



DO YOU KNOW YOUR PARTNER?

By Andrea Scarlett-Lozer

Business partnerships are sometimes created without the parties giving real thought to their status and legal relationship. There are many partnerships which have been created and are operating very informally. In many of these partnerships, the partners would be very surprised at the outcome, if a dispute between them has to be settled by a court. The legal implications of a partnership may be different from what the parties had contemplated.

WHAT MAKES A PARTNERSHIP?

A business partnership is an association of at least two and no more than twenty persons in a business undertaking together for profit which will be distributed between or among them. Where persons establish a formal agreement to enter into business together and then share the proceeds of that undertaking, the existence of a partnership is not likely to be in dispute. There are other circumstances in which the parties may not be as clear in their minds that they are operating a partnership together.

The issue of whether there is a partnership between two or more persons will be determined by a careful assessment of each situation. Merely labelling a business relationship a "partnership" will not automatically create a partnership. Also, abstaining from use of the word "partnership" or other similar words will not prevent the creation of a partnership. A court will look at all the circumstances with a view to assessing whether the persons were in business together. The relevant circumstances may include the conduct of the parties, the mode in which they dealt with each other, and the mode in which they, with the knowledge of each other, dealt with other people.

CASE TO NOTE - ABSENTEE PARTNERS

In one case decided by the Court of Appeal of Jamaica, a skilled welder ("LB") lived in Jamaica and his three brothers and a sister lived overseas. LB wished to set up his own welding establishment and for many years begged his siblings for financial assistance. Eventually, the three brothers assisted in the acquisition of land for the operation of the business. The title for the land was issued in the name of all four brothers and proceeds from the business were used to pay off the mortgage. During the course of operating the business, LB acquired some equipment on his own and was the operator of the business. The brothers continued to reside overseas and never enquired as to the welfare of the business until on one of their visits to Jamaica they realised that LB's circumstances had materially improved and he was driving a car and financing his girlfriend's tertiary education. The court had to decide whether the four brothers were in a business partnership, and thus whether the three brothers residing overseas were entitled to a share of the profits of the business. The court found that, since the proceeds from the business were being used to finance a loan secured by property belonging to all four brothers and this property was the home of the business, there was a partnership in which the intention was to share profits among them.

IMPLICATIONS OF PARTNERSHIP

Operating a business partnership has far-reaching implications because of some of the implied terms of that relationship. The law stipulates, for example, that partners are agents of each other. This means that any business transaction, which may be regarded as a usual transaction of the particular partnership, conducted by one partner is generally binding on all other partners. This rule will apply even if the partners had entered into a written agreement prohibiting a partner from entering into that type of transaction. In this case, the transaction would be valid and binding between the partnership and the third party, but the partners may be entitled to sue the offending partner for breach of contract. All partners will be bound or responsible where a partner commits a breach of the law (for example, bribery) to promote the interest of the partnership or as a means of discharging

his job in the partnership business. In cases where the conduct of a partner is of a nature that third parties would normally expect a partner to be able to perform, the other partners are not entitled to disassociate themselves from the conduct. This principle applies even where the partners had no previous knowledge of the act and even where they had previously expressed disapproval of the particular conduct. However, the third party in a transaction may not be protected where he knew or ought to have known that the partner conducting the business was not properly authorized to bind the partnership.

Business partners have a legal duty to deal with each other in good faith at all times. They are also required to maintain a high level of disclosure as it relates to information and dealings that each has in relation to the affairs of the business. Partners are to account to each other for any profits or private benefit obtained from use of the partnership name, business connection or property and transaction concerning the business.

SHARE OF PROFITS

Partners in a business may also be surprised to learn that profits are to be shared equally, unless they had derived some agreement between or among them, as the case may be, to share profits in some other proportion. There is no implied rule that profits are to be shared proportionately to capital contribution. Neither is there any implied rule that the partner most involved in the operation of the business is to earn a greater profit share. In fact, unless the parties agree otherwise, no partner is entitled to be paid a salary from the earnings of the business. Thus, unless the parties come to some agreement, a partner who invested the largest capital outlay and spends the most time operating the business could earn the same rate of return as the other partners.

RECOMMENDATIONS

Having regard to the information above, all persons entering into a partnership arrangement should seek to agree with each other as to the terms of the partnership, including capital contribution, profit share, and prohibited conduct. Preparation and execution of a partnership deed is highly recommended. It would also be recommended that appropriate due diligence be conducted to assess the character, business ethics and reputation of every proposed partner. In other instances, some persons currently operating business which involve other people may need to evaluate their arrangements and consider whether certain "investors" in the business are partners or not.

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