# 10 Law Relating to Business Organisations

Business organisations can either be incorporated or unincorporated. Incorporation involves creating a separate legal entity. The separate legal entity created can incur its own liabilities and have its own rights that are distinct from those of the owners or creators of the entity. The most common forms of incorporated organizations are the company and the limited liability partnership, though there are others such as statutory boards[1] and management corporations.[2] The most common forms of unincorporated organisations are the sole proprietorship, the partnership and the limited partnership, though there are others such as business trusts.[3]

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[1] Statutory boards, as the name suggests, are incorporated pursuant to various statutory instruments. Examples of such statutory boards include the Monetary Authority of Singapore and the Singapore Tourism Board.

[2] Management corporations are incorporated pursuant to the Land Titles (Strata) Act. Management corporations are set up in places such as condominiums to carry out general management activities.

[3] Basically a trust is an arrangement whereby a person (called the "trustee") holds property for the benefit of others (called the "beneficiaries"). A registered business trust which is registered pursuant to the Business Trusts Act can offer units in the business trust for sale to the general public. Although the registered business trust is not a separate legal entity, the trustee-manager of such a trust has to be incorporated as a company and hence the trustee-manager would have separate legal entity.

Setting up a wrong type of organisation to run a business may affect the business and may affect the owner of the business and hence it is important to make the right choice.

## SOLE PROPRIETORSHIP

As the name suggests, sole proprietorship refers to business being carried out by one person. Many small business organisations, such as neighbourhood shops, are sole proprietorships. Unless otherwise stated, all sections referred to in this part are with reference to the Business Registration Act.

### Registration

In order to carry out business as a sole proprietor, the business must be registered under the Business Registration Act (section 5). However, there are some limited exceptions to registration. For instance, taxi drivers are exempted from the provisions of the Business Registration Act (First Schedule to the Business Registration Act). Similarly, if you want to set up a company or a limited liability partnership, you are exempted from the provisions of the Business Registration Act (sections 4(2) and 4(3) respectively) though you will have to register under other statutes.[4]

### Effect of non-registration

If the person intending to carry on the business does not register it, that would amount to an offence (section 27); in addition, rights under or arising out of any contract cannot be enforced by him, unless the court otherwise orders (section 21(1)). Thus, if a sole proprietor, who has not registered his business, has not been paid for goods which he has sold, he will not be able to institute an action against the person who has bought the goods and recover payment, unless the court otherwise orders. However, the other party to the contract can enforce it (section 21(5)).

[4] See below.



### Registration process

The administrative body in charge of registration is the Accounting and Corporate Regulatory Authority of Singapore. The registration process is simple, inexpensive and can be done online.[5] The person intending to register the business must, among other things, provide a name for the business, describe the nature of the business and must name the principle place of business (section 6). In relation to the name of the business, the name for the intended business must not be identical to that of another corporation or business and must not be in any way undesirable (section 13). However, the mere registration of the name does not give the person proprietary rights to the name (section 12(3)).[6] The question may also arise whether it is possible to run a business from one's home. In this regard, as of the 10th of June 2003, homeowners are allowed to conduct small scale businesses from their homes under the Home Office Scheme. This scheme applies to both private homes as well as Housing and Development Board (HDB) homes. However, written approval from the relevant authorities, namely the Urban Redevelopment Authority and the Housing and Development Board, respectively, must first be sought. The business registration is valid for a certain period of time, which is currently one year, after which it may be renewed (section 8(4)).

In addition to applying to the Accounting and Corporate Regulatory Authority of Singapore, if the business needs to be licensed under some other statute, then that licence has also to be obtained. Thus for instance, if the person intends to run a travel agency, he has also to get approval from the Singapore Tourist Promotion Board. Licensing is also required for many other kinds of business activities, such as for running an employment agency or a hotel.

[5] The details as well as other information relating to registering a business can be obtained at the Accounting and Corporate Regulatory Authority of Singapore at: www.acra.gov.sg/

[6] On the other hand, if the person registers the name as a trademark under the Trade Marks Act (see page 321), he would acquire proprietary rights.

### Not a separate entity

Once set up, the sole proprietorship is not separate from the creator. Thus for instance, whatever debts that are incurred by the business belong to the sole proprietor so that if there are insufficient assets in the business, the sole proprietor's personal assets, such as his private car, may be seized to satisfy the business debts. Similarly, rights of the business belong to the sole proprietor. Thus if the sole proprietor takes the money made by the business, that would not create any problems as the money is his to keep.

### Dissolution

Once created, the sole proprietorship may be dissolved voluntarily or involuntarily. It can be dissolved voluntarily by the sole proprietor giving notice to the Accounting and Corporate Regulatory Authority of Singapore that he is ceasing operations (section 15). The sole proprietorship may also be dissolved involuntarily, such as would be the case where the sole proprietor dies or where the sole proprietor is made a bankrupt (section 26)[7]. If he was made a bankrupt, his assets including business ones such as the stock in trade, would be sold and the proceeds will be distributed to the creditors. If he dies, his assets, including the business ones, will pass in accordance to his will. If he does not have a will, then under the Intestate Succession Act, there are provisions as to who (such as spouse, children) should get what.

### Evalution

Though easy to set up, run and dissolve, the sole proprietorship has one major disadvantage and that is that, as stated, the sole proprietor is not protected or shielded from business debts and thus there could be some risk involved in that regard.

[7] However, the sole proprietor who is made a bankrupt may apply to the High Court or the official assignee to allow him to continue his business: section 26.



## PARTNERSHIP

As stated, the other common form of unincorporated business organisation is the partnership. Though, just as with a sole proprietorship, it may not cost much to set up a partnership, this form of business organisation is more complicated compared to a sole proprietorship because it involves more than one person. Not surprisingly, there is a statute, namely the Partnership Act, to govern issues that may arise in a partnership. Unless otherwise stated, all sections referred to in this part are with reference to the Partnership Act.

### When is there a partnership?

The Partnership Act defines a partnership as a relation that subsists between persons carrying on business in common with a view of profit (section 1). The term "business" is defined widely to include every trade, occupation and profession (section 45) and the term "person" includes companies (section 2 of the Interpretation Act). Thus two companies can form a partnership together.

An important question to be determined is when two persons can be said to be carrying on a business in common with a view of profit.[8] It is important to determine this issue for the rights and obligations between the parties themselves and vis-à-vis third parties vary, depending on whether or not there is a partnership between them. Though much would depend on the actual facts of the case, the Partnership Act (section 2) provides some guidelines in this regard. For instance, it provides that:

- The fact that two people jointly own a property does not itself automatically mean that there is a partnership between them. Thus if X dies and leaves a house which is rented out to his two sons Y and Z, that by itself will not mean that Y and Z are in partnership. On the other hand, if two persons buy and sell properties on a regular basis and share profits, there might be a partnership (*Rabiah Bee Bte Mohamed Ibrahim v Salem Ibrahim* (2007)).

[8] See also page 256.

- The sharing of gross returns itself, too, does not automatically mean there is a partnership between the parties. In *Cox v Coulson* (1916), C entered into an agreement with M. C was to let out a theatre to M and M was to provide a play. C was also to bear lighting and advertising costs, while M was to bear the costs of making the scenery. In return, C was to get 60 per cent of the gross takings of the play, while M was to get 40 per cent of the gross takings. There was an accident in the course of the play and the question arose as to whether C could be sued in respect of it. That depended on whether he was a partner. The court held that considering all the circumstances of the case, particularly the fact that the parties only shared gross returns, there was no partnership between them.
- On the other hand, the fact that (net) profits are shared is indicative that there may be a partnership. However, this too is not conclusive. Thus for instance, if a business owes a creditor money and the creditor makes an agreement with the business that profits from the business would go to repay the debt, or if an employee gets a share of the profits of the business in the form of a bonus, or if a relative of a deceased partner gets an annuity or a periodical payment from the profits of the business, that does not necessarily mean there is a partnership in those circumstances.

## Formalities and other matters

The common perception is that for there to be a partnership, there has to be a written agreement. This is not true. A partnership agreement can be entered into orally. However, needless to state, it would be preferable to have a written agreement, as there will be fewer disputes as to what the parties have actually agreed to.

Just as with sole proprietorships, generally, the business of the partnership has to be registered under the Business Registration Act. Since the application process has already been considered in the context of sole proprietorships, nothing more need be said of it at this juncture.

The minimum number of partners in a partnership is 2. The maximum number is 20, as section 17(3) of the Companies Act provides that partnerships with 20 or more partners have to be incorporated.



However, there are certain exceptions to this rule. Thus for instance, accountants and lawyers are allowed to carry on partnerships even if there are more than 20 partners in the firm (section 17(4) of the Companies Act).

It may also be noted that section 4 of the Partnership Act provides that persons who are running a partnership together can be collectively referred to as the firm.

## Relationship between partners and outsiders

(a) **Partner's liability for the actions of other partners**

A partner of a firm may have actual, implied or apparent authority to enter into contracts on behalf of the partnership.

Actual authority refers to authority that the partner has been expressly conferred with by the other partners. In such a situation, if the partner does something he is expressly authorised to do, the partnership and all the partners would be bound (section 6). Thus if the partners authorise partner Y to buy certain computers on behalf of the firm and Y places the orders for those computers, the partnership and all the partners would be bound.

In addition to actual authority, there is implied authority. Implied authority refers to authority that a partner would usually have. In this regard, section 5 provides that every partner is an agent of the firm and the other partners, and any act done by him in the usual way of business will bind the partnership and the other partners, unless he had no authority to do the act in question and the person with whom he was dealing knows of that or does not believe him to be a partner. As stated in section 5, one partner's act in the usual way of business not only binds the firm but also the other partners. The effect of this is that the partnership, and all the partners too, whether or not they play an active role in the management of the firm (for instance sleeping partners or dormant partners), can be made accountable for a debt incurred by a partner acting in the usual way of business.

As stated, implied authority extends to situations when the partner is acting in the "usual way of business". What is in the usual way of business would of course depend on the facts, but case law, though not exhaustive, has established some guidelines.

Thus for instance, it has been established by cases that all partners in firms have the implied authority to sell goods of the firm and buy goods usually needed by the firm. In *Mercantile Credit Co Ltd v Garrot* (1962), P and G were partners in respect of carrying out motor repairs, but their agreement expressly excluded the buying and selling of cars. P then, without G's knowledge, purported to sell a customer's car to M. M paid P. However, the transaction did not take place and M sued the firm to get back the money paid. The court held that P had the usual authority to do what he did and so the firm was bound. Even though he did not have the actual authority, it did not matter, as M was unaware of this lack of authority. Similarly, all partners have the usual authority to employ employees or agents, such as solicitors, in respect of the firm's activities. Likewise, all partners have the usual authority to receive money in respect of debts due to the firm. Thus if X owes the firm some money and he repays it to Y, a partner of the firm, but Y misappropriates it, the firm cannot sue X and make him to repay the money.

In addition, where the nature of business is trading, cases have also held that the partners have the implied authority to borrow money on behalf of the firm and to give security (such as a pledge[9]) in respect of the loan.

However, it has also been established by cases that generally the partner has no implied authority to enter into a deed[10] or guarantee[11] on behalf of the firm without the consent of the other partners.

Aside from actual authority and implied authority, the partner may also have apparent authority, and in such a situation the firm could also be bound. Apparent authority arises if the firm

[9] As to what is meant by pledge, see page 353.

[10] As to what is meant by deed, see page 37.

[11] As to what is meant by guarantee, see page 356.



represents to another person that the partner in question has the authority to do certain acts and that other person relies on that representation.[12] For instance: X is partner of firm Y. He has the actual authority to order goods from Z and has done so on many occasions. Then one day, X resigns. Thus he is no longer authorised to order goods from Z. However, X nonetheless orders goods from Z (who does not know that X has resigned) on behalf of firm Y, just so that the firm incurs some unwanted liability, and then disappears. In such a situation, though X may not have actual authority at the time when he placed the order, he may have apparent authority as far as Z is concerned (section 36(1)).[13]

What has been discussed thus far is contractual liability. In addition to contractual liability, there could be tortious[14] liability. This is covered under section 10, which provides that any wrongful act or omission done by the partner in the ordinary course of business of the firm binds the firm. Thus, if one partner in the ordinary course of the business of the law firm is negligent in preparing a certain document, the partnership and all the partners can be made accountable for it. What is in the ordinary course of business would depend on the facts. In *United States Trading Co Pte Ltd v Ting Boon Aun* (2008) for instance, where one partner fraudulently got a loan in the partnership's name from the plaintiff and disappeared with it, the other partner was held liable as he could not establish that it was not in the course of the partnership business to obtain loans. On the other hand in *Lim Kok Koon v Tan Cheng Yew* (2004), Lim handed over some monies to Tan (a lawyer) to be held by him as a personal trustee. Subsequently Tan disappeared with the money. Lim then tried suing the partnership firm in which Tan was a partner to get back the money. However, the court held that it was not within the ordinary scope of business of a lawyer to act as a personal trustee and hence the firm was not liable.

[12] This is further discussed on page 215.

[13] As to what Y can do to protect itself, see page 231.

[14] As what is meant by a tort, see Chapter 1?

(b) **Suing and being sued**

The liability of partners in relation to torts,[15] is "joint and several" (section 12). The effect of this rule is that once a partner is sued, the claimant may still sue the other partners if the claim remains unsatisfied or not fully satisfied. It may also be noted that in the event that one partner is sued and that partner personally pays the creditor of the firm, that partner can claim a contribution from the other partners.

Section 9 of the Partnership Act provides that liability of partners in contract or debt[16] is "joint". The effect of this rule is that there can only be one action regarding a particular claim in contract or debt. Thus after one partner is sued, if it turns out that he is unable to pay, the claimant cannot then seek to sue the other partners. However, this rule has now been modified by section 17 of the Civil Law Act.

Thus, now whether the action relates to tort, contract or debt, the claimant who has not been paid or fully paid, may bring a subsequent action against other partners who were not initially sued.

However, usually rather than suing individual partners, pursuant to the Rules of the Supreme Court (Order 77), an action may be brought in the name of the firm. This would generally be an easier alternative. Similarly, pursuant to the same set of rules, the firm may sue in its own name. Thus even though the partnership is not a separate legal entity, the firm may procedurally sue and be sued in its own name.

Once the partnership is held liable, the judgment can be enforced against the firm. If the firm's assets are insufficient, the personal property of the individual partners may also be seized to satisfy the partnership debts. As such, there is a possibility of unlimited liability in the case of partnerships, just as with sole proprietorships.

[15] As what is meant by a tort, see Chapter 13.

[16] Debt refers to matters such as unpaid government taxes or judgment debts.



(c) **Incoming and outgoing partners**

The partnership agreement may have a provision allowing a partner to retire or leave by giving notice. If this happens, section 17(2) provides that the partner who is retiring or leaving will still be liable for partnership debts incurred by the partnership before his departure. In order to get out of this, the partner who is retiring or leaving may get the consent of the other partners and the creditors involved to release him from his liabilities (section 17(3)). If they agree, this arrangement is known as a novation and the partner who is retiring or leaving will be released from the past debts of the firm.

Section 24(7) effectively states that, unless the contract provides otherwise, a new partner may only be appointed if there is unanimous consent of all the partners. If this were considered undesirable, it would be prudent for the partnership agreement to provide otherwise. Once a new partner is appointed, section 17(1) provides that the new partner would not be liable for debts incurred by the partnership prior to that time. However, again, if the new partner, other partners and the creditors involved agree, the new partner may be made liable for the past debts of the partnership.

As far as third parties who deal with the firm are concerned, section 36(1) provides that where there has been a change in the constitution of the firm, such as would be the case where a partner has left the partnership, the person dealing with the partnership is generally entitled to assume that all the apparent members of the old firm are still members of the new firm until he has notice of this change. Thus for instance, if X, Y and Z are partners, and X leaves the partnership, a third party who supplies goods to the firm thinking that X is still a partner may be able to sue X for the price of the goods. To avoid such liability, notice must be given. The type of notice depends on the circumstances. In cases where there have been no previous dealings between the third party and the firm, an advertisement placed in the Government Gazette[17]

[17] For an electronic version, see www.egazette.com.sg/. The Government Gazette also contains many other types of notices and information.

would suffice (section 36(2)). In cases where there has been a previous dealing between the third party and the firm, the third party must receive actual notice of the change, such as in the form of a letter. However, it must be pointed out that such liability only arises if the third party knows that the person was a partner. If the third party is unaware that the person was a partner of a firm at the time it dealt with the firm, then such liability would not arise.

## Relationship between partners

The Partnership Act also has several provisions governing the relationship between the partners. However, it must be noted many of these provisions can be overridden by agreement to the contrary between the parties.

(a) **Property**

It is important to determine to whom the property used in the partnership business belongs for various reasons. For instance, if it belongs to the partnership, during the partnership, the partners may not use it for their individual needs unconnected to the partnership business. Similarly, if it is partnership property as opposed to a partner's personal property, and it appreciates in value, that benefit goes to all the partners. In addition, if it is partnership property, upon dissolution of the partnership, if there is any surplus, the partners may be able to get a share of it.

In this regard, section 20(1) provides that all property originally brought into the partnership and all property acquired on account of the firm or for the purposes of the partnership business, shall be deemed partnership property and be applied by the partners exclusively for the purposes of the partnership. If one partner misappropriates partnership property, the other partners may be able to sue him under the tort of conversion[18] or if he uses it for his own purposes and makes some profits out of it, he may have to account for those profits.

[18] As to what is meant by tort of conversion, see page 299, footnote 7.



While section 20(1) refers to property which is brought into the partnership and all property acquired by the partnership, it may not always be clear what items of property are indeed partnership property. To avoid such doubts, such issues should expressly be-addressed in the partnership agreement if possible.

The issue arose for consideration in *Miles v Clarke* (1953). Clarke took a lease of a place and set up a photography business. However, he was not very successful. Later he engaged Miles, a freelance photographer, who brought in a lot of customers. The agreement between them was that the profits were to be shared. Eventually the relationship between both the parties soured and the partnership business had to be wound up. The question arose as to which items were partnership property. The court held that the stock in trade, like films bought with profits, belonged to the partnership. However, the lease and equipment that was supplied by Clarke, was Clarke's, and not partnership property.

Besides obvious things such as equipment and stock in trade which may amount to partnership property, others things such as good will (this can include the name of the firm: *Ng Teck Sim Colin v Teh Guek Ngor Engelin* (1995)) and rights such as trade marks (*Ng Chu Chong v Ng Swee Choon* (2002)) may amount to partnership property.

(b) **Profits and losses**

Section 24(1) states that, unless there is agreement to the contrary, profits and losses are to be shared equally. Thus though A has contributed more capital than B, B may have an equal right to the profits. If the parties do not wish this to happen, they should have their own provisions as to how profits will be shared in the partnership agreement.

(c) **Indemnity**

Section 24(2) provides that the firm must indemnify every partner in respect of payments made or liabilities incurred by him in the ordinary and proper course of the business of the firm. Thus if X orders books at the request of the firm, but pays first, the firm has to indemnify or reimburse him for the expenses incurred.

(d) **Management**
Section 24(5) provides that every partner has the right to take part in the management of the firm. Thus, though A has contributed more capital than B, both B and A have the equal right to manage the company. If such an outcome is not desired by the parties, the question of who should have the right of management should be expressly addressed in the partnership agreement.

Section 24(8) also provides that ordinary matters may be decided by the majority of partners, but that in order to change the nature of the partnership business, the consent of all the partners must be obtained. Again if such an outcome is not desired, the parties should expressly provide otherwise in the partnership agreement.

(e) **Remuneration**
Section 24(6) provides that every partner is not entitled to any remuneration for his services. Since there will be a distribution of profits, there is no presumption that partners will also be paid a regular salary. If such an outcome is not desirable, then again, this should be expressly addressed in the partnership agreement.

(f) **Expulsion**
Section 25 provides that no majority of members can expel a partner, unless the contract provides otherwise. Nonetheless, even if the contract does not allow for expulsion, it might be possible to apply to court to dissolve the partnership in some circumstances[19] and through this, the unwanted partner may be removed.

(g) **Utmost good faith**
Cases have established that, as between partners, there is a relationship of utmost good faith. Section 29 of the Partnership Act also provides that a partner has to account for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership. Similarly, section 30 provides that a partner who, without the consent of the other

[19] See page 236.



partners, competes with the partnership by carrying on any business of the same nature, is accountable for the profits made by him. If these sections are breached, as stated, the partner who has breached them will have to return any profits made or benefits derived. In *Bentley v Craven* (1853), B carried on a partnership with C, as sugar refiners. C bought sugar at a very low price and re-sold it to the partnership at the market price without disclosing this to the partnership. He thus made a secret profit. When B found out, he sued C for the profits made and the court held that C had to account for it.

## Not a separate legal entity

Just like a sole proprietorship, a partnership is not a separate legal entity. As already stated, this would mean, for instance, that the partners can be made personally liable for the debts of the firm. It is also for this reason that a partnership cannot buy land in its own name. If the partnership wishes to buy a piece of land, it would have to buy it in the name of one or more partners, who would then hold it on trust or hold it on behalf of the partnership.

## Dissolution

Once formed, the partnership may be dissolved by subsequent agreement between the partners or as provided for in the original agreement. Aside from this, there are some provisions in the Partnership Act which also allow dissolution.

(a) **Non-judicial dissolution**
Dissolution under the Partnership Act may be carried out by judicial or non-judicial means. Some instances of non-judicial dissolution are as follows:

- Section 32 provides that, unless there is agreement, to the contrary, the partnership agreement, if entered into for a fixed term, will terminate at the end of the fixed term, or if it is entered into for a particular purpose, such as to conduct a sale, the partnership will dissolve upon the achievement of that purpose; or if it is entered into for an indefinite time, by any partner giving notice to the others of his intention to dissolve the partnership. If the partners do not wish to give any individual partner the power to dissolve the partnership at his will by giving notice, they should have a provision against this in the partnership agreement.

- Section 33 provides that, unless there is agreement to the contrary, the partnership is dissolved when a partner dies or becomes bankrupt. This can cause a lot of inconvenience and so often, there is a provision to the contrary in the partnership agreement.

If the partner dies and the partnership is dissolved, what the deceased partner is entitled to get upon dissolution would go to his estate, as named in his will or as may be determined under the Intestate Succession Act.[20] If the contract provides that the partnership will not be dissolved, the agreement might also provide that the estate of the deceased partner (such as spouse or child) may be entitled to some periodic payment in view of the capital (if any) contributed by the deceased partner.

In relation to bankruptcy of an individual partner, as stated, if the agreement is silent, then the partnership is dissolved. In such an event, the creditors may be entitled to what the bankrupt partner would have been entitled to had the bankruptcy not set it. However, even if the partnership agreement provides that it will not be dissolved, the bankrupt partner's share in the partnership will vest in the official assignee or trustee in bankruptcy for the benefit of the creditors.

(b) **Judicial dissolution**

Assuming the partnership cannot be dissolved in accordance to what has been discussed in the preceding part the partnership may be dissolved by judicial means, that is, with the aid of the court, though this is a more cumbersome process. The grounds based on which the court can order a dissolution are set out in section 35:

[20] See page 224.



- Section 35(a) provides that when a partner is permanently incapable of performing his part of the partnership contract, the partnership may be dissolved. In *Whitewell v Arthur* (1865), one partner was paralysed for some time. However, when the action to dissolve the partnership came up, he recovered. In the circumstances, the court did not grant the dissolution.
- Section 35(b) provides that where one partner is guilty of conduct which is prejudicial to the carrying on of the partnership business, the partnership may be dissolved. In *Essell v Hayward* (1860), the solicitor partner misappropriated money belonging to clients in the course of the partnership business. The court held that the partnership could be dissolved.
- Section 35(c) provides that where one partner willfully or persistently commits a breach of the partnership agreement, the partnership may be dissolved. In *Cheesman v Price* (1865), the partner in question failed to record money that he had taken from the partnership business on 17 occasions. In the circumstances, the court allowed dissolution.
- Section 35(d) provides that where it is established that the business can only be carried on at a loss, the partnership may also be dissolved. Since the whole purpose of the partnership is to make profits, if that goal was not achievable, the court may dissolve the partnership.
- Section 35(e) provides that partnership may also be dissolved if it is just and reasonable to do so in the circumstances. For instance, if there is a serious deadlock between the parties, the court may dissolve the partnership on this ground.

(c) **Distribution of assets on dissolution**

Once the partnership is dissolved, the surplus, after creditors are paid off, would be distributed to the partners (section 39). The manner in which the surplus would be distributed among the partners is set out in section 44, though again this can be varied by agreement to the contrary. Section 44 provides that out of the assets, the debts and liabilities of the firm would first have to be settled. The surplus would then be distributed to the partner who has made a loan to the partnership. Following that, the partner who made a capital contribution to the partnership would get paid. Finally, if there were still a surplus after this, then that surplus would be distributed in the same way as profits. On the other hand, if there were insufficient assets to pay the creditors, the partners would be answerable for the debts of the firm, in the same way as they would be entitled to profits (section 44).

### Evaluation

A partnership has unlimited liability, just like a sole proprietorship, and hence there may be some risk involved in that respect. Further, partners may be made liable for the acts of other partners in some circumstances, and so parties have to choose their partners wisely. While it is not compulsory to have a written agreement, since many of the provisions of the Partnership Act may not sufficiently meet the intentions of the parties, it would be desirable to have a written agreement, where many of the issues raised should be specifically addressed.

## COMPANIES

A company is an organisation set up pursuant to the Companies Act. Unless otherwise stated, all sections referred to in this part of the chapter are with reference to the Companies Act.

### Separate legal entity

A company, unlike a sole proprietorship or a partnership, is a separate legal entity. This means that the company is separate from its owners. The company is a separate person in its own right. Various important consequences flow from this separate legal personality.

(a) **Property**

Since the company is a separate legal entity, it can own property such as land, in its own name, unlike partnerships. While partnership property belongs to the partnership, it cannot be owned in the name of the partnership, it has to be owned in the name of partners, who would hold it on trust or on behalf of the partnership.



Further, property of the company belongs to the company and not the members.[21] If a member or director, takes property belonging to the company, otherwise than as allowed by law; that could amount to the offence of theft. If X, a sole proprietor, takes some property used in his business for personal usage; that will not raise any liabilities. However, if X were to set up a company and do the same thing, that could raise liabilities as stated above.

In addition, if X is a member of a company and he has incurred some debts in his personal capacity and is unable to pay those debts, the company's assets cannot be seized to pay off his debts, as the company's assets belong to the company and not to X. This is unlike partnerships, where the creditors may be able to make claim against the partner's share of the partnership.

(b) **Liability for company debts**

Since the company is a separate legal entity, the debts of the company belong to the company and not to the member. Thus members' personal assets cannot be seized to settle the debts of the company. This is one of the biggest advantages of setting up a company. In this respect, there is far less risk involved in a company as compared to a sole proprietorship or partnership.

The issue arose for consideration in the well-known case of *Saloman v A Saloman & Co Ltd* (1897) involved in the manufacture of shoes and boots. Subsequently, he set up a company carrying on with the same business in the same manner. Nothing had changed except for the fact that a company ran the business now. The company later incurred debts and the business failed. The question arose as to whether Saloman could be made personally liable for the debts of the company. The court held that Saloman could not be personally made liable for the debts of the company, as the company was a separate entity from Saloman and its debts were not Saloman's debts.

Though as stated as a general rule, the members of a company are not personally liable for the debts of the company, there are

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[21] As to member, see page 257.

certain exceptions to this general rule whereby the corporate veil is lifted to prevent abuse. *Some* of the exceptions are as follows:

- Section 340(1)[22] basically provides that when the company is being wound up or is being sued, and it appears that business of the company is carried on with the intention to defraud creditors or for any fraudulent purpose, the persons responsible shall be personally liable for the debts of the company. Take for instance X and Y who set up a company with a capital of $2, with the intention to defraud creditors. They enter into certain transactions with creditors who are yet to be paid. Applying the general rule, the unpaid creditors would only be able to sue the company. But if the company has assets worth only $2 it would be pointless for the creditors to do that. X and Y may have also committed an offence, but even if they are prosecuted, the creditors may not get back their money. However, pursuant to section 340(1), X and Y can be made personally liable for the debts of the company, as they carried on the business of the company with an intention to defraud creditors.
- Section 339(3)[23] effectively provides that an officer, who has incurred debts on behalf of the company when there was no reasonable or probable expectation of the debts being settled, would be guilty of an offence. If convicted, that person could also be made personally liable for those debts. Thus if debts are incurred irresponsibly, though there may be an absence of fraudulent intent, there could be personal liability.

(c) **Suing and being sued**

Related to the rule that generally a company's liabilities cannot be enforced against the personal assets of the member, an action may not be commenced against the members in such circumstances. The proper person to institute an action against would be the

[22] There are similar provisions in relation to a limited liability partnership; see paragraph 94 of the Fifth Schedule to the Limited Liability Partnership Act.

[23] There are similar provisions in relation to a limited liability partnership; see paragraphs 93 and 94 of the Fifth Schedule to the Limited Liability Partnership Act.



company. This is unlike partnerships, where partners can be individually sued. Further, if there were rights to be enforced, the proper person to institute the action to enforce those rights would be the company. The members cannot institute an action to enforce the rights of the company. However, again this rule may be abused in some circumstances.

Take for instance, the case of X and Y who are directors of the company and majority shareholders. They then misappropriate funds belonging to the company. In such circumstances, the proper person to institute an action against X and Y would be the company. Though a company is a separate person, it cannot act by itself since it does not have a mind of its own. It has to act through someone and that someone would usually be the director. So if there is a right to be enforced, the directors would have to initiate the action on behalf of the company. But in the above situation, X and Y are not going to institute an action against themselves. Thus they may simply get away with the fraud, if there were no exceptions to the general rule. Not surprisingly, there are exceptions to the general rule. Some of the exceptions are as follows:

- If the majority committed some fraud on the company and use their power to prevent the company from bringing an action against them, the minority may be able to bring an action on behalf of the company. In *Cook v Deeks* (1916), the company had four shareholders, who were also directors. The three defendant directors diverted contracts that were meant for the company elsewhere. The other director brought an action on behalf of the company seeking to make the defendants account for the profits made. The court allowed it. Similarly, in *Ting Sing Ning v Ting Chek Swee* (2008), the court allowed a director with minority shares to bring an action on behalf of the company against other directors with majority shares who had allegedly breached their fiduciary duties.
- Section 216A of the Companies Act allows a member amongst others to bring an action on behalf of the company and the court may allow it if it considers it in the company's interest that such action should continue. However, due to certain reasons, section 216A does not apply to public listed companies.

(d) **Perpetual succession**

A company has perpetual succession until it is liquidated. Thus, even if the members or directors die or become bankrupt, the company continues, which is not the case with sole proprietorships and which may not be the case with partnerships. Legally, in the case of the company, there is no disruption of the business when an event such as the death or bankruptcy of a member or director takes place.

## Types of companies

There are several types of companies. Section 17(2) of the Companies Act provides that a company may be

- a company limited by shares,
- a company limited by guarantee, or
- an unlimited company.

A company limited by shares refers to a company where the liability of the members to the company is limited to the value of their shares. Usually, the shares would be paid up for, and thus in the event of the company's liquidation, at most the members stand to lose the amount they invested in the company in the form of shares. They cannot be called up to pay more, unlike in partnerships. If the shares are not fully paid up for, and the company has gone into liquidation, the member who has not fully paid up for his shares may be called upon to do so (section 250). Thus if a member owes the company $1 per share, then he may be called to pay this up. However, again, he is not liable for anything more than that. Thus the liability of the member to the company is limited to the value of the shares. Limited companies are the most common form of companies and are abbreviated as "Ltd" ("Bhd" for *Berhad* in Malaysia).

A company may also be limited by guarantee. What this means is that the liability of the members to the company is limited to the amount guaranteed (section 250). The amount guaranteed is usually very nominal or small. Companies limited by guarantees tend to be charitable or non-profit organizations, and not organisations that have a primary goal of making money. For instance, the Singapore Management University, the National University of Singapore and the Singapore Zoological Gardens are companies limited by guarantees.



A company may also be "unlimited", which means that the liability of the members to the company may be unlimited (section 250). In the case of such companies, one of the primary advantages of setting up a company, namely that members are not liable for the debts of the company, is lost. Naturally, such companies are not set up out of choice. In certain professions such as engineering and architecture, if the paid up capital is below a certain amount, such companies have to be "unlimited". However, such companies are not common in practice.

Companies may also be classified in terms of whether they are private or public. Section 18(1) of the Companies Act provides that a company is a private company if the articles or memorandum of association[24] of that company

- restrict the transferability of shares (such as that when shares are sought to be transferred, they must be offered to existing members before they are offered to outsiders), and
- limit the number of members to not more than 50.

Both the above conditions must be present before a company can be considered a private company. The majority of companies are private and they are abbreviated as "Pte" (or "Sdn" for *Sendirian* in Malaysia). If either of the conditions is not satisfied, then the company will be a public company. If it is a public company, it does not mean that it must be listed in the Stock Exchange. For instance, all companies limited by guarantee are public companies, but they are not listed in the stock exchange as they do not have shares. Further, listing is not as of right. There are stringent conditions imposed by the Stock Exchange of Singapore before a listing can take place. Further, public companies are generally subject to more regulation. Thus, if the business is just being set up, it would not help to set up a public company. The normal thing to do would be to set up a private company. Subsequently, when the time is right and the company has the potential to be listed, it may be converted into a public company (section 31 of the Companies Act) as a prelude to listing.

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[24] As to what is meant by articles and memorandum of association, see page 244.

A private company may also be classified as "exempt" or "non-exempt". Among other things, section 4(1) of the Companies Act states that a private company can be an exempt private company if it has less than 20 members, and all the issued share capital are held by natural persons (that is, not by other companies). Such exempt companies have several privileges under the Companies Act. For instance, unlike companies limited by shares, they do not have to include balance sheets and profit and loss accounts in their annual returns (Eighth Schedule to the Companies Act). Further, unlike other companies generally, loans may be made to the directors of such companies (sections 162 and 163 of the Companies Act). In addition, exempt private companies do not have to comply with audit requirements in respect of a financial year, if their revenue for that year is less than a certain stated amount (section 205C of the Companies Act). Typically a small, family-owned business would qualify as an exempt company.

### Registering a company

The registration process for a company as compared to that of a partnership is more complex and costly. To be registered, section 19 of the Companies Act provides that two important documents have to be submitted.[25]

The first is the memorandum of association. The matters that must be addressed in the memorandum are set out in section 22 of the Companies Act. The memorandum of association for instance, has to state the name of the company, whether the company is limited (by shares or guarantee) or unlimited, and the particulars of the first subscribers, who will essentially the first members[26] of the company.

The second document that has to be submitted is the articles of association. The articles of association contain matters relating to the internal management of the company. Thus matters such as the

[25] Other documents may also have to be submitted. For details, see the Accounting and Corporate Regulatory Authority website at: www.acra.gov.sg/

[26] As to members, see page 257.



appointment and removal of directors, the powers of directors, the manner of conducting meetings and mode of issuing shares would usually be contained in the articles of association. However, for a company limited by shares, instead of designing its own articles, it may choose to rely on the articles set out in the Fourth Schedule to the Companies Act (also known as Table A).

Once the necessary documents are lodged, the Registrar of Companies may allow the registration. However, under section 20, the Registrar may refuse registration on certain grounds, such as when it appears that the company will be used for unlawful purposes or for purposes prejudicial to public peace. If the registration is successful, the Registrar will issue a certificate of registration (section 19(4)).

### Dissolution

Once registered, the process by which the company may be dissolved is known as liquidation or winding up. This and certain other matters relating to companies are dealt with in chapter 12.

### Evaluation

While a company may be more expensive and complicated to set up, run and dissolve, there is usually far less risk involved as a result of the limited liability concept (other than in respect of unlimited companies). Further, a company is in a much better position to raise finance. When a business is about to be commenced, the various factors must be weighed and balanced to determine which is the appropriate type of organisation to be set up. However, at the later stages, a typical business would usually take the form of a company, as by that time the need to reduce risk and raise finance would be more pressing. Not surprisingly, most large businesses are companies.

## LIMITED LIABILITY PARTNERSHIP

As of 11 April 2005, it is possible to set up yet another type of organisation, namely, the limited liability partnership. The limited liability partnership combines features of both a partnership and a company. All sections referred to in this part of the chapter are with reference to the Limited Liability Partnership Act, unless otherwise stated.

## Registration and other essentials

The registration process with the Accounting and Corporate Regulatory Authority of Singapore is relatively simpler compared to registering a company. Various matters have to be provided for in the application, such as the name of the limited liability partnership, the general nature of the business of the limited liability partnership, the registered office of the limited liability partnership and the name, identification (if any), nationality and usual place of residence of every person who is to be a partner of the limited liability partnership (section 15). However, unlike a company, a memorandum and articles of association need not be provided.

It is also provided that every limited liability partnership shall either have the words "limited liability partnership" or the acronym "LLP" as part of its name (section 18). Every limited liability partnership has to have at least two partners (section 22). It must also have at least one manager who is a natural person, at least 18 years of age, has full legal capacity and is ordinarily resident in Singapore (section 23). The manager can be a partner, though it is not necessary for this to be the case (section 2). The manager is responsible for various filing requirements that are imposed under the Limited Liability Partnership Act.

## Similarities with a partnership

Like in the case of the partnership, every partner is considered to be the agent of the limited liability partnership (section 9). Further, in so far as the internal relations between the partners in a limited liability partnership are concerned, it is very much like a partnership. Thus as in the case of a partnership, relations between the partners are governed by agreement between the parties, failing which there are default statutory provisions governing the matter (section 10). In the case of the limited liability partnership, these default provisions are set out in the First Schedule to the Limited Liability Partnership Act, which among other things provides:



- Partners of a limited liability partnership are entitled to equal share of the profits of the limited liability partnership,
- The limited liability partnership must indemnify each partner in respect of payments made in the ordinary and proper conduct of the business of the limited liability partnership,
- Every partner in a limited liability partnership has the right to take part in the management of the limited liability partnership;
- Every partner in a limited liability partnership is not entitled to remuneration for being a partner as such,
- Decisions are to be made by a majority,
- Every partner in a limited liability partnership cannot carry on business of the same nature as and competing with the limited liability partnership unless he has the consent of the limited liability partnership,
- Every partner in a limited liability partnership must account to the limited liability partnership for any benefit derived by him without the consent of the limited liability partnership from any transaction concerning the limited liability partnership, or from any use by him of the property, name or any business connection of the limited liability partnership, and
- No majority of partners can expel any partner unless the contract expressly allows it.

## Similarities with a company

In relation to external relations, a limited liability partnership is very much like a company. For instance:

- A limited liability partnership is a body corporate and has separate legal entity from that of its partners (section 4),
- A limited liability partnership has perpetual succession (section 4);
- A limited liability partnership can sue and be sued in its own name (section 5),
- A limited liability partnership can acquire, own and hold both movable and immovable property (section 5), and
- A partner of a limited liability partnership is not personally liable, by way of indemnification, contribution or otherwise, for an obligation incurred by a limited liability partnership solely by reason of being a partner of the limited liability partnership (section 8).

Though not as extensive or onerous as in the case of a company, a limited liability partnership is also subject to some reporting requirements, such as the lodgment of the annual declaration of solvency (section 24). The dissolution process of a limited liability partnership is similar to that of a company and this will be considered in Chapter 12.

### Evaluation

A limited liability partnership gives the owners the flexibility of operating it as a partnership, while giving it limited liability. However, since it has limited liability, to safeguard the interests of the creditors, many of the safeguards which are in place in relation to a company are also applicable in relation to a limited liability partnership. In terms of costs, formality and complexity, it falls somewhere between a partnership and a company. However, unlike a company, it may not be in as good a position to raise finance and thus it may not be suitable for a typical large-scale business. In terms of long-term usage, it may be ideal for some types of businesses, such as professional practices.

## Limited Partnership

As from the 4th of May 2009, it is possible to set up yet another type of business organisation, namely the limited partnership. Unless otherwise stated, all sections referred to in this part are with reference to the Limited Partnership Act.

### Registration and other basics

The registration process with the Accounting and Corporate Regulatory Authority of Singapore for a limited partnership is just slightly more complex as compared to registering a partnership. Various matters have to be provided for in the application, such as the name of the limited partnership, the general nature of the business of the limited partnership, the registered office of the limited partnership, the name, identification (if any), nationality and usual place of residence of every person who is to be a partner of the limited partnership and, in relation to each person who is to be a partner, whether he is to be a "general" partner or "limited" partner (section 11).



A limited partnership must have at least one or more "general" partners and one or more "limited" partners (section 3(2)). A "general" partner would be liable for all the debts and obligations of the limited partnership (section 3(3)). Subject to some exceptions, a "limited" partner would not be liable beyond the amount of his "agreed contribution", solely by reason of his being a limited partner of the limited partnership (section 3(4)). However, in exchange for this limited liability, the "limited" partner cannot take part in the management of the limited partnership and does not have the power to bind the limited partnership (section 6(1)). If he does take part in the management of the limited partnership, he would lose his immunity and would become liable for all the debts and obligations of the limited partnership incurred while he so takes part in the management (section 6(2)). However, the First Schedule to the Limited Partnership Act lists certain matters (for instance, voting for the dissolution of the limited partnership or voting for the admission of new partners or advising the limited partnership in relation to business matters) which are not considered as taking part in the management of the limited partnership.

### Similarities and differences as compared with a partnership

A limited partnership is generally similar to a partnership. Thus like a partnership, a limited partnership is not a separate legal entity. Further, among other things, section 4 provides that, subject to the provisions of the Act, the Partnership Act would apply to limited partnerships.

However, there are also notable differences. These chiefly relate to the role of "limited" partners, some of which have already been highlighted in the paragraph above.

### Evaluation

A limited partnership may be ideal for an angel investor or venture capitalist who wants to invest in a start-up but does not want to incur any additional liability over and above what he has invested to third parties. However, as said, in return for this immunity, he cannot take part in the management of the limited partnership. The general partners benefit from the presence of his funds, but they remain liable for all the debts and obligations of the limited partnerships as per partnerships.

**Table 10.1: Comparing partnerships, companies, limited liability partnerships and limited partnerships**

| Partnership | Company | Limited Liability Partnership | Limited Partnership |
|---|---|---|---|
| Registration process simple and not costly. | Registration process more complex and would cost a little more. | Registration process relatively simple and would cost more than a partnership but less than a company. | Registration process simple and not costly. |
| Partnership property belongs to partners collectively. | Company's property belongs to the company and not the members or directors. | Property of a limited liability partnership belongs to the limited liability partnership and not to the partners in their personal capacity. | Partnership property belongs to partners collectively. |
| Not required to appoint company secretary. | Required to appoint company secretary (section 171 (1) of the Companies Act). This may involved more costs. However, private companies may not have to appoint a professionally qualified company secretary (section 171 (1AA) of the Companies Act). Hence additional costs may not be incurred in the case of private companies. | Not required to appoint company secretary. Required to appoint at least be one manager. However, as the manager need not be professionally qualified and can be a partner, additional costs may not be incurred. | Not required to appoint company secretary. |



**Table 10.1: (cont'd)**

| Partnership | Company | Limited Liability Partnership | Limited Partnership |
|---|---|---|---|
| Not required to submit reports (such as annual returns) to Accounting and Corporate Regulatory Authority of Singapore. | Generally need to submit reports (such as annual returns – section 197 of Companies Act) to Accounting and Corporate Regulatory Authority of Singapore. Hence there are more formalities. | Must submit some reports such as declaration of solvency (section 24 of the Limited Liability Partnership Act) to Accounting and Corporate Regulatory Authority of Singapore. But generally less onerous reporting requirements as compared to companies. | Not required to submit reports (such as annual returns) to Accounting and Corporate Regulatory Authority of Singapore. |
| For income tax purposes should keep proper accounts and if turnover is $500,000 or more required to submit certified accounts with income tax returns to the Inland Revenue Authority of Singapore. However, such information is not open to public scrutiny. | Profit and loss accounts and balance sheets must be submitted with the annual returns and these reports can be inspected by the public. Hence there is less privacy. However, this requirement does not apply to exempt private companies. | Profits and loss accounts and balance sheets have to prepared (section 25 of Limited Liability Partnership Act) and Registrar of the Accounting and Corporate Regulatory Authority may be able to inspect them. However, such information (unlike the declaration of solvency) is not open to public scrutiny. | Proper accounts have to be kept (section 27 of the Limited Partnership Act) and the Registrar of the Accounting and Corporate Regulatory Authority may be able to inspect them. However, such information is not open to public scrutiny. |

**Table 10.1: (cont'd)**

| Partnership | Company | Limited Liability Partnership | Limited Partnership |
|---|---|---|---|
| Income Tax: Partners taxed separately on their income at their individual rates. For resident individuals, the maximum rate is 20% since the Y/A 2007. | Income Tax: Company taxed at a flat rate of 18% for Y/A 2009 and 17% for Y/A 2010. Dividends received by shareholders not taxed since the 1st of January 2008, as all companies in Singapore have migrated to the "one-tier" system. | Income tax: Even though limited liability partnerships are separate legal entities, in terms of tax, partners are taxed at their individual rates as per partnerships. For resident individuals, the maximum rate is 20% since the Y/A 2007. | Income Tax: Partners taxed separately on their income at their individual rates. For resident individuals, the maximum rate is 20% since the Y/A 2007. |
| Partnership Act does not require appointment of auditors. | Companies Act requires appointment of auditors (section 205 of Companies Act). This would mean more costs and formalities. However, exempt private companies may be exempted from this requirement in respect of a financial year if their revenue in respect of that financial year is below a certain stated amount (section 205C of the Companies Act) and hence they may not incur this additional cost. | Limited Liability Partnership Act does not require the appointment of auditors. | Limited Partnership Act does not require the appointment of auditors. |



**Table 10.1: (cont'd)**

| Partnership | Company | Limited Liability Partnership | Limited Partnership |
|---|---|---|---|
| Partners have little statutory duties or liabilities. | Directors have many statutory duties, breach of some of which may result in criminal liabilities. | Partners have some statutory duties, breach of some of which may result in criminal liabilities. | General partners have some (though less as compared to a limited liability partnership) statutory duties or liabilities, breach of which may result in criminal liability. |
| There are no statutory formalities relating to meetings. | There are many statutory formalities relating to meetings. | There are no statutory formalities relating to meetings. | There are no statutory formalities relating to meetings. |
| Decisions made by simple majority or as provided for in the partnership agreement. | Decisions made by directors. Some decisions need shareholder approval. Some such decisions require a 50% majority while others may require a 75% majority. Generally there are more formalities. | Decisions made by simple majority or as provided in the limited liability partnership agreement. | Decisions made by simple majority or as provided for in the partnership agreement, though limited partners generally cannot take part in management of the limited partnership. |
| Profits distributed equally or in accordance with agreement. | Profits have to be distributed by means of dividends. Again there are certain formalities pertaining to this. | Profits distributed equally or in accordance with agreement. | Profits distributed equally or in accordance with agreement. |
| Dissolution usually relatively simple. | Dissolution could be more complicated and costly. | Dissolution process similar to that of a company. | Dissolution usually relatively simple. |

**Table 10.1: (cont'd)**

| Partnership | Company | Limited Liability Partnership | Limited Partnership |
|---|---|---|---|
| Liability is not limited | Liability is generally limited. | Liability is generally limited. | Liability is not limited for general partners. However, for limited partners, in relation to their liability to third parties, it is limited to the amount of "agreed contribution". |
| Partners can be sued individually. | Members generally cannot be sued individually. | Partners generally cannot be sued individually. | Partners can be sued individually, though limited partners are not liable beyond the "agreed contribution". |
| Methods of raising finance more limited. | In a better position to raise finance. For instance, public listed companies can issue shares to the public which can be traded and further, companies can create floating charges[27] as security for loans and hence may be in a better position to borrow. | Methods of raising finance more limited. | Methods of raising finance more limited. |
| Little tax incentives for the business. | Many tax incentives for certain types of companies. | Little tax incentives for the business. | Little tax incentives for the business. |

[27] As to floating charges, see page 349.



## JOINT VENTURES

Having looked at the common types of business organisations that can be set up, we shall now examine the position of joint ventures. Joint ventures are common in certain industries, such as construction and property development, and as the name suggests, a joint venture involves two parties coming together for a particular venture or purpose.

In such a situation, the parties concerned may set up a company, a limited liability partnership or a limited partnership to carry out the activities of the venture, in which case, the rights and liabilities of the parties would be governed by the Companies Act, the Limited Liability Partnership Act or the Limited Partnership Act, respectively.

Alternatively, the parties may set up a partnership to carry out the activities of the venture, in which case their rights and liabilities would be governed by the Partnership Act. In such a situation, this would mean for instance that generally one party would be deemed to be an agent of the other.[28]

It is also possible for the parties concerned to enter into a purely contractual relationship with each other without intending to set up a company, limited liability partnership, limited partnership or partnership. In such an event, the rights and liabilities of the parties would be governed by the contract and not by the Companies Act, Limited Liability Partnership Act, Limited Partnership Act or the Partnership Act. Thus for instance, in such a situation, one party would generally not be considered to be an agent of the other.

While it will be clear if the parties have set up a company, a limited liability partnership or a limited partnership, it may not always be clear whether the parties have set up a partnership or a purely contractual undertaking. In this regard, how the parties have labelled their relationship is not conclusive. What is more crucial is

[28] See page 227.

whether the definition of partnership as provided in the Partnership Act is satisfied. If it were, then the venture would be deemed to be a partnership. Otherwise, the venture would be a purely contractual undertaking. As already noted, section 1 of the Partnership Act provides that two persons would be deemed to be carrying on a partnership if they carry on a *business in common with a view of profit.*[29] Thus if X and Y pool in their resources and set up a restaurant and split the net profits among themselves, that would suggest that they are carrying on a business in common with a view of profit, and hence they would be deemed to be partners. On the other hand, if a publisher and an author come together to publish a book and they agree that gross profits would be split 9:1, it is most unlikely that the parties would have intended to set up a partnership. This is because, as the parties are performing very different business activities, they cannot be said to be carrying on a *business in common* and further they are only sharing gross profits.[30] Hence in such a situation, their rights would be governed by the contract[31] and not by the Partnership Act.

[29] See page 225.

[30] See page 226.

[31] Though a publishing agreement is not in practice referred to as a joint venture agreement, in essence it is like one.

# 11 Company Law: Members, Directors and Others

The two important sets of persons in a company are its members and its directors. In addition, the company secretary and auditor have an important role to play. This chapter concerns these various persons who are involved in the operation of a company. All sections referred to in this chapter are with reference to the Companies Act, unless otherwise stated.

## MEMBERS

Section 190(1) of the Companies Act provides that every company shall keep a register of members. The first members, known as subscribers, must be named in the memorandum of association (section 22). Subsequent persons whose names appear in the register of members become members of the company (section 19(6)).

The term "member" does not necessarily refer to a shareholder. For instance, in the case of a company limited by guarantee, there are no shareholders, yet there can be members. In the case of a company limited by shares, "member" refers to shareholders whose names appear on the register of members. Thus if X buys over shares in Z company from Y, but does not register his name in Z company's register of members, X will not be considered a member of the Z company. He will just be a shareholder. As the law confers rights and imposes liabilities only on the member and not on the shareholder, in such circumstances, X's interests may be adversely affected.

However, it must be noted that in respect of scripless shares[1] that are traded on the Stock Exchange of Singapore, the shares will be registered in the name of the Central Depository. The Central Depository has its own depository register, and persons whose names appear in that register are automatically deemed to be members of the company in question. This is pursuant to section 130D(1)(b) of the Companies Act. Thus people who buy scripless shares in the market become members without having to take the trouble to register in the company's register of members.

## Number of members

Each company must have at least one member (section 17), and there is no maximum number of members, unlike in the case of partnerships, which generally must not have more than 20 partners. However, if there are more than 50 members, the company cannot be registered as a private company (section 18).

## Members and management

By virtue of section 157A of the Companies Act, and usually the articles of association of a company as well (such as Article 73 of Table A[2]), directors have the power to manage the company. Thus generally members cannot tell the directors what to do. In *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunningham* (1906), the directors had the express power to sell the company's assets. The

[1] Share certificates are commonly also referred to as scrips. Under a scrip-based system, when a person wants to sell his share, he has to hand over the share certificate to the buyer. Under a scripless system there are no share certificates and hence nothing to be handed over, and the transfer of the share from the seller to the buyer is executed through electronic means. Today, all companies listed on the Singapore Exchange Securities Trading Ltd (SGX– ST) are traded on a scripless basis.

[2] As to what is meant by Table A, see page 245.



members passed a resolution asking the directors to sell the company's assets to another party. The directors refused to obey the resolution of the members, and so the members went to court asking for a declaration that the directors should observe their resolution. The court did not allow it and stated that since the directors were conferred the power to determine such issues under the articles of association, the members could not interfere.

While generally they cannot take on management decisions, members may embark on certain courses of action if they are unhappy over management decisions. Firstly, the articles of association would usually allow the members to remove the directors by ordinary resolution[3] (such as Article 69 of Table A). In fact, in the case of the public company, it is not possible for the articles to provide otherwise (section 152). Thus if the members are unhappy with management decisions, they may exercise this right and remove the directors (assuming they manage to garner the requisite number of votes) with the hope that the new directors appointed would make more agreeable decisions. In addition, the members theoretically also have the option of altering the articles of association, if they manage to garner the requisite number of votes,[4] to confer particular powers on themselves, though in practice this is rarely done. On a more practical side, the member who is not happy with the management may just sell his stake in the company and place his money elsewhere.

Though generally, members do not have the right to manage the company, the Companies Act does and the articles of association may provide that members must approve certain decisions. For instance it is provided in the Companies Act that when the company wants to issue shares (section 161), or dispose of the whole or a substantial part of its undertakings or property (section 160), the approval of members is necessary. Further, if the memorandum or articles of association are to be amended, the approval of members is required (sections 26 and 37 respectively).

[3] As to what is meant by an ordinary resolution, see page 262.

[4] As for the formalities involved in altering the articles of association, see page 260.

## Members' rights

Though generally, a member does not have the right of management, the Companies Act confers various rights on a member:

(a) **Right to enforce the memorandum and article of association**

One such right relates to enforcing the memorandum and articles of association. Section 39 of the Companies Act effectively provides that the memorandum and articles of association represents a contract between the members and the company, and as between members. Thus the members can enforce the terms of the memorandum and articles of association against the company and vice versa, and also against other members. Thus, if the articles of association states that if there is some dispute between the members and the company, the matter must be settled by arbitration, then this provision can be enforced. Similarly, if the articles of association provide that if a member wishes to transfer his shares, the other members must take them up in equal proportions, the member wishing to transfer his shares may enforce that provision against the other members.

In this regard, it may also be noted that the articles of association would usually provide that when the company is dissolved, any assets remaining after all the liabilities have been met would be distributed to the members. On the other hand, the articles of association usually do not provide that dividends must be declared, even if there are available profits. Thus the member would usually not have the right to demand dividends. If the management wants to plough back the profits into investments instead of declaring dividends, they would usually be entitled to do so. In fact many small private companies do not declare dividends even if there are profits, as their shareholders, also being directors or employees, would receive a regular income in that capacity.

(b) **Right to amend the memorandum and article of association**

Unless otherwise provided in the Companies Act, section 26 provides that the memorandum of a company may be amended by a special resolution. Similarly, section 37 provides that subject to the provisions of the Companies Act and the memorandum, the articles of association of a company too can be removed or altered by means of a special resolution. A special resolution would mean that the resolution has to be passed with at least a 75% majority.

However, all this is subject to section 26A, which allows companies to declare certain provisions in the memorandum or articles of association to be "entrenched". Such entrenched provisions cannot be altered at all or may be altered only if some further conditions are satisfied.

(c) **Right to attend meetings and vote**

Another fundamental right of the member is to attend meetings. The members' stand on various matters is usually established through resolutions passed at members' meetings. There are essentially two types of members' meetings: the annual general meeting (AGM) and the extraordinary general meeting (EGM).

As for the annual general meeting, section 175(1) of the Companies Act provides that such a meeting must be held once every calendar year. Failing to hold an annual general meeting is an offence under section 175(4). However, section 175A allows private companies to dispense with the need to have annual general meetings, if all the members so agree to dispense with it.

At the annual general meeting, the members have the opportunity to query the directors on the performance of the company and other issues. The Companies Act provides that the profit and loss account and the balance sheet must be laid before the members at the annual general meeting (section 201). Further, the Companies Act provides that the appointment of the auditors must be done at the annual general meeting (section 205). In addition, the articles of association would typically provide that at the annual general meeting, the appointment and remuneration of directors must be determined and that the members must approve the dividends (if any) declared by the directors.

Other meetings of members are known as extraordinary general meetings, where resolutions may also be passed. The articles of association would usually provide that the directors could convene such meetings. In addition, there are provisions in the Companies Act and could be provisions in the articles of association, which allow members in certain circumstances to call for such meetings. However, it must be noted that in the case of a private company, instead of convening an actual meeting, which may be very cumbersome, it is possible in certain circumstances to get a resolution passed by written means (section 184A).

Where an actual meeting is called, notice of it has to be given to the members. The amount of notice that has to be given would generally vary with the type of resolution that is sought to be passed. In the case of special resolution (such as a resolution seeking to amend the memorandum), at least a 21-day notice has to be given in the case of a public company and at least a 14-day notice has to be given in the case of a private company (section 184). In the case of an ordinary resolution, at least a 14-day notice has to be given (section 177(2)). However, there are provisions allowing for a shorter notice to be given in certain circumstances (sections 184(2) and 177(3)). In addition, the notice has to, at the very least, set out the text of the resolution, so the members can decide whether or not to attend the meeting. If this is not done, the resolution passed at the meeting may be invalidated, as happened in the case of *Hup Seng Co Ltd v Chin Yin* (1962).

As alluded to above, members have the choice of attending or not attending a meeting. Further, instead of personally attending a meeting, they may send a proxy to vote on their behalf by filling up the proxy form that would usually accompany a notice of a meeting (section 181).

To successfully pass a resolution, there must be a requisite amount of votes. For a special resolution, this cannot be less than 75 per cent majority of the votes, and for an ordinary resolution, this has to be more than 50 per cent of the votes. Voting may be done in several ways. For instance, it may be done by a show of hands (in such a case the number of shares held would not be important), or it can be by poll, in the case of a company with share capital; in such a case, the number of shares would clearly be important. The Companies Act provides for, and the articles of association may also provide for, various situations where a poll must be conducted. It may also be noted that in determining



whether there is a sufficient majority, only the number of votes received is relevant. The position of those not voting is not taken into account.

However, it must be pointed out that while voting is usually a fundamental right of the member, in some situations, such as in case of non-voting preference shares,[5] this right may not be available.

(d) **Right to information**

Having invested capital in the company, another fundamental right of the member is the right to receive information from the company. For instance, the member may inspect various registers held by the company, such as the register of members (section 192), register of directors (section 173) and the register of director's shareholdings (section 164). In addition, the company's balance sheet and profit and loss accounts have to be sent to the members prior to the annual general meeting (section 203). Further, the members have a right to inspect the minutes of meetings (section 189). Theoretically, by receiving such information, the members would be able to assess whether the company is being run in a proper fashion.

(e) **Right to be treated fairly**

Another important right of the member is enshrined in section 216 of the Companies Act. Section 216(1) gives the member a right to apply to court if, among other things, the affairs of the company are being run oppressively or in disregard of the members' interest. This section may be particularly useful to minority shareholders. However, for this section to be successfully invoked there must be something more than a mere disagreement with the decisions made by the majority. There must be some element of unfairness

[5] Very generally, shares of a company may be classified as equity shares or preference shares. The preference share may have certain advantages over an equity share in that it may confer on the holder a preferential right to receive dividends, or may give the holder a priority in relation to the return of capital in the event of liquidation. However, it may also have disadvantages as in that it may not allow the holder to vote.

or a visible departure from standards of fair dealing (*Ng Sing King v PSA International Pte Ltd* (2005)).

In *Re HR Harmer Ltd* (1958) for instance, H was a majority shareholder and director. He ran the business himself without consulting the other directors or members. He set up branches abroad and dismissed a director on his own accord without the approval of the others. Further, he drew money from the company for his own expenses. In the circumstances, the court held that the minority shareholders could petition for relief on the ground that there had been oppression. Similarly, in *Scottish Co-operative Wholesale Society Ltd v Meyer* (1959), M and S were in the business of manufacturing rayon. S was the majority shareholder and controlled the board. After some time, S started to manufacture rayon on its own account and so diverted all the business from the company. M petitioned for relief on the ground that there was oppression and the court granted it.

On hearing such an application, the court has wide discretion as to what it can do. For instance, it may order a buyout, prohibit the act in question, force the company to be wound up or allow an action to be brought on behalf of the company (section 216(2)).

### Liabilities of members

Aside from rights, the shareholder may also incur liabilities. In particular, if the company is being wound up and a member is yet to pay up on his shares, he may be called to do so by the company (section 250).

## COMPANY SECRETARY AND AUDITOR

Before proceeding to consider directors, the position of the company secretary and company auditor will briefly be mentioned.

Section 171(1) of the Companies Act provides that every company shall have one or more secretaries who must be resident in Singapore. The company secretary has to be appointed by the directors (section 171(3)). The company secretary has the duty to ensure that various administrative matters required under the Companies



Act are adhered to. For instance, he is the person who would be in charge of maintaining various registers, such as the register of members, he would be the person who has to file various documents or send various notices, and he would be the person responsible for organising meetings. In the case of a public company, the company secretary would need to have certain qualifications which are set out in section 171(1AA). Typically this would mean that the secretary must be a professionally qualified person, such as an accountant or lawyer. However, in the case of a private company, subject to section 171(1AB), it is now not necessary to appoint such professionally qualified persons. Thus a director (other than a sole director – section 171 (1E)) or any person whom the directors deem fit may act as a company secretary.

In addition, section 205 of the Companies Act requires every company to have an auditor or auditors. Directors appoint the first auditors, but members in the general meeting appoint subsequent auditors. Auditors act as watchdogs to ensure that the accounts give a true and fair view of the company's financial position. Auditors are invariably accountants. Notwithstanding section 205, section 205C now provides that an exempt private company[6] may be exempted from appointing auditors or having audited accounts in respect of a financial year if its revenue for that year falls below a certain prescribed amount.

## DIRECTORS

The other very important group of persons in a company is its directors. In this regard, section 145(1) of the Companies Act provides that every company shall have at least one director who shall be ordinarily resident in Singapore. There is no limit as to the number of directors; though the articles of association of the company may have a provision pertaining to that.

It may also be noted that the term "director" is not restricted to persons appointed as such. Section 4(1) of the Companies Act provides that a person, in accordance with whose directions or

[6] See page 244.

instructions the officers of the company are accustomed to act, or any person acting as an alternate or substitute director, would also be considered a director. Thus if X indirectly manages the whole company but is never formally appointed as a director, or if Y, a director, goes overseas and gets X to act on his behalf, in both circumstances, X could be considered to be a director of the company and would be subjected to all duties imposed on directors.

It may also be mentioned that typically large companies have "executive" and "non-executive" directors. Executive directors, such as the managing director, tend to the day-to-day operations of the company and work on a full-time basis with the company. Non-executive directors do not work on a full-time basis with the company and do not take part in the day-to-day management of the company. Instead, they provide general advice, guidance and supervision.

However, in terms of owing duties, the law does make a distinction between the different categories of directors (*W & P Piling Pte Ltd (in liquidation) v Chew Yin What* (2007).

## Qualifications

Section 145(2) of the Companies Act provides that the director must be a natural person who is at least 18 years of age and who has full legal capacity.[7] Thus since a company is an artificial person as opposed to a natural person, a company cannot be a director of another company. Aside for this, the Companies Act does not prescribe any other necessary qualifications to be a director. Thus there is no requirement that the director must have certain educational qualifications or years of experience. However, the articles of association may provide for other necessary pre-conditions before a person can become a director. For instance, the articles of association may provide that before a person can become a director of that company, he must acquire a certain number of shares in that company.

[7] For instance, if a person is mentally insane, he would not have full legal capacity.



As for the maximum age of directors, for private companies, the Companies Act does not prescribe any maximum age. However, for public companies, section 153(1) provides that the maximum age for directors is 70. However, there are certain provisions in section 153 which allow a director who has reached 70 years to be re-appointed on a year-to-year basis if certain conditions are satisfied.

## Disqualification

Though there are not many positive qualifications, once appointed, the director may be disqualified on various grounds. This is unlike the case of partnerships or limited partnerships[8] where there are not so many grounds.[9] The reason for this is that since the company's liability is usually limited, there is a need to offer some form of protection to creditors. Some of the grounds on which a director may be disqualified are as follows:

(a) **Section 148**

Section 148(1) of the Companies Act[10] provides that an undischarged bankrupt cannot be a director or indirectly take part in the management of a company; the rationale being that if a person cannot manage his own affairs, he should not be managing the affairs of a company. The disqualification is automatic and the person who disobeys the disqualification will be guilty of an offence.

However, the disqualification may be lifted if the leave of court or the written permission of the official assignee is obtained (section 148(2)). Formally, it was difficult to obtain such leave or permission. However, now there has been a change in policy, the

[8] However, in relation to a limited liability partnership there are similar grounds on which a manager of a limited liability partnership may be disqualified.

[9] However, an undischarged bankrupt generally cannot take part in the management of a business, whether as a sole proprietor, partner or limited partner (section 26 of the Business Registration Act and section 29 of the Limited Partnership Act respectively).

[10] There is a similar provision in respect of a manager of a limited liability partnership (section 33 of the Limited Liability Partnership Act).

aim of which is to encourage people to start over again, and so, in deserving cases, the disqualification may be lifted.

(b) **Section 149**

Section 149(1) of the Companies Act[11] allows the minister or official receiver to make an application to court asking for a disqualification order in certain circumstances. Thus the disqualification under section 149 is not automatic. For section 149 to be triggered, the circumstances must be that the director was a director of a company which became insolvent while he was a director, or within three years of him ceasing to be one, and the director's conduct was such as to make him unfit to be a director. Matters that have to be considered in determining whether the director's conduct makes him unfit to be a director are set out in section 149(6). These include matters like, whether the director breached his fiduciary or other duties, whether the director misapplied any money and whether the director's conduct contributed to the company's insolvency.

If the court is satisfied that the conditions are satisfied, a disqualification order for up to five years may be imposed. If the director disobeys the disqualification order, that would amount to an offence, unless he has obtained the leave of court to lift the disqualification.

(c) **Section 154**

Section 154(1) of the Companies Act[12] provides that if a person has been guilty of an offence (in Singapore or elsewhere) involving fraud or dishonesty punishable on conviction with imprisonment of three months or more, he is automatically disqualified for five years from being a director or taking part in the management of a company.

Section 154(2) provides that if a person has committed any offence in Singapore in connection with the formation or

[11] There is a similar provision in respect of a manager of a limited liability partnership (section 34 of the Limited Liability Partnership Act).

[12] There is a similar provision in respect of a manager of a limited liability partnership (section 36 of the Limited Liability Partnership Act).



management[13] of the company, or any offence under section 157[14] or 339,[15] he may be disqualified for up to five years. If the offence is a technical one and not serious, the court may decide not to disqualify him.

If a section 154 disqualification has been imposed, the person concerned who continues to be a director would be guilty of an offence, unless he has the leave of court.

(d) **Section 155**

The Companies Act requires various documents and notices to be filed with the Registry of Companies. The reason for this is for the Registrar of Companies to keep track of the companies, and for persons who do business with a company to get reliable and updated information about that company so that they can assess the risk involved, if any. If these documents and notices are not filed, that may amount to a commission of an offence.

Among other things, section 155 provides that a person who is persistently in default in delivering or filing returns, notices or other documents to the Registrar, will be automatically subjected to a five-year disqualification from managing the company, unless he has the leave of court. The phrase "persistently in default" has been defined to mean that the person must be guilty of three or more offences in relation to the delivery or filing of such returns, documents or notices, or must have had three or more orders made against him in respect of certain related matters, within the last five years.

(e) **Articles of association**

In addition to the Companies Act, the articles of association (such as Article 72 of Table A) may provide for circumstances in which the director could be disqualified. For instance, the articles may provide that the director would be disqualified if he became insane or if he has been absent from director's meetings for more than six months without permission.

[13] For instance, breach of section 162 (see page 276) may constitute an offence in the management of the company.

[14] See page 275.

[15] This section deals with failure to keep proper books of accounts.

### Appointment and removal

How directors are to be appointed or how they are to be removed would usually be found in the articles of association. For instance, the articles of association commonly provide that the directors are to be appointed at the annual general meeting by the members (such as Article 63 of Table A). The articles of association also commonly provide that the members may remove the directors by an ordinary resolution (such as Article 69 of Table A). In addition, as already stated, the articles of association may provide for the automatic removal of directors when certain events happen.

The directors may also resign on their own account. Whether any formalities are to be met in such circumstances would depend on what the articles of association provide. However, generally, if the resignation has the effect of leaving the company with no director who is ordinarily resident in Singapore, then the director cannot resign (section 145(5)). Further, if the director is also an employee, his resignation must be in accordance with the terms of his employment contract.[16]

### Directors and management

The Companies Act (section 157A) and usually the articles of association as well (such as Article 73 of Table A) confer on the directors the power to manage the company. In small companies, the directors might manage the company by themselves, but in larger companies, they would usually delegate the day-to-day task of running the company to others, such as employees.

The board of directors is treated as an agent of the company and is authorised to act on behalf of the company. However, the board may delegate its duties to others, such as individual directors or employees, who then become agents of the company. What they then do binds the company, provided it is done within their actual, implied or apparent authority. Actual authority refers to authority that an agent has expressly been conferred with. Implied authority refers to

[16] On termination of an employment contract, see further page 197.



authority an agent in a similar position would usually be conferred with. What sort of implied authority a particular director or employee may have would, of course, depend on the circumstances. If he is a managing director or an executive director or chief executive officer, he can be expected to have the implied authority to carry out certain kinds of things. For instance, among other things, cases have held that a managing director has the authority to execute negotiable instruments, such as cheques, receive debts due to the company, borrow money on behalf of the company, appoint persons to do work in respect of the company's business and give guarantees on behalf of the company. On the other hand, if he is a non-executive director or an ordinary employee, he is less likely to have such implied authority as stated above. However, he may have apparent authority to bind the company. Apparent authority arises if the company or someone in authority represents to another person that the agent in question has the authority to do certain acts, and that other person relies on that representation.[17]

### Directors' duties

Much more than in the case of partners, directors are subject to various duties. Some of these duties emanate from statutes and others from case law. The reason why directors are subject to so many duties, as stated earlier, is due to the fact that, the company's liability usually being limited, there is a need to offer some form of protection to the creditors. In addition, these duties offer protection to members who have invested capital in the company.

For the sake of simplicity and clarity, the duties imposed by case law will be considered and thereafter the duties imposed by the statutes would be considered. However, it must be stressed that these duties are not mutually exclusive and often overlap.

(a) **Duties imposed by case law**

i. **Duty to avoid conflict of interests**

A director owes fiduciary duties (or duties of trust) to the company and, as such, should not place himself in a position

[17] On apparent authority, see further page 215.

whereby his duties to the company and his personal interest conflict.

In *Furs Ltd v Tomkies* (1935) for instance, Tomkies, a director, was in charge of selling a part of the company's business to a third party. The third party offered Tomkies a payment and, as a result, offered to pay the company a smaller sum for the sale. Not knowing this fact, the company agreed to the sale. When the issue came up, the court held that Tomkies was to return this money to the company, as he had obtained it in breach of his fiduciary duties. Similarly, in *Canadian Aero Service Ltd v O'Malley* (1973), the defendants were acting on behalf of a company in negotiations relating to a certain project. Subsequently, while the negotiations were still in progress, the defendants resigned, set up their own company and got the project. The court held that there was a conflict of interest. The defendant's duty was to get the project for the company; their interest was to get it for themselves. Since there was a conflict and the company lost the opportunity, the defendants were liable to pay damages. In fact, even if the company does not suffer a loss, but there is a conflict and the director makes a profit, he may be made accountable for that profit, as was the case in *Industrial Development Consultants Ltd v Cooley* (1972).

However, where there is a potential conflict and the director gets the approval of the members of the company allowing him to go ahead with a particular course of action, liability would generally not arise. Thus for instance, if the director wants to be a director of two competing companies and this is disclosed to the members, who approve of it, no liability would generally arise.

ii. **Duty to act for proper purpose**
The articles of association usually confer on the directors various powers. However, these powers have to be used for proper purposes. In *Howard Smith Ltd v Ampol Petroleum Ltd* (1974), for instance, the directors had the power to issue new shares. New shares are usually issued to raise money. However, on the facts of the case, the directors issued new shares to stop a takeover bid that they considered was not in the best interests of the company. The court nonetheless held that the powers of the directors had not been exercised for a proper purpose. Similarly, in *Punt v Symons & Co Ltd* (1903), the court held that this duty was breached when the directors issued new shares for the purpose of having sufficient voting power to amend the articles of association of the company in question.



iii. **Duty to act in the best interests of the company**
Another aspect of fiduciary duties is that directors must act in the best interests of the company. If this is not observed, liability can arise. In *Re W & M Roith Ltd* (1967), R was the main shareholder and director. Using his powers, he made a provision enabling his wife to draw a pension on his death. When the matter came up, the court held that though this was in the interest of his wife, it was not in the best interests of the company and hence it was held that the company did not have to pay it. Likewise in *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* (2001), when two directors of Ricwil transferred some contracts entered into by Ricwil to another company in which they had an interest in (in that they were the only shareholders of that company), the court held that this duty was breached. Though in these cases there was conflict of interests as well, there could be cases where this duty is breached, without there being such conflict. For instance, in *Walker v Wimborne* (1975), where directors of one company made an interest-free loan to another company in the group without taking any security in return, the court held that the directors were not acting in the best interests of their company in the circumstances of the case.

If any of the above-mentioned fiduciary duties are breached, various consequences may follow. The director may have to account for the profits he made, return any property he obtained in breach of those duties, or pay damages to the company for its losses. Further, any act done, such as a resolution passed, in breach of those duties may be declared invalid. In addition, if the company enters into a contract with a third party in breach of a fiduciary duty, the contract may be set aside, if the third party knows or ought to have known of that breach.

iv. **Duty to act with due care, skill and diligence**
In addition, as stated in *Re City Equitable Fire Insurance Co Ltd* (1925), a director also has the duty to act with due care, skill and diligence. If this duty is breached and the company suffers losses, the director could be liable for those losses.

Thus for instance, if a director signs a cheque without checking why the money is being paid out, there could be liability, as in *Re Railway & General Light Improvement Co* (1880). Similarly, in *Jurong Readymix Concrete Pte Ltd v Kaki Bukit Industrial Park Pte Ltd* (2000), when the director in question got his company to give a guarantee which was not really necessary, without fully understanding the background, without consulting the other directors and without getting legal advice, it was held he had to indemnify the company for the losses suffered as a result. Further, while directors can delegate their duties, if they delegate their duties to someone to whom a reasonable person would not have delegated their duties, there could be liability. In addition, even if there is proper delegation but the director fails to supervise, there could still be liability (*Re Barrings plc* (1999)).

As for due diligence, the question has also sometimes arisen whether this duty would be breached, if the director does not attend board meetings. In this regard, generally a director is not responsible for the acts or omissions of his co-directors (such as for the frauds committed by them) solely on the ground that he did not attend board meetings.

(b) **Duties imposed by the Companies Act**
In addition to duties imposed by case law, there are various duties imposed on directors by virtue of the Companies Act, the basic aim of which is to prevent abuse on the part of the directors who manage the company. Breach of these duties may involve civil or criminal or both civil and criminal liabilities, depending on the section in question. Some of these duties are as follows.



i. **Section 156**
Under section 156(1) when a company enters into a transaction or is proposing to enter into a transaction and a director has directly or indirectly an interest in that transaction, he must declare the nature of his interest at the meeting of directors as soon as the relevant facts have come to his knowledge. Section 156(2) states that interest shall be taken to mean material interest. Thus if company A is entering into a contract with company B, and X, a director of company A, is the majority shareholder in company B, he has to disclose this to the directors of company A. On the other hand, if company B was a public-listed company and X is an ordinary investor with a few shares in company B, he need not make a disclosure as he would not be considered to have a material interest. Section 156(8) also provides that interest of the director includes the interest of his family. Thus if X's wife is a majority shareholder in company B, X would have also to make a disclosure to directors of company A. Section 156(10) provides that the breach of section 156 results in the commission of an offence. In *Yeo Geok Seng v Public Prosecutor* (2000), Yeo was the director of a company (MFED) and the company was awarded a contract to build a community centre. Yeo then got another company in which he was a director to do the actual construction without disclosing this to the board of MFED. The court held that there was a breach of section 156, and hence he was convicted and fined.

ii. **Section 157**
Section 157(1) of the Companies Act states that a director must act honestly and use reasonable diligence in the discharge of his duties. The term "act honestly" covers a multitude of matters, such as that the director must act in the best interests of the company, must not place himself in a position of conflict of interests, and must not use his powers for improper purposes. The term "reasonable diligence" is apt to cover due care, skill and diligence. As these matters have already been discussed in the context of case law, nothing more would be said of them now.

Section 157(2) of the Companies Act states that an officer of a company (such as a director) shall not make improper use of any information acquired by virtue of his office to gain an advantage for himself or any other person, or to cause detriment to the company. Thus if a director leaks out confidential information relating to the company to another competitor for some reason, this section could be breached.

Section 157(3) states if section 157 is breached, the director would have to return profits made by him, or be liable for losses suffered by the company, and that he would be guilty of an offence. Thus in *Lim Weng Kee v PP* (2002), where the director of a pawnshop released pawn items before the cheque presented for repayment of the loans was cleared, it was held that he was in breach of section 157(1), in that he did not act with reasonable diligence, and hence he was convicted and fined. In an earlier civil suit, the director in question was also held liable for the losses suffered by the company.

iii. **Section 162**

Section 162(1) provides that a company, other than an exempt private company,[18] shall not make a loan or provide a guarantee or any security in respect of a loan to a director. Section 162(6) extends the term "director" to include his family. Section 162(3) provides that the directors who authorise any transaction in breach of section 162 would be liable for any losses suffered by the company, and further, section 162(4) provides that they will be guilty of an offence.

However, there are certain exceptions to section 162, the details of which are contained in sections 162(1) and (2). For instance, if the members approve and the purpose of the transaction is to place with the director funds to meet expenditures incurred by him for the purposes of the company, or for properly performing his duties as the officer of the company, that will not raise any liabilities. Similarly, if the members approve and the purpose of the transaction is to place with the director, who is a full-time employee, funds to purchase a home or, if it is loan given to a director who is a full-time employee and the loan is in accordance with a loan scheme which is open to all employees of the company and which has been approved by the members, again that will not raise any liabilities. Further, if a loan is made to a director of a company in the ordinary course of business, and the business of the company includes granting such loans, as would be the case with a bank, then that would not raise any liability either.

Section 163 extends section 162 to situations where the loan, guarantee or security is given to another company in which the director has a material interest. If a director has 20% or more of the equity shares of that other company, generally, that would be considered to be a material interest (section 163(1)). Thus if X is a director of company B and company B makes a loan to company A, and X is a majority shareholder in company A, section 163 would be breached and the directors who authorise the loan would be guilty of an offence under section 163(7).

iv. **Section 168**

Among other things, section 168(1) provides that any compensation for loss of office of the director has to be approved by the members. Thus if a managing director decides to retire and, before that, declares himself an enormous gratuity, that may have to be approved by the members. If this section is breached, the money received will have to be held on trust for the company, and thus the director will have to return it to the company.

However, there are certain exceptions to section 168(1), and these are contained in section 168(5). For instance, it is provided that if a payment is made pursuant to an agreement which was made with the director *before* he became a director, and the payment was the consideration or part of the consideration for agreeing to be a director, such a payment need not have to be approved by members. The

[18] As to what is meant by exempt private company, see page 244.

probable reason for this is that the likelihood of abuse in such a situation would be slim.

v. **Section 169**

Section 169 effectively provides that any emoluments given to directors, such as directors' fees and allowances, have to be approved by the members. If the section is not observed, the money received would be held on trust for the company and thus the directors would have to return it to the company.

A director may sometimes also be an employee and in that capacity he might receive certain payments, such as a salary. Members need not approve such payments. It is only when the payment is received in his capacity as director that section 169 would be triggered. However, the articles of association may provide that even such payments have to be approved by the members. In addition as stated, there is also the duty to act in the best interests of the company.

(c) **Duties imposed by the Securities and Futures Act**

Another statute that could impose liabilities on the director is the Securities and Futures Act, though it must be stressed that the application of the Securities and Futures Act is not restricted to directors.

One important aspect of the Securities and Futures Act is the prohibition of insider trading. The laws on insider trading ensure that there is level playing in the stock market, and that some players do not profit, from inside information that is not publicly available at the expense of others. Unless otherwise stated, all sections referred to in this part, are with reference to the Securities and Futures Act.

Section 218(1) of the Act provides that if

- a person connected to a corporation possesses information[19] concerning that corporation that is not generally available, and

[19] The term information is defined in section 214 widely and even includes matters relating to suppositions, intentions and negotiations.



- the information is such that a reasonable person would expect it to have a material effect on the price or value of securities of that corporation, and
- the connected person knows or ought reasonably to know that the information is not generally available and might have a material effect on the price or value of those securities,

then, he should not, among other things,

- subscribe for, purchase, sell or enter into an agreement to subscribe for, purchase or sell any such securities (section 218(2)),
- procure another person to subscribe for, purchase, sell or enter into an agreement to subscribe for, purchase or sell any such securities (section 218(2)), or
- directly or indirectly communicate the information or cause the information to be communicated to another person, if the connected person knows, or ought reasonably to know, that the other person would or would be likely to subscribe for, purchase, sell or enter into an agreement to subscribe for, purchase or sell or procure another person to do the same (section 218(3)).

The phrase "a person connected to a corporation" is defined in section 218(5) and this includes officers of the corporation. The term "officer" in turn has been defined in section 218(6) to include directors, secretaries and employees of the corporation.

The Securities and Futures Act supersedes the Securities Industry Act. Under the former Securities Industry Act, only persons connected to a corporation or persons who received price-sensitive information from persons so connected were prohibited. However, now under the Securities and Futures Act, even persons not connected to a corporation or persons who receive price-sensitive information from persons not connected to the corporation, come under a similar prohibition. This is provided by section 219. Thus for instance, if X a director of a company has some price-sensitive information relating to that company, which is not generally available and he passes the information to Y who passes it to Z, Y and Z may fall under prohibition stated in section 219, for instance if they purchase the shares of the company, even if Y and Z are not persons connected to that company.

If section 218 or 219 is breached, that could result in criminal liability. Section 221 provides that a person who contravenes section 218 or 219 shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $250,000 or to imprisonment for a term not exceeding seven years, or both. In *Public Prosecutor v Koh Soe Khoon* (2006), the defendant was the managing director of a listed company. He had confidential price-sensitive information relating to the higher net profit and dividend rates of the company. Before the information was made public on the 2nd of December, he bought more of the company's shares. When the information was made public, the share price of the company went up and the defendant made a paper profit of about $47,000. The defendant was later charged with insider trading. On conviction, he was fined $160,000 and in default, 16 months' imprisonment for the section 218 contravention.

Alternatively, under section 232, the Monetary Authority of Singapore may bring a civil claim for a "civil penalty" to be imposed against any person who has contravened section 218 or 219. However, since section 232 involves a civil claim, it would suffice to establish on the balance of probabilities that a contravention had taken place. This is unlike criminal proceedings pursuant to section 221, where it must be established beyond reasonable doubt[20] that a contravention had taken place. The amount of civil penalty is provided for in section 232(2), and it states that it,

- shall not exceed three times the amount of profits gained or losses avoided by the contravener, or
- shall be an amount equal to $50,000 (in the case of individuals) or $100,000 (in the case of corporations),

whichever is the greater.

Thus far, the liabilities of the contravener to the State have been considered. In addition, the person who contravened section 218 or 219 could face civil liability to a person who has,

[20] See page 8.



contemporaneously with the contravention, subscribed for, purchased or sold securities and who has suffered a loss. This is provided for in section 234. Thus if X, in contravention of section 218 or 219, sold securities to Y at a inflated price because X had inside information which would greatly lower the price of the securities had the information been made public, Y may bring an action against X and claim the difference between the price he paid and the price the securities would have been likely to be traded at, had the information been made public. Section 234(6) provides for a maximum amount that is recoverable under this section. The amount recoverable is restricted to the amount of profits gained or losses avoided by the contravener.

It may also be noted that aside from insider trading, the Securities and Futures Act also prohibits other unfair practices that may arise in a stock market, such as false trading or market rigging (section 197) or market manipulation (section 198). Thus for instance, if A and B by prior arrangement buy and sell the same shares to and from each other repeatedly so as to create an impression of active trading in that counter, these sections could be breached. The making of false or misleading statements pertaining to securities is also prohibited (section 199). Thus in *Public Prosecutor v Wang Ziyi Able* (2008), the online posting of false information that a particular listed company was raided by the Commercial Affairs Departments without caring whether the information was true or false and which information could have likely induced persons to sell their shares in that company, resulted in the commission of an offence.