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WEEK 1

PARTNERSHIPS –

Elements that define a partnership and must be satisfied

Partnership Act 1891 (SA)

s1(1)

Partnership is the relation which subsists between persons **carrying on a business in common** with a **view to profit** and includes an incorporated limited partnership.

- **Business:** includes any trade, occupation or profession. The more likely something is to be carried on and the more often, the more likely it is a business.
- **Carried on:** business must be continuous and repetitive as represented by acts or transactions either in fact or at least intention.
- **In common:** the test (how the court works it out) on if the business is being carried on by each partner for the common benefit of all partners, or is it a separate business for each and only one partner?
 - There must be some mutuality of rights and obligations shared relating to the business
 - Not all partners need to have an active role in the business
 - Agency: the power to buy someone else in a contractual agency
 - Common interest, or just because people own something together, alone is not enough
- **With a view to profit:** the business must be commercial in nature with the aim of making profits.
 - Even though the partners are carrying on their business in the expectation that there could be losses, this is still considered to be carried on “with a view to profit”
 - if you can never make a profit then it is probably not a partnership

Formation of partnership

1. Express agreement: express written agreement or express oral agreement
2. By implication/conduct: by doing something without an express agreement, i.e. opening the business up every day
 - the courts have held a partnership existed from the conduct of the parties notwithstanding no express partnership agreement

A partnership is not a separate legal entity

A partnership is not a separate legal entity from the owners; it is merely a representation of the collective rights and duties of the partners.

Liabilities for partnerships

Joint liability: only one chance for the outsider to sue the partners so they should do it together

Joint and several liability: multiple courses of action, can sue the partners together or separately; there are as many courses of action as there partners, can sue one partner after another.

s9) debts and obligations: *Every partner is liable jointly with the other partners for all the debts and obligations of firm incurred while the partner is a partner*

The outsider can sue any of the partners at any time for the entire debt regardless of who was the decision maker, however the partner can then sue the other partner for their contribution. If the other two partners are bankrupt and can't make a contribution to the debt, then you are stuck with the whole liability. The outsider doesn't have to sue all partners equally, they can sue just one for the whole amount leaving the partners to claim each other

- The partner must act in the usual way and business of the kind carried on by the firm (see s5)

S10 and 12) wrongful acts and omissions:

Every partner is jointly and severally (individually) liable for any wrongful act

or omission of any partner acting in the ordinary course of business or with the authority of the partner's co-partners.

S11 and 12: misapplication of money/property of a third person

Every partner is jointly and severally liable for the misapplication of money or property of a third person which have been placed in the custody of the partnership.

Does a partnership exist?:

When courts are determining whether a partnership exists, the main thing they look for is what the true intentions of the parties were ie the agreement and what they parties say and do to each other

To assist in determining whether a business relationship constitutes a partnership:

- Look at the Definition in section 1(1) PA
- Look at the Partnership Act re positive and negative rules in s2
- Look at the Court's approach – case law
- Look at the s 24 PA 'Default' Rules

Negative rules

s 2(1)(a) - joint or part ownership of property does not of itself create a partnership.

- The fact that they co-own property will not create a partnership. It is the fact that the co-owned assets are being used to "carry on a business in common with a view to profit".

s 2(1)(b) - sharing of gross returns (revenue gained before expenses) of a business does not of itself create a partnership

s 2(1)(c)(i) - The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make the person a partner

- If one person pays an outsider for a debt out of profits, that by itself does not make you a partner

s 2(1)(c)(iv) - an employee or agent remunerated with a share of the profits does not of itself make the employee a partner

Positive rules (prima facie)

s 2(1)(c) - share of profits of a business is prima facie evidence (an assumption) that the person is a partner. The court will treat you as a partnership unless you show that you're not. But by itself, it does not mean you are a partner, it is just strong evidence and not conclusive.

WEEK 4

CORPORATIONS LAW

The Concept of Corporate Personality

The debts and assets of a company are those of the company alone, and not the shareholders/director.

Salomon v Salomon & Co Ltd [1897]

Solomon and his sons had a partnership and they wanted to incorporate it into a company. So what he did was enter into a contract with the company whereby the company bought the business off Solomon and owed him a debt. The court held that because the company was a separate legal person from Solomon the company could enter into a contract with him and so the mortgage that the company granted Solomon. So he had sold the business to a company in which he was the major shareholder. The court held that the company was still separate to him therefore it could enter into a contract with him. The mortgage that the company granted to Solomon was valid. So the court held that the company had to pay Solomon first before the other creditors even though he was the main shareholder.

A company is a separate legal entity distinct and apart from its members

The court held that the debts of the company are the debts of the company alone. When S sold

Macaura v Northern Assurance Ltd

- Wanted to incorporate to remove personal liability, but forgot to transfer insurance policy. The timber all burnt down, but M could not claim on the insurance at all and neither could the company as it was not named on the insurance policy
- Court held that M, the only shareholder of the Co, had no insurable interest in the timber which the Company owned
- A company's property is owned by the company and not by its members.

Separate Legal Entity and Limited Liability** class test

They are not the same thing.

Whilst a partnership has unlimited liability, a company incurs the debts and it is entitled to the assets. The debts of the company are unlimited

liability; there is no way to reduce the liabilities, which are the debts of the company itself. But in a company, the liability of the shareholders is limited.

- S. 516 Corporations Act Company Limited by Shares:

“...a member need not contribute more than the amount (if any) unpaid on the shares..”

However, when the company becomes insolvent and liquidated, the shareholder will be liable for amounts unpaid on their shares (i.e. application fee)

Lee v Lee's Air Farming Ltd

- A company is a separate legal entity distinct from its shareholders
- The company could therefore enter into a contract of employment with Mr. Lee

For the wife to receive superannuation money of L after he died, she had to prove he was an employee of the company. The court held that even though L and his wife were the only shareholders and directors, the company was separate to him, so personally he could enter into a contract with the company whilst being a director. So it was held that Lee was an employee.

Lifting the Corporate Veil

When a company is not a separate legal entity

- **Agency:** Re F.G. (Films) Ltd [1953] 1 WLR 483
- **Set up to defraud members:** Re Darby [1911]
 - Can't set up a company to steal money from the company
- **“mere cloak or sham” to avoid contractual obligations:** Gilford Motor Co. Ltd v Horne [1933] All ER Rep 109
 - Can't incorporate a company to get out of a contractual obligation
- Corporations Act 2001 Duty to Prevent Insolvent Trading s. 588G
 - Bottom of p.6 important for exam – duty to prevent insolvent trading

Types of Companies

1. According to **Liability of Members**

- unlimited liability of the company, but shareholders liability is limited

2. Whether a Company is:

- a **Public Company** or a
 - must have min. one shareholder
 - must have at least 3 directors
 - must have AGM once a year
 - financial statements must be audited and lodged with ASIC

- **Proprietary Company**

- Min. one shareholder but only need to have one director
- Max 50 shareholders who are not employees
- Cannot issue shares to the public

- Large Proprietary Company

- Must have financial statements audited and lodged with ASIC
 - Any two to satisfy:
- Gross operating revenue is \$25mil or more
- Gross assets >\$12.5mil
- 50 or more shareholders

- Small Proprietary Company

- Any two to satisfy:
 - Does not have to audit statements
 - Gross operating revenue < \$25mil
 - Gross assets <\$12.5
 - Less than 50 shareholders

3. Whether a Public Company is **Listed** on the Australian Securities Exchange

4. According to Relationship with Other Companies

- **Holding** Companies (parent companies)
 - Controls the composition of the board
 - > than half of the votes
 - Holds more than half of the issued shares
- **Subsidiary** Companies

- 51% owned by holding company is a partly owned subsidiary, 100% is wholly owned subsidiary

Registration and Corporate Constitution and Replaceable Rules

Registration

S117(1) A company is formed only by registration to ASIC

Once the certificate of registration is issued, then the company becomes a separate legal person

s.124(1) A company has the legal capacity and powers of an individual ... including power to:

- issue and cancel shares
- issue debentures
 - a document that proves company owes you money
- distribute any of the company's property among members
- give security by charging uncalled capital
- grant a floating charge

Corporate Constitution and Replaceable Rules

A company has to have their own internal rules. These are the rules that apply between a company and their shareholders, as well as the rules between company and directors, and the rules between one shareholder and another.

S134

1. Their own written Constitution (lodged with ASIC).
 - Internal rules drawn up by a lawyer

Or

3. They can elect to adopt the Replaceable Rules (RR) in the Corp Act.
 - Saves money

Or

4. They can adopt a combination of both i.e., Constitution and certain RR.

Company Constitution

Sets out rules governing such things as:

- rights of members

- conduct of members' and directors' meetings
- appointment, remuneration and powers of directors

Altering the Constitution

s.136(2) "The company may modify or repeal its constitution ... by special resolution."

- A special resolution means a meeting to vote on questions (resolutions)

S9- For the resolution to pass:

- a notice as set out in paragraph 249L(1)(c) has been given;
- 75% of everyone who can vote in the company

Effect of Constitution and RR

s.140(1)

Constitution and RR have the effect as a contract:

- between the company and each member; and
- between the company and each director and company secretary; and
- between a member and each member;

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.

Hickman v Kent or Romney Marsh Sheep-Breeders Association

- Constitution (Memo and Articles) constitute a statutory contract between the members and the company;
- a company can take action against members to enforce the Constitution;
- Members can take action against the company to enforce their rights under the Constitution.

A member cannot commence an action against the Company to enforce any provision in the Constitution.

- Members only have a right of action to enforce provisions in the Constitution when the provision confers rights upon members in their capacity as members.
 - Things that attach to the rights of ownership of shares

Doctrine of Constructive Notice

At common law

Third parties who deal with a company are deemed to be aware of the contents of the company's public documents at ASIC.

- e.g., constitution

Under Corporations Act s130

A person is not taken to have information about a company merely because the information is available to the public from ASIC

Doctrine of Ultra Vires (Common Law)

- Ashbury Railway Carriage Co v Richie (1875) LR 7 HL 653

Ashbury's Objects included;

"to make, and sell, and lend or hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors".

Ashbury (a UK Co) entered a contract to purchase a concession to construct a railway line in Belgium.

The shareholders supported the contract.

At a later date Ashbury sought to get out of the contract on the basis that it lacked the legal capacity to enter the contract.

House of Lords held:

Ashbury lacked the power to enter the contract

s.125(1) and (2) * p 15 and 20**

... The exercise of a power by the company is not invalid merely because it is contrary to or beyond the company's stated objects or contrary to an express restriction or prohibition in the company's constitution.

- So if a company does something outside of its objects clause, or outside a prohibition or a restriction, its not void and is still valid.
- In this situation, the Ashbury case would now be decided differently, the contract that Ashbury entered into would still be valid even though it was beyond the company's objects clause.
- So the objects clause is now optional. If it does something outside of the clause that thing is still valid.