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FACULTY OF JURIDICAL SCIENCES

Course : B.A.LL.B./BBALL.B IIInd Semester

SUBJECT: COMPANY LAW
SUBJECT CODE: BAL 406/BBL 406

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LECTURE-5

(a) Effect of Pre-Incorporation Contract on Person Purporting to Contract on Behalf of the Company At Common Law:

-if third party knew company was not yet in existence, he could make the purported agent liable on the contract.

(Kelner v Baxter).

- if it appeared that the contract was

with a company already in existence, the court might hold there was no contract at all, and neither the company nor the purported agent could enforce it.

Newborne v Sensolid (GB) Ltd

-This was unsatisfactory and was first changed by legislation in 1972. Provisions are now in s.36C of the Companies Act:

-"A contract which purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly."

This means the "agent" will always be personally liable on the contract unless there is agreement to the contrary.

Exceptions:

(i) Companies Bought "Off the Shelf"
s.36C does not apply where promoter makes contract on behalf of existing company he later buys. The company can then ratify the contract.

(ii) Companies Struck Off the Register

s.36C does not apply where a company has been in existence but has been struck off the register. The section only applies where the company has never

been in existence. **Cotronic (UK) Ltd v Dezonie**

(c) Avoiding Personal Liability

(i) s.36C does not apply if the parties have agreed that the promoter will not be personally liable.

This requires express agreement - courts will not infer it. **Phonogram Ltd v Lane**

(ii) Promoter and third party could make an agreement for novation.

(novation = substitution of a new obligation for an old one)

Promoter could agree with third party that promoter's liability will end when the company, once formed, enters new contract on

same terms.

MCQs

1. novation = substitution of a new obligation for an old one.

- i. True
- ii. False
- iii. Can not say
- iv. None of the above

2. The "agent" will always be personally liable on the contract unless there is agreement to the contrary.

- i. True
- ii. False
- iii. Can not say
- iv. None of the above

3. if third party knew company was not yet in existence, he could make the purported

agent liable on the contract.

- i. True
- ii. False
- iii. Can not say
- iv. None of the above

4. if it appeared that the contract was with a company already in existence, the court might hold there was no contract at all, and neither the company nor the purported agent could enforce it. incorporation.

- i. True
- ii. False
- iii. Can not say
- iv. None of the above

5. Whether Promoter could agree with third party that promoter's liability will end when the company, once formed, enters

new contract on same terms.

- i. True
- ii. False
- iii. Can not say
- iv. None of the above

