FACULTY OF LAW
Bachelor of Laws (Hons)

LAW OF ASSOCIATION I \((LAW604)\)
SUMMARY NOTES
(Based on Partnership Act 1961, Companies Act 2016)

Prepared by
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PARTNERSHIP LAW

[A] Nature of partnership

Formula: **Arief Trading v Aw Yong Wai**

1. Partnership agreement
   Ascertaining whether there was an agreement between them and whether it was in the form of oral or writing
   Case law: **Senanayake v Wong Peng Yuen**

2. Section 3(1) PA – business in common
   Definitive factor, definition of business (sec 2)
   There are two criteria,
   (i) Via cases
      [1] **Lucky Height Development** – the proprietor of land entered JVA with developer to build houses/shoplots. No partnership between them as no business in common.
      [2] **Gulazam v Noorazman** – Policeman enter into business with df to sell, rear and buy cattle where he will provide capital. There was partnership between them.
   (ii) Surrounding circumstances to establish intention of the parties

3. Sec 4 – Guidelines – the rules where it is not deemed as partnership
   **Sec 4(a)** – Partnership does not exist just because the property is owned jointly or commonly used. (Davis v Davis)
   **Sec 4(b)** – Sharing of gross return is not deemed as a partnership as meant by ‘sharing profit’, only net profit. (Cox v Coulson)
   **Sec 4(c)** – The presumption is every sharing of profit will be deemed as partnership. Nevertheless, the court will take into consideration on all circumstances of the case. (Lucky Height Development – ‘prima facie evidence’)
   **Sec 4(c)(i)** – **Cox v Hickman** – A trader agreed for the creditor to run business by assigned them his land, the profits would then be used to fulfil his loan. No partnership.
   **Sec 4(c)(ii)** – Servants are allowed to take part in any project where they have a share of profits, but they will not be liable as partner.
   **Walker v Hirsch** – a clerk receives salary and on top of that 1/8 of firm profit and losses was paid from her. No partnership as her status as an employee.
   **Sec 4(c)(iii)** – **IRC v Lebu’s Trustees** – a deceased bequeathed his share and profits to his wife. Court held the wife not a partner.
Sec 4(c)(iv) –
a person has advanced money as a loan for business. Enters into a contract agreeing to the rate of interest that he will receives will vary as according to the business profits. Such profit does not make him as a partner. *(Re Young, ex parte Jones)*

Sec 4(c)(v) –
there was a sale of a business, its goodwill followed by an agreement that the considerations for the sale will be paid out of a portion of the profits that the business may make. Not liable as a partner. *(Pratt v Stick)*

[B] Relations of Partners inter se

Sec 21 states that every mutual rights and duties of the partners whether ascertained by an agreement or defined by Partnership Act may be varied. Must be by consent by all partners that either be given expressly or infer during the course of dealings.

**Common law duty** – there are *fiduciary duties* among the partners that places a duty to display an utmost good faith in all dealings affecting the partnership.

Sec 22 – Partnership property

To ascertain partnership property is by looking to the partnership agreement. The principle are as follows:

If it expressly stated in an agreement – the property deemed as partnership property

If the agreement is silent – look at the intention of the parties as stated under sec 22(1) and sec 23:

- If the intention shows the property is for the partnership, the it will be deemed so which based on the surrounding circumstances.
- If the intention shows otherwise, the property deemed as individual property.

Sec 22(1) – all property originally brought into partnership stock are deemed as partnership property and must be used exclusively for partnership, except the partnership agreement said otherwise.

*Miles v Clark*: the photographer allowed his equipment to be used in the course of partnership without definite agreement between them. Held: the equipment deemed as not a partnership property.

Sec 22(2) – the co-owner of land, which is not partnership property, are partners as to the profit from the said land, have purchase other land by using the said profit. The land that has been brought is deemed not as a partners but only as co-owners.

Sec 23 – the presumption that every property bought using the partnership money is partnership property is rebuttable and can be proved otherwise.

*Ponnukan v Jebrahatnam*: the appellant entered into partnership with respondent to build houses and to share some profits. The land was owned by respondent. Held: the
appellant failed to prove that the land was intended as a partnership property, hence the appeal failed.

Sec 24 – conversion into personal estate of land held as partnership property

Sec 25 – judgement against partnership property for partner’s separate judgement debt.

Sec 26 – Rights and duties of partners

Sec 26(a) – Capital and profits: All partners must share equally the capital and profits, and contribute equally towards the losses. If the capital is unequally shared, it is presumed that the profits will be distributed based on the ratio of their contribution.

*Kilpatrick v Mackey* – both partners brought a hotel with K contributed larger proportion. When the hotel was sold, the profits were shared evenly and not in proportion to their initial contribution.

Sec 26(b) – indemnify against liability: the firm must indemnify (protect against losses) every partner regarding the payments made and personal liabilities incurred by him. (*Prager v Blatspiel*)

Sec 26(c) – Advancements made by a partner to the firm. The partner that contributed above the amount he agreed to contribute to the capital is considered a loan. Thus, interest of 8% per annum ought to be paid. (*Kilgariff v Morris*)

Sec 26(d) – interest on capital. If the agreement is silent, then he is not entitled to interest.

Sec 26(e) – every partner may take part in the management of the partnership business. Failure to do so will render him to have failed in his duty, which would allow the partnership to be dissolved. The right to participate is still subjected to the partnership agreement if it said otherwise. (*Kelly v Tucker*)

Sec 26(f) – no partner shall entitle to remuneration. Every partner is entitled to act to the best of his ability as a duty to co-partner, thus not entitled to remuneration. (Re Noonan)

Sec 26(g) – no person may be introduced as a partner without the consent of all existing partners. But, partnership agreement may say otherwise. (Martin/ Thompson v Thompson)

Sec 26(h) – any difference relating to ordinary matters may be decided with majority of the partner but not in relation to the nature of business that require unanimous support from all the partners.

*Highley v Walker* – the admission of the partner son as the trainee is the ordinary matter that can be resolved over with majority votes, provided the decision is made in good faith.

Sec 26(i) – every partner may have access to and inspect any related records of the firm includes accounts, meeting minute, etc.

Sec 27 – Expulsion of partner
- All the existing partners includes the partner affected must agree with the expulsion, unless there is an express agreement that the majority may expel the partner.
- The right to expulsion must be used in good faith.
- If the right to expel is confer under the agreement, the notice can be served to the alleged partner in the case where he had breached his duty as a partner in the firm.
- **Green v Howell**: The partnership agreement contain provision that the partner can be expel in the case of misbehaviour. The other partner then served the alleged partner with the notice of expulsion. The court held that the notice was valid.

**Sec 28** – Retirement from partnership at will

- Means if no term was fixed for the expiry of the partnership under the agreement, then the partner may give the notice to do so to the other partners.
- The notice in the form of written would suffice.

**Sec 29** – continuation of a term after an expiry of the partnership

- After the expiration has occurred, and there are no alteration of the right and duties ever been made under a new agreement, then the old right and duties is deemed to be remain the same.

**Sec 30** – duty of disclosure

- The partner has duty to disclose true accounts and full information about all thing relating to the partnership.
- This is necessary to prevent the partners from actively misleading to each other.
- **Wilson v Carmicheal**: this right will continue until it is released by settled accounts or when the court refused to interfere.
- If the partner who has a right over the information is aware that such info is withheld from him, then there is no duty of disclosure and the contract made between the partners is considered valid (**Law v Law**)

**Sec 31** – duty not to make secret profit

- Secret profit means any financial advantages obtained from the commission that agreed without consent from other partner.
- A partner cannot make profit for himself by using the info or position of him without the consent from others partner.
- Any profit obtained innocently will be deemed as partnership property.
- The partner can only keep the profit after get consent from others partner.
- **Pathirana v Pathirana**: the parties were partners in a petrol station belonging to Caltex. Reps give 3 months notices to determine the partnership during that period obtain a new agreement with Caltex and without the consent from the appellant, transfer the agency under his name alone. He then continued to trade in the same premises under his name. Held: the appellant entitled to the share
profit as the agency was a partnership asset. The reps’ unauthorized use of his position was a clear violation of his fiduciary duty.

**Sec 32** – duty not to compete with firm

- Partner has a duty not to carry on a business in the same nature.
- Breach of the duty will render the partner liable to pay to the firm all profit made by him.
- Conflict of interest will occur if:
  i. Business in the same nature
  ii. Business that carry on without the consent from other partners.
- **Aas v Benham**: ship broking not in the same nature as building ship, hence not in competition with the firm.
- **Glassington v Thwaites**: publication of evening newspaper and morning newspaper are business of the same nature.

**Sec 33** – right of assignee

- Sec 33(1): an assignee is not entitled to interfere with the management of the partnership business, but only to receive the profits share.
- **Re Garwood’s Trust**: an assignee is restricted in his control of the assigned assets, but only entitled to share profits.
- Sec 33(2): upon dissolution, the assignee will entitle to the share profits and to ascertain the value of the share (**Watts v Driscoll**).

[C] Liability of Partnership to Outsiders (3rd Parties)

**Sec 7** – Power of partner to bind firm

Elements:

[1] Business culture prevail partnership agreement in determining the usual way of business (**Mercantile Credit v Garrod**).

[2] The act must be carried on in the usual way of business. (**Chan King Yue v Lee & Wong/ Goldberg v Kenkins**)

[3] The partner must act as an agent and not as principal (**Vasu Devan v VA Nair**)

[4] For an act to be in usual way of business of the kind carried out, the act must be necessary not merely convenient for the carrying on of such business (**Union Bank of Australia v Fisher**)

[5] The third party must know or believe the person with whom he entered into the transaction with is a partner (**Sithambaram Chetty v Hap Hing**)

[6] Where a third party enters into a transaction with a person knowing that such person does not have the authority to act, then the firm will not be liable. Nevertheless, third party may know such authority during the previous dealings with the firm or where the partner is held out by other partner.
Sec 8 – Partners bound by acts on behalf of firm

Elements:

(a) An act or instrument relating to the business of the firm;
(b) done or executed in the firm-name (or showing an intention to bind the firm);
(c) by any person authorized;
(d) whether a partner or not;
(e) Binding on the firm and all the partners.

(1)

"An act or instrument relating to the business of the firm; done or executed in the firm-name"

Principle: The execution of deed of assignment stating it was trading in the name of the firm showing an intention to bind the firm despite the signature of the fathers that was forged by the son without father’s knowledge. In this case, the son has an authority to do so as the partner. (Re Briggs)

(2)

"By any person authorized"

<table>
<thead>
<tr>
<th>Types of Authority</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>Express</td>
<td>Oral/written given to the agent expressly by the principal</td>
</tr>
<tr>
<td>Implied</td>
<td>May arise from the conduct or status of the party namely it can be implied from the circumstances of the case. Whether he has actual authority is irrelevant – the principal is bound.</td>
</tr>
<tr>
<td>Apparent/ostensible</td>
<td>Arises from the representation or holding-out of the principal to the 3rd parties who relied on the representation; that the person in question has authority. No actual authority is required.</td>
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| Types of agency | Existence | Name of Principal | | |
|-----------------|-----------|-------------------|-----------------|
| Named           | /         | /                 | Sue the firm    |
| Disclosed       | /         | X                 |                 |
| Unnamed         | x         | X                 | Sue the person  |

Principle: section 8 does not apply to undisclosed principal which suggest that the person authorized must not act as principal but disclosed his agency. (Asamaju Enterprise v MBB)

Instrument means formal written document evidencing an act/agreement like deed.

Sec 9 – Partner using credit of firm for private purposes

Essence elements:
(a) One partner pledges the credit (buat hutang atas nama firma) of the firm for a purpose;
(b) Not connected with the firm’s ordinary course of business;
(c) The firm is not bound;
(d) Unless he is specially authorized by the other partner;
(e) Exception: does not affect any personal liability incurred by an individual partner.

Case study 1: **Higgins v Beauchamp**

Facts: One partner borrowed money from P stating it was for partnership purposes but misappropriated the same. This was cinema business not trading firm. Partnership agreement prohibited borrowing without the consent of the other partner.

Held: the other partner is not bound since there was no implied authority to borrow. Only trading business have such authority and is within its usual way of business.

Case study 2: **Wheatley v Smithers**

A trading partnership is one that must sell and buy goods – thus an auctioneer is not a trading firm.

Case study 3: **London Chartered Bank of Australia v Kerr**

Principle: In order for section 9 to apply, it must show that the other partners have consented to such borrowing. Failure to do so will rendered the firm to bind to such liability.

* Issue: Can an act which is not in the usual way of business bind the partnership?

Case: **Chan King Yue’s case**

Held: Yes, provided it is necessary for the carrying on the partnership business.

* **Sec 17** – Admission by any partner is admissible evidence against the firm.

**Sec 18** – Notice to one partner (active partner) is notice to all, provided there is no fraud by that partner.

* **Sec 10** – Effect of notice that firm will not be bound by acts of partner

Principle: If the partnership agreement restricts the authority of a partner, his acts in the said matter does not bound the firm with regards to third party who has notice.
### Differences of liabilities

| Joint liability | – One course of action only  
| – Sue one party only which the plaintiff sue the firm at once.  
| – Applied to section 11  
| – Sue one partner for only one course of action |
| Several liability | – The aggrieved party may sue the partner according to his choice.  
| – Sue many partners as he wants but cannot rope-in |
| Joint and several liability | – Refer: sec 14  
| – The firm or all partners individually v Third party  
| – Applied for section 12 and 13.  
| – Principle of rope-in where partner who was sued by other can also share the liability with others partner.  
| – Where all partners are named in the writ by plaintiff, every partner must file defence individually (Krishnan v Abdul Razak) |

**Sec 11 – Liability in contract**

- Liability here is joint liability.
- This enable a third party to take actions against the firm for any debts and obligation of a contractual in nature.
- A third party may bring an action against all the partners of the firm jointly, but omitting to name any partner as the defendant will cause the right of action against the unnamed partner to be waived even if he is jointly liable.

**Elements:**

(a)   Every partner is liable jointly with the other partners;
(b)   With regards to partnership debts and obligations (liabilities of a contractual in nature)
(c)   Exception: If a partner dies before the writ is issued then his estate becomes severally liable.

**Sec 12 – Liability of firm for wrongful act (torts)**

- Liability here is joint and several.
- Elements:

[1] A wrongful act is done within the ordinary course of business (Hamlyn v Houston)

Facts: Here the active partner of a firm, defendant bribed the plaintiff’s clerk in order to obtain information concerning the terms of the tender made by the plaintiff. Both firms were in competition with each other doing grain business.
Held: The obtaining of such information was a legitimate activity in the course of the defendant’s business albeit it was obtained in a wrongful manner – as such section 12 applies. Thus is an authorized act not wrongful per se, the other partners would be liable of the act is carried out in a wrongful manner.

[2] When a wrongful act is done with the consent of the other partners

**Cricklewood Holding Ltd v CV Quigley**

Facts: Partner in a legal firm acted dishonestly by raising money via mortgages through the solicitor’s nominee company. He later stole the money.

Held: The said partner’s fraud meant that the other partners were liable for plaintiff’s loss since the dishonest act was committed in the usual way of firm’s business.

However, in the **Estate Realities Ltd v Wignall**

Facts: One partner breached his fiduciary duties in relation to shares of a company. The other partner was overseas when that happen and was not a party to the breach as he did not deal and receive the shares with knowledge.

Held: Section 12 did not apply as such and thus that partner was not required to account for profits nor was he the constructive trustee for the shares since he did not knowingly assist in the breach.

**National Commercial Bank v Batty**

Facts: One partner committed fraudulent conversion of cheques belonging to a company – deposited the cheques into the firm’s account and used the money for his own purpose.

Held: The act of depositing the cheques in the firm’s account was an act in the ordinary course of firm’s business although as a partner he had authority to deposit cheques, there were cheques laced with fraud as such the partner did not had apparent authority.

**Sec 13** – Misapplication of money or property received for or in custody of firm

- The firm or partner receiving money in the scope of his apparent authority from clients misapplies it while in custody of the firm – firm must make the good loss.
- Elements:

[1] The money or property is received by a partner acting within the scope of his apparent authority.

**Earl of Dundonald v Masterman**

Money received by a partner in a firm of solicitors was held to be money paid to the firm in the course of its professional business, and the other partners were liable for any losses occasioned by the negligence of dishonesty of the partner.

[2] The money or property while in the custody of the firm in the course of business, is misapplied by one or more of the partners

**Rhodes v Moules**
Facts: A partner is a solicitor’s firm informed his client who wanted to borrow money by way of mortgaged on the property that additional securities were required. The client handed over share warrants to bearers. The solicitor misappropriated them and was sued. Held: The share certificate was received within the scope of the partner’s apparent authority and in the ordinary course of business.

Liability in Crime

- Personal liability (Chun Shin Kian v PP)

Sec 14 – Liability for wrongs joint and several

(Appplies for sec 12 and 13)

Sec 15 – improper employment of trust property for partnership purposes

- Ex parte Heaton, Re Bell’s indenture

Sec 16 – persons liable for holding-out

Elements:

[1] A representation was made by a person to a third party

- A person must consent to or know that his name is represented as a partner or holds himself out to be a partner (Tower Cabinet Co v Ingram)

[2] The third party relied on such representation

- The third party must have acted on the strength of representation and must have believed it to be true (Lynch v Stiff)

[3] The third party must suffer losses results from the representation

Sec 19(1) – liability of new partner

- A new partner will not be liable to creditor for anything done before his admission to the partnership.

Sec 19(2) – liability of retiring partner

- A retired partner remains liable to third parties for the debts that are incurred by the firm after he has retired, unless the express notice has been given

- Court v Berlin: The dormant partners who was retired was held liable for the loss incurred.

Sec 19(3) – tripartite agreement

- A retiring partner may discharge his debt by constituting a tripartite agreement between him, the existing partner and the creditor to exclude him from any liability incurred.

[D] Dissolution of partnership
Dissolution of the partnership can happen in these ways:

[1] Dissolution by expiration or notice

**Sec 34** – subject to the partnership agreement

(a) If there is fixed term, then notice is not required
(b) If dissolve through adventure or undertaking, notice is not required
(c) If there is no fixed term (partnership at will), then notice is required.

[2] Dissolution by bankruptcy, death or charge

**Sec 35** – subject to partnership agreement

[3] Dissolution by illegality of partnership

**Sec 36**

[4] Dissolution by the court

**Sec 37**

**Sec 38** – Regarding notice

**Sec 38(1)** When a third-party deal with a firm after the change of constitution, he is entitled to treat the apparent members of the old firm as partners until notice of change has been received. Such notice must be personal notice (*Re Siew Inn Steamship*). A person who is in habitually dealing with the firm must receive personal notice regarding the partner’s resignation from firm (*Tan Sin Moh v Lebel Ltd*).

**Sec 38(2)** once advertisement has been produced, those who don’t have any previous dealings with firm cannot make the retired partner to be liable for the losses. A retired partner’s name in the letterhead cannot made him liable as such (*Tower Cabinet v Ingram*)
COMPANIES LAW

Based on Companies Act 2016

[A] Administration of Companies

Sec 9 – Requirement of a company

- The company must have a name, one or more members that will have limited or unlimited liability for the obligations of the company, have one or more shares for a company that limited by shares and one or more directors.

Types of companies

Sec 10 – Classification via liability of members

(a) Company limited by shares
- Sec 10(2) states a company is limited by shares if the liability of its members is limited to the amount of unpaid on shares held by the members.
- If the shares are partly paid and partly unpaid, then the other half of the shares only will be paid upon the winding up of the company.
- The amount of shares that is required to pay is decided under the constitution of a company.

(b) Company limited by guarantee
- Sec 10(3) states a company is limited by guarantee if the liability of its members is limited to amount as the members undertake to contribute in the event of the company is winding up.
- As such companies is prohibit from having a share capital, hence the members of a company are not required to contribute any assets in the event of winding up (sec 12).
- The amount of the undertaking by the members of a company is depending on its constitutions.
- Company limited by guarantee can only be formed with the following objects that specified under sec 45(1). The company can only apply its profit in promoting its objects and is prohibited to pay any dividend to its members. (sec 45(2) a & b) In the event of winding up, all the assets available to its members will be transferred to another body with similar objects (sec 45(2)(c)).
- The company may apply to omit the word “Berhad” from its name (sec 45(3)).

(c) Unlimited Company
- Sec 10(4) states a company is unlimited company if there is no limit on the liability of its members.
- This means, upon the company being wound up, its members are liable for the debts of the company without limit if the company has insufficient assets to meet its debts.
- The creditor of the company may sue for debts and the liability is of all members stipulated in the register of company.
- Creditor also have access to the personal property of all members to an unlimited extent if the company is wound up and has insufficient funds.
Sec 11 - Classifications via public status

(a) Private company

- Sec 2 provides the definition of a private company.
- Private company will carry a name of “Sendirian Berhad”.
- Only company limited by shares and unlimited company can be incorporated as private company (sec 11).
- The features of a private company as refer under sec 42 are as follows:
  (i) Having not more than 50 shareholders;
  (ii) The company is restricted from transfer the shares
  (iii) Prohibits from issuing a prospectus;
  (iv) Prohibited from invite the public to deposit money with the company.
- Regarding to a private company that limited by shares, such company must not offer to the public any shares or debentures of the company (sec 43(1)a).
- If a private company has breached any of the features above, then the company cease to be a private company. The company will become a public company via automatic conversion as specified under the notice from the Registrar (sec 42(4)).

(b) Public company

- Sec 2 provides that the public company is a company other than private company. Hence, the company that is not having any above features is regard as a public company.
- Public company carry a name of “Berhad”.
- Any types of companies can be incorporated as public company (sec 11).
- Public company cannot convert to a private company without the court order (sec 42(6)).

Sec 44 - ‘Offer to the public’

- A private company that limited by shares cannot made an offer to the public as referred under sec 43(1)(a).
- However, an offer is not regarded as an offer to the public if it is under one of the following circumstances as specified under sec 44:
  i. The offer is made to someone who is not an offeree (sec 44(2)).
     This means the offer has lay down certain terms and conditions that specifying an individual that specially selected for the purpose of an offer.
  ii. The offer is made to the person who is already connected to the company. (sec 44(3)a).
     ‘person already connected with the company’ is defined under sec 44(4).
  iii. The offer to subscribe for securities to be held under an employees’ share scheme (sec 44(3)b).
  iv. A private company that limited by shares cannot made an offer to the public as referred under sec 43(1)(a).

Sec 190 provides for a restriction on commencement of business in certain circumstances.
Sec 4 – Holding and Subsidiary company

The company is deemed as subsidiary to another corporation if the corporation has the following characteristics:

1. The corporation has controls the composition of the board of directors indicating as having the power over the operation of a company.
2. The corporation has controls more than half of the voting power of the corporation.
3. The corporation holds more than half of the issued share capital of the corporation.

Sec 5 – Ultimate Holding company

- The corporation having a subsidiary company under it, but it’s not control over any company above it. For example, Sy A has a subsidiary company which is Sy B, but Sy A is not under any control over by any corporation.

Sec 6 - Wholly-owned subsidiary company

- The corporation has no members except that other corporation or its nominee; or a wholly-owned subsidiary of that other corporation or its nominee. This means that the member of a subsidiary company is a same member from holding company. Nominee here means proxy.

Sec 7 – Related company

- As defined under the provision.

* Sec 14 – Application for incorporation

Sec 15 – Requirement to register company

Sec 19 – Notice of registration

- The notice indicates the existence of a company in which used as conclusive evidence to prove the existence of company.

Sec 17 – Certificate of incorporation

- Not mandatory. Only upon application to the SSM by the company.

Sec 18 – Effect of incorporation

- The only matter to indicate the incorporation of a company is the date of an existence of a company that can be referred under the notice of registration.
Corporate Personality

Part 1

(1) **Sec 20(a)** states that a company incorporated is a body corporate and have legal personality separate from its members. (Separate Legal Entity)

**Solomon v Solomon** - The case provides that the company and its organs are separate legal entity. The company cannot be held responsible for the acts of its organs and vice versa. The organs are natural persons while the company is an artificial entity created by law with certain rights.

(2) **Sec 21(1)(a)** states that a company can sue or be sued.

**Foss v Harbottle** provides that the shareholders cannot sue the directors who had stolen from the company since they have not been wronged. It is for the company to sue which is known as Proper Plaintiff Rule

The solutions for this is either:

1) Derivative action; or

2) Shareholder may sack the old company director during general meeting and then sue him.

(3) **Sec 21(1)(b)** states the company can hold property including land.

**Macaura v Northern Assurance** - The company set up by M is the new owner of the timberland since it was transferred by the origin owner which is himself. M is no longer the owner of the land and hence cannot claim the insurance which is under his name.

Other corporate personality includes:

(4) Shareholders have limited liability

**Yee Yut Yee’s Application case** – The court held no for the issue of whether the company secretary and director of a limited company is liable for the claims and debts of the company.

**Abdul Aziz v Ladang Rengo Malay Estate Sdn Bhd** – Shareholders of a company sold all their shares to a new buyer. The court held that the company remains with the employer though the owners have changed since the company is a separate legal entity. The complete change of shareholders does not mean change in company.

(5) Perpetual succession

**Re Noel Tedman** – The demise of directors and shareholders does not affect the existence of company since the shares of deceased can be transferred to the next-of-kin.

**Sec 20(b)** states a company is continue in existence until it is removed from the register

- The company can only be ceased by the name removed from the register.

(6) Ability to hold common seal

**Sec 61** provides that a company may or may not have a common seal.
Lifting a corporate veil – via common law only

1. Fraud
   **Re Darby** – D set up the company name City Ltd which sold an inflated license to Quarry Ltd (promoted by City Ltd) and claimed the principle of SLE as defence. The court held that City Ltd was a dummy company set up for the purpose of enabling D to commit fraud. Hence, the corporate veil is lifted.

2. Company used as a reason to avoid legal duty
   **Gilford Motor Ltd v Horne** – the company set up by defendant was a mere sham – a device to enable him to breach his contract of service in which to evade his legal duties. Injunction granted as the courts lifted the corporate veil and treated the company and Horne as the same person.
   **Jones v Lipman** – the company set up by defendant was a sham to enable him to evade his legal duties to sell the house under the sale and purchase agreement. The court lifted the corporate veil and compelled the defendant and company to transfer the house to plaintiff.

3. Using the company as a cover
   **Re FG Films** – the company set up in UK had no local employee, no registered office and no business premise. Further 90% of the shares were held by US shareholders. It was financed by US company. The court held as the purpose of company was to qualify the film as a UK rather than a US film, hence the corporate veil is lifted.
   **Re Bugle Press Ltd** – the company set up for the sale purpose of buying the shares of the minority shareholders with the motive of evicting them. The corporate veil was lifted since it was a misuse of the purpose contemplated by the Companies Act of UK.

4. Group of companies
   **DHN Food Distributors v Tower Hamlets** – 3 related companies here carrying on business which is different in aspects but the same nonetheless – one provides transport, the other premise and the other DHN held all their shares. The court held that these 3 in one companies and not separate companies since they have the same functional unity in which more like a partnership firm. Thus, the corporate veil was lifted.
   **Tiu Shi Kian v Red Rose Restaurant**
   **Smith Stone & Knight v Birmingham Corp.**
   **Industrial Equity v Blackburn**
   **Walker v Wimborne**

5. Using the company to evade legal judgements
   **Re A Company** – Defendant disposed his personal assets to foreign companies in a way it would conceal his beneficial interest in the property. This was done to prevent plaintiff from obtaining any judgement debts. The court grant injunction to prevent defendant from doing so. The corporate veil that was lifted is necessary to do justice to the case.
   **Asparata v BBMB**
Company constitution

Sec 31 states that the company other than company limited by guarantee may or may not adopt constitution.

Sec 32(1) states that the company that adopt the constitution must be done by way of special resolution (75% majority votes)

Sec 32(2) provides that the Companies Act 2016 prevails over the company constitution.

Sec 33 provides that the constitution if adopted will bind the members to the same extend that all the covenant thereunder is agreed upon in which it was signed and sealed by each members of the company.

Effect of constitution

1. Company – members
   - The employment right is not equivalent to member’s rights (Eley v Positive Govt Security Assurance)
     Beattie v E&F Beattie – The defendant was a director and member of a company was sued for the return of sum (salary) wrongly paid and defendant wanted to refer matter to arbitration as provided under constitution. The court held that defendant was sued in his capacity as director, and not member as such the constitution could not be constitute a contract though he was a member.
   - Right to attend General Meeting
   - Right to vote during General Meeting (Pender v Lushington)
   - Right to be given notice about General Meeting
   - Right for remuneration
     Swabey v Port Darwin Gold Mining – Here director has served the company without any contract of service. The constitution provided pay at a fixed rate per annum. The court held that although the constitution is not constituted as a contract between company and director, the term under the constitution could be incorporated into the contract.
     Re International Cable Ltd – Directors were entitled to remuneration as provided under the constitution of a company.
     Re New Iron ex parte Beckwith – There was no express agreement between the directors and the company but the constitution provided the remuneration of 1000 pounds per year. The court held that the directors could claim the arrears of salary since the contract could be incorporated the terms of the constitution.

2. Members – Members
   - Right for majority shareholder to compulsorily acquire the shares of minority shareholder (Wong Kim Fatt)
   - However, such right must be enforced without the element of oppression (Re Caratti Holding).
   - Oppression here may means forcing to sell the shares below market value.

3. Company – Outsiders
   - Raffles Hotel Ltd v MBB – MBB leased a land to plaintiff company. The constitution provided that MBB could appoint a director in the company. MBB
is not a member. The court held that the constitution could not constitute a contract between MBB (outsider) and the company as MBB is not a member.

- **Southern Foundaries v Shirlaw** - Shirlaw was appointed as the managing director of Southern Foundaries for 10 years via contract of services. Southern Foundaries was taken over by FF Ltd who amended the constitution to give them power to remove directors. Shirlaw was removed. The court held that the company cannot justified a breach of contract by altering its constitution since the amendment did not bind an outsider like Shirlaw. Damages was awarded.

- **Forber v NSW Trotting Club** – F sued the club for excluding him not in accordance with the procedures stated in the constitution. The court held that F was not a member and thus could not enforce the contract stated in the constitution. His right is only that of a spectator.

- **Hickman v Kent/Romney Marsh Sheepbreeders Association** – the constitution are not a contract between outsider and the company. Even if the outsider eventually becomes a member if it does not affect his right as a general right of corporators.

**Sec 35** provides that the constitution of the company must contain inter alia objects of the company.

- The objects here refer to the nature of company in which can be in the form of main object and dependant object.
- Main object means it is a main business of the company. Whereas dependant object means to facilitate the company to achieve the main object clause.
- In order to achieve the main object clause, there is power clauses to empower he dependants and dependant object clause. For example, the company make take loan or raise funds via certain methods.
- Under sec 35(2), the company only subjected to limitation in which it can carry a business based on a constitution that set up the object of the company and not otherwise.
- This is based on the principle of ultra vires in which if the company is carry out a business outside the scope specified under the constitution, it will be deemed as ultra vires to the constitutions.

**Sec 36** provides a company may alter or amend its constitution by a special resolution

Procedure of voting of special resolution:

- The court constraint the amendment of constitution by impose certain mechanism.
- Voting must be done in bona fide for the benefit of the company. This means it is not done to discriminate minority shareholders, etc.
- **Re Greenhalgh** provides that the shareholder must votes in his honest opinion. What is beneficial is for benefit of corporation as general bodies. It is based on concept of hypothetical members.
- **Ellen v Gold Riffs of West Africa** provides that it is not enough for minority shareholder to show that alteration merely prejudices or diminished his rights. The effect of alteration only affect interest of one shareholder, however the benefit of company as a whole because it enabled the company to recover debt owned by it. The court allowed the amendment.
- Shuttleworth v Cox, Bros Co Ltd provides that the alteration was passed to force SW to resign via disqualification. The court held that the alteration was valid because it was beneficial for the company as a whole.
- Deffen Tinplate v Llaneley Steel Co
- Brown v British Abrasive Wheel Co.
- Sidebottom v Kershaw
- Gambotto v WCP Ltd.

[D] Corporate Transactions

Doctrine of Agency

- The organs of a company are the board of directors and shareholders in general meetings.
- The acts that bind the company is the agents of a company acting within their scope of authority.
- The ‘company’ can be regarded as the organs that acting within their scope of authority that deemed as directing mind and will of the company’.
- Lennard’s Carrying Co. Ltd v Asiatic Petroleum provides that the directing mind and will of the company may be the BOD or shareholders in general meeting or the person of co-ordinate jurisdictions appointed by GM.
- Tesco Supermarket v Nattress – Employees who have been delegated the functions of BOD or shareholders in GM is no longer acting as an agent but a directing will of company.
- The company is bound by the acts of its agent provided it is within the scope of his authority.
- There are 2 types of agency:
  i. Actual authority
  ii. Apparent/Ostensible authority

Doctrine of Constructive Notice

- Sec 39 provides for non-application of doctrine of constructive notice.
- This doctrine works as a protection from third party who deals with the company in which they deemed to have knowledge of the nature and contents of the constitution as it is a public document which has been lodge with the ROC (KL Engineering Sdn Bhd v Arab Malaysian Finance).
- The non-application of a doctrine means that the company could no longer use it as a defence to protect them from the third party.

Indoor Management Rule

- The rules protect the outsider who is unaware of the irregularity in the internal matter of the company.
- Royal British Bank v Turquand – the deed of settlement empowered the BOD to borrow such amount authorized by resolution of GM and shareholders. The directors
borrowed 2000 pounds and the company contended that the directors had exceeded their powers since the resolution did not state the limit of the loan. The court held that the outsider dealing in good faith can assume that the acts of the company which is a matter of internal management has been duly and properly performed.

- Exceptions:

i. Must be in good faith
   - The outsider who knows or ought to have known the irregularities at the time of the transaction cannot avail himself to the rule.
   - **Mahfuz bin Hashim v KPK Daerah Segamat** – The issue is whether plaintiff was aware or should be aware that the third parties (chairman and manager) lacked authority to contract from the board. Plaintiff was a member of a company and was fully aware of its by-laws. The court held that the members and directors are protected by the rule and it all depends whether he knows or ought to know the agent’s lack of authority. Here plaintiff ought to know the bylaws because he has copy of it but not the requirement of signatories since it was not stated therein. Outsider who deals with an individual low in corporate hierarchy cannot take advantage over the rule.

   ii. Fraud
   - Company not bound by forged documents even if the third party believed it was issued with the company’s authority.
   - **Ruben v Great Fingall Consolidated**
   - **Northside Development v RG**

   iii. Failure to made proper inquiry when he should as a reasonable lay man under the circumstances.
   - **AL Underwood v Bank of Liverpool & Martins** – the court held that the act of agent paying into his own account the principal’s money was unusual as such put the defendant on inquiry which they failed to do so. This amounted to negligence. Turquand’s rule cannot applied.

**[E] Contracts with the Company**

Part 1 – Pre-incorporation contract

a) Before the company is incorporated

**Sec 65(1)** The contract is deemed to be between promoter and third party. Third party cannot sue the company. As the company not yet be incorporated, company cannot ratify the contract. Hence, the agent or promoter will personally be liable.

b) After the company incorporated

Upon the incorporation of the company, the contract need to be ratified and adopt by the company. The ratification can be made via conduct (implied) or meeting via resolution (express).

   [The contract that adopted by the company]
Sec 65(2) The contract will be deemed as between third party and company. Firstly, the effect is backdated and has retrospective effect.

- It means the contract will bind the company as the date contract is agreed upon and not the date on the company incorporated (that can be elicit from the notice of registration date – sec 19).
- Meanwhile as for the promoter, by virtue of law of agency, the agent or promoter will no longer bound by the contract upon ratification of the pre-incorporation contract by the company (Mihori Bibe’s case).
- Thus, the third party can sue the company pertaining to the contract.

[The contract that did not adopt by the company]

- Normal rules of contract are apply.
- Turquand’s rule may be apply.

Part 2 – Promoters

- The promoter has owned a fiduciary duty to the company, which includes:
  i. To make full and frank disclosure to the company
  ii. Not to make secret profit
  iii. Act on good faith

- Among the duties of the promoters are:

1. Duty to provide company with independent BOD
   Erlanger v NS Phosphate provides that the company could rescind the contract by the syndicate (promoter) as it has breach its fiduciary duty in to provide company with independent BOD. In this case the promoter has been sold the island at an overprice.

2. Duty to make full disclosure
   Gluckstein v Barnes provides that partial disclosure is insufficient.

3. Duty to avoid making secret profits.
   Habib Abdul Rahman v Abdul Cader provides that the contract be rescinded since there was no disclosure made by the promoter.

- Remedies available for breach made by promoters

1. Rescission
   This means put the party in original position before the contract was entered into. However, ones the contract has been adopted by the company, rescission of contract is not possible. The circumstances where rescission is not possible:
   i. Company has adopted such contract
   ii. Unjustifiable delay by the company
   iii. Restitution of contract in which the subject matter has been destroyed
   iv. Innocent party has acquired interest over the subject matter of the contract (Re Leeds Hanley Theaters)

2. Recovery of secret profit
   If rescission is possible, then recoverable of secret profit is possible.

3. Damages
   (normal contract law apply- Tracey v Mandaley)