

Name

Professor

Course

Date

1 Explain in detail whether Peter could potentially be liable in any way because of the catering contract that he made on behalf of Party-on-the Run Pty Ltd.

Peter's liability or lack thereof for the catering contract he made on behalf of Party-on-the Run Company is a question on the liability of company directors for acts done on behalf of the company. It is then best addressed by regarding the duties and responsibilities of employees of his cadre as provided in the company's constitution and the Corporations Act, 2012 which binds the company by virtue of its being a proprietary company which is recognized and governed by the provisions of the Act.¹

The Party-on-the Run Company Constitution provides its line of business as hiring out equipment for corporate events, parties and other social events. The shareholders and employees therein are therefore required to work and corporate toward carrying out this general mandate and advancing the best interests of the company as is expected of them in Section 180(2) of the Corporations Act.

¹ Section 45A of the Corporation Act.

Further, Section 180 (1) of the Corporations Act succinctly sets out the functions of an employee as such:

1. Exercise of due care and diligence while carrying out functions with the standard of a reasonable person holding the same office under the same circumstances.²
2. Adherence to the business judgment rule (in addition to exercise of due diligence).³

There is no doubt that while carrying out the functions due to them, employees will severally need to make decisions on behalf of the company which is an unnatural body and cannot, therefore, act on its own. Such decisions are arrived at by a process of analysis termed as a ‘business judgement’ and defined in section 180(3)⁴ as those that inform the decision of whether or not to take certain action in a matter which is relevant to the operations of the business. The considerations that the employee must regard are defined in Section 180 (2) as the elements of exercising due diligence which are ensuring that judgment is being made in good faith and for a proper purpose rather than in furtherance of their personal interests, gathering sufficient information on the matter at hand in order to make an informed decision and also making sure to satisfy themselves that the judgement is in the best interests of the corporation. The sections also provide that their breach constitute a civil liability as set out in section 1317E of the Corporations Act. It was further enunciated in *Hickman v Kent or Romney Marsh Sheep-Breeders’*

² Section 180 (1) of the Corporation Act.

³ Section 180 (2) of the Corporation Act.

⁴ Corporations Act

Association⁵ that any act done by a member or director outside of his mandate as such does not bind the company.

In the given hypothetical case, Peter is an employee of ‘Party-on-the Run’ Proprietary Limited. He is therefore expected to carry out the functions laid out in section 180 (1) in the manner prescribed in section 180 (2) and in furtherance of Clause 1 of the Company’s Constitution. In contracting to deliver catering services which are outside the services offered by the company, Peter not only breached his duties as an employee by, among other acts, failing to consult the board of directors but also acted in bad faith since he had personal interests in the matter by virtue of his wife having proposed and offered to lead the venture. He also failed to exercise due diligence by getting information on the agreement he was entering and as a result underquoted the price, a mistake that could cost the company. He did not establish his decisions as being in the best interests of the company and could very well be acting in pursuance of his conflicting personal interests. These factors, taken as a whole, could potentially make Peter liable under section 1317E as was in the case of *Grande Enterprises Ltd v Pramoko*⁶ where Mr. Pramoko, one of the directors of ‘Southern Cross International Investments Limited’ was found personally liable for a false and misleading promise which he had made on behalf of the company. Similarly, since Mr. Peter was acting outside of the confines in which he is permitted by the company he works for, he can potentially be held personally liable.

⁵ *Hickman v Kent or Romney Marsh Sheep-Breeders’ Association* [1915] 1 Ch 881, 900:

⁶ *Grande Enterprises Ltd v Pramoko* (2014) WASC 294.

2. Explain in detail whether the agreement that Peter made on behalf of Party-on-the Run Pty Ltd, with Tim's Tyres to cater for their end-of-year function, is binding on Party-on-the-Run Pty Ltd.

The question of corporate liability for acts done by employees who are acting on its behalf can be addressed by first and foremost giving regard to the legal capacities and powers of companies provided for under Section 124 of the Corporations Act which provides that companies have the mandate to, among other things, act as authorized by any company law.⁷ Section 124(2)⁸ is to the effect that the legal capacity of a company is not affected by the question of whether or not what is being done favors the company and further, an act done on behalf of a company is not invalid simply because it is outside its mandate as provided in its own laws or the national laws.⁹ This gives the deciding power to the company's representatives providing allowance for mistakes and losses as will often happen in the ordinary running of a business.

Since the company is not a natural person and cannot physically act in its own interests, it is licensed under Section 126 to give express or implied authority to natural persons who may then act on its behalf. These persons are deemed to be agents of the company with full authority to legally bind the company. While dealing with the company, third parties who are acting in good faith are protected by law in a number of assumptions which they are allowed to make such as that the company's constitution and any other law appertaining to company transactions have

⁷ Bostock T, 'The Corporations Act 2001' (2012) 2002 Amicus Curiae.

⁸ Section 124 (2) Corporations Act.

⁹ Section 125 (2) Corporations Act.

been complied with and that any person who is named director, secretary, agent or such other officer from the company's public information has been duly appointed and has the authority to carry out the functions that would normally be carried out by a person in a similar position and a similar company. There is also an assumption that such persons are performing and will be properly performing their duties to the company.¹⁰ The provision is in accordance with the 'Indoor Management Rule'¹¹ and has the effect of placing the responsibility of ensuring that only the right persons act on its behalf and that such persons duly carry out their duties squarely in the hands of the concerned company rather than a third party who may lack the resources to make certain of this. The law then serves to strengthen public confidence in companies and encourage business with it.¹²

In the case, Peter who is the director of Party-on-the Run Pty Ltd and therefore a legal representative of the company presented himself as such to Patricia who was acting on behalf of her own company, Tim's Tyres when she called to hire party equipment, a business for which Party-on-the Run Pty Ltd has made itself known for. Patricia then, acting in good faith, agreed to have them provide the extra function of catering for the event on representation by Peter that the company could carry out the function at a rate which he also represented to her. Under section 129 of the Corporations Act which is discussed above, Patricia was legally entitled, to presume that Peter was duly authorized to carry out the function of making a catering agreement as any other company director would be. Although the company's constitution expressly provides for the mandate of the company, its rules are subject to legislation and it is only the company that

¹⁰ Section 129 Corporations Act.

¹¹ *Royal British Bank v Turquand* (1856) 119 ER 886.

¹² Hill, Jennifer G. "Corporate Criminal Liability In Australia: An Evolving Corporate Governance Technique?". *SSRN Electronic Journal*, 2003. Elsevier BV, doi:10.2139/ssrn.429220.

handles or regards deviation from it.¹³ The acts of Peter then, though misguided and not authorized or in the best interests of the company, bind Party-on-the Run Pty Ltd by virtue of him having acted on its behalf in the instance of making the catering contract in question. The company will therefore have to provide the catering service, offer Tim's Tyres an alternative provider or face a civil suit by Tim's Tyres for any damages they may incur as a result of their non-performance. A possible remedy that the company has against Peter is to sue him on the doctrine of ultra vires since he acted contrary to his mandate under the company's constitution.¹⁴

2 Explain in detail whether Peter would be able to 'have Donald dismissed as a director', or to 'get out of the company' by resigning as a director and selling his shares to his neighbor, Pat, as he is thinking of doing.

There are two ways in which the directors of proprietary companies may be removed from their positions and these are by operation of the law¹⁵ or by resolutions in the company¹⁶. In the first instance, a company director may be removed from his position by a directive of the court for being insolvent or contravening civil penalties which could be on an application by ASIC. In the second instance, a company is allowed to terminate the services of a director either by a resolution to remove such person from office or by a resolution to appoint someone else in his or her place. The section then provides that it is a replaceable rule in the meaning of section 135¹⁷

¹³ *Forbes v New South Wales Trotting Club Ltd* [1977] 2 NSWLR 515, 520

¹⁴ H. N, 'Municipal Corporations. Ultra Vires. Liability In Quasi Contract For Benefits Received Under Ultra Vires Contract' (1930) 16 Virginia Law Review.

¹⁵ Section 206 Corporations Act.

¹⁶ Section 203 Corporations Act.

¹⁷ Section 135 Corporations Act.

which provides that such rules may be substituted by a company's own policies and their contravention is not necessarily a contravention of the Act¹⁸. Indeed it was acknowledged by the court in *Scottish & Colonial Ltd -v- Australian Power and Gas Co Ltd*¹⁹ that section 203 as read with section 206 of the Corporations Act do not in any way limit or modify a company's right and ability to determine its own rules and procedures on the removal of its directors or managers. Unfortunately the Party-on-the-Run company constitution is silent on the matter and therefore the provisions of section 203 are wholly applicable in this matter in that Peter, being the only co-director has the mandate to actually remove Donald from his post as director. This is in line with the company's practice as seen in the case where Donald was able to unilaterally block a resolution by Peter to convene a general meeting of shareholders for purposes of evaluating the idea of having the company expand into catering.

As to the issue of resignation, Donald is allowed, under the Corporations Act, to resign from the post of director if he issues a written notice at the registered offices of Party-on-the-Run Proprietary Limited Company.²⁰ He is, however, precluded by his company's constitution from offering to sell his shares to any person who is not a current shareholder unless he has offered to sell to them first and they have all declined. He must therefore first offer to sale to Donald, Alicia, Malcom and his wife before he can offer to Pat who is an external party.

¹⁸ Ibid.

¹⁹ *Scottish & Colonial Ltd and by Barrett J in Gosford Christian School Ltd -v- Totonjian* (2006) 201 FLR 424.

²⁰ Section 203A Corporations Act.

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