



Association of Taxation Technicians

Examination

November 2007

PRINCIPLES OF LAW

ANSWERS (without marks)

ATT LAW – NOVEMBER 2007

Answers for Question 1.1

The essential elements of a contract are that the parties intend to create legal relations and that there is an agreement between the parties signified by an offer and acceptance . The arrangement should be intended to be legally enforceable . Agreement is essential . It is essential that there be certainty as to what has been agreed .

In England, the obligations assumed by each party to a contract must be supported by the exchange of consideration . Under English law a gratuitous promise is binding only if made by Deed.

[Scots Law – consideration is not required under Scots Law . Subject to personal bar, a gratuitous promise in Scotland can be constituted only by writing].

Answers for Question 1.2

A contract of employment may be oral or in writing or a mixture of both . It may be set out in letters rather than a formal contract . It may be implied by the parties' conduct or from letters exchanged between the parties . So long as the parties can be shown to have agreed on essential terms, such as hours and pay, then there is a binding contract . However, an employer is required by statute to give an employee a written statement setting out certain terms of the contract within two months following commencement .

The particulars which should be provided in writing are:

1. The names of the employer and employee .
2. The date when the employment began and the date when the employee's period of continuous employment began .
3. Details of remuneration including the interval at which it is paid .
4. Terms and conditions relating to hours of work .
5. Terms and conditions relating to holidays and holiday pay , sickness leave/sick pay , pensions and pension schemes .
6. The length of notice required on either side .
7. The period of employment (if not indefinite) .
8. The job title or description of the work the employee is employed to undertake .
9. The place of work .
10. Details of the currency in which remuneration will be paid , additional remuneration and any terms and conditions relating to return to the UK if the employee is required to work outside the UK .
11. Disciplinary and guidance rules .

Answer for Question 2

A Tax adviser
Any Street
Any Town

Date

To Fred
Fred's Office
Fred's Business
Fred' Street
Fred's Town

Dear Fred

Re: Incorporation of your Business

I am writing as requested to advise you on how your sole trade may be incorporated and what formalities will apply. Incorporating an existing business will require a company to be incorporated or bought "off the shelf". You will then have to sell your existing business to the company. It is usual for a company to be bought "off the shelf" but they are sometimes especially formed for the specific purpose.

The formation of a company is comparatively straightforward. One or more subscribers sign an agreed Memorandum and Articles of Association, and undertake to purchase a minimum number of shares each, usually one. The Articles of Association contain detailed rules relating to the operation of the company and set out the rights and obligations of the shareholders and establish the division of power between the shareholders and directors.

The subscribed copy is delivered to the Registrar of Companies with a Companies Form 10 which gives details of the registered office, first directors and first secretary, and a Companies Form 12, which is a statutory declaration by one of the subscribers or a solicitor that all the necessary formalities have been observed. This is accompanied by the fee payable (£20) and incorporation is usually completed within 7 working days.

The Registrar issues a certificate of incorporation giving the name and number of the company and the company exists from the date on the certificate.

I trust the above answers your questions about how a company is formed and if you require any further information, then please do not hesitate to contact me.

Kind regards.

Yours sincerely,

A Tax Adviser

Answer for Question 3

Memo from a Tax Adviser to Tax Partner

Date

Re: Advantages of Express Trusts

The advantage of an express trust may be outlined as follows:-

1. Retention of control .

The owner of the property may wish to retain control of it, whilst giving away the capital and income benefit derived from it . This can be done by gifting the property to a trust and remaining a trustee of the settlement . This is particularly useful if the settlor personally wishes to protect the value of property which he retains perhaps land or shares in a private company . The settlor may wish to prevent control over the property from passing to the intended beneficiary which would be the effect of an outright gift . An example might be if the proposed beneficiary was too young to control the property . Alternatively, the settlor may wish to control the flow of income to a beneficiary and preserve the value of the capital fund until a later date. As a trustee, the settlor can remain actively involved without retaining beneficial ownership .

2. The future destination of the property .

The settlor may wish to ensure that the property is dealt with in a particular way in the future . For example, a husband might, by his will, declare a trust in favour of his wife for the life and thereafter to his children absolutely . The husband's estate passes to his children on the death of the wife. This prevents the wife from disposing of the property to some other party , which she would be free to do if it was an outright gift .

3. Future flexibility .

The settlor may wish to make a gift now but decide at some future date who should ultimately benefit . For example, the settlor may wish to provide his grandchildren with assets but may not wish to transfer the property to the grandchildren immediately and may not know whether further grandchildren will be born . For example, a trust fund could consist of shares in the family company . The settlor may wish that the shares go only to beneficiaries who decide to work in the business. The funds could therefore be settled on discretionary trusts and so held until a future date for distribution . Alternatively, the fund could be settled on a life interest now but the trustees be given powers to vary the trust at a future date . This would give the trustees the power to create in the future a discretionary, accumulation and maintenance, or other trust .

4. Holding property on behalf of those incapable of holding it for themselves . An obvious example of this kind of trust would be one established to hold property for a mentally handicapped beneficiary. Similarly, a minor cannot hold certain classes of property such as land which have to be held on trust pending the beneficiary's majority .

5. Concealing Beneficial Ownership .

A bare trust enables the owner of property to conceal his interest in it behind a nominee . There is no objection to this in law, provided that it is not done fraudulently .

I trust this is helpful, but please let me know if you require any further information.

A Tax Assistant

Answer for Question 4

Development of the common law in England.

Before 1066 and the Norman Conquest, there was no unified system of law for the whole country . England, Wales, Scotland and Ireland were still quite separate. Local areas were largely autonomous and had their own systems of courts and local law .

William the Conqueror introduced a strong central government in England and from this emerged a system of justice which was common to the whole country. This became the “common law” .

The king appointed commissioners to travel around the country to deal with his affairs. Some of these commissioners had judicial powers; they were the first royal judges . They reported back to the King . The King and his council gradually took on the judicial function of applying the best of the local laws to the matters brought before the “King’s council” . After a time the judicial part of the King’s council split off and formed the common law courts which sat in London . The judges were making law .

Indeed, it was not until the 19th century that legislation surpassed case law as the primary source of law in England (and elsewhere in the United Kingdom) .

The law administered by the common law courts of England depended on a system of writs, namely written commands issued by the Lord Chancellor . Originally, there was no limit to the different types of writ but in the 13th century a law forbade the creation of new writs . This step severely restricted the development of the common law because a complainant (known as the plaintiff) would have no remedy if he could not fit his case into one of the existing categories of writ . Devices were built up to circumvent these difficulties, but those restrictions contributed to the development of the law of “equity” .

Development of equity

Citizens who were unable to obtain resolution of their grievances in the King’s common law courts petitioned the King to obtain relief by direct royal intervention . These petitions came before the King in council and by custom were referred to the principal civil master, the Lord Chancellor, so that he might deal with them on the King’s behalf .

In medieval times the Chancellor was usually a cleric . In dealing with each petition his concern was to establish the truth of the matter and then to impose a just solution without undue regard for technicalities or procedural points . “Equity” is derived from the Latin word “aequitas”, meaning justice.

The Chancellor enforced his authority by summoning the parties to attend for interrogation; the penalty for failure to comply could be imprisonment or confiscation of property . Thus royal power was made available to make the law effective .

Interaction of equity and the common law

The system of equity, developed and administered by the Court of Chancery, was not a complete alternative to the common law but a method of adding to and improving on the common law . This interaction of equity and common law produced two significant results.

- (i) New rights – Equity recognised and protected rights for which the common law gave no safeguards .
- (ii) Better remedies – The standard common law remedy for the successful claimant was the award of monetary compensation, namely damages, for his loss . Equity was able to order the defendant to do what he had agreed to do (specific performance) or to abstain from wrongdoing (injunction) .

Thus there were basically two sets of courts in England, the common law court which administered the common law which was very rigid, and the Court of Chancery which had discretion to do things in equity which the common law would not allow. In theory equity accepted common law rights but insisted that they should be exercised in a just fashion. Over time, a rule developed that where the common law and equity conflicted, equity would prevail .

Amalgamation of court but not rules

In 1875 the jurisdiction in England and Wales of the common law courts and the Court of Chancery was transferred to one court, the Supreme Court of Judicature, which remains to a large extent the same today . A similar transfer occurred in Ireland in 1877. Thus, it became possible to bring an action to seek remedies at common law and equity at the same time and in the same court .

Answer for Question 5

From Tax Assistant

Date

To Mr Principal

Re: Partnership

As requested I set out the requirements for the definition of a partnership and how a partnership may be formed, together with the points that should be included in a partnership agreement.

What is the definition of a partnership?

The Partnerships Act 1890 states that "partnership is the relation which subsists between persons carrying on a business in common with a view to profit". If a relationship falls with the definition then it is a partnership. Even though those concerned did not realise it. Partnership exists even if the parties expressly state that their relationship was not to be a partnership.

For a partnership to exist therefore there must be a least two partners and the business must be carried on with a view to profit. This means that the partners must intend that the business yield a profit and be entitled to a share of the profits. Profits are the surplus after all the expenses of the business have been deducted from the Revenue earned by the business. Hence for a partnership to exist, the partners must share the net profit, showing the gross profit is not normally sufficient. A partnership may exist as the medium through which a continuing business venture is operated. For example, a firm of accountants or it may be the means through which a single venture is carried out. For example, a couple of persons organising a concert as here.

There is no legal requirement for written partnership agreement, but in practice there are advantages in setting out the terms in writing and having them signed. There are very few formalities required to set up a partnership. A partnership may exist as a matter of fact because of the way in which parties manage their business. There may be no written agreement but the Courts may still infer that there is a partnership agreement.

Ideally the partnership agreement should cover the following matters:-

1. The firm's name; place of business; and nature of the firm's business.
2. The date on which the partnership is to commence and its duration.
3. The proportions in which capital is to be provided and whether interest is to be paid on capital before profits are dividend.
4. The way in which profits are to be shared and provisions for partners' drawings.
5. Meetings of the partners and management of business.
6. Restrictions on the activities of partners for example, other occupations and businesses in which the partners may not engage. Particularly if they are competing or would expose a partner or the firm to risk.
7. The admission of new partners and the retirement and expulsion of the partners.
8. The death or retirement of a partner. This usually takes the form of an option of accrual clause.

9. The keeping of books of account ; the preparation of a annual profit and loss account and balance sheet ; and provisions dealing with taxation .
10. An indemnity for each partner against liabilities incurred (for example, where he alone is sued by an outsider) in the ordinary and proper course of business or in the course of acting to preserve partnership property or business ; and
11. Dispute resolution usually arbitration, mediation or through the Courts .

A partnership may be dissolved:-

1. By an effluxion of time, if the partnership is entered into for a fixed term .
2. By termination of the venture, if the partnership was entered into for a single venture .
3. By the death or bankruptcy of a partner or by notice given by a partner (for example, on retirement) unless the partnership agreement provides otherwise .
4. By subsequent illegality , that is if an event occurs which makes it unlawful to continue the business .
5. BY order of the Court for example, on permanent incapacity of a partner, or unjust inequitable grounds .

Answer for Question 6

a. Surviving spouse and issue

As Jack has a surviving spouse, Jill and issue (namely children, grandchildren, etc.), his children Bill and Ben then;

(i) Jill is entitled to the personal chattels , a statutory legacy of £125,000 , plus interest , a life interest in half of the residue ; and

(ii) Bill and Ben are entitled in equal shares to an interest in half of the residue absolutely , and an interest in the other half in remainder (that is, after the end of Jill's life interest .

As Bill and Ben are minors, their entitlement is held on trust until they attain the age of 18 . If a child predeceases his parent, his children (if any) take the share of his parent (in equal shares) .

b. Surviving spouse, no issue but other close relatives.

Katie has no issue so:

(i) Robbie is entitled to the personal chattels , a statutory legacy of £200,000 , plus interest , half of the residue absolutely ; and

(ii) Katie's parents (or, if none, her sister Danni or her issue) are entitled in equal shares to an absolute interest in half of the residue .

c. Surviving spouse, but no issue or close relations.

Jack leaves Lily, but no issue, no parents and no brothers and sisters of the whole blood nor any issue of such brothers or sisters , so the whole estate goes to Lily .

d. No surviving spouse.

There is no surviving spouse so the whole estate goes to the nearest group of relatives absolutely in equal shares in the following order:

(i) Issue;

(ii) Parents;

(iii) Brothers and sisters of the whole blood (sharing both parents) or their issues;

(iv) Brothers and sisters of the half blood (sharing one parent) or their issue;

(v) Grandparents;

(vi) Aunts and uncles of the whole blood or their issue;

(vii) Aunts and uncles if the half blood or their issue; and

(viii) The Crown, Duchy of Lancaster or Duke of Cornwall .