

Chan Kwai [1946-72] HKC 213, CA and s 11 below. A partner who has retired and is unwilling to be a plaintiff but is compelled to do so under the Rules of the High Court, O 15, may be provided with an indemnity against costs and security: see *Kao, Lee & Yip v Koo Hoi Yan* [2003] 1 HKLRD 125.

Where a partner is sued as an individual in his own name, served with a writ as an individual and entered an appearance as such, the Rules of the High Court (Cap 4 sub leg) O 81 rr 2-8 cannot result in execution against the alleged co-partners: see *Lynn v Consolidated Sales Ltd* [1970] HKLR 373.

Partnerships are subject to the Business Registration Ordinance (Cap 310). The fact that a partnership's application for such registration refers to certain partners, is not conclusive as to who in fact are the partners: see *Kwong Cheuk Him v Lo Shea Chung* [1988] HKC 239, CA and the commentary with respect to apparent members at [38.05] below. See also *The Annotated Ordinances of Hong Kong*, Business Registration Ordinance (Cap 310).

Section 350 of the Companies Ordinance (Cap 32) provides that any persons who carry on business under a name of which 'Limited', 'Corporation' or 'Incorporated', or any contraction of those words, or the Chinese version thereof, is the last word, are liable to a fine, unless the business is duly incorporated with limited liability. See also *The Annotated Ordinances of Hong Kong*, Companies Ordinance (Cap 32).

RELATIONS OF PARTNERS TO PERSONS DEALING WITH THEM

7. Power of partner to bind firm

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm, of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

[7.01] England

Cf the Partnership Act 1890 c 39 s 5 [Eng].

[7.02] General note

For modifications of the general law in the case of limited partnerships, see the Limited Partnerships Ordinance (Cap 37) s 5.

The acts of an infant partner may bind the adult partners, although the infant is not bound: see [3.03] above. See also *Halsbury's Laws of England* Vol 35 (4th Ed Reissue) para 33.

[7.03] Agent of the firm

As to the meaning of 'agent', see [4.18] above.

The extent of a partner's implied authority to bind the firm, must depend on the nature of the business carried on by the firm, the customs and usages of the business, and whether or not it is a trading partnership. The implied authority of a partner in a non-trading partnership is more limited than that in a trading partnership. The following are instances in which a partner has been held to have authority to bind the firm: (a) buying goods on the firm's credit of a kind used in the business (see *Bond v Gibson* (1808) 1 Camp 185); (b) hiring employees of the firm (see *Drake v Beckham* (1843) 11 M & W 315, 12 LJ Ex 486); (c) giving receipts for or releasing debts due to the firm (see *Duff v East India Co* (1808) 15 Ves 198; *Henderson and Smith v Wild* (1811) 2 Camp 561; and *Cowan v Dart* (1848) 10 LTOS 466); and (d) selling a car on behalf of a firm describing itself as a garage (see *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103). See also s 40 below and the notes thereto, regarding the continuing authority of partners, for the purposes of winding up, after dissolution.

In a trading partnership (but not in a non-trading partnership) a partner has implied authority to borrow money for partnership purposes (see *Chan Pat (t/a Hop Kwan Garment Factory) v Lin Wan Garment Factory* [1987] 2 HKC 197, CA), to bind the firm by negotiable instruments (see *Bank of Australasia v Breillat* (1847) 6 Moo PCC 152, 12 Jur 189) and to invest surplus capital of the partnership in another undertaking (see *Fook Lung Firm v Lai Yuen Firm* (1912) 7 HKLR 90; 95 (reversed (1912) 7 HKLR 150, on other grounds). Examples of non-trading partnerships are: (a) brokers and commission agents (see *Yates v Dalton* (1858) 28 LJ Ex 69); (b) auctioneers (see *Wheatley v Smithers* [1907] 2 KB 684, 76 LJ KB 900); cinema proprietors (see *Higgins v Beauchamp* [1914] 3 KB 1192, [1914-15] All ER Rep 937); and (c) solicitors (see *Hedley v Bainbridge* (1842) 3 QBD 316, 11 LJ QB 293; and *Garland v Jacomb* (1873) LR 8 Exch 216, 28 LT 877).

For the purposes of establishing ostensible authority, the question of whether or not an undertaking was given in the usual course of a solicitors' business, falls to be considered on the basis of the transaction as it appears objectively, irrespective of its true nature: see *United Bank of Kuwait Ltd v Hammoud* [1988] 3 All ER 418, [1988] 1 WLR 1051.

A partner usually has no implied authority to bind the firm in any of the following ways: (a) by executing deeds of behalf of the firm (see *Steiglitz v Egginton* (1815) Holt NP 141, [1814-23] All ER Rep 455; and *Green v Sutton* (1840) 2 Mood & R 269); (b) by giving guarantees (see *Brettel v Williams* (1849) 4 Exch 623, [1843-60] All ER Rep 702; Cf *Sandilands v Marsh* (1819) 106 ER 511), unless this is in the usual line of business of the firm (see *Crawford v Stirling* (1802) 4 Esp 207, [1775-1802] All ER Rep

[26.06] Capital

The capital of a partnership is the aggregate of the contributions made by the partners, either in cash or in kind, for the purpose of commencing or carrying on the partnership business and intended to be risked by them therein. The capital is a fixed sum which must be distinguished from the assets. The latter may vary from day to day and includes everything belonging to the firm having any money value: see *Reed (Inspector of Taxes) v Young* [1984] STC 38; affd [1986] 1 WLR 649, HL.

Even if it is proved that the partners contributed unequal shares in the capital of the company, subject to any agreement to the contrary on settlement of accounts, they are entitled to share equally in the capital of the partnership, see *Popat v Shonchhatra* [1997] 3 All ER 800 (CA).

[26.07] Profits

There is no single definition of 'profits' which will fit all cases (see *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353 at 366, [1900-3] All ER Rep 484 at 490, per Farwell J); but the term implies a comparison between the state of business at two specific dates and means the amount of gain made by a business during the year (see *Re Spanish Prospecting Co Ltd* [1911] 1 Ch 92 at 98, per Fletcher Moulton LJ; and *Dalgety v Commissioner of Taxes* [1912] NZLR 260 at 261-2, per Williams J). The term has been held to mean profits available for division after deduction of excess profits duty (see *Bishop v Nicol's Trustees* [1921] SC 229) and ascertainable on the footing of the moneys paid and received within the accounting period, irrespective of the time at which the work was done (see *Badham v Williams* (1902) 86 LT 191). See also *Bishop v Smyrna and Cassaba Rly Co* [1895] 2 Ch 265, (4) LJ Ch 617. In the case of salaried partners, the salary received is a share of the profits: see *Watson v Haggitt* [1928] AC 127.

The difference in the value appearing in the books and the selling price of real estate belonging to the firm, is profit (see *Robinson v Ashton* (1875) LR 20 Eq 25, 44 LJ Ch 542); and so is a gratuity to one partner on the sale of property valued by the firm (see *Hancock v Heaton* (1874) 22 WR 784). However, profits from an office held by a partner are not profits of the business (see *Alston v Sims* (1855) 3 Eq Rep 834, 24 LJ Ch 553), unless governed by special agreement between the parties (see *Carlyon-Britton v Lumb* (1922) 38 TLR 298).

Profits derived from capital, both before and after dissolution, are profits for the purposes of this and the partners are entitled to share such capital profits equally: *Popat v Shonchhatra* [1997] 3 All ER 800. Cf s 44, post dissolution capital profits are not 'profits' for the purposes of s 44.

[26.08] Business

See [2.02] above.

[26.09] Paragraph (b): Application

The right to indemnity may be lost by failure to claim it, or may be forfeited by inefficiency, neglect or misconduct: see *M'Ireath v Margetson* (1785) 4 Doug KB 278; *Re Webb* (1818) 8 Taunt 443, 2 Moore CP 500; and *Thomas v Atherton* (1878) 10 Ch D 185, 48 LJ Ch 370.

[26.10] Indemnify

An 'indemnity' is a contract, express or implied, to indemnify against a liability, and the liability under which is coterminous with the liability it is intended to cover, and is independent of the question whether someone else makes default or not: see *Pontifex v Foord* (1884) 12 QBD 152; *Carshore v North Eastern Railway Co* (1885) 29 Ch D 344; *Tritton v Bankart* (1887) 56 LJ Ch 629; and *Guild v Conrad* [1894] 2 QB 885. See also *Halsbury's Laws of England* Vol 20 (4th Edn Reissue) paras 345 et seq.

[26.11] Personal liabilities incurred

See *Matthews v Ruggles-Brise* [1911] 1 Ch 194, 80 LJ Ch 42 (liability under a lease assigned to a company).

As to the meaning of 'liable', see [4.14] above.

[26.12] Paragraph (c): Application

Apart from the provisions of this section, interest may not be allowed unless: (a) there is express stipulation for payment (see *Stevens v Cook* (1859) 5 Jur NS 1415; *Hill v King* (1863) 3 De G J & Sm 418, 1 New Rep 341; *Rishton v Grissell* (1868) LR 5 Eq 326; and *Dinham v Bradford* (1869) 5 Ch App 519); or (b) it is established by a course of dealing as shown by the partnership books or a trade custom (see *Millar v Craig* (1843) 6 Beav 433). Interest may also be payable in the case of default: see *Fawcett v Whitehouse* (1829) 1 Russ & M 132, 8 LJOS Ch 50; *Spartali v Constantinidi* (1872) 20 WR 823, on appeal 21 WR 116; and *Keily v Stevens* (1886) 3 TLR 189.

Interest was not allowed where the partnership account was settled after a lapse of time (see *Boddam v Ryley* (1785) 2 Bro CC 2, on appeal (1787) 4 Bro Parl Cas 561), or on sums drawn where one partner had drawn more than that to which he was entitled (see *Meymott v Meymott* (1862) 31 Beav 445, 32 LJ Ch 218). See also *Suleman v Abdul Latif* (1930) 57 LR Ind App 245.

[26.13] Interest

As to meaning, see [4.22] above.

[26.14] Paragraph (e): Application

A limited partner cannot take part in the management: see the Limited Partnerships Ordinance (Cap 37) s 5(1).

A limited partner may become a general partner, and vice versa, but the change must be reported to the Registrar of Companies (see s 8(1) below) and, where a general partner becomes a limited partner, advertised in the Gazette (see s 9 below).

[3.04] Body corporate

For the meaning of 'corporation', see *Halsbury's Laws of Hong Kong*, Vol 6, paras [95.0007]–[95.0008].

[3.05] Definitions

For 'firm', see by virtue of s 2(1) above, the Partnership Ordinance (Cap 38) s 6; and for 'general partner', see s 2(1) above.

4. Registration of limited partnership required

Every limited partnership must be registered as such in accordance with the provisions of this Ordinance, or in default thereof it shall be deemed to be a general partnership and every limited partner shall be deemed to be a general partner.

[4.01] England

Cf the Limited Partnerships Act 1907 c 24 s 5.

[4.02] Registered

For manner of registration and particulars required, see s 7 below.

The Registrar of Companies must keep a register and an index of the names of limited partnerships registered under the present Ordinance: see s 13 below.

[4.03] Definitions

For 'general partner', see s 2(1) above; and for 'limited partner' and 'limited partnership', see s 3 above.

5. Modifications of general law in case of limited partnerships

- (1) A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm:
Provided that a limited partner may by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business, and may advise with the partners thereon.
- (2) If a limited partner takes part in the management of the partnership business, he shall be liable for all debts and

obligations of the firm incurred while he so takes part in the management as though he were a general partner.

- (3) A limited partnership shall not be dissolved by the death or bankruptcy of a limited partner, and the lunacy of a limited partner shall not be a ground for dissolution of the partnership by the court unless the lunatic's share cannot be otherwise ascertained and realized.
- (4) In the event of the dissolution of a limited partnership its affairs shall be wound up by the general partners unless the court otherwise orders.
- (5) Application to the court to wind up a limited partnership shall be by petition under the Companies Ordinance (Cap 32), and the provisions of that Ordinance relating to the winding-up of companies by the court and of the rules made thereunder (including provisions as to fees) shall, subject to such modification (if any) as the Chief Executive in Council may by rules provide, apply to the winding-up by the court of limited partnerships, with the substitution of general partners for directors.
- (6) Subject to any agreement expressed or implied between the partners—
 - (a) any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the general partners;
 - (b) a limited partner may, with the consent of the general partners, assign his share in the partnership, and upon such an assignment the assignee shall become a limited partner with all the rights of the assignor;
 - (c) the other partners shall not be entitled to dissolve the partnership by reason of any limited partner suffering his share to be charged for his separate debt;
 - (d) a person may be introduced as a partner without the consent of the existing limited partners;
 - (e) a limited partner shall not be entitled to dissolve the partnership by notice.

[5.01] Enactment history

Subsection (5) was revised by Ordinance 23 of 1999 substituting Chief Executive in Council for Governor in Council.

[5.02] England

Cf the Limited Partnerships Act 1907 c 24 s 6.

[2.09] Prescribed

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean, when used in or with reference to any Ordinance, prescribed by that Ordinance or by subsidiary legislation made under that Ordinance.

At common law, 'prescribe' means 'lay down or impose authoritatively' or 'lay down as a rule or direction to be followed': see *Re the Motor Vehicles Distribution Scheme Agreement* [1961] 1 All ER 161.

[2.10] Place of business

Where a foreign company has established a place of business in Hong Kong, it is required to be registered under the Companies Ordinance (Cap 32) Pt XI. The meaning of 'place of business' under this Ordinance is similar to that under the Companies Ordinance (Cap 32) Pt XI, which has been summarized as: 'a local habitation of its own, eg an office; there must be some particular premises. It is not sufficient for the company to carry on business through an agent': see *Palmer's Company Law* (20th Ed) p 761. See also *Alexandra Knitters Ltd v AB Hellenic* [1946-1972] HKC 573.

Moreover, 'place of business' is defined in s 341 of the Companies Ordinance (Cap 32) to include a share transfer or share registration office and any place used for the manufacture or warehousing of any goods, but excludes a place not used by the company to transact any business which creates legal obligations. See *Elsinct (Asia Pacific) Ltd v Commercial Bank of Korea Ltd* [1994] 3 HKC 365.

[2.11] Protection of Wages on Insolvency Fund

The recommendation of the establishment of the 'Protection of Wages on Insolvency Fund' was first put forward in 1984. The Working Group on the 'Problems experienced by Workers of Companies in Receivership' recommended the establishment of this Fund, which should be financed by raising business registration tax for this specific purpose.

Before the establishment of this Fund and the enforcement of related legislation, many workers had to wait several months before receiving wages owed to them, because of the complicated and time-consuming nature of insolvency and bankruptcy proceedings. Moreover, they may never receive the full wages owed if their employers did not have sufficient assets.

With the establishment of this Fund, the Commissioner of Inland Revenue may step in as soon as there is concrete evidence of an insolvency or bankruptcy and immediately pay wages owed to the employees. These claims will thereafter be subrogated to the Fund, which can pursue the recovery of the payments it has made to employees, during the normal course of bankruptcy and insolvency proceedings.

This Fund consists of: (a) moneys paid by the Commissioner of Inland Revenue under s 21 below, whether paid before or after 19 April 1985 (the commencement date of the Protection of Wages on Insolvency Ordinance (Cap 380)); (b) moneys recovered by subrogation or payment made by

mistake under the Protection of Wages on Insolvency Ordinance (Cap 380) Pt VI; (c) interest and other income derived from the moneys and investments comprising the Fund; and (d) other moneys lawfully paid into the Fund.

[2.12] Subsection (1A): General note

A foreign company which has established a place of business in Hong Kong and is therefore required to be registered under the Companies Ordinance (Cap 32) Pt XI, is deemed to be a person carrying on business in Hong Kong, notwithstanding any notification of cessation of business under s 8(2), and therefore liable to be registered under this Ordinance.

[2.13] Subsection (1B): General note.

The Commissioner may serve notice on any person deeming him, for the purposes of this Ordinance, to be a person carrying on business or a person carrying on business or at a branch of the business, as suggested by subs (2).

[2.14] Subsection (2): Duties

This term, in its popular sense, is equivalent to 'functions', and has a meaning wide enough to include powers incidental to the exercise of functions: see *A-G v Cooper* [1974] NZLR 713 at 720 per Richmond J.

[2.15] Powers

'Power' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include any privilege, authority and discretion.

As to statutory powers and the exercise thereof, see generally, the Interpretation and General Clauses Ordinance (Cap 1) Pt VI.

By virtue of s 24 of the Hong Kong Reunification Ordinance (110 of 1997), commencing 1 July 1997: (a) subject to (b) below, all common law powers and statutory powers under Ordinances adopted as laws of the Hong Kong Special Administrative Region which were vested in public officers, and extant immediately before 1 July 1997 (except for those that are inconsistent with the Basic Law of the Hong Kong Special Administrative Region), shall on and after that date continue in existence and vest in the corresponding public officers in the Hong Kong Special Administrative Region; and (b) those prerogative powers (including rights, privileges and immunities) exercisable by a public officer immediately before 1 July 1997, except for those that are inconsistent with the Basic Law of the Hong Kong Special Administrative Region, shall on and after that date continue in existence, vest in the Chief Executive and be exercisable by the corresponding public officer in the Hong Kong Special Administrative Region.

3. Persons answerable for doing all acts, etc required to be done

- (1) The expression in this Ordinance "person carrying on business" (經營業務的人) means-

Subsection (5) was added by the Public Revenue (Protection) Revenue Order 1999 (LN 90 of 1999) and s 27 of the Revenue Ordinance (44 of 1999), commencing 1 April 1999.

[7.02] General note

This section sets out the obligation on the persons carrying on business, to pay the annual fee when called upon to do so, by the Commissioner of Inland Revenue.

Under subs (1), any person carrying on business or carrying on business at a branch has an obligation to pay the fee prescribed in Sch 1 item 1 or Sch 2 item 2 below, when the Commissioner calls upon him to do so by notice. This obligation rests both on those who do not possess a valid registration certificate and those who intend to carry on the business after the expiry of a valid registration certificate where the Commissioner has not received any notification of cessation in respect of the business.

Subsection (2) provides that, if the Commissioner does not call upon the person carrying on business or person carrying on business at the branch within one month of the expiry of the relevant business (or branch) registration certificate, then such person is obliged to notify the Commissioner of the matter.

Subsection (3) has retrospective effect, in that any person carrying on business at any time during the 6 years preceding the issue of the notice without a valid registration certificate can be called upon to pay the fees which would have been payable by him had the provisions of this Ordinance been complied with.

Subsection (4) provides that any person called upon to pay the fees must comply with the time requirement specified in the notice.

Subsection (5) provides that in the event of cessation of business any prescribed fee or any levy which is payable, remains payable and that any fee or levy which has been paid will not be refunded.

[7.03] Person

As to meaning, see [2.03] above.

[7.04] Business

See [2.02] above.

[7.05] Possession

As to meaning, see [4.06] above.

[7.06] Subsection (2): Writing

As to meaning, see [6.10] above.

[7.07] Within 1 month

As to the meaning of 'month', see [3.16] above. As to the computation of time, see [3.08] above.

[7.08] Subsection (3): Years

'Year' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean a year according to the Gregorian calendar.

[7.09] Definitions

For 'business', 'Commissioner', 'levy', 'valid branch registration certificate' and 'valid business registration certificate', see s 2(1) above; for 'person carrying on business', see s 3(1) above.

8. Information to be furnished

- (1) Where there occurs any change in the particulars of a business as set out in the form of application for registration (whether such form was submitted under this Ordinance or under the Business Regulation Ordinance 1952 (14 of 1952)), any person carrying on such business shall within 1 month of such change notify the Commissioner in writing thereof.
- (2) Where a business ceases to be carried on, any person who was carrying on such business shall, within 1 month of the cessation, notify the Commissioner in writing thereof.
- (2A) Where a person gives notice to the Commissioner in any return or other document submitted in accordance with the Inland Revenue Ordinance (Cap 112) of any matter required to be notified under subsection (1) or (2), such notice shall be treated as notification by that person for the purposes of those subsections.
- (3) (Repealed)
- (4) To obtain full information for the purposes of this Ordinance, the Commissioner may give notice in writing to any person, appearing to him to be a person able to furnish information, requiring him-
 - (a) to supply such particulars as the Commissioner may deem necessary; or
 - (b) to attend at a time and place to be named by the Commissioner for the purpose of being examined respecting such information.
- (5) In this section references to a business include references to a branch of that business.