PARTNERSHIPS

1. What is Partnership

- Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.
  - s 7 Partnership Act.
- The term business comprehends all commercial and professional activities

What are the requirements of a partnership?

A. <u>A Valid Agreement exists between participants (*play fair Development Corp Pty Ltd v Ryan*)</u>

- Where the agreement must be examined
  - Express and implied intentions
    - Examining the facts and ascertaining the intention of the participants from their statements and conduct. The court looks to substance, not form.
    - The objective intention of the document, if expressly written (*Cox v Hickman*).
  - Substance
    - It is the substance of the relationship between the parties that is essential.
    - The fact that there was no sharing of profits did not mean that this negatived other evidence of a partnership (*Stekel v Ellice*)
- Is co-ownership and issue?
  - General rule
    - Co-ownership in itself is not enough to create partnership (WAPA s 8(1)
  - Exceptions
    - *Davis v Davis* where the two brothers borrowed money on the security of two inherited houses and drew identical weekly expenses as from the business
- Is sharing of gross returns an issue?
  - General Rule
    - More than mere sharing of gross returns needs to be shown (WAPA s 8(2)
      - *Cribb v Korn* was no partnership but a mere tenancy. As the landowner had exclusive right to occupy the land and Cribb had no right to direct or control the landowner's working of the land, there could be no partnership but merely a tenancy.

B. <u>That a Business is being carried on: *Khan v Miah*</u>

- This implies that there is a continuity of business

C. <u>That the alleged partners have mutual rights and obligations (common)</u>

- Alleged partners have mutual rights and obligations as principals arising from this business connection: *Beckingham v Port]ackson and Manly Steamship Co Ltd*

How is a partnership determined to exist?
(Statutory Interpretation)

General Rules

- Examining the facts and ascertaining the intention of the participants from their statements and conduct.
- The court looks to substance, not form.
  - The objective intention of the document, if expressly written (*Cox v Hickman*).

2. The 3 elements of Partnership (s 7 of the *Partnership Act*)

A. The 'Carrying on' of Business

- The expression 'Carrying on' implies a repetition of acts and excludes the case of an association formed for doing one particular act which is never to be repeated.
  - *Smith v Anderson* (that there will be continuity):
    - Is there a Block of land to be developed?
      - General rule
        - *Ballantyne v Raphael* (1889) 15 VLR 538, a syndicate of more than 20 persons had been formed to acquire a large block of land. The intention was to subdivide the land and sell individual allotments at a profit. The court, which approved of *Smith v Anderson*, held that this was not a company, association or partnership carrying on business for gain.
      - Exception
        - In *Ford v Comber* (1890) it was admitted that there was a possibility that an agreement to share the costs of acquiring a single block of land and the profit on resale could constitute a partnership.

B. The carrying on of business must be in 'Common'

- General Rule
  - To constitute a partnership, the common requirement is satisfied by demonstrating the business is conducted by, or on behalf of, all the alleged partners
    - *Lang v James Morrison & Co Ltd* (HCA); *Re Ruddock*
    - *Lang* – the High Court held that there was no partnership. According to Griffith CJ at 6:
      - "the real substance of the transaction was that the plaintiffs and Thomas McFarland agreed to enter into a joint venture. They were not partners as against third parties, but each party had certain rights against each other".
- The general principle of the authorities is, that a right to participate in profits constitutes a partner and that, notwithstanding stipulation of being dormant or not liable to losses.
  - *Re Ruddock*

<u>There are 2 elements of in 'common'</u>

i. There is agency

- Partners must be able to act on behalf of each other.

ii. Mutual rights & obligations

- Parties must share mutual rights & obligations as principals, arising from the business connection.
  - *Smith v Anderson*
- Not necessary to be active:
  - It is not necessary that each partner be active in the business – it is possible to be a sleeping or dormant partner:
    - *United Dominions Corporation Limited v Brian Proprietary Limited* [1985] HCA 49; *Playfair*
  - Note Cf: other relations.
    - e.g. lessor, lender, professional adviser.
- Are there Separate bank accounts?
  - General rule
    - No partnership as there were separate bank accounts and two of the alleged partners had no part in the business of the firm other than to sign two letters.
    - Instead, the third party was seen as the agent for the other two partners
      - *Lang v James Morrison & Co Ltd*
- Do partners seek to evade partnership liability by conveyancing?
  - General rule
    - the relation of partners is the result of their respective substantial rights, not of the words employed, and that the result of the partnership liability from participation of profits cannot be evaded by the form of conveyance – Re Ruddock
- Are acts undertaken in contemplation of business being undertaken in the future
  - General rule
    - Acts carried out in contemplation of a business being undertaken in the future did not point to a partnership. Further, the holding of property jointly did not change things (the partnership still stands) – *Keith Spicer Ltd v Mansell*

iii. <u>Business must be carried on for a 'view to profit'</u>

- Requires that the association have as its object the acquisition of financial gains for its members, thus excluding clubs or societies formed to promote educational, sporting, cultural or social activities, in which any profits accruing from their activities are applied to the promotion of that interest and not distributed to the members in the form of dividends or bonuses

<u>Definition of Profit</u>

- Profits are not defined in the partnership act.
- However, the courts have come up with definitions courts usually adopt the balance sheet approach.
  - This test involves comparing any change in value of the assets of the company at two different points in time.
    - *Re Spanish Prospecting Co Ltd* [1911]; *Bond Corporation Holdings Ltd & Anor v Grace Bros Holdings Ltd & Ors*
- 'Clubs are associations of a peculiar nature. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscription required by the rules of the club to be paid so long as he remains a member'.
  - *Wise v Perpetual Trustee Co Ltd* [1903] AC

Is there a person who is not entitled to a share of the profits?

- While a partnership will have a view to profit, a person with no entitlement to share in the profits of the firm may still be a partner: *M Young Legal Associates Ltd v Zahid*

Is sharing profits an issue?

- WAPA s8(3): 'The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent upon or varying with the profits of a business, does not of itself make him a partner in the business; and in particular (Reflects the common law *Cox v Hickman* rule.)
- Test: are they persons involved carrying on business as partners, acting on behalf of each other (this test is not conclusive).
- The actual agreement may have to be examined (see above).
- 5 exceptions where the sharing of profits presumption does not arise
    1. Payment of a debt paid out of accruing profits of the partnership.
        - WAPA s8(3)(a).
    2. Remuneration of a servant or agent by a share of the profits.
        - s 8(3)(b) does not make that person a partner, liable as a partner, or give them the rights of a partner.
    3. Annuities to the widow or children of a deceased former partner paid from partnership profits.
        - WAPA s 8(3) (c).
    4. Loan to a person carrying on business with interest varying with the profits, or by a share of the profits.
        - WAPA s 8(3)(d) does not of itself make the lender a partner in the business.
    5. Receipt of a share of profits in consideration of the sale of the goodwill of the business.
        - WAPA s 8(3)(e)

3. Dispute as to whether there is a Joint Venture or Partnership?

- The term 'joint venture' […] connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. Such a joint venture ... will often be a partnership.
    - *United Dominions Corporation Ltd v Brian Pty Ltd and others* (1985)

Has the Agreement failed to describe a joint venture?

- The contract did not expressly provide for the sharing of losses, but that was implied. There was a common business where profit would be shared, and all parties would be involved in the business as well as concerned with one another's finance as one would be in a partnership.
    - *Canny Gabriel Castle Jackson Advertising Pty Ltd & Fourth Media Management Pty Ltd v Volume Sales (Finance) Pty Ltd*

4. Partnership Property

Is partnership property an issue?

- The distinction between partnership property and personal property of the partners is critical.

A. **Definition**

- s 30(1) PAWA defines partnership property to include all property rights and interests in property:
  a. originally brought into the partnership;
  b. acquired on account of the firm; or
  c. Acquired for the purposes and in the course of the partnership business.
     - Property: includes land and goods, and extends also to money, bank accounts, IP rights (copyright, trademarks, goodwill)
     - Separate property: property used by the partnership business is not necessarily partnership property: *Kelly v Kelly*
       - It may remain separate property, or
       - be owned jointly or in common by some or all the partners as the private property of each of them.

B. **Identifying partnership property**

- Whether property is partnership property is determined either by express agreement between the partners, or by reasonable inference from the way the property has been dealt with: *Kelly v Kelly*
  - Property bought with partnership money is deemed to be partnership property unless the contrary intention appears.
    - s 31 PAWA
  - Land purchased out of partnership profits, made from land, which is not partnership property, is presumed to be held in the same manner as the original land.
    - s 30(3) PAWA
  - 'in the absence of an agreement to the contrary'
- Is there property used in the partnership?
  - Whether property used in a partnership is a question of fact.
  - General rule:
    - Use of property: by the partnership does not necessarily make it partnership property: *Kelly v Kelly*

C. **Is the nature of a Partner's interest an issue?**

- No title to specific property: A partner's share in the partnership property at any time: s 33 WAPA)
- is not the title to any specific property;
- It is title to the proportion of the then partnership assets to which he would be entitled if the whole were realized and converted into money, after all the debts and liabilities were discharged.
  - s 33 WAPA.

D. **Is the assignment of a share of property an issue?**

- A partner can assign his or her share in the partnership.
  - s 42 WAPA
- This does not entitle the assignee, as against the other partners, to interfere in the management or administration of the partnership business.
  - s 42 WAPA
  - *FCT v Everett*: a taxpayer purported to assign a fraction of his share in a partnership together with the right to receive a corresponding share of partnership profits. The

majority of the High Court of Australia held that the assignment involved present property.

5. Partners' Relations

Partners relations – obligations to each other

- Partnership is a contractual relationship

A. <u>Fiduciaries</u>

- At general law and in the Partnership Act, it is clearly recognised that partners owe fiduciary duties to each other.
  - *Birtchnell v Equity Trustees*
- The Fiduciary duty starts at least from the time the formal agreement was executed
  - *United Dominions Corp Ltd v Brian Pty Ltd*
- Fiduciary duties continue until the final settlement of accounts on winding up.
  - *Chan v Zacharia*
- Partners are subject to both statutory and general law duties. Overlap:
  - with equity (fiduciary duties); and
  - similar duties apply to directors
- In general law, there are 2 main type of fiduciary obligation:
  1. the relationship between partners of trust and confidence; and
  2. agency principles.
     - Now embodied in PAWA ss40,41.
     - Both derive from the nature of a partnership.

B. <u>Conflicts and Profits Rule</u>

- Requires a partner to avoid conflicts between the interests of the partnership and his or her own interests: *Chan v Zacharia*
  - A partner is required 'to refrain from engagements which conflict, or which may possibly conflict, with the interests of those whom he is bound to protect'
  - This derives from agency principles – a partner is an agent of the partnership – an agent should not be able to make profit without the knowledge and consent of the principal:
    - *Birtchnell v Equity Trustees*
  - s 18 of PAWA
- Are Secret profits and issue?
  - Requires a partner to account for secret profits made using the partnership property, resources or opportunities, or within the scope of its business: *Chan v Zacharia*
  - A partner is forbidden from 'withholding from the firm any opportunity of advantage, which falls within the scope of its undertakings, and from using for his own exclusive benefit info, knowledge or resources to which the firm is entitled' – *Birtchnell v Equity Trustees*

C. <u>Duty to account for all benefits</u>

- PAWA s 40(1): 'Every partner must account to the firm
  - for any benefit derived by him,
  - without the consent of the other partners,
  - from any transaction concerning the partnership, or from any use by him of the partnership, property, name, or business connection.'

- Extends beyond business:
  - This duty can extend beyond the scope of the partnership business to any use of the name, business or connection
- Duration:
  - Duty applies to transactions even after dissolution by death of a partner, and before the affairs of the partnership have been completely wound up: PAWA s 40(2)

D. <u>Duty not to compete with the firm</u>

- Prohibition: PAWA s 41: if a partner, without the consent of the other partners, carries on any business:
  - of the same nature as; and
  - competing with;
  - that of the firm;
  - they must account for and pay over to the firm all profits made by him in that business
- Restates the conflicts rule

Partners relations – obligations to outsiders

A. <u>Third parties and contractual liability (agency rule)</u>

- Partnership can be seen as a branch of the law of agency.
  - But each partner is both an agent and a principal.
  - This is known as mutuality of agency
    - i.e. each partner is an agent for the others and can form a contract between ALL the partners and a 3rd party.
  - Partners and Co-partners can only bind the firm to the extent of their authority.
- Relevant legislation: s 26 PAWA
  - 'the acts of every partner who does any act necessary for or usually done in carrying on business of the kind carried on by the firm of which he is a member shall bind his partners to the same extent as if he were their agent duly appointed for that purpose; unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing':
    - knows that he has no authority; or
    - does not know or believe him to be a partner.

B. <u>Knowledge of a third party</u>

- Three scenarios:
  1. Knows no authority:
     - if the 3rd party knows the person has no authority = firm is not bound.
  2. Does not know/believe they are a partner:
     - if 3rd party deals with a person without knowing/believing the person to be a partner = firm is not bound.
  3. Undisclosed principle:
     - is this reconcilable with the doctrine of the undisclosed principal?
     - E.g. if 3rd party deals only with 2 partners and does not know about the existence of another partner, the doctrine of the undisclosed principal would mean that the unknown partner is also a party to the contract.
       - *Mercantile Credit Co v Garrod* [1962] 3 All ER 1103; *Goldberg v Jenkins & Law* (1889)

C. **Special powers of partners**

- Every member of a partnership carrying on business of a kind in which any of a list of acts is usually done, MAY bind the firm by the same respectively: s 27 PAWA
  - borrow money
  - pledge any goods or personal chattels belonging to the firm (e.g. to secure borrowing)
  - mortgage goods belonging to the firm
    - *Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd*

D. **Liability of firm for wrongs**

- Partners are jointly and severally liable for wrongs (torts) committed by a partner when acting with authority OR within the ordinary course of business of the firm: section 17(1) of PAWA
- Liability for wrongs is joint and several: section 19 of PAWA
  - *Polkinghorne v Holland* (1934)

E. **Misapplication of money or property**

- Firm liable where :
  - money or property of a 3rd party is misapplied by a partner acting within the scope of his actual or apparent authority in the partnership affairs, OR
  - where a firm in the course of its business receives money or property of a 3rd party and it is misapplied by a partner while in the custody of the firm
    - the firm is liable to make good the loss: s 18(1) PAWA
- Custody of firm:
  - money (or property) is deemed to be in custody of firm when:
    - paid to an agent of the firm, or
    - paid to the firm's account in the ordinary course of business: PAWA s 18(2)

In what circumstances is a partner bound to a third party?

1. When the partners have authorised a person, whether or not a partner, to enter into a transaction on their behalf with the outsider.
   - In such cases the normal rules of agency apply so that if the agent has acted in entering into a transaction within his or her actual or apparent authority, the partners will be bound to the transaction;
2. When the partners have authorised one of their partners to act on behalf of the partnership with an outsider.
   - In these circumstances all the partners will be bound by the authorised act of their fellow partner/agent.
   - It does not matter whether the transaction was within the scope of the partnership business or whether the outsider was aware that the agent was a partner in the business.
   - The key to the partners being bound in this situation is the fact that the transaction was authorised by all the partners.
3. When one of the partners has acted, without express authorisation, in circumstances where four requirements which are set out in section 5 of the Partnership Act have been satisfied.
   - In this situation the fact of being a partner confers authority to bind the partnership. This will be so as long as the following four requirements are satisfied:
     i. the act or transaction was entered into by a partner;
     ii. the act or transaction entered into must be within the scope of the kind of business carried on by the firm;
        - If, in assuming to do what is within the course of that business, he is guilty of a wrongful act or default, his partners are responsible,

notwithstanding that it is done fraudulently and for his own benefit: *Lloyd v Grace Smith & Co* [1912]
        - The giving of financial or investment advice was within the usual course of business of that firm of solicitors (*Polkinghorne v Holland* (1934))
    - Firms may be liable to a transaction entered into by a partner notwithstanding that the firm does not enter into transactions of that type. This will be so where the transaction is of a kind that is usually entered by other firms in the same industry (*Mercantile Credit Co Ltd v Garrod*)
    - Specifically, on trading partnerships (*Bank of Australasia v Breillat*)
        - Pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, and procure to be discounted, promissory notes, bills of exchange, checks [sic] and other negotiable paper, in the name of and on account of the partnership.

4. the act or transaction must be effected in the usual way; and
    - Further, for the act to be usual in the business of the firm, it must be reasonably necessary and not merely convenient for the carrying out of that type of business.
        - In *Union Bank of Australia v Fisher* (1893) 14 LR (NSW) Eq 241 it was held that the handing over of original documents to a solicitor, although convenient, was not a usual practice.
5. The other party to the transaction must either know or believe that the person acting is a partner or must not know of his or her lack of authority to act.
    - NB: ratification (implied or expressed) is possible if the partners are fully informed (*Wilson v Tumman*)
    - Undisclosed principal: is this reconcilable with the doctrine of the undisclosed principal? i.e. if 3rd party deals only with 2 partners and doesn't know there's a third partner, doctrine of the undisclosed principal still means that the third partner is also a party to the contract (*Mercantile Credit Co v Garrod* [1962] 3 All ER 1103; *Goldberg v Jenkins & Law* (1889) 15 VLR 36

6. Dissolution and Winding Up

A. Dissolution

- Dissolution of a partnership is a turning point in its affairs, not a termination': *Chan v Zacharia*
    - Note: Fiduciary obligations do not terminate until settlement of accounts on winding up.
    - So dissolution is really only the first stage of ending a partnership
- Dissolution is usually followed by some means of settling the entitlements of the parties, either by:
    - winding up; or
    - continuation of the partnership with a new composition.
- How can a partnership be dissolved:
    1. agreement between the partners: PAWA, s 43
    2. if a partnership for a fixed term – passage of time: PAWA, s 43(a)
    3. if partnership for a single venture or undertaking – end of the venture/undertaking: PAWA, s 43(b)
    4. if a partnership at will – by notice in writing: PAWA, s 43(c)
    5. death or bankruptcy of any partner: PAWA, s 44(1)

6. at the option of any partner, if a partner assigns his share of partnership property: PAWA, s 44(2)

B. <u>What are creditors rights against partners? (winding up)</u>

- PAWA s 47:
  - A person dealing with a firm after dissolution is entitled to treat all 'apparent' members of the old firm as still being members of the firm, until given notice of the change.
  - An advert in the Govt Gazette and in a Perth newspaper shall be notice of the dissolution to persons who had no dealings with the firm before the dissolution.
  - The estate of a partner who dies or becomes bankrupt, or retires, is not liable for partnership debts contracted after the date of death, bankruptcy or retirement.