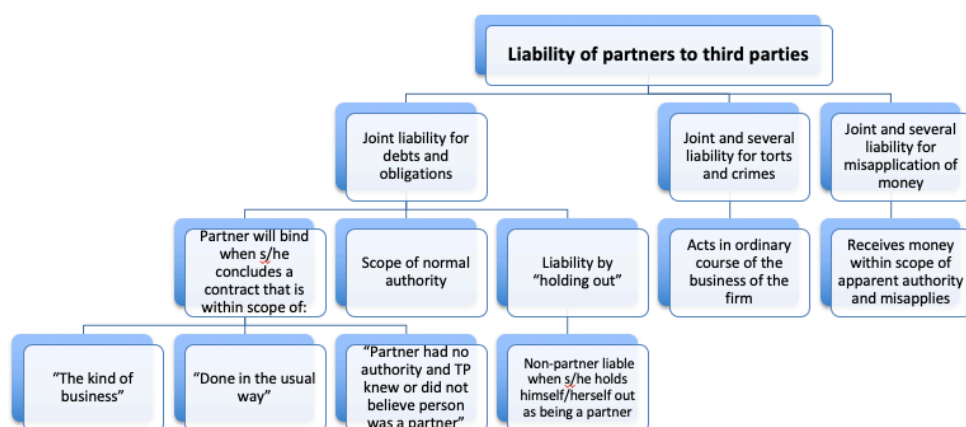
Fiduciary obligations/Statutory duties

Fiduciary obligations to each other (CACL 16.290) (Nghĩa vụ uy thác cho nhau)	Statutory duties (reflecting common law fiduciary duties) (nhiệm vụ theo luật định phản ánh nhiệm vụ uy thác pháp luật chung)
<p>❖ P'ship is founded on mutual trust and confidence – gives rise to a fiduciary duty of full disclosure to each other. Partners bound to exercise good faith which continues right through to dissolution</p> <p>thành lập dựa trên sự tin tưởng và tự tin lẫn nhau - làm phát sinh nghĩa vụ ủy thác công khai đầy đủ cho nhau. Các đối tác buộc phải thực hiện đức tin tốt mà tiếp tục thông qua để giải thể</p>	<p>❖ Partners must render true accounts and full information of all things affecting the partnership: s32</p> <p>❖ Duty to account for benefits derived from dealings with partnership without consent or for use by any of them of the p'ship property, name or business connection: s33(1)</p> <p>❖ Duty not to compete with partnership: s34</p>

Liability of partner to third parties

Liability for debts and obligations (contracts): ss 9 & 13

- Each partner is liable *jointly* with the other partners for all debts and obligations of the firm incurred while he/she is a partner: **s13**.
- A partner (acting as an agent) will bind co-partners where
 - he/she *does any act or enters into a transaction*
 - that is within the scope **of kind of business carried on by the partnership; and**
 - is carried out in **the usual way** that partnerships of that kind conduct business;
 - PROVISIO - unless the partner had no authority to so act and
 - the third party knew this, or
 - the third party did not know or believe that the partner was a partner: **s9**.



Two limbs of section 9	<i>kind of business</i>	<i>the usual way</i>
	<p><i>Mercantile v Garrod</i></p> <ul style="list-style-type: none"> ❖ Mr G and P form a partner carrying a garage business, G is sleeping partner. ❖ P sold a car which he had no title to MC without the consent of G ❖ MC who had not been informed that the partnership agreement excluded from its scope of buying and selling of cars, but on previous occasions entered into transactions with P, believing that were dealing with a partner. <p>⇒ MC succeeded in claiming money from G because the sale of the car was the doing of an act in keeping with the usual business of the firm, and under a provision equivalent to section 8 of partnership Act, the firm was bound by the act of P</p>	<p><i>Goldberg v Jenkins (CA 16.520)</i></p> <p>A partner in a business purported to borrow money in the p'ship name on behalf of the p'ship at an exorbitant interest rate (60%) The normal rate is 6-8%, but borrowing in the exorbitant rate is not an usual way, thus the firm was not to be bound to the transaction.</p>

PROVISO

- 3. Did the other person know or believe there was no authority or did not believe him to be a partner
 - *Construction Engineering v Hexyl* (CACL 16.540) – the court held that one company (Tambel Pty Ltd) which conducted a business of land development in partnership with another company (Hexyl Pty Ltd) did not have apparent authority to make contracts binding on the other company- this was because the third party (Construction Engineering) was unaware of the existence of Hexyl Pty Ltd
- **Joint liability: s13** (CACL 16.550)
 - The creditor could sue each and every partner jointly up to the full amount – ie each is liable up to the full amount - but creditor can only sue once
 - A partner or partners who is sued can insist that other members be ‘joined’ in the one (and only) action.

Liability of partners to third party for wrongful acts of a partner: ss14-16

- Each partner is liable for any loss or harm caused to a third person while acting ‘*in the ordinary course of the business of the partnership*’ or ‘*with the authority of the co-partners*’: **s14**.
- This needs to be answered by looking at the p’ship agreement and the business of the p’ship
 - *Walker v European Electronics* (CACL 16.630)
 - G was acting in the “ordinary course of the business” and therefore the other partners were jointly and severally liable.
 - *National Bank v Batty* (CACL 16.650)
 - Davis was *not* acting in the course of the firm’s business or within authority when he fraudulently deposited cheques into the firm’s account and then misappropriated them
 - *Polkinghorne v Holland & Whittington* (CACL 16.600)
 - Why were the solicitors liable to P even though H provided investment advice and *not* legal advice?
- **Joint and several liability s.16:** P could sue one (or more) partners and receive the full amount and leave it to the partner who has been sued to get the others to contribute according to their share of the liability.