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Commercial Law Examination Notes

Renee Farrow 2014

Topic 1 – Sole Traders & Partnerships Part

1.1 Advantages of a Partnership

- Simple

1.2 Inexpensive

1.3 Flexible

- Privacy
- Pooling of financial resources & expertise
- Some potential taxation benefits compared to companies

1.4 Disadvantages of a partnership

- Unlimited liability of general partners
- Max of 20 partners
- May be difficult for partner to sell their interest in partnership
- Each partner becomes bound by fellow partners acting with actual or apparent authority
- Liability for wrongful acts committed by fellow partners in course of business or with authority of co-partners
- Loss of control compared to sole trader

1.5 DOES A PARTNERSHIP EXIST?

- Look at definition in s1(1)
- Look at Partnership act re positive & negative rules
- Look at courts approach – case law
- Look at s24 Default Rules

1.6 Law to Partnerships

- Partnership Act 1891 (SA)
- Common Law and Equity

1.7 Partnership Act 1891 (SA) – pg 6 of Course Reader 1

S1 (1)

- Partnership is the relation which subsists between persons **carrying on a business in common** with a **view to profit** and includes and incorporated limited partnership
- Business
- Carrying on
- In common
- View to profit
- Business

- *Hope v Bathurst City Council* 'includes any trade, occupation or profession'
- Carrying on
 - Repetitive facts
 - Continuity
 - All entered into contract
 - Preparatory acts – e.g. enter into a lease
 - Mutuality of interests
- In common
 - Test is that the business is being carried on by, or on behalf of, all partners
 - Mutuality of rights & obligations
 - Common interest alone is not enough
 - Agency is not a prerequisite
 - All entered into contract → mutuality of interest (*Beckingham*)
 - Entered an agreement
 - Common goal
 - Joint decision making
- With a view to profit
 - Share profit – prima facie evidence of partnership (s2 (1)(c))

1.8 Negative rules – pg 9 course booklet

- S2 (1) – Joint ownership of property
 - Joint ownership of property does not of itself create a partnership
- S2 (1)(b) – sharing of gross returns
 - Sharing of gross returns does not of itself create a partnership
- S2 (1)(c) – sharing of profits
 - Sharing of profits of a business does not of itself make a partner

S2 (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

S2 (1)(c)(ii)

- An employee or agent is remunerated with a share of the profits does not of itself make the employee a partner

S2 (1)(c)(iv)

- A person lends money to a business where the interest rate varies with the business profits or where the lender will receive a share of profits arising from carrying on the business does not itself make the lender a partner

1.9 Positive rules – pg 10 of course booklet

- S2 (1)(c)
 - Share of profits of a business – prima facie evidence a partnership exists but this can be rebuttable

1.10 Case Law

Re Ruddock – pg 10 of CB1

- Labels are not decisive – labels parties give to describe an arrangement are not decisive – courts attempt to ascertain the true intention of the parties

Re Megevand; Ex Parte Delhasse – pg 11 of CB1

- Delhasse LOANED to Megevand
- Court held this was a partnership
- 'If ever there was a case of a partnership this is it...'
- Loss sharing agreement
- Sharing of profits – prima facie

Beckingham v Port Jackson and Manly Steamship Coy – Pg 11 of CB1

- Court held - No partnership exists
- Agreement to share profits re s2 (1)(c)
- Agreement stated Port Jackson was 'agents' of Beckingham – supports intention not to be partners
- PJ was to carry out work at B's expense
 - Indicates no sharing of all obligations
 - On other hand indicates that one party had the right to pledge liability of the other
- Clause in agreement that PJ was not responsible for safety of ship
- NO PARTNERSHIP

Canny Gabriel Castel Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd – Pg 12 CB1

- Agreement did not describe the parties as partners – said 'joint venture'
- Parties were joint venturers in commercial operation with a view to profit
- Profits to be shared
- Policy of joint venture was a matter of joint agreement
- No mention of sharing of losses

COURT HELD:

- Labels not decisive (*Re Ruddock's* case)
- Sharing profits
- Policy of joint venture decided/agreed jointly
- Assignment of part of property was attempted
- Parties interested in each others financial viability like partners
- Loan was advanced by VS 'to the joint venture' not to fourth media
- HELD THAT JOINT VENTURE WAS A PARTNERSHIP

1.11 Joint Venture

- 'A joint venture is an associated of persons, natural or corporate, who agree by contract to engage in some common, usually ad hoc undertaking for joint profit by combining their respective resources, without, however, forming a partnership in the legal sense or corporation; Their agreement also provides for a community of interest among the joint

venturers each of who is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control.'

- An association of parties who agree by contract to engage in some common venture without forming a partnership

Features of Joint Ventures:

- Joint venturer not responsible for acts of co-venturers
- Joint venturer can dispose of its share of the product, subject to specific arrangements
- Joint ventures may in some circumstances compete with each other
- Joint venture is not recognized as a separate legal entity
- Joint venture not required to lodge separate taxation return

1.12 Wrongful acts of partners

- Providing negligent advice a client
- Manufacturing a product which is negligently designed/made/assembled or has inadequate instructions or warnings
- Negligently damaging a clients property

Must be proved that:

- The partners authorized the wrongful act or
- The wrongful act occurred in the ordinary course of business

Walker v European Electronics Pty Ltd – pg 13 of CB1

- 'Acting in the ordinary course of business'
 - Identify nature and scope of pship business
 - Was partner acting in ordinary course of business when wrongful act occurred

COURT HELD:

- Insolvency side of the business included the conduct of company receiverships
- Court concluded therefore that acting as a receiver was not as an individual appointment but as part of firms business
- As such, court concluded that the partner was acting in ordinary course of firms business when he committed wrongful (fraudulent acts) acts in question

1.13 Joint liability s9 (1) – pg 15 of CB1

- Every partner is liable jointly with the other partners for all the debts and obligations of the firm incurred while the partner is a partner

Section 5:

Actual authority → when principle instruct the agent to do something and the agent acts within that area

Apparent/ostensible authority – section 5

- Every partner is an agent of the firm and the other partners
- Act done
 - In usual way – *Goldberg v Jenkins* (pg 17 CB1)
 - Carrying on the kind of business by the firm (industry perspective) – *Polkinghorn v Holland* (pg 15 CB1)

Proviso – s5 (1)

- Other partners not bound/liable IF:
 - Partner had no authority
AND
 - The third person knows the partner has no authority
Or
 - The third person does not know or believe the partner to be a partner

Consequences when a partner enters a contract with no authority

- Breach of warranty of authority – *Collen v Wright*
- Misleading or deceptive conduct – Schedule 2 – the Australian Consumer Law s18

1.14 Liability of Incoming and Retiring Partners – pg 18 of CB1

General rules:

- Retired partner is not liable for partnership debts incurred after retirement
- Partner will be only liable for debts and obligations incurred while he or she is a partner

Expectations to these general rules:

Holding out as a partner – s14(1)

- Everyone who by words spoken or written or by conduct represents/holds himself out of knowingly allows himself to be represented as a partner will be liable as a partner to anyone who has acted on that representation to give credit to the firm

Lynch v Stiff – pg 19 CB1

- Letterhead stated names, Williamson II was sole proprietor, Stiff dealt with Williamson III who misappropriated the money and fled. Stiff then sued Lynch
COURT HELD
- To knowingly allow your name to be used on letterhead is sufficient representation as a partner i.e. constitute holding out
- The party must have acted on the faith of that representation giving credit to the firm
- The representation need only be partial inducement

Tower Cabinet and Co. v Ingram

- Partner retired. A client of the partnership, Tower Cabinet, received a written order for goods on the partnership letterhead. The letterhead still contained the name of retired partner. Client sued retired partner on the order contract
COURT HELD:
- Retired partner not liable as he had not 'knowingly' allowed himself to be represented

Rights of persons dealing with the partnership – s36

- Persons who dealt with the firm before the change:
 - S36(1) – where a person deals with a firm after a change in its constitution, the person is entitled to treat all apparent members of the old firm as still being members of the firm until the person has notice of the change
- Persons who have not dealt with the firm before the change
 - S36(2) – an advertisement in the *Gazette* will be notice as to persons who did not have dealings with the firm before the date of the dissolution or change so advertised
- Retiring partner not known to creditor before retirement to be a partner
 - S36(3) – a partner who dies, or who become insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, insolvency, or retirement, respectively.

1.15 The relationship between partners

Section 19

- The mutual rights and duties of partners, whether ascertained by agreement or defined by the Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing

Section 24 – Default Rules as to interests and duties as partners

- 24(1)(a) – partners share equally in capital and profits and must contribute equally to losses
- 24(1)(b) – firm must indemnify each partner for payments/liabilities incurred:
 - in the ordinary and proper conduct of the business; or
 - the preservation of the business or property of the firm
- 24(1)(c) – partner entitled to 7% interest p.a for payments/advance beyond that which the partner agreed to subscribe
- 24(1)(d) – partner not entitled to interest on capital before ascertainment of profits
- 24(1)(e) – every partner is entitled to take part in the management of the business

- 24(1)(f) – no partner is entitled to remuneration for acting in the partnership business
- 24(1)(g) – no person may be introduced as a partner without the consent of all existing partners
- 24(1)(h) – differences/disagreements between the partners:
 - ordinary matters – decided by a majority of the partners
 - change in nature of the partnership business – consent of all existing partners required
- 24(1)(i) – partnership books kept at place of business and each partner may have access, inspect and copy

Lecture week 3

1.16 Fiduciary Duties pg 21 CB1

S28(1) Duties of partners to render accounts and information

- Partners are bound to render true accounts and full information of all things affecting the partnership

S29(1) Accountability of partners for private profits

- Every partner must account to the firm for any benefit derived without consent of the other partners from:
 - Any transaction of the partnership property, name or business connection
 - Any transaction concerning the partnership

Bentley v Craven pg 21 CB1

- Partner bought goods in his own name and then resold them to the partnership for a profit
- Court held P1 had to pay profits to the partnership

Birtchnell v Equity Trustees, executors and agency Co Ltd

- P was a partner in a land agency business
- P had a business relationship with a client of the agency and two of them went into a real estate venture without the consent of P's partners
- P died
- P's partners sued P's estate to recover profits
- Court held that P's estate had to pay P's profits to the partnership

S30(1) Duty of partner not to compete with firm (pg 22)

- A partner who carries on without the consent of the partners, a business competing with the partnership, must pay to the firm all profits made by that partner

1.17 Partnership property (pg23)

Most explained in CB1 pg 23

24(1)(a) all partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses

Kelly v Tucker

- Court held: partners were entitled to get back their capital contribution before profits were shared as there was an implied term in their agreement

S20(1) partnership property of firms other than incorporated limited partnerships

- All property originally brought into the partnership stock, or acquired on account of the firm, or for the purposes and in the course of the partnership business are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement

S21 Property bought with partnership money

- Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm

Harvey v Harvey

FACTS:

- H owned a run down pastoral property
- H entered an oral agreement with his brother, HL, & HL's 3 sons, to carry on the pastoral business
- HL and sons provided their labour and skills
- H was a dormant partner
- 21 years later the partnership was dissolved

ISSUES:

- was the land partnership property?
- Were the substantial improvements partnership property?

COURT HELD

- The land was **not** partnership property
 - H during negotiations mentioned he wanted the property to be available for his young son
 - No entry in partnership books treating the land as partnership property
- Also held the improvements were not partnership property as they could not be separated from the land

Must look at the object or purpose of the business to help determine what constitutes property of the partnership

Robinson v Ashton

- Any increase or decrease in the value of partnership property is partnership profit or loss

1.18 Limited Partnerships

Section 1B(1) – interpretation

- 'limited partner' means a partner in the limited partnership whose liability for the liabilities of the partnership is limited in accordance with Part 3

Part 3

- s48 Limited partnership is formed on registration
 - 48(1) a limited partnership is formed by and on registration of the partnership under this Part as a limited partnership
- s49 composition of limited partnership
 - s49(1) a limited partnership must have at least one general partner and at least one limited partner
- s75 identification of limited partnerships
 - s75(2) any doc issued on behalf of a limited partnership must contain the words 'a Limited partnership' (or L.P or LP) at the end of the firm name
- s50 – size of limited partnership
 - s50(1) a limited partnership may have any number of limited partners
 - s50(3)(a) a limited partnership must not have more than 20 general partners
 - s50(3)(b) exception for professional partnership under s115(2)
- s65(1) a LP must not take part in the management of the business and does not have power to bind the limited partnership
- s65(2) if a limited partner takes part in the management of the business the limited partner is liable, as if the partner were a general partner, for the liabilities of the partnership incurred while the limited partner takes part in the management of that business

1.19 Dissolution of partnership – pg26

- S33 - Dissolution by insolvency, death or charge
 - Subject to any agreement b/w the partners, every partnership is dissolved as regards all the partners by the death or insolvency of any partner
- S34 – dissolution by illegality of PS
 - A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on
- S25 – Expulsion of partner
 - No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners
- S35 dissolution by the court
 - On application by a partner the court may decree a dissolution of the PS in any of the following cases:

- a. When a partner becomes, through permanent mental incapacity, incapable of managing the partners affairs
- b. When a partner becomes permanently incapable of performing the partners part of the partnership contract
- c. When a partner has been guilty of such conduct as is calculated to prejudicially affect the carrying on of the business
- d. When a partner wilfully or persistently commits a breach of the partnership agreement
- e. When the business of the partnership can only be carried on at a loss
- f. Whenever in any case it is just and equitable that the partnership be dissolved

1.20 Distribution of Assets

S44 – in settling accounts between partners after dissolution, subject to any agreement

- a) losses paid first out of profits, then out of capital, and if necessary by the partners individually in the proportion in which they were entitled to share profits
- b) assets of the firms shall be applied in the following manner:
 - i. pay debts & liabilities of outside creditors
 - ii. pay rateably advances to partners
 - iii. pay rateably capital to each partner
 - iv. residue, if any, distributed in the proportion profits are divided

1.21 Syndicate

Definition – a number of parties that become associated in a business enterprise/venture without forming a partnership or joint venture

- Fewer mutual or common interest between the parties & as such, the law does not consider the parties:
 - Have fiduciary obligations to each other
 - The parties don't accept or incur liability for each other

Topic 2: Trusts

2.1 Definition of fixed trust

A fixed trust is an equitable obligation binding a party (trustee) to deal with property (trust property) of which the trustee is the legal owner, for the benefit of persons (beneficiaries) who are the equitable owners

- A trust is not a separate legal entity
- The trustee is the legal owner of trust property
- Trustee is personally liable for debts/expenses of the trust
- Therefore, contracts should not be executed in the Trust name but instead in the Trustee's name

Beneficiaries: Generally speaking, beneficiaries are regarded as the equitable owners of the trust property in a fixed trust

2.2 Discretionary Trust

- Different to fixed trust:
 - It is also an equitable obligation
 - Trustee is also the legal owner of the trust property
 - But the beneficiaries do not own the trust property
 - Beneficiaries have a 'mere expectancy'

Discretionary trust: Beneficiaries do not own the trust property, they are a 'mere expectancy' in a discretionary trust

Advantages of a trust (fixed):

- Pass benefits to others
- Protect assets from creditors
- Possible tax benefits

Disadvantages:

- Costs
- Possible loss of control
- Personal liability of the trustee

2.3 Trustee's duties

- Must familiarize themselves with the terms and the nature of the trust property
- Must familiarise themselves with the terms and the nature of the trust property.
- Must obey and carry out directions in the trust instrument/document
- Must keep proper accounts and furnish full information when required.
- Must act in person unless authorised to delegate by the trust instrument or statute.
- Must not derive a profit from their office unless authorised in the trust instrument or authorised by the beneficiaries.
- Duty of care

- Duty to invest

2.4 Trustee's liability

- A trust is not a separate legal entity
- Trustee is personally liable for debt/expenses/liabs of the trust and for any torts/acts/omissions
- If trustee breaches fiduciary duties – must pay compensation or profits into trust property

2.5 Trustee's rights

- To be indemnified/repaid for expenses which are properly incurred and not in breach of the trust, trustee act or the fiduciary duties
- To approach the court
- To be discharged after the trust estate is finalized

2.6 Trustee's right to reimbursement

- Against the trust property
- If the trust property is not sufficient, then against the beneficiaries ONLY if:
 - The trust is a fixed trust or a unit trust
 - The beneficiaries are 'absolutely entitled' to the trust property
 - The beneficiaries are 'sui juris' (full legal age and capacity)
- Trust deed can exclude liability of beneficiaries to trustee

Topic 3 - Corporations Law

3.1 the Concept of corporate personality (pg 3, CB2)

Salomon v Salomon & Co. Ltd

A company is a separate legal entity distinct and apart from its members; a company's debts are its own and no one else. Per Lord Halsbury LC.

S124(1) legal capacity and powers of a company – a company has the legal capacity and powers of an individual

Macaura v Northern Assurance Ltd

- Court held that M, the only SH of the company, had no insurable interest in the timber which the Co owned
- A company's property is owned by the company & not by its members

Corporation Act s516 Limited Liability

- Note: 'Limited liability' is different to the 'separate legal entity' concept.
- S516 – company limited by shares:
 - A member need not contribute more than the amount (if any) unpaid on the shares

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.
- Court held that he would get insurance, as he is an employee in the company (similar to Soloman v Soloman)

Lifting the Corporate Veil

Only in exceptional circumstances that the courts may pierce or lift the corporate veil & disregard the separate legal personality of the company. (pg 5 CB2)

3.2 Types of companies – pg 7 CB2

- Classification according to liability of members
- Classification according to whether a company is a public or proprietary company
- Whether a public company is listed on the ASX
- Classification according to their relationship with other companies
 - Holding companies
 - Subsidiary companies

3.3 Registration of companies

- S117(1) Companies must be registered by ASIC
- S117(2) – contents of application (pg 11 CB2)
- More details pg 11,12 CB2

3.4 Corporate constitution & replaceable rules

Mostly described pg 13 – 15 CB2

Companies now have choice, they can have:

- Their own written constitution (lodged with ASIC), or
- They can elect to adopt the Replaceable Rules (RR) in the Corp Act, or
- They can adopt a combination of both i.e., Constitution & certain RR

Altering the constitution s136(2) – the company may modify or repeal its constitution by special resolution

Hickman v Kent

- In CB2 pg 14

Question: can a member commence an action against the company to enforce any provision in the Constitution?

Answer: No. members only have a right of action to enforce provisions in the constitution when the provision confers rights upon members in the capacity as members. Can only enforce the things that are attached to being a SH. E.g. can't enforce the right to be a SH or director for life, as that's giving me rights in some other capacity.

Example:

- Constitution grants members of Class B shares, the right to 2 votes per a class B share, but they only count 1. Therefore you can go to court and enforce the right to 2 votes. Also if you don't get notice of a meeting.

3.5 Doctrine of constructive notice – pg 15

IMPORTANT – goes with company contracts on pg 20 of CB2

Company 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 – now abolished by s130 of the corporations act

Corporations Act

- **S130** a person is not taken to have information about a company merely because the info is available to the public from ASIC

3.6 Doctrine of Ultra Vires (common law)

- A company cannot do anything outside its objects clause (clause where company sets out purpose)

Ashbury Railway Carriage Co v Riche

- Objects clause: