



FACULTY OF JURIDICAL SCIENCES

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

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

NAME OF FACULTY: Ms. Anjali Dixit
Assistant Professor



LECTURE-4

II. FORMATION OF A COMPANY

1. Promoters

Promotion of a company is concerned with taking the steps necessary for incorporation.

(a) **Definition** "Promoter" is not defined in the Companies Act.

Some attempts at definition have been made by the courts:

Twycross v Grant

Whaley Bridge Printing Co v Green

Whether someone is acting as promoter of a

company is a question of fact rather than a question of law.

(b) Duties of Promoters

In the 19th century, it was common for promoters to sell their own property to a newly formed company at an inflated price, or to acquire assets for the company and receive a commission from the seller.

The courts then began to impose a fiduciary duty on promoters similar to that imposed on agents. A promoter must disclose any profit or potential conflict of interest to either:

- (i) an independent board of directors, or
- (ii) existing or intended shareholders.

(c) Remedies for Breach of Promoters Duty

- (i) Where promoter has sold his own property to the company, without disclosing this - the company can

rescind the contract and recover the purchase price:

Erlanger v New Sombrero Phosphate Co.

Right of rescission is lost if *restitutio in integrum* is not possible.

(ii) The promoter may have to account to the company for any profit he has made. (**Gluckstein v Barnes**)

(iii) The company may be able to sue the promoter for damages for breach of fiduciary duty. **Re Leeds & Hanley Theatre of Varieties.**

(d) Payment of Promoters

A company cannot enter into a contract before incorporation - so a promoter has no legal claim against the company for fees and expenses.

In Scotland, memorandum or articles of the

company can be drawn up with a provision that the company will pay fees and expenses incurred in promoting the company.

(e) Suspension of Promoters

Company Directors Disqualification Act 1986, s.2(1)

The court can make a disqualification order against a person who has been convicted of an indictable offence in connection with the promotion, formation or management of a company.

The order can be for a maximum of 15 years - a person who is disqualified is prohibited from directly or indirectly taking part in the promotion or formation of a company.

2. Pre-Incorporation Contracts:

A company has no contractual capacity prior to incorporation - so contracts cannot be made on its behalf.

(a) Effect of Pre-Incorporation Contract on the Company

Company cannot be bound to the contract because it had no contractual capacity.

Company cannot ratify the contract because it was not in existence at the time the contract was made. Company cannot sue or be sued on the contract.

MCQs

1. A company has no contractual capacity prior to incorporation - so contracts cannot be made on its behalf.

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

2. A public company must have at least two shareholders and at least two directors.

- i. True

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

3. In the 19th century, it was common for promoters to sell their own property to a newly formed company at an inflated price, or to acquire assets for the company and receive a commission from the seller.

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

4. Promotion of a company is concerned with taking the steps necessary for incorporation.

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

5. Whether someone is acting as promoter of a company is a question of fact rather than a question of law.

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

